UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, et al.	
Plaintiffs	
- against -	**C.A. No. 1:04CV01864 (RMU)**
	Oral Argument Requested
DONALD RUMSFELD, et al.	
Defendants.	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* Cases on which Plaintiffs chiefly rely.

CONSTITUTION

STATUTES

TREATIES

RULES AND REGULATIONS

CONGRESSIONAL RECORDS

RESTATEMENTS AND MODEL CODES

ARTICLES

MISCELLANEOUS

This is a case about torture. Defendants never once mention the word in their Motion to Dismiss. Nor do defendants mention plaintiffs' two-year detention without charges, their cruel and degrading treatment during that detention, or the denigration and infringement of plaintiffs' religious beliefs and practices. Defendants do not even engage in a ritual denial of the allegations in the Complaint. There is a good reason for these omissions; the well-pleaded facts alleging torture in this Complaint have now been corroborated through multiple sources, including the United States itself and defendants' own documents.

Instead, defendants seek refuge in abstraction and euphemism; they invoke a ritual chant of "war powers," "national security," and "foreign policy" to avoid accountability for their actions and to stay this Court's hand. But defendants' knowing violation of the universal norm against torture implicates none of these doctrines. The applicable principles here are simple, well-recognized and timeless:

i) It is *always* wrong to authorize or administer torture – whether in war or peace; torture is never a legitimate tool in the interest of national security or foreign policy.

ii) It can *never* be within the scope of a government employee's duties to torture people, as the President's official statement that torture is against the policy of the United States confirms. Defendants cannot have it both ways, claiming publicly to abjure torture and then providing a free pass to those in the chain of command who approve and authorize torture.

iii) There is no more fixed star in the firmament of the law of nations than the prohibition against torture and, accordingly, Defendant Rumsfeld and the other defendants in the military chain of command could not have been in any doubt that ordering torture violates clearly established rights. Defendants' argument that they thought they could torture people at Guantánamo because they thought it

was a lawless enclave prior to the Supreme Court's ruling in *Rasul* is repugnant and legally untenable.

iv) The intentional infringement of plaintiffs' religious rights violates fundamental principles of the First Amendment, as recognized and applied through the Religious Freedom Restoration Act.

Defendants do not address these basic principles. Reduced to its essentials, defendants' brief makes three arguments. With respect to Counts I-IV, defendants argue that their authorization of torture was within the scope of their employment and, accordingly, they are absolutely immune from liability. With respect to Count IV, defendants argue further that the Geneva Conventions are not self-executing and that individuals do not have standing to enforce them. With respect to Counts V-VII, defendants argue that they cannot be liable for violating the U.S. Constitution or the Religious Freedom Restoration Act because these fundamental laws do not apply at Guantánamo or, at the least, defendants were unaware at the time that they applied at Guantánamo. As discussed in detail below, none of these arguments provides grounds to dismiss plaintiffs' Complaint.

FACTUAL BACKGROUND

Plaintiffs are British citizens who were arbitrarily detained and tortured at the United States Naval Base at Guantánamo Bay Naval Station, Cuba ("Guantánamo") for more than two years before they were released without charge and flown home to Great Britain in March 2004. Complaint ("Compl.") ¶¶ 4-5. Plaintiffs never received any military training or took up arms against the United States. Plaintiffs have never been members of any terrorist group. Compl. ¶ 1.

Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed are boyhood friends from the working class town of Tipton in the West Midlands of England. Compl. ¶ 31. They were all born and raised in the United Kingdom. At the time of their detention, they were 24, 20, and 19 years old respectively. Shafiq attended the University of Central England and worked part time. Asif and Rhuhel worked in local factories and volunteered at the local community center. Compl. ¶¶ 32-34. Asif went to Pakistan in September 2001 to join his father who had arranged for Asif to marry a young woman in his family's ancestral village. Rhuhel joined him to be his best man. Shafiq was in Pakistan about to begin a computer science course. After the bombing began in Afghanistan, plaintiffs, who had traveled there to provide humanitarian assistance, tried to cross back into Pakistan, but the border had been closed. Compl. ¶ 35. They were trying to find a way to leave Afghanistan when they were captured by General Rashid Dostum, an Afghan warlord temporarily allied with the United States. General Dostum has been widely reported to have been delivering prisoners to the United States on a per-head bounty basis. Compl. ¶¶ 37-38. The United States took custody of Asif, Rhuhel, and Shafiq without any conceivable good faith basis for concluding that they were or had been engaged in activities hostile to the United States. Compl. ¶ 38.

Jamal Al-Harith was also born and raised in the United Kingdom. He is a web designer in Manchester. Jamal arrived in Pakistan on October 2, 2001, to participate in a long-planned religious retreat. When he was advised to leave the country because of animosity toward British nationals, he booked passage on a truck headed overland through Iran to Turkey, where he planned to catch a plane to England. While in Pakistan, the truck in which he was riding was hijacked at gunpoint by Afghans. When he was identified as a foreigner, he was forced into a jeep that crossed into Afghanistan, where he was handed over to the Taliban. Jamal was accused

of being a British spy, held in isolation and beaten repeatedly by Taliban guards. Eventually, the Taliban fled under U.S. advances and Jamal was told he was free to leave. The British Embassy's plans to evacuate him were peremptorily interrupted when U.S. Special Forces arrived at the prison and told Jamal, "You're not going anywhere. We're taking you to Kandahar airbase." Compl. ¶¶ 3, 63.

All four men were first held in United States custody in Afghanistan and later transported under appalling conditions to Guantánamo, where they were imprisoned without charge or hearing for more than two years. They were systematically tortured in violation of the United States Constitution and domestic and international law. Compl. ¶ 4. The horrific and shameful treatment visited upon these young men and others has now been widely reported in the media and confirmed by internal U.S. documents. Much of it was videotaped by U.S. officials. Shafiq, Asif, Rhuhel, and Jamal were repeatedly struck with rifle butts, punched, kicked, and slapped. These beatings were often administered while they were hooded and shackled, and thus unable to resist or to protect themselves from serious harm. They were regularly "short shackled" in painful "stress positions" for many hours at a time, causing deep flesh wounds and permanent scarring. They were also threatened with unmuzzled dogs, forced to strip naked, subjected to repeated forced body cavity searches, intentionally subjected to extremes of heat and cold for the purpose of causing suffering, injected with drugs and unknown substances, kept in filthy cages for 24 hours per day with no exercise or sanitation, denied access to necessary medical care, harassed in practicing their religion, deprived of adequate food and water, deprived of sleep, deprived of communication with family and friends, and deprived of information about their status. Compl. ¶ 6.

These actions were taken in a misconceived and illegal attempt to utilize torture and other cruel, inhuman, or degrading acts to coerce information regarding terrorism. They were misconceived because, according to the conclusion of the U.S. military as expressed in the Army Field Manual, torture does not yield reliable information, Army Field Manual 34-52, and because plaintiffs had no information to give. They were illegal because, as defendants well knew, torture and other cruel, inhuman, and degrading treatment of detainees is prohibited by the United States Constitution, federal statutory law, the Uniform Code of Military Justice ("UCMJ"), United States treaty obligations, and customary international law. Compl. ¶ 8.

Plaintiffs were tortured pursuant to systematic directives from defendant Donald Rumsfeld which were implemented through the military chain of command. On or about December 2, 2002, Defendant Rumsfeld signed a memorandum approving numerous illegal interrogation methods, including putting detainees in "stress positions" for up to four hours; forcing detainees to strip naked; intimidating detainees with dogs; interrogating them for 20 hours at a time; forcing them to wear hoods; shaving their heads and beards; keeping them in total darkness and silence; and using what was euphemistically called "mild, non-injurious physical contact."[1] As Defendant Rumsfeld knew, these and other methods were in violation of the United States Constitution, federal statutory law, the Geneva Conventions, and customary international law as reflected in, *inter alia*, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), *U.S. ratification* 1994, Ex. 1 ("UN Torture Convention"). This memorandum of December 2, 2002, authorizing torture and other mistreatment, was originally

[1] The use of euphemism is of course a time-honored way to disguise and justify torture. *See, e.g., In re: Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (listing techniques of "tactical interrogation" used in the Philippines by Marcos regime).

designated by Defendant Rumsfeld to be classified for ten years but was released at the direction of President George W. Bush after the Abu Ghraib torture scandal became public. Compl. ¶ 9.

After authorizing, encouraging, permitting, and requiring the acts of torture and other mistreatment inflicted upon plaintiffs, Defendant Rumsfeld subsequently commissioned a "Working Group Report" dated March 6, 2003, to address "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations." This report, also originally classified for a period of ten years by Defendant Rumsfeld, was also released after the Abu Ghraib torture scandal became public. This report details the requirements of international and domestic law governing interrogations, including the Geneva Conventions; the UN Torture Convention; customary international law; the torture statute, 18 U.S.C. § 2340; assault within maritime and territorial jurisdiction, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112; interstate stalking, 18 U.S.C. § 2261a; and conspiracy 18 U.S.C. § 2 and § 371. The report attempts to identify putative "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." Working Group Report, at 3 (emphasis in original). Compl. ¶ 10. The report thus acknowledges that the techniques in use were *prima facie* unlawful.

The report then makes a transparent, *post hoc*, attempt to create arguments that the facially criminal acts perpetrated by the defendants were somehow justified. It asserts first that the President as Commander-in-Chief has plenary authority to order torture, a proposition that ignores settled legal doctrine from King John at Runnymede to *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). Compl. ¶ 10. The report next tries to apply common law doctrines of self-defense and necessity, arguing the legally erroneous proposition that the United States has the right to torture detained individuals because it needs to defend itself or because it

is necessary that it do so. Finally, the report suggests that persons inflicting torture and other mistreatment will be able to defend against criminal charges by claiming that they were following orders. The report asserts that the detainees have no constitutional rights because the Constitution does not apply to persons held at Guantánamo. However, the report acknowledges that U.S. criminal laws *do* apply to Guantánamo, and further acknowledges that the United States is bound by the UN Torture Convention to the extent that conduct barred by that Convention would also be prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution.[2] Compl. ¶ 10.

In April 2003, following receipt of the Working Group Report, Defendant Rumsfeld issued a new set of recommended interrogation techniques, requiring prior approval for four techniques. These recommendations recognized specifically that certain of the approved techniques violated the Geneva Conventions and customary international law, including the use of intimidation, removal of religious items, threats, and isolation. The April 2003 Report, however, officially withdrew approval for certain unlawful actions that had been ongoing for months, including hooding, forced nakedness, shaving, stress positions, use of dogs and "mild, non-injurious physical contact." Nevertheless, these illegal practices continued to be employed against plaintiffs and other detainees at Guantánamo. Compl. ¶ 11.

In sum, defendants' conduct reflects a conscious and calculated awareness that the torture, violence, and degradation that they ordered to be implemented at Guantánamo were illegal. Defendants thereafter engaged in premeditated and cynical efforts to twist legal doctrine in case they were confronted with, and forced to account for, their actions. Defendants well knew that their activities resulting in the detention, torture, and other mistreatment of plaintiffs

[2] On June 22, 2004, the conclusions of this report and other memoranda attempting to justify torture were explicitly repudiated by President Bush. Compl. ¶ 10.

were illegal and violated clearly established law – *i.e.*, the Constitution, federal statutory law, the UCMJ, treaty obligations of the United States, and customary international law. Defendants' after-the-fact attempt to create an Orwellian legal façade makes manifest their conscious awareness that they were acting illegally and in violation of clearly established legal and human rights. Compl. ¶ 12.

