CASE NO. 06-5209

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL, et al.,

Appellants,

v.

DONALD H. RUMSFELD, et al.,

Appellees.

Appeal from the United States District Court
For the District of Columbia, C.A. No. 1:04CV01864 (RMU)
The Honorable Ricardo M. Urbina, District Judge

BRIEF OF APPELLANTS

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Dated: January 8, 2007
*Admission Pending

CERTIFICATE AS TO PARTIES RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), appellants Shafiq Rasul, et al., certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

1. **Plaintiffs:**

   Shafiq Rasul

   Asif Iqbal

   Rhuhel Ahmed

   Jamal Al-Harith

2. **Defendants:**

   Former Secretary Of Defense Donald Rumsfeld

   Air Force General Richard Myers

   Army Major General Geoffrey Miller

   Army General James T. Hill

   Army Major General Michael E. Dunlavey

   Army Brigadier General Jay Hood

   Marine Brigadier General Michael Lehnert

   Army Colonel Nelson J. Cannon

   Army Colonel Terry Carrico

   Army Lieutenant Colonel William Cline

   Army Lieutenant Colonel Diane Beaver

3. **Intervenors:**

   None

4. **Amici:** There were no Amici in the District Court.

   Appellants are aware that certain Amici intend to file briefs in support of Appellants' position in this Court, but are not aware of the precise signatories.

B. RULINGS UNDER REVIEW

The rulings under review were entered by the U.S. District Court for the District of Columbia (Urbina, J).

February 6, 2006	Memorandum Opinion Granting in Part and Deferring Ruling in Part on Defendants' Motion to Dismiss, 414 F. Supp. 2d 26 (D.D.C. 2006), App. 82-115.
July 10, 2006	Order Granting Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 54(b) and Directing Final Judgment as to Counts I-VI of the Complaint, App. 140.
July 20, 2006	Final Judgment on Counts I-VI of the Complaint, App. 141.

C. RELATED CASES

This appeal has been consolidated with *Rasul v. Rumsfeld*, C.A. No. 06-5222, which is before this Court on defendants' interlocutory appeal as of right.

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GLOSSARY

1.	ATCA	Alien Tort Claims Act, 28 U.S.C. § 1350
2.	Compl.	Plaintiffs' Complaint
3.	FTCA	Federal Tort Claims Act, 28 U.S.C. §§ 2671-80
4.	Geneva Convention on Civilian Detainees	Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
5.	Geneva POW Convention	Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135
6.	Guantánamo	U.S. Naval Base at Guantánamo Bay Naval Station
7.	MCA	Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in relevant part at 10 U.S.C. § 949)
8.	Opp.	Plaintiffs' Opposition to Defendants' Motion to Dismiss the Complaint
9.	RFRA	Religious Freedom Restoration Act, 42 U.S.C. § 2000(b)(b)
10.	UCMJ	Uniform Code of Military Justice
11.	Westfall Act	Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in relevant part at 28 U.S.C. § 2679)

TABLE OF AUTHORITIES

FEDERAL CASES

* Cases on which Appellants chiefly rely

STATE CASES

STATUTES & RULES

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JURISDICTIONAL STATEMENT

Plaintiffs'[1] complaint asserted claims under international law, the Geneva Conventions, the Constitution, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000(b)(b). Federal jurisdiction was proper below pursuant to 28 U.S.C. § 1331 and the Alien Tort Claims Act, 28 U.S.C. § 1350.

The district court issued three decisions relevant to this Court's jurisdiction. On February 6, 2006, the district court granted defendants' motion to dismiss Counts I-VI of the complaint (claims under international law, the Geneva Conventions and the Constitution), while reserving its decision on Count VII of the complaint (violation of RFRA). On May 8, 2006, the district court denied defendants' motion to dismiss the RFRA count. On July 3, 2006, defendants filed a timely notice of interlocutory appeal on the RFRA claim.

Plaintiffs filed an unopposed motion pursuant to Fed. R. Civ. P. 54(b) to certify the district court's decision of February 6, 2006, for immediate appeal. The district court granted this motion on July 10, 2006, and entered final judgment as to Counts I-VI of the complaint on July 20, 2006. On July 25, 2006, plaintiffs filed a timely notice of appeal. This Court's jurisdiction is accordingly proper pursuant to 28 U.S.C. § 1291.

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[1] For ease of reference, and in light of the cross appeal in this case, appellants use the terms "plaintiffs" and "defendants" to refer to the parties below, regardless of their posture as appellant or appellee in this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In determining whether defendants, the former Secretary of Defense and high-ranking U.S. military officers in the chain of command, are entitled to immunity under the Westfall Act, 28 U.S.C. § 2679(b)(1), did the district court err when it ruled, as a matter of law and without allowing discovery, that:

   a. Defendants acted within the scope of their employment when they devised a program of torture, prolonged arbitrary detention, cruel and abusive treatment, and religious persecution of plaintiffs, innocent alien non-combatants detained at Guantánamo;

   b. Torture (and other abusive conduct) was "a foreseeable consequence of the military's detention of suspected enemy combatants" and "incidental to [defendants'] roles [as] military officials" and thus within the scope of defendants' employment;

   c. Torture (and other abusive conduct) was within the scope of defendants' employment notwithstanding that it is contrary to the announced policy of the President and the official position of the State Department that torture by the U.S. military is prohibited, expressly outside the scope of any military personnel's authority, and forbidden by military regulations governing defendants' duties?

2. Did the district court err in ruling that the provision of the Westfall Act precluding immunity where "a *civil action* against [the] employee . . . is brought for a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2)(A) (emphasis added),

applies only to the specific constitutional claim and not to the entire "civil action" as the statute expressly provides?

3. Did the district court err when, on authority of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), it rejected plaintiffs' claim that defendants' acts of torture violated rights secured to them under the Geneva Conventions, in light of the Supreme Court's subsequent reversal of that decision?

4. Did the district court err in ruling that defendants are entitled to qualified immunity on grounds that no reasonably competent public official should be expected to know that a program of torture, prolonged arbitrary detention, cruel and abusive treatment, and religious persecution against alien non-combatants detained at Guantánamo violated the Constitution?

STATEMENT OF THE CASE

This action is brought by four British citizens who allege they were detained and tortured at the United States Naval Base at Guantánamo Bay Naval Station, Cuba ("Guantánamo") from early 2002 until early-2004. They were subsequently released and have never been charged with any crime. They have never been determined to be "enemy combatants."

Defendants are former Secretary of Defense Donald Rumsfeld and high-ranking military officers in charge of plaintiffs' incarceration and treatment at Guantánamo. The complaint asserts seven causes of action premised on violation of *jus cogens* norms of international law, The Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva POW Convention") and The Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Geneva

Convention on Civilian Detainees"), the Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000(b)(b).

Defendants moved to dismiss the complaint on a number of grounds, including that they are entitled to absolute immunity under The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in relevant part at 28 U.S.C. § 2679) (the "Westfall Act"), with respect to the international law and Geneva Convention claims, and to qualified immunity with respect to the constitutional claims. The district court dismissed these claims as barred by the doctrines of absolute and qualified immunity. This appeal challenges the dismissal, and in particular the district court's determinations that:

a. defendants were acting within the scope of their employment in torturing plaintiffs, because such conduct was a "foreseeable consequence" of plaintiffs' detention, and defendants were therefore entitled to absolute immunity under the Westfall Act; and

b. defendants were entitled to qualified immunity for their conduct in designing and implementing a deliberate plan to detain and torture plaintiffs because this conduct did not violate clearly established law.

Appellants respectfully submit that these decisions are in error and should be reversed.

STATEMENT OF FACTS

INTRODUCTION

This is a case about torture. Whatever euphemisms are applied, whatever abstractions are invoked, plaintiffs were tortured at the behest and direction of these defendants. For more than

two years during their detention at Guantánamo, plaintiffs were stripped, short-shackled for hours in painful stress positions, deprived of sleep, isolated for days in total darkness, deliberately subjected to extremes of heat and cold, threatened with unmuzzled dogs, injected with foreign substances, deprived of contact with their families, deprived of medical care, kept in filthy cages with no access to exercise or sanitation, subjected to repeated body cavity searches, and harassed and humiliated as they attempted to practice their religion. *E.g.*, App. at 13-14, 32-34, 35-38, 39-45 (Compl. ¶¶ 4-6, 67-78, 83-97, 104-07, 111, 117, 124, 127, 130, 134). These practices are familiar to despots and dictators all over the world.

