13-5096
[Consolidated with 13-5097]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAMI ABDULAZIZ ALLAITHI, et al.,

Plaintiffs-Appellants

v.

DONALD RUMSFELD, et al.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia
Case Nos. 08-CV-1677 (RCL), 06-CV-1996 (RCL)
Hon. Royce C. Lamberth

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

In the District Court and in this Court, the parties are:

Plaintiffs-Appellants: Sami Abdulaziz Al Laithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam and Abu Muhammad.[1]

Defendants-Appellees: Donald Rumsfeld, Gen. Richard Myers, Gen. Peter Pace, Gen. James T. Hill, Gen. Bantz Craddock, Maj. Gen. Michael Lehnert, Maj. Gen. Michael E. Dunlavey, Maj. Gen. Geoffrey Miller, Brig. Gen. Jay Hood, Rear Adm. Harry B. Harris, Jr., Col. Terry Carrico, Col. Adolph McQueen, Brig. Gen. Nelson J. Cannon, Col. Mike Bumgarner, Col. Wade Dennis, and Esteban Rodriguez.

No *amici* or intervenors appeared in the District Court, and no *amici* or intervenors have yet appeared in this Court.

B. Ruling Under Review

The ruling under review is the Memorandum Opinion of the United States Court for the District of Columbia (Lamberth, C.J.) dated February 1, 2013 granting Defendants-Appellees' Motion to Dismiss Plaintiffs-Appellants' Complaint in *Allaithi v. Rumsfeld*, No. 08-1677, and Second Amended Complaint ("SAC") in *Celikgogus v. Rumsfeld*, No. 06-1996. Plaintiffs-Appellants filed a

[1] Messrs. Hasam and Muhammad are using pseudonyms (with the District Court's permission) in order to protect their families from persecution relating to their status as former Guantanamo detainees. *See* JA20.

copy of the District Court's Memorandum Opinion in this Court on April 29, 2013, and it is reproduced at JA136-48.

C. Related Cases

The case on review has not previously been before this Court or any other court (except the District Court whose decision is now under review in this Court).

The case of *Al Janko v. Gates, et al.*, D.C. Circuit Case No. 12-5017, which has been fully briefed but not yet argued in this Court, involves substantially the same defendants and may involve one similar issue. In *Al Janko*, a Combatant Status Review Tribunal ("CSRT") twice determined that the plaintiff was an enemy combatant. The plaintiff, however, later obtained habeas relief, and the district court determined that his detention had been unlawful from the beginning. *Al Janko* may present, among other issues, the issue of whether the Federal Tort Claims Act ("FTCA") and the Westfall Act (28 U.S.C. §§ 1346(b), 2671-80.) bar the Alien Tort Statute (28 U.S.C. § 1350) ("ATS") claims of an alien who alleges abuse at Guantanamo Bay even after his habeas petition was granted and his order of release issued. At issue in this case is the application of the Westfall Act to some Plaintiffs-Appellants' ATS claims arising from their abuse at Guantanamo Bay following the determination by CSRTs that some Plaintiffs-Appellants were not enemy combatants.

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GLOSSARY OF ABBREVIATIONS

ATS	Alien Tort Statute (28 U.S.C. § 1350)
AUMF	Authorization for the Use of Military Force (115 Stat. 224)
CSRT	Combatant Status Review Tribunal
FTCA	Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, *et seq.*)
JA	Joint Appendix
RFRA	Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb, *et seq.*)
VCCR	Vienna Convention on Consular Relations (21 U.S.T. 77)

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Plaintiffs' claims, including under 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1343 and 42 U.S.C. § 1985(3) (Federal Civil Rights Act); 28 U.S.C. § 1350 (Alien Tort Statute); 42 U.S.C. §§ 2000bb, *et seq.* (Religious Freedom Restoration Act); and the Constitution of the United States.

The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as this is an appeal of a final decision of the United States District Court for the District of Columbia.

The District Court entered its Order granting Defendants' Motion to Dismiss on February 1, 2013. This appeal was timely noticed on April 1, 2013, pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES

I. Whether the District Court erred in finding, without affording any opportunity for discovery and as a matter of law, that the Westfall Act (28 U.S.C. § 2679) bars the Alien Tort Statute (28 U.S.C. § 1350) claims of Plaintiffs-Appellants, non-resident aliens who were detained and allegedly abused at Guantanamo Bay, Cuba, because Defendants-Appellees were acting within the scope of their employment when they allegedly abused Plaintiffs-Appellants even following determinations by CSRTs that certain

Plaintiffs-Appellants were not enemy combatants;

II. Whether the District Court erred in concluding that the First and Fifth Amendment rights of non-resident aliens detained at Guantanamo Bay, Cuba – and in particular, the constitutional rights of aliens determined not to be enemy combatants – were not "clearly established" at the time of their alleged abuse for purposes of the qualified immunity inquiries, thus barring Plaintiffs-Appellants' claims under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Civil Rights Act of 1871, 42 U.S.C. § 1985(3);

III. Whether the District Court erred in dismissing Plaintiffs-Appellants' First and Fifth Amendment and 42 U.S.C. § 1985(3) claims by first considering the question of whether such rights were "clearly established" and declining to reach the substantive constitutional questions;

IV. Whether the District Court erred in holding that Plaintiffs-Appellants were not persons subject to the protection of the Religious Freedom Restoration Act ("RFRA") (42 U.S.C. §§ 2000bb, *et seq.*); and

V. Whether the District Court erred in dismissing, without discussion, certain Plaintiffs-Appellants' claims under the Vienna Convention on Consular Relations ("VCCR") (21 U.S.T. 77).

STATUTES AND REGULATIONS

In accordance with D.C. Circuit Rule 28(a)(5), pertinent statutes and regulations are set forth in an addendum bound with the brief.

STATEMENT OF THE CASE

This case was brought by six Plaintiffs, former detainees at Guantanamo Bay Naval Base, under the ATS, *Bivens* and 42 U.S.C. § 1985(3), RFRA, and the VCCR. Five of the Plaintiffs[2] filed their original Complaint in the *Celikgogus* case on Nov. 21, 2006, and filed their Second Amended Complaint on Apr. 1, 2008. (JA001.) A sixth Plaintiff, Mr. Al Laithi, filed his Complaint on Sep. 30, 2008. (JA015.) Defendants moved to dismiss both cases on Feb. 19, 2010. (JA013, JA018.) Subsequently, the District Court consolidated the cases for pretrial purposes, on May 2, 2012. (JA134.)

On Feb. 1, 2013, the District Court granted Defendants' Motions to Dismiss, and dismissed both cases, finding that all of Plaintiffs' claims were barred as a result of this Court's rulings in the *Rasul* cases.[3] (JA136-48.)

Plaintiffs timely filed a Notice of Appeal on Apr. 1, 2013. (JA149.)

[2] Messrs. Celikgogus, Sen, Mert, Hasam, and Muhammad.

[3] *Rasul v. Myers (Rasul I)*, 512 F.3d 644 (D.C. Cir. 2008), *judgment vacated by* 555 U.S. 1083 (2008), *judgment reinstated by Rasul v. Myers (Rasul II)*, 563 F.3d 527 (D.C. Cir. 2009) and *Rasul v. Myers (Rasul II)*, 563 F.3d 527 (D.C. Cir. 2009).

