IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YUKSEL CELIKGOGUS, *et al.*,	)	
Plaintiffs,	)	
v.	)	**No. 06-CV-1996 (HHK)**
DONALD RUMSFELD, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants, former Secretary of Defense Donald Rumsfeld, former Chairman, Joint Chiefs of Staff General Richard Myers, former Chairman, Joint Chiefs of Staff General Peter Pace, General James T. Hill, General Bantz J. Craddock, Major General Michael Lehnert, Major General Michael E. Dunlavey, Major General Geoffrey Miller, Brigadier General Jay Hood, Rear Admiral Harry B. Harris, Jr., Colonel Terry Carrico, Colonel Adolph McQueen, Brigadier General Nelson J. Cannon, Colonel Michael I. Bumgarner, Colonel Wade F. Dennis, and Mr. Esteban Rodriguez, respectfully submit this motion to dismiss the Second Amended Complaint as a matter of law, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The grounds for this motion are enumerated below.[1]

STATEMENT OF POINTS AND AUTHORITIES

The United States Court of Appeals for the District of Columbia Circuit's holding in Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (Rasul II), cert. denied, -- S. Ct. -- , 2009 WL

[1] A similar motion to dismiss based on the same grounds has been concurrently filed in Allaithi v. Rumsfeld, No. 08-CV-1677 (D.D.C.) (HHK), a case related to this matter and also before this Court.

2588226 (U.S. Dec. 14, 2009) (No. 09-277), reaffirming its prior holding in Rasul v. Myers, 512 F.3d 644 (D.C. Cir.) (Rasul I), vacated and remanded, 129 S. Ct. 763 (2008), forecloses recovery for Plaintiffs on any and all claims raised in the Second Amended Complaint. Defendants rely on the Court of Appeals' holding in Rasul as authority to dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because it is a case which this Court held was related to the instant action and which resulted in a stay of these proceedings, and the decision reaffirms existing Supreme Court and Circuit precedent squarely in the context of non-resident aliens detained outside United States sovereign territory who are suing federal employees solely in their individual capacities.

BACKGROUND

This action involves claims for monetary damages and declaratory relief by Plaintiffs, five non-resident aliens who allege they were detained at Guantanamo Bay Naval Station, Cuba ("Guantanamo"), and at military installations in Afghanistan, by the United States military in the course of ongoing hostilities in Afghanistan and Iraq.[2] See Sec. Am. Compl. ¶ 6; Request for Relief. They assert that the former Secretary of Defense and other high-ranking military officers are liable, in their individual capacity, for torture and abuse allegedly inflicted on Plaintiffs during their detention. Id. ¶¶ 6, 14-29. Plaintiffs do not allege that the Defendants *personally* tortured and abused them, but rather that they, *inter alia*, "exercised command responsibility,"

[2] Plaintiffs Yuksel Celikgogus, Ibrahim Sen, and Nuri Mert are Turkish citizens who claim they were detained for over two years at military facilities in Kandahar, Afghanistan, and at Guantanamo, and later released to Turkey. See Sec. Am. Compl. ¶¶ 1, 4. Plaintiffs Zakirjan Hasam and Abu Muhammad, a Uzbek refugee and an Algerian, respectively, claim they were detained for over four years at military facilities in Kandahar and/or Bagram, Afghanistan, and at Guantanamo, and later released to Albania. Id. ¶¶ 1, 5.

"exercised command and control over subordinates at the detention facilities" and "acquiesced in and/or permitted" this conduct. Id. ¶¶ 6, 175. Relying upon Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq., ("RFRA"), and the Federal Civil Rights Act, 42 U.S.C. § 1985(3), Plaintiffs assert nine claims for relief. Specifically, they claim violations of: (1) the ATS for "prolonged arbitrary detention," "torture," and "cruel, inhuman or degrading treatment or punishment;" (2) the Geneva Conventions; (3) the Vienna Convention on Consular Relations; (4) the First Amendment's freedom of religion; (5) the Fifth Amendment's right to due process; (6) RFRA's prohibition against religious interference; and (7) the Federal Civil Rights Act's prohibition against conspiring to deny equal protection of the laws. See Sec. Am. Compl.

