**CASE NO. 06-5282**

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**UNITED STATES COURT OF APPEALS**
**DISTRICT OF COLUMBIA CIRCUIT**

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**JENNIFER K. HARBURY,**

**Appellant**

**v.**

**MICHAEL V. HAYDEN, et al.,**

**Appellees.**

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Appeal from the United States District Court
For the District of Columbia, C.A. No. 96-0438 (CKK)
The Honorable Colleen Kollar-Kotelly

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# BRIEF OF *AMICUS CURIAE* UNITED STATES REPRESENTATIVE BARNEY FRANK IN SUPPORT OF APPELLANT JENNIFER K. HARBURY

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JENNIFER K. HARBURY,
on her own behalf and as Administratrix
of the Estate of Efraín Bámaca Velásquez,

Appellant,

C.A. No. 06-5282

v.

MICHAEL V. HAYDEN,
Director of the Central Intelligence Agency,
*et al*,

Appellees.

BRIEF OF *AMICUS CURIAE*
UNITED STATES REPRESENTATIVE BARNEY FRANK

## STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

United States Representative Barney Frank respectfully submits this brief *amicus curiae* in the above entitled and numbered case. In 1988, Representative Frank sponsored the bills that became the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679 (2000) ("Westfall Act"). As Chairman of the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, he wrote the House Report and led the House debate on this legislation. Accordingly, he has become deeply concerned by recent

judicial decisions holding that torture falls within a federal employee's scope of employment under the Westfall Act. These decisions are in direct conflict with the intent of the 100th Congress in enacting this legislation.

## STATEMENT OF THE CASE

In March 1996, Ms. Jennifer Harbury brought suit against the Central Intelligence Agency, the Department of State, the National Security Council, and individual employees thereof for ordering and/or abetting the torture and extrajudicial execution of her husband, Efraín Bámaca Velásquez, in Guatemala. On August 1, 2006, the District Court for the District of Columbia, *inter alia*, accepted the Attorney General's certification that any torture committed by the defendant employees fell within the scope of their employment. This resulted in the substitution of the United States as the defendant under the Westfall Act and the dismissal of Ms. Harbury's claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80 (2000).

As discussed below, such a ruling contravenes the clear intent of the 100th Congress. The U.S. government can never be substituted into cases involving the use of torture by federal officials. Instead, such officials must face any resulting litigation in their individual capacities. Accordingly, it is respectfully urged that the legislative intent be upheld and enforced, and the judgment of the U.S. District Court be reversed on this issue.

## ARGUMENT

### I. Introduction and Summary

The District Court erred in dismissing Ms. Harbury's claims because the conduct at issue—torture—falls outside any government official's scope of employment under the Westfall Act. The legislature intended the Westfall Act to provide compensation from the federal treasury to injured citizens, while also protecting federal employees from burdensome lawsuits for garden-variety torts. However, as discussed below, Congress has withheld protection for egregious or seriously criminal acts such as torture. Tortfeasors who commit such acts remain individually liable for the resulting damages.

### II. Congress Did Not Immunize Individual Federal Employees from Liability for Egregious or Seriously Criminal Acts.

#### A. Congress Intended the Exclusion of Outrageous or Seriously Criminal Conduct from the Scope of Employment.

In 1988, the Supreme Court ruled that official immunity could not shield a U.S. employee from personal liability unless the tort in question was within the scope of employment *and also required the exercise of discretion. Westfall v. Erwin*, 484 U.S. 292 (1988). Since an initial finding of discretion would require burdensome court presentations, Congress became concerned about the chilling

effect of this decision on U.S. officials.[1] In passing the Westfall Act in 1988, the legislature barred all tort suits against federal employees acting within the scope of their employment.[2] The federal government would be substituted for the individual defendants in such cases, and sovereign immunity would be waived. The injured parties, in turn, gained the government's deep pocket for purposes of compensation.

