UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the defendants, Secretary of Defense Donald H. 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, and Army Lieutenant Colonel Diane Beaver (collectively, "Defendants"), hereby move to dismiss plaintiffs' claims for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The grounds for the motion are set forth in the accompanying memorandum of points and authorities. A proposed order also is enclosed.

Dated: March 16, 2005

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, killing approximately 3,000 persons. The President responded with many steps to protect the Nation, including military action. Congress also acted by passing a joint resolution specifically authorizing the President's use of military force against the "nations, organizations, or persons ... [the President] determines planned, authorized, committed, or aided the terrorist attacks." The resolution emphasized that those responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Auth. for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

Consistent with the President's constitutional powers and the joint resolution, armed forces of the United States were sent to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that supported and protected that network. In the course of that campaign – which is ongoing – the United States and its allies have captured thousands of individuals. Just as in virtually every major armed conflict in the Nation's history, the military has determined that many of those taken into custody should be detained during the war. Such detention serves the vital objectives of gathering intelligence to further the overall war effort and preventing combatants from continuing to aid our enemies.

The United States military transferred some aliens captured during hostilities to the U.S. Naval Base at Guantanamo Bay, Cuba (hereinafter "Guantanamo"). That action was taken consistent with the President's determination that the detainees "pose a severe security risk to those responsible for guarding them and to each other," and that "[t]he United States must take

into account the need for security in establishing the conditions for detention at Guantanamo." Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002, at 2 (<www.whitehouse.gov/news/releases/2002/02/20020207-13.html>).[1]

The plaintiffs in this action are four aliens who were allegedly captured in the course of the United States' military operations in Afghanistan and later detained at Guantanamo. The plaintiffs claim that they were released from detention in May 2004 and flown to the United Kingdom, where they now reside. *See* Compl. ¶¶ 5, 138. The plaintiffs' release occurred shortly before the Supreme Court's decision in *Rasul v. Bush*, 124 S.Ct. 2686 (June 28, 2004), which held that 28 U.S.C. § 2241 provided federal courts in the United States with jurisdiction over habeas corpus petitions filed by the Guantanamo detainees.

This case does not involve habeas claims of the sort addressed in *Rasul*. Rather, the plaintiffs here claim that their confinement at Guantanamo is actionable on novel tort theories, and they seek recovery of damages personally against Secretary of Defense Donald H. Rumsfeld and ten senior U.S. military officials.[2] The plaintiffs assert that the actions taken by the defendants caused them to be held in harsh conditions at Guantanamo in violation of their alleged international law rights under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Geneva Conventions, their alleged constitutional rights under the Fifth and Eighth Amendments,

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[1] The President has also announced that "[t]he United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949." *Id.* at 1.

[2] The other named defendants are General Richard Myers, General James T. Hill, Major General Geoffrey Miller, Major General Michael E. Dunlavey, Brigadier General Jay Hood, Brigadier General Michael Lehnert, Brigadier General Nelson J. Cannon, Colonel Terry Carrico, Lieutenant Colonel William Cline, and Lieutenant Colonel Diane Beaver.

and their alleged religious rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.*

The defendants in this motion seek dismissal of all plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Counts I-IV in the complaint seeking recovery for violations of international law principles under the ATS and the Geneva Conventions should be dismissed on absolute immunity grounds under the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (hereinafter "Liability Reform Act"). That Act bars suits against federal officials for conduct performed within the scope of their employment except for tort claims for the violation of federal constitutional or statutory rights. Plaintiffs' sole tort remedy for claims covered by the Liability Reform Act is an action against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, which plaintiffs cannot pursue because they have not exhausted the required administrative remedies under the FTCA.

Counts V and VI in the complaint alleging the violation of plaintiffs' Fifth and Eighth Amendment rights should be dismissed under the "special factors" doctrine because there are grave separation of powers concerns that counsel against the recognition of constitutional tort claims in this context. The judiciary has never implied a so-called *Bivens*[3] claim in circumstances presenting war powers, national security, or foreign policy concerns remotely similar to those existing here.