STATEMENT OF THE FACTS

The six Plaintiffs-Appellants in this case – Sami Abdulaziz Al Laithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam and Abu Muhammad – are former detainees at Guantanamo Bay Naval Base. They were detained there for years by the United States, subjected to inhumane treatment, abuses and torture, and were released without any determination that they were enemy combatants. As disturbing as that is, even worse is that three of the Plaintiffs-Appellants, Messrs. Al Laithi, Hasam, and Muhammad, were evaluated by CSRTs and determined not to be enemy combatants but nevertheless continued to be held and abused at Guantanamo for up to two years after those determinations.[4]

I. AFGHAN AND PAKISTANI THIRD PARTIES SEIZED PLAINTIFFS, THEN TRANSFERRED THEM TO UNITED STATES FORCES

A. Messrs. Hasam, Muhammad, and Al Laithi

In late 2004, Messrs. Zakirjan Hasam, Abu Muhammad, and Sami Abdulaziz Al Laithi were all affirmatively determined by the United States in CSRT proceedings not to be enemy combatants. Nevertheless, all three were

[4] As a result of this Court's rulings in the *Rasul* cases, this appeal focuses on the post-CSRT-determination detention and abuse of Messrs. Al Laithi, Hasam, and Muhammad. Nevertheless, Appellants reserve the right to supplement their arguments with respect to the remaining Appellants should they seek *en banc* determination or further appellate review. Specifically, innocent persons, even those not officially cleared by CSRT determinations or habeas proceedings, should be protected against torture and inhumane treatment by the ATS and the Constitution (through a *Bivens* action). Innocent individuals should not be left without legal remedies for torture and inhumane treatment.

detained and subjected to continued abuse and inhumane treatment until they were released, two years after the determinations in the cases of Messrs. Hasam and Muhammad, and ten months in the case of Mr. Al Laithi. (JA064 at ¶ 124; JA068-70 at ¶¶ 141-47; JA070 at ¶ 148; JA074-77 at ¶¶ 163-73; JA114 at ¶¶ 68, 70.)

All three Plaintiffs were originally seized by Afghans or Pakistanis and transferred to the custody of the United States, and all were eventually transferred to Guantanamo, where they were abused both before and after being conclusively determined not to be enemy combatants. (*See* JA064-68 at ¶¶ 124-40; JA070-74 at ¶¶ 148-73; JA099-100 at ¶ 11; JA106-09 at ¶¶ 30-44; JA110-14 at ¶¶ 44-66, 68, 70.)

B. Messrs. Celikgogus, Sen, and Mert

Yuksel Celikgogus, Ibrahim Sen, and Nuri Mert are Turkish citizens captured in Afghanistan or Pakistan by locals in 2001 and transferred to U.S. custody. Like the other Plaintiffs, they were subsequently transported to the U.S. military base at Guantanamo in or around January 2002 where they were detained and subjected to similar abuse and torture. (JA042-46 at ¶¶ 45-54; JA048-51 at ¶¶ 64-72; JA054-56 at ¶¶ 85-93; JA059-63 at ¶¶ 108-19.) Plaintiffs Sen and Mert requested access to consular officials, but these requests were denied. (JA056 at ¶ 93; JA063 at ¶ 119.) Mr. Celikgogus and Mr. Sen were released from

Guantanamo to Turkey in November 2003, and Mr. Mert was released to Turkey in April 2004. (JA027 at ¶ 4.) None of these Plaintiffs received any kind of judicial, administrative or military hearing the entire time they were in U.S. custody. (JA039-40 at ¶¶ 35, 39; JA045-46 at ¶ 52.)

II. THE UNITED STATES DETERMINED THAT CERTAIN PLAINTIFFS WERE NOT ENEMY COMBATANTS YET CONTINUED THEIR DETENTION AND ABUSE

In July 2004, then Deputy Defense Secretary Paul Wolfowitz ordered the establishment of CSRTs, which purported to provide an administrative process for determining whether or not a prisoner was an "enemy combatant." (JA045-46 at ¶ 52.)[5] Although the U.S. has referred to detainees exonerated by the CSRT process as "no longer enemy combatants," the CSRTs issued only two kinds of determinations: that the detainee is an enemy combatant, or that he is not. *See Qassim v. Bush*, 407 F. Supp. 2d 198, 199-200 (D.D.C. 2005) ("[t]he government's use of the Kafkaesque term 'no longer enemy combatants' deliberately begs the question of whether these petitioners ever were enemy combatants"). By the time the CSRTs were initially concluded in March 2005, only thirty-eight of 558 detainees were found not to be enemy combatants. *See infra*, Br. at 21 n.12. Plaintiffs Hasam, Muhammad, and Al Laithi are three of the thirty-eight.

[5] The CSRTs lacked even the most basic elements of due process, including the right to present evidence, to know the evidence in the accusation, to have independent counsel and to have the case heard by an independent body. (JA045-46 at ¶ 52.)

A. Messrs. Hasam and Muhammad Were Detained and Abused for Nearly Two Years After CSRTs Determined That They Were Not Enemy Combatants

In December 2004, CSRTs addressed the status of Zakirjan Hasam and Abu Muhammad. (JA068 at ¶ 141; JA074 at ¶ 164.) Despite the biased nature of the proceedings, each Plaintiff was determined not to be an enemy combatant. (*Id*.) Notwithstanding the United States' own conclusion that neither Mr. Hasam nor Mr. Muhammad were members or supporters of groups fighting the United States or its allies, they continued to be held and abused at Guantanamo Bay for nearly two more years. (JA068-69 at ¶¶ 142-45; JA074-75 at ¶¶ 165-67.)

During the 23 months after his exoneration and before his release, military personnel repeatedly put Mr. Hasam in solitary confinement, although a military psychologist had concluded that he should never be held in solitary confinement. (JA069 at ¶ 143.) He was deprived of sleep for prolonged periods, deliberately subjected to cold temperatures, prevented from praying and forcibly shaved. (JA068-69 at ¶¶ 142-43.) He was medicated with pills and injections against his will. (JA069 at ¶ 144.) He was denied access to family members. (*Id.*) When finally transferred from Guantanamo to Albania on November 16, 2006, he was shackled and tied to his airplane seat. (*Id.* at ¶ 145.)

Mr. Muhammad also was regularly subjected to abuses in the many months after his CSRT determination. For example, Guantanamo officials allowed

Algerian officials to interrogate him, even though Mr. Muhammad was known to be a refugee from the Algerian regime; similar interrogations had driven other detainees to attempt suicide. (JA067 at ¶¶ 137-38; JA075 at ¶ 168.) Mr. Muhammad continued to be shackled, subjected to body searches and forced to wear blackened goggles and ear coverings, as he had been prior to his CSRT determination. (JA074 at ¶ 165.) He was under constant surveillance, including while in or around the bathrooms. (JA075 at ¶ 166.) His prayer was disrupted and his religious practices mocked. (*Id.* at ¶ 167.) His need for medical care was ignored, with lasting consequences, including severe dental problems. (JA074 at ¶ 163; JA076 at ¶ 173.) When transferred from Guantanamo to Albania, he, like Mr. Hasam, was shackled and then tied to his airplane seat. (JA076 at ¶ 171.)

B. Mr. Al Laithi Was Detained and Abused for Ten Months Following the Government's Determination That He Was Not an Enemy Combatant

In November 2004, a CSRT determined that Mr. Al Laithi was not an enemy combatant. (JA114 at ¶ 68.) Notwithstanding the U.S. military's own conclusion that Mr. Al Laithi was not a member or supporter of a group fighting the United States or its allies, he continued to be held and abused at Guantanamo Bay for ten more months. (*Id.*)

Mr. Al Laithi was subjected to a range of abuses, both before and after the CSRT determination that he was not an enemy combatant. For example, groups of

guards would burst into his cell, chain him hand and foot, and sometimes beat him for trivial or nonexistent infractions of camp rules such as the order of his toiletry items in his cell. (JA112 at ¶¶ 58-59.) He was denied access to his family. (JA114 at ¶ 69.) His efforts to practice his religion were repeatedly thwarted and mocked: he was forcibly shaved, his water for performing required ablutions was taken from him, and his Koran deliberately desecrated. (JA113 at ¶ 61.)