ARGUMENT

I. COUNTS I-IV OF THIS ACTION CANNOT BE DISMISSED ON THE BASIS OF THE UNITED STATES' CERTIFICATION THAT DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR RESPECTIVE EMPLOYMENT.

The conduct alleged in the Complaint is expressly prohibited, *inter alia*, by the United States Constitution, U.S. criminal statutes, Article 93 of the UCMJ, *codified at* 10 U.S.C. § 893 ("Article 93"), Army Regulation 190-8, the Army Field Manual, the Geneva Conventions, and the UN Torture Convention. The President has categorically stated that the United States does not permit or condone torture. Nevertheless, the defendants and the United States submit to this Court that the defendants' conduct was all in the ordinary course of duty for U.S. cabinet and senior military officers. Based on the United States' blanket certification that defendants were acting within the scope of their employment, defendants argue with respect to the first four counts of the Complaint that they are absolutely immune, pursuant to the 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) (the "Westfall Act"), from civil liability for their acts. Defendants then argue, apparently on behalf of the United States, that plaintiffs have failed to exhaust their administrative remedies and that these four Counts therefore should be dismissed. Defendants' position is wrong both as to the facts and the law.

The United States' certification is insufficient as a matter of law for two reasons: i) it contradicts the official position of the United States that, as a matter of law, acts of torture are *not* within the scope of employment of U.S. military officers; and ii) defendants' position has been flatly rejected as a matter of law in closely analogous cases where foreign officials attempted to argue that torture was within their duties as state officers.

Defendants' motion to dismiss should also be rejected as a matter of fact because, at best, the United States' certification presents an issue of fact in dispute as to which discovery is required and on which this Court must hold an evidentiary hearing. The certification is not a basis for dismissing this action as to the individual defendants or substituting the United States as a party.

Finally, even assuming, *arguendo*, that defendants were acting within the scope of their employment, plaintiffs' action is expressly exempted from the application of the Westfall Act because it is a civil action asserting constitutional violations.

For these reasons, which are discussed in detail below, defendants' motion to dismiss Counts I-IV is meritless and should be denied.

A. The Immunity Provided by the Westfall Act Is Available Only to Federal Employees Acting Within the Scope of Their Employment and Only for Civil Actions That Do Not Assert Constitutional or Statutory Violations.

The Westfall Act permits the United States to substitute itself as a defendant in actions brought against federal officers for negligent and wrongful acts and omissions undertaken within the scope of their employment. 28 U.S.C. § 2679(b)-(d). As a result of such a substitution, the individual defendants are held absolutely immune from personal liability, and the exclusive remedy is an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 ("FTCA"). The Westfall Act also, however, contains an exception provision. Under

this provision no substitution is permitted in civil actions against federal officers for constitutional torts and violations of federal statutes. 28 U.S.C. § 2679(b)(2). Thus, pursuant to the Westfall Act, in order for the exclusive remedies of the FTCA to apply, two criteria must be satisfied: i) defendants must have been acting within the scope of their employment; *and* ii) the actions complained of must be ordinary acts or omissions, not rising to the level of constitutional or express statutory violations. In this case, neither criterion is satisfied. Defendants were not and could not have been acting within the scope of their employment in ordering torture, and their actions constitute constitutional and statutory violations. Accordingly, defendants' motion to dismiss on this ground should be denied in its entirety.

B. In Ordering Torture, Cruel and Degrading Treatment and Prolonged Arbitrary Detention, Defendants Were Not, as a Matter of Law, Acting Within the Scope of Their Employment.

Assuming the truth of the allegations of the Complaint, defendants could not, as a matter of law, have been acting within the scope of their employment as U.S. cabinet and military officers. Let us be clear here. The Complaint alleges that defendants devised, ordered, authorized, approved, and implemented a systematic campaign of torture, cruel and degrading treatment, and prolonged arbitrary detention against innocent civilians who had not been charged with any crime and who had not engaged in combat against the United States. *E.g.*, Compl. ¶¶ 8-12, 19-28, 141, 146, 151-58. The acts alleged in the Complaint include:

- repeated beatings (including physical assaults with rifle butts, and severe beatings administered while the plaintiffs were shackled and blindfolded);
- prolonged isolation including isolation in total darkness;
- assaults on plaintiffs and their meager belongings, including religious items, with water jets from industrial strength hoses;
- deliberate and malicious exposure to extremes of heat and cold;
- use of unmuzzled dogs to threaten plaintiffs;
- forced nakedness;
- repeated body cavity searches;

- denial of food and water;
- deliberate disruption of sleep;
- shackling in painful stress positions for extended periods;
- use of drugs and injection of unknown substances into the plaintiffs' bodies;
- deliberate interference with and denigration of plaintiffs' religious beliefs and practices, including the deliberate submersion of the Koran in a toilet bucket; and
- contamination of plaintiffs' cells with human excrement.

These acts shock the conscience and violate *jus cogens* norms of international law,[3] as well as the U.S. Constitution, U.S. criminal law, military law and regulations, and numerous treaties to which the United States is a party. Nonetheless, according to defendants' motion to dismiss, these acts were all in the line of duty for U.S. cabinet and military officers. The law is otherwise.

1. The United States' Westfall Certification Is, as a Matter of Law, Contrary to the Official Position of the United States.

The United States has submitted to this Court a certification that directly contradicts the official position of the United States Department of State concerning whether military officers who order or impose torture are acting within the scope of their duties.[4] In 1999, the State Department made its first report to the United Nations Committee Against Torture. U.S. Department of State, Initial Report of the United States of America to the U.N. Committee

[3] Under Article 53 of the Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 8 I.L.M. 679, 1155 U.N.T.S. 331, a *jus cogens* norm is:

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In other words, the norm describes a bare minimum of acceptable behavior such that no Nation State may derogate from it.

[4] Defendants do not take issue with the proposition that the allegations of the Complaint if proven would constitute torture. The acts alleged in the Complaint are within the catalogue of abusive practices that have been found to constitute torture. *See, e.g., In re: Estate of Marcos Human Rights Litigation*, 910 F. Supp. at 1463 (listing techniques of "tactical interrogation" used by Marcos regime). The treatment of detainees at Guantánamo been condemned as torture by international bodies and other world leaders. *E.g.*, Resolution 1433 (2005), Parliamentary Assembly of the Council of Europe, April 26, 2005, at Strasbourg (condemning treatment at Guantánamo as torture in violation of international law, based in large part on the testimony of plaintiff Jamal Al-Harith). Ex. 2. In addition, the United States' treatment of the Guantánamo detainees has been condemned as "tantamount to torture" by the International Committee of the Red Cross. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. Times, Nov. 30, 2004, at A1.

Against Torture (1999) ("State Dept. Report"), relevant pages attached as Ex. 3. In the State Department Report, the United States made clear its condemnation of torture in any and all circumstances, and acknowledged that:

- the prohibition on torture applies to the U.S. military (State Dept. Report ¶ 6);
- torture "cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer" (State Dept. Report ¶ 100); and
- "a commanding officer who orders such punishment would be acting *outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm"* (State Dept. Report ¶ 109).

Id., Ex. 3 (emphasis added).

The State Department Report thus makes clear that a military officer who orders torture is acting outside the scope of his employment. It also recognizes that an order to commit torture is an illegal order that cannot be relied on to excuse the conduct of a subordinate. In the United States, there are no free passes for torture. The certification submitted here directly contradicts the official position of the United States. The certification should not be relied on by this Court.

2. The Ordering of Torture, Cruel and Degrading Treatment and Prolonged Arbitrary Detention Is Outside the Scope of Employment for Officers of the United States Because These Acts Are Never Legitimate Executive Acts.

Sadly, defendants are not the first to argue that ordering torture, arbitrary detention, and cruel and inhumane treatment is an ordinary part of the executive function for senior officers of government and that the judiciary has no role in scrutinizing such conduct. This argument has, in fact, been used for decades by foreign tyrants seeking to avoid liability in U.S. courts for ordering, authorizing, and approving disappearance, detention, torture, and degradation of their political enemies. The argument has, however, been uniformly rejected as a matter of law in closely analogous cases. For instance, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),

the Second Circuit rejected the defendant's attempts to invoke sovereign and act of state immunity for his acts of torture and murder, stating "there are few, if any issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." *Id.* at 881. The Court ultimately determined that the defendant's acts of torture and murder, as a matter of law, exceeded his authority, stating, "we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state." *Id.* at 889-90.

The Ninth Circuit followed the Second Circuit's reasoning in a series of cases brought against Ferdinand Marcos and senior members of his government for arbitrary and prolonged detention, torture, and cruel and degrading treatment very similar to the allegations of the Complaint. *See, e.g., Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); *In re: Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 497-98 & n.10 (9th Cir. 1992); *In re: Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). In considering Marcos' claims for sovereign and act of state immunity, the Ninth Circuit concluded that these "acts of torture, execution and disappearance were clearly outside of his authority as president. . . . Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state." *In re: Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994). *See also Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (Guatemala's Minister of Defense was not acting within scope of his official duties when he ordered and directed campaign of kidnapping, torture, and execution).

These cases are directly analogous to the situation before the Court. They stand for the proposition that torture can never be an official act legitimately within the scope of a government

officer's duties. The acts of these leaders violated their public trust as well as the respective Constitutions, laws, and policies of their countries. In the instant case, defendants' conduct as alleged in the Complaint violated the U.S. Constitution, U.S. treaties, and other sources of domestic and international law. The acts alleged in the Complaint are unratified by the U.S. government. Compl. ¶¶ 142-44, 148-58. Indeed, the present Attorney General, under whose supervision the instant motion to dismiss and certification were filed, has stated expressly that the "President had not authorized or condoned torture, nor had [he] directed any actions or excused any actions. . . that might otherwise constitute torture." *Panel I of a Hearing of the Senate Judiciary Committee, Subject: The Nomination of Alberto Gonzales to Be Attorney General*, Fed. News Serv., (Jan. 6, 2005), Ex. 4. Under these circumstances, this Court should determine, as a matter of law, that defendants' acts so exceeded their authority that they could not possibly have been within the scope of their employment, because no sovereign could order or authorize such conduct. *Cf. Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (foreign state had no discretion to commit illegal acts that were "contrary to the precepts of humanity as recognized in both national and international law").

C. Counts I-IV Cannot Be Dismissed Because, at Best, the United States' Certification Raises a Factual Issue in Dispute as to Which Plaintiffs Are Entitled to Discovery.

Even if this Court were to determine that torture, cruel and degrading treatment and prolonged arbitrary detention could, as a matter of law, fall within the scope of legitimate duties of U.S. military and cabinet officers, it is clear that this case cannot be dismissed at this juncture. At best, the United States' certification raises a factual issue, as to which the plaintiffs are entitled to take discovery.

Whether a defendant was acting within the scope of his or her employment is an issue of fact. *E.g.*, *Brown v. Argenbright Sec.*, 782 A.2d 752, 757 (D.C. 2001). A disputed factual issue such as scope of employment generally cannot be determined on a motion to dismiss. Defendants' submission of a Westfall certification that they were acting within the scope of their employment does not change this fundamental precept. As the Supreme Court held in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995), certification by the Attorney General "does not conclusively establish as correct the substitution of the United States as defendant in place of the employee." Because of the Attorney General's strong incentive to issue certifications, particularly in cases in which certification would result in an overall dismissal of the action, the Court recognized that judicial review of the decision is crucial. *Id.* at 427-30. Indeed, in *Stokes v. Cross*, 327 F.3d 1210, 1213-14 (D.C. Cir. 2003), the D.C. Circuit has recently reaffirmed that a Westfall certification is just the beginning – and not the end – of the factual inquiry.