This torture was not the act of a rogue guard or interrogator. Defendants designed and approved a plan to detain and torture plaintiffs and hundreds of others like them – a plan, memorialized through written instructions, that was systematically implemented to degrade and debase plaintiffs on a daily basis for more than two years. *E.g.*, App. at 15-18, 48, 49-50 (Compl. ¶¶ 8-12, 146, 152). Defendants conceived and implemented their torture program in violation of their oaths of office, the express policy statements of the President, applicable military regulations, U.S. and international law, the Constitution, and any pretense of honor or morality. App. at 15-18, 46-50 (Compl. ¶¶ 8-12, 141-158). Initially, the Defense Department dismissed allegations of torture as "terrorist misinformation." After the sickening details were made public, defendants argued to the district court that ordering these acts was within the course of their duties as U.S. cabinet and military officers and that they could not have known that the acts were wrongful.

But defendants' knowing violation of the universal norm against torture was not a foreseeable part of their duties and it was not undertaken with the kind of good faith ignorance

protected by qualified immunity. The applicable principles here are simple, well-recognized, and timeless:

i) It is *always* wrong to authorize or administer torture; torture is *never* a legitimate tool in the interest of national security or foreign policy;

ii) It is *never* within the scope of a government employee's duties to torture people, as the President's official statement that torture is against the policy of the United States confirms. The district court's decision that torture is incidental to the official duties of U.S. cabinet and military officers and reasonably foreseeable flies in the face of our law, undermines its moral underpinnings, and directly contradicts the holdings of U.S. courts, which have uniformly refused to allow foreign leaders to invoke doctrines of immunity to insulate themselves against liability for their own acts of torture; and

iii) There is no more fixed star in the firmament of the law of nations than the prohibition against torture, and, accordingly, the defendants could not have been in any doubt that ordering torture violated clearly established rights. Defendants' failed attempts to circumvent their obligations and create a lawless enclave where they could abuse people with impunity are indicative of their knowledge that they were violating plaintiffs' fundamental rights.

FACTUAL ALLEGATIONS

Plaintiffs are British citizens who were detained and tortured at Guantánamo for more than two years before they were released without charges and flown home to England in March 2004. App. at 13-14 (Compl. ¶¶ 4-5). Plaintiffs never received any military training or took up

arms against the United States. Plaintiffs have never been members of any terrorist group. App. at 12 (Compl. ¶ 1).

Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed are boyhood friends from the working class town of Tipton in the West Midlands of England. App. at 24 (Compl. ¶ 31). They were born and raised in the United Kingdom. At the time of their detention, they were 24, 20, and 19 years old respectively. App. at 24 (Compl. ¶¶ 32-34). Asif went to Pakistan in September 2001 to marry a young woman from his family's village. Rhuhel joined him to be his best man. Shafiq was in Pakistan about to begin a computer science course. After the bombing began in Afghanistan, these young men, who had traveled to Afghanistan to provide humanitarian assistance, tried to return to Pakistan, but found the border closed. App. at 25 (Compl. ¶ 35). They were captured by General Rashid Dostum, an Afghan warlord temporarily allied with the United States. General Dostum was widely reported to have delivered prisoners to the U.S. military on a per-head bounty basis. App. at 25-26 (Compl. ¶¶ 37-38). The U.S. military took custody of Asif, Rhuhel, and Shafiq without any conceivable good faith basis for concluding that they had been engaged in activities hostile to the United States. App. at 25-26 (Compl. ¶ 38).

Jamal Al-Harith was also born and raised in England. He is a web designer in Manchester. Jamal arrived in Pakistan on October 2, 2001, to participate in a long-planned religious retreat. When he was advised to leave the country because of animosity toward British nationals, he booked passage on a truck headed to Turkey, from which he planned to fly home to England. The truck was hijacked at gunpoint by Afghans. When identified as a foreigner, Jamal was forcibly brought to Afghanistan and handed over to the Taliban. Jamal was accused of being a British spy, held in isolation, and beaten repeatedly by Taliban guards. When the Taliban fled under U.S. advances, Jamal was freed. The British Embassy's plans to evacuate

him were preempted when U.S. Special Forces arrived at the prison and took Jamal into custody. App. at 12-13, 31 (Compl. ¶¶ 3, 63).

All four men were first held in U.S. custody in Afghanistan and later transported, under appalling conditions, to Guantánamo, where they were imprisoned and systematically tortured without charge or hearing for more than two years. App. at 13-14 (Compl. ¶ 4). The horrific treatment visited upon these young men and others has now been widely reported in the media and confirmed by internal U.S. documents. During the Spring of 2004, plaintiffs were flown to England and released. They were never charged with any crime and never found to be enemy combatants. App. at 13-14, 46 (Compl. ¶¶ 4-5, 137).

These innocent young men were tortured pursuant to directives from defendant Rumsfeld which were implemented through the military chain of command. On December 2, 2002, defendant Rumsfeld approved a memorandum condoning numerous illegal interrogation methods, including putting detainees in stress positions for up to four hours; forcing detainees to strip naked; intimidating detainees with dogs; interrogating them for 20 hours at a time; forcing them to wear hoods; shaving their heads and beards; keeping them in total darkness and silence; and using what was euphemistically called "mild, non-injurious physical contact." As defendant Rumsfeld knew, these and other methods were in violation of the Constitution, federal statutory law, the Geneva Conventions, and customary international law as reflected in, *inter alia,* The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), *U.S. ratification* 1994, Ex. 1 ("UN Torture Convention").

After authorizing the acts of torture and other mistreatment inflicted upon plaintiffs, defendant Rumsfeld commissioned a "Working Group Report" dated March 6, 2003, to address

"Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations." This report details the requirements of international and domestic law governing interrogations, including the Geneva Conventions; the UN Torture Convention; customary international law; and numerous sections of the U.S. Criminal Code. The report attempts to identify putative "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." Working Group Report at 3 (emphasis in original). App. at 16-17 (Compl. ¶ 10). The report thus acknowledges that the techniques in use were *prima facie* unlawful.

The report then makes a transparent, *post hoc*, attempt to create arguments under which the facially criminal acts already perpetrated by these defendants could somehow be justified. It asserts that the President as Commander-in-Chief has plenary authority to order torture, a proposition that ignores settled legal doctrine from King John at Runnymede to *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). App. at 16-17 (Compl. ¶ 10). It next tries to apply common law doctrines of self-defense and necessity, asserting the legally nonsensical proposition that the United States has the right to torture in order to defend itself or because it is necessary to do so. Ignoring the Nuremberg cases, the report wrongly suggests that persons who torture may be able to defend against criminal charges by claiming that they were following orders. Finally, the report asserts that the detainees have no constitutional rights because the Constitution does not apply to persons held at Guantánamo. However, the report acknowledges that U.S. criminal laws *do* apply to Guantánamo and that the United States is bound by the UN Torture Convention to the extent that conduct barred by that Convention would also be prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution.[2] App. at 16-17

[2] On June 22, 2004, the conclusions of this report and other memoranda attempting to justify torture were explicitly repudiated by President Bush. App. at 16-17 (Compl.¶ 10).

(Compl. ¶ 10). These documents can only be seen as a shameful nadir for American law, a cynical attempt to manipulate legal language to justify the inherently unjustifiable.

In April 2003, following receipt of the Working Group Report, defendant Rumsfeld issued a new set of recommended interrogation techniques. These recommendations recognized that certain of the approved techniques, including the use of intimidation, removal of religious items, threats, and isolation, violated the Geneva Conventions and customary international law. The recommendations officially withdrew approval for certain unlawful actions, including hooding, forced nakedness, shaving, stress positions, use of dogs, and "mild, non-injurious physical contact." Nevertheless, these illegal practices continued to be employed against plaintiffs and other detainees at Guantánamo. App. at 17 (Compl. ¶ 11).

In sum, the complaint alleges that defendants' conduct reflects a conscious and calculated awareness that the torture, violence, and degradation that they ordered and implemented at Guantánamo were illegal. Defendants' after-the-fact legal contortions to create an Orwellian legal façade manifests their knowledge that they were acting illegally and in violation of clearly established legal and human rights. App. at 18 (Compl. ¶ 12).

SUMMARY OF ARGUMENT

Plaintiffs' complaint asserts that the conduct of former Secretary of Defense Rumsfeld and senior officers in the chain of command in implementing and approving their detention and torture violated customary international law, the Geneva Conventions and the Constitution. The district court dismissed the international law claims on the ground that, as a matter of law, defendants were acting within the scope of their employment and are therefore immune from suit pursuant to the Westfall Act, 28 U.S.C. § 2679(b)(1). The district court dismissed the Geneva

Convention claims based on this Court's since-overruled decision in *Hamdan v Rumsfeld*, 415 F.3d 33 (D.C. Cir 2005). With respect to the constitutional claims, the district court found that defendants had qualified immunity because they could not have been on notice of plaintiffs' having a clearly established legal right not to be tortured until the Supreme Court decided *Rasul v. Bush,* 542 U.S. 466 (2004), which was after plaintiffs' release from Guantánamo. In sum, the district court has found that defendants are immune from being held accountable for manifestly heinous criminal conduct that has dishonored our nation and undermined the rule of law. Each of the district court's rulings is clearly erroneous and should be reversed.

