UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| SHAFIQ RASUL, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>DONALD RUMSFELD, *et al.*<br><br>Defendants. | Civ. No. 04-01864 (RMU)<br>(Judge Urbina) |

**REPLY MEMORANDUM IN SUPPORT OF**
**THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS**

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## FEDERAL CASES



* - Indicates those cases upon which the Individual Defendants chiefly rely.

* - Indicates those cases upon which the Individual Defendants chiefly rely.

* - Indicates those cases upon which the Individual Defendants chiefly rely.

* - Indicates those cases upon which the Individual Defendants chiefly rely.

* - Indicates those cases upon which the Individual Defendants chiefly rely.

* - Indicates those cases upon which the Individual Defendants chiefly rely.

## FEDERAL STATUTES



## OTHER SOURCES



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As we demonstrated in our opening memorandum, 28 U.S.C. § 2679(d) provides that the exclusive remedy for plaintiffs' international law claims is a suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80. With respect to plaintiffs' constitutional claims, special factors counsel hesitation in implying a remedy here. Although plaintiffs seek to recover damages from the personal resources of U.S. Secretary of Defense Donald Rumsfeld and ten senior U.S. military officials whom plaintiffs allege comprised the chain of command for the U.S. facility at Guantanamo Bay, Cuba, at heart their *Bivens* claims represent a direct challenge to the Executive Branch's constitutional duty and authority to conduct war, protect national security, and formulate foreign policy. Such claims raise grave separation of powers concerns, and Supreme Court precedent makes clear that courts should not extend the non-statutory *Bivens* remedy to this new context. In any event, these constitutional claims should be dismissed on qualified immunity grounds because plaintiffs have not alleged the violation of any constitutional right, let alone a clearly-established constitutional right. Finally, qualified immunity bars plaintiffs' claims under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq*., because it was (and is) not clearly established that RFRA has extraterritorial application.

## I. Substitution Under the *Westfall* Act is Appropriate

### A. Since the Scope of Employment Inquiry Presents a Question of Law, Discovery is Unnecessary

Plaintiffs declare that scope of employment inquiries always raise an issue of fact, and that the D.C. Circuit has "directed that district courts hold an evidentiary hearing, regardless of the content of the certification." Pls.' Opp. at 15 (citing *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003)). That is not an accurate summary of *Stokes v. Cross* or of the law of this Circuit generally. Instead, it

is well-established that where, as here, defendants seek dismissal based on the facts alleged in the complaint, scope of employment presents a purely legal question. *See Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995); *see also Hoston v. Silbert*, 681 F.2d 876, 879 (D.C. Cir. 1982) ("Whether given acts are within the scope of employment is ultimately a legal question.").[1]

Since the instant scope inquiry presents a question of law, it would be inappropriate to hold an evidentiary hearing or otherwise conduct discovery. *See Schneider v. Kissinger*, 310 F.Supp.2d 251, 264 n.14 (D.D.C. 2004), *appeal docketed*, No. 04-5199 (D.C. Cir. oral arg. held March 11, 2005) ("Given that the Court accepts as true the plaintiffs' *factual* assertions . . . there is no need for an evidentiary hearing to resolve this [scope of employment] legal issue."). Even *Stokes,* upon which plaintiffs rely for their assertion that they are entitled to discovery, confirms that an evidentiary hearing would be inappropriate. After specifically recognizing that "not every complaint will warrant further inquiry into the scope-of-employment issue," the court held that discovery is necessary only if a scope inquiry involves a disputed issue of fact. *See Stokes*, 327 F.3d at 1215-16.[2] Where plaintiffs have not met their burden of raising a material dispute by pleading sufficient facts that, if true, would rebut the certification, they are not entitled to discovery. *Id.* at 1215.

Addressing the scope inquiry as a question of law where plaintiffs' allegations have been accepted as true spares federal employees the burdens of unnecessary discovery. *See id.* at 1216.

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[1] Defendants accept the truth of the allegations in the complaint for purposes of this motion only. Should this case survive the motion to dismiss, defendants would vigorously contest plaintiffs' allegations.

[2] *See also Koch v. United States*, 209 F.Supp.2d 89, 92 (D.D.C. 2002) ("[o]nly if the district court concludes that there is a genuine issue of material fact to the scope-of-employment issue should the federal employee be burdened with discovery and an evidentiary hearing").

This is in keeping with the purpose of the *Westfall* Act, which is to confer on federal employees a form of absolute immunity from suit. *United States v. Smith*, 499 U.S. 160, 163 (1991); *Haddon*, 68 F.3d at 1423. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (citation omitted)). For these reasons a government official is entitled to a pre-discovery resolution of any substantial claim to immunity from suit presented by way of a Rule 12(b)(6) motion to dismiss, *see Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996), and immediate appeal of a denial of certification and substitution. *See Mathis v. Henderson*, 243 F.3d 446, 448 (8th Cir. 2001).

Defendants have accepted, for purposes of this motion only, the truth of the allegations in the complaint. In so doing, they assert that the complaint fails to describe conduct outside the scope of their employment. This presents a pure question of law that does not require discovery.

**B. Plaintiffs Have Failed to Rebut the Scope Certification by the Attorney General's Designee**

Plaintiffs argue that the certification filed on behalf of defendants here is "insufficient" as a matter of law because it "contradicts" what they describe as the "official position of the United States Department of State." Pls.' Opp. at 9, 11. They maintain that this "official position," which they have created by selecting a few words from a 1999 report by the U.S. Department of State, determines whether the Secretary of Defense and the military chain of command acted within the scope of their employment here. *See id.* at 11-12. At the same time, they assert that a second, more contemporary statement by the federal government, namely the scope certification submitted by the Attorney

General's designee, is entitled to no particular evidentiary weight. *See id.* at 15. It is unclear why plaintiffs believe that one "official position" should outweigh another. More importantly, it is well-settled that, for purposes of substitution, scope of employment turns on "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), which plaintiffs allege was the District of Columbia. *See Haddon*, 68 F.3d at 1423; Compl., ¶ 14.