In the report to Congress in H.R. 4612, the bill that was to become the Westfall Act, U.S. Representative Frank indicated that the law of the state in which the conduct occurred would normally govern the scope of employment issue for purposes of substitution.[3] However, he also expressly noted certain limitations on the scope of employment, stating that outrageous or seriously criminal actions would of course be excluded. As stated in the report, "[i]f an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted . . . and the individual employee remains liable."[4]

In the discussion section, the House Report listed eight factors forming the parameters of scope of employment under the Westfall Act. These factors are set

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[1] *See* H. R. REP. NO. 100-700 (1988) at 3, *reprinted in* 1988 U.S.C.C.A.N. 5945 at 5946-47.
[2] 28 U.S.C. § 2679.
[3] H. R. REP. NO. 100-700 at 5 (citing *Williams v. U.S.*, 350 U.S. 857 (1955)).
[4] H. R. REP. NO. 100-700 at 5.

forth in the leading treatise on the FTCA, Lester Jayson's *Handling Federal Tort Claims*,[5] which draws them from § 229(2) of the Restatement (Second) of Agency ("Restatement").[6] Of key relevance here is the final factor: whether or not an act is "seriously criminal."[7] As Comment b to Restatement § 229 explains, "[a]lthough an act is a means of accomplishing an authorized result, it may be done in so outrageous . . . a manner that it is not within the scope of employment." Likewise, Comment a to § 231 states that "the master is not responsible for acts which are clearly inappropriate or unforeseeable" and that "serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do." One example given is that of a gardener chasing a child out of a garden with a stick; while this chase may be within the scope of employment, if the gardener shoots the child, his conduct exceeds the scope of employment.[8]

In accordance with the Restatement, the 100th Congress fully intended that an employee's conduct would fall outside the scope of employment when that conduct was egregious or a serious crime. It is also helpful to review Deputy Assistant Attorney General Willmore's testimony before the subcommittee. He

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[5] Lester Jayson, *Handling Federal Tort Claims* (1986 ed.), *cited in* H.R. REP. NO. 100-700, at 5-6.
[6] Restatement (Second) of Agency (1958).
[7] *Id.* § 229(2)(j).
[8] *Id.* § 231 cmt. a.

testified that under the Westfall Act, "employees accused of egregious misconduct—as opposed to mere negligence or poor judgment—will not generally be protected from personal liability for the results of their actions."[9] When U.S. Representative Frank asked Mr. Willmore to provide examples of cases in which acts fell outside the scope of employment, the Department of Justice ("DOJ") furnished a list of nine illustrative cases,[10] which exemplify the types of conduct that the DOJ would not certify under the Westfall Act. Several of these cases involved torts committed while using vehicles for personal purposes.[11] In other cases, however, the acts in question were not garden-variety torts, but truly egregious misconduct. For example, the cases included a Navy hospital employee who sexually molested adolescent patients[12] and a military police officer who stopped an automobile and raped and shot the female occupants.[13]

To summarize, Congress never provided any immunity or protection for an

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[9] *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 79 (1988) ("Westfall Committee Hearing"), (prepared statement of Robert L. Willmore, Deputy Assistant Att'y Gen., Civil Division, Department of Justice).

[10] Westfall Committee Hearing at 128-30.

[11] *See, e.g., Croes v. U.S.*, 726 F.2d 31 (1st Cir. 1984); *Gupton v. U.S.*, 799 F.2d 941 (4th Cir. 1986); *Concepcion v. U.S.*, 374 F. Supp. 1391 (D. Guam 1974).

[12] *Thigpen v. U.S.*, 618 F. Supp. 239 (D.S.C. 1985), *aff'd*, 800 F.2d 393 (4th Cir. 1986).

[13] *Bates v. U.S.*, 517 F. Supp. 1350 (W.D. Mo. 1981), *aff'd*, 701 F.2d 737 (8th Cir. 1983).

official's extreme abuse of power. A fine balance was struck between providing a remedy for the injured party and avoiding undue burdens on government employees. Most erroneous or even wrongful official actions were to be protected. An official engaged in torture, however, was to stand alone in facing the legal consequences of his or her actions.

The U.S. District Court in this case, as well as in *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (2006), failed to consider any of this legislative history, pinning its decisions instead on the preliminary four factors of Restatement § 228 alone. *Id.* at 32. This was an error, as it contradicts and evades the clearly stated intentions of the 100th Congress.