Plaintiffs commenced this action on November 21, 2006, and amended their complaint on March 21, 2007. See Docket Nos. 1 & 11. On March 23, 2007, Defendants filed a motion to stay the proceedings based on the pending appeals in the related case, Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006). See Docket Nos. 7, 12, & 13. On May 22, 2007, this Court ordered a stay pending the outcome of the consolidated appeals in Rasul v. Rumsfeld, Nos. 06-5209, 06-5222 (D.C. Cir.). See Docket No. 19.

On January 11, 2008, the Court of Appeals issued its decision in Rasul, affirming the dismissal of constitutional and international law and treaty claims by non-resident aliens against senior military personnel based on alleged acts of torture and abuse at Guantanamo. Rasul I, 512 F.3d at 644. The Court of Appeals also went further and rejected the Rasul plaintiffs' RFRA

claim, overturning the District Court's prior determination that plaintiffs could maintain such a cause of action based on their alleged treatment at Guantanamo. Id. at 668-72.

On January 22, 2008, this Court ordered Defendants to respond to Plaintiffs' Amended Complaint by March 11, 2008. See Docket No. 23 & 01/22/2008 Minute Order. Defendants filed a motion to dismiss Plaintiffs' claims on March 10, 2008, however, three days prior Plaintiffs requested a further stay of the proceedings. See Docket Nos. 25, 27 & 29. The Court granted the motion for further stay before Plaintiffs' opposition to Defendants' motion to dismiss was due. See Docket 03/14/2008 Reset Deadlines & 04/01/2008 Minute Order. That same day, after receiving permission from the Court, Plaintiffs filed their Second Amended Complaint. See Docket No. 37.

On December 15, 2008, in light of Boumediene v. Bush, 128 S. Ct. 2229 (2008), the Supreme Court vacated the holding in Rasul I and remanded the case for "further consideration." Rasul v. Myers, 129 S. Ct. 763 (2008). On remand, the Court of Appeals reaffirmed its prior decision in Rasul I, dismissing all the claims. Rasul II, 563 F.3d at 527. On August 24, 2009, the Rasul plaintiffs filed a petition for writ of certiorari (No. 09-227). The Supreme Court denied certiorari on December 14, 2009. Rasul v. Myers, -- S. Ct. -- , 2009 WL 2588226 (U.S. Dec. 14, 2009) (No. 09-277). Accordingly, the Rasul plaintiffs have exhausted their appeals and therefore the stay is no longer in effect.

On December 31, 2009, the Court entered the parties' Joint Stipulation on the Schedule for a Motion to Dismiss the Second Amended Complaint. See Docket No. 41 & 12/31/2009 Minute Order. As a result, the Defendants have until February 19, 2010, to file this Motion to Dismiss the Second Amended Complaint.

ARGUMENT

Because the Plaintiffs in Celikgogus and the plaintiffs in Rasul allege nearly identical causes of action on behalf of former non-resident alien detainees held at Guantanamo and/or in Afghanistan, against many of the same defendants, the Court of Appeals' decision in Rasul forecloses, as a matter of law, the Plaintiffs' claims in this action.

In Rasul, the non-resident alien plaintiffs advanced the following causes of action relevant to this motion: (1) violation of the Fifth Amendment; (2) violation of the Eighth Amendment; (3) "prolonged arbitrary detention," "torture," and "cruel, inhuman or degrading treatment," in violation of the ATS; (4) violations of the Geneva Conventions; and (5) violations of RFRA. Rasul I, 512 F.3d at 649, 651-52. On motion, the District Court dismissed the international law and treaty claims (i.e., ATS and Geneva Conventions) based on the ground that the defendants were entitled to absolute immunity on those claims under the Westfall Act, 28 U.S.C. § 2679. Id. The District Court also dismissed the constitutional claims by holding the defendants were entitled to qualified immunity because any constitutional rights the plaintiffs may have possessed were not clearly established at the time of the alleged violations. Id. at 649, 652-53. The District Court, however, did not dismiss the Rasul plaintiffs' RFRA claim. Id. at 649, 653.

On appeal, the Court of Appeals not only affirmed the dismissal of the Rasul plaintiffs' ATS, Geneva Conventions and Bivens claims, but it also reversed the District Court's ruling as to the RFRA claim, finding that neither the Constitution nor federal statutory law conferred rights on non-resident aliens detained by the U.S. military abroad. Id. at 649, 665-67, 672. The Court of Appeals further held that, even if the Rasul plaintiffs could assert constitutional rights, the

military official defendants were entitled to qualified immunity because it was not clearly established at the time that non-resident aliens possessed constitutional rights.[3] Id. at 665-67.