With respect to the international law claims, the district court ignored binding precedent holding that the issue of whether an employee's activity is within the scope of his employment is a quintessential question of fact for the trier of fact. The district court erred both in refusing to permit discovery on this issue and by deciding it as a matter of law. Under settled law, plaintiffs were entitled to discovery based on the allegations of the complaint and their submission of unequivocal statements by the United States that torture is illegal under military, statutory, international and constitutional law and can never be within a public official's scope of employment. In any event, the district court's determination as a matter of law that torture was within the scope of employment is contrary to the Restatement approach followed in the District of Columbia, requiring consideration of, *inter alia*, whether conduct purportedly incident to the scope of employment is "seriously criminal," as the conduct alleged in this case undoubtedly is.

Even if the conduct at issue were arguably within the scope of employment, this does not support dismissal as a matter of law. The Westfall Act contains an exception to immunity for a "*civil action* against an employee of the Government... which is brought for a violation of the Constitution of the United States." (emphasis added). The district court wrongly applied the

Supreme Court's legislatively overruled holding in *Finley v. United States,* 490 U.S. 546 (1989) to find that this exception was not meant to apply to the entire civil action but only to plaintiffs' constitutional claims. The district court's holding was erroneous because *Finley* is inapposite, and its reasoning is inapplicable to the Westfall Act. The term "civil action" in the Westfall Act embodies Congress' purpose of excluding from general immunity egregious conduct that rises to the level of a constitutional violation. The district court should have looked to numerous analogous cases in which courts have construed "civil action" in accordance with its plain meaning, *i.e.*, the entire case.

The district court based its dismissal of plaintiffs' Geneva Convention claim on this Court's holding in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir 2005), that the Conventions did not provide a private right of action. But the Supreme Court overruled *Hamdan* and permitted the petitioner to invoke rights secured to him by the Conventions. This conclusion is consistent with accepted rules of treaty interpretation and this Court should recognize a private right of action under the Geneva Convention.

Finally, the district court's grant of qualified immunity as a matter of law is similarly erroneous. While the district court accepts that the conduct alleged is manifestly unlawful, it found that defendants lacked notice that they were violating plaintiffs' rights because their right not to be tortured was not "clearly established" until the Supreme Court decided *Rasul v. Bush*, 542 U.S. 466 (2004). The district court's analysis is inconsistent with qualified immunity jurisprudence, which makes clear that qualified immunity is not available for egregious and consciously illegal conduct, even when there is no case law directly on point holding that the conduct is unconstitutional. Torturing detainees violates fundamental rights and stains the

integrity of the government. Defendants cannot reasonably claim that they believed that they were acting within the constraints of the Constitution.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's decision to dismiss a complaint *de novo*. *See Kugel v. United States*, 947 F.2d 1504, 1505 (D.C. Cir. 1991). The Court must construe the complaint in the light most favorable to the plaintiff. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Dismissal should be affirmed only if plaintiffs can prove no set of facts under which they are entitled to relief. *Id.*

II. THE DISTRICT COURT ERRED BY SUBSTITUTING THE UNITED STATES FOR THE INDIVIDUAL DEFENDANTS UNDER THE WESTFALL ACT.

Plaintiffs' complaint alleges that the highest officials of the U.S. military deliberately formulated, approved and implemented a policy of torture consisting of acts that so shock the conscience they are universally condemned, including by the Constitution, U.S. criminal statutes, Article 93 of the UCMJ, *codified at* 10 U.S.C. § 893 ("Article 93"), Army Regulation 190-8, the Army Field Manual, the Geneva Conventions, and the UN Torture Convention. Defendants' conduct was not only illegal but was wholly unauthorized by U.S. law, by any directive from the President as Commander In Chief or by any other U.S. authority. App. at 46-50 (Compl. ¶¶ 140-42, 148-58); App. at 73, 78 (Compl. ¶¶ 3-4, ¶ 58). That torture is never authorized and, indeed, cannot be authorized by a sovereign, is a settled proposition of international law, which has long been recognized in the United States. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Xuncax v. Gramajo*,

886 F. Supp. 162, 175-76 (D. Mass. 1995). It necessarily applies to the conduct of U.S. officials as well as the conduct of foreign despots.

Nevertheless, the district court expressly rejected what it termed "vague analogies" to the standards against which our courts have consistently measured the conduct of foreign tyrants when they have sought immunity from actions charging similar acts of torture. App. at 96 n.7. Instead, the district court determined that U.S. officials could claim immunity if their conduct occurred within the scope of their employment under state law standards of *respondeat superior*. *Id.* On that basis, the district court concluded that defendants are immune pursuant to the Westfall Act. In making this determination, the district court expressly held as a matter of law that torture of detainees was both "a foreseeable consequence of the military's detention of suspected enemy combatants" and "incidental to [defendants'] roles [as] military officials." This holding is not only abhorrent, it is clearly erroneous.

As an initial matter, while state law principles governing scope of employment are germane to the analysis, there are important caveats that the district court simply ignored. The liberal construction of the doctrine of *respondeat superior* adopted in modern law is designed to broaden the resources available to compensate tort victims by making employers liable for their employees' misconduct in circumstances where the employees themselves may have few assets. In the Westfall context, a different set of policies apply. While the statute in most circumstances also broadens the available resources for compensation by making the United States liable, it does something that common law *respondeat superior* does not: immunize the wrongdoing employee. State *respondeat superior* law is thus an imperfect parallel that can, particularly under such extreme circumstances, lead to perverse results.

Moreover, even as a straightforward application of *respondeat superior*, the district court's analysis fails. First, the district court failed to apply the proper standard under the Restatement in determining whether defendants' conduct was within the scope of their employment. Second, the scope of employment question is one for the trier of fact on a full evidentiary record. It was therefore error to refuse to allow plaintiffs to take discovery on this point.

A. Application of the Westfall Act

The Westfall Act permits the United States to substitute itself as a defendant in actions brought against federal officers for negligent and wrongful acts and omissions undertaken within the scope of their employment. 28 U.S.C. § 2679(b)-(d). As a result, the individual defendants are absolutely immune from personal liability, and the exclusive remedy becomes an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 ("FTCA"). The Westfall Act, however, does not provide immunity for civil actions alleging constitutional torts or violations of federal statutes. 28 U.S.C. § 2679(b)(2). Thus, for Westfall immunity to apply: i) defendants must have been acting within the scope of their employment; *and* ii) the actions complained of must be ordinary acts or omissions, not rising to the level of constitutional or express statutory violations.

When a federal officer is sued, the Attorney General may certify that the officer was acting within the scope of employment. 28 U.S.C. § 2679(d). The Attorney General's certification is not entitled to any "particular evidentiary weight." *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003) (*quoting Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994)). The Supreme Court has recognized that the Attorney General may "feel a strong tug" to supply a certification, in cases like this one, where the conduct falls within one of the exceptions to the

FTCA, leaving both the United States and the individual officers immune from suit. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427-28 (1995). The submission of a certification simply shifts to the plaintiff the obligation to come forward with specific facts rebutting the certification and ordinarily "the plaintiff cannot discharge this burden without some opportunity for discovery." *Id.* Although this Court initially indicated that disputed issues of fact concerning scope of employment could be resolved by the court after an evidentiary hearing, *id.*, more recently it has mandated that disputed issues of fact concerning scope of employment, like all other disputed factual issues, be decided by the trier of fact at trial. *Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006).

B. The District Court Improperly Denied Discovery.

The district court's decision that defendants' conduct in ordering and supervising torture and other cruel and degrading treatment was within the scope of their employment was error on two grounds. First, whether a defendant is acting within the scope of his or her employment is an issue of fact. *E.g.*, *Brown v. Argenbright Sec.*, 782 A.2d 752, 757 (D.C. 2001). Even in the Westfall context, a disputed factual issue such as scope of employment cannot be determined on a motion to dismiss. *Majano*, 469 F. 3d at 140-41. Second, even assuming that this is one of the rare cases in which there are no factual disputes and the court could decide the issue as a matter of law, the court below misapplied the law in reaching its result.

Plaintiffs' complaint asserted that defendants' conduct was unauthorized and beyond the scope of their employment. Plaintiffs proffered earlier official statements of the United States which expressly contradicted the certification in this case that torture could be within the scope of a U.S. official's duties. Plaintiffs proffered later official statements that torture of detainees at Guantánamo was unauthorized and contrary to U.S. policy. Despite these submissions, which

clearly raise a material dispute of fact concerning whether defendants' acts were within the scope of their employment, the court below denied plaintiffs discovery, holding that plaintiffs had failed "to meet their burden of proving that the individual defendants acted outside the scope of their employment." App. at 103. But it is not plaintiffs' burden to "prove" that defendants acted outside the scope of employment on a motion to dismiss.