The certification of scope provided by the Attorney General's designee is entitled to "*prima facie*" effect. *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). To rebut this certification, plaintiffs bear the burden of establishing that the official acted outside the scope of his employment, as determined by local *respondeat superior* law. Here, the District of Columbia looks to the Restatement (Second) of Agency (1958) to define scope of employment. *See Stokes*, 327 F.3d at 1215. Under the Restatement,

> 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 unexpected by the master.

*Id.* at 1216 (citing Restatement (Second) of Agency § 228(1)).

The Restatement test "is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Stokes*, 327 F.3d at 1216. It excludes only those "actions committed solely for [the servant's] own purposes." *Id.* District of Columbia law "liberally construes the doctrine of *respondeat superior*," *id.*, and the courts accordingly have found a wide range of conduct to be within the scope of employment. *See Schneider*, 310 F.Supp.2d at 265.[3]

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[3] "*Weinberg* is a prime example of the breadth of the term 'scope of employment.' In that case, the D.C. Court of Appeals sustained a jury verdict against the owners of a laundromat when an employee

Application of the Restatement test confirms that defendants acted within the scope of their employment. The first prong asks whether the conduct at issue is of the kind that the employee was employed to perform. To the extent that plaintiffs offer an analysis of the Restatement, they focus entirely on this first criterion. *See* Pls.' Opp. at 9. Their argument essentially is that a violation of the law cannot possibly be within scope. *See id.* at 10. This argument "is based on an erroneous interpretation of the term 'scope of employment.'" *Schneider*, 310 F.Supp.2d at 265.

> The plaintiffs' theory that a violation of international law always falls outside the scope of a federal official's employment misconstrues 'the scope' of this term. It is well settled that an employee is capable of committing a variety of illegal or tortious acts for which his employer may be held liable, even though the employer did not hire him for that purpose. *** [Defining] scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employee or his boss.

*Id.* (original emphasis). Plaintiffs' efforts to defeat *Westfall* Act immunity solely by reference to their own legal characterizations of the conduct at issue have no basis in law or policy. As the D.C. Circuit has observed in a similar context, "if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be 'completely abrogate[d].'" *Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (quotations omitted). That is no less true when immunity is claimed under the *Westfall* Act. *See, e.g., Johnson v. Carter*, 983 F.2d 1316, 1323 (4th Cir. 1993). Thus, contrary to plaintiffs' argument, government officials do not act outside the scope of employment even

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shot a patron in the face following an argument about missing shirts. The Court held that, as a matter of law, a reasonable jury could conclude that the 'employee was acting within the scope of his employment' when he committed the shooting." *Schneider*, 310 F.Supp.2d at 265 n.15 (citing *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981)).

assuming they have acted illegally.[4]

The recent decision in *Schneider v. Kissinger*, 310 F.Supp.2d at 257, supports this analysis. In *Schneider*, plaintiffs challenged the government's certification that National Security Advisor Henry Kissinger acted within scope when he allegedly committed egregious human rights violations in support of a coup d'etat in Chile. *Id.* at 257. In rejecting that challenge, this Court found that Kissinger acted within scope because his conduct affected the establishment of a socialist government in Chile which "would have had a substantive impact on U.S. foreign policy and would naturally implicate national security concerns for which Dr. Kissinger had some responsibility." *See id.* at 266.[5]

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[4] Plaintiffs also argue that defendants' certification has been "flatly rejected" by what they call "closely analogous cases." Pls.' Opp. at 9. These cases are irrelevant, however. They do not address the term "scope of employment" as it is defined under the *Westfall* Act, but focus instead on the scope of a foreign official's "authority" as defined by the Foreign Sovereign Immunities Act (FSIA). *See, e.g., In re: Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175 (D. Mass. 1995); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 670 (D.D.C. 1980). There is no evidence that "scope of authority" in the FSIA means the same thing as "scope of employment" under the *Westfall* Act. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, 110 (6th ed. 2000) (noting limited value of comparing language in two distinct statutes); *cf. Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 867 (9th Cir. 1992) (improper to apply "narrow 'scope of authority' test" instead of the "broader 'scope of employment'" test when considering scope challenges under the FTCA). In addition, the purposes of the FSIA and the FTCA are different. The FSIA was designed to reduce "the foreign policy implications of sovereign immunity determinations," *Letelier*, 488 F.Supp. at 670, while the *Westfall* Act amended the FTCA "to assure that the decisions of federal public servants in the course of their work will not be adversely affected by the fear of personal liability for money damages and of the burden of defending damage liability claims." *Melo v. Hafer*, 13 F.3d 736, 744 (3d Cir. 1994). Finally, contrary to plaintiffs' suggestion, even in the FSIA context there is no general exception to immunity based on alleged violations of *jus cogens* principles of international law by sovereign nations, *see Princz v. F.R.G.*, 26 F.3d 1166, 1173-75 (D.C. Cir. 1994), or heads of state, *see He v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004), and plaintiffs have offered no basis to infer such an exception to the *Westfall* Act.

[5] Plaintiffs' attempt to distinguish *Schneider* is unpersuasive. They say *Schneider* is different because the plaintiffs there "affirmatively pleaded that the conduct complained of was authorized and ordered by the President." Pls.' Opp. 18 (emphasis added). The opposition does not describe this "conduct," but implies that President Nixon authorized the specific acts attributed to Dr. Kissinger. In truth, the *Schneider* plaintiffs alleged only that President Nixon issued a general command "'that the

