[ORAL ARGUMENT NOT YET SCHEDULED]

In the

United States Court of Appeals

for the

District of Columbia Circuit

No. 06-5209

SHAFIQ RASUL, ASIF IQBAL, RHUHEL AHMED, JAMAL AL-HARITH,

Plaintiffs-Appellants,

- v. -

DONALD H. RUMSFELD, Secretary of Defense, RICHARD MYERS, Air Force General, GEOFFREY MILLER, Army Major General, JAMES T. HILL, Army General, MICHAEL E. DUNLAVEY, Army Major General, JAY HOOD, Army Brigadier General, MICHAEL LEHNERT, Marine Brigadier General, NELSON J. CANNON, Army Colonel, TERRY CARRICO, Army Colonel, WILLIAM CLINE, Army Lieutenant Colonel, DIANE BEAVER, Army Lieutenant Colonel, DOES 1 THROUGH 100,

Defendants-Appellees.

On appeal from the United States District Court for the District of Columbia in Civil Case No. 04-1864 Ricardo M. Urbina, United States District Judge

BRIEF *AMICI CURIAE* OF RETIRED MILITARY OFFICERS, MILITARY LAW AND HISTORY SCHOLARS AND THE NATIONAL INSTITUTE FOR MILITARY JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

(*See inside cover for list of* Amici Curiae)

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January 15, 2006

AMICI CURIAE

Brigadier General (Ret.) David M. Brahms

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Commander (Ret.) David Glazier

Professor Elizabeth L. Hillman

Professor Jonathan Lurie

Professor Diane Mazur

National Institute of Military Justice

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici curiae* retired military officers, military law and history scholars and the National Institute for Military Justice certify the following:

A. Parties and *Amici*

Except for the following, all parties, intervenors and *amici* appearing before the district court and in this court are listed in the Brief for Appellants Shafiq Rasul, et al.

1. ***Amici***: *Amici* are the National Institute for Military Justice and former military officers and scholars of military law and military history, who are:

Brigadier General (Ret.) David M. Brahms

Lieutenant Commander (Ret.) Eugene R. Fidell

Commander (Ret.) David Glazier

Professor Elizabeth L. Hillman

Professor Jonathan Lurie

Professor Diane Mazur

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants Shafiq Rasul, et al.

C. Related Cases

References to related cases appear in the Brief for Appellants Shafiq Rasul, et al.

CERTIFICATE PURSUANT TO CIRCUIT RULE 29

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* retired military officers, military law and history scholars and the National Institute for Military Justice certify that as of the date of this certification, the only other brief *amicus curiae* of which we are aware is the Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellants. These two briefs could not be joined as a single memorandum because the perspectives and analyses provided in these two briefs are totally different. In this brief, *amici* describe the well-established prohibition on torture and inhumane treatment under military law and tradition, the law of war and the doctrine of command responsibility, and the reasons why, in this special military setting, the conduct alleged could not be within the scope of Appellees' employment under the Westfall Act or justify the imposition of qualified immunity. The International Law Scholars discuss only why torture is a violation of international law and can not be considered "official action" within the scope of a government official's employment. Their brief does not address the military law and military doctrine that are the focus of this brief. Any overlap between the two briefs is insignificant. We understand that one other group is considering filing a brief *amici curiae*, but we do not know as of the date of this certification whether they will timely file. The information provided to us by that group makes it clear that they are addressing an entirely separate issue and that there is no overlap with this brief. Accordingly, we did not consider it practical to consolidate this brief with the briefs of any other *amici*.

Dated: January 15, 2007

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the National Institute of Military Justice ("NIMJ") makes the following disclosure:

NIMJ is a nonprofit corporation whose members are law professors and experts in military law, most of whom have served as military lawyers. No parent companies or publicly held companies have 10% or greater ownership in NIMJ.

TABLE OF AUTHORITIES

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GLOSSARY

1	1949 Geneva Conventions	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
2	App. Br.	Appellants' Brief
3	CAT	U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39146, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984)
4	FM 2-22.3	U.S. Dep't of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations* (September 2006)
5	FM 6-22	U.S. Dep't of Army, Field Manual 6-22, *Army Leadership* (Oct. 2006)
6	FM 22-100	U.S. Dep't of Army, Field Manual 22-100, *Military Leadership*, §§ 3-22 – 3-23 (Aug. 1999)
7	FM 27-10	U.S. Dep't of the Army, Field Manual 27-10, *The Laws of Land Warfare* (July 1956)
8	FM 34-52	U.S. Dep't of the Army, Field Manual 34-52, *Intelligence Interrogation* (May 1987)
9	FM 101-5	U.S. Dep't of Army, Field Manual 101-5, *Staff Organization and Operations*, 1-1 (May 1997)
10	GPW	Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135
11	Guantánamo	United States Naval Base at Guantánamo Bay, Cuba
12	Protocol I	Protocol Additional to the Geneva Conventions of August