Despite having sustained serious injuries while in U.S. custody, Mr. Al Laithi's repeated requests for medical care were ignored. (JA113-14 at ¶ 66.) Instead, guards forced him to walk and exercise beyond his physical capacity. (*Id.*) When he could not move, they dragged him from his hospital room or to the recreation yard, causing him excruciating pain and worsening his injuries to the point where Mr. Al Laithi became wheelchair-bound. (*Id.*) To this day he remains immobilized and in severe pain with a back fracture. (JA114-15 at ¶ 71.)

III. PLAINTIFFS HAVE SUFFERED CONTINUING EFFECTS FROM THEIR ABUSE

Although they have now been released, all Plaintiffs continue to suffer the effects of the Defendants' conduct. As discussed above, Mr. Al Laithi's mobility is seriously curtailed, and he suffers severe pain from a back fracture. (JA114-15 at ¶ 71.) In addition, he experiences heart palpitations and constant anxiety. (*Id.*) He has difficulty concentrating and lacks interest in eating. (*Id.*) His detention has also had lasting social and economic effects. Due to the stigma of Mr. Al Laithi's

imprisonment at Guantanamo, he and his family members have limited job prospects. (*Id*.)

The other Plaintiffs also have ongoing medical problems stemming from the physical injuries and medical neglect they suffered while in Guantanamo. (JA051, JA057, JA063, JA070, JA076-77 at ¶¶ 76, 97, 123, 147, 173.) They remain traumatized by their treatment, experiencing lingering psychological problems. (*Id*.) Their economic opportunities are seriously reduced, their standing in their communities – to the extent they could even return to their communities – diminished, and their family relations in some cases drastically altered. (*Id*.) Even those Plaintiffs who were able to return to their country of origin have had great difficulty securing employment and reintegrating into their community because of their injuries and the stigma of having been detained at Guantanamo. (*Id*.) Mr. Hasam and Mr. Muhammad, initially sent to live in a refugee center in Albania, were particularly isolated and disadvantaged. (*Id.*)

IV. THE DEFENDANTS ORDERED, ENCOURAGED, AND/OR CARRIED OUT THESE ABUSES

Defendants ordered, encouraged, enabled or carried out cruel, inhumane and degrading treatment for detainees at Guantanamo, including persons – such as Plaintiffs – known not to be enemy combatants. Specifically, Defendants Michael Dunlavey and Geoffrey Miller pressed for the use of so-called "aggressive interrogation techniques" at Guantanamo that were never before approved by the

U.S. military. (JA079 at ¶ 182.) Donald Rumsfeld gave blanket approval for the use of a substantial number of these practices on detainees, including forced shaving, forced nudity, isolation, light deprivation, prolonged forced stress positions, intimidation with dogs and other exploitation of phobias, hooding, prolonged interrogations lasting up to 20 hours, "mild, non-injurious physical contact" and a range of other practices that constitute torture and cruel, inhumane and degrading treatment in violation of the Geneva Conventions (6 U.S.T. 3316) and U.S. law. (*Id*.) Although a few weeks later he rescinded the blanket approval, Mr. Rumsfeld did not seek to end the use of these methods; to the contrary, he indicated that they could be employed whenever specifically approved. (*Id*.) In April 2003, he issued new guidance approving many practices that violated domestic and international law, and which continued in use at Guantanamo. (JA080 at ¶ 183.) The Plaintiffs were victims of those abuses.

For their part, Defendants Richard Myers, Peter Pace, James Hill, Bantz Craddock, Michael Lehnert, Jay Hood, Harry Harris, Terry Carrico, Adolph McQueen, Nelson Cannon, Mike Bumgarner, Wade Dennis and Esteban Rodriguez, who at various times all occupied military positions with responsibility for personnel at Guantanamo Bay Naval Base, perpetuated the ongoing practice of abusing detainees – including those known not to be enemy combatants – by instructing subordinates on the employment of harsh interrogation techniques,

ratifying subordinates' actions, and otherwise encouraging inhumane treatment. (JA032-37 at ¶¶ 15-29; JA078 at ¶ 178.) They neither acted to stop abuses, including the continued use of interrogation techniques formally disapproved by the Defense Department, nor did they carry out investigations of or take any action against those who used torture or cruel, inhumane or degrading treatment on detainees, including those persons, like Plaintiffs, who were not enemy combatants. (JA078 at ¶¶ 177-78.)

The named Defendants not only enabled, encouraged and instructed others to abuse detainees held at Guantanamo, they ordered or implemented prolonged, arbitrary detentions for persons brought to Guantanamo. (JA051, JA056, JA063-64, JA068, JA074 at ¶¶ 73, 94, 120, 125, 141, 165.) Persons were held at Guantanamo for years without process of any kind to determine whether they were, in fact, enemy combatants. (*Id.*) And the Defendants continued to detain, for months and years on end, persons whom they knew were not enemy combatants. (*Id.*)

SUMMARY OF ARGUMENT

The District Court ruled that Plaintiffs' ATS claims against the individual Defendants were barred by the Westfall Act because this Court ruled in *Rasul I* that the detention and abuse of suspected enemy combatants was within the scope of employment of United States officers and employees. (JA145.) However, this

case differs from *Rasul* in significant respects that warrant a different outcome on Plaintiffs' claims. Most importantly, three of the Plaintiffs – Messrs. Al Laithi, Hasam and Muhammad – were determined by CSRTs not to be enemy combatants, yet were held at Guantanamo and subjected to abuses and inhumane treatment for up to two years after that determination.

Critically, in *Rasul* none of the plaintiffs had ever received CSRT determinations, and all therefore remained "suspected enemy combatants." In fact, by its terms, *Rasul* applied only to "suspected enemy combatants." *See, e.g., Rasul I,* 512 F.3d at 656, 658 ("the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in") (emphasis added).

Because three of the Plaintiffs in this case were specifically determined *not* to be enemy combatants, the *Rasul* cases are not controlling and it is error to apply a standard of conduct acceptable for the treatment of "suspected enemy combatants" to those who have definitively been determined otherwise. Certainly as a matter of law, Plaintiffs have, at the very least, sufficiently pled that Defendants' conduct was not within the scope of employment because U.S. officers and personnel continued to detain, torture, and engage in "seriously criminal conduct" against the cleared detainees. *See id.* at 660.

On their ATS claims, Plaintiffs should at a minimum be entitled to discovery to determine whether, in fact, Defendants' conduct and torture – which persisted in some cases for nearly two years after some Plaintiffs had been cleared by the CSRT tribunals and had been determined not to be enemy combatants – was within the scope of their employment or not. In other words, Plaintiffs' complaints raise the factual question of whether there was any justification for the post-CSRT detention and abuse.

Additionally, non-enemy combatants detained on territory under the "complete jurisdiction" and "*de facto* sovereignty" of the United States possessed constitutional rights against torture and inhumane treatment that were "clearly established" at the time of their detention, and Plaintiffs are "persons" that should be protected under RFRA.[6]

Finally, Plaintiffs Sen and Mert were denied access to consular officials and have asserted claims under the VCCR, which, unlike the Geneva Convention, confers individually-enforceable rights. *See Jogi v. Voges*, 480 F.3d 822 (7th Cir.