On remand from the Supreme Court following the Boumediene decision, the Court of Appeals reinstated its prior ruling on the RFRA, international law and treaty claims. Rasul II, 563 F.3d at 528-29, 533. With regard to the Bivens claims, the Court of Appeals held that in light of Pearson v. Callahan, 129 S. Ct. 808 (2009), it no longer needed to reach the constitutional issue (i.e., whether detainees at Guantanamo possess constitutional rights), but rather could simply rule that at the time in question such rights were not clearly established. Rasul II, 563 F.3d at 530-32. In addition to affirming the dismissal of the Bivens claims based on qualified immunity, id. at 532, the Court of Appeals also held that "special factors" (i.e., national security, foreign affairs, and military policy) were another, alternative ground for rejecting the constitutional claims. Id. at 532 n.5. The Court then concluded that the "Bivens claims are therefore foreclosed on this alternative basis ...." Id.

Accordingly, the holding of Rasul directly disposes of all the claims in the instant action. This holding not only clearly applies to the present case but also compels dismissal as a matter of law. More specifically, Plaintiffs' claims fail for the reasons enumerated below.

[3] As further support for dismissing the Rasul plaintiffs' constitutional claims, the Court of Appeals also held that "it was not clearly established at the time of the alleged violations–nor even today–that a reasonable officer would know that Guantanamo is sovereign United States territory." Rasul I, 512 F.3d at 667.

I. Rasul confirms that Plaintiffs' constitutional claims are barred by qualified immunity.[4]

The Court of Appeals in Rasul held, consistent with Supreme Court and Circuit precedent, that the Bivens claims are barred by qualified immunity because it was not clearly established at the time of the alleged misconduct that aliens outside sovereign United States territory possessed constitutional rights. Rasul I, 512 F.3d at 665-67; Rasul II, 563 F.3d at 530-32. Rejecting plaintiffs' contention that a reasonable person would have been on notice merely because the "prohibition on torture is universally accepted," the Court of Appeals emphasized that "[t]he issue we must decide ... is whether the rights ... were clearly established at the time of the alleged violations." Rasul I, 512 F.3d at 666; see also Rasul II, 563 F.3d at 530. No legal authority could "support[] a conclusion that military officials would have been aware, in light of the state of the law at the time [2002-2004], that detainees [in Cuba] should be afforded the [constitutional] rights they now claim." Id. at 666-67; see also Rasul II, 563 F.3d at 530 n.3.

Not surprisingly, the District Court reached the same conclusion in In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85 (D.D.C. 2007) (Hogan, C.J.) months earlier, when it dismissed the constitutional claims in that action.[5] Id. at 108-10. In Iraq Detainees Litig., the District Court stressed, like the Court of Appeals later did in Rasul, that "the

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[4] The Supreme Court has repeatedly stressed that courts should apply qualified immunity "at the earliest possible stage of litigation." Saucier v. Katz, 533 U.S. 194, 201 (2001) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)), modified in part by Pearson, 129 S. Ct. at 808 (adding flexibility to Saucier two-step, qualified-immunity analysis).

[5] See also Al-Zahrani v. Rumsfeld, No. 09-0028, slip op. at 13 n.5 (D.D.C. Feb 16, 2010) (Huvelle, J.) ("Even if plaintiffs' claims were not foreclosed under the Bivens special factors analysis, their claims would fail because under Rasul II, defendants would be entitled to qualified immunity.").

cases make clear that what must be 'clearly established' is the constitutional right," id. at 109 (citations omitted). At the time of the alleged violations in the Iraq Detainees Litig. case, "no constitutional right could be invoked by the plaintiffs; as a result, no reasonable official could have understood that what he was doing violated the Fifth Amendment as it applied to them, regardless of whether the defendants' conduct otherwise was illegal under some other source of law." Id. at 109.

Like the plaintiffs in Rasul (and in Iraq Detainees Litig. and Al-Zahrani), here Plaintiffs are also non-resident aliens who were detained outside United States sovereign territory during the same time period. For that reason, the Court of Appeals' holding in Rasul regarding qualified immunity controls here.[6]

II. Plaintiffs' constitutional claims are further barred because of the special factors inherent in foreign policy, especially during a time of war.