Here, defendants include a cabinet officer and several of the most senior members of the military chain of command. Acting pursuant to congressional authorization and presidential order, the military detained individuals captured during hostilities and transferred some of them to Guantanamo Bay. *See, e.g., Khalid v. Bush*, 335 F.Supp.2d 311, 319 (D.D.C.), *appeal docketed*, No. 05-5063 (D.C. Cir. notice of appeal Mar. 2, 2005) (Congress "gave the President the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks"). This served the vital objectives of gathering intelligence to further the overall war effort and preventing combatants from continuing to aid our enemies. That the military chain of command developed plans for the detention and interrogation of these individuals is to be expected. Assuming, for purposes of the instant motion only, that the conduct alleged in the complaint transpired as a result of these plans, it must be considered under the Restatement and District of Columbia law on *respondeat superior* to be of "the same general nature" or "incidental to" authorized conduct. *See, e.g., Schneider*, 310 F.Supp.2d at 265 (finding Kissinger's allegedly tortious conduct to be "incidental"

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necessary steps be taken to prevent Allende from becoming President of Chile'" and instructed the CIA to "'play a direct role in organizing a military coup d'etat in Chile.'" *Schneider*, 310 F.Supp.2d at 255 (quotation omitted). The *Schneider* plaintiffs did not affirmatively plead that the President authorized Dr. Kissinger to kidnap General Schneider, the commander-in-chief of the Chilean Army, much less engage in the other tortious conduct identified in the complaint: "summary execution; torture; cruel, inhuman, or degrading treatment; arbitrary detention; wrongful death; [and] assault and battery." *Id.* at 257. Rather, the *Schneider* plaintiffs alleged that President Nixon established a general purpose and left the specifics to Dr. Kissinger, whose tortious conduct, they unsuccessfully argued, exceeded the scope of his employment because it had not been approved by the President. *Id.* This is analogous to the case at bar, where the military chain of command acted pursuant to congressional authorization and presidential order. *See* Auth. for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224; Memorandum from the President to the Vice President, *et al.*, Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), at http://www.library.law.pace.edu/research/020207_bushmemo.pdf.

to his cabinet duties and his orders from the President).[6]

Thus, plaintiffs' claims that the alleged tortious conduct was "illegal," Pls.' Opp. at 12, contrary to the "official position" of the United States, *id.* at 11, or not specifically "ordered by the President," *id.* at 18, all are simply immaterial to the scope inquiry. The first criterion of the Restatement test asks only whether the employees' actions were "incidental" to their employment. *See Haddon*, 68 F.3d at 1423; *see also id.* at 1425 (defendant was not within scope because his "conduct was completely unrelated to his official responsibilities"). Where "the forbidden conduct is merely the servant's own way of accomplishing an authorized purpose, the master cannot escape responsibility no matter how specific, detailed and emphatic his orders may have been to the contrary." W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 70 at 503 (1984) (footnote omitted).

There can be no dispute regarding the remaining three factors in the Restatement test, and plaintiffs' opposition makes no attempt to address them. The complaint shows that defendants acted within the authorized time and space limits of their employment. *See, e.g.,* Compl., at 7-9 (while serving as Secretary of Defense, Donald Rumsfeld "commissioned a 'Working Group Report,'" "signed a memorandum," and "issued a new set of recommended interrogation techniques"). Moreover, plaintiffs acknowledge that defendants' alleged conduct took place as part of an effort to obtain information relevant to the war on terrorism. *See* Pls.' Opp. at 7. The congressional authorization and

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[6] *See also Haddon*, 68 F.3d at 1424 (an act is "incidental to" authorized conduct if it is "a 'direct outgrowth' of an employee's instructions or job assignment"); *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981) (laundromat worker could be found to be within scope when he shot customer during dispute over missing shirts because the "assault arose out of the transaction which initially brought [customer] to the premises . . . and was triggered by a dispute over the conduct of the employer's business" and thus was "the outgrowth of a job-related controversy") (cited in *Haddon*, 68 F.3d at 1425).

presidential order referenced above confirms that this alleged conduct by defendants was actuated by a desire to serve their employer. This satisfies the third criterion in the Restatement test. Finally, the alleged use of intentional force by the military could not have been unexpected. One need only consider the challenges inherent in the detention of potentially violent individuals and the exigencies of national defense to appreciate that the intentional use of force might be necessary to operate a maximum security detention facility during war-time.

The foregoing demonstrates that, based on the facts alleged in the complaint, defendants acted within the scope of their employment. The United States accordingly should be substituted in place of the federal employees as the defendant for plaintiffs' international law claims. Following the substitution of the United States in accordance with the *Westfall* Act, the claims asserted in Counts I-IV are "subject to the limitations and exceptions applicable to" FTCA claims. 28 U.S.C. § 2679(d)(4). This includes 28 U.S.C. § 2675, which provides, as a jurisdictional prerequisite, 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 claims all have been finally denied by the agency in writing." Since plaintiffs have not exhausted their administrative remedies, this Court lacks jurisdiction to hear the claims set forth in Counts I-IV.

**C. There is No Support for Plaintiffs' Novel Reading of the *Westfall* Act**

Plaintiffs argue that their "*entire civil action* is exempt" from 28 U.S.C. § 2679(b)(2), the exclusive remedy provision of the FTCA. Pls.' Opp. at 19 (original emphasis). According to plaintiffs, the use of the phrase "civil action" instead of the word "claim" in 28 U.S.C. § 2679(b)(2) means that the United States may not be substituted as the defendant for their international law claims because their

complaint also contains a constitutional claim. *Id.* This novel argument, which runs counter to almost two decades' worth of decisions on the subject and is wholly inconsistent with the legislative intent of section 2679, does not merit serious consideration.