		12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 75, June 8, 1977, 1125 U.N. 3
13	UCMJ	Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq.*
14	Westfall Act	Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in relevant part at 28 U.S.C. § 2679)

Amici submit this brief in support of Appellants and urge reversal of the district court's judgment dismissing Appellants' claims for damages resulting from the violation of their rights under the Constitution and international law. *Amici* show that the district court's conclusion that Appellees were immune from suit conflicts with military tradition, law and regulation and fundamental principles of command responsibility. This brief is filed with the consent of all parties and pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.

Interest of *Amici*

Amici are retired military officers, scholars of military law and history, and a nonprofit organization dedicated to advancing the fair administration of military justice. They have an interest in the maintenance of our Nation's military tradition of humane treatment of detainees captured in armed conflict and strict enforcement of military, domestic and international law requiring such treatment.

Brigadier General (Ret.) David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. Among other things, he was the principal legal advisor for POW matters at Headquarters Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, and the senior uniformed lawyer for the Marine Corps.[1]

Lieutenant Commander (Ret.) Eugene R. Fidell served in the United States Coast Guard as a Judge Advocate, and is now an adjunct professor of law at Washington College of Law, American University, where he teaches Military Justice. He is president of the National Institute of Military Justice.

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[1] References to each *amici*'s institutional or organizational affiliations are for identification purposes only.

Commander (Ret.) David Glazier served twenty-one years as a United States Navy surface warfare officer and is now an Associate Professor of Law at Loyola Law School Los Angeles, where he teaches the law of war.

Elizabeth L. Hillman is a former Air Force Captain and is now a Professor of Law at Rutgers Law School-Camden, where she teaches courses in military law, constitutional law, and legal history. She previously taught military history at the United States Air Force Academy.

Jonathan Lurie, Professor of History and Adjunct Professor of Law at Rutgers University, teaches legal history and military legal history.

Diane Mazur, a former Air Force Captain, is now a Professor of Law at the University of Florida College of Law, where she teaches Civil-Military Relations.

The National Institute of Military Justice ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty, but nearly all of whom have served as military lawyers, several as flag and general officers.

Statement of the Issue

Whether the Secretary of Defense and military officers are entitled to immunity under the Westfall Act or qualified immunity from Appellants' claims of torture and other inhumane acts allegedly inflicted on them while they were detained at the United States Naval Base at Guantánamo Bay, Cuba ("Guantánamo").

Introduction and Summary of Argument

Appellants are British citizens who allege that they were arbitrarily detained and subjected to torture and inhumane treatment at Guantánamo. Appellants were held for more than two years before being released without charge in March 2004. *Rasul* v. *Rumsfeld*, 414 F. Supp. 2d 26, 28-29 (D.D.C. 2006) ("*Rasul*"). In this suit, Appellants seek damages from former Secretary of Defense Donald Rumsfeld and military officials ("Appellees") they claimed were responsible for their torture, alleging, among other things, that Appellees' conduct violated their rights under the Constitution and international law. The district court dismissed, on the pleadings, the international law claims as immune under the Westfall Act, *id.* at 30-39, and the constitutional claims on the basis of qualified immunity. *Id.* at 39-44.

Amici submit that the district court's dismissal of these claims based on Westfall Act immunity and qualified immunity conflicts with the long-established prohibition on torture and inhumane treatment under military law, regulation and tradition, as well as federal and international law, and the doctrine of command responsibility, under which Appellees are accountable for such conduct committed by persons subject to their command.

Westfall Act immunity for conduct within their "scope of employment" should not be available to shield Appellees from liability for conduct that, if proven, reflects egregious violations of Appellees' command responsibilities. It was the essence of Appellees' "scope of employment" to instruct their subordinates that torture and inhumane treatment were forbidden and to prevent such conduct. Instead, they allegedly not only failed to prevent it, but authorized subordinates to engage in it. It is inconceivable that such conduct falls within Appellees' "scope of employment." Similarly, qualified immunity should not be available to government officials

who were on notice that their actions and omissions were clearly unlawful and so plainly violated their command responsibilities.

Argument

I.

APPELLEES' ALLEGED CONDUCT WAS STRICTLY PROHIBITED UNDER MILITARY LAW AND POLICY AND THE LAW OF WAR, AS WELL AS DOMESTIC AND INTERNATIONAL LAW

A special feature of this case is its military setting. The conduct alleged not only violated prohibitions under the U.S. Constitution, federal statutes, treaties and customary international law, but most importantly, long-standing prohibitions of military law, regulation and policy, the law of war and the fundamental doctrine of command responsibility. As we show in subsequent sections, these special features have a crucial bearing on the questions of immunity that are the subject of this appeal.