Plaintiffs' constitutional claims should also be dismissed on qualified immunity grounds because they have not alleged the violation of any constitutional right that is clearly established

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[3] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

in the law. Similarly, plaintiffs' last claim in the complaint – count VII for the alleged violation of religious rights under RFRA – should be dismissed under the qualified immunity doctrine because it is not clearly established that RFRA has extraterritorial application.

ARGUMENT

I. Defendants Are Entitled To Absolute Immunity From Suit On Counts I-IV For The Alleged Violations Of Plaintiffs' Rights Under International Law

In Counts I-III, plaintiffs bring claims for damages under the ATS. That statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In Count IV, plaintiffs assert damages claims for alleged violations of the Geneva Conventions. The Liability Reform Act makes plain, however, that the exclusive remedy for these claims is a suit against the United States under the FTCA. *See* 28 U.S.C. § 2679(d).

Section 2679(d) states that a plaintiff's sole remedy for a claim of damages arising from any "negligent or wrongful act" or omission of a government employee acting within the scope of his or her employment is a suit against the United States under the FTCA. *Schneider v. Kissinger*, 310 F. Supp.2d 251, 264 (D.D.C. 2004), *appeal docketed*, No. 04-5199 (D.C. Cir. June 3, 2004). Upon certification by a designee of the Attorney General that the individual employee acted within the scope of his employment, the United States is substituted in place of the individual defendant.[4] *Id.* (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420

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[4] The Attorney General has delegated his authority to certify scope of employment to any Director of the Torts Branch, Civil Division. *See* 28 C.F.R. § 15.4(a). Timothy P. Garren, a Torts Branch Director, has certified that plaintiffs' claims are based upon actions taken by defendants in the scope of their federal offices. Ex. 1 (Notice of Scope Certification). Consistent with that certification and the arguments set forth herein, the United States should be substituted in place of the individual defendants with respect to Counts I-IV of the Complaint.

(1995)); *see also* 28 U.S.C. § 2679(d)(1). As part and parcel of this substitution, the individual defendants are absolutely immune from suit for the alleged international law violations outlined in the complaint. *See* 28 U.S.C. § 2679(b)(1) ("civil action[s] or proceeding[s] . . . against the employee or the employee's estate [are] precluded").

The Liability Reform Act provides only two exceptions to its exclusive remedy rule. That rule does not apply to claims brought "for a violation of the Constitution" or "for a violation of a statute of the United States." 28 U.S.C. § 2679(b)(2). All other claims against federal employees based upon conduct undertaken within the scope of federal employment are barred by the Act. *See, e.g., United States v. Smith*, 499 U.S. 160, 166-67 (1991) (refusing to infer another exception beyond the two expressly stated in the Liability Reform Act).

The plaintiffs' claims under the ATS and Geneva Conventions do not fall within either exception. As the Supreme Court recently made clear in *Sosa v. Alvarez-Machain*, "the ATS is a jurisdictional statute creating no new causes of action." 124 S.Ct. 2739, 2761 (2004). The ATS itself creates no substantive rights that can be "violated" for purposes of the Liability Reform Act. The ATS merely affords the jurisdictional basis for the assertion of rights conferred elsewhere, namely by the law of nations or a U.S. treaty. *Alvarez-Machain*, 124 S.Ct. at 2761. Thus, a claim brought under the ATS is "not exempt from the exclusive remedy provision of the Liability Reform Act." *Alvarez-Machain v. United States*, 331 F.3d 604, 631 (9th Cir. 2003), *rev'd on other grounds*, 124 S.Ct. 2739 (2004); *see also Schneider*, 310 F.Supp.2d at 266-67 (the United States must be substituted in place of individual defendants on ATS claims).