[6] Plaintiffs acknowledge that this Court's ruling in *Rasul II* may foreclose their *Bivens* and RFRA claims, but they preserve the right to assert that *Rasul II* was wrongly decided in the event there are subsequent *en banc* or further appellate proceedings.

2007). Because Vienna Convention claims were never brought by the *Rasul* plaintiffs, the *Rasul* cases do not foreclose these claims.[7]

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the District Court's grant of the Defendants-Appellees' Motion to Dismiss *de novo*. *See, e.g., Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C. Cir. 2006); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002).

Plaintiffs are not required to plead all the facts that might be uncovered by discovery; they need only state a claim that is plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"A complaint should not be dismissed for failure to state a claim or for lack of subject-matter jurisdiction unless, taking as true the facts alleged in the complaint, 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief'. . . . '[T]he issue presented by a motion to dismiss is not whether [] plaintiff[s] will ultimately prevail but whether [they are] entitled to offer evidence to support the claims.'" *Rochon*, 438 F.3d at 1216 (citations omitted). *See also Nat'l Wrestling Coaches*

[7] Despite dismissing Plaintiffs' Complaints in their entireties, the District Court never addressed Plaintiffs' claims under the Vienna Convention.

Ass'n v. Dep't of Educ., 366 F.3d 930, 951 (D.C. Cir. 2004) (citations omitted); *Schnitzer v. Harvey*, 389 F.3d 200, 202 (D.C. Cir. 2004); *Richardson v. United States*, 193 F.3d 545, 549 (D.C. Cir. 1999); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998).

II. THE WESTFALL ACT AND THE *RASUL* CASES DO NOT FORECLOSE PLAINTIFFS' ATS CLAIMS

A. The *Rasul* Cases Apply Only to Actual or Suspected Enemy Combatants

Unlike *Rasul*, this case concerns the prolonged detention and abuse of individuals indisputably determined to be innocent. In *Rasul I*, this Court held that former Guantanamo detainees suspected of being enemy combatants throughout their detention could not bring claims against United States officers and employees who had abused them under the ATS,[8] because the defendants were acting within the scope of their employment. Therefore, the claims against individual defendants

[8] The ATS, 28 U.S.C. § 1350, provides that district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Such torts include, for example, torture. *See, e.g.*, Torture Victims Protection Act of 1991, 106 Stat. 73 (1992), note following 28 U.S.C. § 1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *see also id.* at 762 (Breyer, J., concurring) (violations of law of nations include claims for torture, genocide, crimes against humanity and war crimes). Although the ATS is a jurisdictional statute, the Supreme Court has recognized an implied cause of action under common law for clear violations of international law. *See id.* at 724.

were therefore barred by the FTCA[9] and the Westfall Act.[10] *See Rasul I*, 512 F.3d at 660-61. Both the district court below and this Court in *Rasul I* noted that the Authorization for the Use of Military Force ("AUMF"), 107 P.L. 40, 115 Stat. 224 (2001), authorized the President to "use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and that the torture of detainees was merely incidental to the conduct authorized by the AUMF. *See Rasul I,* 512 F.3d at 656. But *Rasul I*'s language makes clear that its holding – that the torture of detainees was within the scope of defendants' employment – was limited to suspected enemy combatants. *See, e.g., Rasul I,* 512 F.3d at 656, 658

[9] The FTCA, 28 U.S.C. §§ 1346(b), 2671-80, is a limited waiver of sovereign immunity and governs suits against the United States for negligent or wrongful acts or omissions of Federal officials or employees while acting within the scope of employment. *See* 28 U.S.C. §§ 2672, 2674. The FTCA requires a person to present a claim to the "appropriate Federal agency" and requires that claim to "have been finally denied in writing," or for the Federal agency to fail to "make final disposition of a claim within six months after it is filed" before instituting an action against the United States for money damages arising from the negligent or wrongful conduct of a Federal official or employee acting within the scope of his employment. 28 U.S.C. § 2675. The FTCA does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

[10] The Westfall Act, 102 Stat. 4563 (1988), amended the FTCA and provides that an FTCA action against the United States is the exclusive remedy for personal injury "arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1) (emphasis added). However, this limitation does not apply to a civil action that is brought for a violation of the Constitution of the United States, or 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).

("the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in") (emphasis added), 660 ("foreseeable that conduct that would ordinarily be indisputably 'seriously criminal' would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants") (emphasis added), 662 ("defendants were employed to detain and interrogate suspected enemy combatants") (emphasis added).[11]

In this case however, Defendants engaged in abuse and mistreatment of people whom their employer, the United States, had determined were not enemy combatants. That distinction makes all the difference.

B. Because Detainees Have a Constitutional Right to Challenge Their Detention, CSRTs Were Implemented by the Government, and CSRT Exonerations Therefore Have Legal Significance

The District Court rejected Plaintiffs' arguments that their cases were distinguishable from *Rasul* because some Plaintiffs had been determined not to be enemy combatants. (JA144-45.) Although this Court ruled in *Rasul I* only that the

[11] *See also In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 114 (D.D.C. 2007) (detaining and interrogating suspected enemies within scope of military officials' obligations); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 34 (D.D.C. 2006) (torture within scope of CIA officers' employment because undertaken "not for personal benefit, but was foreseeable action conducted for the purpose of gathering information and intelligence"), *aff'd* 522 F.3d 413 (D.C. Cir. 2008). In contrast to these cases, there is no intelligence purpose derived from the abuse and torture of non-enemy combatants, and Plaintiffs-Appellants are aware of no authority in which the torture and abuse of innocent persons was held to be within the scope of employment.

detention and abuse of enemy combatants and suspected enemy combatants was within United States employees' scope of employment, the District Court nevertheless applied this holding to those the United States government and military had conceded were *not* enemy combatants. The District Court ruled that the CSRT clearance was a "distinction without a difference," and that the military itself appeared to treat the CSRTs as insignificant, as evidenced by the Plaintiffs' continuing detention after they were cleared. (*Id.*) But that is the point: the fact that Defendants ignored the outcome of the CSRTs constitutes the violation and takes the conduct outside the scope of the employment. The District Court erred by, in effect, failing to appreciate the significance of a positive CSRT determination.

The CSRT rulings were not intended to be ignored. The United States – the Defendants' employer – intended for CSRTs to be an adequate substitute for detainees' right to habeas corpus. CSRTs are accorded legal significance, contrary to the ruling of the District Court. In *Hamdi v. United States*, 542 U.S. 507, 538-39 (2004), the Supreme Court ruled that suspected enemy combatants had the right, at least under the Geneva Convention, to "rebut the Government's" case against them. In addition, the Court acknowledged that the AUMF granted authority to detain only "enemy combatants." *See id.* at 523; *see also id.* at 518 ("no doubt that individuals who fought against the United States . . . are [the]

individuals Congress sought to target in passing the AUMF. . . . [D]etention of individuals falling into t[hat] limited category . . . is fundamental and accepted") (emphasis added), 524 ("[e]ven in cases in which the detention of enemy combatants is legally authorized…") (emphasis added), 526-27 (enemy combatants are those persons "part of or supporting forces hostile to the United States" and "engaged in armed conflict against the United States").