A. Humane Treatment of Persons Detained in Armed Conflict Has Been a Cornerstone of United States Military Doctrine Since the Nation's Founding

Throughout its history, the United States military has maintained a tradition of treating captured combatants humanely. After winning the Battle of Trenton, George Washington ordered his troops to give refuge to hundreds of surrendering Hessian soldiers. While European military tradition allowed field commanders to decide whether to put captured enemy soldiers "to the sword" or to keep them captive, Washington instructed his lieutenants to treat captured soldiers "with humanity," and to "[l]et them have no reason to complain of our copying the brutal example of the British army." David Hackett Fischer, *Washington's Crossing*, 377-79 (2004).

The requirement that prisoners of war be treated humanely was codified during the Civil War, when President Lincoln signed General Orders No. 100 in 1863, also known as the Lieber Code. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, United States War Department General Orders No. 100 (April 24, 1863). The Lieber Code declared that military law "be strictly guided by the principles of justice, honor and humanity – virtues adorning a soldier even more than other men, for the reason that he possesses the power of his arms against the unarmed." *Id.* at § I, art. 4. The Code forbade the "intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" upon a prisoner of war. *Id.* at § III, art. 56. The Code specified that while prisoners of war may be confined "such as may be deemed necessary on account of safety," they "are to be subjected to no other intentional suffering or indignity" and "treated with humanity." *Id.* at art. 75-76. The use of violence in extracting information from captured enemy forces was also forbidden. *Id.* at § I, art.16 ("Military necessity does not admit of cruelty . . . nor of torture to extort confessions.") The Lieber Code became part of military training at the United States Military Academy. Col. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 Mil. L. Rev. 112, 114 (2004). Notably, the Lieber Code was promulgated as guidance for treatment of an enemy considered to be engaged in unlawful rebellion against the United States.

The Lieber Code has served as "the basis of every convention and revision" of international law concerning the treatment of prisoners of war, including the subsequent Hague Conventions of 1899 and 1907, the first multilateral codification of the modern law of war. Brig. Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of*

War, 5 Miami L.Q. 40, 42 (1950). The brutality of the First World War prompted the United States and more than forty other nations to enter into the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. At the end of the Second World War, the laws of war were revisited, resulting in the adoption in 1949 of the four Geneva Conventions.[2]

The four Geneva Conventions of 1949 provide comprehensive standards for the treatment of persons detained in armed conflicts. The Third Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW")) addresses the treatment of prisoners of war. Common Article 3 – so denominated because it is common to all four Geneva Conventions – addresses the treatment of persons detained in armed conflicts that do not involve conflicts between nation states, such as civil wars. Common Article 3 provides a minimum standard that prohibits "violence to life and person . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment" against all detainees, regardless of their status. *See, e.g.*, GPW, Art. 3.

Article 75 of Protocol I to the Geneva Conventions prohibits torture, "violence to the life, health, or physical or mental well-being," and "outrages upon personal dignity, in particular humiliating and degrading treatment" of any detainees. Protocol Additional to the

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[2] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively, the "1949 Geneva Conventions"). All four conventions were ratified by the United States in 1955. *See* 101 Cong. Rec. 9,958-73 (1955).

Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 75 at ¶ 2, June 8, 1977, 1125 U.N. 3, ("Protocol I"). The United States has not adopted Protocol I, but it "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003).[3] The United States military has long trained its officers to observe the laws of war and the standards set forth in the Hague and Geneva conventions. *See generally* Finnegan, 181 Mil. L. Rev. 112; United States Dep't of the Army, Field Manual 27-10, *The Laws of Land Warfare* (July 1956) ("FM 27-10").

The military maintained this commitment to treat detainees in armed conflicts with humanity in contemporary campaigns, even if detainees did not technically qualify for treatment as "prisoners of war" under the Third Convention. During the Vietnam War, the United States extended prisoner of war protections as articulated in the Geneva Conventions to all captured combatants – including captured Viet-Cong, who did not follow the laws of war. *See* United States Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in* Charles I. Bevans, ed., *Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (1968). Following revelations of serious human rights abuses by U.S. soldiers during the Vietnam War, the military undertook investigations which found that troops and command had been inadequately trained in the law and principles of the Geneva Conventions. *See* Maj. Jeffrey F. Addicott and Maj. William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 Mil.

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[3] Mr. Taft was Legal Adviser to the Department of State from 2001 to 2005.