Substitution also is required on Count IV because plaintiffs' claim for alleged violation of the Geneva Conventions likewise is not a claim "for a violation of the Constitution . . . or . . . for

a violation of a statute of the United States." *See* 28 U.S.C. § 2679(b)(2)(B). Treaties adopted by the United States may be part of the "law of the land,"[5] *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996), but a tort claim based directly upon a treaty does not constitute a claim for the violation of the Constitution or a federal statute as required by the Liability Reform Act. This is especially clear given the Supreme Court's narrow construction of the exceptions to the Liability Reform Act. *See, e.g., Smith*, 499 U.S. at 173-74. In *Smith*, the Court held that "Congress' express creation of these two exceptions [for violations of the Constitution and federal statutes] convinces us that the Ninth Circuit erred in inferring a third exception" to the Liability Reform Act. *Smith*, 499 U.S. at 167. This Court should reject plaintiff's attempt to create a third exception for claims for violations of treaties.[6]

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[5] It should be noted that the distinction between federal constitutional, statutory, and treaty provisions is expressly recognized in the Constitution. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . ." Art. VII, Clause 2 (emphasis added).

[6] In any event, Count IV should be dismissed because the Geneva Conventions do not provide private parties with judicially enforceable rights. "Treaties, as a general rule, are not privately enforceable . . . enforcement in the final analysis is reserved to the executive authority of the governments who are parties to the treaties." *Khalid v. Bush*, Nos. 04-1142, 04-1166, 2005 WL 100924 *10 (D.D.C. Jan. 19, 2005), *appeal docketed*, No. 05-5063 (D.C. Cir. March 4, 2005); *see also Z. & F. Assets Realization Corp. v Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940) (footnotes omitted), *aff'd on other grounds*, 311 U.S. 470 (1941) ("the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters"). The Supreme Court has long held that, in regard to individuals seeking enforcement of a treaty, "judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. 580, 598 (1884); *see also Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (refusing to adjudicate claim that U.S. policy and actions concerning Nicaragua violated the U.N. Charter). In fact, the Supreme Court has specifically held that the 1929 Third Geneva Convention did not provide private parties with judicially enforceable rights. *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950); *see also Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (rights of alien enemies under the 1929 Third

Upon the substitution of the United States on Counts I-IV in accordance with the Liability Reform Act, dismissal of the resulting FTCA claims is required. The Liability Reform Act provides that when the United States is substituted for the individual defendants, the resulting claim is fully "subject to the limitations and exceptions applicable to" FTCA claims. 28 U.S.C. § 2679(d)(4). In this case, plaintiffs have not satisfied the jurisdictional requirements for proceeding on an FTCA claim. An essential prerequisite to the pursuit of an FTCA claim against the United States is the exhaustion of all administrative remedies. *See* 28 U.S.C. § 2675(a) ("An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claims all have been finally denied by the agency in writing"); *McNeil v. United States*, 508 U.S. 106, 112 (1993); *Schneider*, 310 F.Supp.2d at 266-67. This requirement is jurisdictional. 28 U.S.C. § 2675(a); *see also Jackson v. United States*, 730 F.2d 808, 809 (D.C. Cir. 1984); *Schneider*, 310 F.Supp.2d at 269. Since plaintiffs have not exhausted their administrative remedies, this Court lacks subject matter jurisdiction over their FTCA claims. *See* 28 U.S.C. § 2675(a); *McNeil*, 508 U.S. at 112.

Geneva Convention may be vindicated "only through protests and intervention of protecting powers"); *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 (C.D. Cal. 1985) (Geneva Conventions were not intended to establish "judicially enforceable obligations"). Although the Geneva Conventions have been revised since then, Congress has yet to indicate any intent to radically transform this area of the law by granting those captured during armed combat with the right to enforce the Geneva Conventions in federal court. *See Hamdi*, 316 at 468-69; *see also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring,) *overruled on other grounds*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring). This issue is currently before the D.C. Circuit. *See Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. argument set for April 7, 2005).