When faced with complaints that contain both common law and constitutional claims, the courts have consistently permitted substitution of the United States on common law tort claims. *See, e.g., Simpkins v. Dist. of Columbia Gov't*, 108 F.3d 366, 368 (D.C. Cir. 1997) (after noting "any civil action" language in 28 U.S.C. § 2679, opposition to scope certification, and the existence of *Bivens* claims, the D.C. Circuit affirmed the substitution of the United States in place of the individual defendant for all common law claims); *In re Turner*, 14 F.3d 637, 639 (D.C. Cir. 1994) (affirming an award of costs against the United States for the improper failure to certify scope of employment under 28 U.S.C. § 2679 in a case involving constitutional claims); *Richardson v. U.S. Dep't of Interior*, 740 F.Supp. 15, 20 (D.D.C. 1990) (where plaintiff asserts both common law and *Bivens* claims, substitution of the United States on all common law claims is appropriate); *Krieger v. U.S. Dep't of Justice*, 2005 WL 555418 *1-2 (D.D.C.) (same); *Greer v. Mosbacher*, 1992 WL 84900 *2 (D.D.C.) (same).[7] Against this backdrop, it is beyond cavil that the substitution of the United States "under the [*Westfall*] Act is evaluated on a count by count basis rather than against the complaint as a whole." *Michalik v.*

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[7] *See also Lyons v. Brown*, 158 F.3d 605, 607-08 (1st Cir. 1998) (addressing scope of employment and substitution of United States as defendant for common law claims in mixed Title VII/ state law action); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 506 (2d Cir. 1994) (substituting United States for all FTCA claims in a mixed *Bivens*/ FTCA complaint); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1142-44 (6th Cir. 1996) (substituting United States as defendant on common law claims even though plaintiff had also brought claims under both the Sherman Act and the Lanham Act); *Duffy v. United States*, 966 F.2d 307, 309 (7th Cir. 1992) (substitution of the United States in mixed *Bivens*/ FTCA complaint); *Pelletier*, 968 F.2d at 867 (same).

*Hermann*, 2002 WL 31844910 *3 (E.D. La.) (after reviewing each claim separately, court substituted United States as defendant for common law claims, but not for claims brought under 28 U.S.C. § 1983) (citing *Anderson v. Gov't of the Virgin Islands*, 199 F.Supp.2d 269 (D.V.I. 2002)); *cf. Lyons*, 158 F.3d at 607 ("Where a single case involves multiple claims, certification [and substitution] is properly done at least down to the level of individual claims and not for the entire case viewed as a whole. This is evident from *Behrens* [*v. Pelletier*, 516 U.S. 299 (1996),] itself as well as other cases approving certification of some claims but not others.") (citations omitted).[8]

Plaintiffs fail to cite a single case that uses a different interpretation of the phrase "civil action" in 28 U.S.C. § 2679. Instead, they offer only their own unique interpretation of "civil action" as they contend it is used outside the context of section 2679.[9] *See* Pls.' Opp. at. 20. Plaintiffs' discussion of other statutes is of "little relevance" to the interpretation of 28 U.S.C. § 2679 because "[e]very statute is an independent communication, for which either the intended or understood meaning may be different." 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, 110 (6th ed. 2000).

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[8] Other courts have recognized that substitution of the United States for all common law claims has "no effect on [plaintiff's] constitutional claims." *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (denying scope challenge and substituting United States in place of individual defendants for all FTCA claims in a complaint that asserted both constitutional and common law tort claims); *see also Smith*, 499 U.S. at 180 ("Senator Grassley, one of the sponsors of the [*Westfall* Act], explained: . . . '[the Act] does not have any effect on the so-called *Bivens* cases or Constitutional tort claims.'") (citing 134 Cong.Rec. 29933 (1988)).

[9] Plaintiffs' attempt to create a distinction between "claims" and "civil actions" under 28 U.S.C. § 2679 cannot even withstand the weight of their own lawsuit. 28 U.S.C. § 2679(b)(2) provides that the exclusive remedy provision does not apply to "a civil action . . . which is brought for a violation of the Constitution." (emphasis added). Plaintiffs assert that their "civil action" fits within this exception, but they fail to mention that their self-described "constitutional civil action" also contains claims for violations of international law. The opposition offers no explanation as to how plaintiffs decided their "action" was "brought for" constitutional, as opposed to international law, violations.

Even plaintiffs' own citations undermine their attempt to create a new definition for the term "civil action" in 28 U.S.C. § 2679. In *Finley v. United States*, for example, the Supreme Court found that the "change [in the language of the FTCA's jurisdictional grant] from 'claim against the United States' to 'civil actions on claims against the United States," did not affect the substance of the provision. 490 U.S. 545, 553-54 (1989). In reaching this conclusion, the Court rejected an argument analogous to the one plaintiffs make here. *Id.* at 554 (dismissing plaintiffs' theory that the phrase "civil action on claims against the United States" permitted assertion of jurisdiction "over any 'civil action,' so long as the action includes a claim against the United States") (original emphasis).

Plaintiffs' unprecedented parsing of "civil action" also runs contrary to the purpose of the *Westfall* Act.[10] Congress passed the Act after the Supreme Court's decision in *Westfall v. Erwin*

> seriously eroded the common law tort immunity previously available to federal employees and created an immediate crisis involving the prospect of personal liability, and [Congress feared] that the threat of protracted personal tort litigation would seriously undermine the morale and well-being of federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the [FTCA] as the proper remedy for federal employee torts.

*Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (citing *United States v. Smith*, 499 U.S. at 163). The "purpose of the *Westfall* Act [was] to assure that the decisions and conduct of federal public servants in the course of their work will not be adversely affected by fear of personal liability for

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[10] The legislative history also does not support plaintiffs' novel interpretation of 28 U.S.C. § 2679. It instead confirms that Congress intended to permit substitution of the United States as the defendant for common law claims even in cases where plaintiffs have asserted constitutional claims. "The remedy against the United States would be exclusive, and would preclude any action or civil suit for money damages from being lodged against the Federal employee or his estate based upon the same conduct. It also would make it clear that the remedy provided in this legislation does not extend to constitutional torts or to causes of action specifically authorized to be brought against an individual by another statute of the United States." H.R. Rep. 100-700, *8, 1988 U.S.C.C.A.N. 5945, **5952 (emphasis added).

money damages and of the burden of defending damage liability claims." *Melo v. Hafer*, 13 F.3d 736, 744 (3d Cir. 1994).[11] To achieve this purpose, Congress provided for the substitution of the United States as the defendant for all common law torts committed by federal employees acting within the scope of their employment. Given its understanding that federal employees faced a "crisis" after *Westfall v. Erwin*, it is plain that "Congress did not intend for the *Westfall* Act to make substitution less available." *Id.* at 746.