The Court of Appeals' acceptance of Judge Brown's concurrence in Rasul I regarding special factors counseling hesitation against fashioning Bivens claims, also precludes Plaintiffs' Bivens claims. Rasul II, 563 F.3d at 532 n.5 ("As Judge Brown noted in her initial concurrence, federal courts cannot fashion a Bivens action when 'special factors' counsel against doing so." Rasul I, 512 F.3d at 672-73 (Brown, J., concurring) (quoting Chappell v. Wallace, 462 U.S. 296,

[6] Furthermore, Plaintiffs' bare allegations of supervisory liability fail to satisfy the threshold personal involvement requirement of alleging a claim against the Defendants sufficient to overcome qualified immunity. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The Supreme Court's decision in Iqbal, held that supervisory government officials cannot be held individually liable based on "the misdeeds of their agents," "mere knowledge of [a] subordinate's" allegedly unconstitutional conduct, or conclusory allegations of adopting a supposedly unconstitutional policy that may be "consistent with" illegal conduct but that is "more likely" explained by legal conduct. Id. at 1948-51. See also id. Dissent Op. at 1957 ("the majority ... is eliminating Bivens supervisory liability entirely").

298 (1983))). Citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985), the Court of Appeals held that the "danger of obstructing U.S. national security policy is one such factor." Id. Judge Brown also recognized that "[p]ermitting damage suits by detainees may allow our enemies to '*obstruct the foreign policy of our government*.'" Rasul I, 512 F.3d at 673 (Brown, J., concurring) (citing Sanchez-Espinoza, 770 F.2d at 209 (emphasis added)); see also Iraq Detainees Litig., 479 F. Supp. 2d at 103-04. This Court has also found judicial "intrusion" into military affairs is "inappropriate" regardless whether Congress has provided an adequate remedy for a plaintiff's injuries. Iraq Detainees Litig., 479 F. Supp. 2d at 106 (quoting United States v. Stanley, 483 U.S. 669, 683 (1987)). Facing nearly identical claims and contexts as raised here, the Court of Appeals held that it would be improper for a court on its own to provide a money damage remedy. Rasul II, 563 F.3d at 532 n.5.

Because the same, inescapable special factors are present here which counsel hesitation against creating a new action for detainees, Plaintiffs' constitutional claims are barred and the Court need not inquire further into the underlying merits. The inherent special factors in this case fully support the finding that Plaintiffs' Bivens claims must be dismissed.[7]

III. Even if the Court should address the constitutional issue, Plaintiffs' Bivens claims still fail because Plaintiffs have no constitutional rights as they are non-resident aliens located outside United States sovereign territory.

The Bivens claims should be dismissed on the grounds stated above without reaching the question of whether the Plaintiffs can even invoke constitutional rights. That was the approach

[7] See also Al-Zahrani, No. 09-0028, slip op. at 13 ("The D.C. Circuit's conclusion that special factors counsel against the judiciary's involvement in the treatment of detainees held at Guantanamo binds this Court and forecloses it from creating a Bivens remedy for plaintiffs here.").

adopted in Rasul II, and the same approach should be followed here. Rasul II, 563 F.3d at 530-32. However, if the Court were to reach the constitutional issue, the law of the Circuit is clear. Id. at 529-30. See also Boumediene, 128 S. Ct. at 2262. After Boumediene, the Court of Appeals in Kiyemba v. Obama, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009) reaffirmed that non-resident aliens detained outside United States sovereign territory have no constitutional due process rights. As such, the Plaintiffs' Bivens claims should be dismissed.

IV. Plaintiffs' claims under the ATS, the Geneva Conventions, and the Vienna Convention are also foreclosed by Rasul because they are not statutes under which recovery may be obtained against a federal employee and are barred by the Westfall Act.

