No. _____

IN THE

Supreme Court of the United States

SAMI ABDULAZIZ ALLAITHI, ET AL.,
Petitioners,

v.

DONALD RUMSFELD, FORMER SECRETARY OF DEFENSE,
DEPARTMENT OF DEFENSE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Westfall Act exempts from personal liability any United States official who commits a tort while "acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(1). Does a United States official act within the scope of his or her employment when authorizing or carrying out the physical and religious abuse and prolonged detention of Guantanamo detainees previously determined not to be enemy combatants?

2. Are Guantanamo detainees "persons" who may avail themselves of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*?

PARTIES TO THE PROCEEDING

Petitioners, who were the plaintiffs-appellants in the courts below, are Sami Abdulaziz Allaithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, and Abu Muhammad.

Respondents, who were the defendants-appellees in the courts below, are Former Secretary of Defense Donald Rumsfeld, Air Force General Richard Myers (Ret.), Marine General Peter Pace (Ret.), Army General James T. Hill (Ret.), Army General Bantz Craddok (Ret.), Marines Major General Michael Lehnert (Ret.), Army Major General Michael E. Dunlavey (Ret.), Army Major General Geoffrey Miller (Ret.), Army Brigadier General Jay Hood (Ret.), Navy Admiral Harry B. Harris Jr., Army Colonel Terry Carrico (Ret.), Army Colonel Adolph McQueen (Ret.), Army Brigadier General Nelson J. Cannon (Ret.), Army Colonel Mike Bumgarner (Ret.), Army Colonel Wade Dennis (Ret.), Esteban Rodriguez, and John Does 1-100, individuals involved in the abuses of Petitioners at Kandahar, Bagram, and Guantanamo.

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Sami Abdulaziz Allaithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, and Abu Muhammad respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a) is reported at 753 F.3d 1327 (D.C. Cir. 2014). The opinion of the district court (App. 17a) is reported at 920 F. Supp. 2d 53 (D.D.C. 2014). The order of the court of appeals denying rehearing en banc (App. 32a) is not reported.

JURISDICTION

The court of appeals entered the judgment sought to be reviewed on June 10, 2014, and denied rehearing en banc on November 18, 2014. An application to extend the time to file this petition was granted on January 14, 2015, extending the time to file the petition to and including April 17, 2015. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Alien Tort Statute (28 U.S.C. § 1350), the Authorization for the Use of Military Force (115 Stat. 224), a Federal Tort Claims Act exception (28 U.S.C. § 2680(k)), excerpts of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (also known as the Westfall Act) (28 U.S.C. § 2679),

excerpts of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb, *et seq.*), and excerpts of the Dictionary Act (1 U.S.C. § 1) are reproduced in the Appendix (App. 94a).

STATEMENT OF THE CASE

Petitioners are six individuals who were detained at Guantanamo Bay Naval Base, Cuba ("Guantanamo"). Three of the Petitioners, Messrs. Muhammad, Hasam, and Allaithi, were expressly determined by the United States not to be enemy combatants following Combatant Status Review Tribunal ("CSRT") hearings. Despite that finding, they continued to be held at Guantanamo for up to two years following the CSRT determinations. During those years, they were subjected to physical and religious abuse, including confiscation and desecration of their Korans, sleep deprivation, forced medication, and forcible shaving of their religious beards. They were also prohibited from praying and kept in solitary confinement. Respondents are former U.S. Department of Defense and military officials who authorized or carried out these abuses.

The remaining three Petitioners, Messrs. Celikgogus, Sen, and Mert, were also subject to physical and religious abuse at Guantanamo, but were released prior to any CSRT proceedings. The following facts are taken from the Complaints and must be assumed true at this stage of the proceedings.

Three Petitioners Were Found Not To Be Enemy Combatants By The Military's Own CSRT Process

Three of the Petitioners were the beneficiaries of favorable CSRT rulings—of which there were few—but were inexplicably subject to physical and religious abuse and prolonged detention at Guantanamo following those rulings. This Court should not permit the individuals who authorized and carried out such abuses of exonerated detainees to be immunized *as a matter of law*. Instead, this Court should grant this petition to clarify that the abuse and prolonged detention of non-enemy combatants does not fall within the scope of Respondents' employment as a matter of law, and that victims of religiously-motived abuse at Guantanamo may have judicial recourse.

CSRTs were established in July 2004 by then Deputy Defense Secretary Paul Wolfowitz as a result of the Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), to purportedly provide the *constitutionally-mandated* process for a detainee to challenge the propriety of his detention. *See Boumediene v. Bush*, 533 U.S. 723, 733-34, 784 (2008). Because the government acknowledged that it only had authority to detain "enemy combatants," defined broadly—"individual[s] who [were] part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners"[1] —CSRTs

[1] Deputy Sec'y of Defense, Mem. for the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7,

were designed to adjudicate which detainees were in fact enemy combatants.

The CSRT process placed a heavy burden on detainees and favored the government, as this Court determined in *Boumediene*: detainees were not afforded or permitted legal counsel; "[t]he government's evidence [was] accorded a presumption of validity"; "there [were] in effect no limits on the admission of hearsay evidence"; detainees had limited ability to rebut the Government's evidence or to find or present his own evidence; and "the detainee's opportunity to question witnesses [was] likely to be more theoretical than real" given the tribunal's authority to consider any evidence it deemed "relevant and helpful." 553 U.S. at 767, 783-84. Not surprisingly, by the time the CSRTs were initially concluded in March 2005, only 38 of 558 detainees were found not to be enemy combatants. Petitioners Muhammad, Hasam, and Allaithi were among the 38 determined not to be enemy combatants.

The CSRT rulings were intended to be determinative and comply with "due process requirements." *See Boumediene*, 533 U.S. at 733-34. Thus, the rulings ought to be accorded legal significance and those who were exonerated should have been treated accordingly. Favorable rulings are not, as the district court concluded and the court of appeals agreed, "distinctions without a difference." App. 4a, 15a, 26a-27a. Indeed, as a practical matter, the rulings led Respondents to segregate those found not to be enemy combatants at Camp Iguana, which housed

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2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf (last visited Apr. 10, 2015).

other non-enemy combatants. App. 73a, 81a. Respondents apparently understood that detainees such as Muhammad, Hasam, and Allaithi were supposed to be treated differently due to their CSRT clearances.

Muhammad

Petitioner Muhammad, an Algerian refugee and father of six, is a former medical doctor and schoolteacher. App. 75a. He is not and never was an enemy combatant. Pakistani and U.S. officials mistakenly arrested him in May 2002, and transferred him to Bagram and then to Guantanamo. App. 75a-77a. At Guantanamo, Muhammad was beaten repeatedly and subjected to religious abuse. App. 79a-82a.

In December 2004, U.S. officials invited Muhammad to participate in a CSRT, an overture he refused because the government prohibited him from presenting a critical witness. App. 80a. Nevertheless, despite his non-participation, the CSRT ruled that Muhammad was not an enemy combatant. (*Id.*). Muhammad was not informed of the ruling for five months, was not transferred to Camp Iguana with the other non-enemy combatants for eight months, and was not released from Guantanamo for another two years. App. 80a-82a.

After the CSRT determination, guards continued to disrupt his religious practices by confiscating his Koran, disrupting and mocking his prayer, and desecrating Korans around him. App. 81a. Muhammad continued to be subjected to body searches, shackling, blackened goggles, and ear coverings. *Id.* Fol-

lowing his release, Muhammad lived alone and in poverty in Albania with continuing dental, stomach, and psychological problems. App. 82a.

Hasam

Like Petitioner Muhammad, Petitioner Hasam is not and never was an enemy combatant.

About two-and-a-half years into his mistaken imprisonment, U.S. forces permitted Hasam to participate in a CSRT in December 2004. App. 73a. The CSRT found him not to be an enemy combatant. *Id.* Hasam was not informed of the ruling for five months, and was not transferred to Camp Iguana with the other non-enemy combatants until August 2005. *Id.* At Camp Iguana, Hasam was prohibited from praying, forcibly shaved in a manner abhorrent to his religion, forcibly medicated and injected, and intentionally deprived of sleep through the use of bright lights and extreme temperatures. In addition, despite a psychologist's order that Hasam should never be held in solitary confinement, he was held in solitary confinement several times, once for two weeks due to the alleged disciplinary infraction of another detainee. App. 73a-74a.

About two years after the CSRT declared him to be a non-enemy combatant, Hasam was finally transferred to Albania—shackled and chained to the seat of the plane. App. 74a. The total length of his wrongful imprisonment was over four-and-a-half years. *Id.* He currently lives in poverty with tremendous ongoing physical, psychological, and social problems. App. 75a.

Allaithi

Petitioner Allaithi is an Egyptian and former university English professor. App. 44a. He too is not and never was an enemy combatant. In late 2001 to early 2002, Pakistani officials wrongfully detained Allaithi and transferred him to U.S. custody. App. 44a. U.S. officials detained and abused Allaithi, first in Kandahar, and then in Guantanamo. App. 48a. Almost three years later, in November 2004, Allaithi was determined by a CSRT not to be an enemy combatant. App. 49a. Despite the ruling, U.S. officials continued to detain Mr. Allaithi for an additional ten months for no apparent reason. *Id.* He was eventually released to the custody of the Egyptian government in October 2005. App. 48a-49a.

At Guantanamo, Mr. Allaithi was subjected to a range of physical and religious abuse. App. 46a-49a. Mocking his Muslim faith, U.S. officials desecrated his Koran, forcibly shaved his religious beard, and removed his water necessary for ablution. App. 46a. Ultimately, the abuse left Mr. Allaithi psychologically ravaged, suicidal, and in a wheelchair with a fractured back. App. 46a-49a. Tainted by the stigma of being a Guantanamo detainee, both Allaithi and his family have limited ability to make a living and support themselves. App. 49a.

Celikgogus, Sen, and Mert

Petitioners Celikgogus, Sen, and Mert were not enemy combatants, but were released from Guantanamo before receiving CSRT determinations. They were wrongfully apprehended, sent to Guantanamo,

and subjected to physical and religious abuse. When they attempted to pray, Respondents disrupted them with loud music, or sometimes beat or threatened them. App. 66a-69a. Respondents desecrated their Korans, and subjected them to extreme punishment if they attempted to defend the Koran. App. 69a-70a. Respondents forced Sen to watch pornography, which was against his religion, and told him that he was in Guantanamo because he was Muslim and he would remain there as long as he stayed Muslim. App. 67a-68a.

Procedural History

After they were eventually released from Guantanamo, Petitioners brought claims for, *inter alia*, violation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, against Respondents—former U.S. Department of Defense and military officials. Petitioners alleged that Respondents ordered, encouraged, enabled, or carried out cruel, inhumane, and degrading treatment of detainees at Guantanamo, including persons—such as Petitioners—found not to be enemy combatants.

Specifically, Respondents Michael Dunlavey and Geoffrey Miller pressed for the use of so-called "abusive interrogation techniques" at Guantanamo that were never before approved by the U.S. military. App. 82a-84a. 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 in-

terrogations 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. *Id.* Although a few weeks later he formally rescinded the blanket approval, Mr. Rumsfeld did not seek to end the use of these methods in practice; instead, 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. App. 84a.

For their parts, Respondents 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, perpetuated the ongoing practice of committing physical and religious-based abuse of detainees—including those found not to be enemy combatants—by instructing subordinates on the employment of harsh interrogation techniques, ratifying subordinates' actions, and otherwise encouraging inhumane treatment. App. 58a-66a, 82a-84a. They did not act 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 Petitioners, who were not enemy combatants. *Id.* They also did not take steps to prevent religious-based abuse of detainees. *Id.*

Respondents filed a motion to dismiss on the ground that this case was indistinguishable from the previously dismissed case of *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*"), *judgment vacated by* 55 U.S. 1083 (2008), *judgment reinstated by Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"). Like this case, *Rasul I* and *Rasul II* involved claims of abuse by former Guantanamo detainees against Department of Defense and military defendants. However, unlike this case, in *Rasul I* and *II* the plaintiffs never received CSRT determinations and were thus never determined not to be enemy combatants—in contrast with three of the exonerated Petitioners here. On those facts, the *Rasul I* court held that torture was incidental to the defendants' employment duties of detaining and interrogating "suspected enemy combatants." 512 F.3d at 658-59. The *Rasul I* court therefore dismissed the ATS claims pursuant to the Westfall Act, 28 U.S.C. § 2679, which substitutes the United States as the defendant in cases against all federal employees acting within the scope of their employment. *Id.* The *Rasul II* court also dismissed the plaintiffs' RFRA claim on the ground that RFRA did not protect the religious freedom of former Guantanamo detainees, who the court held are not "persons" within the meaning of RFRA. 563 F.3d at 532-33.

In this case, the district court granted the Respondents' motion, dismissing Petitioners' complaints for failure to state a claim upon which relief could be granted and lack of subject matter jurisdiction. App. 33a. The district court held that the case was controlled by *Rasul I* and *Rasul II*. App. 26a-27a.

The court of appeals affirmed the district court's decision on largely the same grounds, holding that *Rasul I* and *II* controlled—notwithstanding that three of the Petitioners here had been exonerated by CSRT determinations. App. 11a, 14a. The court of appeals went further, to posit—without any evidentiary support whatsoever—that the purpose of the post-CSRT abuse was to "maintain an orderly detention environment" and that the prolonged post-CSRT detention was due to "the realities of war, and, for that matter, administrative bureaucracy." App. 9a, 11a.

Petitioners sought rehearing en banc, based in part on this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S. Ct. 2751 (2014), which was released after the court of appeals' decision. The court of appeals denied the request without an opinion. App. 32a-33a.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for certiorari because the court of appeals found as a matter of law that Respondents acted within the scope of their employment when they abused Guantanamo detainees even after they were conclusively determined not to be enemy combatants. The determination that Respondents were acting within the scope of their employment is a fact-dependent one, not amenable to resolution as a matter of law. But, more importantly, the decision risks insulating government officials in the future from any consequences for abuse of individuals simply because they were held in military custody. This question is of critical importance and has not been, but should be, settled by

this Court. As underscored by the recent disclosure of the United States Senate Select Committee on Intelligence's Study on the CIA's Detention and Interrogation Program ("Torture Report"),[2] failure to even permit inquiry into the facts regarding such alleged abuses risks creating an environment in which officials can act without limit and without accountability—here, involving persons known to be innocent by the government who were nevertheless subject to abuse and prolonged detention. The Complaints allege actions by Respondents in the chain of command at Guantanamo who authorized or carried out physical and religious abuse of those detainees who were knowingly held without basis. The Court should settle the question of whether, *as a matter of law*, Respondents' alleged conduct is immune from liability or even factual inquiry.

Additionally, in rejecting Petitioners' RFRA claims, the court of appeals adopted a cramped reading of "persons" entitled to protection from RFRA that is no longer viable given this court's decision in *Burwell v. Hobby Lobby*. This Court should settle the question of whether *Hobby Lobby* is limited to its precise facts, or whether it should be read to mandate that all "persons" may avail themselves of RFRA protections.

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[2] *See* Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Dec. 3, 2012) (hereinafter "Torture Report pg. ___), *available at* http://www.documentcloud.org/documents/1376717-cia-report.html#document/ (last visited Apr. 10, 2015).

I. THE COURT SHOULD NOT SANCTION THE PHYSICAL AND RELIGIOUS ABUSE OF INNOCENT DETAINEES IN U.S. MILITARY CUSTODY

Petitioners brought claims against Respondents under the Alien Tort Statute ("ATS") for (i) torture, (ii) prolonged arbitrary detention, and (iii) cruel, inhuman or degrading treatment or punishment in violation of international law. The ATS, 28 U.S.C. § 1350, although jurisdictional on its face, allows plaintiffs to bring "private claims [for international law violations] under federal common law." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013). *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *id.* at 762 (Breyer, J., concurring) (international law violations include torture).

Limiting the liability of individual defendants, the Westfall Act substitutes the United States as the defendant in actions against federal employees "acting within the scope of [their] office or employment." 28 U.S.C. § 2679(d)(1). The Westfall Act then converts ATS claims into Federal Tort Claims Act ("FTCA") claims. 28 U.S.C. § 2679(b)(1). The United States has sovereign immunity generally and, according to Respondents, the limited waiver of that immunity in the FTCA does not reach these facts because they fall within the "foreign country" exception in 28 U.S.C. § 2680(k). App. 38a. Thus, substitution of the United States denies Petitioners any remedy at all.