II. Counts V And VI For The Alleged Violation Of Plaintiffs' Constitutional Rights Should Be Dismissed On Both Special Factors And Qualified Immunity Grounds

A. Special Factors Preclude Recognition of a *Bivens* Action Under the Alleged Facts of this Case

The "special factors" doctrine, developed by the Supreme Court in *Bivens* and its progeny, precludes any constitutional claim for damages against the individual defendants in this case. In *Bivens*, the Supreme Court held that the victim of an alleged Fourth Amendment violation could bring suit to recover damages even though no statute created a cause of action provided there were "no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. In subsequent years, the Supreme Court has extended the *Bivens* remedy on just two occasions and, in both instances, the Court specifically determined that there were no "special factors counseling hesitation" in the judicial creation of a remedy. *See Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

In the twenty-five years since *Carlson*, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). For instance, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court refused to recognize a *Bivens* remedy for the alleged violation of First Amendment rights arising out of federal personnel decisions for fear that the claim might interfere with a statutory scheme regulating the federal workplace. *See also Schweiker v. Chilicky*, 487 U.S. 412, 420 (1988) (rejecting a *Bivens* remedy for the denial of social security benefits because a statutory procedure already existed to challenge adverse eligibility determinations). In *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669, 682-83 (1987), the Court rejected a *Bivens* remedy for alleged constitutional torts

arising incident to military service for fear that such a claim would adversely impact order and discipline in the military. In *FDIC v. Meyer*, 510 U.S. 471 (1994), the Court determined that a *Bivens* claim could not be asserted against a federal agency because of its potential impact on federal fiscal policy. Most recently, in *Malesko*, the Supreme Court refused to extend a *Bivens* remedy to private companies performing governmental functions under contract with the United States because it would not serve the public policy purposes of the remedy. 534 U.S. at 68. "The result [of these decisions] is a sort of presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees." *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988).

The plaintiffs here seek to extend *Bivens* to a new, highly sensitive context, one that would allow a damages cause of action against military officials for the wartime actions of the U.S. military in capturing non-resident aliens on foreign battlefields and detaining them outside the United States. There are many important special factors related to the Executive Branch's constitutional duty and authority to conduct war, protect national security, and formulate foreign policy that preclude recognition of a *Bivens* remedy in this context. Permitting plaintiffs' claims to proceed in the face of such stark separation of powers concerns would constitute a sharp departure from the Supreme Court's well-settled reluctance to extend *Bivens* liability.

Federal courts have traditionally been loath to interfere in military decisions made by the Executive Branch during wartime. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 n. 2 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war"); *Van Tu v. Koster*, 364 F.3d 1196, 1198 (10th Cir. 2004) (finding "availability of a *Bivens* remedy" for the conduct of U.S. military officers during the

Vietnam War to be "questionable"); *Khalid v. Bush*, Nos. 04-1142, 04-1166, 2005 WL 100924 *12 (D.D.C. Jan. 19, 2005), *appeal docketed*, No. 05-5063 (D.C. Cir. March 4, 2005) ("[T]he Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed."). Such deference is appropriate because the Constitution delegates authority over decisions related to the conduct of war to the political branches. *See* U.S. Const. Art. I, § 8; Art. II, § 2; *see also Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004) (plurality) ("our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them"); *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (Constitution mandates that "the political branches of government are [to be] accorded a particularly high degree of deference in the area of military affairs"). Deference is especially warranted where, as here, defendants acted pursuant to authorization from Congress. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635-37 n. 2 (Jackson, J., concurring); *see also* AUMF, 115 Stat. 224; *Khalid*, 2005 WL 100924, at *4-5.