### B. Congress Has Always Understood Torture to Epitomize Outrageous and Seriously Criminal Misconduct.

The 100th Congress deemed torture to be one of the most outrageous and seriously criminal acts imaginable. The Members understood torture to be an element of the crime of genocide,[14] and the type of act authorized by despotic

[14] On November 4, 1988, two weeks after the Westfall Act became law, the Genocide Implementation Act passed into law, defining the permanent impairment of mental faculties through torture as one element of genocide. 18 U.S.C. § 1091 (2000).

regimes like the Khmer Rouge in Cambodia.[15] They assumed that such acts would never be considered to fall within any official's scope of employment.

Members of the 100th Congress were of course also fully aware of the teachings of Nuremberg, the Fourth Hague Convention of 1907,[16] and the Third Geneva Convention of 1949.[17] They were likewise conscious of U.S. jurisprudence and longstanding thought on this issue: Patrick Henry himself stated that if torture is permitted in this country, "we are then lost and undone." *Culombe v. Connecticut*, 367 U.S. 568, 581 n.23 (1961).

The understanding of the 100th Congress was also consistent with the longstanding conviction of Congress that torture is an egregious and criminal act that no branch of the U.S. government could ever condone. In 1984, the 98th Congress passed a broadly supported joint resolution in opposition to the practice

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[15] On October 18, 1988, a joint resolution supporting the protection of the Cambodian people from the Khmer Rouge passed into law, declaring that the Cambodians "might genuinely be free [from] the spectre of the coercion, intimidation, and torture that are known elements of the Khmer Rouge ideology." Pub. L. No. 100-502, 102 Stat. 2504 (1988).

[16] The Convention banned torture of prisoners of war. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 4, 36 Stat. 2277 205 Consol. T.S. 277.

[17] The Convention prohibits, *inter alia*, the torture of civilians, prisoners of war, and others. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 3 & 13, 6 U.S.T. 3316, 75 U.N.T.S. 972.

of torture by foreign governments.[18] Representative Fascell, the first among 189 sponsors, summarized congressional sentiments:

> Torture is an insidious practice of brutality which is the most egregious example of man's inhumanity toward man. Torture is antithetical to our respect for the rights and dignity of the individual—it is violent; it is abhorrent; and it is illegal.[19]

Representative Fascell added, "[t]here is no such thing as official torture,"[20] while other representatives described torture as an "unjustifiable crime against humanity,"[21] and an "inhuman menace" that "can never be tolerated if a humane world order is to be achieved and maintained."[22] Representative Broomfield noted, "the U.S. Government has always taken a strong stand against the practice of torture,"[23] and Representative Brown observed that "a fair and just legal system . . . has no room for torture."[24]

Congress has repeatedly acted to abolish the practice of torture internationally as well. In 1992, Congress enacted the Torture Victim Protection

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[18] Joint Resolution Regarding the Implementation of the Policy of the United States Government in Opposition to the Practice of Torture by any Foreign Government, 22 U.S.C. § 2656 (2000)..
[19] 130 CONG. REC. 24,858 (1984).
[20] 130 CONG. REC. 24,859 (1984).
[21] 130 CONG. REC. 24,860 (1984) (statement of Rep. Wirth).
[22] 130 CONG. REC. 24,861 (1984) (statement of Rep. Conte).
[23] 130 CONG. REC. 24,860 (1984).
[24] 130 CONG. REC. 24,861 (1984).

Act,[25] and in 1994, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[26] In 1996, Congress criminalized acts of torture committed abroad by U.S. nationals.[27] In debating the Torture Victims Relief Reauthorization Act of 2005,[28] Representatives called torture one of "the most heinous types of crimes that can be committed."[29] One Congresswoman declared, "[t]o even suggest that the U.S. government would condone the use of torture should shame every one of us in this House."[30] These were the same values that led ninety senators to vote for the Detainee Treatment Act of 2005;[31] as Senator Obama noted, that "amendment reaffirms a fundamental value of the American people—that torture is morally reprehensible."[32]

## III. Congressional Intent and Generally Accepted Agency Principles Must Prevail in Rare Cases in Which State Law Might Immunize Seriously Criminal Acts.