Pursuant to the Westfall Act, the Attorney General may certify that federal employees acted within the scope of employment, as the Attorney General

did in this matter. 28 U.S.C. § 2679(d)(1); App. 4a. Plaintiffs, however, may rebut the certification by alleging "specific facts that, taken as true, would establish that the defendant's actions exceeded the scope of his employment." *Jacobs v. Vrobel*, 724 F.3d 217, 220 (D.C. Cir. 2013) (citation and internal quotation omitted). *See also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) ("the scope-of-employment certification is reviewable in court"). Whether a defendant acted within the scope of his or her employment is, in turn, a question of state *respondeat superior* law. Thus, liability of U.S. government officials for the abuse of Guantanamo detainees is ultimately dictated by the vagaries of state law. *See* App. 5a. *See also* Elizabeth A. Wilson, *Is Torture All In A Day's Work?*, 6 RUTGERS J.L. & PUB. POL'Y 175, 189 (2008) ("[N]o 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.").

The standard for reviewing an Attorney General scope of employment certification is patterned after the motion to dismiss standard. *Vrobel*, 724 F.3d at 221. Accordingly, the Court is to assume that the Petitioners' well-pleaded factual allegations are true and then determine whether it is plausible that Respondents' conduct exceeded the scope of their employment. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The allegations of the Complaint include detailed, explicit acts of physical and religious abuse by Respondents, including prohibition of prayer, confis-

cation and desecration of Petitioners' Korans, solitary confinement, sleep deprivation, forced medication, and forcible shaving of Petitioners' religious beards.[3] Because much or all of this conduct serves no legitimate purpose in advancing the interests of the United States with respect to intelligence-gathering or any other function, Petitioners have plausibly alleged that Respondents were motivated by personal and religious animosity rather than a sincere desire to serve the United States, and that they acted outside their scope of employment in physically and religiously abusing Petitioners and detaining them for up to two years after they were held to be non-enemy combatants. *See Iqbal*, 556 U.S. at 678-79 (plausible allegations must be permitted to go forward); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007) (same).

A. This Court Should Settle The Question Of Whether There Are Limits On The Abuse of Innocent Detainees

If, as a matter of law, Respondents can escape liability under the ATS (via the Westfall Act) for the physical and religious abuse of innocent detainees, then future military custodians will act without regard to any after-the-fact remedy for their abuses short of criminal prosecution. This Court should grant this petition to restore judicially-enforceable limits regarding the proper treatment of innocent persons found not to be enemy combatants.

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[3] *See, e.g.*, App. 46a-50a, 67a-83a.

1. The Abuse And Prolonged Detention Of Innocent Individuals Is Not "The Kind" Of Work U.S. Officials Are Employed To Perform

This Court should not permit to stand the court of appeal's ruling that the physical and religious abuse of persons known by the government not to be enemy combatants is work "of the kind" that government officials and agents are employed to perform. That U.S. officials are employed to interrogate and detain known and suspected enemy combatants does not provide *carte blanche* authorization for such agents to abuse persons they know to be innocent. This is especially true here, where Congress has authorized the use of force and detention only against enemy combatants. *Hamdi*, 542 U.S. at 518 (recognizing that "individuals who fought against the United States . . . are [the] individuals Congress sought to target in passing the AUMF" and that "detention of individuals falling into [that] *limited category*" is acceptable) (emphasis added).

Whether a federal employee's actions exceed his or her scope of employment is a question governed by "the law of the place where the employment relationship exists." App. 5a. Here, that place is the District of Columbia. *Id.* Under D.C. law the conduct of an employee falls within the scope of employment 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.

App. 6a (quoting Restatement (Second) of Agency § 228(1) (1958)) (hereinafter, "Restatement factors"). If any of the four factors is absent, then the conduct falls outside the scope of employment, and the employer is not liable for the employee's conduct. *See Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006) (ending scope of employment analysis and ruling in favor of the plaintiff after determining that a single factor was not met).

Conduct is "of the kind" an individual is employed to perform if it is "of the same general nature as that authorized" or "incidental to the conduct authorized." *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995), *abrogated on other grounds by Osborn v. Haley*, 549 U.S. 255 (2007) (citation and emphasis omitted). Courts frame the latter consideration as whether the conduct was "foreseeable" or "a direct outgrowth of the employee's instructions or job assignment." *Id.* Although intentional torts may fall within the scope of employment, such torts are not within the scope of employment if the employee's job merely provides an opportunity to commit the tort. *Id.* That is the case here.

Respondents were employed to detain and interrogate suspected enemy combatants in either a su-

pervisory or direct capacity.[4] As this Court has recognized, Respondents' power to detain suspected enemy combatants derived from Congressional authorization, specifically the Authorization for Use of Military Force ("AUMF"), which authorized the executive branch to "use all necessary and appropriate force against those . . . persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2011." 107 P.L. 40, 115 Stat. 224 (2001) (emphasis added); *Hamdi*, 542 U.S. at 518.

While indeed broad, Respondents' authority to detain suspected enemy combatants does not extend to the indefinite detention and abuse of those specifically found *not* to be enemy combatants. Indeed, no U.S. court, before the court of appeals in this case, has ever extended the AUMF—or any other law or provision—to authorize the abuse of innocent per-

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[4] The court of appeals held that Petitioners failed to specify how the Respondents were involved with the abuses Petitioners suffered. App. 13a-14a. But the court of appeals disregards not only the formal approvals several Respondents issued for the abuses at issue, but also the principle of "command responsibility," which holds a superior responsible for the actions of subordinates in the military context. *See In re Yamashita*, 327 U.S. 1, 14-16 (1946); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777-78 (9th Cir. 1996) (citing cases, legislative history of the Torture Victim Protections Act, and other authorities). Petitioners' allegations that Respondents ordered, encouraged, enabled, or carried out cruel, inhumane, and degrading treatment of detainees at Guantanamo adequately alleges command responsibility liability and demonstrates Respondents' involvement in the abuses at issue. Moreover, the Complaint asserts that "Doe" defendants—who will be identified if discovery is permitted—carried out the actual abuse. App. 44a, 65a-66a.

sons formally determined not to be enemy combatants. Certainly, deliberate infliction of pain, psychological distress, and humiliation are not accepted (or acceptable) by members of the U.S. 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 (forbidding general misconduct)). Moreover, torture committed by U.S. nationals abroad or by any offender present in the United States is punishable by 20 years in prison, and if the victim dies, by death or a life sentence. 18 U.S.C. § 2340A. And finally, the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, provides a civil remedy to victims (or their survivors) of torture by any government in the world besides the United States government.

The court of appeals based its entire conclusion on *Rasul I*. App 6a. But on its face, *Rasul I* only applies to known or suspected enemy combatants. *See id.* at 658 ("detention and interrogation of *suspected enemy combatants*"), 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*"), 662 ("defendants were employed to detain and interrogate *suspected enemy combatants*") (emphasis added). In *Rasul I*, the court held that the torture of known or suspected enemy combatants served intelligence gathering purposes, was incidental to the detention and interrogation duties of military officers "charged with winning the war on terror," and was thus conduct "of the kind" the military officers were employed to perform. 512 F.3d at 657.

None of these justifications (setting aside whether they were even valid in *Rasul I*) hold here because, unlike the plaintiffs in *Rasul I*, Petitioners were expressly determined by the U.S. government *not to be enemy combatants*. That is a critical distinction—not one "without a difference" as held by the district court and upheld by the court of appeals. App. 4a, 15a, 26a-27a. Indeed, the court of appeals conceded that the intelligence gathering rationale for abusing Petitioners "dissipated" following their CSRT determinations, App. 11a, and it is not clear how the interrogation of detainees who have already been held innocent could possibly be "incidental" to the duties of military officers "charged with winning the war on terror." This Court should grant this petition to ensure that constitutionally mandated due process proceedings, previously recognized as indispensable in *Hamdi* and *Boumediene*, are given both legal and practical effect, and that Respondents' abuse of non-enemy combatants is not immunized as a matter of law.

The court of appeals observation, based on *Johnson v. Weinberg*, 434 A.2d 404 (D.C. 1981) and *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976), that the "of the kind" test is "not a particularly rigorous one," App 10a, only highlights that this area of the law is in need of clarity. *See, e.g.*, *Haddon*, 68 F.3d at 1427-28 (Sentelle, J., dissenting) ("I am not convinced that [*Johnson* or *Lyon*] are properly decided"). *Cf. Jordan v. Medley*, 711 F.2d, 211, 213-14 (D.C. Cir. 1983) (describing D.C. law on the scope of employment question for intentional torts as "less than entirely clear"); *Boykin v. Dist. of Columbia*, 484 A.2d 560, 563 (D.C. 1984) (*Johnson* approaches the "outer limits" of *respondeat superior* liability). *See*

also Gambling v. Cornish, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977) (in determining whether an act falls within the scope of employment, "the line must be drawn somewhere"). And such clarity is especially critical here, where a determination that conduct is within the scope of employment forecloses any recovery under federal law for victims of abuse by U.S. government officials without even any fact finding.

2. The Abuse Of Innocent Individuals Does Not Serve The Interests Of The United States

This Court should also set limits on the Government's use of the Westfall Act to escape ATS liability by finding that the abuse of non-enemy combatants was not "actuated, at least in part, by a purpose to serve the master." This Court may do so by finding that physical and religious abuse of those determined not to be enemy combatants does not serve the principal's interest. That is especially the case here, where the principal (the United States), acting through the legislative branch (the AUMF), the executive branch (the Department of Defense's implementation of CSRT procedures), and the judicial branch (in *Hamdi* and *Boumediene*), has determined that the detention of persons deemed not to be enemy combatants is unauthorized. Although a partial desire to serve the master is sufficient to satisfy this element under D.C. law, then-Judge Scalia pointed out the absurdity of adopting a limitless approach to this prong: "Quite obviously, a bank teller who shoots a bank examiner with the intent of serving his employer's interest does not impose liability upon his principal, no matter *how* much the act was meant to further the bank's interest." *Jordan*, 711

F.2d at 214 (emphasis in original). Likewise, acts of physical and religious abuse alleged to be carried out for reasons of personal animus should not be determined to serve the employer's interest as a matter of law.

Majano, 469 F.3d at 140, explains why. There, a federal employee pushed a custodial worker out of the way to gain access to her workplace. Once inside, she followed the custodial worker down a 30-foot hallway and assaulted her by repeatedly yanking a lanyard around her neck—resulting in the custodial worker needing neck surgery. *Id.* The *Majano* court held that the employee's forcible entry to her workplace was "motivated, at least in part" to serve her employer. *Id.* at 142. The court held differently, however, with respect to the assault. *Id.* The court held that a reasonable jury could interpret the assault as not at all actuated to serve the employer, but instead as "solely for the accomplishment of [the employee's] independent malicious or mischievous purposes." *Id.* "Outrageous" conduct and punishment disproportionate "to the necessities of [one's] master's business" provides evidence that an individual acted outside the scope of employment. *Boykin*, 484 A.2d at 563 (quoting Restatement (Second) of Agency § 245, cmt. f).

Petitioners' allegations plausibly demonstrate that Respondents' abuse and detention of Petitioners after they were found innocent was not actuated even in part to serve the United States. As the court of appeals conceded, Petitioners no longer served any intelligence-gathering purpose. App. 11a. *See also Hamdi*, 542 U.S. at 521 (the AUMF does not authorize "indefinite detention for the purpose of interroga-

tion"). Nor were they a threat to national security, as they had explicitly been found not to be enemy combatants. And yet, Petitioners were placed in solitary confinement, deprived of sleep for prolonged periods, prevented from praying, deprived of their Korans, forcibly shaved in a manner abhorrent to their religion, subjected to sensory deprivation, and beaten. Thus, Petitioners' allegations plausibly show that Respondents acted outrageously and arbitrarily, motivated by personal animosity toward Petitioners, and not to serve the United States. *See Jordan*, 711 F.2d at 216 ("The outrageous quality of an employee's act may well be persuasive in considering whether his motivation was purely personal.") (citation and internal quotation omitted). Pursuant to this Court's jurisprudence, that is all that is required. *See Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 556, 570.[5]

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[5] The Court should not credit the court of appeal's suggestion that there were benign justifications for Respondents' actions here. Ignoring the allegations of the Complaints, *see Twombly*, 550 U.S. at 556 (the motion to dismiss plausibility standard does not impose a probability requirement), the court of appeals instead made a series of unsupported assumptions to explain away the gravity of the claims. First, the court of appeals held that Respondents' failure to effectuate an immediate release reflected "the realities of war, and, for that matter, administrative bureaucracy." App 9a. But there is nothing in the Complaints to support that. Second, the court of appeals assumed that Respondents physically and religiously abused Petitioners to "maintain an orderly detention environment." App. 11a. Again, there is nothing in Petitioners' Complaints to permit that inference. At this stage of the proceedings, the well-pleaded allegations of the Complaints should be sufficient.

By deciding as a matter of law that Respondents' abuse and detention of non-enemy combatants was motivated by a desire to serve the United States, the court of appeals set a boundless precedent no less extreme than that rejected by then-Judge Scalia in *Jordan*, 711 F.2d at 214—and one squarely at odds with the allegations of the Complaints. This Court should grant the petition to consider reasonable limits on the Government's ability to immunize, as a matter of law, U.S. government officials from ATS liability for the abuse of non-enemy combatants

3. This Court Cannot Sanction A Ruling that Excuses As A Matter Of Law Unlawful Physical and Religious Abuse As An Expected Consequence of Military Detention

Following exoneration by the CSRT, it was not foreseeable that Respondents would continue to abuse Petitioners for up to two more years.

Generally, "serious crimes are . . . unexpectable." Rest. (Second) of Agency § 231, cmt. a; *see also* Rest. (Second) of Agency § 229(2)(j). The prolonged abuse of those known to be innocent surely must qualify as a "serious crime," and therefore should be held to be "unexpectable." *See Gambling*, 426 F. Supp. at 1155 (holding that the false arrest, false imprisonment, and rape of an innocent woman by police officers was "too outrageous . . . to be considered 'expectable' under the Second Restatement test."); *Boykin*, 484 A.2d at 536 (rejecting argument that teacher's sexual assault on student was foreseeable and noting that "the mere fact that an employee's employment situa-

tion may offer an opportunity for tortuous activity does not make" the tortuous activity foreseeable). Although the use of force in interrogating suspected enemy combatants may have been foreseeable, the abuse of those declared non-enemy combatants for up to two years could not be.

This Court should grant certiorari to set reasonable limits on the Government's ability to immunize its employees from ATS liability by claiming their use of force on innocent persons found not to be enemy combatants was foreseeable. The Court may do so by drawing a line distinguishing between expectable behavior and plausibly-alleged unacceptable and unexpectable use of force against persons known to be improperly detained.

As final matter, relying upon *respondeat superior* under the Westfall Act to extinguish potential ATS liability, as the court of appeals did here, essentially turns a victim-focused doctrine on its head. Many states and D.C. apply *respondeat superior* "very expansively, in part because doing so usually allows an injured tort plaintiff a chance to recover from a deep-pocket employer rather than a judgment-proof employee." *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (citing Restatement (Third) of Agency § 2.04 cmt. b (2006) ("Respondeat superior … reflects the likelihood that an employer will be more likely to satisfy a judgment.")). The purpose for expansive application is not met here, however, because the employer here—the United States—is itself "judgment-proof" on sovereign immunity grounds according to Respondents. App. 36a. Under these circumstances, a narrow application of the *respondeat superior* test is

more appropriate to preserve Petitioners' federal claim under the ATS.

Moreover, to make such a determination on the pleadings, as a matter of law, is especially troubling. Scope of employment questions are generally questions of fact for the jury, not questions decided on a motion to dismiss. *See Majano*, 469 F.3d at 140. In the "infrequent" and "unusual" circumstance in which courts resolve scope of employment questions as a matter of law, they do the opposite of what the court of appeals did here: they "hold that the employee's action was *not* within the scope of her employment." *Id.* at 141 (emphasis in original). This norm is even more pronounced in the case of intentional torts. As then-Judge Scalia observed in *Jordan v. Medley*, directed verdicts are "particularly rare" in cases involving intentional torts—like this one—because by their nature, intentional torts are "willful and thus more readily suggest[ ] personal motivation" rather than motivation to serve the employer. 711 F.2d at 215.