L. Rev. 153, 162-64 (1993). Following the Vietnam War, the United States Army amended its doctrine concerning the treatment of enemy prisoners of war in order to emphasize the primacy of the Geneva Conventions and humanitarian law, adopting the "implementation of the Geneva Conventions" as the main objective of enemy prisoner of war operations in place of the "acquisition of maximum intelligence information." *See* Maj. James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, Military Review, Jan.-Feb. 2005, at 44, 50 (comparing United States Dep't of the Army Field Manual 19-40, *Enemy Prisoners of War and Civilian Detainees*, ¶ 1-2a (Dec. 1967) with United States Dep't of the Army Field Manual 19-40, *Enemy Prisoners of War, Civilian Detainees, and Detained Persons*, ¶ 1-3a (Feb. 1976)).

B. The Uniform Code of Military Justice and the Military's own Regulations Forbid the Mistreatment of Detainees

The law governing the conduct of military personnel is set forth in the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. Subt. A, Pt. II, Ch. 47., and Field Manuals issued by the Armed Forces. The UCMJ and the Field Manuals have consistently prohibited the mistreatment of detainees.

The UCMJ prohibits military personnel from committing acts of "cruelty toward, or oppression or maltreatment of any person subject to his orders." 10 U.S.C. § 893. Actual and attempted murder, manslaughter, rape, maiming and assault are punishable under the UCMJ. 10 U.S.C. §§ 880, 918-920, 924, 928. Extorting or threatening a detainee for information is also prohibited, pursuant to 10 U.S.C. §§ 927 and 934, respectively.

FM 27-10 contains the Army's interpretation of the law of war, incorporating reference to international conventions – including the 1949 Geneva Conventions – and rules of

the customary law of war. Importantly, FM 27-10 incorporates Common Article 3 of the Geneva Conventions. *See* FM 27-10, Art. 11; *see also id.* at Arts. 246, 248, 271, 446. FM 27-10 also mandates that prisoners of war must "at all times be humanely treated . . . [and] protected, particularly against acts of violence or intimidation and against insults and public curiosity." *See* FM 27-10, Art. 89 (incorporating GPW, art. 13). FM 27-10 also prohibits the use of "physical or mental torture" or "any other form of coercion" in obtaining information from prisoners of war. *Id.* at Arts. 93 (incorporating, GPW, art. 17).

The United States Department of the Army Field Manual 34-52, *Intelligence Interrogation* (May 1987) ("FM 34-52")[4], in effect at the time of Appellees' alleged conduct, sets forth acceptable interrogation techniques and prohibited conduct. FM 34-52 recognizes that all principles and techniques of interrogations outlined in the manual are to be used only "within the constraints" established by the UCMJ and the Geneva Conventions. FM 34-52, *preface* at iv. The manual makes clear that the Geneva Conventions and United States policy "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8; *see also id.* at 1-12 ("threats in and of themselves constitute a form of coercion").[5]

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[4] On September 6, 2006, the U.S. Army replaced FM 34-52 with Field Manual 2-22.3, *Human Intelligence Collector Operations* (Sept. 2006) ("FM 2-22.3"). This manual contains the same prohibitions on torture and mistreatment of detainees as FM 34-52. *See, e.g.*, FM 2-22.3 at 5-26.

[5] The manual includes as examples of physical and mental torture:

- Infliction of pain through chemicals or bondage;
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time;
- Any form of beating;

As discussed in detail in Point II, *infra*, Appellees also have command responsibility, which makes them liable for acts of subordinates if they knew, or should have known, of conduct that violates these standards, and failed to take measures within their power to prevent such conduct, or failed to investigate and punish violations of which they are or should be aware. FM 34-52 specifies that the Geneva Conventions impose an "affirmative duty upon commanders to insure their subordinates are not mistreating protected persons or their property. The command and the government will ultimately be held responsible for any mistreatment." FM 34-52, D-1. These prohibitions apply regardless of whether the individual detained is a prisoner of war, captured insurgent, or civilian internee. *Id.* at 1-7. Army personnel are warned that "improper" or "unlawful" interrogation techniques could not only harm critical intelligence gathering efforts, but also "send U.S. soldiers to prison." *Id.* at C-4.

Against this background, the Offices of the Judge Advocate General for the Navy, Army and Air Force in 2003 expressed concern over the suggested authorization of aggressive techniques for use in interrogating detainees in a draft report for Secretary Rumsfeld. Brigadier General Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, warned that authorizing use of aggressive interrogation techniques would have a number of adverse affects, including "Criminal *and Civil Liability* of DOD Military and Civilian Personnel in Domestic, Foreign, and International Forums." Memorandum from Brigadier General Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to the

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- Mock executions; and
- Abnormal sleep deprivation.

Id. at 1-8; *see also id.* at D-1 – 2.