Under plaintiffs' reading of 28 U.S.C. § 2679, substitution would rarely occur. Plaintiffs would need only to append a meritless constitutional claim to their complaint and thereby deny federal employees the opportunity to assert their absolute immunity under the exclusive remedy provision. This would reduce the *Westfall* Act to a pleading exercise, which is not the result Congress intended. *See id.* Plaintiffs' interpretation of the term "civil action" consequently cannot stand.[12]

**D. Substitution of the United States as the Defendant for Plaintiffs' International Law Claims is Appropriate**

Plaintiffs have asserted, under the Alien Tort Statute (ATS), damages claims against defendants for violation of international law, but these claims must instead proceed against a different defendant, the

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[11] Plaintiffs assert, in reliance on a committee report, that "Congress' focus in enacting the Westfall Act was the seriousness of the defendant's misconduct, rather than the specific claims or causes of action that a plaintiff might bring." Pls.' Opp., at 21 (citing H.R. Rep. No. 100-70, at 5 (1988)). Plaintiffs argue, without citation, that the reference to "egregious misconduct" in that report was shorthand for any "civil action against an officer accused of a constitutional or statutory tort." *Id.* There is no support for this novel theory.

[12] *See* Singer, STATUTES AND STATUTORY CONSTRUCTION, at 201 (An "interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act.").

United States, and pursuant to another statute, the FTCA. The FTCA's exclusive remedy provision covers all claims for negligent or wrongful U.S. conduct save those which are brought for a violation of the Constitution or "for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2) (emphasis added). Since "the ATS itself cannot be violated for purposes of § 2679(b)(2)(B)," claims asserted pursuant to its grant of jurisdiction are not exempt from the exclusive remedy provision. *See Schneider*, 310 F.Supp.2d at 266-67 (citing *Alvarez-Machain v. United States*, 331 F.3d 604, 631 (9th Cir. 2003), *rev'd on other grounds*, 124 S.Ct. 2739 (2004)).

Plaintiffs argue that *Schneider* and other decisions like it were erased by the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004). According to plaintiffs, the *Sosa* Court held that the ATS "imposes the duty of care required by the law of nations" and that "the ATS is 'violated' when the law of nations or a treaty is violated." Pls.' Opp. at 23. Plaintiffs are not being accurate with this Court. What *Sosa* actually held is that the ATS is simply "jurisdictional" in that it provides federal courts with jurisdiction to hear certain claims for violation of international law. *Sosa*, 124 S.Ct. at 2755; *see also Simpson v. Socialist People's Libyan Arab Jamahiriya*, 362 F.Supp.2d 168, 175 n.4 (D.D.C. 2005) (Urbina, J.) ("the Supreme Court recently declared that the ATS is jurisdictional"); *Schneider*, 310 F.Supp.2d at 267 ("'a claim under the [ATS] is based on a violation of international law, not of the [ATS] itself").

Plaintiffs have not identified a single decision holding that the ATS can be "violated" for purposes of the *Westfall* Act. *Sosa* left the preexisting case law on the relationship between the ATS and the FTCA intact and it remains well-settled that claims brought under the ATS are not exempt from

the exclusive remedy provision of the FTCA. *See Schneider*, 310 F.Supp.2d at 266-67 (citing *Alvarez-Machain*, 331 F.3d at 631); *Bieregu v. Ashcroft*, 259 F.Supp.2d 342, 353 (D.N.J. 2003) (citing *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd on other grounds sub nom. Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) and at 800 (Bork, J., concurring). The United States therefore should be substituted as the defendant for the international law claims asserted in Counts I-IV.[13] As plaintiffs have not exhausted their administrative remedies, the Court lacks jurisdiction over these FTCA claims.

## II. Special Factors Preclude Recognition of Plaintiffs' *Bivens* Claims

Counts V and VI of the complaint assert constitutional claims for damages under *Bivens v. Six*

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[13] Plaintiffs maintain that "[t]here can be little doubt the relevant provisions of the Geneva Conventions are self-executing," in the sense of providing plaintiffs a private right of action in tort, but they do not cite any case law for this bold proposition. Pls.' Opp. at 28. In fact, there is "unanimous precedent" holding that the Geneva Conventions do not give rise to rights privately enforceable in court. *Linder v. Calero Portocarrero*, 747 F.Supp. 1452, 1463 (S.D. Fla. 1990) (citing *Tel-Oren*, 726 F.2d at 808-09 (Bork, J., concurring); *Huynh Thi Anh v. Levi*, 596 F.2d 625, 629 (6th Cir. 1978); and *Handel v. Artukovic*, 601 F.Supp. 1421, 1425 (C.D. Cal. 1985)), *rev'd in part on other grounds*, 963 F.2d 332 (11th Cir. 1992); *see also Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 439 n.16 (D.N.J. 1999) (the courts have "unanimously held" the Geneva Conventions do not give rise to rights privately enforceable in court) (citations omitted). The Court in *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004), *appeal docketed*, No. 04-5393 (D.C. Cir. Nov. 16, 2004), found that certain provisions of the Geneva Conventions pertaining to trials for crimes were judicially enforceable, and the Court in *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005), *appeal docketed sub nom. Al Odah v. United States* (D.C. Cir. notice of appeal Mar. 7, 2005), adopted the reasoning in *Hamdan*. Neither of those decisions, however, concerned the broad range of Convention articles raised by plaintiffs here. Thus, plaintiffs "can find no authority for the proposition that the Geneva Conventions should be applied to create standards for the adjudication of a domestic tort action." *Linder*, 747 F.Supp. at 1463; *Iwanowa*, 67 F.Supp.2d at 439 n.16 (same). Moreover, even if the Geneva Conventions provided plaintiffs with a private right of action, a claim for violation of the Geneva Conventions would be subject to the FTCA's exclusive remedy provision, because such a claim would be one for violation of a treaty rather than "for a violation of the Constitution" or "for violation of a statute of the United States . . ." 28 U.S.C. § 2679(b)(2)(A) & (B).

*Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). As explained in the defendants' opening memorandum, Defs.' Mot. to Dismiss, at 8-9, a *Bivens* claim is a judicially-created cause of action that courts may recognize only when there are no "special factors counseling hesitation" in doing so. *Bivens,* 403 U.S. at 396. Under the special factors doctrine, an effective presumption exists against the recognition of novel claims and courts must be especially wary whenever a plaintiff seeks to extend the *Bivens* remedy to "any new context." *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68 (2001); *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988).

The gist of the plaintiffs' argument that the special factors doctrine does not apply here is that they are not proposing to extend *Bivens* into any new context because they are merely asserting a "conditions of confinement" claim -- the type of claim they argue is "typical" of *Bivens* litigation. Pls.' Opp. at 43.[14] Plaintiffs ignore the wholly unprecedented nature of their alleged cause of action. Plaintiffs are asking this Court to afford to aliens captured on foreign battlefields during wartime a damages remedy in tort personally against the senior military and civilian leadership of our Nation's armed forces. That remedy would permit enemy aliens to force the leaders of our armed forces into court whenever detainees claim that they have been mistreated or improperly confined. Plaintiffs cite no precedent for their proposed cause of action because no remotely similar tort claim has ever been

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[14] Plaintiffs also erroneously contend that the special factors doctrine applies to preclude a *Bivens* claim only when there are other available remedies. Pls.' Opp. at 43. The actual rule is that "[a] Bivens action is only permitted where 1) the petitioner has no alternative means of obtaining redress, and 2) there are no special factors counseling hesitation." *Lee v. Hughes*, 145 F.3d 1272, 1275 (11th Cir. 1998), quoting *Stephens v. Dept. of Health and Human Serv.*, 901 F.2d 1571, 1577 (11th Cir. 1990) (emphasis added). Federal courts have often dismissed *Bivens* claims on special factors grounds even where there was no other remedy available to the plaintiff. *See, e.g., Spagnola v. Mathis*, 859 F.2d 223, 228-29 (D.C. Cir. 1998) (*per curiam*) (*en banc*); *Dotson v. Griesa*, 398 F.3d 156, 168 (2d Cir. 2005); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir. 1998).

afforded to alien military detainees in the history of this country's warfare. Creating such a remedy here would constitute a radical extension of *Bivens*.

Such an expansion of personal liability to the military would strike at the heart of the Executive Branch's exercise of its powers to conduct war, formulate foreign policy, and protect national security. The existence of the remedy would directly interfere with military decision-making because it would effectively cede to the judiciary the authority to define how military detainees must be confined and cared for overseas during wartime. That would involve such concerns as the security requirements that may be imposed at detention facilities and the appropriate assignment of military resources to the task – sensitive military judgments that are outside the expertise and traditional role of the courts. The creation of a tort remedy also would impose a significant burden on the military to implement that remedy, leading to even further judicial supervision and control. The task of providing military detainees confined overseas with broad access to courts and attorneys in the United States would be fraught with security concerns and could absorb significant military resources.[15]

In addition to the military decision-making and resources concerns, it is reasonable to anticipate that enemy aliens would utilize such litigation to cause maximum disruption in the administration of military detention facilities overseas. Claims could be filed in an effort to intimidate military personnel and to undermine their authority. Subjecting military leaders to such personal tort liability could distract

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[15] Those difficulties would be much more extensive than those that otherwise may arise in habeas corpus litigation. Unlike habeas corpus claims, conditions of confinement claims are open-ended and not limited to the legality of confinement and are brought against defendants in their individual capacity seeking damages from them personally. Indeed, recognition of conditions of confinement claims would likely involve the courts in perpetual litigation over living conditions in overseas military detention facilities, even as to detainees whose enemy combatant status is undisputed.

them from their military duties and chill them from the vigorous performance of difficult and dangerous assignments. The specter of captured aliens harassing military personnel with time-consuming individual capacity litigation also could cause grave damage to military morale.[16]

Federal courts have long been reluctant to interfere in Executive Branch decision-making in foreign affairs, national security, and military operations because of separation of powers concerns. *See* Defs.' Mot. to Dismiss, at 8-14 (collecting cases). Such concerns are quintessential examples of the types of special factors that preclude the recognition of a *Bivens* claim. All those concerns apply fully and forcefully in this case to bar the plaintiffs' proposed claims.

## III. Defendants are Entitled to Qualified Immunity on Plaintiffs' Constitutional Claims

Plaintiffs' argument in regard to the defendants' qualified immunity defense to the *Bivens* claims apparently is that the case law is clear that "the Constitution follows the defendants wherever they are stationed or located." Pls.' Opp. at 40. Under the plaintiffs' theory, the Constitution governs the action of federal officials throughout the world and protects everyone equally, irrespective of their citizenship or connection to the United States. The fundamental flaw in this contention is that it has been consistently rejected by the Supreme Court in a variety of contexts. As discussed in detail in the defendants' opening memorandum, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme

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[16] In holding that criminal defendants may not sue prosecutors for constitutional violations committed against them in the course of a prosecution, the Supreme Court explained: "Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the state's advocate." *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976); *see also Pierson v. Ray*, 386 U.S. 547, 554 (1967) (reasoning that judges "should not have to fear that unsatisfied litigants may hound ... [them] with litigation ... [which] would contribute not to principled and fearless decision-making but to intimidation"). Those concerns would be far greater here if alien military detainees were permitted to hound the leadership of our armed forces in our courts.

Court held that alien military detainees held outside the United States are not generally entitled to constitutional protections; in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court determined that aliens who have no substantial connection to this country generally are not afforded constitutional protections in the federal criminal investigatory context even when held in custody here;[17] and in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court endorsed the so-called "entry fiction," recognizing that aliens seeking to immigrate into this country are not normally afforded constitutional protections prior to their lawful admission even when physically present in the country.