At the very least, Petitioners are entitled to preliminary discovery on the motivations of defendants and other issues affecting the application of scope of employment factors, and not outright dismissal of their case, as happened here. *See Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003).

B. The CIA Torture Report Demonstrates The Need For Imposing Reasonable Limits On The Conduct Of U.S. Officials

On December 9, 2014, the United States Senate Select Committee on Intelligence ("SSCI") released the CIA Torture Report, which investigated the CIA's detention and interrogation program and its use of torture on detainees. The disturbing details of the Torture Report reveal the result of rogue government agents and agencies operating without fear of liability or judicial scrutiny, and emphasize the immediate need for settling the critical questions presented in this case.[6] If this Court does not step in, the court of appeals' holding will be used by the government in future cases to argue for boundless immunity for wrongful government conduct under the Westfall Act and exceptions to the FTCA. Indeed, under the court of appeals' holding, it is hard to imagine *any* conduct occurring extraterritorially, against any persons that would ever give rise to a claim not barred by FTCA exceptions and the Westfall Act.

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[6] U.S. military officials also engaged in unrestrained abuse at Abu Ghraib, a former prison in Iraq, that was initially used to interrogate prisoners, but soon became notorious for the physical and sexual abuse, torture, rape, sodomy, and murder of detainees. *See* Seymour M. Hersh, *Torture at Abu Ghraib: American soldiers brutalized Iraqis. How far up does responsibility go?*, NEW YORKER, May 10, 2004, *available at* www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (last visited Apr. 10, 2015).

The Torture Report details the harsh torture techniques employed at Guantanamo—techniques that were "brutal and far worse than the CIA represented." *See* Torture Report pg. 12. These included sleep deprivation, physical torture, rape, and threats of injury or sexual abuse against family members, including young children. Detainees were "stripped and shackled nude" with their hands above their heads for extended periods of time, and dragged up and down the corridors while being slapped and punched. *Id.* at 77.

CIA personnel tortured detainees without any knowledge or authorization by either the President or the United States Department of Justice. As the Torture Report states, "CIA Headquarters approved requests to use water dousing, nudity, the abdominal slap, and dietary manipulation, despite the fact that the techniques had not been reviewed by the Department of Justice." *Id.* at 114. In limited circumstances the Department of Justice did review and approve the use of certain interrogation techniques, but with a caveat: if the CIA provided faulty or incorrect information, then the Department's legal conclusions would no longer apply. *Id.* at 14. Unsurprisingly, the CIA misrepresented the basis for using the interrogation techniques and, according to the report, "[w]hen the CIA determined that information it had provided to the Department of Justice was incorrect, the CIA rarely informed the department." *Id.* In other words, the CIA affirmatively misled the Department of Justice into authorizing the use of certain interrogation techniques.

The CIA never informed then-President George W. Bush about the torture techniques it implement-

ed. *Id.* at 15 ("According to CIA records, no CIA officers, up to and including CIA Directors George Tenet and Porter Goss, briefed the president on the specific CIA enhanced interrogation techniques before April 2006."). Neither Congress nor Former President Bush ever knew—let alone authorized—the use of torture on the detainees. Moreover, the CIA also actively avoided informing Vice President Cheney about the location of detention facilities, stating there was a "primary need" to "eliminate any possibility that [ ] could explicitly or implicitly refer to the existence of a black site during the call with the vice president." *Id.* at 151.

The Executive Branch's reaction to the Torture Report was strong and resolute. President Barack Obama condemned torture as "inconsistent with our values as a nation," as "not serv[ing] broader counterterrorism efforts or national security interests," and as causing "significant damage to America's standing in the world, [making] it harder to pursue our interests with allies and partners."[7] Senator John McCain reacted similarly, describing CIA torture as having "actually damaged our security interests, as well as our reputation as a force for good in the world," "stained our national honor," and "[done] much harm and little practical good."[8,9]

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[7] The White House, Office of the Press Secretary, *Statement by the President Report of the Senate Select Committee on Intelligence* (Dec. 9, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence (last visited Apr. 10, 2015).

[8] Sen. John McCain (R-Ariz.), *Floor Statement by Senator John McCain on Senate Intelligence Committee Report on CIA*

The extreme abuses detailed in the Torture Report occurred because of a lack of adequate oversight. The court of appeals' opinion should not provide the roadmap that enables U.S. government officials to carry out more of the same in the future, including the abuse and prolonged detention of those determined not to be enemies of the United States.

Interrogation Methods (Dec. 9, 2014), *available at* http://www.mccain.senate.gov/public/index.cfm/2014/12/floor-statement-by-sen-mccain-on-senate-intelligence-committee-report-on-cia-interrogation-methods (last visited Apr. 10, 2015).

[9] *See also* Sen. Susan Collins (R-Maine), *Sen. Collins' View on Senate Intelligence Committee Report on CIA Interrogation Program* (Dec. 9, 2014), *available at* http://www.collins.senate.gov/public/index.cfm/press-releases?ID=af9451d7-9eab-41fa-a63f-71886cd65c52 (last visited Apr. 10, 2015) ("The use of torture is deplorable and is completely contrary to our values as Americans."); Sheryl Gay Stolberg, *On Torture, O'Malley Stands to the Left of Clinton*, N.Y. TIMES, Dec. 10, 2014, *available at* http://www.nytimes.com/politics/first-draft/2014/12/10/on-torture-omalley-stands-to-the-left-of-clinton/ (last visited Apr. 10, 2015) (quoting Gov. Martin O'Malley (Md.): "[W]hen we torture detainees, we engage in reprehensible behavior . . that makes the United States more vulnerable to attack, and . . . makes it harder for the United States to lead coalitions and to build coalitions." "I think there needs to be some accountability so that this doesn't happen again.").

The Torture Report revealed that the CIA itself echoed McCain's statement that torture, including at Guantanamo, did "little practical good" in terms of intelligence gathering. According to the Torture Report, the CIA's use of enhanced interrogation techniques "was not an effective means of obtaining accurate information or gaining detainee cooperation." Torture Report pg. 2.

II. PETITIONERS, AS NATURAL PERSONS, ARE ENTITLED TO THE PROTECTIONS OF RFRA

The court of appeals' dismissal of Petitioners' RFRA claims on the ground that Petitioners are not "persons" conflicts with this Court's interpretation of "persons" in *Hobby Lobby* and the plain language of RFRA. Indeed, if left to stand, the court of appeals' decision would leave natural persons bereft of RFRA's protections, even as corporate entities enjoy its protection. *Hobby Lobby*, 134 S. Ct. at 2768-69. As sharply noted by Judge Brown in her dissent in *Rasul I,* the majority decision to dismiss the RFRA claims of former Guantanamo detainees on the ground they were not "persons" left the court with "the unfortunate and dubious distinction of being the only court to declare those held at Guantanamo are not 'person[s].'" 512 F.3d at 676 (Brown, J., dissenting).

In a single sentence, the court of appeals concluded that Petitioners, natural persons with bona fide religious beliefs, cannot bring RFRA claims because they "were located outside sovereign United States territory at the time their alleged RFRA claims arose," and therefore "do not fall within the Act's definition of 'person.'" App 14a-15a. In other words, the court of appeals held that RFRA cannot apply to natural persons if they suffered religious harm outside the contiguous United States, regardless of the United States' involvement or "jurisdiction and control" over the place of harm. This pronouncement runs directly contrary to this Court's jurisprudence. At a minimum, the underlying deci-

sion pertaining to RFRA must be vacated in light of *Hobby Lobby*.

A. This Court's Decision In *Hobby Lobby* And The Plain Language of RFRA Demonstrate That Petitioners Are "Persons" Under The Act

As the Court held in *Hobby Lobby*, 134 S. Ct. at 2760-61, RFRA was a Congressional expansion of the Free Exercise Clause of the First Amendment. RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the Government can establish that application of the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b).

The term "government" is defined broadly and includes any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," or of a "covered entity," which includes "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States."[10] 42 U.S.C.

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[10] The United States maintains "complete jurisdiction and control" over Guantanamo, making it a territory of possession of the United States. *See Boumediene*, 533 U.S. at 755. (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T. S. No. 418 (hereinafter "1903 Lease Agreement")). Cuba's *de jure* sovereignty is essentially meaningless because Cuba cannot rescind the lease until the parties jointly agree to modify the 1903 Lease Agreement or the United States abandon the base. *See id.* If it wishes, the Unit-

§ 2000bb-2. If the "government" regulated by RFRA may govern territories in the United States' possession, it follows that "persons" burdened by the government's actions may also reside in those territories.

RFRA does not explicitly define "person." The court of appeals took a narrow approach to the definition, relying upon its prior position in *Rasul I*. In *Rasul I*, the court of appeals rejected the district court's adoption of the commonplace dictionary definition of "person," and looked instead to cases discussing the meaning of "person" in the context of other constitutional provisions, rejecting nonresident aliens as "persons" because they lacked "sufficient connection with this country." 512 F.3d at 668-72. But this Court rejected that reasoning in *Hobby Lobby*, ruling that the term "person" as used in RFRA should be interpreted according to its common meaning as expressed in the Dictionary Act—not limited by constitutional jurisprudence pertaining to free exercise under the First Amendment. 134 S. Ct. at 2768. "Under the Dictionary Act, the word 'person' includes 'corporations, companies, associations, firms, partnerships, societies, and joint stock compa-

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ed States can maintain the lease and occupy the base in perpetuity. *See id.* Accordingly, even as the United States lacks *de jure* sovereignty, it exercises *de facto* control and sovereignty over the region. *See id.* at 768-69 ("Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.") (citing *Rasul*, 542 U.S. at 480 (Kennedy, J., concurring)). This wording of the 1903 Lease Agreement should not be read as a blank check for the United States government to operate with no oversight.

nies, as well as individuals.'" *Id.* (quoting 1 U.S.C. § 1). It would be a strange reading indeed to conclude that closely held corporations are "persons" as contemplated by the Dictionary Act, *see Hobby Lobby*, *id.* at 2769, but natural persons, like Petitioners, are not "persons" under the Act. Under *Hobby Lobby*, the definition of "person" turns on the nature of the entity, as defined in Dictionary Act, not on the sovereign status of the territory in which the religious abuse occurred.[11] And nothing in the Dictionary Act prohibits natural persons not within the contiguous United States from being deemed "persons."

Freedom of religion is central to life and liberty and recognized in numerous international civil rights declarations and mandates. *See* Hague Regulations Respecting the Laws and Customs of War on Land, Hague Convention IV, 18 October 1907, Art. 18 (signed by the United States, noting that: "Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities."); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966),

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[11] There is support for the position that RFRA restricts the United States government's actions, regardless of the status of persons affected by those actions. *See Lamont v. Woods,* 948 F.2d 825, 834, 840 (2d Cir. 1991) (holding that there is "no basis for distinguishing between [the U.S. government's] foreign and domestic establishments of religion," and so the Establishment Clause restricts the government's extraterritorial actions).

999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 ("Everyone has the right to freedom of thought, conscience, and religion . . . to manifest his religion or belief in . . . worship and observance"); Universal Declaration of Human Rights, Art. 2, U.N. General Assembly (10 December 1948) (same). Respondents' actions violated Petitioners' fundamental rights—fundamental rights that even Guantanamo prisoners undeniably possess. *Hamdi*, 542 U.S. at 536-37 (recognizing that accused enemy combatants at Guantanamo have limited rights due to their imprisonment in an area under complete U.S. control). The Court should grant the petition because Petitioners fall within the ambit of RFRA.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Date: April 17, 2015

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 21, 2014 Decided June 10, 2014

No. 13-5096

SAMI ABDULAZIZ ALLAITHI,

APPELLANT

v.

DONALD H. RUMSFELD, FORMER SECRETARY OF DEFENSE,

DEPARTMENT OF DEFENSE, *ET AL.*,

APPELLEES

Consolidated with 13-5097

Appeals from the United States District Court for the District of Columbia

(No. 1:08-cv-01677)

(No. 1:06-cv-01996)

Russell P. Cohen argued the cause for appellants. With him on the briefs were *Howard M. Ullman* and *Shayana D. Kadidal*.

Sydney Foster, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Matthew M. Collette*, Attorney. *Sharon Swingle*, Attorney, entered an appearance.

Before: TATEL and BROWN, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*. As the United States enters the coda of its military engagement in Afghanistan, we continue with our task of resolving the many legal questions left in the wake of warfare. In this case, we assess whether certain detainees cleared by a military tribunal but nevertheless subjected to continued detention and allegedly abusive treatment have sufficiently alleged that those authorizing and supervising their detention acted outside the scope of their employment. We conclude they did not, and we affirm the decision of the district court.

I

This appeal arises from events surrounding six individuals formerly detained at the U.S. Naval Base in Guantanamo Bay, Cuba. Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, Abu Muhammad, and Sami Allaithi were all kept at the detention facility for various periods of time between 2001 and 2006. Celikgogus, Sen, and Mert were returned to their home country of Turkey without any determination by the Combatant Status Review Tribunals (CSRTs). Hasam, Muhammad, and Allaithi appeared before a CSRT and were subsequently cleared—i.e., no longer classified as suspected enemy combatants.

The CSRT determinations, however, did not mark the end of their respective stays at Guantanamo. Hasam, for instance, was informed he was cleared on May 8, 2005 but was not transferred

to the custody of Albanian officials until November 16, 2006. Muhammad similarly received word in May 2005, but did not depart for Albania until nearly two years later. Allaithi was informed of his CSRT clearance sometime after November 2004, and he was transferred to the custody of Egyptian officials about ten months after his appearance before a CSRT.

Their extended stays could hardly be called uneventful. According to Hasam, he was subjected to forced grooming, solitary confinement, sleep deprivation, forced medication, transport in "shackles and chains, blackened goggles, and ear coverings," and the disruption of his religious practices after CSRT clearance. *See* J.A. at 68–69. After receiving his CSRT determination, Muhammad was "shackled, physically searched and insulted." *See* J.A. at 74.

On November 21, 2006, Celikgogus, Sen, Mert, Hasam, and Muhammad filed suit in district court, claiming these events—in addition to ones that took place prior to CSRT clearance but not before us today—gave rise to various causes of action, including violations of the Alien Tort Statute (ATS), the Geneva Convention, the Vienna Convention on Consular Relations, the First Amendment, the Due Process Clause, the Religious Freedom Restoration Act (RFRA), and the Federal Civil Rights Act. Nearly two years later, Allaithi followed suit, making similar claims. The crux of the plaintiffs' allegations was that the named

defendants "authorized" and "turned a blind eye to" the alleged abuses[1]. *See* J.A. at 80, 116–17.

The Attorney General certified the Appellees were acting within the scope of their employment at the time of the alleged events. The Government then filed a motion to dismiss in both cases, arguing both iterations of *Rasul v. Myers* foreclosed the Appellants' claims. *See generally Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (*Rasul II*); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir.) (*Rasul I*), vacated and remanded by 555 U.S. 1083 (2008). After consolidating the two suits, the district court agreed with the Government's position and dismissed the cases. With respect to the Appellants' treatment after CSRT clearance, the district court explained the determination was a "distinction without a difference," as the tribunals "did not change the fact that the plaintiffs were detainees of the U.S. military as part of its operations in conducting the war on terror." *Celikgogus v. Rumsfeld,* 920 F. Supp. 2d 53, 58–59 (D.D.C. 2013). Because the ATS claims against the individual defendants should have been Federal Torts Claims Act (FTCA) claims against the United States, the district court concluded the plaintiffs' failure to exhaust available administrative remedies deprived it of subject matter jurisdiction. *See id.* at 59.

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[1] The complaints also contain allegations against Doe defendants. The plaintiffs did not appeal the district court's dismissal of that aspect of their respective cases. Any issues concerning these defendants are therefore forfeited.

II

We review a district court's Rule 12(b)(1) dismissal *de novo*. *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 231 (D.C. Cir. 2013).

The Alien Tort Statute (ATS) grants jurisdiction and recognizes a cause of action for "private claims [for international law violations] under federal common law." *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, 1663 (2013). In ATS suits filed against officers or employees acting within the scope of their employment, the United States is substituted as a defendant pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(1). The Attorney General may certify an employee was acting within the scope of his employment, though his certification only serves as prima facie evidence that can be rebutted by "specific facts that, taken as true, would establish that the defendant's actions exceeded the scope of his employment." *Jacobs v. Vrobel*, 724 F.3d 217, 220 (D.C. Cir. 2013).