Because there are strong public policy reasons the court should make an early factual determination as to scope of employment in a case involving federal officers, the D.C. Circuit has issued specific guidance on how the District Court should handle such a dispute. In *Stokes*, the Court reiterated its holding in *Kimbro v. Velten*, 30 F.3d 1501 (D.C. Gr. 1994), that the United States' certification is entitled to no "particular evidentiary weight." *Stokes*, 327 F.3d at 1214 & 1215. Rather, the Court held that the submission of a certification simply shifts to the plaintiff the obligation to come forward with specific facts rebutting the certification. *Stokes*, 327 F.3d at 1214. The Court noted that plaintiffs will rarely be able to discharge this burden without some opportunity for discovery. *Id.*[5] The D.C. Circuit also directed that district courts hold an evidentiary hearing, regardless of the content of the certification, concerning the question

[5] In determining the likely utility of discovery, the Court noted that the district court should interpret the plaintiff's complaint liberally, in accordance with Rule 8, Fed. R. Civ. P. *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003).

whether the defendants were acting within the scope of their duties. *Id.* Defendants' motion to dismiss does not mention *Stokes*, yet it is controlling here.

Whether a defendant was acting within the scope of his or her employment requires consideration of a number of factual issues, including whether the act at issue is the kind of act the defendant was employed to perform and whether the authorization and implementation of the specific violence at issue in the Complaint was "expectable." Restatement (Second) of Agency § 228(1) (1958).[6] Whether a defendant's conduct was within the scope of his employment also requires consideration whether the conduct was "authorized" or "unauthorized" and, if unauthorized, whether it substantially departed from authorized conduct. *See, e.g.*, Restatement (Second) of Agency § 229.[7]

In the instant case, it would be surprising if discovery revealed that the conduct complained of is "of the type" defendants were employed to perform. Torture is *sui generis*. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J. concurring) (identifying the torturer, the pirate and the slave trader as "*hostis humani generis*" – the enemy of all mankind.); *Filartiga*, 630 F.2d at 890 (same). It is expressly banned by U.S. domestic and international law as well as military law and regulations. Thus, it is difficult to conceive that defendants were employed to undertake work that included torture, or even work "of the same

[6] The United States has certified that the defendants were acting within the scope of their employment, an issue that is ordinarily determined as a matter of state law. Defendants have not specified under what state law they have chosen to make their certification. It is likely however that either D.C. or Virginia law would apply to this determination.

[7] As alleged in the Complaint, defendants' conduct was contrary to applicable law and regulations and was *unauthorized* by the President. Compl. ¶¶ 142-144, 148-158. Where conduct is unauthorized, additional facts are relevant to the determination whether defendants' conduct was within the scope of their employment. These include:

1) Whether the conduct is incidental to authorized conduct;
2) Whether the unauthorized conduct is of the sort commonly done by persons in defendant's circumstances;
3) Whether or not defendant's employer has reason to expect that the unauthorized conduct will be done;
4) The extent of departure from the normal method of accomplishing an authorized result; and
5) Whether or not the unauthorized act is seriously criminal.

Restatement (Second) of Agency § 229.

type" as torture. But in any event, the scope of defendants' actual employment, with respect to detention and interrogation is an appropriate subject for discovery at this juncture.

Whether conduct is "expectable," or "incidental" to authorized conduct, is generally a question of foreseeability. *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995). In the instant case, plaintiffs should be permitted to take discovery on whether it was foreseeable that defendants – virtually all of whom are highly-disciplined military officers – would violate military regulations, as well as U.S. and international law, in order to direct and devise the torture, detention, and degradation of innocent civilians. In addition, plaintiffs are entitled to take discovery concerning such issues as whether the use of torture, extreme force, cruel and degrading treatment, and prolonged arbitrary detention are commonly authorized and permitted by U.S. officials; and whether the United States was aware of or had reason to foresee that torture would be authorized and would occur at Guantánamo.

Plaintiffs submit that, not only is discovery on these points relevant to the Court's consideration of this case, it is also very likely to support plaintiffs' claims. Already, there is substantial evidence pleaded in the Complaint and in the public record that the use of any force whatsoever in interrogating detained persons violates regulations of the Armed Forces, including the Army Field Manual 34-52 and Army Regulation 190-8.[8] Finally, the trier of fact may consider the indisputable fact that defendants' ordering, approval, and ratification of torture, cruel and degrading treatment and prolonged arbitrary detention was "seriously criminal." Restatement (Second) of Agency § 229. Documents indicate that Defendant Rumsfeld, and presumably other defendants, were specifically advised that the procedures authorized and implemented by them were in breach of criminal statutes.

[8] One reason that torture was almost certainly not foreseeable is the Army's longstanding conclusion that it is an ineffective tool for obtaining accurate information. Army Field Manual 34-52; Compl. ¶ 143.

Because there is substantial evidence, both pleaded in the Complaint and from the public record, that the conduct alleged in the Complaint was both unconstitutional and unauthorized by the President, the instant case differs significantly from *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), *appeal docketed*, No. 04-5199 (D.C. Cir. oral arg. held March 11, 2005). In *Schneider*, plaintiffs affirmatively pleaded that the conduct complained of was authorized and ordered by the President. Based on this allegation, the Court found that Kissinger's actions were within the scope of his employment. In the instant case, defendants concede in their papers, and the United States has conceded in public statements, that the President never ordered the torture or the cruel and degrading treatment of Guantánamo detainees.

Accordingly, defendants' motion to dismiss as to Counts I-IV should be denied as a matter of law. In the alternative, pursuant to the Circuit's guidance in *Stokes*, the Court must permit plaintiffs reasonable discovery concerning defendants' scope of employment and conduct an evidentiary hearing at which evidence on this issue can be considered.

D. As a Matter of Law, the Entire Civil Action Against Defendants Falls Within the Exception to the Westfall Act.

In their motion to dismiss, defendants argue that the United States should be substituted as the defendant in Counts I-IV and that plaintiffs' remedy against the United States is exclusive, 28 U.S.C. § 2679(b)(1), with respect to these Counts.[9] Defendants concede that this argument does not apply to Counts V-VII, which assert specific constitutional and statutory violations. Defendants' claim-by-claim approach, however, ignores the fact that all of the claims in this action arise out of a common nucleus of operative facts. They are part of a single civil action. As discussed further below, pursuant to the unambiguous text of the statute, where a plaintiff

[9] Defendants also argue that plaintiffs have failed to exhaust administrative remedies and that Counts I-IV should be dismissed in favor of administrative consideration and adjudication of plaintiffs' claims. This argument is premature in that it presupposes that the United States has been substituted as the defendant in this action.

alleges a constitutional violation, his or her *entire civil action* is exempt from the exclusive remedies of the FTCA. 28 U.S.C. § 2679(b)(2). Accordingly, the United States is not permitted to seek substitution with respect to Counts I-IV of the Complaint, and those Counts cannot be dismissed by reference to the FTCA's exclusive remedies provision.

By its plain language, 28 U.S.C. § 2679(b)(2) provides that the exclusive remedies of the FTCA do not apply to the plaintiffs' "*civil action*" when a constitutional violation is asserted. Section 2679(b)(2) states:

> Paragraph (1) [which provides that an action against the government is the exclusive remedy for plaintiffs injured by federal employees acting within the scope of their employment] does not extend or apply to a *civil action* against an employee of the Government
>
> (A) which is brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

28 U.S.C. § 2679(b)(2) (emphasis added).

The term "civil action" means an entire proceeding and not merely an individual claim. *Harvey Aluminum Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953) (A. Hand, J.); *Addamax Corp. v. Open Software Found., Inc.* 149 F.R.D. 3, 5 (D. Mass 1993); *Smith, Kline & French v. A.H. Robins Co.*, 61 F.R.D. 24, 29 (E.D. Pa. 1973); *see also*, Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.'"); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

Congress' choice of language in the FTCA in general, and the Westfall Act in particular, clearly reflects an understanding of the difference between a "claim" and a "civil action." Thus, for example, Congress chose to limit federal jurisdiction under the FTCA to "civil actions on *claims against the United States*." 28 U.S.C. § 1346(b)(1). The Supreme Court interpreted this narrower language to limit federal jurisdiction to the specific claims asserted against the United

States, permitting no pendent party jurisdiction. *United States v. Finley*, 490 U.S. 545, 552-53 (1990). In *Finley*, the Supreme Court expressly relied on the fact that the phrase "claims against the United States" limited the more general term "civil actions." Other sections of the FTCA similarly recognize the distinction between a "claim" and a "civil action." *E.g.*, 28 U.S.C. § 2679(d)(1), (2), & (5); 28 U.S.C. § 2679(e).

Section 2680 of the FTCA, which is similar to § 2679(b)(2) in that it lists the exceptions to the FTCA generally, is instructive in this respect. Section 2680 uses *exclusively* the term "claim" in defining the scope of the exceptions to the FTCA's waiver of sovereign immunity. In contrast, Congress' decision to use the broader term "civil action" in connection with exceptions to the Westfall Act reflects a clear intent that the exceptions to the Westfall Act encompass the entire civil action and *not* merely a particular claim as would be the case under Section 2680.

This interpretation of the term "civil action" as used in the Westfall Act is entirely consistent with both Supreme Court and lower court precedent. Thus, in *Commissioner v. Jean*, 496 U.S. 154 (1990), a unanimous Supreme Court held that the use of the term "civil action" in the Equal Access to Justice Act required that attorneys' fees be assessed on the case as an "inclusive whole, rather than as atomized line-items." *Id.* at 161-62. Lower courts interpreting jurisdictional, removal, and substantive statutes have come to the identical conclusion. *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990) (28 U.S.C. § 1441 permitting removal of any civil action involving a foreign sovereign permits the removal of the entire proceeding); *In re: Surinam Airways Holdings Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992) (same); *In re: Aircrash Disaster Near Roselawn Indiana*, 96 F.3d 932, 943 (7th Cir. 1996) (same); *FSLIC v. Southwest Fed. Savings Corp.*, 962 F.2d 1144, 1147-50 (5th Cir. 1992) (interpreting provision of FIRREA giving federal jurisdiction to "any civil action, suit or proceeding" in which FSLIC is a

party to mean the entire action); *Pharmacia Corp. v. Clayton Chem. Acquis. L.L.C.*, No. 02-cv-0428 (MJR), 2005 U.S. Dist. Lexis 5286, at *27-28 (S.D. Ill. Mar. 8, 2005) (interpreting "civil action" in context of CERCLA to refer to the "entire civil proceeding, including all component claims and cases within that proceeding.")

In interpreting a statute, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Where the words of the statute are unambiguous, no further judicial inquiry is necessary or permitted. *Rubin v. United States*, 449 U.S. 424, 430 (1981). Here, the words of the Westfall Act are clear and unambiguous: any civil action against a government employee asserting a constitutional claim is exempt from application of the FTCA. The statue does not contemplate or permit claim by claim parsing of a single civil action.