The plaintiffs nonetheless insist that the Supreme Court recently reversed positions in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), and that the Constitution is now understood to have broad international application to all actions taken by federal officials in regard to aliens and citizens alike. U.S. District Judge Green took a step in the direction of such an interpretation of the *Rasul* opinion by recognizing Fifth Amendment procedural due process rights for enemy aliens seeking to challenge the legality of their detention in *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C.), *appeal docketed sub nom. Al Odah v. United States*, No. 05-5064 (D.C. Cir. notice of appeal Mar. 7, 2005). However, the defendants submit that such an expansive interpretation of *Rasul* cannot be squared with Supreme Court opinions in a long line of cases, including *Eisentrager*, *Verdugo* and

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[17] Plaintiffs attempt to minimize *Verdugo-Urquidez* by treating Justice Kennedy's concurring opinion as if it was the opinion of the Court. Pls.' Opp. at 33 (asserting that Justice Kennedy's concurring opinion "was the key to the five-vote majority decision."). Justice Kennedy's separate opinion, however, was a concurring opinion, not an opinion concurring only in the judgment; Justice Kennedy made explicit that he joined the opinion of the Court. *See Verdugo-Urquidez*, 494 U.S. at 275. Because the lead opinion garnered five votes and thus was the opinion of the Court, it is that opinion that reflects the Court's holding. (Justice Stevens, in contrast, concurred only in the judgment, providing a sixth vote for the Court's result). *See id.* at 279.

*Zadvydas*, none of which was overturned in *Rasul*. Rather, the *Rasul* decision merely constitutes a statutory interpretation of the reach of federal habeas corpus and provides no guidance on the extraterritorial application of the Constitution to aliens. That interpretation of *Rasul* was recently adopted by U.S. District Judge Leon in *Khalid v. Bush*, 335 F.Supp.2d 311 (D.D.C.), *appeal docketed*, No. 05-5063 (D.C. Cir. notice of appeal Mar. 2, 2005), in a detailed and thoroughly supported decision discussed in the defendants' opening memorandum.

Both the *Guantanamo Detainee Cases* and *Khalid* are currently before the D.C. Circuit. The important point here is that regardless of how the matter is finally decided, there is no question that the defendants in this action are entitled to qualified immunity. Under the qualified immunity doctrine, federal officials are immune from suit unless they violate a clearly established constitutional right. Such a right is generally defined as one so thoroughly developed and consistently recognized in the jurisdiction at the time of the action as to be indisputable or beyond question. *See* Defs.' Mot. to Dismiss, at 14-17. The alleged actions of the defendants in this case occurred before the *Rasul* opinion was issued, at which time the D.C. Circuit's decision in *Al Odah v. United States*, 321 F.3d 1134, 1135-36 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 124 S.Ct. 2686 (2004), was the controlling authority in this jurisdiction. Plaintiffs do not dispute that the D.C. Circuit expressly held in *Al Odah* that the Constitution did not apply to aliens held in Guantanamo Bay. Plaintiffs offer no explanation whatsoever as to why the D.C. Circuit's then-controlling decision does not at the very least require dismissal of their constitutional claims on qualified immunity grounds. Similarly, while plaintiffs concede that there remains a split based on *Khalid* and *Guantanamo Detainee Cases* as to the application of the Constitution to aliens in Cuba even today, Pls.' Opp. at 30 n.16, they ignore the obvious consequences

of that dispute as to the immunity issue.[18]

The few decisions that plaintiffs do address in their qualified immunity analysis are irrelevant. Plaintiffs appear to rely heavily on *Reid v. Covert*, 354 U.S. 1, 6 (1957), a decision that merely stands for the undisputed proposition that the Constitution applies to citizens of the United States as to actions taken against them abroad by federal agents. It provides no authority whatsoever for the extraterritorial application of the Constitution to aliens. Plaintiffs also cite *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), *Dorr v. United States*, 195 U.S. 138 (1904), and *Ralpho v. Bell*, 569 F.2d 607, 618 (D.C. Cir. 1977), Pls.' Opp. at 41, three cases that generally discuss the extension of the Constitution to U.S. territories governed under laws and systems established by Congress. Each of those cases was expressly distinguished by the D.C. Circuit in *Al Odah* on the ground that Guantanamo Bay is leased property and not a territory of the United States. 321 F.3d at 1144. It cannot logically be argued that the defendants should have known that the Constitution applied to plaintiffs at Guantanamo based on cases that were expressly rejected in the controlling opinion at the time.[19]

The only other argument offered by plaintiffs to contest the qualified immunity defense involves

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[18] "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). It is also notable that Judge Green certified *In re Guantanamo Detainee Cases* for interlocutory appeal under 28 U.S.C. § 1292(b), *see* 355 F.Supp.2d 443 (D.D.C. 2005), Docket No. 162, Certification Order and Stay (February 3, 2005), and the D.C. Circuit subsequently accepted that certification. *Al Odah v. United States*, No. 05-5064 (D.C. Cir. notice of appeal Mar. 7, 2005). This establishes that both the D.C. Circuit and Judge Green recognize that there is "substantial ground for difference of opinion" on a "controlling question of law." 28 U.S.C. § 1292(b). The law cannot be considered clearly established under these circumstances.