The question of whether a particular act falls within the scope of employment is governed "by the law of the place where the employment relationship exists." *Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006). In *Rasul I*, we explained that, for cases involving acts related to detention at Guantanamo Bay, the place of employment is the District of Columbia. *Rasul I*, 512 F.3d at 655. D.C. law, in turn, has incorporated the Second Restatement of Agency, *see, e.g., Schecter v. Merchs. Home Delivery, Inc.*, 892 A.2d 415, 427– 28 (D.C. 2006), which sets forth four factors, all of which

must apply for the conduct of a servant to fall within the scope of employment:

> (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.

RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958); *see also Jacobs*, 724 F.3d at 221; *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006). We apply the test "very expansively," and in essence ask "whether the defendant merely was on duty or on the job when committing the alleged tort." *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008); *see also Ballenger*, 444 F.3d at 664 (noting the duties test is to be "liberally construed").

Though we are presented with an extensive chronology of events with multiple players, the actions at issue can be divided into two. First, we have the continued detention of the plaintiffs post-CSRT clearance. Second, we have all acts attendant to that continued detention—the allegations of torture, religious desecration, etc., that occurred during the post-clearance period. We conclude that claims in both categories, as pled, fail to support the

conclusion that the defendants acted outside the scope of their employment.

A

From the outset, we affirm the decision of the district court as to Celikgogus, Sen, and Mert. These three individuals were not cleared by a CSRT—a fact they claim is a dispositive factor. And by their own admission, this case does not focus on them. *See* Reply Br. at 7 n.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 Plaintiffs Al Laithi, Hasam, and Muhammad."). Celikgogus, Sen, and Mert cannot prevail with *Rasul I* in the books, and we are in no position to overturn that decision of this court.[2] *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." (citation omitted)).

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[2] Unlike their three co-plaintiffs, Celikgogus, Sen, and Mert do not allege post-CSRT abuses, namely because it would be chronologically impossible for them to allege abuse that occurred after a CSRT clearance that never happened. We see no reason to disagree with their concession that the pre-release abuse they allegedly endured is not discernibly different from the sort in *Rasul I*. *See* Reply Br. at 7 n.4. Certainly, Celikgogus, Sen, and Mert could have made allegations that better satisfied the Restatement factors, as compared to the *Rasul I* plaintiffs. The trio did not, and thus we cannot entertain that hypothetical. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) ("Federal courts may not . . . give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990))).

That leaves us with Hasam, Muhammad, and Allaithi, who have all raised claims of prolonged detention. Hasam was detained for a little over a year and a half after his clearance by a CSRT; Muhammad for about two. There is some uncertainty about the duration between Allaithi's receipt of CSRT clearance and his transfer to Egyptian officials, but about ten months elapsed between his appearance before the tribunal and his eventual transfer.

Allaithi and his fellow former detainees argue the CSRT clearance ended the duties of their jailers. According to them, the 2001 Authorization for the Use of Military Force only permitted the lawful detention of suspected enemy combatants. Therefore, they reason military officials could not continue to detain cleared detainees, as such continued detention would be *ultra vires* and thus outside the scope of employment. *See* Appellants' Br. at 28.

Obviously, however, the individual defendants here were expected to facilitate continued detention post-CSRT clearance. In a July 7, 2004 memorandum establishing the CSRTs, the Pentagon indicated the transfer of cleared detainees would require coordination between three parties: the Secretary of Defense, the Secretary of State, and a detainee's country of citizenship (or a suitable substitute). *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., at 3–4 (July 7, 2004) (explaining that, once "the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, . . . [the Secretary of Defense] or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate

the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States"). The Secretary of the Navy subsequently instructed officials at Guantanamo Bay to coordinate the continued detention and transportation of cleared detainees. *See* Memorandum from Gordon England, Sec'y of the Navy, Implementation of the Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, encl. 1, at 9 (July 29, 2004) ("In these cases [where a detainee is no longer classified as an enemy combatant] the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues."). Though the memoranda are hardly paragons of clarity, they do establish that post-clearance detention was authorized and expected. Nothing indicates a failure to effectuate an immediate release of detention was a dereliction of duty putting the Appellees' conduct outside the scope of employment. To think otherwise would be to ignore the realities of war, and, for that matter, administrative bureaucracy.

B

These memoranda, however, make no mention of acts attendant to post-clearance detention. They contain no reference endorsing the disruption of religious practices, the shackling and chaining of detainees, and the imposition of solitary confinement. Still, based on our understanding of the pleadings, we conclude these actions fell within the defendants' scope of employment.

We first assess whether the alleged misconduct is "of the kind" the named defendants were employed to perform. "To qualify as conduct of the kind [an employee] was to perform, [his or her] actions must have either been 'of the same general nature as that authorized' or '*incidental* to the conduct authorized.'" *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995) (quoting RESTATEMENT (SECOND) OF AGENCY § 229 (1957)). Conduct is "incidental" so long as it is "foreseeable"—that is, it must be a "direct outgrowth of the employee's instructions or job assignment." *Id.* (quoting *Boykin v. Dist. of Columbia*, 484 A.2d 560, 562 (D.C. 1984)). The foreseeability test is to be liberally applied—"broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Ballenger*, 444 F.3d at 664. The test is not a particularly rigorous one.[3]

Hasam alleges he was subjected to disruption of his religious practices, solitary confinement, shackles and chains, blackened goggles, ear coverings, sleep deprivation, body searches, and forcible shaving. *See* J.A. at 68–69. Similarly, Muhammad contends he was "shackled, physically

[3] This court has previously upheld a jury's determination that sexual assault committed by an employee of a delivery service in the course of delivering a mattress was "foreseeable" and therefore incidental to authorized duties. *See Lyon v. Carey*, 533 F.2d 649, 651 (D.C. Cir. 1976). Similarly, in *Johnson v. Weinberg*, 434 A.2d 404 (D.C. 1981), the District of Columbia Court of Appeals— taking a cue from *Lyon*—determined the shooting of a customer by a laundromat employee could potentially be an "outgrowth of a job-related controversy." *Id.* at 409.

searched and insulted after his non-enemy combatant designation," with "guards . . . disrupt[ing] his religious practice . . . and desecrat[ing] . . . Korans." *See* J.A. at 74–75. They assert this unpalatable treatment could not be within the scope of their jailers' employment—the two ostensibly had no intelligence value post-CSRT clearance, unlike the detainees who brought similar challenges in *Rasul I*.[4]

But *Rasul I* still controls. In that case, we made it clear the sort of conduct described here was incidental to "the *detention* and interrogation of suspected enemy combatants" and therefore "the type of conduct the defendants were employed to engage in." See *Rasul I*, 512 F.3d at 658–59. Though the intelligence rationale has dissipated, the need to maintain an orderly detention environment remained after CSRT clearance.

Penn Central Transportation Co. v. Reddick, 398 A.2d 27 (D.C. 1979), provides us with a helpful contrast. There, a railroad brakeman was traveling from New Jersey to Alexandria, Virginia, for work. *See id.* at 28. After taking the train down to D.C., he took a cab to complete his journey. *See id.* En route, the railroad employee assaulted his cab driver. *See id.* at 29. The D.C. Court of Appeals determined the railroad company that employed the brakeman could not be held liable for this assault, as it was "neither

[4] We note Allaithi does not allege he was subjected to treatment similar to that endured by Hasam and Muhammad after his CSRT clearance. Instead, he only avers he was "held for ten additional months after his CSRT before his transfer out of Guantanamo." J.A. at 114.

a direct outgrowth of the employee's instructions or job assignment, nor an integral part of the employer's business activity, interests or objectives." *Id.* at 32. As "nothing in the business of running a railroad . . . [made] it likely that an assault [would] occur between a railroad brakeman and a taxicab driver . . . [over a] taxicab ride," the court determined the tort was beyond the scope of employment. *Id.*

The conduct here, however, is not similarly devoid of a connection between tort and employer. Indeed, the treatment of the detainees in this case appears to be standard for all those similarly situated. *See, e.g., Ali v. Rumsfeld*, 649 F.3d 762, 765–66 (D.C. Cir. 2011); *Rasul I*, 512 F.3d at 650–51. Authorized or not, the conduct was certainly foreseeable because maintaining peace, security, and safety at a place like Guantanamo Bay is a stern and difficult business. We are therefore hard-pressed to conclude the actions leading to the plaintiffs' treatment were not "a direct outgrowth of the [defendants'] instructions or job assignment." *See Penn Central*, 398 A.2d at 32. Instead, we hold the conduct was incidental to the kind authorized by the CSRT memoranda.

We also cannot agree with the Appellants' contention that the Appellees had no purpose to serve the master—the third Restatement requirement. The master here is the United States, and it has a well-recognized penological interest in "maintaining security and discipline" at Guantanamo Bay. *See Aamer v. Obama*, 742 F.3d 1023, 1040 (D.C. Cir. 2014). Our review of the pleadings suggests the defendants served the

purpose of fulfilling that interest and took actions accordant with effecting "detention in a military prison." *See* Oral Arg. Tr. at 20:10 (explaining one of the underlying functions of the defendants was "maintaining security and order at the detention facility"). The fact that a detainee has been cleared by a CSRT, i.e., may not have been involved in combat against American forces, does not extinguish the possibility the detainee may nevertheless decide to be disruptive until his release.

The Appellants' argument does not precisely reflect what the Restatement requires. While they argue "[t]he 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," Appellants' Br. at 31, this is not an accurate articulation of D.C. law. Local law requires an employee be *solely* motivated by his own purposes for consequent conduct to fall outside the scope of employment. *See Weinberg v. Johnson*, 518 A.2d 985, 990 (D.C. 1986) ("The first criterion . . . excludes from the scope of employment all actions committed *solely* for the servant's own purposes." (emphasis added)). It is difficult for a detainee to plausibly allege the defendants' post-clearance conduct was *entirely* motivated by some sort of personal animus; this is especially true when the conduct is similar, if not identical, to the sort determined to be within the scope of employment *prior* to clearance, *see, e.g., Rasul I,* 512 F.3d at 658–59. Indeed—and critically for this case—the Appellants failed to assert that the Appellees' actions were completely devoid of a purpose to serve the United States, despite having ample notice of the scope-of-employment framework set forth by *Rasul I*. Moreover, the allegations set

forth in the complaint—that the named defendants "authorized, mandated, implemented, encouraged, condoned, acquiesced in, turned a blind eye to, or failed in their command obligations to prevent the torture and cruel, inhuman, or degrading treatment that took place at Guantanamo," *see* J.A. at 78, 80, 116–19—are the conclusory sort that "are not entitled to the presumption of truth." *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Despite vividly detailing the various abuses allegedly endured by the Appellants, the complaints do not specify how the *named defendants* were involved with these abuses. *See* J.A. at 68–69, 75, 112–13. With the first and third Restatement factors satisfied—and the others uncontested—we conclude the allegedly abusive conduct fell within the named defendants' scope of employment.

III

We briefly address the remainder of the Appellants' arguments. First, they contend the district court erred in dismissing their RFRA and *Bivens* claims. These contentions are foreclosed by the *Rasul* decisions, and *stare decisis* forbids us from revisiting the wisdom of existing caselaw. The Appellants cannot pursue a *Bivens* claim because qualified immunity "insulates the defendants" here; alternatively, special factors counsel against allowing the claim to move forward. *See Rasul II*, 563 F.3d at 530, 532 n.5. Their RFRA claim meets a similar fate; because the Appellants were "located outside sovereign United States territory at the time their alleged RFRA claim arose, they do not fall [within the Act's] definition of 'person'" and are

therefore barred from bringing a RFRA challenge. *See Rasul I*, 512 F.3d at 672.

As for their Vienna Convention argument, we decline to entertain the Appellants' bare-bones contention that the treaty confers a private right of action. "In this circuit, it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166– 67 (D.C. Cir. 2013). Two sentences of argument, a threadbare conclusion, and a handful of marginally relevant citations do not provide us with enough to adequately assess the strength of their legal conclusions. *See* Appellants' Br. at 40–41. But even if they did, we strongly doubt the Appellants' position is the correct one. *See, e.g., United States v. Emuegbunam,* 268 F.3d 377, 392–94 (6th Cir. 2001); *United States v. Jimenez-Nava,* 243 F.3d 192, 197–98 (5th Cir. 2001).

This case has had a long history, one clouded by uncertainty as *Rasul* was making its way up and down the courts. But the now-settled law reveals several flaws and inadequacies of the Appellants' complaint—some discussed above, some not. In response, counsel invites us to remand this case to allow them an opportunity to rectify whatever mistakes lie in their pleadings. *See, e.g.*, Oral Arg. Tr. at 11:13–16, 13:14–18. We cannot. Not only did the Appellants have ample time to amend their complaint after the dust settled in *Rasul*, we ordinarily cannot return a case to the district court for the opportunity to amend inadequate pleadings unless the plaintiffs first ask that court for leave to

amend and are denied. *See Brooks v. Grundmann*, --- F.3d ----, 2014 WL 1420295, at *6 (D.C. Cir. Apr. 15, 2014) (explaining a failure to ask the district court for leave to amend a complaint "bars [the court] from remanding [the] case to give [the plaintiff] an opportunity to fix her complaint"). Though the *Celikgogus* plaintiffs did ask for leave to amend, the district court granted their motion for leave, which gave rise to their second amended complaint. Despite being filed *after* the release of *Rasul I*, the second complaint still did not conform to the framework we set forth in that case. And the Appellants never asked for leave to amend again. Thus, we have little reason to veer from our precedent; accordingly, we decline to send this case back to the district court.

IV

The district court's grant of Appellees' motion to dismiss is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YUKSEL CELIKGOGUS, *et al.*,
Plaintiffs,
v. **Civil No. 06–1996 (RCL)**
DONALD RUMSFELD, et al.,
Defendants.

SAMI ABDULAZIZ AL LAITHI,
Plaintiff,
v. **Civil No. 08–1677 (RCL)**
DONALD RUMSFELD, *et al.*
Defendants.

MEMORANDUM OPINION

The six plaintiffs in this action—Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, Abu Muhammad, and Sami Al Laithi[1]—were held by the United States at the Guantanamo Bay detention facility where they allege that they were abused by defendants or at defendants' direction. They bring these consolidated actions against numerous U.S. officials, asserting claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350; the First and Fifth Amendments to the U.S. Constitution; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*.; and the Civil Rights Act of 1871, 42 U.S.C. § 1985(3). Three of the men allege that abuses occurred after a Combatant

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[1] Plaintiff Al Laithi's case was consolidated with the *Celikgogus* case after all briefing on both motions to dismiss was completed. *See* Order, *Al Laithi*, ECF No. 51.

Status Review Tribunal determined that the three men were not enemy combatants.

Defendants have moved to dismiss plaintiffs' complaints for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *Celikgogus*, Defs.' Mot., ECF No. 43; *Al Laithi*, Defs.' Mot., ECF No. 10. Because all of these claims are legally indistinguishable from those rejected by the D.C. Circuit in *Rasul v. Myers* (*Rasul I*), 512 F.3d 644 (D.C. Cir. 2008), *cert. granted, judgment vacated*, 555 U.S. 1083 (2008), *judgment reinstated Rasul v. Myers* (*Rasul II*), 563 F.3d 527 (D.C. Cir. 2009), the Court will GRANT defendants' motions to dismiss.

I. BACKGROUND

The following are the facts of the case as alleged in plaintiffs' complaints, *Celikgogus*, 2d Am. Compl., ECF No. 37; *Al Laithi*, Compl., ECF No. 1, which the Court must take as true while resolving defendants' motions to dismiss. *See Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007).