Although the *Hamdi* case itself considered the rights of a citizen-detainee to challenge his confinement, the language cited above made clear that even noncitizen detainees have the right to challenge their confinements. The Supreme Court reinforced this holding in *Rasul v. Bush*, 542 U.S. 466, 488 (2004), decided the same day, and explicitly ruled that suspected enemy combatants have the right to challenge their detentions. *See also id.* at 488 (Kennedy, J., concurring) (emphasizing the importance of proceedings to determine combatant status, as "[i]ndefinite detention without trial or other proceeding . . . allows friends and foes alike to remain in detention") (emphasis added).

The United States government asserted that the CSRTs were so substantive and robust a process that as a matter of constitutional law, they could serve as an adequate substitute for the detainees' rights to habeas corpus. *See Boumediene v. Bush*, 553 U.S. 723, 733-34 (2008) ("[a]fter *Hamdi*, the Deputy Secretary of Defense established [CSRTs] to determine whether individuals . . . were 'enemy

combatants' . . . . [T]hese procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*"), 784 ("[t]he Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*").[12]

It defies sense that the CSRTs – mandated by the due process requirements of U.S. law, implemented by the government in an attempt to satisfy those requirements, and defended by the government as robust enough to displace detainees' right to statutory habeas corpus – may determine that a person is not an enemy combatant, but that person's detention may continue not "for a matter of weeks, but . . . from months to years" following this determination. *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring). In fact, the circumstances presented by this

[12] Although CSRTs were implemented by the government to afford due process rights to detainees, in lieu of habeas corpus proceedings, the Supreme Court ultimately ruled in *Boumediene*, 553 U.S. at 767, that the "procedural protections afforded to the detainees in the CSRT hearings" fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." CSRTs themselves were completed in March 2005 (for those detained at Guantanamo Bay as of September 2004) and ultimately determined that only thirty-eight of 558 detainees were not enemy combatants. Thereafter, the Department of Defense conducted annual "Administrative Review Boards" to determine whether detainees were still enemy combatants, or "no longer" enemy combatants. *See id.* at 821 (Roberts, C.J., dissenting). *See also Combatant Status Review Tribunals/Administrative Review Boards*, Dept. of Defense, http://www.defense.gov/news/Combatant_Tribunals.html (last visited Aug. 15, 2013); *Detainee and Other Related Documents*, OSD/FS FOIA Service Center, http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/, http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/csrt_arb/index.html (last visited Aug. 15, 2013).

case are even more disturbing, as the Plaintiffs suffered not only prolonged detention following a CSRT determination that they were not enemy combatants, but continuing torture. A conclusion that a CSRT determination makes no difference not only trivializes Plaintiffs' claims, but ignores clear precedent on the legal import and significance of the CSRTs. The fact that Defendants abused and continued to detain Plaintiffs notwithstanding the outcomes of their CSRTs – proceedings held to comply with a detainee's due process rights – is the wrong at issue.

C. The Fact That Some Plaintiffs Were Cleared by the CSRTs, Which Were Heavily Biased In Favor of the Government, Reinforces that *Rasul* Cannot Foreclose the ATS Claims of Non-Enemy Combatants

The CSRT process was – to be clear – deeply flawed and lacked the most fundamental protections. But that makes the claims of those Plaintiffs cleared by such a biased process even stronger.

In *Boumediene*, the Supreme Court articulated a deeply disturbing critique of the CSRT process, and held that the CSRTs did not obviate the need for habeas review.

> In comparison [to the "rigorous adversarial process" of trial by military commissions], the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, . . . that person is not the

> detainee's lawyer or even his "advocate." The Government's evidence is accorded a presumption of validity. The detainee is allowed to present "reasonably available" evidence, but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage.
>
> …
>
> The most relevant [deficiencies] for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. . . . [A]t the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence, . . . the detainee's opportunity to question witnesses is likely to be more theoretical than real.
>
> …
>
> [E]ven when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error [in favor of the Government] in the tribunal's findings of fact. This is a risk inherent in any process that . . . is "closed and accusatorial."

553 U.S. at 767 & 783-85 (citations omitted).

Despite the heavily-biased nature of the CSRTs in favor of the government and against detainees, Messrs. Al Laithi, Hasam, and Muhammad were determined by CSRTs not to be enemy combatants. As noted *supra*, only thirty-eight of over 550 detainees were cleared by CSRTs. A non-enemy combatant determination was thus sufficiently rare that such a determination should have been accorded immediate and considerable effect. A non-enemy combatant determination is not,

and was not, a "distinction without a difference" (JA144), and if anything, given the relative rarity of non-enemy combatant determinations, and in light of procedural limitations of CSRTs, the determinations should carry even more weight. The government itself implemented CSRTs to identify those individuals who were not enemy combatants, and who therefore could not be detained pursuant to the AUMF. It certainly did not intend for its employees to continue to detain and torture innocent persons for years after a non-enemy combatant determination.

D. In Continuing to Detain and Torture Non-Enemy Combatants, the Defendants Were Not Acting Within the Scope of Their Employment

Because the *Rasul* cases do not bar Plaintiffs' ATS claims, the Court must independently evaluate whether the Defendants acted within the scope of their employment when they abused and tortured Plaintiffs. As discussed below, the District Court erred in making this determination as a matter of law.

1. The Court should not defer to the Attorney General's certification

As a preliminary matter, although the Attorney General certified that the Defendants were acting within the scope of their employment (JA132-33), this determination neither binds this Court nor provides any real insight into the actual nature of the Defendants' jobs or conduct. Certification merely works to create a rebuttable presumption, which the plaintiff can dispel. *See Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003). As the Supreme Court has observed, in cases

where a certification, if accepted by the court, would foreclose a plaintiff's claim – in other words, in cases like this one – "[t]he impetus to certify becomes overwhelming." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995). The need for meaningful judicial review of the facts in these cases is therefore heightened. *See id; Stokes*, 327 F.3d at 1214 ("the plaintiff cannot discharge this burden without some opportunity for discovery.").

Here, the certification is wholly conclusory: "On the basis of the information now available, I find that at the time of the conduct alleged in the complaint the individual defendants … were acting within the scope of their employment as employees of the United States." (JA132-33.) The Court must therefore determine independently whether solitary confinement, sleep deprivation, exposure, shackling, blindfolding, forcible shaving, body cavity searches, disruption and mockery of religious practices, and all the other abuses inflicted on the Plaintiffs after the government's own CSRT process established that they were not enemy combatants were so clearly within the scope of the Defendants' employment that no reasonable juror could find otherwise. *See Lamagno*, 515 U.S. at 434; *see also Rasul I*, 512 F.3d at 655 (collecting cases). On the present record, there is no evidence that such abuses were within the scope, as discussed below.

2. The Court cannot determine as a matter of law that Defendants were acting within the scope of their employment, as several factors of the four-factor test are lacking

In determining whether the abusive treatment of detainees at Guantanamo falls within the scope of employment, courts have applied the law of the District of Columbia, which has adopted the Restatement (Second) of Agency, Section 228 (1957). *See Rasul I*, 512 F.3d at 655; *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 32 (D.D.C. 2006); *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 430 (D.C. 2006). The Restatement provides that the:

> Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 663 (D.C. Cir. 2006) (*quoting* Restatement (Second) of Agency § 228 (emphasis added)).