In Rasul, the Court of Appeals held that the Westfall Act applies to international law claims for torture and abuse brought by non-resident, alien detainees against high-ranking military officers pursuant to the ATS and the Geneva Conventions and those claims were dismissed. Rasul I, 512 F.3d at 649, 665-67; Rasul II, 563 F.3d at 528-29 (reinstating the prior ruling on the international law and treaty claims). The Westfall Act makes the remedies under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, "exclusive of any other civil action or proceeding for money damages" for any tort committed by a federal official or employee "while acting within the scope of his office or employment." Rasul I, 512 F.3d at 655 (quoting 28 U.S.C. § 2679(b)(1)). The holding in Rasul II, reinstating Rasul I's judgment dismissing the international law and treaty claims, requires that because Defendants were acting within the scope of their employment at the time of the alleged conduct,[8] Plaintiffs' claims under

[8] The Attorney General has certified that each Defendant was acting within the scope of his employment at the time of the alleged violations. See Attachment 1.

the ATS, the Geneva Conventions, and the Vienna Convention should be dismissed for lack of jurisdiction for failure to exhaust administrative remedies.[9] Rasul II, 563 F.3d at 528 n.1.

The Court of Appeals rejected the Rasul plaintiffs' argument that the alleged conduct should not be deemed within the scope of defendants' employment because the Westfall Act was not intended to cover violations of *jus cogens* norms (such as the prohibition against torture) or "seriously criminal" conduct. Rasul I, 512 F.3d at 657-58. It held that "the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in." Id. at 658. "Therefore, the alleged tortious conduct was incidental to the defendants' legitimate employment duties." Id. at 659. "[T]he serious criminality of the defendants' alleged conduct" does not preclude application of Westfall Act immunity. Id. at 659-60; see also 28 U.S.C. §§ 2679(b) and (d)(1).

As every court that has addressed the issue has recognized, ATS claims clearly do not qualify for the Westfall Act's exception, because the ATS "is a jurisdictional statute creating no new causes of action." Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). Under Sosa, it is indisputable that the ATS is not a federal statute that authorizes recovery against a federal employee. Nor is the Geneva Convention a "statute of the United States," within the meaning of 28 U.S.C. § 2679(b)(2)(B). Iraq Detainees Litig., 479 F. Supp. 2d at 112-13; see also Bansal v. Russ, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007). While not expressly addressing the application of the statutory exception to such claims, the Court of Appeals in Rasul held that "the Geneva Conventions claim is ... precluded by the Westfall Act." Rasul I, 512 F.3d at 663. Accordingly,

[9] The Second Amended Complaint fails to state that Plaintiffs exhausted their administrative remedies under the FTCA, as required prior to filing suit. See Sec. Am. Compl.; see also McNeil v. United States, 508 U.S. 106, 112 (1993).

Plaintiffs have no judicially enforceable rights under the Geneva Conventions, or for the same reasons, under the Vienna Convention.[10]

Because controlling Supreme Court precedent makes it clear that claims under the ATS, the Geneva Conventions, and the Vienna Convention grant no substantive rights to Plaintiffs and are barred by the Westfall Act, Plaintiffs' claims based on them should be dismissed.

V. Rasul bars Plaintiffs' RFRA claim because it held non-resident aliens were not "persons" under RFRA.

The Rasul holding also summarily forecloses Plaintiffs' RFRA claim. The Court of Appeals held that because the plaintiffs in Rasul were non-resident aliens located outside the United States, they were not "persons" within the meaning of RFRA. Rasul I, 512 F.3d at 668, 672; Rasul II, 563 F.3d at 532-33. "We believe that RFRA's use of 'person' should be interpreted consistently with the Supreme Court's interpretation of 'person' in the Fifth Amendment and 'people' in the Fourth Amendment to exclude non-resident aliens." Rasul I, at 670-72; Rasul II, 563 F.3d at 532-33. Therefore, as non-resident aliens, Plaintiffs in the current action are not entitled to RFRA's protections and their RFRA claim must be dismissed. Rasul II, 563 F.3d at 533 (reinstating Rasul I's judgment dismissing the RFRA claim).[11]

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[10] Hamdan v. Rumsfeld, 548 U.S. 557 (2006), is not to the contrary. Rather, there, the Court assumed that the Geneva Conventions provided no judicially enforceable rights but found instead that certain Convention rights had been incorporated by statute. Id. at 627-28. The Supreme Court did not disturb the venerable rule that treaties are presumed *not* to create rights judicially enforceable by private parties. See, e.g., Head Money Cases, 112 U.S. 580, 597-98 (1884); Holmes v. Laird, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972).

[11] See also Rasul II, 563 F.3d at 533 n.6 ("In the alternative, for the reasons stated in Judge Brown's initial concurring opinion, defendants are entitled to qualified immunity against plaintiffs' RFRA claim.").