1. The District Court Applied the Incorrect Legal Standard in Denying Plaintiffs Discovery.

This Court's decision in *Stokes* makes clear that plaintiffs have a right to discovery. A complaint cannot be dismissed without discovery if its allegations taken as true and read liberally raise a "material dispute" concerning whether the defendants were acting in the scope of their employment. *Stokes*, 327 F.3d at 1215. In *Stokes*, this Court expressly rejected the argument, which the district court erroneously accepted below, App. at 103, that plaintiffs were required to prove at the motion to dismiss stage that the individual defendants acted outside the scope of their employment. *Stokes*, 327 F.3d at 1215. Indeed, pursuant to *Stokes*, plaintiffs are not required even "to allege the existence of evidence [they] might obtain through discovery." *Id.* at 1216. Plaintiffs' complaint need only allege facts that, taken as true, would rebut the certification submitted by defendants. *Id.* Because the court below erred by requiring the plaintiffs to submit "proof" concerning the scope of defendants' employment at an impermissibly early stage of the proceeding, the decision must be reversed and remanded.

2. Plaintiffs Met their Burden of Setting Forth a Material Issue Meriting Discovery.

Plaintiffs have easily met the modest burden imposed by *Stokes*. For instance, plaintiffs' complaint alleges that the defendants conceived and implemented a program to torture detainees. Plaintiffs alleged that the program was illegal under the UCMJ and applicable military

regulations, the Constitution, federal criminal law and customary international law. The complaint also asserted that the conduct was wholly unauthorized. In their Opposition to Defendants' Motion to Dismiss, plaintiffs identified specific relevant facts requiring discovery, including whether the use of torture, extreme force, cruel and degrading treatment, and prolonged arbitrary detention are commonly permitted by U.S. officials[3] and whether it was foreseeable that senior government officials would order torture at Guantánamo despite presidential prohibitions. Opp. at 16-18. This Court has previously held that, even where it is questionable whether the allegations of the complaint are sufficient to raise a question of fact, plaintiffs are entitled to discovery if they can identify specific information that would be available through discovery that they would submit in support of their complaint. *Id.* at 1215. Plaintiffs' Opposition brief did just that.

In addition to the allegations of the complaint, plaintiffs submitted supplemental material to the court below which evidenced a material dispute of fact. Plaintiffs filed a previous statement by the United States that expressly contradicted the Attorney General's certification. In 1999, the U.S. State Department made its first report to the United Nations Committee Against Torture. U.S. Department of State, Initial Report of the United States of America to the U.N. Committee Against Torture ("State Department Report"). In the State Department Report, the United States condemned torture in any and all circumstances, and acknowledged that:

- the prohibition on torture applies to the U.S. military;
- torture "cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer;" and
- "a commanding officer who orders such punishment would be acting *outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm.*"

[3] This might, for example, be evidenced by training manuals, policies or protocols governing use of force in interrogations and detentions, and complaints by detained persons or prisoners concerning use of torture.

App. at 67, 69 (emphasis added). Such a prior inconsistent statement, standing alone, is sufficient to raise a material issue of fact precluding judgment as a matter of law. *See, e.g.*, *Crockett v. Abraham*, 284 F.3d 131, 133 (D.C. Cir. 2002).

The district court relegated the State Department Report to a footnote, concluding that "state law, not State Department representations to the United Nations, governs the scope of employment determination." App. at 93 n.5. While plaintiffs do not dispute the relevance of state law to the scope of employment issue, they respectfully submit that the district court's statement is a *non sequitur*. An employer's direct admissions concerning the scope of employment are clearly relevant under state law. *See Murphy v. Army Distaff Found.*, 458 A.2d 61, 63 (D.C. 1983) (holding that conflicting statements regarding employee's duties precluded decision concerning scope of employment as matter of law); *Dist. Certified TV Serv. v. Neary*, 350 F.2d 998, 999 (D.C. Cir. 1965) (admitting testimony from employer that employee was disobeying instructions at time of accident). And the Westfall Act focuses particular attention on an employer's representation by expressly requiring certification. 28 U.S.C. § 2679(d). This requirement appears nowhere in state law. Given the relevance of the United States' representations concerning scope of employment, under both state law and the provisions of the Westfall Act, and in light of the Supreme Court's warning that courts should be cautious about accepting certifications at face value, *Lamagno*, 515 U.S. at 427-30, the district court's refusal to consider evidence contradicting the United States' certification was reversible error.

C. The District Court Erred in Dismissing this Action as a Matter of Law.

In deciding, as a matter of law, that defendants' conduct was within the scope of their employment, the district court improperly limited the factors it considered, and so reached an erroneous conclusion. State law governs whether a defendant is acting within the scope of his or

her employment. *Majano*, 469 F.3d at 141. The district court considered the scope of employment under the law of the District of Columbia, which follows the Restatement (Second) of Agency. App. at 92; *Stokes*, 327 F.3d at 1215. Under the Restatement, conduct is within the scope of employment if it is authorized or "incidental to" authorized conduct. Restatement (Second) of Agency § 228; *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995) (quoting Restatement (Second) of Agency § 229).

The Restatement sets forth four general factors relevant to the scope of a defendant's employment: a) whether the conduct at issue is "of the kind" the defendant is generally employed to perform; b) whether the conduct occurred within the authorized time and space of defendant's employment; c) whether the defendant's intent was, at least in part, to serve the purposes of his employer; and d) in case of force, whether the use of force was "not unexpectable" by the employer. Restatement (Second) of Agency § 228; *Haddon*, 68 F.3d at 1423-24. The general factors are supplemented by additional guidelines in other sections of the Restatement. Where, as here, the defendants' conduct was not authorized, *see* App. at 46-50, (Compl. ¶¶ 140-42, 148-58), the Restatement lists additional factors to be considered to determine whether the conduct was, nonetheless, incidental to authorized conduct. Restatement (Second) of Agency § 229. Consciously criminal or intentionally tortious acts may be potentially within the scope of employment, but

> [t]he fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but *serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do.*

Restatement (Second) of Agency § 231, cmt. a (emphasis added). *See also Boykin v. Dist. Of Columbia*, 484 A.2d 560, 563 (D.C. 1984) (citing § 245 of the Restatement (Second) of Agency).

The district court limited its consideration to the four factors listed in the Restatement (Second) of Agency § 228 and failed to consider the factors listed in § 229 or the guidance of § 231. Applying solely the § 228 factors, the district court held that defendants were acting within the scope of their employment because: a) defendants' design and implementation of a program of torture and other violations of international law were somehow authorized or incidental to authorized conduct; b) defendants' conduct occurred within the time and place of their employment; c) defendants' conduct was motivated by a desire, however misguided, to advance the cause of their employer, the United States; and d) defendants' conduct was foreseeable. The district court erred in holding that defendants' conduct was at any time authorized, because this determination is flatly contradicted by the express allegations of the complaint and by undisputed facts. The district court further erred in determining that defendants' conduct was incidental to authorized conduct purportedly because torture, as a specific instrument of government policy, was "foreseeable." Finally, the district court failed to consider other factors made relevant by the Restatement, and further failed to recognize that those factors required discovery.

1. At No Time Was Defendants' Conduct Authorized.

The district court held that defendants' conduct was initially authorized because they "acted pursuant to directives contained in a December 2, 2002 memorandum from defendant Rumsfeld." App. at 93. Because the complaint alleged that this memorandum was withdrawn by defendant Rumsfeld in April 2003, the district court concluded that "the crux of the dispute here is whether the defendants' actions after April 2003 were incidental to the conduct

authorized." App. at 94 (internal citation omitted). In effect, the court determined that defendant Rumsfeld authorized his own conduct ordering torture, and that the authorization somehow further applied to all other defendants. The district court misreads the complaint and is wrong as a matter of law.

An agent cannot authorize his own conduct. Restatement (Second) of Agency § 7; *Mayer v. Buchanan*, 50 A.2d 595, 598 (D.C. 1946). Moreover, the complaint expressly alleges that the defendants' conduct was never authorized. *See* App. at 46-47 (Compl. ¶ 142) (quoting Army Field Manual that "[t]he use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government."). In addition, the complaint expressly alleges that the President, the Commander-In-Chief of all defendants, did not authorize the torture and degradation that defendants inflicted on plaintiffs. App. at 48 (Compl. ¶ 146). Indeed, the President has expressly rejected any suggestion that he ever authorized or condoned torture. App. at 16-17 (Compl. ¶ 10); *id.* at 78, (Compl. ¶ 58). Finally, the district court ignored that, as a matter of law, defendants could never be authorized or properly ordered to commit war crimes such as torture. *The Nuremberg Decision*, 6 F.R.D. 69, 110 (1947) ("he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law."); *id.* at 154.

U.S. courts have recognized for more than 25 years that no sovereign has the power to authorize torture. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit rejected the defendant's attempts to invoke sovereign and act of state immunity for acts of torture and murder, stating "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."