Although plaintiffs respectfully submit that the facial language of the Westfall Act is clear, the Court may refer to the legislative history of the statute, which supports plaintiffs' reading of the statute. Congress' focus in enacting the Westfall Act was the seriousness of the defendant's misconduct, rather than specific claims or causes of action that a plaintiff might bring. Congress thus distinguished between "egregious misconduct" for which no immunity was available and ordinary acts of negligence and poor conduct to which Westfall immunity would apply. Indeed, Congress expressly stated, "if an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant and the individual employee remains liable." H.R. Rep. No. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949. In keeping with Congress' intent to preclude immunity in cases involving egregious misconduct, Congress exempted from the FTCA the entire civil action against an officer accused of a constitutional or statutory tort. The exemption

was *not* limited to the constitutional or statutory claim itself. Congress' legislative action was entirely logical. It would have made little sense for Congress to preclude immunity for a claim based directly on the Constitution while at the same time extending immunity for related causes of action based on the identical conduct by the same actor.

Finally, interpreting the exception to the Westfall Act to cover the entire civil action, and not merely the specific causes of action alleging constitutional or statutory violations, is consistent with the general public policy in favor of judicial economy and against claim-splitting. It has long been recognized that the adjudication in a single proceeding of all claims arising out of a single "common nucleus of operative fact" is favored. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966); *Montecatini Edison SPA v. Ziegler*, 486 F.2d 1279, 1287 (D.C. Cir. 1973). This policy promotes judicial economy and convenience of the parties and avoids the dangers of inconsistent judgments. In the instant case, defendants assert that this case should be split in two parts – Counts I-IV should be dismissed for lack of exhaustion and sent for determination and/or adjudication to a federal agency, while Counts V-VII should go forward in this Court. This is precisely the type of claim-splitting that both Congress and the courts have generally disfavored.[10] The Westfall Act should not be interpreted to create such piecemeal and inefficient adjudication.

E. Counts I-IV Are Subject to the Westfall Exception Because the Alien Tort Statute Is a Federal Statute.

Counts I-IV are cognizable under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), which provides that an action may be brought in federal court for violations of customary international law and treaties of the United States. Defendants misread *United States v. Smith*,

[10] Congress overturned the Supreme Court's ruling in *Finley* by adopting 28 U.S.C. § 1367, which provides for pendent party jurisdiction in cases under the FTCA. This clearly indicates a congressional preference that FTCA cases arising out of a single nucleus of operative fact be tried in a single proceeding.

499 U.S. 160 (1991), as holding that the Westfall Act precludes federal statutory claims that incorporate other sources of law. In *Smith*, the plaintiffs did not allege any federal statutory claims. *Id.* at 162 n.1. The Supreme Court merely rejected plaintiffs' argument that the Gonzalez Act, 10 U.S.C. § 1089, which limits the liability of military medical personnel for torts committed within the scope of their employment, somehow created a federal cause of action that would fall within the statutory claims exception of the Westfall Act. The ATS, unlike the Gonzalez Act, is intended specifically to create liability, not limit it. As the Supreme Court noted, the ATS was intended to give standard expression to the "'brooding omnipresence' of the common law." *Sosa v. Alverez-Machain*, 124 S. Ct 2739, 2760 (2004). By giving "standard expression" to the common law, the ATS itself incorporates those standards and imposes the duty of care required by the law of nations. Unlike the Gonzalez Act in *Smith*, which contained no reference to law or standards, the ATS is "violated" when the law of nations or a treaty is violated. Indeed, *Sosa* makes clear that "Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation." *Id.* at 2761.

Finally, the legislative history of the Westfall Act is clear that the statutory claim exception was created to "ensure that preexisting remedies protected by a statute would not be affected." *Smith*, 499 U.S. at 182 (Stevens, J., dissenting). The Westfall Act "'*does not change the law*, as interpreted by the Courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal Statutes.'" *Id.* at 183 n.9 (quoting H.R. Rep. No. 100-700 at 7 (1988) (emphasis added)). Adopting defendants' position would thwart congressional intent to ensure that preexisting remedies, such as those created under the ATS, remain intact.[11]

[11] Plaintiffs in *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004) *appeal docketed*, No. 04-5199 (D.C. Cir. oral arg. held March 11, 2005), raised a similar argument which was rejected, by the District Court. However, the

II. THE GENEVA CONVENTIONS ARE AN APPROPRIATE BASIS FOR LIABILITY IN THIS MATTER.

Defendants argue in a footnote that Count IV of the Complaint should be dismissed because the Geneva Conventions are not "self-executing" and therefore no individual cause of action exists. Defs. Br. at 6 n.6. As discussed below, the Geneva Conventions protect individual rights and are enforceable by individuals. The relevant provisions of the Geneva Conventions are in fact self-executing and are properly the subject of interpretation by the courts.[12]

A. The Geneva Conventions Protect Detainees from Torture and Cruel and Degrading Treatment.

In the wake of World War II, the international community negotiated four Conventions to protect persons captured and detained as a result of war or conflict. Among these Conventions – which are known collectively as the Geneva Conventions – are the Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva POW Convention") and the 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 ("Geneva Convention on Civilian Detainees"). The relevant provisions of these Conventions are substantively identical.

The Conventions require the humane treatment of all prisoners of war and civilian detainees. Geneva POW Convention Art. 13; Geneva Convention on Civilian Detainees Art. 27. The Conventions also expressly prohibit the following:

- Violence to life and person. . . . mutilation, cruel treatment and torture (Geneva POW Convention Art. 3; Geneva Convention on Civilian Detainees Art. 3; s*ee also id.* Art. 32);

Court did not analyze differences between *U.S. v. Smith* and an ATS claim, nor did it analyze the impact of *Sosa v. Alvarez Machain*. The issue is now on appeal to the D.C. Circuit

[12] Although not specifically identified in the Complaint as a claim under the Alien Tort Statute, plaintiffs' claims under the Geneva Conventions can be brought either as stand-alone common law claims for breach of the Conventions or pursuant to the ATS. 28 U.S.C. § 1350 (permitting claims based on violation of the law of nations or a treaty of the United States).

- Outrages upon personal dignity, in particular, humiliating and degrading treatment (Geneva POW Convention Art. 3; Geneva Convention on Civilian Detainees Art. 3);

- Physical or mental torture or any other form of coercion for the purpose of securing information (Geneva POW Convention Art. 17; Geneva Convention on Civilian Detainees Art. 31);

- Threats, insults, or unpleasant or disadvantageous treatment if the prisoner refuses to answer questions (Geneva POW Convention Art. 17); and

- Interference with religious practices (Geneva POW Convention Art. 34; Geneva Convention on Civilian Detainees Art. 93).

These Conventions are among the most important international agreements to which the United States is a party, giving protection to our military personnel abroad as well as embodying the American commitment to the universal norm of human dignity.

B. Plaintiffs Have a Cause of Action for Violation of Their Rights Under the Geneva Conventions.

Plaintiffs' rights guaranteed under the Geneva Conventions were repeatedly violated during their incarceration at Guantánamo. As alleged in the Complaint, plaintiffs were non-participants in combat; they are citizens of a U.S. ally and co-signatory to the Geneva Conventions; and they were taken into custody in Afghanistan, which is a signatory to the Geneva Conventions. Despite these facts which entitle them to the protections of the Conventions, they were tortured, degraded, and physically and mentally coerced for more than two years.

Contrary to defendants' argument, plaintiffs have enforceable rights under the Convention, and enforcement of the Conventions is not limited to diplomatic actions by other party states. An individual may assert private rights under a treaty if a private right of action is provided expressly or by implication. *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d

18, 21 (2d Cir. 1988). To be directly enforceable in U.S. courts, the treaty must: (1) prescribe a rule by which the rights of the private citizen or subject may be determined, *The Head Money Cases*, 112 U.S. 580, 598-99 (1884), and (2) be self-executing.

In *The Head Money Cases*, the Supreme Court expressly recognized that certain treaties create or recognize rights enforceable by individuals:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.
>
> . . .
>
> The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the law made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of a private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

112 U.S. at 598-99. The Geneva conventions contain precisely such rules under which the rights of an individual may be determined. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 164-65 (D.D.C. 2004), *appeal docketed*, No. 04-5393 (D.C. Cir. oral arg. held Apr. 7, 2005); Carlos Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1134-40 (1992). Indeed, the Conventions were written "first and foremost to protect individuals, and not to serve state interest." Oscar M. Uhler *et. al.*, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958).

The language of the Conventions belies defendants' argument that the Conventions give rights only to other Contracting States and not the individual detainees. Both the Geneva POW Convention and the Geneva Convention on Civilian Detainees expressly provide that detained persons "may in no circumstances renounce in part or in entirety *the rights secured to them* by

the present Convention." Geneva POW Convention Article 7; Geneva Convention on Civilian Detainees Article 8 (emphasis added). This language could not be clearer that rights under the Conventions are secured *to the individual detainees.* Otherwise, there would be no need to include this non-waiver provision because an individual would never have the right or ability to "renounce" a right given only to another Contracting State.[13]

As one district court has stated in reference to the Geneva POW Convention:

> [I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of [the Geneva POW Convention] is to ensure humane treatment of POWs–not to create some amorphous, unenforceable code of honor among the signatory nations.

United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992); *see also Hamdan*, 344 F. Supp. 2d at 164-65; *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002).

C. The Relevant Provisions of the Geneva Conventions Are Self-Executing.

Defendants' argument that plaintiffs' claim is not cognizable because the Geneva Conventions are not "self-executing" is a red herring. A treaty is considered self-executing when it is effective upon ratification and no additional legislation is necessary to accomplish the purposes of the treaty. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (A self-executing treaty is one that "operates of itself without the aid of any legislative provision."), *overruled in part on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); *see also*, *Lindh*, 212 F. Supp. 2d at 553-54 & n.20; *Noriega*, 808 F. Supp. at 797-98. A treaty may "contain both

[13] These provisions, which make clear that the 1949 Geneva Conventions confer individual non-waivable rights on detained persons, did not appear in the Third Geneva Convention of 1929, which was interpreted by the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950).

self-executing and non-self-executing provisions." *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); *Noriega*, 808 F. Supp. at 797-98.

There can be little doubt that the relevant provisions of the Geneva Conventions are self-executing. The Articles of the Conventions discussed above prohibit any signatory state from torturing detained persons; from committing outrages upon their persons or treating them with brutality; from exposing them to cruel and degrading treatment; from using physical or mental coercion or torture in order to secure information from them; and from interfering with their religious practices. In ratifying the treaties, the United States assumed the specific obligation to comply with these prohibitions. No further legislation was required.[14] This is the very definition of "self-executing." *See* Restatement (Third) of the Foreign Relations Law of the United States § 111, Rpt.'s Note 5 (1987) ("obligations not to act, or to act only subject to limitations, are generally self executing"); Vazquez, 92 Colum. L. Rev. 1082, 1127-28 (1992).[15]

D. Interpretation and Enforcement of the Geneva Conventions Are Not Committed to the Executive Branch.

Defendants suggest that the interpretation and enforcement of the Conventions are committed to the Executive Branch and that this Court lacks jurisdiction to consider plaintiffs' claim. Defs. Br. at 6 n.6. This simply misstates the law. Since *Marbury*, it has been established

[14] The U.S. military has long viewed the Geneva Convention as self-executing, and in 1997, the U.S. military published Regulation 190-8, a multi-service regulation which governs treatment of Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees ("Army Reg. 190-8"). Relevant pages attached as Ex. 5. This regulation's language closely mirrors the language of the Geneva Conventions, and it provides that all detainees (regardless of reason for detention) are to be treated humanely and that there is no justification for inhumane treatment. Army Reg. 190-8, Ch. 1:1-5(a)(4), Ex. 5. The regulation cites the Geneva Conventions themselves as its authority, Army Reg. 190-8, Ch. 1:1-1(b), Ex. 5, indicating the U.S. military's view that no enabling legislation was necessary to give the Geneva Conventions legal effect in the United States.