Plaintiffs are foreign nationals who came to Afghanistan, Tajikistan, or Pakistan as refugees or in search of employment. See *Celikgogus*, 2d Am. Compl. ¶¶ 9–13, 53, 77, 98, 124, 148; *Al Laithi*, Compl. ¶ 11, 30. After the United States began bombing Afghanistan in October 2001, Mr. Celikgogus, Mr. Sen, and Mr. Al Laithi were arrested by Pakistani authorities while fleeing Afghanistan, *Celikgogus*, 2d Am. Compl. ¶¶ 53, 77, *Al Laithi*, Compl. ¶ 30, and Mr. Mert was captured in Afghanistan by unknown armed men. *Celikgogus*,

2d Am. Compl. ¶ 98. Around the same time, Mr. Hasam was forcibly taken from Tajikistan into Afghanistan, *Celikgogus*, 2d Am. Compl. ¶ 124, and Mr. Muhammad was arrested in his home by Pakistani authorities. *Celikgogus*, 2d Am. Compl. ¶¶ 148–49. Each was subsequently transferred into U.S. custody. *Celikgogus*, 2d Am. Compl. ¶¶ 54, 78, 99, 124–25, 150; *Al Laithi*, Compl. ¶ 32. Mr. Hasam and Mr. Muhammad were initially detained at the Bagram airbase near Kabul while Mr. Celikgogus, Mr. Sen, Mr. Hasam, Mr. Mert, and Mr. Al Laithi were detained at the U.S. airbase in Kandahar. *Celikgogus*, 2d Am. Compl. ¶¶ 35–43; *Al Laithi*, Compl. ¶¶ 33–45.

All were subsequently transferred to the U.S. detention facility at Guantanamo Bay, Cuba. *Celikgogus*, 2d Am. Compl. ¶ 45; *Al Laithi*, Compl. ¶ 46. Four of the plaintiffs (Mr. Celikgogus, Mr. Sen, Mr. Mert, and Mr. Al Laithi) were initially held at Camp X-Ray, where they allege that they were subjected to harsh conditions including sleep deprivation, exposure to extreme heat and cold, being forced to defecate in public, being prohibited from practicing their religion, and other abuse. *Celikgogus*, 2d Am. Compl. ¶ 46; *Al Laithi*, Compl. ¶¶ 50–54. Camp X-Ray was replaced by Camp Delta in April 2002, where all six plaintiffs were held. *Celikgogus*, 2d Am. Compl. ¶ 47; *Al Laithi*, Compl. ¶ 55. All plaintiffs allege that they were subjected to harsh conditions including sleep deprivation, arbitrary discipline, forced nudity, and a variety of physical, psychological, and cultural abuse. *Celikgogus*, 2d Am. Compl. ¶¶ 47–51; *Al Laithi*, Compl. ¶¶ 56–66.

In late 2004, the U.S. Department of Defense instituted Combatant Status Review Tribunals ("CSRTs"), an administrative process to determine whether a detainee was an "enemy combatant." *Celikgogus*, 2d Am. Compl. ¶ 52; *Al Laithi*, Compl. ¶ 67; *see also Boumediene v. Bush*, 553 U.S. 723, 733 (2008). Mr. Hasam, Mr. Muhammad and Mr. Al Laithi each had CSRT hearings which determined that they were not enemy combatants. *Celikgogus*, 2d Am. Compl. ¶ 52; *Al Laithi*, Compl. ¶ 67. Mr. Hasam and Mr. Muhammad were detained for seventeen months after this determination. *Celikgogus*, 2d Am. Compl. ¶ 52. Mr. Al Laithi was detained for ten months after his favorable CSRT ruling. *Al Laithi*, Compl. ¶ 68. All three allege that abuse continued during this post-CSRT detention.

All plaintiffs were ultimately released from U.S. custody: Mr. Celikgogus, Mr. Mert and Mr. Sen were returned to Turkey, Mr. Hasam and Mr. Muhammad were sent to Albania, and Mr. Al Laithi was sent to Egypt. *Celikgogus*, 2d Am. Compl. ¶¶ 73, 94, 120, 146, 172; *Al Laithi*, Compl. ¶ 70. All allege ongoing medical, psychological, and social problems resulting from their detention. *Celikgogus*, 2d Am. Compl. ¶¶ 73–76, 94–97, 120–23, 146–47, 172–73; *Al Laithi*, Compl. ¶ 70–71.

Plaintiffs brought these consolidated actions against former Secretary of Defense Donald Rumsfeld and numerous military personnel—ranging from former Chairman of the Joint Chiefs of Staff General Richard Myers to individual guards and interrogators at Guantanamo (named as John Does). *Celikgogus*, 2d Am. Compl. ¶¶ 14–30; *Al Laithi*, Compl. ¶¶ 12–25.

II. LEGAL STANDARDS

A defendant may move to dismiss a complaint or claim for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). In response, the plaintiff must show that her claims lie within "the judicial Power of the United States," U.S. Const. art. III, § 1, and that a federal statute grants the Court jurisdiction to hear those claims. *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010).

A defendant may also move to dismiss a complaint or claim for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A complaint must recite facts sufficient to "raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 555).

III. ANALYSIS

Plaintiffs raise four types of claims: (i) ATS claims; (ii) *Bivens* claims based on the First and Fifth Amendments; (iii) RFRA claims; and (iv) claims of conspiracy to deprive plaintiffs of their civil rights under 42 U.S.C. § 1985(3). For the reasons discussed below, all of these claims fail.

A. ATS Claims

1. Legal Standard

The Alien Tort Statute ("ATS") 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." 28 U.S.C. § 1350. The ATS does not create a cause of action, but gives courts jurisdiction over "claims in a very limited category defined by the law of nations and recognized at common law" circa 1789. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–24 (2004).

ATS claims against federal employees are subject to the Westfall Act, 28 U.S.C. § 2671 *et seq*., which provides, in pertinent part:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). "Once a court determines that the federal employee acted within the scope of employment, the case is, inter alia, restyled as an action against the United States that is governed by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir.

2006). The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. § 2675(a). "[T]he failure to exhaust administrative remedies [is] jurisdictional." *Rasul* I, 512 F.3d at 661.

"[T]he Attorney General's certification that a federal employee was acting within the scope of his employment . . . does not conclusively establish as correct the substitution of the United States as defendant in place of the employee," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995), but it does "constitute prima facie evidence that the employee was acting within the scope of his employment." *Ballenger*, 444 F.3d at 662 (citing *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994)). "[A] plaintiff challenging the government's scope-of-employment certification bears the burden of coming forward with specific facts rebutting the certification." *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

In answering the scope-of-employment question, District of Columbia courts employ the Restatement of Agency, which provides:

> 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.

Restatement (Second) of Agency § 228(1) (1958); *see also Rasul I*, 512 F.3d at 655. A servant's conduct must meet all four prongs in order to fall within the scope of her employment. *See Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006). This test is applied "very expansively" and "often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort." *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008).

In *Rasul I*, the D.C. Circuit applied these principles to dismiss ATS claims brought by former Guantanamo detainees based on allegations of abuse. *See Rasul I*, 512 F.3d at 655–61 (analyzing D.C. law on the scope-of-employment question). The circuit concluded that the abuse of detainees by U.S. officials at Guantanamo was within the scope of their employment so that, under the Westfall Act, the United States was substituted as defendants, and plaintiffs were required to exhaust administrative remedies under the FTCA—which

they failed to do. *See id.* The court explained, "the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in," *id.* at 658, and the alleged abuse was "incidental to the defendants' legitimate employment duties." *Id.* at 659; *see also Rasul II*, 563 F.3d at 529.

More recently, in *Ali v. Rumsfeld*, the D.C. Circuit held again that military personnel who allegedly ordered or allowed the abuse of detainees in Iraq and Afghanistan were acting within the scope of their employment. 649 F.3d 762, 775 (D.C. Cir. 2011) (citing *Rasul I*, 512 F.3d at 654–61). Accordingly, the *Ali* court affirmed the dismissal of ATS claims against those personnel for failure to exhaust FTCA administrative procedures. *Id.*

2. Analysis

Plaintiffs assert several ATS claims,[2] all of which are legally indistinguishable from those

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[2] Specifically, plaintiffs assert ATS claims based on:

(1) Prolonged arbitrary detention, *Celikgogus*, 2d Am. Compl., Count I, ¶¶ 189–192, *Al Laithi*, Compl. Count I, ¶¶ 88–91;

(2) Torture, *Celikgogus*, 2d Am. Compl., Count II, ¶¶ 193–199, *Al Laithi*, Compl. Count II, ¶¶ 92–98;

(3) Cruel, inhuman or degrading treatment or punishment, *Celikgogus*, 2d Am. Compl., Count III, ¶¶ 200– 206, *Al Laithi*, Compl. Count III, ¶¶ 99–105;

(4) The Geneva Conventions, including Common Article 3, which prohibits "outrages upon personal dignity, in particular, humiliating and degrading

addressed by the D.C. Circuit in *Rasul I*, 512 F.3d at 656–58, and thus fail for lack of subject matter jurisdiction. As the *Rasul I* court found, "the detention and interrogation of suspected enemy combatants is a central part of the defendants' duties as military officers charged with winning the war on terror." 512 F.3d at 658. As in *Rasul*, the plaintiffs here were detained by the U.S. in the course of military operations in the war on terror. And, as in *Rasul*, the Attorney General has certified that defendants were acting within the scope of their employment, *Celikgogus*, Certification, ECF No. 43–1; *Al Laithi*, Certification, ECF No. 10–1, creating a rebuttable presumption that plaintiffs have the burden to overcome. *See Stokes*, 327 F.3d at 1214. Plaintiffs fail to carry this burden, offering no reason to question the Attorney General's certification here and distinguish their case from *Rasul*.

Mr. Hasam, Mr. Muhammad, and Mr. Al Laithi complain of abuse occurring after they had been cleared as non-enemy combatants by CSRTs, and suggest that this distinguishes them from the plaintiffs in *Rasul*. *Celikgogus*, Pls.' Opp'n 13–21, *Al Laithi*, Pl.'s Opp'n 12–16. The Court disagrees. It finds that the CSRT-clearance is, for purposes of determining scope of employment, a "distinction

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treatment," *Celikgogus*, 2d Am. Compl., Count IV, ¶¶ 207–211, *Al Laithi*, Compl. Count IV, ¶¶ 106–110; and

(5) The Vienna Convention on Consular Relations (plaintiffs Sen and Mert only), *Celikgogus*, 2d Am. Compl., Count V, ¶¶ 212–216.

without a difference," See Celikgogus, Defs.' Reply 2; Al Laithi, Defs.' Reply 2, and that plaintiffs have failed to meet their burden by "coming forward with specific facts rebutting the [Attorney General's] certification" and explaining why the CSRTs should be accorded legal significance in this Court for the scope-of-employment issue. *See Stokes*, 327 F.3d at 1214. The CSRTs did not change the fact the plaintiffs were detainees of the U.S. military as part of its operations in conducting the war on terror. Indeed, the CSRTs appear not to have had much significance even within Guantanamo itself as the three CSRT-cleared plaintiffs were detained for many months thereafter. See *Celikgogus*, 2d Am. Compl. ¶ 52; *Al Laithi*, Compl. ¶ 68. Given the apparent lack of significance accorded to the CSRTs on the ground at the time they were in use, this Court will not retroactively accord the legal significance to these procedures that plaintiffs now seek. Nothing in *Rasul I's* holding that detainee-abuse was within defendants' scope of employment indicated that this determination rested upon the outcome of any administrative procedure. Accordingly, *Rasul I* is no less applicable to detainee-plaintiffs who were held after being cleared by CSRTs than to those who were never subjected to that procedure. See *Rasul I*, 512 F.3d at 658.

Plaintiffs attempt to bolster their failed CSRT distinction by referring to the statutory limits on executive authority established in the Authorization for Use of Military Force ("AUMF"). 50 U.S.C. § 1541. See *Celikgogus*, Pls.' Opp'n 17; *Al Laithi*, Pl.'s Opp'n 13. But while that statute provides the President to use "all necessary and appropriate force" against terrorists and their supporters, it does

not make CSRTs a legally authoritative procedure to determine appropriate targets. Indeed, it does not mention CSRTs at all, which were implemented years after it was enacted.

The alleged abuse that is the subject of plaintiffs' ATS claims was therefore entirely within the scope of defendants' employment. Under the Westfall Act, the United States is substituted as a defendant on these claims. Plaintiffs must demonstrate compliance with the FTCA's administrative exhaustion requirements. See 28 U.S.C. § 2675(a). In this case, as in *Rasul I*, plaintiffs would have had to "file an administrative claim with either the Department of Defense (DoD) or the appropriate military department before bringing suit." *Rasul I*, 512 F.3d at 661 (citing 28 C.F.R. § 14.1). As in *Rasul I*, because there is no evidence that those procedures have been followed, the Court lacks subject matter jurisdiction over these claims.[3] *See id.*

B. *Bivens* Claims

Plaintiffs allege that their abuse by defendants violated the First and Fifth Amendments

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[3] Plaintiffs also request that they be permitted to conduct discovery into the scope of defendants' employment. *Celikgogus*, Pls.' Opp'n 22–23; Al Laithi, Pl.'s Opp'n 17–19. As in *Rasul I*, the Court denies this request because "discovery is not warranted if the plaintiff did not allege any facts in his complaint or in any subsequent filing that, if true, would demonstrate that [the defendant] had been acting outside the scope of his employment." *Rasul I*, 512 F.3d at 662 (internal quotations omitted) (quoting *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003)).

to the Constitution, asserting claims under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See Celikgogus*, 2d Am. Compl. Counts VI–VII, ¶¶ 217–230; *Al Laithi*, Compl. Counts V–VI, ¶¶ 111–124. Defendants are entitled to immunity for these claims.

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Defendants are entitled to qualified immunity unless the plaintiffs alleged (1) a violation of a constitutional right that (2) was "clearly established" at the time of violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In *Rasul II*, the court "exercis[ed] the *Pearson* option with regard to plaintiffs' *Bivens* claims," *Rasul II*, 563 F.3d at 530, and determined that the plaintiffs' Fifth and Eighth Amendment rights were not "clearly established" at the time of the alleged violations. *See id.* at 530–32. The court reasoned that "[a]t the time of [plaintiffs'] detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights." *Rasul II*, 563 F .3d at 530; *see also Rasul I*, 512 F.3d at 666 ("An examination of the law at the time the plaintiffs were detained reveals that . . .

courts did not bestow constitutional rights on aliens located outside sovereign United States territory."); *Ali*, 649 F.3d at 770–73; *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 108–110 (D.D.C. 2007).

Again, plaintiffs' constitutional claims fail because they are legally indistinguishable from those addressed in *Rasul II*. Because it was not "clearly established" at the time of the alleged violations that "aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights," defendants are entitled to qualified immunity on these claims. *See Rasul II*, 563 F.3d at 530.

C. RFRA

Plaintiffs' RFRA claims, see *Celikgogus*, 2d Am. Compl. Count VIII, ¶¶ 231–237; *Al Laithi*, Compl. Count VII, ¶¶ 125–131, are likewise barred by *Rasul*. RFRA provides that the "Government shall not substantially burden a person's exercise of religion," unless certain conditions are met. *See* 42 U.S.C. § 2000bb–1(a)–(b). But the *Rasul II* court explained that nonresident aliens are not protected "persons" under this statute. 512 F.3d at 671–72. Because plaintiffs were non-resident aliens at the time of the alleged RFRA violations, their RFRA claims must also be dismissed for failure to state a claim.

D. Federal Civil Rights Act Claims

Finally, plaintiffs also raise Federal Civil Rights Act claims. *Celikgogus*, 2d Am. Compl. Count

IX, ¶¶ 238–239; *Al Laithi*, Compl. Count VIII, ¶¶ 132–135. Section 1985(3) of Title 42 of the U.S. Code provides a right of action for damages for the victim of a conspiracy by two or more persons with "the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . ." 42 U.S.C. § 1985(3). These claims fail because defendants are entitled to qualified immunity for any violation of plaintiffs' equal protection rights. As discussed above, it was not clearly established at the time of the alleged violations that plaintiffs, as non-resident aliens, had any such rights under the Constitution. Accordingly, these claims will be dismissed.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' complaints will be dismissed for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

An order will issue with this opinion.

Signed by Royce C. Lamberth, Chief Judge, on February 1, 2013.

United States Court of Appeals
For the District of Columbia Circuit

No. 13-5096 **September Term, 2014**

1:08-cv-01677-RCL

Filed On: November 18, 2014

Sami Abdulaziz Allaithi,

Appellant

v.

Donald H. Rumsfeld, Former Secretary of Defense, Department of Defense, *et al.*,

Appellees

Consolidated with 13-5097

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh*, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Randolph, Senior Circuit Judge

O R D E R

---

* Circuit Judge Kavanaugh did not participate in this matter.