The express limitations of Congress on the scope of employment under the Westfall Act will only conflict with state law in rare cases. Indeed, it is not clear

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[25] 28 U.S.C. § 1350 (2000).
[26] G.A.Resolution 39/46, [annex, 39 U.N. GAOR Supp. (51) at 197, U.N. Doc. A/39/51 (1984)].
[27] 18 U.S.C. §§ 2340, 2340A.
[28] Pub. L. No. 109-165, 119 Stat. 3574 (2006).
[29] 151 CONG. REC. H11,057 (daily ed. Dec. 6, 2005) (statement of Rep. Becerra).
[30] 151 CONG. REC. E2634-35 (daily ed. Dec. 22, 2005) (statement of Rep. McCollum).
[31] S. Amdt. 1977 to H.R. 2863, Pub. L. No. 109-148, §§ 1001–06, 119 Stat 2680, 2739-44 (2005).
[32] 151 CONG. REC. S11,070 (daily ed. Oct. 5, 2005).

that any conflict exists here.[33] What is clear is that in such rare cases it is appropriate, indeed mandatory, that the decision of Congress to exclude outrageous and seriously criminal misconduct from a Westfall substitution be respected and enforced. The courts should avoid a mechanical application of state agency law that would defeat congressional intent in the context of federal employees and a federal statute. In other words, while the District of Columbia may extend the scope of employment (and hence provide a deep pocket) in cases involving private

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[33] Even assuming *arguendo* that this Court were to apply state scope of employment law in the instant case, it should find that the law of the District of Columbia excludes torture from the scope of employment. D.C. courts look to the Restatement when analyzing scope of employment. *See Haddon v. U.S.*, 68 F.3d 1420, 1423 (D.C. Cir. 1995); *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 427-28 (D.C. Ct. App. 2006) (quoting *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758 n.8 (D.C. Ct. App. 2001)). Insofar as certain decisions in the District of Columbia suggest that outrageous or criminal acts may be within the scope of employment, these have departed from D.C. principles by overlooking the Restatement's provisions. Further, exceptional private-employer cases such as *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976) and *Weinberg v. Johnson*, 518 A.2d 985 (D.C. Ct. App. 1986) should not be considered controlling, since these decisions are acknowledged as outliers that occupy "the outer limits of [scope of employment] liability[.]" *Boykin v. District of Columbia*, 484 A.2d 560, 563 (D.C. Ct. App. 1984). In this regard, the Court in *Boykin* cited Comment f to Restatement § 245: "[T]he fact that the servant acts in an outrageous manner or inflicts a punishment out of all proportion to the necessities of his master's business is evidence indicating that the servant has departed from the scope of employment." *Id.* Indeed, in *Haddon*, 68 F.3d at 1427-28, Judge Sentelle's dissent explicitly recognized inconsistencies in District of Columbia jurisprudence resulting from the *Lyon-Weinberg* doctrine's departure from the principles of the Restatement.

Courts within the District of Columbia have thus struggled to reconcile the holdings of *Lyon* and *Weinberg* with the Restatement and other decisions. In the case at bar, this Court should resolve any tension in favor of express Congressional intent.

employers, it may not eviscerate the express limitations set out by the 100th Congress for cases brought under the FTCA. If any conflict exists, then separate tests must be utilized in the two separate lines of jurisprudence.

Clearly Congress has valid grounds for withholding protection in the context of egregious and criminal actions. The rule of law must be protected, and corruption and the abuse of power prevented, if our nation is to flourish. Moreover, public policy has long required the promotion of fundamental human rights. That such federal interests may override an otherwise controlling state law in the context of federal liability is not a new concept. Justice Antonin Scalia, speaking for the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988), noted in particular that the civil liability of federal officials for actions taken in the course of their duty is an "area that [the Supreme Court has] found to be of peculiarly federal concern, warranting the displacement of state law."[34] *See also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (noting, in the preemption context, that a court's "primary function is to determine whether, under the circumstances of [a] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

[34] To support this proposition, Justice Scalia cited *Westfall*, 484 U.S. at 295; *Howard v. Lyons*, 360 U.S. 593, 597 (1959), *Barr v. Matteo*, 360 U.S. 564, 569-74 (1959) (plurality opinion); *id.* at 577 (Black, J., concurring); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Bradley v. Fisher*, 13 Wall. 335 (1872).