Commandant of the Marine Corps, to General Counsel of the Air Force (Feb. 27, 2003) *reprinted in* 151 Cong. Rec. S8794 (emphasis added). Similarly, in his comments on the same draft, Major General Jack L. Rives, Deputy Judge Advocate General of the United States Air Force, suggested that the report contain the following:

> U.S. Armed Forces are continuously trained to take the legal and moral 'high-road' in the conduct of our military operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. *Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful.*

Memorandum from Major General Jack L. Rives, Deputy Judge Advocate General of the U.S. Air Force, to SAF/GC (Feb. 6, 2003) *reprinted in* 151 Cong. Rec. S8794-95 (emphasis added). Likewise, Major General Thomas J. Romig, U.S. Army, Judge Advocate General, noted that some of the "aggressive counter-resistance interrogation techniques" being considered by the Department of Defense failed to "comport with Army doctrine as set forth in Field Manual (FM) 34-52 Intelligence Interrogation."[6]

In July 2004, Alberto Mora, then General Counsel to the Navy, criticized the interrogation techniques authorized by Secretary Rumsfeld in his December 2, 2002 memorandum,[7] stating:

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[6] Memorandum from Major General Thomas J. Romig, U.S. Army, Judge Advocate General, to General Counsel of the Air Force (Mar. 3, 2003), *reprinted in* 151 Cong. Rec. S8794.

[7] Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Defense, to Donald Rumsfeld, Secretary of Defense (Nov. 27, 2002) (approved by Secretary Rumsfeld on December 2, 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dodmenus.pdf, last visited January 11, 2007.

> [These techniques] should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture . . . . Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute 'cruel, inhuman, or degrading treatment, another class of unlawful treatment.

See Memorandum from Alberto J. Mora to Inspector General, United States Department of the Navy at 6 (July 27, 2004), available at http://www.newyorker.com/images/pdfs/moramemo.pdf, last visited January 11, 2007.

C. The Prohibition On Torture Is Also Well-Established in Civilian Law

There are additional prohibitions of torture and inhumane treatment beyond those in military law and the law of war. The United States is bound by the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39146, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) ("CAT"). CAT prohibits torture and cruel, inhuman and degrading treatment.[8] CAT, art. 1, 26. CAT also provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." CAT, art. 2(2). In 1994, Congress enacted legislation implementing CAT, making it a felony for any U.S. national or any person present in the United States to commit or attempt to commit torture outside the United States. Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (Codified at 18 U.S.C. § 2340, *et seq.*). In a recent report to the United Nations

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[8] In ratifying the CAT, the United States expressed the reservation that cruel, inhuman and degrading treatment was limited to conduct that violated the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. *See* United States Declarations and Reservations to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, § I.(1), available at http://www.ohchr.org/english/countries/ratification/9.htm, last visited January 11, 2007. In most cases that is likely to be the same conduct forbidden by the Convention.

Committee Against Torture, which oversees compliance with CAT, the U.S. government declared emphatically that it accepts no justification for torture:

> No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture . . . . The U.S. Government does not permit, tolerate, or condone torture . . . by its personnel or employees under any circumstances.[9]

In 1997 Congress amended the War Crimes Act of 1996, making it a felony for any member of the Armed Forces of the United States or any U.S. national to violate Common Article 3 of the Geneva Conventions of 1949 which expressly forbids torture and inhumane treatment or to commit any "grave breaches" of the 1949 Geneva Conventions.[10] War Crimes Act of 1996, Pub. L. No. 105-118, 111 Stat. 2436 (Codified as amended at 18 U.S.C. § 2441 (1997)). Grave breaches include "torture or inhuman treatment." *See* GPW, art. 130.

* * *

In sum, the torture and mistreatment of military detainees is unequivocally forbidden by military doctrine, military law and regulations, federal statutory law and the standards of the Geneva Conventions and CAT. Appellees were thus on notice not only that they were forbidden from authorizing such conduct, but under the doctrine of command responsibility

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[9] *See* Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America (May 6, 2005), U.N. Doc. CAT/C/48/Add.3 (2005) at 4, *available at* http://www.state.gov/g/drl/rls/45738.htm., last visited January 11, 2007.

[10] In September 2006, the War Crimes Act was amended by the Military Commissions Act; however, the amendments do not change the fact that torture and inhumane treatment are criminal acts. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)-(c), 120 Stat. 2600, 2633-35 (Codified as amended at 18 U.S.C. § 2441(d) (2006)).

were legally obligated to instruct military personnel to refrain from such conduct and to prevent such conduct of which they knew or should have known.

II.