[19] The only other case cited by plaintiffs in regard to qualified immunity is *United States v. Tiede*, 86 F.R.D. 227, 242-43 (U.S. Ct. Berlin 1979), a lower court opinion that was of no precedential value at the time given the conflicting analysis in *Al Odah*.

a mischaracterization of the immunity issue as merely a "technical jurisdictional" concern. Plaintiffs contend in that regard that it is "both ethically troubling and legally untenable" for the defendants to seek dismissal based on whether it was clearly established at the relevant time that the Constitution applied to plaintiffs at Guantanamo Bay because that somehow suggests that the defendants thought the alleged torture of detainees "was not legally actionable" at the base. Pls.' Opp. at 42. On the contrary, the defendants have never suggested that they thought it was permissible for federal officials to torture military detainees or that abuse of any kind should go unpunished under the law. There is no question that military law and regulations clearly prohibit the mistreatment of detainees, as is vividly demonstrated by the successful prosecution of soldiers for the abuse of prisoners in Iraq. The issue is not whether abuse is legally actionable in the military. The issue is whether alien military detainees can pursue tort claims personally against the civilian and military leadership of this Nation's armed forces for the alleged violation of constitutional rights when it was (and is) far from clear that such detainees possessed the constitutional rights they assert. *See Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides the basis for the cause of action sued upon.").[20] It is plain under the case law that such novel claims cannot proceed consistent with the

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[20] Contrary to suggestions in plaintiffs' papers, the fact that the alleged conduct may have been prohibited under military law does not show that the constitutional tort claims that plaintiffs seek to assert were clearly established. To answer the question "whether a reasonable official in defendants' position would have known that their actions violated a clearly established constitutional or statutory right, the Court may look no further than the statute or constitutional right that forms the basis for plaintiff's claim." *Tripp v. Dep't of Defense*, 173 F.Supp.2d at 61 (citing *Davis*, 468 U.S. at 193-96). Accordingly, the defendants are entitled to qualified immunity from plaintiffs' constitutional claims because it was not clearly established that the alleged conduct violated the constitutional rights claimed by plaintiffs, and it is irrelevant whether the alleged conduct clearly violated a statute, regulation, or norm.

qualified immunity doctrine – which is a fundamental point at the heart of this case and is certainly not a "technical" concern. *See, e.g., Wong v. United States*, 373 F.3d 952, 976 & n.32 (9th Cir. 2004) (granting qualified immunity on Fifth Amendment claims alleging race and religious discrimination "because of the uncertainty surrounding the [alien's] constitutional status," while noting that immunity probably would not have applied if not for plaintiff's unclear constitutional status).

## IV. Plaintiffs Have Failed to State a Claim Under the Religious Freedom Restoration Act

Plaintiffs also rely on *Rasul*, which they maintain holds that the "Constitution and related statutes" extend beyond the borders of the United States, to preserve their claims under the Religious Freedom Restoration Act (RFRA). Pls.' Opp. at 48.[21] As the prior discussion demonstrates, the fact that plaintiffs must resort to a decision rendered after their release merely confirms that the law was not clearly established in their favor at the relevant time.[22]

Plaintiffs' RFRA claim should also be dismissed based on this Court's recent analysis in

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[21] Alternatively, defendants have established that neither the text nor the legislative history of RFRA even so much as suggests that Congress intended for the statute to apply to non-resident aliens outside the United States. Defs.' Mot. to Dismiss, at 24. Plaintiffs do not contest this point. Without evidence that "clearly manifest[s]" congressional intent to apply RFRA outside the United States, the presumption against extraterritorial application controls. *See Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53, 66 (D.D.C. 2003) (there is a "general presumption" against extraterritorial application).

[22] Plaintiffs contend that *Veitch v. Danzig* held prior to their detention that RFRA controlled the actions of military officers "regardless of where they were stationed." Pls.' Opp. at 53 (citing *Veitch v. Danzig*, 135 F.Supp.2d 32, 35 (D.D.C. 2001)). This once again inverts the appropriate analysis. The question here is not whether RFRA applies to federal officials, but whether it was clearly established that plaintiffs have judicially enforceable rights under RFRA. It is plain that they do not. In addition, plaintiffs misapprehend *Veitch*. In *Veitch*, this Court merely implied, in *dicta*, that an American service member stationed abroad might be able to seek relief from the Navy under RFRA. *Veitch*, 135 F.Supp.2d at 35. This *dicta* means little here as it is beyond dispute that Congress expected for RFRA to apply to American citizens, but it is a wholly different question whether it was intended to apply to non-resident aliens abroad. *Veitch* certainly did not answer this latter question, much less clearly establish the law for this Circuit.

*Larsen v. U.S. Navy*, 346 F.Supp.2d 122, 136-37 (D.D.C. 2004). This Court held that, since RFRA provides a vehicle for challenging "neutral" and "generally applicable" laws, it does not apply where it is alleged that defendants intentionally imposed a substantial burden on religious practices.[23]

Attempting to avoid the consequences of *Larsen*, plaintiffs argue disingenuously that their RFRA claims satisfy this "neutral requirement" because they are "largely based" on "neutral or generally applicable rules" that "particularly burden[ed] Muslims" at Guantanamo. Pls.' Opp. at 49-50. However, it is clear that plaintiffs' claims in this case are not based on alleged neutral rules that merely had an incidental impact on their religious practices. Plaintiffs instead claimed in their complaint that they were subjected to a campaign of intentional abuse and mistreatment at the base, which included gratuitous and malicious interference with their religious practices. They specifically alleged in that regard that "[d]efendants regularly and systematically engaged in practices specifically aimed at disrupting Plaintiffs' religious practices." Compl. ¶ 206. Plaintiffs also claim that they were "prevented from calling out the call to prayer, with American soldiers either silencing the person who was issuing the prayer call or playing loud music to drown out the call to prayer." *Id.* at ¶ 78. This is precisely the type of intentional infringement of religious practices that was determined in *Larsen* to fall outside the intended scope of RFRA. At the very least, it cannot be logically argued that such alleged conduct was clearly covered by RFRA, as would be necessary to avoid dismissal of the claim on qualified immunity grounds.

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[23] Plaintiffs filed a notice of supplemental authority on June 8, 2005 suggesting that the Supreme Court's decision in *Cutter v. Wilkinson*, ___ U.S. ___, No. 03-9877, 2005 WL 1262549 *4 (May 31, 2005), overturned this Court's holding in *Larsen*. In fact, *Cutter* merely rejected a facial challenge under the Establishment Clause to provisions of RLUIPA. In addition, *Cutter*, like *Rasul*, was decided too late to be considered for purposes of qualified immunity.

**CONCLUSION**

For the above referenced reasons, the defendants request that this Court dismiss all of plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).

Respectfully submitted,

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