Id. at 881. The *Filartiga* Court held that, as a matter of law, acts of torture and murder exceeded that foreign leader's authority. *Id.* at 889. *Filartiga* has recently been cited with approval by the Supreme Court. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 738 n. 29 (2004).

The Ninth Circuit followed the Second Circuit's reasoning in cases against Ferdinand Marcos and senior members of his government for arbitrary and prolonged detention, torture, and cruel and degrading treatment very similar to the allegations of this complaint. *See, e.g., In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 497-98 & n. 10 (9th Cir. 1992); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). In considering Marcos's claims of immunity, the Ninth Circuit concluded that "acts of torture, execution, and disappearance were clearly acts outside of his authority as President....Marcos's acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state." *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994). *See also Nuru v. Gonzalez*, 404 F.3d 1207, 1222-23 (9th Cir. 2005) (torture violates *jus cogens* norms and can never be authorized by a government); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175-76 (D. Mass. 1995) (Guatemala's Minister of Defense was not acting within scope of his official duties when he ordered and directed campaign of kidnapping, torture, and execution).

While the district court denigrates plaintiffs' reliance on these cases as "vague analogies" to the acts of "foreign tyrants," App. at 96 n.7, there is nothing vague about the proposition for which these cases stand or their relevance here. Torture can *never* be authorized as a legitimate act of any government – including the United States. Contrary to the district court's determination, defendant Rumsfeld's December 2002 memorandum is evidence of his complicity in torture but it is certainly not official authorization for it. At the very least, whether this conduct was authorized is a question of fact. By failing to permit discovery and deferring

decision of this issue to trial, the district court committed reversible error.

2. Defendants' Conduct in Ordering Torture Was Not Incidental to Authorized Conduct

The district court further erred in determining that, if not authorized, defendants' conduct was at least "incidental" to authorized conduct. While the court examined garden-variety agency cases, it reached its determination without ever considering the factors most germane to the matter as outlined in Restatement (Second) of Agency § 229 and other relevant provisions that specifically consider whether intentional torts and consciously criminal conduct can be within the scope of employment. Not surprisingly, there are no District of Columbia cases that consider whether establishing a program to inflict torture could fall within an employee's authorized employment or be "incidental" to it. And there are no cases that consider such conduct in circumstances where a ruling that the conduct falls within the scope of employment would confer immunity on the employee and insulate him from civil liability. Especially in these extraordinary circumstances, where run-of-the-mill scope of employment cases decided under local law provide so little guidance, the district court had an obligation to broaden its consideration of the issue and to examine all available authority and the policies underlying that authority. Its failure to do so was error.

Restatement § 229 supplies guidance on this point. It requires the court to consider ten factors in determining whether a defendant's conduct, although unauthorized, is nevertheless incidental to authorized conduct. Factors pertinent here include:

1) Whether the unauthorized conduct is of the sort commonly done by persons in defendant's circumstances;
2) The extent of departure from the normal method of accomplishing an authorized result; and
3) Whether or not the unauthorized act is seriously criminal.

Restatement (Second) of Agency § 229.

As alleged in the complaint, defendants designed and implemented a program to torture, to detain persons indefinitely without charges or trial, and to use cruel and degrading tactics in an attempt to obtain information. These allegations, taken as true, support plaintiffs' assertion that the conduct at issue is "seriously criminal." *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J. concurring) (identifying the torturer, the pirate and the slave trader as '*hostis humani generis*' – the enemy of all mankind," quoting *Filartiga*, 630 F.2d at 890). Indeed, defendants' own working group report concedes as much. App. at 16-17 (Compl. ¶ 10). Under both § 229 and § 231 of the Restatement, the intentionally criminal nature of defendants' acts strongly militates against such acts being within the scope of employment. Use of torture, prolonged arbitrary detention, and cruel and degrading treatment, which the United States has long condemned, are also a substantial departure from the government's "normal method" of detaining and interrogating persons of interest. Moreover, as plaintiffs argued below, many of the Restatement factors – such as whether the conduct is commonly performed by persons in defendants' circumstances and whether their employer had reason to expect that defendants would order and implement a plan of torture – could not be fully considered without first allowing discovery. Each of these factors, had the court considered them, would have precluded its holding, as a matter of law, that defendants' conduct was within the scope of their employment.

Instead of examining such factors, the district court relied on its reading of two cases – *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976), and *Weinberg v. Johnson*, 518 A.2d 985 (D.C. 1986) – for the proposition that "practically any conduct [falls] within the scope of, or incidental to, that authorized by their employer so long as the action has some nexus to the action

authorized." App. at 94. *Weinberg* and *Lyon* stand for no such proposition. The two cases simply recognize two sets of circumstances – both radically different from the one presented here – in which isolated acts of violence by an employee were deemed to be questions for the jury, not issues of law. Neither case supports the district court's ruling here.

Even a cursory examination of these two cases demonstrates how far afield they are from the instant action. In *Weinberg*, the plaintiff, a customer in a laundromat, was shot by an employee in a dispute that arose over whether the employee had removed plaintiffs' shirts from the washer. At the first trial, the court directed a verdict in favor of the employer, holding as a matter of a law that the employee's acts in shooting the plaintiff were outside the scope of his employment. 518 A.2d at 986-87. The D.C. Court of Appeals reversed, holding that a reasonable jury could determine that the shooting was within the scope of employment and that the plaintiff was entitled to have a jury consider the question. *Id.* After a second trial, the defendant-employer asserted again that the issue should be decided as a matter of law. Again the D.C. of Appeals held that the issue was properly one for the jury. *Id.*

This Court came to a similar conclusion in *Lyon v. Carey*. In *Lyon*, the defendant was a deliveryman who got into an altercation with a customer whom he assaulted and then raped. As in *Weinberg*, the trial court determined that the rape/assault could not, as a matter of law, be within defendant's scope of employment. *Lyon*, 533 F.2d at 650-51. On appeal, this Court disagreed, holding that the question was one of fact and that a reasonable jury could find that the conduct was within the defendant's employment. *Id.*

Despite the obvious limitations of *Weinberg* and *Lyon*, and their transparent attempt not to deprive victims of compensation, the court below suggested that they compel the result it reached. The district court stated:

> If the doctrine of *respondeat superior* is panoptic enough to link sexual assault with a furniture deliveryman's employment because of the likely friction that may arise between deliverymen and customer, it must also include torture and inhumane treatment wrought upon captives by their captors. Stated differently, if "altercations" and "violence" are foreseeable consequences of a furniture deliveryman's employment, then torture is a foreseeable consequence of the military's detention of suspected enemy combatants.

App. at 95. The court's analysis is without logical basis. The fact that an intentional tort *may* be found by a reasonable jury to be within the scope of employment does not compel such a result in every intentional tort case. To the contrary, in other cases applying D.C. law, specific intentional torts have been determined as a matter of law *not* to have been committed within the scope of employment. *E.g.*, *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346 (D.C. 1987); *Boykin*, 484 A.2d at 562-63; *Penn Central Transp. v. Reddick*, 398 A.2d 27 (D.C. 1979). If anything, the cases relied on by the district court suggest that courts should be chary of deciding scope of employment as a matter of law, an approach that this Court has recently strongly endorsed. *See Majano*, 469 F.3d at 140-41.

The district court's reliance on *Weinberg* and *Lyon* was misplaced for another, even more fundamental reason. Both involved altercations between employees and customers. Both turn on the degree to which the defendant's conduct was connected to his work responsibilities. If the case at bar arose from a rogue soldier beating an individual detainee, these cases might be on point. But the case at bar bears no factual resemblance to this garden-variety type of lawsuit, and therefore the precedential value of such cases is quite limited.

The issue presented with respect to defendants here, which was in no way presented in *Lyon* and *Weinberg*, is whether a deliberate decision by the Secretary of Defense and senior military officers to use torture and cruel and degrading treatment as an instrument of policy, in radical departure from authorized techniques for detention and interrogation, and contrary to

federal law, military law, and international law, should be deemed to be within the scope of employment for federal officers. The fact that a D.C. jury might be permitted to view it as "foreseeable" that a guard might get into a dispute with a prisoner resulting in violence and injury or even that a rogue interrogator might decide on his own to inflict torture on a particular detainee, in no way suggests that the court is entitled to prejudge the question of whether a jury would find it foreseeable that the Secretary of Defense and senior military officers would deliberately commit crimes under the UCMJ, federal law, and international law. Yet this is the result the district court reached here by its simplistic application of *Lyon* and *Weinberg*. The district court's finding, as a matter of law, that torture was within the scope of employment was reversible error.

D. The District Court Erred In Dismissing Plaintiffs' International Law Claims, Because The Entire Civil Action Against Defendants Falls Within The Exception To The Westfall Act.