To sanction the creation of a damages action against defendants for their exercise of constitutionally- and congressionally-delegated war powers would compromise the Executive Branch's authority to safeguard the Nation. *Bivens* actions brought by potential enemy aliens could "hamper the war effort and bring aid and comfort to the enemy and diminish the prestige of our commanders." *Eisentrager*, 339 U.S. at 778-79 ("Executive power over enemy aliens, undelayed and unhampered by litigation has been deemed, throughout our history, essential to war-time security . . . It would be difficult to devise more effective fettering" of executive branch officials than "to allow the very enemies [they are fighting] ... to call [them] to account in [their] own civil courts."). Recognition of a *Bivens* remedy against senior military officials in this

context also would risk inter-branch conflict in policy areas where the courts have routinely deferred to the Executive. *See Eisentrager*, 339 U.S. at 779 ("Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.").[7]

Even in times of peace, federal courts have broadly deferred to the Executive Branch on national security matters. *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs."); *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000) (determinations regarding national security raise non-justiciable issues); *Halperin v. Kissinger*, 807 F.2d 180, 187 (D.C. Cir. 1986) ("harm produced" by assertion of damages actions against federal officials "is particularly severe in the national security field, since 'no governmental interest is more compelling'"); *Schneider*, 310 F.Supp.2d at 269 n.27 (dismissing claims for equitable relief because they concerned "foreign and national security policy directives of the President"). In *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), for example, the Tenth Circuit found "that the predominant issue of national security clearances" was a special factor that precluded a *Bivens* action arising from the denial of access to a secured work area. *Id.* at 563. The analysis in *Beattie* refusing to imply a claim on behalf of

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[7] Implying a damages remedy here would create a paradoxical result. U.S. soldiers serving abroad would be barred from bringing *Bivens* actions for injuries arising out of their military service, *see Stanley*, 483 U.S. at 682-83, while those whom they captured would be able to sue U.S. military personnel. *See Eisentrager*, 339 U.S. at 783 (stating that it would be a "paradox" if what the court denied "our own soldiers" it granted to "enemy aliens in unlawful hostile action against us"). Rather than confer a right of action "on all of the world except Americans defending it," *id.* at 784, this Court instead should find that the Executive's authority over the military is a special factor counseling hesitation.

a citizen for allegedly unconstitutional conduct occurring in the United States during peace-time is compelling support for dismissal of the present case. There are obvious and significant national security concerns inherent in subjecting federal officials to personal liability for their decisions regarding the detention of non-resident aliens outside the United States during wartime. The prospect of prolonged litigation and personal liability might unduly influence decisions concerning the release of potential enemies from military custody, which could enhance the risk to our military in the field and adversely impact the fundamental security of the Nation.

The threat to national security posed by permitting non-resident aliens to sue military officials for actions taken abroad was indirectly addressed by the Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Although *Verdugo* did not concern the special factors doctrine, its rationale provides a compelling basis for implementation of that doctrine in this case. As aptly explained in *Verdugo*:

> For better or for worse, we live in a world of nation-states in which our Government must be able to "function effectively in the company of sovereign nations.... Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. *If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.*

494 U.S. at 275 (emphasis added).

Even apart from national security concerns, courts have traditionally deferred to the Executive Branch on foreign policy matters. *See, e.g., Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2766 n.21 (2004) (recognizing "policy of case-specific deference to the political branches" in foreign affairs and "strong argument that federal courts should give serious weight to the

Executive Branch's view of the case's impact on foreign policy"); *Verdugo-Urquidez*, 494 U.S. at 273 (highlighting "significant and deleterious consequences" that the creation of a damages action would have on "foreign policy operations"); *Eisentrager*, 399 U.S. at 779; *Curtiss-Wright Export Corp.*, 299 U.S. at 320; *Dist. No. 1, Pacific Coast Dist. v. Maritime Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000) (holding that Executive's "judgments on questions of foreign policy and national interest" were "not subjects fit for judicial involvement"). Indeed, in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985), a *Bivens* case arising out of an alleged plan by former President Reagan and members of the National Security Council to overthrow the government of Nicaragua, the D.C. Circuit expressed special disdain for damages actions aimed at altering foreign policy. The Court stated in that regard:

> [T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials . . . The foreign affairs implications of suits such as this cannot be ignored – [especially] their ability to produce what the Supreme Court has called in another context 'embarrassment of our government abroad' through multifarious pronouncements by various departments on one question. Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment of whether a damage remedy should exist.