The test's four parts are not factors to be weighed but separate, conjunctive criteria, each one of which must be satisfied for conduct to fall within the scope of employment. *See Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006) (ending analysis upon concluding one factor not met); *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995) (existence of job-related dispute may support jury verdict that employee's threats of violence were intended to further

employer's interest, but cannot in itself establish that employee acted within scope of employment), *abrogated on other grounds by Osborn v. Haley*, 549 U.S. 255 (2007). Moreover, the test is "an objective one, based on all the facts and circumstances." *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986) (*Johnson II*). Because its application requires evaluation of events and relationships that are complex and often open to interpretation, scope of employment issues are questions of fact. *See, e.g. Brown v. Argenbright*, 782 A.2d 752, 757 (D.C. 2001); *see also Majano*, 469 F.3d at 141 (collecting cases); *Kimbro v. Velten*, 30 F.3d 1501, 1509-10 (D.C. Cir. 1994) (remanding for determinations of fact). Of the four parts of the test, two are especially significant here: Restatement (Second) of Agency § 228(1)(a), requiring that the conduct be of the kind that the defendant was employed to perform, and Restatement (Second) of Agency § 228(1)(c), which inquires into the defendants' motivation.

(1) Defendants were not employed to detain and torture non-enemy combatants

First, subjecting individuals determined not to be enemy combatants to abuses and inhumane treatment is not action "of the kind" that Defendants were employed to perform. As explained *supra*, the AUMF authorized detention only of enemy combatants. At least one court in the D.C. Circuit has explained that the AUMF authorizes the government only to "detain [only] those who are 'part of' the 'Taliban or Al Qaida forces,'" or "co-belligerents." *Hamlily v. Obama*, 616 F.

Supp. 2d 63, 70 (D.D.C. 2009). *See also id.* at 77-78. No court or body has ever concluded that the AUMF, or any other law or provision, gives the United States or its employees the authority to detain, torture, and abuse innocent persons who are formally determined not to be enemy combatants or belligerents, and Defendants could not have been employed to perform this illegitimate purpose. This Court should not be the first to hold that the detention and abuse of innocent persons is within the scope of employment.

The United States' determination that certain Plaintiffs were not enemy combatants is critical to the determination of the scope of Defendants' employment. Once the United States determined the Plaintiffs were not enemy combatants and therefore outside the purview of the authority granted by the AUMF, it had nothing left to do but expediently release them – and certainly its employees could not continue to abuse them. *See Parhat v. Gates*, 532 F.3d 834, 854 (D.C. Cir. 2008) (government must "expeditiously" release or transfer detainees not proven to be enemy combatants).

The United States, itself lacking the legal authority to detain or interrogate the cleared Plaintiffs, could not have authorized the individual Defendants to detain or interrogate them, let alone to engage in activities such as depriving them of sleep, exposing them to cold, forcibly shaving them, and harassing them in the practice of their religion. The Defendants have not pointed to, and indeed could

not point to, any policies or procedures authorizing such treatment for persons who are not enemy combatants. In short, they had no authority to continue holding and abusing Plaintiffs for nearly two more years.

Second, those activities could not have been "incidental" to the performance of Defendants' legitimate duties. Unauthorized conduct can be within the scope of employment if the employee engages in it as a method of carrying out his legitimate responsibilities – or, as courts sometimes term it, if it is a direct outgrowth of his job. *See Rasul I*, 512 F.3d at 658; *see also, e.g., Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (resolution of customer dispute through violence); *Howard Univ. v. Best*, 484 A.2d 958, 987 (D.C. 1984) (dean's interaction with faculty member at faculty meetings and university functions part of job responsibilities); *Weinberg*, 518 A.2d at 992 (resolution of customer dispute through violence).[13] However, for the challenged activity to be within the scope,

[13] Importantly, in these cases, the victim sought to bind the employer through *respondeat superior* liability, to recover against the well-financed corporate defendant. Arguably, the courts in *Lyon*, *Best*, and *Weinberg* found the employer liable to permit the victim's recovery. Conceivably, these cases stand for the proposition that in a close case, the court should strike the balance in favor of the outcome most beneficial for the victim. *See, e.g., Lyon*, 533 F.2d at 649 ("although the assault was perhaps at the outer bounds of *respondeat superior*…"). In contrast, Defendants here argue that they acted within the scope of employment to *bar* Plaintiff-victims' recovery.

Additionally, in the cases cited by *Rasul I*, recovery was available against the employer, whereas in this case, the United States argues that it is immune from FTCA claims. The unfairness of applying decisions meant to *protect* injured

"D.C. law . . . requires that the *alleged tort* arise from the *employee's* authorized duties." *See Haddon*, 68 F.3d 1420 at 1425 (emphasis in original). Conversely, if a particular goal or outcome is not part of the employee's job, the means he uses to accomplish it are not part of his job either – even if his conduct was connected to or made possible by his employment. *See id.* at 1425 (electrician's effort to induce chef to withdraw complaint against supervisor not within scope of employment); *see also Penn. Central Trans. Co. v. Reddick*, 398 A.2d 27, 32 (D.C. 1979) (railroad brakeman's assault of taxi driver for not promptly providing transportation from station to rail yard not within scope of employment).

Here, once the United States determined that certain Plaintiffs were not enemy combatants, the Defendants' legitimate job responsibilities no longer included treating them as suspected terrorists under the special authority conferred by the AUMF. Thus, the only employment-related end – the detention and interrogation of suspected enemy combatants – for which the abuses and inhumane treatment at issue could possibly have served as a means no longer applied. *See Rasul I*, 512 F.3d at 658-60. Certainly, deliberate infliction of pain, psychological

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Plaintiffs to instead deny them recovery is striking. *See* Elizabeth A. Wilson, *Is Torture All In A Day's Work?*, 6 Rutgers J.L. & Pub. Pol'y 175, 189 (2008) ("no court has reflected on the peculiarity of using the local D.C. state law of *respondeat superior* to decide the liability of U.S. officials for acts committed outside the United States involving alleged violations of universally-binding norms of human rights. Rather, courts have applied a local state law decision upholding a jury verdict clearly intended to give an egregiously-injured plaintiff a deep pocket) (emphasis added).

distress and humiliation are not accepted (or acceptable) conduct by members of the United States military in other contexts. *See*, *e.g.*, 10 U.S.C. §§ 893, 928, 934 (Uniform Code of Military Justice Arts. 93 (forbidding cruelty and maltreatment), 128 (forbidding assault), & 134 (misconduct in general)); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (UCMJ incorporates American common law of war and law of nations, including the Geneva Conventions). Simply put, treating individuals who were determined not to be enemy combatants like terrorists was not, objectively, a way for the Defendants to do their jobs.

(2) Plaintiffs have plausibly alleged that Defendants' conduct was actuated by animus rather than "a desire to serve the master"

Not only do the Defendants' actions fail to satisfy the first criterion for conduct within the scope of employment – which in itself disposes of their contention that the ATS claims are barred – at least some fail to satisfy the third criterion, that they were motivated by a purpose to serve the employer. *See Majano*, 469 F.3d at 140; Restatement (Second) of Agency § 228(1)(c). The moment the employee begins pursuing his own ends, the employee is no longer within the scope of his employment even though he may appear to be on the job. *See Schecter*, 892 A.2d at 42; *Boykin v. Dist. of Columbia*, 484 A.2d 560, 562 (D.C. 1984) (school employee's assault of blind student he was assigned to guide not within scope of employment). Intentional torts, which more readily suggest

personal motivation, are especially difficult to resolve as a matter of law in favor of the employee. *See Majano*, 469 F.3d at 142 (reversing holding that Westfall Act applied because reasonable jury could conclude defendant did not forcibly pull co-worker's building access card from lanyard around co-worker's neck out of desire to serve government); *cf. M.J. Uline Co .v. Cashdan*, 171 F.2d 132, 134 (D.C. Cir. 1949) (reversible error to instruct jury that assault by hockey player was within the scope of employment because player "may have been, at the moment he struck the blow, completely indifferent to the work he was employed to do and actuated only by anger or hostility toward the man he tried to injure").