VI. Because Rasul and Supreme Court and Circuit precedent bar all of Plaintiffs' claims, Plaintiffs cannot claim a conspiracy to deny them equal protection of the law under the Federal Civil Rights Act.

Plaintiffs are also not entitled to the protections of the Federal Civil Rights Act. As demonstrated above, it is well-settled that the non-resident, alien Plaintiffs do not have constitutional rights or in the very least those rights were not clearly established at the time of the alleged violations. As a result, they cannot claim a denial of any equal protection rights under the Constitution. Moreover, Plaintiffs' conclusory allegations that Defendants "conspired" and "acted in concert with intent," see Sec. Am. Compl. ¶¶ 6, 187, even in the light most favorable to Plaintiffs, are "insufficient to establish a court's jurisdiction under the conspiracy theory[]" of 42 U.S.C. § 1985(3). Islamic American Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 59 (D.D.C. 2005), aff'd in part, 477 F.3d 728 (D.C. Cir. 2007). Accordingly, Plaintiffs' Federal Civil Rights Act claim should also be dismissed.

VII. Even if the Second Amended Complaint is not dismissed, Plaintiffs are not entitled to equitable relief.

The Second Amended Complaint also requests equitable relief, see Sec. Am. Compl., (Request for Relief, ¶¶ 1-2), but such relief is not available here. As demonstrated above, Plaintiffs allege no violations at all. Yet, even if any violations have sufficiently been alleged, equitable relief is not available because Plaintiffs have sued the Defendants only in their individual capacities mainly on Bivens theories of recovery. See Sec. Am. Compl. ¶¶ 6, 14-29. Bivens claims are limited to damages awards personally against current and former federal employees and do not encompass equitable relief, which may only be obtained on official capacity claims. Iraq Detainees Litig., 479 F. Supp. 2d at 119; Hatfill v. Gonzales, 519 F. Supp. 2d 13, 26-27 (D.D.C. 2007) (Walton, J.) (the equitable relief plaintiff seeks "can only be

provided by the government through government employees acting in their official capacities"); see also Acierno v. Cloutier, 40 F.3d 597, 608 (3d Cir. 1994) (en banc) ("[A] defendant who loses a claim for injunctive relief is simply ordered to refrain from taking certain action in his or her official capacity"); Libby v. Marshall, 833 F.2d 402, 405 (1st Cir. 1987) (equitable relief "would require [officials] to exercise their official powers in certain ways").[12] In light of these principles, Plaintiffs' attempt to sue the Defendants in their individual capacities for equitable relief fails as a matter of law because Plaintiffs seek relief from improper parties.[13] The Plaintiffs also lack standing as to the requested equitable relief because they are no longer detainees, do not face future injury, and the Defendants no longer hold the positions alleged, see Sec. Am. Compl. ¶¶ 3-5, 9-29. Iraq Detainees Litig., 479 F. Supp. 2d at 118. See also City of Los Angeles v. Lyons, 461 U.S. 95, 105-13 (1983);[14] Kalka v. Hawk, 215 F.3d 90, 94 n.6 (D.C. Cir. 2000); City of Houston v. Department of Hous. & Urban Dev., 24 F.3d 1421, 1429 n.6 (D.C. Cir. 1994). For these reasons equitable relief is not available to Plaintiffs as a damages remedy in this action.

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[12] Therefore, it follows that the equitable relief Plaintiffs seek here "can be obtained only from the defendants in their official capacities, not as private individuals." Feit v. Ward, 886 F.2d 848, 858 (7th Cir. 1989) (citations omitted). The relief they seek would be against "the office," not the officeholder, see Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989), and the government would be the real party in interest, see Kentucky v. Graham, 473 U.S. 159, 167 (1985).

[13] See, e.g., Ameritech Corp. v. McCann, 297 F.3d 582, 587 (7th Cir. 2002); Frank v. Relin, 1 F.3d 1317, 1327 (2d Cir. 1993).

[14] But cf. Johnson v. Williams, – F. Supp. 2d – , 2009 WL 302180 (D.D.C. Feb 6, 2009) (Lamberth, C.J.) (unreported) (unlike injunctive relief, declaratory relief need not demonstrate likelihood of future injury).