The Westfall Act states expressly that the exclusive remedy provision of the FTCA (substituting the United States and immunizing individual defendants) "does not extend or apply to a *civil action* against an employee of the Government . . . which is brought for a violation of the Constitution." 28 U.S.C. § 2679(b)(2) (emphasis added). Plaintiffs argued below that their constitutional claims, and accordingly their entire "civil action," fall within this exception. The district court rejected plaintiffs' argument, holding that only the specific constitutional claims fall within the exception. The district court therefore substituted the United States as defendant for the international law and the Geneva Convention claims, immunizing defendants. Because the district court's decision is belied by the plain language of the statute, as well as Congressional intent in enacting it, this Court should reverse.

In rejecting plaintiffs' argument that the exclusive remedy provisions of the Westfall Act do not apply to plaintiffs' entire "civil action" when a constitutional or statutory tort is asserted, the district court relied on *Finley v. United States,* 490 U.S. 546 (1989). *Finley*, however, has been overturned by statute, and, in any event, is not applicable here.

In *Finley*, the Supreme Court decided that the language "civil action on claims against the United States" as used in the FTCA did not grant federal courts jurisdiction to hear claims against parties other than the United States where such claims do not raise federal questions. The district court quoted *Finley* for the proposition that a 1948 change in the language of the FTCA from "claims against the United States" to "civil actions on claims against the United States" does not permit "the assertion of jurisdiction over any 'civil action,' so long as that action *includes* a claim against the United States." App. at 100-01; *Finley*, 490 U.S. at 554.

Finley is not controlling here. First, the Supreme Court's holding in *Finley* has been legislatively overturned. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611, 2619-20 (2005). In abrogating *Finley*, Congress indicated that the term "civil action," as used in the FTCA, should be read to refer to the entire civil action and not just to particular claims. This determination is consistent with long-standing policies against claim-splitting. Second, *Finley's* reasoning is inapplicable here. The Court's reasoning in *Finley* was significantly influenced by the fact that the change in language was the result of a 1948 recodification of the Judicial Code. The Court was, accordingly, bound by precedent to read such language narrowly, presuming that no change in policy was intended, in the absence of evidence of Congressional intent. *Finley*, 490 U.S. at 554. In contrast to the FTCA language interpreted in *Finley*, the Westfall Act is not a mere recodification of an existing statute. This Court should therefore give "civil action" its plain meaning, consistent with the use of the term "civil action" in the Federal Rules themselves

and in numerous other statutes. *See, e.g., Commissioner v. Jean*, 496 U.S. 154, 161-62 (1990) ("civil action" in Equal Access to Justice Act required that attorneys' fees be assessed on case as an "inclusive whole, rather than as atomized line-items"); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990) (28 U.S.C. § 1441 permitting removal of any "civil action" involving foreign sovereign permits removal of entire proceeding); *In re Surinam Airways Holdings Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992) (same); *In re Aircrash Disaster Near Roselawn Indiana*, 96 F.3d 932, 942-43 (7th Cir. 1996) (same); *FSLIC v. Mackie.*, 962 F.2d 1144, 1147-50 (5th Cir. 1992) (interpreting "civil action, suit or proceeding" in FIRREA to mean entire action); *Pharmacia Corp. v. Clayton Chem. Acquis. L.L.C.*, 382 F.Supp. 2d 1079, 1087 (S.D. Ill. 2005) (interpreting "civil action" in CERCLA to mean "entire civil proceeding, including all component claims and cases within that proceeding").

The structure of the FTCA and the Westfall Act make clear that, with respect to these particular statutes, Congress was cognizant of the differences between an individual "claim" and a "civil action," which is more naturally read as comprising a group of claims. Section 2680 of the FTCA, which lists the exceptions to the FTCA generally, is instructive in this respect. Section 2680 exclusively uses the term "claim" in defining the scope of the exceptions to the FTCA's waiver of sovereign immunity. In contrast, Congress' decision to use the broader term "civil action" in connection with exceptions to the Westfall Act reflects its intent that the exceptions to the Westfall Act encompass the entire civil action and not merely a particular claim as would be the case under the exceptions listed in § 2680. In interpreting a statute, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the legislature uses certain language in one part of the statute and different language in another, the court

assumes different meanings were intended." *Sosa*, 542 U.S. at 712 n. 9 (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46:06 at 194 (6th rev. ed. 2000)). Where the words of the statute are unambiguous, no further judicial inquiry is necessary or permitted. *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Although the district court characterized its interpretation as "consistent with Congress' intent to provide immunity for common-law torts," the district court ignored a key limitation on that immunity. Congress did not intend to provide immunity for "egregious misconduct."[4] Indeed, Congress expressly stated, "[i]f an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable." H.R. Rep. No. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949. *See also Sosa*, 542 U.S. at 707 n.4 (FTCA intended to apply to "garden variety torts").

This distinction, between egregious misconduct – which Congress did not intend to immunize – and mere negligence or poor judgment – which it did – is embodied in the statutory and constitutional exceptions to the absolute immunity granted by the Westfall Act. In short, in enacting the Westfall Act, Congress focused on the seriousness of the defendant's misconduct rather than on specific claims or causes of action that a plaintiff might bring. If a defendant's conduct rises to the level of a constitutional or statutory violation, then immunity is not available. The cause of action arises from the core conduct and the parsing of a single nucleus of operative facts into specific claims does not affect the analysis of whether or not Congress intended the conduct to be immunized.

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[4] In interpreting federal statutes, courts must always strive to realize the intent of Congress. *United States v. Am. Trucking Co.,* 310 U.S. 534, 542 (1940). If the "plain meaning" of words, especially taken in isolation and out of context, would lead to "absurd or futile results," or even "an unreasonable one 'plainly at variance with the policy of the legislation as a whole,'" courts should look beyond the words to the purpose of the act. *Id.* at 543.

The district court's reading of the Westfall Act exceptions would lead to anomalous and illogical results. Officials would be immune from some claims arising out a particular nucleus of operative facts, and not for others, depending on the nature of the particular claims asserted within a single cause of action. The district court's reading of the exceptions also violates general public policy in favor of judicial economy and against claim-splitting. It has long been recognized that the adjudication in a single proceeding of all claims arising out of a single "common nucleus of operative fact" is favored. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966); *Montecatini Edison SPA v. Ziegler*, 486 F.2d 1279, 1287 (D.C. Cir. 1973). In these circumstances, the Westfall Act should not be interpreted to foster piecemeal and inefficient adjudication.

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED PLAINTIFFS' CLAIM UNDER THE GENEVA CONVENTIONS.

In a footnote and without analysis, the district court dismissed plaintiffs' claim that torture and mistreatment violated their rights under the Geneva Conventions on the basis that "the D.C. Circuit has ruled that the Geneva Conventions do not incorporate a private right to enforce [their] provisions in court." App. at 90 n.4 (citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005)). *Hamdan,* which was decided after the briefing was completed below, has since been reversed by the Supreme Court. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). While not specifically deciding to what extent the Geneva Conventions confer private rights of action, the Supreme Court characterized the reasoning of the Circuit's *Hamdan* decision, which rejected the petition on, *inter alia*, the ground that a private right of action is not available under the

Geneva Conventions, as not "persuasive." *Id.* at 2793. The Supreme Court then considered the petition and allowed Hamdan to assert rights under the Geneva Conventions. *Id.* at 2793-94.[5]

An individual has enforceable rights under a treaty if a private right of action is provided expressly or by implication. *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988). A private right of action exists where the treaty: (1) prescribes a rule by which the rights of the private citizen or subject may be determined, and (2) is self-executing. *Diggs v. Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976). The Geneva Conventions meet these requirements. In *Hamdan*, the Supreme Court concluded that the Geneva Conventions are judicially enforceable and considered the Conventions as a source of rights enforceable by individuals. The Court strongly suggested that the Conventions provide a private cause of action. *Hamdan*, 126 S. Ct. at 2793-94 & nn. 57-58 (citing authorities for proposition that Conventions are enforceable by individuals). Against this backdrop, the district court's summary dismissal of the plaintiffs' Geneva Conventions claim was error.