Here, Plaintiffs have alleged a series of acts, each one of which violated their rights. Senior officers approved the cruel and inhumane practices used on the Plaintiffs, and they instructed and encouraged subordinates in the use of those practices. Junior personnel, including guards, beat, mocked, imprisoned and otherwise abused the Plaintiffs. The motivations of these Defendants at the time they engaged in these acts – acts directed toward individuals who were known not to be enemy combatants – are, at a minimum, unresolvable as a matter of law. Indeed, Plaintiffs have plausibly alleged that Defendants acted out of animus toward them, including, in particular, their religious beliefs. (*See, e.g.*, JA054-55, JA061, JA069, JA075, JA081 at ¶¶ 88, 114, 143, 167 and 187; JA113, JA119 at

¶¶ 61, 86.) On this ground alone, at this stage of the case, the ATS claims may not be dismissed.

3. Other factors confirm that Defendants were not acting within the scope of their employment

In *Rasul I*, this Court found that defendants had acted within the scope of employment because, *inter alia*, plaintiffs fail to allege that "defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence." 512 F.3d at 658-59. In this case, however, Plaintiffs allege just that. Once Plaintiffs had been cleared as non-enemy combatants, Defendants' actions were no longer related to the "gathering of intelligence from suspected enemy combatants" Rather, Defendants were abusing innocent persons, for nearly two years, for reasons that had nothing to do with the gathering of intelligence. In fact, as alleged by Plaintiffs, at least some Defendants acted out of animus towards them and their religious beliefs. Defendants were those rogue agents, whose actions far exceeded the bounds of legitimate force and intelligence gathering sanctions by the AUMF.

This Court also recognized in *Rasul I* that seriously criminal conduct lessens the likelihood that conduct comes within the scope of employment. *Id.* at 660 (*quoting* Rest. (Second) of Agency § 231 cmt. a). However, this Court nevertheless held that any "seriously criminal conduct" committed by the *Rasul* defendants was within the scope of employment, as it was "foreseeable" that such

conduct would be "implemented by military officials responsible for detaining and interrogating suspected enemy combatants." *Id.*

Even if the torture of suspected enemy combatants might be "foreseeable," for intelligence gathering purposes, the continued torture of Plaintiffs for nearly two years after being declared non-enemy combatants could not have been foreseeable. At the very least, whether such conduct was "foreseeable" is a question of fact that should entitle the Plaintiffs to survive the Defendants' Motion to Dismiss.

E. A Finding That Defendants Acted Within the Scope of Employment Leaves the Plaintiffs Without Any Remedy for the Unjustifiable Abuse and Torture They Suffered

Ruling that the Westfall Act bars Plaintiffs' claims leaves them without any remedy. Essentially, the United States, by torturing and abusing innocent persons at Guantanamo Bay Naval Base, has sought to render itself immune from any liability.

Defendants argue that Plaintiffs' claims must proceed via the provisions of the FTCA. But the United States also argues that any FTCA claims would be barred by 28 U.S.C. § 2680(k), which provides that "[t]he provisions of this chapter [Title 28, Chapter 171] . . . shall not apply to [a]ny claim arising in a foreign country." *See* Brief for Defendants-Appellees at 34-48, *Al Janko v. Gates*, No. 12-5017 (D.C. Cir. Mar. 1, 2013).

A literal reading of the statute suggests, should FTCA claims be barred by 28 U.S.C. § 2680(k), that the exclusivity provisions of 28 U.S.C. § 2679 (i.e., the Westfall Act) would also be inapplicable, as both statutes are contained within Title 28, Chapter 171 of the U.S. Code. However, the United States argues, and courts have held, that the plain reading of the statute has been foreclosed, and therefore that the Westfall Act and the FTCA may bar both claims against the United States, as well as the same claims against individual defendant employees. *See B&A Marine Co. v. American Foreign Shipping Co.*, 23 F.3d 709, 715 (2d Cir. 1994) (argument that Westfall Act provisions do not apply "has considerable force and is strengthened by a literal reading of the statute," but nevertheless finding that Westfall Act applies and that claim could not proceed under FTCA); *Al Janko v. Gates*, 831 F. Supp. 2d 272, 281-84 (D.D.C. 2011) (finding both that ATS claims are barred by Westfall Act, and that identical FTCA claims are barred by foreign country exception to FTCA).[14] *See also Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 116-119 (D.D.C. 2010), *aff'd on other grounds sub nom, Talal Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012); *Bird v. United States*, 923 F. Supp. 338,

[14] Even if this Court finds in the *Al Janko* appeal that the exception contained in 28 U.S.C. § 2680(k) does not apply to claims arising from conduct at Guantanamo Bay Naval Base, a territory under the "complete jurisdiction" and "*de facto* sovereignty" of the United States, *see Boumediene*, 553 U.S. at 755, Plaintiffs' claims could still be barred because it is unclear whether equitable tolling would apply. *See* 28 U.S.C. § 2401(b); *Norman v. United States*, 467 F.3d 773, 775-776 (D.C. Cir. 2006).

343 (D. Conn. 1996) (FTCA claims arising in Guantanamo are barred by Section 2680(k)).

To leave individuals, specifically deemed not to be enemy combatants, without any legal relief for inhumane treatment, abuse, and torture, would be a gross injustice.

III. DEFENDANTS DID NOT LACK FAIR WARNING – AND COMMON SENSE DICTATES – THAT TORTURE OF NON-ENEMY COMBATANTS ON A U.S. BASE, UNDER THE "COMPLETE JURISDICTION" OF THE UNITED STATES, WAS ILLEGAL AND UNCONSTITUTIONAL

Although *Rasul II* rejected Fifth and Eighth Amendment *Bivens*[15] claims brought by suspected enemy combatants detained at Guantanamo, it should not bar the *Bivens* claims here. *Rasul II* held that such claims were barred by the doctrine of qualified immunity, because the constitutional rights of non-resident alien detainees outside the United States, and at a location not within its *de jure* sovereign control, to not be abused or tortured were not "clearly established" at the

[15] In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971), the Supreme Court held that individuals have an implied cause of action against federal government officials who violate their constitutional rights. *Bivens* actions afford plaintiffs a cause of action against individual government officials for violations of their constitutional rights, including rights secured under the First and Fifth Amendments to the U.S. Constitution. *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987) (First Amendment violation redressable under *Bivens*); *Beard v. O'Neal*, 728 F.2d 794, 898 (7th Cir. 1984) (Fifth Amendment due process violation redressable under *Bivens*).

time of the constitutional violations, before the *Rasul* plaintiffs had been released in 2004. *See* 563 F.3d at 530-31.

Notably, in 2004 the Supreme Court held that the detention of non-enemy combatants (persons who "have engaged neither in combat nor in acts of terrorism against the United States") and who have been "held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing," unquestionably violated "the Constitution or laws or treaties of the United States. " *See Rasul v. Bush*, 542 U.S. at 483 n.15. Additionally, as *Rasul II* recognized, the Supreme Court had reversed *Rasul I*'s holding that "basic constitutional protections" did not apply to alien detainees. *See* 563 F.3d at 531. Therefore, even if *Rasul II* is correct in its holding that, before 2004, courts had not previously held that the Constitution extended to aliens "outside the United States," the Supreme Court had established, at least as early as June 28, 2004 (the date that the *Rasul* Supreme Court decision was released) that detainees did possess basic constitutional protections. Since some of the Plaintiffs were cleared by CSRTs in late 2004, their *Bivens* claims for violations of constitutional rights, at least arising after the determinations that they were not enemy combatants, should survive.