CONCLUSION

Plaintiffs' claims are squarely foreclosed by Rasul, as well as Supreme Court and Circuit precedent. Accordingly, the Court lacks subject matter jurisdiction to hear Plaintiffs' claims under Rule 12(b)(1) and/or the Plaintiffs have failed to state claims upon which relief may be granted under Rule 12(b)(6). Defendants, therefore, respectfully request that the Court dismiss Plaintiffs' Second Amended Complaint with prejudice. As required by LCvR 7(c), a proposed order is at Attachment 2.

Dated: February 19, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General, Civil Division

ANN M. RAVEL
Deputy Assistant Attorney General, Civil Division

TIMOTHY P. GARREN
Director, Torts Branch, Civil Division

/s/ James G. Bartolotto
JAMES G. BARTOLOTTO
DC Bar Member No. 441314
JAMES R. WHITMAN
Wis. Bar Member No. 1036757
Trial Attorneys
United States Department of Justice
Torts Branch, Civil Division
P.O. Box 7146
Ben Franklin Station
Washington, D.C. 20044-7146
james.bartolotto@usdoj.gov
Tel: (202) 616-4174
Fax: (202) 616-4314
Attorneys for the Defendants

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on February 19, 2010, a true and correct copy of the foregoing "DEFENDANTS' MOTION TO DISMISS" was filed with this Court electronically and served by mail on any party to this action unable to accept electronic filing. Notice of this filing will be sent by electronic mail (e-mail) to Plaintiffs' counsel and all parties by operation of the Court's electronic filing system (ECF) or by mail to any party unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF System. This Motion is filed electronically pursuant to LCvR 5.4 and comports with LCvR 7.

/s/ James G. Bartolotto
JAMES G. BARTOLOTTO
Trial Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,	)	
v.	)	**No. 06-CV-1996 (HHK)**
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Defendants.	)	

CERTIFICATION OF SCOPE OF EMPLOYMENT

I, Timothy P. Garren, Director, Torts Branch, Civil Division, United States Department of Justice, acting pursuant to the provisions of 28 U.S.C. § 2679(d)(2), and by virtue of the authority vested in me by 28 C.F.R. § 15.4 (2007), hereby certify that I have read the complaint in this action. On the basis of the information now available, I find that at the time of the conduct alleged in the complaint the individual defendants, former Secretary of Defense Donald Rumsfeld, former Chairman, Joint Chiefs of Staff General Richard Myers, former Chairman, Joint Chiefs of Staff General Peter Pace, General James T. Hill, General Bantz J. Craddock, Major General Michael Lehnert, Major General Michael E. Dunlavey, Major General Geoffrey Miller, Brigadier General Jay Hood, Rear Admiral Harry B. Harris, Jr., Colonel Terry Carrico, Colonel Adolph McQueen, Brigadier General Nelson J. Cannon, Colonel Michael I. Bumgarner, Colonel Wade F. Dennis and Mr. Esteban Rodriguez, were acting within the scope of their employment as employees of the United States.

Dated: February 19, 2010

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division
U.S. Department of Justice

IN THE UNITED STATES DISTRICT COURT
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Plaintiffs,	)	
v.	)	**No. 06-CV-1996 (HHK)**
DONALD RUMSFELD, *et al.*,	)	
Defendants.	)	**Document No.:**

[PROPOSED] ORDER

Upon consideration of the Defendants' Motion to Dismiss, and any response thereto, it is hereby **ORDERED** that the Defendants' Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED that, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiffs' claims against former Secretary of Defense Donald Rumsfeld, former Chairman, Joint Chiefs of Staff General Richard Myers, former Chairman, Joint Chiefs of Staff General Peter Pace, General James T. Hill, General Bantz J. Craddock, Major General Michael Lehnert, Major General Michael E. Dunlavey, Major General Geoffrey Miller, Brigadier General Jay Hood, Rear Admiral Harry B. Harris, Jr., Colonel Terry Carrico, Colonel Adolph McQueen, Brigadier General Nelson J. Cannon, Colonel Michael I. Bumgarner, Colonel Wade F. Dennis, and Mr. Esteban Rodriguez, are dismissed with prejudice and Plaintiffs' claims against the United States are dismissed without prejudice.

SO ORDERED.

Dated _____, 2010

_____
HENRY H. KENNEDY, JR.
United States District Judge