A. The Geneva Conventions Guarantee Rights to Individuals.

The Geneva Conventions were written "first and foremost to protect individuals, and not to serve state interest." Oscar M. Uhler *et. al., Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). By interpreting and enforcing rights secured to the petitioner by the Geneva Conventions in *Hamdan*, the Supreme Court has rejected this Court's earlier view that the Conventions give rights only to

[5] The Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in relevant part as 10 U.S.C. § 949) ("MCA") does not preclude plaintiffs' private action to enforce the Geneva Conventions. Although Section 5(a) of the MCA prohibits use of the Conventions as "a source of rights" by private parties, this provision, in stark contrast to several other provisions of the MCA, does not contain an effective date or retroactivity provision. Consequently, the MCA does not affect this action, which was pending at the time of its passage. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (noting deeply rooted "presumption against retroactive legislation"); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (statute does not affect pending claims "absent a clear indication that Congress intended such a result").

other signatories and not individuals. Both the Geneva POW Convention and the Geneva Convention on Civilian Detainees expressly provide that detained persons "may in no circumstances renounce in part or in entirety *the rights secured to them* by the present Convention." Geneva POW Convention, Article 7; Geneva Convention on Civilian Detainees, Article 8 (emphasis added). This formulation confirms that rights under the Conventions are secured *to individuals.* If the intention were otherwise, that rights are secured only to the nation-state signatories, this non-waiver provision would be meaningless, because individuals would have no rights to "renounce." In addition, the Conventions contain provisions requiring that prisoners be given notice of their protections, which strongly suggests that the Conventions guarantee rights to individuals. Geneva POW Convention Act 41. *See Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J. dissenting) (notice provision in Vienna Convention on Consular Relations indicative that treaty secures rights to individuals). As one district court has stated in reference to the Geneva POW Convention:

> [I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of [the Geneva POW Convention] is to ensure humane treatment of POWs–not to create some amorphous, unenforceable code of honor among the signatory nations.

United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992).

B. The Relevant Provisions of the Geneva Conventions Are Self-Executing.

A treaty is considered self-executing when it is effective upon ratification and no additional legislation is necessary to accomplish the purposes of the treaty. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (self-executing treaty "operates of itself without the aid of any legislative provision"), *overruled in part on other grounds, United States v. Percheman*, 32 U.S.

(7 Pet.) 51 (1833). A treaty may "contain both self-executing and non-self-executing provisions." *Lidas, Inc. v. United States,* 238 F.3d 1076, 1080 (9th Cir. 2001); *Noriega*, 808 F. Supp. at 797-98.

There can be little doubt that the relevant provisions of the Geneva POW Convention and the Geneva Convention on Civilian Detainees are self-executing. These Conventions prohibit any signatory from torturing detained persons; from committing outrages upon their persons or treating them with brutality; from exposing them to cruel and degrading treatment; from using physical or mental coercion or torture in order to secure information from them; and from interfering with their religious practices. In ratifying these treaties, the United States assumed the specific obligation to comply with these prohibitions and to do so for the express benefit of individual detainees. No further legislation was required. This is the very definition of "self-executing." *See* Restatement (Third) of the Foreign Relations Law of the United States § 111, Rpt.'s Note 5 (1987) ("obligations not to act, or to act only subject to limitations, are generally self executing"); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1127-28 (1992).

Given that the relevant provisions of the Geneva Conventions are both self-executing and guarantee rights to individuals, the district court erred in dismissing plaintiffs' Convention-based claims.

IV. THE DISTRICT COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The district court dismissed plaintiffs' constitutional claims (Counts V-VI of the complaint) based on a finding that defendants enjoyed qualified immunity when they designed and implemented a policy of torture. The court found that plaintiffs' right not to be tortured was

not clearly established. As a result, the district court held that defendants are entitled to immunity.

Defendants' conduct was grossly illegal; they knew it; and they were seeking a legal loophole to avoid responsibility. Their contention that they should be immune from suit because they thought that detainees at Guantánamo had no constitutional rights and could be tortured without accountability is an anathema and should be rejected. The doctrine of qualified immunity was never intended to provide a license for knowing and deliberate misconduct which defendants tried, but failed, to shield from accountability.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded 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). Here, it is beyond cavil that defendants' conduct violated plaintiffs' constitutional rights – torture, prolonged arbitrary detention, and cruel and degrading treatment violate the bedrock legal norms of any civilized society. *Rasul*, 542 U.S. at 484 n.15. There is also no question that any reasonable and competent public official would have been on notice that such conduct was not only illegal but that it violated fundamental constitutional constraints on governmental power. Indeed, the complaint specifically refers to defendants' memoranda acknowledging the fact that the conduct was illegal. App. at 15-18 (Compl. ¶¶ 9-12).

A. The District Court Incorrectly Analyzed Defendants' Claim of Qualified Immunity.

It is axiomatic that qualified immunity is not absolute – it only immunizes persons who act without knowledge that their conduct violates protected rights. Although the qualified immunity standard "gives ample room for mistaken judgments," it does not protect "the plainly

incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Similarly, it does not shield officers from liability for conduct "so egregious" that any reasonable person would know it was illegal without guidance from courts. *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992).

The district court rested its decision that plaintiffs' constitutional rights were not well established on its conclusion that the Supreme Court's decisions in *Rasul v. Rumsfeld,* 542 U.S. 507 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) were the first to deal "precisely with the facts and basic concerns presented here" and constituted "the first indication that detainees may be afforded a degree of constitutional protection." App. at 112-13. This is not accurate, but, in any event, qualified immunity does not turn on locating a prior case deciding identical facts and concerns; rather it involves an assessment of "objective reasonableness." The Supreme Court has stated empathically that qualified immunity can be denied although "the very action in question has not previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A plaintiff does not need to identify legal precedent arising from "materially similar" facts to the case at bar. *Hope v. Pelzer*, 536 U.S. 736, 739 (2002). As the Supreme Court observed in *United States v. Lanier*, "the easiest cases don't even arise. There has never been a. . . .section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. 259, 271 (1997) (internal citations omitted).

For a right to be clearly established, it is enough that "the contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "[T]he salient question . . . is whether the state of the law [at the relevant time] gave [the officials] *fair warning* that their alleged treatment of [the plaintiff]

was unconstitutional." *Hope*, 536 U.S. at 741 (emphasis added). As is clear from *Hope* and *Lanier*, the "fair warning" standard is inherently a commonsense, good faith standard, not a legalistic inquiry into whether fundamental legal requirements can be evaded. Thus, the Supreme Court held in *Hope* that "the obvious cruelty inherent" in the use of the hitching post, and treatment "antithetical to human dignity" under circumstances that were both "degrading and dangerous," were sufficient to trigger notice. *Id.* at 745-46. The fact that the specific practice had never been addressed by the courts did not afford the defendants in *Hope* an escape into qualified immunity. No less so here.

B. A Reasonable Person in the Defendants' Position Would Have Been Fairly on Notice that Torturing Plaintiffs was Illegal and Unconstitutional.

Even without the benefit of *Rasul and Hamdi,* defendants had ample warning that their conduct was illegal and unconstitutional. At the time that plaintiffs were under defendants' complete control, torture undeniably violated U.S. law. Indeed, torture violates the core norms of every civilized country. It was also clearly established that fundamental rights, such as the right to be free from torture, are guaranteed to aliens resident not only in the United States proper but in all territories under U.S. control. Finally, defendants' own regulations, their solicitation of legal opinions seeking a means to evade those regulations, and their actions in knowing dereliction of their own regulations make clear that they were fully aware of the wrongful character of their conduct. In these circumstances, the district court should have found that defendants were duly on notice of plaintiffs' rights.

1. Torture Indisputably Implicates Established Constitutional Norms.

The prohibition on torture is universally accepted. *See Sosa*, 542 U.S. at 762 (Breyer, J. concurring) (torture is included among the subset of conduct "universally condemned" under international law); *Filartiga*, 630 F.2d at 883-84. Virtually all of the specific acts alleged in the

complaint have been held to be illegal and violative of the Fifth and/or Eighth Amendment by a wide variety of judicial decisions. *See, e.g., Hope*, 536 U.S. at 737-38 (shackling in painful positions, exposure to sun, deprivation of water and access to toilet facilities); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1248 (M.D. Ala. 1998) (shackling in painful positions, severe chafing of handcuffs); *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (forced nakedness, isolation in darkness, deliberate exposure to cold, withholding hygienic items, withholding food, shackling in painful positions); *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1223 (D. Colo. 2001) (beating while shackled); *Evicci v. Baker*, 190 F. Supp. 2d 233, 238-39 (D. Mass. 2002) (same); *Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (beating while shackled and blindfolded, exposure to extreme cold, forced nakedness, solitary confinement); *Nelson v. Heyne*, 491 F.2d 352, 357 (7th Cir. 1974) (forced use of tranquilizing drugs); *Harper v. Wall*, 85 F. Supp. 783, 785-86 (D.N.J. 1949) (attacks with dogs). Consequently, there can be no question that defendants were on notice that their conduct violated established constitutional norms.

2. Fundamental Constitutional Rights Are Clearly Recognized as Applying Beyond our Borders.

The Supreme Court and this Circuit have long held that fundamental rights such as the ones at issue here are applicable beyond U.S. borders. For example, in the "*Insular Cases,*" the Supreme Court consistently found that fundamental constitutional rights apply to people in territories under U.S. control regardless of their citizenship. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (disclaiming "any intention to hold that the inhabitants of these territories are subject to an unrestrained power. . . upon the theory that they have no rights"); *Dorr v. U.S.*, 195 U.S. 138, 148-49 (1904) (trial by jury is not one of the fundamental rights which applies outside the U.S.); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) (in U.S. territories "it is locality that is determinative of the application of the Constitution . . . and not the status of the people who

live in it"). *See also In re Guantánamo Detainee Cases*, 355 F.Supp. 2d 443, 454-56 (D.C. 2005) (summarizing and discussing the *Insular* line of cases). This Court has also found that the due process clause of the Fifth Amendment, the clause at issue here, restricts U.S. governmental conduct in Micronesia, even though the United States is not the "technical" sovereign. *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977). More recently, it has noted that "inhabitants of non-state territories controlled by the United States – such as unincorporated territories or occupation zones after war – are entitled to certain 'fundamental rights.'" *Harbury v. Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000), *rev'd on other grounds sub nom*, *Christopher v. Harbury*, 536 U.S. 403 (2002).