[15] That these provisions are self-executing is evident when one compares them to other provisions of the Geneva Conventions, which expressly require legislation in order to be effective. *See United States v. Noriega*, 808 F. Supp. 791, 797-98 & n.8. For example, Articles 129 and 130 of the Geneva POW Convention define "grave breaches" of the Conventions, and require each signatory country to enact criminal laws imposing "effective penal sanctions" on persons who commit specified "grave breaches" of the Convention's provisions. These latter provisions are clearly not self-executing, because the obligation undertaken by the U.S. is to pass legislation, not to engage or refrain from engaging in specific conduct.

that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Geneva Conventions, along with other treaties, federal statutes, and the Constitution itself, are the supreme Law of the Land, pursuant to the Supremacy Clause of the Constitution. U.S. Const. Art. VI. The Supreme Court has long recognized that the power of Article III courts to interpret and apply law necessarily includes the power to interpret treaties. *Owings v. Norwood's Lessee*, 9. U.S. 344, 348 (1809); *The Head Money Cases*, 112 U.S. at 598-99; *Jones v. Meehan*, 175 U.S. 1, 3 (1899) ("[t]he construction of treaties is the peculiar province of the judiciary"); *see also, Perkins v. Elg*, 307 U.S. 325 (1939) (overruling State Department interpretation of citizenship treaty); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements").

As discussed above, the 1949 Geneva Conventions create individual rights that are enforceable in this Court. Defendants' motion to dismiss plaintiffs' Geneva Convention claim must, therefore, be denied.

III. PLAINTIFFS' *BIVENS* CLAIMS ARE MERITORIOUS AND CANNOT BE DISMISSED AT THIS JUNCTURE.

Defendants argue substantively that plaintiffs have not stated a cognizable *Bivens* claim because: i) the Fifth and Eighth Amendments to the Constitution do not apply to detainees at Guantánamo; and ii) the Eighth Amendment does not apply because Plaintiffs were never convicted of a crime. Defendants also raise two arguments as to why plaintiffs' *Bivens* claims, however meritorious, should not be permitted to go forward: i) "special factors" preclude this Court from recognizing the claims; and ii) defendants are entitled to qualified immunity. These arguments are untenable.

As discussed in detail below, plaintiffs are entitled to the protection of the Fifth and Eighth Amendments, both of which apply to plaintiffs' detention and treatment at Guantánamo. As the Supreme Court has found, Guantánamo is not a Hobbesian enclave; the rule of law governs there. In addition, there are no special factors precluding this Court from considering plaintiffs' claims, and defendants are entitled to no immunity for their egregious conduct. Defendants' motion to dismiss on these grounds should be denied.

A. The Prolonged Arbitrary Detention, Torture and Cruel and Degrading Treatment of Plaintiffs Violated Their Fifth and Eighth Amendment Rights.

1. The Constitution Applies at Guantánamo Bay Naval Base.

As though last year's Supreme Court term had not occurred, defendants argue to this Court that Guantánamo is a lawless black hole – where detainees have neither constitutional nor statutory protections. Defs. Br. at 18-19. This position was soundly rejected by the Supreme Court in *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004). As Judge Joyce Hens Green observed in her careful analysis of *Rasul*,

> [I]t is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed. Indeed, had the Supreme Court intended to uphold the D.C. Circuit's rejection in *Al Odah* [*v. United States*, 321 F. 3d 1134 (D.C. Cir. 2003)] of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect. . . .

In re: Guantanamo Detainees Cases, 355 F. Supp. 2d 443, 463 (D.D.C. 2005), *appeal docketed sub nom Al Odah v. United States*, No. 05-5064 (D.C. Cir. notice of appeal Mar. 7, 2005) ("*Guantanamo Detainees*").[16]

[16] Defendants rely heavily on Judge Leon's opinion in *Khalid v. Bush*, 355 F. Supp. 2d 311, (D.D.C. 2005), *appeal docketed*, No. 05-5063 (D.C. Cir. Mar. 2, 2005), decided virtually simultaneously with Judge Green's decision *In re Guantanamo Detainees Cases*, 355 F. Supp, 2d 443 (D.D.C. 2005) *appeal docketed sub nom Al Odah v. United*

Despite the Supreme Court's decision in *Rasul*, defendants argue that *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), compel the dismissal of plaintiffs' *Bivens* claims because the Constitution does not apply outside the territory of the United States and because it does not apply to persons who have established no substantial connection with the United States. These arguments are unavailing.

First, as discussed above, defendant's argument was rejected by the Supreme Court in *Rasul*, which expressly held that Guantánamo is *not* outside the territory of the United States for these purposes. The Court stated:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the 'territorial jurisdiction' of the United States. By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

124 S. Ct. at 2696 (citations omitted).

Although the Supreme Court was specifically addressing the applicability of the federal habeas corpus statute at Guantánamo, the Court's reasoning clearly also identically applies to constitutional protections on which statutory habeas is based. That application is underscored by the *Rasul* Court's further ruling that aliens detained in military custody at Guantánamo also have the "privilege of litigation" in federal courts for claims under another federal statute that deals only with conditions of confinement. *Id.* at 2698-99. The Court's decision makes clear that protections of the U.S. Constitution, and statutes derived from it, extend to Guantánamo, at least in the context presented here. *See also Guantanamo Detainees*, 355 F. Supp. 2d at 464 ("[I]t is

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States, No. 05-5064 (D.C. Cir. notice of appeal Mar. 7, 2005). Judge Leon and Judge Green reach conflicting conclusions on the existence and extent of the constitutional rights of detainees held at Guantánamo. Both cases are now on appeal in the Court of Appeals.

clear that Guantanamo must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.")

Second, the Supreme Court clearly distinguished the circumstances of the Guantánamo detainees from the circumstances present in *Eisentrager*. *Eisentrager* involved habeas petitions filed by German nationals who were convicted of war crimes by U.S. military tribunals in China and incarcerated in Germany. *Eisentrager*, 339 U.S. at 766. While there, they sought habeas relief in the U.S. courts, claiming violations of various rights under the U.S. Constitution. *Id*. at 767. Finding that the "enemy aliens" were never within territory under U.S. control, the Supreme Court held they had no standing to file habeas petitions in a U.S. court. *Id*. at 777-78. As discussed above, this reasoning does not apply to Guantánamo, which is within the complete jurisdiction and control of the United States.

In addition, in *Rasul*, the Court held that the principles announced in *Eisentrager* were not applicable to cases involving the Guantánamo detainees because, unlike the *Eisentrager* plaintiff, the detainees:

> are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 124 S. Ct. at 2693.

Third, the Supreme Court expressly distinguished *Rasul* from *Verdugo-Urquidez.* In *Verdugo-Urquidez*, a Mexican national claimed a search of his Mexican residences by U.S. drug enforcement agents violated the Fourth Amendment prohibition of unreasonable search and seizure, when the evidence from those searches was introduced at his trial in the U.S. *Verdugo-Urquidez*, 494 U.S. at 262. The Supreme Court denied his claim, holding that the Fourth

Amendment requirement that a search be authorized by a judicially issued warrant does not apply to foreign nationals in foreign countries. *Id*. at 275.

In *Rasul*, the Supreme Court relied on Justice Kennedy's concurring opinion in *Verdugo-Urquidez*, where he reaffirmed the body of law holding that foreign nationals have constitutional rights even in territories where the United States is not sovereign. *Rasul*, 126 S. Ct. at 2698 n.15 (citing *United States v. Verdugo-Urquidez*, 494 U.S. at 277-278 (Kennedy, J., concurring)). Justice Kennedy's concurring opinion, which was key to the five-vote majority decision in *Verdugo-Urquidez*, stressed that whether due process rights apply to aliens abroad requires a contextual analysis that asks whether application of the right abroad would be "impracticable and anomalous." 494 U.S. at 277-78. The Fourth Amendment prohibition of unreasonable search and seizure specifically at issue in *Verdugo-Urquidez*, he reasoned, would be functionally anomalous as applied abroad because no judge would even have jurisdiction to issue warrants abroad. *Id*. Therefore, he joined the majority in concluding that the Fourth Amendment did not apply abroad.

In this case, however, there simply is nothing "impracticable" or "anomalous" about applying the Fifth Amendment right to due process to plaintiffs' torture at Guantánamo. The prohibition on torture stems from basic universal concepts of decency and respect for human dignity, and applies to all "persons," without regard to nationality. *Filartiga*, 630 F.2d at 884. Further, the application of due process would not infringe on Cuban sovereignty in any way, and would cause the U.S. government no more hardship than would recognizing the same rights of detainees held within the continental United States. The American military is in full control of Guantánamo, it is not bound by Cuban law, and certainly the United States government does not contend that it is. *See Guantanamo Detainees*, 355 F. Supp. 2d at 463-64.

Finally, as Justice Kennedy's concurrence makes clear, *Verdugo-Urquidez* does not stand for the proposition that constitutional rights are not available to foreign nationals who lack a "substantial connection" with the United States. Defs. Br. at 22.[17] As Justice Kennedy stated, "the Court has not decided, that persons in the position of the respondent have no constitutional protection." *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). Cases decided both before and after *Verdugo-Urquidez* have rejected the argument defendants make here. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352 (Fed. Cir. 2004), *petition for cert. filed* 73 U.S.L.W. 3595 (Mar. 24, 2005) (No. 04-1291) (Takings Clause of Fifth Amendment applies to property interests of foreign nationals "located abroad even where there is no demonstrable connection between them or their property and the United States"); *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (Due Process Clause binds commission established by United States to address foreign nationals' claims in Micronesia). The courts' refusal to adopt defendants' argument is for good reason. Under defendants' theory, an alien extradited to the United States could be sentenced to a punishment of torture because his lack of a "substantial connection" would prevent him from having Fifth or Eighth Amendment rights. This argument was specifically rejected in Justice Kennedy's concurrence in *Verdugo-Urquidez*, when he acknowledged that, "[a]ll would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Id.*[18]

[17] The cases relied upon by the defendants for the proposition that courts should evaluate foreign nationals' constitutional rights "in terms of whether they have assumed the burdens of societal obligations" are inapposite. Defs. Br. at 22. *See Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1183 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1299 (2005); *32 Co. Sovereignty Committee v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *People's Mojahadin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999). First of all, there is no question that plaintiffs detention, whether voluntary or not, was a substantial connection with the United States. Second, the plaintiffs in the cases cited by the defendants – quite unlike the plaintiffs in the instant case – were not coerced into a substantial connection with the United States by being forcibly taken into U.S. custody and held against their will for over two years without charges.