This Court can and should find that innocent persons who are not suspected enemy combatants are entitled to basic constitutional protections – certainly protections that preclude torture and other inhumane treatment – and that those protections were "clearly established" at the time of Plaintiffs' detentions.

Additionally, because three Plaintiffs were expressly determined not to be enemy combatants, the Court can find, in contrast to *Rasul II*, that an inquiry into their status, and recognition of a damages remedy for their mistreatment, would not interfere with "core" executive functions or chill military effectiveness on the battlefield, nor would it call into question judgments made by the political branches regarding national security and military affairs. *See* 563 F.3d at 532 n.5. In fact, the judgment made in this case was that three of the Plaintiffs were *not* enemy combatants and should not continue to be detained under the AUMF. An inquiry into the policies and procedures governing the treatment of certain Plaintiffs after they were determined not to be enemy combatants would not expose enemy combatant detention policies, practices, and procedures, nor would it afford enemies of the United States a mechanism to obtain information about military affairs that could be used to disrupt command missions.

IV. THE DETAINEES WHO WERE DETERMINED NOT TO BE ENEMY COMBATANTS WERE "PERSONS" ENTITLED TO PROTECTION UNDER RFRA

Rasul II incorrectly decided the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*,[16] does not apply to Guantanamo detainees.[17]

Briefly, Plaintiffs allege that Defendants prevented them from practicing their religion, mocked their beliefs and desecrated the Koran. (*See*, *e.g.*, JA045, JA049, JA055, JA060-61, JA069, JA075 at ¶¶ 50, 68, 89, 113, 143, 167.) Such conduct violates RFRA. Further, Plaintiffs are "persons" for RFRA purposes, as Judge Brown found in her concurrence. RFRA was enacted to afford protection to a broader range of religious practices than that encompassed by the First Amendment. *See Rasul II*, 563 F.3d at 534 (Brown, J., concurring). When during drafting Congress removed the term "First Amendment" from RFRA to achieve this broader protection, it did not import back into the statute any geographic scope limitation through the word "person." Inapposite Fourth and Fifth Amendment cases, even if they constitute a relevant legislative background, do not establish

[16] RFRA, 42 U.S.C. §§ 2000bb, *et seq.*, provides a cause of action for "a person whose religious exercise has been [substantially] burdened" by the government, where the application of the burden is not "in furtherance of a compelling government interest," or where the burden is not the "least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1.

[17] Plaintiffs acknowledge that this Court may be bound by the *Rasul II* court's holding on this issue, but wish to preserve their argument for purposes of any further appellate proceedings.

that Congress intended that "person" for RFRA purposes would not encompass non-resident aliens. Thus, nothing supports the *Rasul II* court's limitation that the term "religious exercise" as used in RFRA would not encompass Plaintiffs' claims.

V. PLAINTIFFS ADEQUATELY ASSERTED CLAIMS FOR DENIAL OF ACCESS TO CONSULAR OFFICIALS, AS GUARANTEED BY THE VCCR[18]

Although the District Court declined to address Plaintiffs' claims under the Vienna Convention, the *Rasul* cases do not foreclose these claims. There was no Vienna Convention claim asserted in *Rasul*. Here, Mr. Sen and Mr. Mert both repeatedly asked to see consular officials from their country of origin, Turkey. (JA053 at ¶ 83; JA063 at ¶ 119.) Their requests were ignored (although the United States apparently acceded to requests from security services from Algeria and Uzbekistan to access other detainees for purposes of interrogation). (*See* JA067 at ¶ 137; JA075 at ¶ 168.)

Unlike the Geneva Conventions, the Vienna Convention does confer enforceable individual rights. *See Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007); *see*

[18] The VCCR, 21 U.S.T. 77, is an international treaty, ratified by the United States, that defines a framework for consular relations. The VCCR provides several individual, private rights, and is self-executing. *See Jogi v. Voges*, 480 F.3d 822, 830-31 & 834-35 (7th Cir. 2007). In particular, Article 36 of the VCCR requires that the United States inform, "without delay," foreign nationals who are arrested or detained of their right to have their embassy or consulate notified of that arrest. Article 36 also requires the United States to allow consular officers to visit their citizens who are in prison, custody, or detention, to converse and correspond with them, and to arrange for their legal representation.

also Medellin v. Texas, 552 U.S. 491, n.4 (2008) (assuming, without deciding, that Vienna Convention confers individually enforceable right on foreign nationals); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (*per curiam*) (Vienna Convention "arguably confers on an individual the right to consular assistance following arrest."). Further, United States policy is to comply with the Vienna Convention. *See, e.g.*, 28 C.F.R. § 50.5; 8 C.F.R. § 236.1(e). Defendants' denials of Mr. Sen's and Mr. Mert's requests for access to consular officers were therefore without authority, outside the scope of the Defendants' employment, and independently actionable. *Cf.* Br. for U.S. as *Amicus Curiae* in Supp. of Pet'r., *Medellin v. Texas*, 552 U.S. 491 (2008), No. 06-984, at 7-8.

CONCLUSION

Unlike *Rasul*, this case concerns the prolonged detention and abuse of individuals indisputably determined to be innocent. That is a distinction with a difference and makes clear the error of the District Court. Accepting the facts alleged in Plaintiffs' Complaints as true, this Court must conclude that Plaintiffs have stated claims for relief under the ATS, and that the torture and continued detention – in some cases, for nearly two years – of innocent persons cannot, as a matter of law, fall within the scope of Defendants' employment.

Additionally, the *Rasul* cases do not bar the *Bivens* and RFRA claims of non-enemy combatants, and nothing in *Rasul* prevents this Court from allowing

Plaintiffs to proceed on their claims under the Vienna Convention.

As a result, Plaintiffs-Appellants respectfully request that this Court vacate the District Court's Order Granting Defendants' Motion to Dismiss, and remand this case to allow the Plaintiffs to take discovery on their claims.

Dated: August 22, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 10,160 words, excluding the parts of the brief exempted by Fed. R. App. P 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P.32(a)(6)

because it has been prepared using Microsoft Word 2007 in a proportionally spaced typeface, 14-point Times New Roman font.

/s/ Russell Cohen
Russell Cohen

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, I caused the Plaintiffs-Appellants' Opening Brief, Addendum, and Joint Appendix, to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that pursuant to D.C. Circuit Rule 31, eight copies of this Brief, and seven copies of the Joint Appendix, will be filed with the Clerk, and two copies of the Brief and Joint Appendix were served by mail on August 22, 2013, on counsel for the Defendants-Appellees:

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ADDENDUM: PERTINENT STATUTES AND REGULATIONS

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PERTINENT STATUTES AND REGULATIONS

1. Alien Tort Statute (28 U.S.C. § 1350)

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

2. Authorization for the Use of Military Force (115 Stat. 224)

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and
Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and
Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and
Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) In General.--That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

...

3. Westfall Act (28 U.S.C. § 2679)

...
(b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) 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.
...

4. Federal Tort Claims Act Exception (28 U.S.C. § 2680)

The provisions of this chapter[1] and section 1346(b) of this title shall not apply to—

(k) Any claim arising in a foreign country.

5. Religious Freedom Restoration Act (42 U.S.C. § 2000bb-1)

(a) In general
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

[1] Title 28, Chapter 171, which includes 28 U.S.C. §§ 2671-80.

6. Vienna Convention on Consular Relations (21 U.S.T. 77)

...

Article 36
Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

...