APPELLEES ARE NOT ENTITLED TO ANY IMMUNITY

Despite the prohibitions on torture and inhumane treatment described above, the district court held that Appellees are entitled to Westfall Act immunity and qualified immunity from Appellants' claims based on such conduct authorized or countenanced by Appellees. *Rasul*, 414 F. Supp. 2d at 28. As we show below, given these clear prohibitions and the allegations that Appellees blatantly violated their command responsibilities not only by failing to prevent such conduct, but by authorizing or ordering it, they are not entitled to Westfall Act immunity or qualified immunity.

A. Appellees Are Not Entitled To Immunity Under the Westfall Act

The district court found that Appellees' alleged conduct falls within their "scope of employment," as that term is used in the Westfall Act, and is therefore immunized. *Rasul*, 414 F. Supp. 2d at 34. *Amici* submit that this decision is erroneous, especially in light of Appellees' command responsibilities. It ignored the unique command responsibilities imposed on Appellees for the alleged conduct of their subordinates who inflicted torture and inhuman and degrading treatment on detainees in their custody. The claim that Appellees not only failed to prevent such conduct by their subordinates but authorized or encouraged it is so flatly inconsistent with the responsibilities and duties of their official positions that it cannot reasonably be deemed to come within the scope of their employment.

1. Appellees' Command Responsibilities Require That They Be Accountable For the Conduct Alleged Here

Under U.S. military law and the law of war, persons in positions of command are held legally responsible for the unlawful conduct of their subordinates, if they either directed it or knew or should have known of it and failed to take measures within their power to prevent it, or failed to investigate and punish violations of which they are or should be aware.[11] The doctrine of command responsibility has been recognized in international law at least since a proclamation of Charles VII of France in 1439,[12] and has since become accepted as part of the law of war and of U.S. military regulations. It was recognized by the United States Supreme Court in *In re Yamashita*, 327 U.S. 1 (1946), which held that General Yamashita, the commander of Japanese forces in the Philippines, could be held liable for atrocities committed by his troops against non-combatants and American prisoners of war. Yamashita argued that he had not violated the law of war because he was not charged with either committing atrocities or directing the commission of atrocities by his troops. *Id.* at 14. The Supreme Court disagreed, finding that Yamashita should be held personally accountable for failing to take measures to prevent the atrocities, and because "the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war. . . ." *Id.* at 14-15. *See also, e.g.*, *Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1289, 1296 (11th Cir. 2002); *Hilao* v. *Estate*

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[11] *See, e.g., Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002); Protocol I, *supra*, art. 86(2).

[12] *See* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 Transnat'l L. & Contemp. Probs. 319, 320-21 (1995).

of Marcos, 103 F.3d 767, 776-78 (9th Cir. 1996); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 171-73 (D. Mass. 1995).

The doctrine of command responsibility is also customary international law. The Annex to the Fourth Hague Convention of 1907, which addressed the laws and customs of land warfare, provided that an armed force must be "commanded by a person responsible for his subordinates" in order to be accorded the rights of lawful belligerents. Annex to the Fourth Hague Convention Respecting the Laws and Customs of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2277, 2295, 1 Bevans 631. Protocol I of the Geneva Conventions of 1949, adopted in 1977, specifies that:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Protocol I, *supra*, art. 86(2).[13] In addition, the doctrine of command responsibility has been adopted by the International Criminal Court and by other International Tribunals, such as, for example, those for the former Yugoslavia and for Rwanda.[14]

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[13] Though the United States has not ratified Protocol I, it is recognized that Article 86 reflects customary international law. *See* Symposium, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Poly. 415, 428 (1987).

[14] *See* Rome Statute of the International Criminal Court, art. 28, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 7, May 25, 1993, U.N. Doc. S/25704; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the

Most importantly, this doctrine is embraced by U.S. Army regulations and field manuals. A soldier who exercises command authority in the United States military "[is] responsible for everything [his or her] command does or fails to do." U.S. Dep't of Army, Army Regulation 600-20, *Army Command Policy*, §2-1b (June 2006). A commander assumes "the legal and ethical obligation . . . for the actions, accomplishments, or failures of a unit." U.S. Dep't of Army, Field Manual 101-5, *Staff Organization and Operations*, 1-1 (May 1997) ("FM 101-5"). As a matter of official military policy, the "ultimate authority, responsibility, and accountability" for the acts of subordinates "rest wholly with the commander." *Id.* at 1-2.

The doctrine of command responsibility is fundamental to military discipline and effectiveness by giving commanders incentives to control subordinates and encouraging subordinates to follow the orders of commanders who they know are accountable for them. *See* U.S. Dep't of Army, Field Manual 22-100, *Military Leadership*, §§ 3-22 – 3-23 (Aug. 1999) ("FM 22-100")[15]; Cmdr. Roger D. Scott, *Kimmel, Short, McVay: Cases Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 Mil. L. Rev. 52, 170 (1998) ("command responsibility is the bedrock upon which all military discipline rests") (quoting Sen. Malcolm Wallop (R-WY)); *Prosecutor* v. *Delalic*, Case No. IT-96-21-T, Judgment, ¶ 647 (Nov. 16, 1998) ("The doctrine of command responsibility is . . . a species of vicarious responsibility through which military discipline is regulated and ensured.").

Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighboring States Between January 1, 1994 and December 31, 1994, art. 6, Nov. 8, 1994, 33 I.L.M. 1598.

[15] In October 2006, the U.S. Army replaced FM 22-100 with Field Manual 6-22, *Army Leadership* (Oct. 2006) ("FM 6-22"), which reaffirms the same doctrines of command responsibility as FM 22-100. *See* FM 6-22, §§ 2-10 – 2-12, 4-16, 6-22.

The doctrine of command responsibility is integral to the legal and moral responsibilities of the commander.

> The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority. Nowhere else does a boss have to answer for how subordinates live and what they do after work. Our society and the institution look to commanders to make sure the missions succeed, that people receive proper training and care, that values survive.

FM 22-100, §1-61. And before a military commander is considered fit to exercise this sacred trust, he or she must internalize, accept and *embody* certain core values, including loyalty, duty, respect, and integrity. *See id.* at §§1-1 – 1-4, 2-4 – 2-39. Pursuant to these values, a leader "take[s] full responsibility for [his] actions and those of [his] subordinates." *Id.* at §2-14.

It is inconceivable that the blatant violations of Appellees' command responsibilities alleged here could come within Appellees' "scope of employment" and entitle them to immunity.

2. The Conduct Alleged Is Not Within Appellees' Scope of Employment Because it is Directly Contrary to Their Command Responsibilities

In determining that Appellees' conduct fell within the "scope of employment," the district court looked to cases elaborating on that concept under the doctrine of *respondeat superior*, relying on two of the most extreme cases that have since been characterized as occupying "the outer limits of [scope of employment] liability." *Boykin* v. *District of Columbia*, 484 A.2d 560, 563 (D.C. Ct. App. 1984). These cases held that a reasonable jury could find within the scope of employment a mattress delivery person's rape of a customer following an argument over the inspection and payment for the mattress and a laundromat employee's shooting of a customer during an argument over clothes which the employee had a duty to

remove from an unattended laundry machine. *See Rasul*, 414 F. Supp. 2d at 33-34, citing *Lyon* v. *Carey*, 533 F.2d 649 (D.C. Cir. 1976) and *Weinberg* v. *Johnson*, 518 A.2d 985 (D.C. 1986).

As an initial matter it seems illogical to blindly apply cases involving issues of *respondeat superior* to determine the "scope of employment" for purposes of Westfall immunity. *Respondeat superior* seeks to determine whether it is fair to impose liability on an employer who is better able to satisfy a judgment than its employee. 27 Am. Jur. 2d, *Employment Relationship*, § 374 (2006). But *respondeat superior* does not thereby immunize the employee from liability; the employee remains liable for the conduct, but liability is extended to the employer as well.

Conferring immunity raises quite different questions of policy, such as the societal benefits of conferring immunity weighed against the benefits of insisting on accountability. In determining "scope of employment" in that context, such considerations may dictate a narrower definition. Here, it was central to Appellees' job function to educate and train military personnel within their command to comply with standards forbidding torture and inhumane treatment and to do all within their power to prevent deviations from those standards. Instead, Appellees allegedly not only failed to exercise these responsibilities, but authorized or encouraged such misconduct. Accordingly, immunizing the conduct alleged here as within Appellees' "scope of employment" runs counter to the essence of their job function, which was to take responsibility for their subordinates' conduct.

In any event, even under *respondeat superior* standards, Appellees' alleged conduct does not fall within the scope of their employment. That conduct does not meet two of the factors required to establish scope of employment under *respondeat superior*: that the conduct at issue is "of the kind [the employee] is employed to perform" and that "if force is

intentionally used by the servant against another, the use of force is not unexpectable by the master." *Rasul*, 414 F. Supp. 2d at 32 (quoting Restatement (Second) of Agency § 228 (1957)).

Appellees are alleged to have authorized, encouraged or failed to prevent conduct that violates military, domestic and international laws prohibiting torture and inhumane treatment. And as noted, the U.S. government has made clear that it "will not permit, tolerate or condone torture . . . by its personnel or employees under any circumstances." *See* p. 13, *supra.* The district court nevertheless concluded that this was "the kind" of conduct Appellees were "employed to perform," 414 F. Supp. 2d at 32-34, and that given the post-9/11 environment, such conduct was foreseeable:

> [T]he heightened climate of anxiety, due to the stresses of war and pressures after September 11 to uncover information leading to the capture of terrorists, would naturally lead to a greater desire to procure information and, therefore, more aggressive techniques for interrogations. Indeed, according to the plaintiffs, this increased motivation culminated in defendant Rumsfeld's . . . approving more aggressive interrogation techniques . . . . Although these aggressive techniques may be sanctionable within the military command, . . . the fact that abuse would occur is foreseeable.