[18] The Supreme Court explicitly distinguished the Fourth Amendment from other constitutional rights, specifically contrasting it to the Fifth and Sixth Amendments, in rendering its holding. *Verdugo-Urquidez*, 494 U.S. 259, 264-

2. The Conduct Alleged in the Complaint Violated the Fifth and Eighth Amendments.

Whether stated in terms of the Fifth Amendment's right to substantive due process or the Eighth Amendment's right to be free from cruel and unusual punishment, it is indisputable that a person in government custody has the right not to be tortured. *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) ("Compulsion by torture to extort a confession" violates due process); *Rochin v. California*, 342 U.S. 165, 172 (1952).[19] Such conduct violates the Fifth Amendment because it "shocks the conscience." *Rochin*, 342 U.S. at 172. It has long been held that any conduct that would violate the Eighth Amendment if visited upon a convicted person, violates the Fifth Amendment if visited upon a person held in detention. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (detained man had Due Process rights "at least as great as the Eighth Amendment protections available to a convicted prisoner"); *see Hamm v. DeKalb County*, 774 F.2d 1567, 1573-74 (11th Cir. 1985) ("states may not impose on pre-trial detainees conditions that would violate a convicted person's Eighth Amendment rights").[20] Thus, the distinction

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65 (1990). The decision plainly does not extend to constitutional rights in general, but is limited to the application abroad of Fourth Amendment rights where observance of the rights would be impracticable and anomalous.

[19] Equally, the U.S. Constitution protects persons from prolonged arbitrary detention and from cruel and degrading treatment at the hands of the government. *Hayes v. Faulkner Co.*, 388 F.3d 669 (8th Cir. 2004) (38-day detention without charges violated substantive due process); *Hope v. Pelzer*, 536 U.S. 730, 738 n.8 (2002) (denying prisoners bathroom breaks and not permitting them to clean themselves affronted human dignity in violation of the Eighth Amendment.); *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1983) (city policy requiring strip search and visual body cavity inspection of all women detained violated Fourth and Fourteenth Amendments).

[20] Defendants argue that the Eighth Amendment does not apply to plaintiffs' treatment at Guantánamo because plaintiffs were never convicted of any crime. Judge Green recognized the irony of this argument when she noted that, in the upside down world of Guantánamo, persons not accused or convicted of any crime have fewer rights than those who have actually been accused or convicted. *See In re Guantanamo Detainees*, 355 F. Supp. 2d at 447. But more importantly, defendants' argument highlights the contradiction in the United States' position in respect of the Guantánamo detainees. Although the plaintiffs were never charged with, much less convicted of, any crime, the United States has consistently represented to this Court that in fact plaintiffs were sent to Guantánamo after an official finding by the United States that they were "enemy combatants." *See id.* at 446; *Khalid*, 355 F. Supp. 2d at 316 n.2 (citing Deputy Secretary of Defense Paul Wolfowitz, Memorandum for the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004) ("CSRT Order")). The CSRT Order represented that "each detainee [at Guantánamo] has been determined to be an enemy combatant *through multiple levels of review* by officers of the Department of Defense." *Id*. (emphasis added), Ex. 6. Thus, although there was no formal adjudication of guilt, the United States has taken the consistent position that plaintiffs were found by it to be guilty

defendants seek to draw between the plaintiffs' rights under the Fifth Amendment and their rights under the Eighth Amendment is unsupportable.

The plaintiffs' torture, their prolonged arbitrary detention, and their cruel and degrading treatment at the Guantánamo facility must shock any human conscience. Not only is the prohibition on torture a universally accepted international norm, *Filartiga*, 630 F.2d at 883-84, but virtually all of the specific acts alleged in the Complaint have been held to be illegal and violative of the Fifth and/or Eighth Amendment by judicial decisions directly on point. *E.g.*, *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002) (shackling in painful positions, exposure to sun, deprivation of water and bathroom breaks); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1248 (M.D. Ala. 1998) (shackling in painful positions, severe chafing of handcuffs); *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (forced nakedness, isolation in darkness, deliberate exposure to cold, withholding hygienic items, depriving prisoners of food, shackling prisoners in painful positions); *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1223 (D. Colo. 2001) (beating while shackled); *Evicci v. Baker*, 190 F. Supp. 2d 233, 238-39 (D. Mass. 2002) (same); *Davis v. Seiter*, No. 96-3316 (KYV), 1998 U.S. Dist. Lexis 10965 (D. Kan. June 30, 1998) (beating while shackled, exposure to elements, contamination of cell with human feces); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (beating while shackled and blindfolded, exposure to extreme cold, forced nakedness, solitary confinement); *Nelson v. Heyne*, 491 F.2d 352, 357 (7th Cir. 1974) (forced use of tranquilizing drugs); *Harper v. Wall*, 85 F. Supp. 783, 785-86 (D.N.J. 1949) (attacks with dogs). The Supreme Court's decision in *Hope v. Pelzer*, is instructive. In *Hope*, the Court held that shackling of prisoners in stress positions, particularly when that technique was used along with

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of being enemy combatants. In light of this position, the United States cannot assert that plaintiffs are not entitled to Eighth Amendment protections because they were not "convicted" of anything.

extreme heat, isolation, deprivation of water, and/or deprivation of toilet breaks was "obvious" cruelty, *Hope*, 536 U.S. at 738, and "antithetical to human dignity." *Id.* at 745. These practices were also used on plaintiffs at Guantánamo. *E.g.*, Compl. ¶¶ 67-69, 80, 92, 95, 104-106, 121, 124-127, 130.

Based on well-settled law, the acts alleged in the Complaint thus clearly violated both the Fifth and Eighth Amendments. Accordingly, the Complaint states a proper *Bivens* action.

B. Defendants Are Not Entitled to Qualified Immunity for Their Participation in the Torture, Detention, and Degradation of Plaintiffs at Guantánamo.

Rather than defend their actions substantively, defendants argue that they should be immune under the doctrine of qualified immunity because their acts did not violate a clearly established constitutional right. Defendants argue that, because the Supreme Court's decision in *Rasul* was not handed down until after plaintiffs were released, defendants were not on notice that their conduct violated plaintiffs' rights (or that plaintiffs had any rights) at the time the conduct was undertaken. Defendants' argument is unconscionable and legally unsupportable.

1. The Qualified Immunity Standard

Where, as here, defendants have violated "clearly established . . . constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), they are not entitled to qualified immunity. A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739 (internal citation and quotation omitted). Plaintiffs need not demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("the absence of legal precedent addressing an identical

factual scenario does not necessarily yield a conclusion that the law is not clearly established"). Nor need they identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Plaintiffs need only show that the official had "fair warning" that their conduct was likely to be unconstitutional. *Id.* at 740.

The test for qualified immunity is one of "objective reasonableness." Thus, qualified immunity does not protect officials from liability for conduct that is "so egregious" that any reasonable person would know it was illegal without guidance from courts. *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992). In this case, any reasonable person would have been aware that the conduct alleged in the Complaint was "so egregious" as to be unlawful. There are few rights more clearly established than the right to be free from torture and cruel and degrading treatment while in government custody. *Filartiga,* 630 F.2d at 881-82.

2. Defendants Were on Notice of the Illegality of Their Conduct.

As discussed above, multiple judicial decisions should have put defendants' on notice that the specific acts they ordered and implemented were illegal and unconstitutional. Indeed, the illegality of shackling prisoners in stress positions, denying prisoners water and toilet breaks, and leaving them exposed to extreme heat was sufficiently well established in 2002, about the time plaintiffs were being transported to Guantánamo (and well before Defendant Rumsfeld specifically approved these techniques, Compl. ¶9), that the Supreme Court denied qualified immunity to prison officials who ordered or implemented these practices. *Hope,* 536 U.S. at 745-46; *see also Gates v. Collier*, 501 F.2d at 1306. No less so here.[21]

[21] Defendants' practices at Guantánamo parallel other practices condemned by the Supreme Court and the Middle District of Alabama in, respectively, *Hope* and *Austin*. In *Hope* and *Austin*, the Courts describe the cruelty of guards who deliberately taunted plaintiff Hope by spilling water in front of him. *Hope v. Pelzer,* 536 U.S. 730, 734-35 (2002); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1247-48 (M.D. Ala. 1998). These allegations are disturbingly similar

It is significant, as well, that defendants were on notice that cruelty toward, and oppression and maltreatment of, prisoners is a violation of Article 93 and of Army Reg. 190-8. Military courts have long held that the protections of Article 93 extend to non-military persons subject to the orders of military personnel. *United States v. Dickey*, 20 C.M.R. 486, 488-89 (Army Bd. Rev. 1956). Abuse and torture of prisoners is simply unlawful. *Dickey*, 20 C.M.R. at 488-89; *United States v. Lee*, 25 M.J. 703, 704-05 (Ct. Mil. Rev. 1987); *United States v. Finch*, 22 C.M.R. 698, 700-01 (Navy Bd. Rev. 1956).

The instant case stands in stark contrast to *Wilson v. Layne*, 526 U.S. 603 (1999), which is relied on by defendants. In *Wilson*, U.S. marshals were sued for violations of the Fourth Amendment because they permitted journalists to observe the execution of a search warrant pursuant to the Marshals Service's "ride along" policy. The Supreme Court held that, although the conduct violated the Fourth Amendment, the individual defendants were entitled to qualified immunity because the law was not settled and because the marshals were following a clear policy of the Marshals Service permitting such "ride alongs." In the instant case, not only is the unconstitutionality of the acts alleged in the Complaint obvious and well-established in case law, but defendants were also acting *contrary* to applicable law and regulations, including Article 93, Army Reg. 190-8, and the Army Field Manual 34-52. *See Hope*, 536 U.S. at 743-44; *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) (prohibition in prison regulations put defendants on notice of illegality of conduct). The holding of *Wilson* thus supports the imposition of liability in this case.

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to the allegations of the Complaint that plaintiff Asif Iqbal was short-shackled in an intentionally cooled room, taunted about the cold by guards, and then left shackled in isolation for another three to four hours. Compl. ¶ 124.

3. The Constitution Governed Defendants' Conduct with Respect to Their Treatment of the Plaintiffs.

Defendants' qualified immunity argument relies on the proposition that there were no constraints on their conduct with respect to the detainees at Guantánamo, and that any reasonable federal officer would have believed that he or she was permitted to engage in facially unconstitutional acts of torture, violence, and degradation there. According to defendants' argument, however wrong their acts were, they are entitled to qualified immunity because they were not then aware that they could be liable to plaintiffs under the U.S. Constitution for their conduct. As the District Court in Massachusetts noted recently, "substantive rights should not be confused with the vehicles for their enforcement." *Xuncax*, 886 F. Supp. at 177 n.13 (D. Mass. 1995). Defendants clearly "cannot complain that [they] had no notice that torture was not a lawful act." *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996) (granting retroactive application of the Torture Victim Protection Act). Nor can defendants suggest that they "believed [their] actions fell within some prevailing legal norm." *Xuncax*, 886 F. Supp. at 177.

Regardless of where the detainees were incarcerated, defendants were and are U.S. cabinet and military officers sworn to uphold the Constitution and "to bear true faith and allegiance to the same." 5 U.S.C. § 3331. Defendants' obligation to uphold the Constitution follows the defendants wherever they are stationed or located. *Reid v. Covert*, 354 U.S. 1, 6 (1957) (holding that constitutional rights extend to U.S. citizens tried by a U.S. military court in Great Britain). Similarly, defendants were and are bound by the terms of the UCMJ and military regulations wherever they serve or are located. Article 5 of the UCMJ, *codified at* 10 U.S.C. § 805. There is no question that the Constitution and the UCMJ apply to defendants' conduct, whether that conduct occurs at Guantánamo, Great Britain, the District of Columbia, or

Arlington, Virginia. Indeed, in submitting the United States' certification that defendants were acting, as a matter of U.S. law, within the scope of their employment, defendants presumably concede that U.S. law, including the U.S. Constitution, applies to their conduct.