Upon consideration of appellants petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUITS

SAMI ABDULAZIZ ALLAITHI,

Appellant,

v. No. 13-5096, et al.

DONALD H. RUMSFELD, FORMER SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, *ET AL.*

Appellees.

Friday, February 21, 2014

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES TATEL AND BROWN, AND SENIOR CIRCUIT JUDGE RANDOLPH

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

RUSSELL COHEN, ESQ.

ON BEHALF OF THE APPELLEES:

SYDNEY FOSTER, ESQ.

****

… that the Defendants were engaged in conduct or action or inaction that was fundamentally within the scope of their employment.

JUDGE RANDOLPH: I know we held in Rasul that District of Columbia law applied to determine the scope of employment, why is that correct?

MS. FOSTER: Well, Your Honor, I'll note that, I mean, no one here is disputing that D.C. law applies.

JUDGE RANDOLPH: I understand that. I know.

MS. FOSTER: Okay. You know, I think, you know, this Court has held that where the employment relationship exists is kind of the proper focus.

JUDGE RANDOLPH: Yes, where is the employment relationship here? Is it through the Department of Defense?

MS. FOSTER: I think that's right, and I think the reason --

JUDGE RANDOLPH: Yes, but that's in Virginia.

MS. FOSTER: That's right. So, it's possible

Virginia law could also be applicable, Virginia law --

JUDGE RANDOLPH: And when you talk about the --

MS. FOSTER: -- has a similar –

JUDGE RANDOLPH: -- servant master, who's the master?

MS. FOSTER: I think, Your Honor, the master here is the United States lead by, you know, the Commander in Chief, which is the President.

JUDGE RANDOLPH: The President. Okay. So, the President's located in D.C. and --

MS. FOSTER: The President's located in D.C., a lot of the Defendants here are high level Defendants, including former Secretary of Defense Rumsfeld who, you know, would have had a lot of his work connected very strongly to D.C. --

JUDGE RANDOLPH: Okay.

MS. FOSTER: -- even though his office is located at the Pentagon in Virginia.

JUDGE RANDOLPH: Okay. And your position is the Federal Tort Claims Act doesn't apply to Guantanamo, right?

MS. FOSTER: Our position is that acts, right, that rise of Guantanamo are barred by the foreign country exception, that is correct.

MS. THATCHER: Let me take you back to the discussion you and I were having about the supervisory employees. And as I understand it your

point is that their alleged failure to prevent abuse was acting within the scope of employment because their job was to prevent abuse, is that, did I hear you correctly?

MS. FOSTER: That's right.

JUDGE TATEL: Okay.

MS. FOSTER: That's right, Your Honor.

JUDGE TATEL: So, I have to think about that. But I'm going to ask you about paragraph 183 of one of the complaints, these are the allegations about the Secretary of Defense.

MS. FOSTER: Sure. Yes.

JUDGE TATEL: Which talks about an April, 2003 where the Secretary of Defense issued a set of recommended techniques requiring his express approval for four specific techniques, one of which was removal of religious items.

MS. FOSTER: Correct.

JUDGE TATEL: So, here you have an allegation that one of the supervisory Defendants is alleged to -- this isn't a question of supervision at all, it's just a question of direct responsibility, authorizing the removal of religious items.

MS. FOSTER: Right. But, Your Honor, I mean, this allegation here says that Secretary Rumsfeld recommended the use of these techniques as abuse, or sorry, as interrogation methods, that's quintessentially within the scope of his employment.

JUDGE TATEL: But this is post-CSRT.

MS. FOSTER: I don't think that changes anything. Like A. we don't, we don't know, actually, this is before CSRTs were even established, so we don't know at all that these policies continue to apply to the individuals who were detained in a segregated facility, as Your Honor noted, after…

****

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Paula Underwood

Paula Underwood March 10, 2014

DEPOSITION SERVICES, INC.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SAMI ABDULAZIZ ALLAITHI
Shubragass, Tanta
Egypt

Plaintiff,

v.

[FILED
SEP 30 2008
Clerk, U.S.
District and
Bankruptcy
Courts]

DONALD RUMSFELD
Fmr. Secretary of Defense
Department of Defense
1000 Defense Pentagon
Washington D.C. 20301-1000;

Civil Action No.__

GEN. RICHARD MYERS
Fmr. Chairman, Joint Chiefs of Staff
9999 Joint Chiefs of Staff Pentagon
Washington, D.C. 20318;

GEN. JAMES T. HILL
Fmr. Commander, United States Southern Command
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

[Case: 1:08-cv-01677
Assigned To Kennedy, Henry H.
Assign. Date 9/30/2008

Description: Civil Rights - Non. Employ.]

GEN. BANTZ CRADDOCK
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c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

MAJ. GEN. MICHAEL LEHNERT
Fmr. Commander Joint Task Force-160
Guantanamo Bay Naval Base, Cuba
c/o United States Marines
Marine Pentagon
Washington, D.C.;

MAJ. GEN. MICHAEL E. DUNLAVEY
Fmr. Commander, Joint Task Force-GTMO
Fmr. Commander, Joint Task Force-170
Guantanamo Bay Naval Base, Cuba
c/o United States Army
Army Pentagon
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MAJ. GEN. GEOFFREY MILLER
Fmr. Commander, Joint Task Force-GTMO
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c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

BRIG. GEN. JAY HOOD
Fmr. Commander, Joint Task Force, GTMO
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COL. TERRY CARRICO
Fmr. Commander, Camp X-Ray
Guantanamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

COL. ADOLPH MCQUEEN
Fmr. Commander, Joint Detention Operations
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Guantanamo Bay Naval Base, Cuba
c/o United States Army
Army Pentagon
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BRIG. GEN. NELSON J. CANNON
Fmr. Commander, Joint Detention Operations
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c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

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Fmr. Commander, Joint Detention Operations
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Guantanamo Bay Naval Base, Cuba
c/o United States Army

Army Pentagon
Washington, D.C. 20310-0200;

ESTEBAN RODRIGUEZ
Director, Joint Intelligence Group
Guantanamo Bay Naval Base, Cuba
c/o Department of Defense
Defense Pentagon
Washington, D.C. 20301-1000;

and

JOHN DOES 1-100, individuals involved in the abuses of Plaintiff at Kandahar and Guantanamo;

All in their individual capacities;

Defendants.

COMPLAINT

****

2. As a foreigner in Afghanistan and Pakistan in 2001 or 2002, in the fog of war and with the U.S. offering generous bounties for the capture of alleged terrorists, Plaintiff was wrongfully detained by Pakistani officials and shortly thereafter transferred to U.S. custody. From his earliest interactions with U.S. soldiers and interrogators, Plaintiff was subjected to physical, mental and religious abuse carried out by U.S. soldiers and/or civilians who were under the command authority of officials in the Department of Defense.

******

11. Plaintiff Sami Abdulaziz Allaithi is an Egyptian who was working as a university English professor in Kabul, Afghanistan when the U.S. bombing campaign forced him to flee Afghanistan. He was captured by Pakistanis after crossing the Afghan-Pakistan border. Subsequently, the Pakistanis transferred him to U.S. custody in or around the end of 2001 or the beginning of 2002. Plaintiff brings this action, in his individual capacity, for the prolonged arbitrary detention, torture, cruel, inhuman or degrading treatment, violation of religious rights, and denial of due process he suffered at the hands of U.S. officials and those in command authority over those officials, or persons acting in coordination with or under the control of the U.S. government, from in or around December 2001 until October 2005. On or around October 1, 2005, the U.S. government transferred Plaintiff to Cairo, Egypt. He is now unemployed, physically disabled, psychologically traumatized, and living with his family.

******

25. Plaintiff does not know the true names and capacities of defendants sued herein as Does 1-100 and therefore sues these defendants by fictitious names. Does 1-100 were the military and civilian personnel who ordered, authorized, condoned, created methods and procedures for, exercised command responsibility over, conspired with, aided or abetted subordinates and/or directly or indirectly participated in the abuses of Plaintiff as hereinafter alleged.

******

46. After approximately one month in Kandahar, U.S. officials transported Plaintiff to Guantanamo in early 2002. Prior to Plaintiff's transfer, guards forcibly shaved Plaintiff's hair and beard. He was hooded, shackled and forced to wear blackened goggles, ear coverings, padded gloves and a hood. He was tied in the plane so that he could not freely move.

******

58. Alleged disciplinary violations at Guantanamo subjected detainees to extreme cruelty, often at the hands of the Extreme or Immediate Reaction Force ("ERF" or "IRF" teams). When ERF teams invaded a detainee's cell, the detainee was instructed to turn around in the cell so that he was not facing the guards, kneel on the ground and place his hands on the back of his head. Four or more guards subsequently entered the cell with rubber sticks, and frequently tear gas or pepper spray, and chained the detainee's hands and feet. ERF teams were very rough and sometimes kicked and beat the detainee. Subsequently, the teams forced the detainee to remain restrained and tied in a painful position or brought the detainee to solitary confinement.

59. Plaintiff, a man in his mid- to late-forties during his imprisonment without charge at Guantanamo, was subjected to the violence of the ERF teams more than ten times. Guards sometimes "ERF'ed" Plaintiff for such minor infractions as the order of his toiletry items in his cell or, in Camp X-

Ray, for speaking to another prisoner, moving his head or not facing a particular direction. A group of guards violently burst into his cell in riot gear and chained his hands and feet, sometimes beating him in the process. Sometimes, the ERF team would leave Plaintiff bound and chained in his cell.

60. Plaintiff was subjected to a variety of physical, mental and verbal torture or cruel, inhuman or degrading treatment during interrogations. These included prolonged solitary confinement; sleep deprivation; deprivation of food, water and sanitary facilities; exposure to temperature extremes; light and sound manipulation, including the sounds of screams or crying; beatings; threats to his life; and forced stress positions and prolonged "short-shackling" with wrists and ankles bound together and to the floor. Sometimes interrogators asked Plaintiff very basic questions about his family and his life at home; other times, they accused him of being a terrorist and belonging to Al Qaeda. On one occasion, during an interrogation at Guantanamo, an interrogator threatened Plaintiff with a gun — with the interrogator pointing a gun at him and stating that he would kill Plaintiff if he did not "tell the truth."

61. Plaintiff was subjected to various forms of religious and cultural abuse, including forced grooming, mocking or disruption of prayer or the call to prayer, the removal of water for ablution, the removal of religious items and the desecration of his Koran or the Koran of other detainees through intentional touching, dropping, stepping on or throwing it.

62. Plaintiff was subjected to force-feeding against his will.

63. Plaintiff was repeatedly held in solitary confinement.

64. Plaintiff underwent psychological deterioration while at Guantanamo, becoming increasingly anxious and suicidal.

65. Plaintiff also suffered severe physical deterioration at Guantanamo that was either instigated and/or aggravated by the physical abuse of U.S. forces while he was a captive in Afghanistan and Guantanamo.

66. While Plaintiff entered Guantanamo walking, he left in a wheelchair. During his detention, he repeatedly sought medical care that was not provided. He was forced to go to recreation against his will and physical ability. When he resisted, and was unable to walk, he was dragged by force to the recreation yard and dropped on the floor. On one occasion, guards attempted to drag Plaintiff by force from the isolation room in the hospital. The pulling of the guards caused indescribable pain and left Plaintiff immobile and temporarily out of consciousness. When he regained consciousness, his mobility had significantly decreased. He faced pressure to undergo a major operation, but Plaintiff refused because he did not trust that the medical professionals were acting in his interests.

67. Plaintiff did not undergo any administrative, judicial or military hearing until 2004 after then Deputy Defense Secretary Paul

Wolfowitz ordered the establishment of Combatant Status Review Tribunals ("CSRTs") which purported to provide an administrative process for determining whether a prisoner is an "enemy combatant." The CSRTs lack 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.

68. Plaintiff's CSRT did not occur until November 2004, after he had been imprisoned in Guantanamo for more than two and a half years. Despite the biased procedure, Plaintiff's CSRT classified him as a non-enemy combatant. Nonetheless, Plaintiff was held for ten additional months after his CSRT before his transfer out of Guantanamo. In total, Plaintiff was arbitrarily detained by U.S. forces for more than forty-five months.

69. Plaintiff was denied access to family, visitors and, prior to 2005, legal counsel.

Plaintiff's Transfer from U.S. Custody

70. On October 1, 2005, U.S. officials transferred Plaintiff to the custody of the Egyptian government.

71. Plaintiff has ongoing physical, psychological and social problems resulting from his prolonged and debilitating detention in U.S. custody. He has continuing medical problems stemming from his detention and he remains traumatized by his experiences. His persistent health problems include

total immobility and a back fracture; severe pain; heart palpitations; deteriorated eyesight; and constant anxiety, difficulty concentrating and a lack of appetite. Further, tainted by the stigma of Guantanamo, both Plaintiff and his family have limited job prospects.

******

81. In October 2002, Defendant Dunlavey requested permission of Defendant Rumsfeld to make interrogations in Guantanamo more aggressive. Defendant Miller, who assumed command from Defendant Dunlavey, also pushed for the use of more aggressive techniques. Defendant Rumsfeld thereafter approved numerous interrogation methods to which Plaintiff was subjected that are clearly illegal under U.S. law. On or around December 2, 2002, Defendant Rumsfeld signed a then-classified memorandum approving hooding, prolonged forced "stress positions" for up to four hours, forced nudity, intimidation with dogs or other "exploitation of phobias," prolonged interrogations up to twenty hours, deprivation of light, forced grooming, isolation, and "mild, non-injurious physical contact." In January, 2003, he rescinded the blanket approval of these methods which violate domestic and international law, but the methods could be carried out, based on specific approval.

82. In April 2003, after a "Working Group Report" recommended the continued use of abusive interrogation methods, Defendant Rumsfeld issued a new set of recommended techniques, requiring his explicit approval for four techniques that violated

the Geneva Conventions and/or customary international law, including the use of intimidation, removal of religious items, threats and isolation. The April 2003 report, however, officially withdrew approval for unlawful actions that had been ongoing for months, including hooding, forced nakedness, shaving, stress positions, use of dogs, and "mild, non-injurious physical contact." Nevertheless, these illegal practices continued to be employed in Guantanamo, which Defendants intended, or knew or should have known were occurring. Defendants failed in their command obligation to prevent these abuses and investigate and punish those responsible.

******

REQUEST FOR RELIEF

Wherefore Plaintiff demands judgment against Defendants jointly and severally, including:

1. Declaring that Defendants' actions, practices, customs, and policies, and those of all persons acting on their behalf and/or their agents and/or employees, alleged herein, were illegal and violate the rights of Plaintiff as to each applicable count;

2. Declaring that Plaintiff's detention was unjustified, unconstitutional, and unlawful;

3. Awarding compensatory and punitive damages in an amount that is fair, just and reasonable, including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper; and

4. Ordering such further relief as the Court considers just and proper.

A jury trial is demanded on all issues.

Dated: September 30, 2008

/s/ Emilou MacLean
Emilou MacLean (Pursuant to LCvR 83.2(g))
Shayana Kadidal (Bar No. 454248)
Carolyn Patty Blum
Michael Ratner
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Karasu/Sakarya
Turkey;

IBRAHIM SEN
Altintepe Mah.
Holilulloh Sok. Nr. 18
Van/Merkez
Turkey;

Civil Action No. 06-CV-1996 (HHK)

NURI MERT
Sarıkız Cad. Kaan Apt.
Pırlanta İnşaat Daire Nr. 8
Akçay/Balıkesir
Turkey;

ZAKIRJAN HASAM
United Nations High Commissioner for Refugees
Center for Refugees
Babrru
Albania;

ABU MUHAMMAD
United Nations High Commissioner for Refugees
Center for Refugees
Babrru
Albania;

Plaintiffs,

v.

DONALD RUMSFELD
Fmr. Secretary of Defense
Department of Defense
1000 Defense Pentagon
Washington D.C. 20301-1000;

GEN. RICHARD MYERS
Fmr. Chairman, Joint Chiefs of Staff
9999 Joint Chiefs of Staff Pentagon
Washington, D.C. 20318;

GEN. PETER PACE
Fmr. Chairman, Joint Chiefs of Staff
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GEN. JAMES T. HILL
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GEN. BANTZ CRADDOCK
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COL. WADE DENNIS
Commander, Joint Detention Operations Group
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c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

ESTEBAN RODRIGUEZ
Director, Joint Intelligence Group
Guantánamo Bay Naval Base, Cuba
c/o Department of Defense
Defense Pentagon
Washington, D.C. 20301-1000;

and

JOHN DOES 1-100, individuals involved in the abuses of Plaintiffs at Kandahar, Bagram and Guantánamo;

All in their individual capacities;

Defendants.