It cannot be realistically argued that Guantánamo is not controlled by the United States. The U.S. government occupies this territory under an indefinite lease that grants it "complete jurisdiction and control." *Rasul*, 542 U.S. at 480. Thus, the United States lacks only titular sovereignty over this area. U.S. law is the only law that applies at Guantánamo. Guantánamo falls within the special maritime and territorial jurisdiction of the United States; therefore, U.S. criminal law applies there, including the panoply of constitutional rights that go along with criminal prosecution. 18 U.S.C. § 7; *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990), *United States v. Rogers*, 388 F. Supp. 298, 301-02 (E.D. Va. 1975) (Fourth Amendment applies to criminal cases arising out of conduct of civilians at Guantánamo). More than 25 years ago, the Justice Department's Office of Legal Counsel concluded that the base comes within the ambit of federal legislation. Installation of Slot Machs. on U.S. Naval Base, Guantánamo Bay, 6 Op. Off. Legal Counsel 236 (1982). Consequently, defendants were fairly on notice that U.S. law, including the fundamental protections secured under the Constitution, governed their conduct at Guantánamo.

In ruling otherwise, the district court relied primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) ("*Verdugo*"), but these cases are not dispositive here. *Eisentrager* involved a petition for a writ of *habeas corpus* brought by convicted enemy prisoners of war imprisoned in Germany. As the Supreme Court held, the prisoners in *Eisentrager* had been convicted of war crimes, which put them in a substantially different posture than plaintiffs, who are innocent civilians. *Rasul*, 542 U.S. at 476. Regardless of the plaintiffs' status, however, there is nothing in *Eisentrager* that suggests that it is constitutionally permissible for the U.S. military to torture prisoners in their custody, wherever those prisoners may be held. The prohibition on torture, as a fundamental right, was well-established by the time *Eisentrager* was decided. *See Brown v. Mississippi*, 297 U.S. 278, 285-87 (1932) (torture "inconsistent with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions"). In addition, *Eisentrager* arose in another sovereign country with its own laws, not an area within the territorial and maritime jurisdiction of the United States. Defendants could not have reasonably relied on *Eisentrager* as giving them cover for their mistreatment of plaintiffs and the other Guantánamo detainees.

The district court's reliance on *Verdugo-Urquidez* is equally inapt. *Verdugo* involved the trial of an alleged Mexican drug lord. The question presented was whether the United States could use evidence gathered from a search of the defendant's apartment in Mexico, where no warrant for the search was obtained in advance. The Supreme Court held that the evidence could be used because the Fourth Amendment did not restrict the United States from participating in a search of property in Mexico. It is difficult to see how the defendants could have relied on the holding in *Verdugo*, which was expressly limited to the question of the Fourth Amendment's applicability to a search in a foreign sovereign nation, to justify their arbitrary detention and

torture of the plaintiffs at Guantánamo. The plaintiffs' detention at Guantánamo involved neither the Fourth Amendment, nor the pre-trial procedures and sovereignty of another country. And, contrary to the district court's holding, *Verdugo* supports plaintiffs' argument that defendants' conduct at Guantánamo was unconstitutional. The Supreme Court in *Verdugo* undertakes a lengthy discussion, on an amendment-by-amendment basis, of what rights have been held to apply to aliens and citizens outside the United States. This discussion culminates with the conclusion that "only fundamental rights" are guaranteed to inhabitants of territories under U.S. control, such as Guantánamo. *Verdugo-Urquidez*, 494 U.S. at 268-69 (citing cases). Since at least 1932, it has been established that torture "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Brown*, 297 U.S. at 285-86.

3. Defendants' Own Actions Demonstrate that They Were Aware that Their Conduct Was Wrongful and Unconstitutional.

Good faith is at the heart of qualified immunity. The Supreme Court often uses the terms "qualified immunity" and "good faith immunity" interchangeably. *See, e.g., Harlow*, 457 U.S. at 815. It is intended to protect from individual liability the defendant who "makes a mistake in judgment" or "fails to anticipate subsequent legal developments." *Polk v. Dist. of Columbia*, 121 F. Supp. 2d 56, 71 (D.D.C. 2000). It is not intended to protect defendants who engage in deliberately unlawful conduct, *Malley*, 475 U.S. at 341; *McIntyre v. United States*, 336 F. Supp. 2d 87, 123-26 (D. Mass. 2004), or "active deception." *Polk*, 121 F. Supp. 2d at 71. Although the Supreme Court applies an objective test for good faith in this context, it has noted that "[b]y defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819. Yet a license for lawless conduct is precisely what defendants sought and were granted by the court below.

Like the state court judge who committed sexual assault in *United States v. Lanier*, defendants here assert that it is unfair to subject them to liability because the unconstitutionality of their conduct was not clear. Judge Lanier argued that he was not on notice that the Constitution was implicated in his criminal conduct – sexual assault of five women – even though he was presumably aware that state criminal statutes prohibited such conduct. Similarly, defendants here assert that, although they were clearly aware that torture violated every known legal standard, they were not on notice that the Constitution would be implicated because of the location of their egregious criminal conduct. Like the Court in *Lanier*, this Court should reject defendants' attempt to take refuge in a legal loophole to avoid the consequences of their manifestly illegal conduct. Defendants could have been in no doubt about the unlawfulness of their acts.

As in *Hope*, defendants were knowingly violating their own regulations. Such knowing violations preclude reliance on qualified immunity. *Hope*, 536 U.S. at 743-44. And like the prison guards in *Hope*, defendants here had much more than a "single warning." *Hope*, 536 U.S. at 740-41. Defendants' conduct violated virtually every law of which they could have been aware – federal criminal law, the UCMJ, military regulations, the Army Field Manual, and international law. Cruelty, oppression and maltreatment of prisoners is a violation of Article 93 and of Army Reg. 190-8 and military courts have long held that these protections extend to non-military persons subject to the control of military personnel. *United States v. Dickey*, 20 C.M.R. 486, 488-89 (Army Bd. Rev. 1956). Abuse and torture of prisoners have repeatedly been found unlawful. *Dickey*, 20 C.M.R. at 488-89; *United States v. Lee*, 25 M.J. 703, 704-05 (Ct. Mil. Rev. 1987); *United States v. Finch*, 22 C.M.R. 698, 700-01 (Navy Bd. Rev. 1956). Plaintiffs submit that, whether there was a constitutional case directly on point or not, defendants' "warning" was

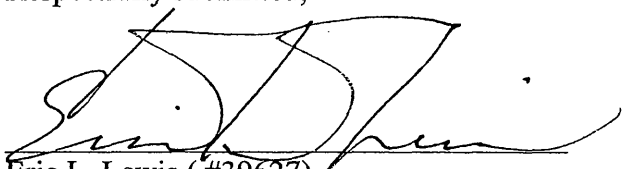
more than "fair." As the Supreme Court has held, "it is not unfair to hold liable the official who knows or should know that he is acting outside the law." *Butz v. Economou*, 438 U.S. 478, 506 (1978)

Defendants plainly selected Guantánamo as plaintiffs' detention facility in a calculated effort to avoid accountability for conduct that had long been held unconstitutional when it occurred in U.S. prisons. But Guantánamo is not a Hobbesian enclave where defendants could violate clear prohibitions on their conduct imposed by statute and regulations, and then point to a purported constitutional void as a basis for immunity. *Lanier* and *Hope* preclude such a cynical use of qualified immunity. As many courts have held, granting qualified immunity in a circumstance in which the unlawfulness of defendants' conduct was clear but in which there was no constitutional case directly on point would pervert the very purpose of qualified immunity, immunizing the most egregious conduct because it was so far beyond the pale that no court had been required to address it. *See, e.g.*, *Lanier*, 520 U.S. at 271-72; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1061 (9th Cir. 2003); *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 253 (2d Cir. 2001); *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992). The district court's dismissal of the plaintiffs' constitutional claims on qualified immunity grounds must be reversed.

CONCLUSION

WHEREFORE, for the reasons stated herein, plaintiffs-appellants request that the order of the district court be reversed and this matter be remanded for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief contains 13,735 words.

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This is to certify that true and correct copies of the foregoing Brief of Appellants was sent via Federal Express to the following on January 8, 2007:

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