Moreover, even before *Rasul*, the Supreme Court and other courts had long recognized that the Constitution, and especially the Fifth Amendment, constrains government conduct in U.S.-controlled territory. *Reid*, 354 U.S. at 6; *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977); *United States v. Tiede*, 86 F.R.D. 227, 242-43 (U.S. Ct. Berlin 1979). As the *Tiede* court observed, without such constraint, the U.S. government can trample fundamental rights of persons under their dominion:

> [I]f the occupation authorities may act free of all constitutional restraints, no one in the American Sector of Berlin has any protection from their untrammeled discretion. . . . The American authorities . . . would have the power . . . with respect to German and American citizens alike, to arrest any person without cause, to hold a person incommunicado, to deny an accused the benefit of counsel, to try a person summarily and to impose sentence—all as a part of the unreviewable exercise of foreign policy.

United States v. Tiede, 86 F.R.D. at 242-43.

The Supreme Court's decision in *Reid* confirmed the continuing vitality of the basic principle enunciated in the *Insular Cases* that all persons – citizens or foreign nationals – have "fundamental" constitutional rights in territories under U.S. control. *Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1922); *Dorr v. United States*, 195 U.S. 138, 145 (1904).

It has long been established that Guantánamo is not a legal black hole. As long ago as 1965, the Navy Judge Advocate and the United States Attorney General opined that Guantánamo was within the "special maritime and territorial jurisdiction of the United States," and thus, U.S. criminal law applies there. *See* Ex. 7 at 7 (History of Guantánamo records application of U.S. criminal law to civilians at Guantánamo pursuant to joint opinion of Navy Judge Advocate and

Attorney General); 18 U.S.C. § 7.[22] Where U.S. criminal law applies, constitutional protections associated with criminal prosecution apply. *Reid*, 354 U.S. at 40-41; *United States v. Rogers*, 388 F. Supp. 298, 301-02 (E.D. Va. 1975) (Fourth Amendment applies to criminal cases arising out of conduct of civilians at Guantánamo). Guantánamo's status as a U.S. territory where U.S. law applies has been reiterated in a variety of contexts since then. *See* "Installation of Slot Machines on U.S. Naval Base, Guantánamo Bay," 6 U.S. Op. O.L.C. 236, 237-38 (1988) (Guantánamo is subject to U.S. law on gaming). Accordingly, defendants cannot argue that they were not "on notice" that the plaintiffs had constitutional rights at Guantánamo.

Finally, defendants' argument that, although they knew torture was impermissible on the mainland, they thought it was not actionable on Guantánamo is both ethically troubling and legally untenable. Essentially, defendants claim they lacked knowledge of a technical jurisdictional fact. Knowledge of the basis of jurisdiction for what is otherwise a *malum in se* felony is not a material element of an offense in the criminal context, Model Penal Code, Comment 1.13, and defendants cannot interpose such a technicality here to claim that they were not aware they were violating a clearly established right. Defendants knew there was a universal right not to be tortured; they just hoped that, by segregating the plaintiffs and other detainees on Guantánamo, they could avoid accountability. They cannot.

C. No Special Factors Warrant Dismissal of Plaintiffs' *Bivens* Actions.

1. This Case Does Not Require an "Extension" of *Bivens*.

Defendants argue that plaintiffs' *Bivens* claims require an "extension" of the *Bivens* doctrine. It does not. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,

[22]The complete text of the History of Guantánamo is available at the U.S. Navy website at http://www.nsgtmo.navy.mil/gazette/History_64-82/CHAPTER%20V.htm. Relevant pages attached as Ex. 7.

403 U.S. 388 (1971), the Supreme Court held that federal officers may be sued for damages by victims whose constitutional rights they have violated. *Id.* at 395. In the instant case, defendants do not dispute that they are federal officers. The fact that a number of the defendants are military officers does not exempt them from liability under *Bivens*. *See Willson v. Cagle*, 711 F. Supp. 1521, 1525-26 (N.D. Cal. 1988), *aff'd*, 900 F.2d 263 (1990). Equally, there is no question that plaintiffs have constitutional rights, *Rasul*, 124 S. Ct. at 2698 n.15, and that the Complaint alleges a violation of those rights. Not only are plaintiffs' allegations typical in *Bivens* actions, as discussed above, *supra* at 30-37, virtually all of the conduct alleged in the complaint has been ruled unconstitutional in cases directly on point. Indeed, all of plaintiffs' claims fall within the ordinary scope of a *Bivens* action seeking redress for "conditions of confinement." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). [23]

2. The Executive Powers Cited by Defendants Do Not Preclude This Court from Considering Plaintiffs' *Bivens* Claims.

The defendants seek to immunize themselves, arguing that – regardless of the merits of plaintiffs' claims – this Court should not permit plaintiffs' action to go forward because "special factors counsel[] hesitation," *Bivens*, 403 U.S. at 396. As indicated in the cases cited by defendants, special factors have previously been found where there are elaborate procedural remedies already available to plaintiffs or where there was a particular risk to the public treasury in implying a remedy under *Bivens*. *See*, *e.g.*, *Bush v. Lucas*, 462 U.S. 367, 380 (1983); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). None of those factors is present here.

[23] The cases cited by defendants for the proposition that this case is an "extension" of Bivens are irrelevant. *FDIC v. Meyer*, 510 U.S. 471 (1994), and *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), involved defendants who are not federal officials. *Bush v. Lucas*, 462 U.S. 367 (1983), *Schweiker v. Chilicky*, 487 U.S. 412 (1988), and *McIntosh v. Turner*, 861 F.2d 524 (8th Cir. 1988), involved elaborate administrative remedies procedures with which a *Bivens* action could interfere. Similarly, *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), were *Bivens* actions brought by active duty members of the military who were entitled to elaborate administrative procedures to adjudicate claims of wrongdoing. None of these circumstances pertain to the instant case.

Defendants' argument that they should be immune from suit because their conduct occurred as part of the exercise of the Executive's powers to wage war, protect national security, and conduct foreign policy comes perilously close to being an *apologia* for the torture and degradation experienced by the plaintiffs. This argument flies in the face of express U.S. treaty obligations that "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." UN Torture Convention, at Article 2, pt. 2, Ex. 1; *see also* State Dept. Report at ¶ 100, Ex. 3 ("Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.")

Defendants urge this Court to deny plaintiffs a *Bivens* remedy because the Executive Branch is entitled to substantial deference with respect to plaintiffs' detention at Guantánamo. A very similar argument was rejected by the Supreme Court last term in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). As Justice O'Connor wrote for the plurality, "whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id*. The extensive analyses in the other *Hamdi* opinions – Justices Souter and Ginsberg (concurring) and Justices Scalia and Stevens (dissenting) – reflect the implicit agreement of at least eight justices that the separation of powers doctrine does not circumscribe the Court's power to rule upon the Executive's actions in detaining purported "enemy combatants" in connection with the conflict in Afghanistan. As the Supreme Court has stated, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit," and, further, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those

liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967); *accord Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("even the war power does not remove constitutional limitations safeguarding essential liberties.")[24]

The cases relied on by defendants do not require deference in the circumstances presented here. For instance, defendants rely on *Beattie v. Boeing*, 43 F.3d 559 (10th Cir. 1994), for the proposition that the Court should defer to the Executive Branch in matters of "national security." *Beattie* involved a dispute over the issuance of a security clearance, an issue that the Supreme Court determined was committed to the Executive Branch in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Whatever deference may be owed to the Executive in this limited and technical area, these cases do not suggest a general doctrine that the presence of any purported "national security" concern precludes a *Bivens* action, and they have no relevance to the torture, wrongful detention, and conditions of confinement claims asserted by the plaintiffs here.

Defendants' argument that permitting plaintiffs' *Bivens* action to go forward threatens the Executive Branch's foreign policy function merits only brief mention. The plaintiffs' *Bivens* action seeks redress for their prolonged arbitrary detention, and the torture and degradation inflicted upon them by the defendants and others under their control and direction while plaintiffs were in the custody of the U.S. military. Plaintiffs' claims are not about the correctness of U.S. policy in invading Afghanistan, the admission or exclusion of aliens into the United States, the deportation of individuals from the United States, or the government's repatriation negotiations. Defs. Br. at 12-14. Accordingly, the defendants' reliance on cases like *Sanchez-*

[24] *See also Ex parte Milligan*, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.").

Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), which concerned the United States' policy decision to fund the Nicaraguan Contras, is entirely inapposite.[25] Defendants' argument that the "release of specific detainees may be the subject of intense international negotiations" reflecting the "Nation's policy positions and relationships with other countries," *see* Defs. Br. at 14, is irrelevant. This action is about plaintiffs' treatment and confinement; it is not about their release.

3. The Facts Alleged in the Complaint Do Not Support a Finding of Special Factors.

Defendants' arguments that plaintiffs' detention implicates the Executive Branch's exercise of powers over war, national security, and foreign policy rely on assertions that conflict with the allegations of the Complaint. They cannot be credited by the Court at this stage of the proceedings, when plaintiffs are entitled to all presumptions in their favor. Contrary to the defendants' unsupported assertions, Defs. Br. at 9, plaintiffs were not enemy combatants captured on a "foreign battlefield;" they were in fact citizens of a United States ally, the United Kingdom. Three of the plaintiffs were literally sold to the U.S. military by a Northern Alliance warlord, hundreds of miles from any battlefield. Compl. ¶¶ 37-43. The fourth plaintiff – Jamal al-Harith – was taken into U.S. custody immediately upon his "liberation" from a Taliban prison, where he had been wrongly incarcerated by the United States' adversary – the Taliban – as an alleged British spy. Compl. ¶ 3.

Following their capture, plaintiffs were detained thousands of miles from any "battlefield." Ultimately they were released without any charges being filed. Even if the defendants were able to make out a credible argument that the initial capture of plaintiffs could

[25] Cases cited by defendants to support the position that federal courts in peacetime have deferred to the Executive Branch concerning national security matters are equally irrelevant. Plaintiffs' claims do not implicate or impinge on the United States' ability to "function effectively in the company of sovereign nations" as was the situation in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990), where the Court held that any restrictions on searches and seizures occurring incident to the United States' conduct while protecting American interests abroad should be regulated by the political branches.

be justified as part of the fog of war, there is no possible justification for plaintiffs' prolonged detention or the abuse and degrading treatment that plaintiffs suffered.[26]

4. Defendants' Egregious Conduct Was Not Authorized by Congress.

Defendants' argument that this Court should preclude a *Bivens* action because the Executive Branch was acting pursuant to authorization from Congress is specious. Simply put, Congress cannot and did not authorize the Executive Branch to violate the Constitution. Although the Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," it did not, and constitutionally could not, authorize defendants' prolonged arbitrary detention, torture, or cruel and degrading treatment of the plaintiffs.

IV. PLAINTIFFS ARE ENTITLED TO PURSUE THEIR CLAIMS THAT THEIR RIGHTS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT WERE VIOLATED BY DEFENDANTS' EGREGIOUS CONDUCT.