SECOND AMENDED COMPLAINT

****

12. Plaintiff Zakirjan Hasam is an Uzbek refugee. He fled religious persecution in Uzbekistan in January 2001. Mr. Hasam was captured by Afghanis and subsequently transferred to U.S. custody in or around April 2002. Mr. Hasam brings this action, in his individual capacity, for the prolonged, arbitrary detention, torture, cruel, inhuman or degrading treatment, violation of religious rights, and denial of due process he suffered at the hands of U.S. officials and those in command authority over those officials, or persons acting in coordination with or under the control of the U.S. government, from in or around April 2002 until November 16, 2006. On November 16, 2006, the U.S. government transferred Mr. Hasam to Tirana, Albania where he now lives in a refugee center. Mr. Hasam seeks to proceed under the pseudonym that he has used since his capture because he fears reprisals against himself or his family.

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15. Defendant Air Force Gen. Richard Myers is a U.S. citizen residing in Virginia. From October 1, 2001 until October 1, 2005, Defendant Myers was Chairman of the Joint Chiefs of Staff. As the senior uniformed military officer in the chain of command during the relevant times November 2001 until October 1, 2005, Defendant Myers possessed and exercised command and control over the U.S. military and the U.S. detention facilities at

Guantánamo Bay and in Afghanistan. Defendant Myers is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

16. Defendant Marine Gen. Peter Pace is a U.S. citizen and resident of Virginia. Defendant Pace served as the Chairman of the Joint Chiefs of Staff between September 30, 2005 and October 1, 2007. As the senior uniformed military officer in the chain of command during the relevant times September 30, 2005 until November 16, 2006, Defendant Pace possessed and exercised command and control over the U.S. military and the U.S. detention facilities at Guantánamo Bay and in Afghanistan. Defendant Pace is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

17. Defendant Army Gen. James T. Hill is a U.S. citizen and resident of Florida. From August 18, 2002 until November 9, 2004, Defendant Hill was Commander of the United States Southern Command ("SouthCom"). During his tenure, Defendant Hill possessed and exercised command and control over subordinates at the Guantánamo Bay detention facility. Defendant Hill is sued in his individual capacity for ordering, authorizing,

condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

18. Defendant Army Gen. Bantz Craddock is a U.S. citizen and resident of West Virginia. From November 9, 2004 until October 18, 2006, Defendant Craddock was Commander of the United States Southern Command ("SouthCom"). During his tenure, Defendant Craddock possessed and exercised command and control over subordinates at the Guantánamo Bay detention facility. Defendant Craddock is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

19. Defendant Marine Maj. Gen. Michael Lehnert is a U.S. citizen and resident of Florida. From January 11, 2002 until March 28, 2002, Defendant Lehnert was Commander of Joint Task Force-160. In this role, Defendant Lehnert was responsible for the construction and operation of Camp X-Ray and Camp Delta at Guantánamo and responsible for the care, custody and control of detainees. During his tenure, he possessed command and control over U.S. military stationed at the detention facility at Guantánamo. Defendant Lehnert is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command

responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

20. Defendant Army Maj. Gen. Michael Dunlavey is a U.S. citizen and resident of Pennsylvania. Defendant Dunlavey was initially Commander of Joint Task Forces-170, responsible for the coordination and implementation of interrogation efforts at Guantánamo, and later Commander of its successor Joint Task Force-GTMO, formed from the merger of JTF-160 and JTF-170 in October 2002, and responsible for operating the detention facility and conducting operations at Guantánamo. From February until November 2002, Defendant Dunlavey possessed and exercised command and control over subordinates at the detention facility at Guantánamo Bay. Defendant Dunlavey is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

21. Defendant Army Maj. Gen. Geoffrey Miller is a U.S. citizen and resident of Texas. From October 2002 until March 2004, Defendant Miller was Commander of Joint Task Force-GTMO, responsible for operating the detention facility and conducting operations at Guantánamo. During his tenure, he possessed and exercised command and control over U.S. troops stationed at Guantánamo. Defendant Miller is sued in his individual capacity for ordering, authorizing, condoning, creating

methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

22. Defendant Army Brig. Gen. Jay Hood is a U.S. citizen and resident of South Carolina. From March 2004 until March 31, 2006, Defendant Hood was Commander of Joint Task Force-GTMO, responsible for operating the detention facility and conducting operations at Guantánamo. During his tenure, he possessed and exercised command and control over subordinates at the U.S. detention facility at Guantánamo Bay. Defendant Hood is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

23. Defendant Navy Rear Adm. Harry Harris is a U.S. citizen and a resident of Texas. From March 31, 2006 until the present, Defendant Harris has been the Commander of Joint Task Force-GTMO, responsible for operating the detention facility and conducting operations at Guantánamo. Defendant Harris is responsible for the conduct of all interrogations at Guantánamo. During the relevant time period of March 31, 2006 until November 16, 2006, he possessed and exercised command and control over subordinate troops stationed at Guantánamo Bay. Defendant Harris is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for,

exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

24. Defendant Army Col. Terry Carrico is a U.S. citizen and resident of Texas. From January 11, 2002 to April 28, 2002, Defendant Carrico was Commander of Camp X-Ray, the initial temporary detention facility at Guantánamo Bay. During his tenure, he possessed and exercised command and control over subordinate troops stationed at Guantánamo Bay. Defendant Carrico is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

25. Defendant Army Col. Adolph McQueen is a U.S. citizen and resident of Michigan, currently stationed at Fort Meade, Maryland. From November 2002 until August 2003, Defendant McQueen was the Commander of Joint Detention Operations Group (JDOG) at Guantánamo, responsible for guarding the prisoners and providing security. During his tenure, he possessed and exercised command and control over subordinate troops stationed at Guantánamo Bay. Defendant McQueen is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

26. Defendant Army Brig. Gen. Nelson Cannon is a U.S. citizen and resident of Michigan. From August 2003 to September 2004, Defendant Cannon was the Commander of Joint Detention Operations Group (JDOG) at Guantánamo, responsible for guarding the prisoners and providing security. During his tenure, he possessed and exercised command and control over U.S. military at the detention facility at Camp Delta, Guantánamo. Defendant Cannon is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

27. Defendant Army Col. Mike Bumgarner is a U.S. citizen and a resident of North Carolina. From April 2005 until March 2006, Defendant Bumgarner was the Commander of the Joint Detention Group (JDOG) at Guantánamo, responsible for guarding the prisoners and providing security. During his tenure, he possessed and exercised command and control over subordinate troops stationed at Guantánamo Bay. Defendant Bumgarner is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

28. Defendant Army Col. Wade Dennis is a U.S. citizen. From March 2006 until the present,

Defendant Dennis was the Commander of the Joint Detention Group (JDOG) at Guantánamo, responsible for guarding the prisoners and providing security. During the relevant time period of March 2006 until November 16, 2006, he possessed and exercised command and control over subordinate troops stationed at Guantánamo Bay. Defendant Dennis is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

29. Defendant Esteban Rodriguez is a U.S. citizen and resident of Virginia. From July 2003 until 2006, Defendant Rodriguez was the civilian Director of the Joint Intelligence Group responsible for managing intelligence-gathering operations at Guantánamo and reporting to the Commander of JTF-GTMO. During his tenure, he possessed and exercised command and control over subordinate troops stationed at Guantánamo Bay. Defendant Rodriguez is sued in his individual capacity for ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses of Plaintiffs as hereinafter alleged.

30. Plaintiffs do not know the true names and capacities of defendants sued herein as Does 1-100 and therefore sue these defendants by fictitious names. Does 1-100 were the military and civilian

personnel who ordered, authorized, condoned, created methods and procedures for, exercised command responsibility over, conspired with, aided or abetted subordinates and/or directly or indirectly participated in the abuses of Plaintiffs as hereinafter alleged .

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67. Sometimes the guards exacted a severe punishment for minor infractions, such as looking at or talking to guards or another detainee, or even when he had done nothing. Sometimes as punishment, Mr. Celikgogus' mattress was removed, and he was forced to sleep on the cement. Sometimes, soldiers sprayed him with a chemical spray which burned his eyes and body and made it difficult to breathe. The agony was prolonged because guards would turn off the water in the cell. At other times, guards assaulted him with an industrial strength hose for an extended period of time. The strength of the water from the hose knocked him to the wall and soaked the contents of his cell, including his few personal items such as his Koran.

68. Having been deprived of all remnants of a normal human life, Mr. Celikgogus was left with only his religion, prayer and religious study. However, U.S. soldiers consistently placed substantial burdens on his ability to practice his religion and pray. On numerous occasions, his efforts to pray were banned or interrupted. He witnessed U.S. soldiers desecrate Korans. Soldiers prevented detainees from chanting the call to prayer, with guards either silencing the person who was

issuing the prayer call, or disrupting the call by playing loud music, imitating the call, screaming or hitting the bars of the cells to drown out the call. All detainees, then, would be prohibited from their normal prayer ritual without the communal call to prayer. During interrogations, interrogators prohibited Mr. Celikgogus from praying, despite his explicit requests to pray. Guards desecrated Korans and insulted Islam.

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73. Mr. Celikgogus never received any administrative, judicial or military hearing of any kind. After approximately twenty-three months in U.S. custody, he was transferred to Turkey.

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89. U.S. soldiers consistently placed substantial burdens on Mr. Sen's ability to practice his religion and pray. On numerous occasions, his efforts to pray were banned or interrupted. He witnessed U.S. soldiers desecrate Korans. Soldiers prevented detainees from making the call to prayer, with guards either silencing the person who was issuing the prayer call or disrupting the call by playing loud music, imitating the call, screaming or hitting the bars of the cells to drown out the call. During interrogations, an interrogator told Mr. Sen that he was in Guantanamo because he was Muslim and that we would remain there as long as he stayed Muslim. The same interrogator desecrated the Koran by throwing it on the ground under his foot. During another interrogation, Mr. Sen was forced to watch pornographic videos. When Mr. Sen was in

solitary confinement, guards occasionally forced pornographic magazines on him. These videos and magazines were particularly loathsome to his religious beliefs.

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94. Mr. Sen never received any administrative, judicial or military hearing of any kind. After approximately twenty-three months in U.S. custody, he was transferred to Turkey.

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112. On one occasion, a woman guard knocked Mr. Mert's Koran to the ground. When he spit at the guard who desecrated his Koran, an ERF team, in full riot gear, burst into his cell, knocked Mr. Mert to the ground and beat him. After shackling him and forcibly removing him from the cell, the soldiers applied a chemical spray and then water at high pressure to Mr. Mert. He was then taken to solitary confinement for approximately three weeks. While in solitary confinement, Mr. Mert was exposed to constant bright light and cold temperatures. He was only wearing shorts and was not given any blankets. During this time, he was prohibited from having a Koran. When Mr. Mert was removed from solitary confinement, a soldier mocked his religion by suggesting that Allah did not exist and that God is America. When Mr. Mert spit, he was again attacked by an ERF team and again returned to solitary confinement for approximately one month. Mr. Mert experienced another term of solitary confinement when he protested the abuse of another detainee.

113. Guards desecrated Korans and insulted Islam. Guards often prevented Mr. Mert and other detainees from having water required to perform ablutions. Soldiers disrupted the call to prayer by making sounds, imitating the call, screaming, hitting the bars of the cells and playing loud music both in the interrogation rooms and in the cells. Mr. Mert witnessed a soldier throw a Koran into the toilet. During room searches, guards sometimes knocked the Koran on the ground or stepped on it.

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120. Mr. Mert never received any administrative, judicial or military hearing of any kind. After nearly twenty-seven months in U.S. custody, he was transferred to Turkey.

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125. U.S. soldiers transferred Mr. Hasam by airplane to the military base in Bagram, Afghanistan in or around April or May 2002. In Bagram, soldiers prohibited Mr. Hasam from reading the Koran aloud, communicating with other detainees or praying communally.

126. Mr. Hasam was subjected to lengthy and brutal interrogations in Bagram. Because of a fear that he or his family would be persecuted in Uzbekistan if he disclosed details about his personal or family history, Mr. Hasam refused to disclose to his interrogators details about his life in Uzbekistan. On the third day of interrogations, U.S. soldiers subjected Mr. Hasam to physical abuse by forcing

him to do strenuous exercises, hitting him in the chest and repeatedly punching him in the stomach.

127. Subsequent to this beating, U.S. soldiers forced Mr. Hasam to undergo an operation against his wishes. He was never provided any accurate information about the purpose and type of operation being performed. In fact, he was admittedly given inaccurate information about the type of operation performed and, to this day, still does not know what operation was performed or why. Further, the operation did not improve the pain that he felt as a consequence of the beating.

128. After approximately two weeks in Bagram, Mr. Hasam was transferred to Kandahar. During the flight, Mr. Hasam was tied tightly though he had just undergone an operation. Soldiers pressed down on his back with their knees during the flight, causing immense pain.

129. Upon arrival in Kandahar, Mr. Hasam was stripped of his clothing with scissors and forced to undergo a body cavity search. Guards placed Mr. Hasam naked on a table and took photographs of him, mocked him and sat on him.

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135. Mr. Hasam was subjected repeatedly to lengthy terms of solitary confinement. After Mr. Hasam's first interrogation, he was placed in solitary confinement for approximately three weeks. During this time, he was released only once, and his release was for the purpose of undergoing a second interrogation. While in solitary confinement, Mr.

Hasam was denied the most basic items, including toilet paper and a mattress. Mr. Hasam was released from isolation for only two weeks when he was placed again in isolation for nearly one week.

136. Mr. Hasam was subjected to coercive interrogations that included physical abuse and threats to send him and his family to Uzbekistan to be tortured. Mr. Hasam's fourth interrogation lasted more than seven hours. During this prolonged interrogation, he was not permitted to eat, drink or relieve himself. An interrogator physically abused Mr. Hasam by pressing hard on his throat, pushing him backwards while he was shackled, and grabbing Mr. Hasam's jaw. Towards the end of this interrogation and while Mr. Hasam was chained to the floor, a female interrogator entered the room and came very close to Mr. Hasam. She touched his shoulder and held his waist, a taboo in his Islamic faith. After leaving Mr. Hasam alone and shackled to the floor for four hours, the male interrogator returned to the interrogation and accused Mr. Hasam of being a member of an Uzbek terrorist organization and threatened to send Mr. Hasam to Uzbekistan, implying that he knew that Mr. Hasam would be subjected to torture in Uzbek jails.

137. The day after this interrogation, U.S. officials gave three interrogators whom Mr. Hasam believes to be from Uzbekistan access to Mr. Hasam. U.S. soldiers brought Mr. Hasam to the interrogation room and attached Mr. Hasam's shackles to the floor. During this interrogation, Mr. Hasam's Uzbek interrogators threatened to take Mr. Hasam to Uzbekistan and torture him and his family.

138. Fearing for his own life and that of his family, Mr. Hasam took these threats seriously, especially since they were occurring in a U.S. military prison. In response, Mr. Hasam attempted suicide in his cell block by hanging himself with a bedsheet the morning after the interrogation.

139. Mr. Hasam survived the suicide attempt and was resuscitated in the medical clinic. While he was in the clinic, he was visited by a high-ranking military officer. However, on that very same day, he was returned by U.S. soldiers to be interrogated again by the same Uzbek officials in the same interrogation room. They again verbally abused him and threatened to take Mr. Hasam to Uzbekistan the following day. The subsequent day, Mr. Hasam was brought to another interrogation with the three Uzbeks and an American who identified himself as a U.S. government official. The American reiterated the threats of the Uzbeks that Mr. Hasam would be returned to Uzbekistan.