Id. at 36.

But the district court misconceived the nature of Appellees' responsibilities. It was neither incidental to Appellees' job functions nor foreseeable or expected that the Secretary of Defense, nor high-ranking officers, would ignore their command responsibilities and submit to pressures to procure information by authorizing or failing to prevent torture. Appellees' job function was to make clear to those within their command the prohibitions against the use of such "aggressive" techniques so that subordinates conducting interrogations would *not* give in to the "stresses and pressures of war" and employ techniques that violated these prohibitions. It could not, and should not, be expected or foreseen that Appellees would authorize or encourage

such conduct or create such confusion about the proper standards that those conducting the interrogations or directly responsible for the conditions of custody would not know what was or was not forbidden. And it certainly was not expectable that Appellees would submit to pressures they were obligated to train others to resist. Appellees' alleged conduct was neither incidental to their employment nor foreseeable and therefore, not within the scope of employment.

B. Appellees Are Not Entitled to Qualified Immunity Because They Were on Notice That the Conduct Alleged Was Unlawful and Violated Their Command Responsibilities

Nor should qualified immunity be applied where there is no question that Appellees were on notice that torture and inhumane treatment were prohibited and that they were responsible for preventing such conduct. The district court found that in light of the "unsettled nature of Guantánamo detainees' constitutional rights in American courts," Appellees are entitled to qualified immunity since they "cannot be said to have been 'plainly incompetent' or to have 'knowingly violated the law.'" *Rasul*, 414 F. Supp. 2d at 44, citing *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991). But given the conduct alleged, Appellees either were "plainly incompetent" or "knowingly violated the law." Qualified immunity protects officials in exercising their discretion where they, in good faith, believe that their conduct is lawful. App. Br. 42-44. Appellees could not have been acting in good faith if they engaged in conduct long prohibited by military, domestic and international law, merely because they might have believed that these Appellants, under the complete control and exclusive jurisdiction of the United States, nevertheless were not entitled to U.S. constitutional protections from torture and inhumane treatment. Appellants persuasively show that their right to such constitutional protections were in fact clear at that time. App. Br. 36-42. But even if this were not clear at the time, the purposes of qualified immunity could hardly be served by immunizing Appellees from liability

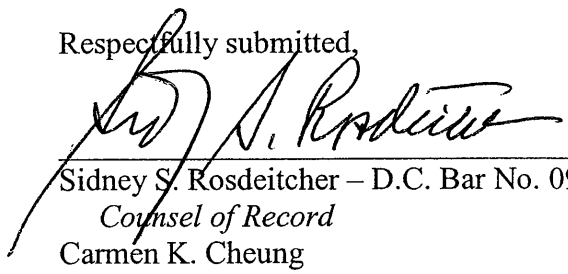
for conduct they had to know was unlawful and in violation of their command responsibilities, merely because it was unclear that these Appellants could seek a remedy for their injuries. We know of no case supporting such a perverse proposition.

Conclusion

For the reasons set forth above, the Court should reverse the district court's judgment.

Dated: January 15, 2007

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 AND CIRCUIT RULE 32

I, Carmen K. Cheung, hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a) that, according to the word-count feature of Microsoft Word 2002, the foregoing appellate brief contains 6518 words (exclusive of the certificates required by Circuit Rules 26.1, 28(a)(1) and 29(d), the glossary, the table of contents, the table of authorities, the certificate of service and this certificate) and therefore complies with the 7,000 word limit for *amicus* briefs in the Federal Rules of Appellate Procedure and the Rules of this Court.

Dated: January 15, 2007

Carmen K. Cheung

CERTIFICATE OF SERVICE

This is to certify that I have this day caused two true and correct copies of the foregoing BRIEF *AMICI CURIAE* OF CONCERNED RETIRED MILITARY OFFICERS, MILITARY LAW AND HISTORY SCHOLARS AND THE NATIONAL INSTITUTE FOR MILITARY JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL and one true and correct copy of the attached MOTION TO SUBMIT BRIEF *AMICI CURIAE* OF RETIRED MILITARY OFFICERS, MILITARY LAW AND HISTORY SCHOLARS AND THE NATIONAL INSTITUTE FOR MILITARY JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL to be served by Overnight Courier Service (Federal Express) upon the following:

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