In cases involving acts as egregious as torture, federal concerns compel the exclusion of such acts from the protections provided by substitution under the Westfall Act. In the few situations in which state law would fail to exclude such conduct from the scope of employment, the federal courts should adopt a more nuanced approach. This has been done in other contexts related to the FTCA and its subsequent amendments. *See, e.g.*, *Garrett v. Jeffcoat*, 483 F.2d 590 (4th Cir. 1973) (holding that, under Federal Drivers Act, release of employee from liability for negligent act had no effect whatever on liability of United States, notwithstanding contrary state law); *see also Munson v. U.S.*, 380 F.2d 976 (6th Cir. 1967) (holding inapplicable an Ohio law stating release of a servant from liability would exonerate the master, given that the state rule was intended to protect a master's right to indemnity, and under *U.S. v. Gilman*, 347 U.S. 507 (1954) the federal government was not entitled to such indemnity); *Moschetto v. U.S.*, 961 F. Supp 92, 95 (S.D.N.Y. 1997) (ruling that an injured laborer had no viable federal tort claim against the United States for strict liability, even though New York law places a nondelegable duty upon a landowner to provide a safe workplace, because the FTCA does not waive sovereign immunity for state law claims of strict liability).

## IV. Previous Cases' Inclusion of Torture Within the Scope of Federal Employment Constitutes an Error of Law.

As stated above, when designing the Westfall Act and debating the limits of its protections for federal agents, the 100th Congress made its intentions clear with regard to outrageous and seriously criminal acts. Such acts may not receive immunity, and the official in question remains individually liable. Torture—one of the most outrageous and seriously criminal acts conceivable—thus falls well outside the protections afforded by substitution. To the extent that previous decisions in the District of Columbia overlook these principles, this Court should decline to follow them in federal tort cases.

Despite congressional intent, the D.C. District Court has recently utilized the precise type of mechanical application of state law principles that frustrates legislative intent. In *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, the District Court permitted the substitution of the United States in the context of alleged torture by military personnel at the Guantánamo Bay Naval Station. This ruling was based on the questionable grounds that "courts in the District of Columbia categorize practically any conduct as falling within the scope of [employment] so long as the action has some nexus to the action authorized." *Id.* at 33. On the contrary, regardless of potential outcomes stemming from the mechanical application of

state jurisprudence, the Westfall Act requires courts to bar the immunization of torture by excluding it from the scope of federal employment.[35]

The conduct at issue in *Rasul* clearly should have been excluded from the scope of employment, and governmental substitution barred under Westfall. In the instant case as well, the District Court erred as a matter of law in allowing a Westfall substitution.

## CONCLUSION

The 100th Congress understood the necessity of holding individual officials firmly accountable for *outrageous* and seriously criminal misconduct, and for this reason passed the Westfall Act with clearly expressed limitations. The Westfall Act was intended to protect federal employees acting within the scope of their employment, while maintaining individual liability for those whose conduct falls beyond the pale. Torture epitomizes the type of conduct that falls into the latter, unprotected category. Any federal officials engaging in such conduct must face the resulting litigation against them in their individual capacities.

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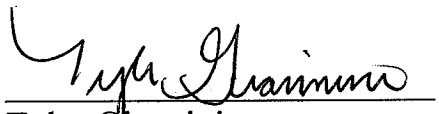
[35] Other recent D.C. Circuit decisions have also dealt with allegations of torture perpetrated abroad, but have been determined on other grounds. *See, e.g.*, *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006). To the extent that the District Court held that torture falls within the scope of employment under Westfall in these cases, its decisions demonstrate the same error of law discussed above with respect to *Rasul*.

## PRAYER FOR RELIEF

For the above stated reasons, U.S. Representative Barney Frank, *amicus curiae* in this case, respectfully prays that this Court enforce and uphold the intent of Congress by reversing the District Court's erroneous decision to permit substitution of the United States as the defendant in cases involving official acts of torture.



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