140. Guards repeatedly subjected Mr. Hasam to forced grooming, shaving his beard and hair, as punishment for alleged disciplinary infractions. On some occasions in which Mr. Hasam was forcibly groomed, he also was assaulted by being thrown on the asphalt, doused with a hose of pressurized water, and held to the ground. Guards physically abused Mr. Hasam regularly when they removed him from his cell, including by smashing his face to the floor or pressing their knees against his head. As another form of punishment, Mr. Hasam was strapped to the bed in his cell for several hours. On one occasion, when Mr. Hasam refused a blood test, soldiers sprayed chemical gas on him, stripped him naked

and tied him to the bed in his cell. They drew blood by force while Mr. Hasam was tied naked to the bed. After this, Mr. Hasam was held in an isolation cell with only his shorts for eight hours as cold air was piped in through the ceiling. In a later incident, Mr. Hasam received seven stitches in his head as a result of abuse that he received when guards attempted to remove his belongings from him while he was in solitary confinement. On this occasion, four guards entered his cell, sprayed him with a chemical and slammed him repeatedly against the wall.

141. Mr. Hasam participated in a CSRT in December 2004. Not until on or about May 8, 2005 was Mr. Hasam informed that the CSRT had declared him to be a non-enemy combatant. On or about August 18, 2005, Mr. Hasam was transferred to Camp Iguana with other non-enemy combatants, more than three years after he was detained in Guantánamo and eight months after his CSRT.

142. In Camp Iguana, soldiers continued to disrupt the religious practice of Mr. Hasam and other detainees by making noise during prayers. Mr. Hasam continued to be abused after being transferred to Camp Iguana, including with practices abhorrent to Mr. Hasam's religion, such as forced grooming and deprivation of the Koran.

143. While he was in Camp Iguana, and after a psychologist informed Mr. Hasam that he should never be held in solitary confinement, Mr. Hasam was subjected to solitary confinement in several instances. On one occasion, Mr. Hasam was subjected to two weeks of solitary confinement for the alleged disciplinary infractions of another

detainee. Despite having been declared a non-enemy combatant, Mr. Hasam was transported to solitary confinement in shackles and chains, blackened goggles and ear coverings. He was deprived of sleep during the two weeks because of constant, disruptive noise. On another occasion, for an alleged disciplinary infraction while Mr. Hasam was detained in Camp Iguana, Mr. Hasam was subjected to a body search and forcibly shaved, treatment highly objectionable to Mr. Hasam's Muslim faith. In solitary confinement, Mr. Hasam was exposed to extremely low temperatures and constant bright lights, making it difficult to sleep. Mr. Hasam was provided a blanket for only five hours every night. For the first two days in solitary confinement, guards prohibited Mr. Hasam from praying with others.

144. Mr. Hasam was forcibly medicated with pills and injections repeatedly while in Guantánamo. Mr. Hasam was denied access to family, visitors and, prior to 2005, legal counsel.

Plaintiff Hasam's Transfer from U.S. Custody

145. Though he was classified as a non-enemy combatant almost two years earlier, on November 16, 2006, Mr. Hasam was transferred from Guantánamo as if he was still a prisoner. He was wearing prison clothing, shackles on his feet and straps on his hands. He was tied to the seat of the airplane. On the plane, rows of soldiers, some armed, faced Mr. Hasam and the other detainees.

146. The U.S. soldiers who transported him turned Mr. Hasam over to the custody of Albanian officials. Mr. Hasam now lives in a refugee center

outside of Tirana, Albania. Mr. Hasam's transfer from Guantanamo Bay to Albania was widely publicized within the country, and he experiences discrimination as a result of his detention in Guantánamo and his transfer to a country of which he is an outsider stigmatized by U.S. government actions.

147. Mr. Hasam has ongoing physical, psychological and social problems resulting from his detention in U.S. custody. He has continuing medical problems stemming from his detention and he remains traumatized by his experiences in Bagram, Kandahar and Guantánamo. His physical problems include dental, knee, head and eye problems. Transported against his wishes to impoverished and isolated Albania, Mr. Hasam has limited job prospects and great difficulty establishing a community.

Abu Muhammad

Plaintiff Muhammad's Abduction in Pakistan

148. An Algerian refugee, Mr. Muhammad had been living in Pakistan and had received official recognition as a refugee by the United Nations High Commissioner for Refugees (UNHCR) when he was arrested by Pakistani and U.S. officials on or about May 26, 2002. A medical doctor by training, Mr. Muhammad had been working as a schoolteacher and living with his pregnant wife and five children.

149. Pakistani officials came to his house searching for a man of a different nationality. However, after the Pakistani officials left the house,

they returned with U.S. officials and they arrested Mr. Muhammad and confiscated personal belongings and family documents, including Mr. Muhammad's laptop computer, critical family documents and other personal effects. Mr. Muhammad was detained in a jail in Pakistan for approximately nine days.

Plaintiff Muhammad's Detention in U.S. Custody in Afghanistan

150. On or about June 5, 2002, Mr. Muhammad was shackled, hooded and transferred to the U.S. military base in Bagram, Afghanistan. He was transported on the floor of an airplane and chained at the waist with a rope connected to the wall of the plane that was tightened during the trip. U.S. soldiers lifted Mr. Muhammad by his neck whenever he leaned back.

151. Upon arrival in Bagram, Mr. Muhammad, connected to the other detainees by a string, suffered cutting on his arm. Soon after arrival, guards forcibly stripped Mr. Muhammad of his clothing. Mr. Muhammad was subjected to full body searches between five and ten times in Bagram with no privacy.

152. Mr. Muhammad was severely sleep deprived in Bagram. Guards blasted loud music at night and shone constant bright lights at the detainees.

153. Several days after Mr. Muhammad arrived in Bagram, despite his resistance, guards forcibly shaved his beard, an affront to his Muslim faith. He was forcibly shaved again prior to

departure for Guantánamo. Guards sometimes desecrated Mr. Muhammad's Koran, by throwing it in the toilet or the shower. Guards often screamed at Mr. Muhammad and threatened him if he attempted to touch the Koran.

154. Mr. Muhammad was detained in a tent fenced in with barbed wire. Guards prohibited detainees from speaking to one another. Sometimes, guards forced Mr. Muhammad and other detainees to lie on the ground motionless and threatened to shoot them if they moved. Guards punished Mr. Muhammad and other detainees by forcing them to stand hooded in stress positions for extended periods of time or in an isolation block. When detainees spoke, stood, or prayed aloud or collectively, they were often subjected to this punishment. Detainees also were punished for uttering the call to prayer. Mr. Muhammad was punished nearly every day in Bagram, sometimes for standing, talking or praying. On one occasion, a guard grabbed Mr. Muhammad's neck through the door of the fence, put a hood on his head, and left him shackled there for hours.

155. Mr. Muhammad was interrogated three times in Bagram. During his last interrogation, Mr. Muhammad's interrogator informed him that he would likely be sent back to Pakistan. Mr. Muhammad took this to mean that the U.S. officials had no more interest in detaining him. Instead, he was sent to Guantánamo where he stayed for four and a half years.

156. On or about August 4, 2002, after Mr. Muhammad was detained for approximately two months in Bagram, guards transferred Mr.

Muhammad to Guantánamo. Guards hooded him, covered his ears and eyes, shackled his hands tightly to his waist, did a forced body cavity search and dressed him in an orange jumpsuit. Guards forcibly medicated Mr. Muhammad against his wishes prior to the flight. The medication altered his consciousness and made it difficult for Mr. Muhammad to pray. Mr. Muhammad was transported to Guantánamo on a cargo plane which made a temporary stopover where the detainees were forced to change planes. During the transfer, Mr. Muhammad was abused.

Plaintiff Muhammad's Detention in Guantánamo Bay

157. On arrival at Guantánamo, guards transferred Mr. Muhammad to a receiving area in a vehicle. During the transfer, they forced Mr. Muhammad into a stress position and beat him repeatedly in the head, neck and back. After arriving, Mr. Muhammad was examined and forced to strip. A guard took photographs of him naked, wearing only shackles on his hands and feet. Another guard subjected Mr. Muhammad to another forced body cavity search.

158. After a first long interrogation in Guantánamo, guards brought Mr. Muhammad to an isolation cell where he was prohibited from communicating with others and the room was made extremely cold with strong air conditioning. During his first week in Guantánamo, a guard grabbed Mr. Muhammad's hand painfully when he collected tablets for an illness.

159. After one week in isolation, Mr. Muhammad was interrogated by a U.S. official who asked Mr. Muhammad to work for the U.S. Central Intelligence Agency (CIA). When Mr. Muhammad refused, the official promised to repeat the proposal the following week. He threatened Mr. Muhammad that he would stay in Guantánamo forever if he rejected the proposal. Mr. Muhammad again refused his offer the following week.

160. When guards removed Mr. Muhammad from his cell, they conducted searches and exposed him to unique abuses. Mr. Muhammad was also punished for non-cooperation with an interrogator. On one occasion, when Mr. Muhammad refused to speak with an interrogator, he was left chained in an extremely cold room for approximately seven hours. He was denied food during this period. Approximately two days after this interrogation, Mr. Muhammad was put in solitary confinement for several weeks without any personal effects, including his Koran. He was subjected to extremely cold temperatures without a blanket to protect himself.

161. Guards were intentionally disruptive with sound and light while Mr. Muhammad and others were praying. During Mr. Muhammad's first year at Guantánamo, guards did not provide Mr. Muhammad and other detainees with food at the appropriate time to break the fast during Ramadan.

162. On several occasions, guards conducted searches of the cells at night, depriving Mr. Muhammad and other detainees of sleep. Guards left the detainees shackled outside the cells for many hours as they conducted the searches accompanied

by dog. The dogs barked constantly at Mr. Muhammad and the others.

163. Mr. Muhammad requested medical care for an ulcer that developed while at Guantánamo, but did not receive it. In addition, Mr. Muhammad developed severe dental problems while at Guantánamo and did not receive prompt or appropriate treatment despite serious pain and repeated urgent requests. Because of this delay, three of Mr. Muhammad's teeth rotted and fell out. In a subsequent dental visit in Guantánamo, Mr. Muhammad was provided with replacement teeth that did not last an hour. When Mr. Muhammad was transferred to Albania, a dentist informed him that two bridges had to be replaced because they were rotten.

164. Mr. Muhammad refused to participate in his December 2004 Combatant Status Review Tribunal ("CSRT") hearing because the government refused to allow him to present as a witness employees of the UNHCR who knew of his refugee status. Even without Mr. Muhammad's participation, the CSRT recognized Mr. Muhammad to be not an enemy combatant. However, Mr. Muhammad was not notified of this finding until five months later, on or about May 10, 2005.

165. Mr. Muhammad remained in U.S. custody four and a half years after he was captured, two years after a Defense Department tribunal recognized him to be not an enemy combatant, and eighteen months after he was told the results of this hearing. Mr. Muhammad continued to be shackled,

physically searched and insulted after his non-enemy combatant designation.

166. His living conditions did not substantially change. Even after having been classified as a non-enemy combatant, Mr. Muhammad always was subjected to a search of his body prior to being transported anywhere within Guantánamo. His wrists and ankles were shackled, and he was sometimes forced to wear blackened goggles and ear coverings. On or about August 18, 2005, Mr. Muhammad and the remaining non-enemy combatants at Guantánamo were moved to Camp Iguana. In Camp Iguana, Mr[sic] Muhammad and the other detainees were constantly monitored by several video cameras, including one in or near the bathrooms.

167. Moreover, guards continued to disrupt his religious practice. On or about June 2005, while Mr. Muhammad was outside of his cell, guards searched the cells of those labeled non-enemy combatants and desecrated some of their Korans. In Camp Iguana, soldiers disrupted prayer by making noise or mocking the religious practices of the detainees. On one occasion while Mr. Muhammad was in Camp Iguana, soldiers confiscated the Korans of detainees in Camp Iguana.

168. While Mr. Muhammad was detained in Camp Iguana, and even though Mr. Muhammad was known to be a refugee from his home country, Guantánamo camp officials allowed Mr. Muhammad to be interrogated by Algerian officials.

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173. Mr. Muhammad has ongoing physical, psychological and social problems resulting from his detention in U.S. custody. He has continuing medical problems stemming from his detention and he remains traumatized by his experiences in Bagram and Guantánamo. His physical problems include dental, stomach and dermatological problems. Transported against his wishes to impoverished and isolated Albania, Mr. Muhammad has limited job prospects, great difficulty establishing a community and significant burdens to reunite with his family. Mr. Muhammad now lives in a refugee center outside of Tirana. He feels he cannot bring his family to Albania because he is unable to support them financially and his children cannot get an education in Albania in their native languages of French or Arabic. A medical doctor by training, Mr. Muhammad cannot practice medicine in Albania.

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177. Defendants were aware, or should have been aware, that Plaintiffs were subject to prolonged arbitrary detention, torture, cruel, inhuman or degrading treatment, violations of their religious rights, denials of their rights to consular access and deprivations of due process while imprisoned at Kandahar and Guantánamo. Defendants took no steps to prevent the infliction of torture or these other forms of mistreatment to which Plaintiffs were subject nor did Defendants investigate and punish the perpetrators of these abuses. By so doing, Defendants failed in their legal obligations as commanders, under domestic and international law, to ensure that subordinates never perpetrate abuses against detainees in the custody of the U.S. military.

178. Instead, Defendants authorized, mandated, implemented, encouraged, condoned, acquiesced in and/or failed in their command obligations to prevent the infliction of abuses, including violations of the religious rights, the right to consular access, and the right to due process, of the Plaintiffs. Defendant Rumsfeld and other defendants in the chain of command intended for the techniques to be practiced on Plaintiffs, or knew, or should have known, of the techniques practiced on Plaintiffs – including beatings, short-shackling, sleep deprivation, injections of unknown substances, subjection to extremes of cold or heat and light and dark, hooding, stress positions, isolation, forced shaving, forced nakedness, forced sexual contact and intimidation with vicious dogs and threats, many in concert with each other. Defendants failed to take all necessary measures to investigate and prevent these abuses, or to punish personnel under their commands for committing these abuses.

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182. In October 2002, Defendant Dunlavey requested permission of Defendant Rumsfeld to make interrogations in Guantanamo more aggressive. Defendant Miller, who assumed command from Defendant Dunlavey, also pushed for the use of more aggressive techniques. Defendant Rumsfeld thereafter approved numerous interrogation methods to which Plaintiffs were subjected that are clearly illegal under U.S. law. On or around December 2, 2002, Defendant Rumsfeld signed a then-classified memorandum approving hooding, prolonged forced "stress positions" for up to four hours, forced nudity, intimidation with dogs or

other "exploitation of phobias," prolonged interrogations up to twenty hours, deprivation of light, forced grooming, isolation, and "mild, non-injurious physical contact." In January, 2003, he rescinded the blanket approval of these methods which violate domestic and international law, but the methods could be carried out, based on specific approval.

183. In April 2003, after a "Working Group Report" recommended the continued use of abusive interrogation methods, Defendant Rumsfeld issued a new set of recommended techniques, requiring his explicit approval for four techniques that violated the Geneva Conventions and/or customary international law, including the use of intimidation, removal of religious items, threats and isolation. The April 2003 report, however, officially withdrew approval for unlawful actions that had been ongoing for months, including hooding, forced nakedness, shaving, stress positions, use of dogs, and "mild, non-injurious physical contact." Nevertheless, these illegal practices continued to be employed in Guantánamo, which Defendants intended, or knew or should have known were occurring. Defendants failed in their command obligation to prevent these abuses and investigate and punish those responsible.

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REQUEST FOR RELIEF

Wherefore Plaintiffs each demand judgment against Defendants jointly and severally, including:

1. Declaring that Defendants' actions, practices, customs, and policies, and those of all persons acting on their behalf and/or their agents and/or employees, alleged herein, were illegal and violate the rights of Plaintiffs as to each applicable count;

2. Declaring that each individual Plaintiff's detention was unjustified, unconstitutional, and unlawful;

3. Awarding compensatory and punitive damages in an amount that is fair, just and reasonable, including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper; and

4. Ordering such further relief as the Court considers just and proper.

A jury trial is demanded on all issues.

Dated: March 7, 2008

/s/ Shayana Kadidal
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STATUTORY PROVISIONS INVOLVED

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.

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3. Westfall Act (28 U.S.C. § 2679)

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(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.

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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—

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(k) Any claim arising in a foreign country.

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

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.

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

(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.

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42 U.S.C. § 2000bb-2

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercised, as defined in section 2000cc-5 of this title.

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6. The Dictionary Act (1 U.S.C. § 1)

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

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the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

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