During plaintiffs' incarceration at Guantánamo, defendants deliberately and substantially burdened plaintiffs' practice of their Muslim religion in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). As with plaintiffs' *Bivens* claims, defendants argue that RFRA does not apply "extraterritorially" to military detainees at Guantánamo and that they have qualified immunity from suit because they could not anticipate the application of the

[26] The government's argument in footnote 7 at page 11 of its brief that recognizing plaintiffs' *Bivens* action somehow elevates foreign detainees over brave U.S. soldiers is plainly wrong. To the extent such a comparison is relevant, United States soldiers do not have fewer rights than plaintiffs – they have more. The United States soldiers have a complex, heavily regulated process by which they can assert alleged violations of their rights. *See Chappell v. Wallace*, 462 U.S. 296, 302 (1983) and *United States v. Stanley*, 483 U.S. 669 (1987).

statute to aliens at Guantánamo. Because the Supreme Court's ruling in *Rasul v. Bush, supra*, is explicit that provisions of the United States Constitution and related statutes do extend to prisoners at Guantánamo, and because defendants breached a duty that was clear even before that decision, defendants' motion to dismiss the RFRA claim must fail.

A. Defendants' Conduct Violated the Religious Freedom Restoration Act by Substantially Burdening Plaintiffs' Exercise of Their Religion.

The Religious Freedom Restoration Act was enacted in 1993, and is inextricably intertwined with the Free Exercise Clause of the First Amendment to the U.S Constitution. RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability." RFRA, 42 U.S.C. § 2000bb-1(a). RFRA was enacted to reverse the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the government could burden a person's free exercise of religion provided it could establish a "rational basis" for its conduct. Under RFRA, government interference with the free exercise of religion under the First Amendment is prohibited unless the government demonstrates both a compelling interest and that the burden is the least restrictive means of furthering that compelling interest. RFRA, 42 U.S.C. § 2000bb-1(a) & (b). Once a plaintiff establishes a substantial burden on religious exercise, the burden of demonstrating compelling interest and least restrictive means shifts to the defendant. 42 U.S.C. § 2000bb-1(b).[27]

Plaintiffs' allegations clearly state a claim for violation of RFRA with respect to Muslim prisoners. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001)

[27] After *City of Boerne v. Flores*, 521 U.S. 507 (1997), held RFRA unconstitutional as applied to states, Congress used different constitutional authority to extend RFRA's application to certain state actions by enacting the Religious Land Use and Institutionalized Persons Act of 2000, P.L. 106-274, (codified in part at 42 U.S.C. § 2000cc) ("RLUIPA"). RLUIPA also underscores RFRA's application to U.S. territories and possessions (42 U.S.C. § 2000bb-2(2)).

(recognizing potential RFRA claim related to grooming policies requiring shaving and short hair as applied to Rastafarian and Sunni Muslim prisoners); *Taylor v. Cox*, 912 F. Supp. 140 (E.D. Pa. 1995) (seizure of Koran stated claim under RFRA); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), *on remand* 151 F.3d 1033 (7th Cir. 1998) (Table) (right to participate in Ramadan observances covered by RFRA). Defendants' motion to dismiss does not even attempt to assert a compelling interest in interfering with plaintiffs' religious expression or that their approach was the least restrictive alternative available. At this stage of the pleadings, plaintiffs plainly allege a valid claim under RFRA.

This Court's decision in *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122 (D.D.C. 2004) is not to the contrary. In *Larsen*, ministers who sought employment as military chaplains challenged the Navy's alleged quotas on non-liturgical chaplains as a violation of the First and Fifth Amendments and RFRA.[28] The Court determined that their claim was one of intentional discrimination, and not a challenge to a rule that is neutral or generally applicable, and dismissed the *Larsen* plaintiffs' RFRA claim.[29] *Larsen*, 346 F. Supp. 2d at 137-38.

Plaintiffs' claims in the instant case are largely based on neutral or generally applicable rules that adversely affected their exercise of religion. For instance, plaintiffs allege that defendants, as a matter of policy, withheld religious objects from detainees at Guantánamo. Compl. ¶ 78. The withholding of such objects particularly burdens Muslims whose religious practices require them. In addition, defendants enforced schedules and conditions for detainees that particularly interfered with Muslim times of prayer and calls to prayer. Compl. ¶ 94. Shaving prisoners' beards, though nominally neutral, substantially burdens Muslim men whose

[28] In *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002) (Urbina, J.), a similar challenge was brought by current and former non-liturgical chaplains in the Navy.

[29] In the context of that case, the Court's dismissal of the RFRA claim did not have any cognizable effect on the litigation. Plaintiffs were permitted to go forward with substantively identical constitutional claims which were to be determined on a "strict scrutiny" basis.

religion requires adult men to wear beards. Defendants also precluded communication between prisoners, Compl. ¶ 78, which restricted Muslim prayers and the call to prayer. Thus, plaintiffs' RFRA claims meet the neutral rule requirement set out in *Larsen*.

Plaintiffs respectfully submit, however, that, pursuant to the language of the RFRA statute, they are *not* required to make a showing that the rule being challenged was neutral or a rule of general applicability. The language of RFRA manifest Congress' intent to provide a cause of action for *all* government actions that substantially infringe on religion whether through an act of intentional discrimination or through promulgation of a neutral rule with a disparate effect. The language of the statute prohibits burdening free exercise "*even if* the burden results from a rule of general applicability." The neutral principles limitation would turn the broadening language "*even* if" into narrowing language equivalent to "*only* if." Plaintiffs respectfully submit it was not the intent of Congress to eliminate remedies for the most egregious forms of intentional discrimination while broadening remedies for more subtle disparate impact discrimination.

The broad sweep of the statute was recognized by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997):

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment . . . any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

521 U.S. at 532. This reading of the RFRA statute has recently been endorsed by the United States in its brief on the merits in the Supreme Court case of *Cutter v. Wilkinson*, No. 03-9877 (oral argument held March 21, 2005) *available at* 2004 WL 2961153. In that case, the federal

government sets forth in a detailed paragraph the kinds of burdens on religious exercise that Congress sought to address in RFRA and RLUIPA. The paragraph states:

> Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence collected during three years of hearings…Congress learned, for example, that prison officials had deliberately taped confessional communications between a priest and penitent and had denied Jewish inmates acces to matzo during Passover. H.R. Rep. No. 219, supra, at 9-10. Congress also heard testimony of sectarian discrimination in the accommodations afforded prisoners, such as permitting the lighting of votive candles but not Chanukah candles. [citation to Congressional hearing omitted]. Prison officials repeatedly refused to let Jewish prisoners miss meals on fast days or to obtain a "sack lunch" to break their fast at nightfall. *Id.* at 43. Instances of unreasoned interference with religious rituals also were identified, including cases where prison officials, (i)"without the ghost of a reason," prevented Protestant prisoners from possessing crosses, (ii) forced a Catholic priest "to do battle over bringing a small amount of sacramental wine into prisons," and (iii) forbade a prisoner attending Episcopal services to take communion. Joint Stmn., 146 Cong. Reg. At S7774-S7775, S7777.

United States' Br. in *Cutter v. Wilkinson*, *supra*, 2004 WL 2961153, at *1-3. These examples from RLUPIA's legislative history reflect deliberate discrimination as well as neutral principles and are notably similar to the conduct plaintiffs challenge here.

Finally, in the event the Court finds that plaintiffs' RFRA claims are not sound, plaintiffs would seek to amend their Complaint to seek redress for these violations directly under the First Amendment, and would allege as a component of that claim that defendants' conduct was intentionally discriminatory against their practice of their Muslim religion. *See, e.g., Patel v. United States*, 132 F.3d 43 (Table), 1997 WL 764570 (10th Cir. 1997) (First Amendment and Bivens claim for withholding religious book permitted to proceed).

B. RFRA Applies to Federal Actions at Guantánamo.

Defendants move to dismiss solely on the ground that RFRA does not apply to Guantánamo detainees because Guantánamo, on the island of Cuba, is "extraterritorial" to the

United States. Defs. Br. at 24-27. This argument fails for the reasons stated above. *See supra* at 30-34 and 40-42.

The cases relied on by defendants do not support their position. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), heavily relied on by the defendants, turns on the technical language of an immigration statute not at issue here. Moreover, *Sale* involved the question of whether a U.S. immigration statute applied on the high seas. The *Sale* Court's decision says nothing about whether the statute would have applied to persons under prolonged U.S. detention at Guantánamo, a jurisdiction over which – unlike the high seas – the United States exercises "complete jurisdiction and control." *Rasul*, 124 S. Ct. at 2696. To the extent defendants rely on another immigration case, *Cuban Am. Bar Assoc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), for the proposition that U.S. statutory and constitutional protections do not apply at Guantánamo, that case must be deemed to have been overruled by *Rasul*, at least in the context presented here.[30]

C. Federal Defendants Do Not Have Qualified Immunity from the RFRA Claim.

Finally, defendants argue that even if RFRA applies, defendants are entitled to qualified immunity from suit for damages because the rights at issue are not clearly established. Defendants' argument suffers from the same infirmities as do their qualified immunity arguments with respect to plaintiffs' *Bivens* claims. Defendants' conduct violated clear rights under RFRA. It also violated the terms of the Geneva Conventions as well as Army Regulation 190-8, both of which require the United States to permit free exercise of religion by detained persons. Geneva POW Convention Art. 34 and Geneva Civilian Convention Art. 93; Army Reg.

[30] Defendants' reliance on *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), is particularly misplaced, for in that case the court ruled that the criminal and immigration laws at issue *did* apply outside U.S. territorial borders.

190-8 1-5(g), Ex. 5 ("Enemy Prisoners of War and Retained Persons will enjoy latitude in the exercise of their religious practices") and 6-7(d) Ex. 5 ("Civilian Internees will enjoy freedom of religion"). They could have been under no illusion that harassing and denigrating Muslims in their worship was lawful whether at Guantánamo or elsewhere. Moreover, as discussed, *supra* at 40-42, any reasonable person in defendants' position would have been aware that U.S. law would apply at Guantánamo. This argument is even stronger for RFRA because, in 2000, RFRA was amended to clarify that it applied in U.S. territories. *See* RFRA, Sec. 2000bb-2 (1) and (2) (2000 Amendments); *Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (application of RFRA to Guam).

Finally, long before *Rasul* was decided, cases indicated that RFRA was applicable to the actions of military officers regardless of where they were stationed. Thus, for instance, in *Veitch v. Danzig*, 135 F. Supp. 2d 32 (D.D.C. 2001), an active-duty Navy chaplain alleged violations of RFRA because he wanted to preach a particular version of Protestantism. He asserted his claim for preaching both on shipboard of the USS Enterprise, homeported in Norfolk (but presumably sailing on the high seas) and in Naples, Italy, where he came to be stationed. The Court noted that plaintiff's claims raised serious concerns under RFRA, but denied his motion for preliminary injunction because it found that his own misconduct, and not his religious practices, were the cause of his voluntary resignation. *Id.* at 35-36. In short, defendants had every reason to understand, even before *Rasul v. Bush*, that RFRA applied to conduct of federal officials outside the geographic area of the United States, and that it applied in effective territories such as Guantánamo Bay.[31]

[31] At minimum, plaintiffs are entitled to discovery to determine the basis for Defendants' claims that their duties were not clear.

CONCLUSION

WHEREFORE, for the reasons stated above, defendants' motion to dismiss should be denied in its entirety. A proposed Order is attached.

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