Id.

The present case threatens direct interference with the Executive Branch's foreign policy function. The detainees held in military custody are of many nationalities, and determinations concerning them have far-reaching foreign policy implications. Just as decisions regarding the admission or exclusion of aliens into the United States under immigration law have a fundamental and inherent foreign policy component, so too does the detention and repatriation of

detainees in military custody. The release of specific detainees may be the subject of intense international negotiations and reflects our Nation's policy positions and relationships with other countries that are interwoven with political considerations properly the responsibility of the Executive Branch. *See Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) ("principles of judicial review ... require courts to listen with care when the government's foreign policy judgments, including, for example, the status of repatriation negotiations, are at issue"); *Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999) (the United States should not have to disclose its foreign policy objectives "for deeming nationals of a particular country a special threat – or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals").

There is no question that the plaintiffs' claims raise crucial separation of powers concerns because they threaten interference with core functions of the Executive Branch regarding the conduct of war, the protection of national security, and the formulation of foreign policy. The case law makes clear that potential interference with any of these important and sensitive functions is enough by itself to preclude a judicially-created tort remedy. Consistent with that compelling authority and the Supreme Court's oft-repeated reluctance to extend the *Bivens* remedy into new contexts, plaintiffs' novel constitutional claims – collectively threatening at least three Executive Branch functions – should be rejected under the special factors doctrine.

B. Defendants are Entitled to Qualified Immunity on Plaintiffs' Claims for the Violation of their Fifth and Eighth Amendment Rights

Plaintiffs seek in their *Bivens* claims to recover damages from the personal resources of eleven federal officials rather than from the coffers of the U.S. Treasury. *See Kentucky v.*

Graham, 473 U.S. 159, 165 (1985). The courts have long recognized that such actions "entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In recognition of these costs, qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established legal rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) ("Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences'"); *see also Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998). Qualified immunity provides sweeping protection to federal officials from the entirety of the litigation process; it is not merely a defense to liability. *See id.* The qualified immunity inquiry accordingly must be resolved at the earliest possible stage of the litigation. *See Harlow*, 457 U.S. at 817; *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996).

In order to overcome qualified immunity, a plaintiff must demonstrate that the constitutional right in question was clearly established in the circumstances at the time of the allegedly wrongful conduct. This is a high threshold, as illustrated by two Supreme Court decisions: *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Saucier v. Katz*, 533 U.S. 194 (2001). These decisions stress two key points: (1) if the propriety of an official's conduct is at least debatable, he is protected by qualified immunity, and (2) the right in question must be defined in terms of the government employee's specific actions rather than as an abstract matter.

Anderson involved a Fourth Amendment claim asserted against an FBI agent for participating in the warrantless search of a home. *See* 483 U.S. at 637. The Eighth Circuit rejected qualified immunity on the ground that the law was clearly established that a warrantless search of a home is permissible only upon a showing of probable cause and exigent circumstances, the existence of which remained in dispute in the case. *Id.* at 638. That ruling was reversed by the Supreme Court, which held that qualified immunity may not be denied based upon abstract legal principles without regard to the "objective legal reasonableness" of the defendant's particular conduct under the circumstances. *Id.* at 639. To overcome qualified immunity, the plaintiff had to allege facts known to the defendant establishing that no officer in his position could reasonably have believed that the action was lawful. *See id.* at 640-41.

In *Saucier v. Katz*, the Court overturned a Ninth Circuit decision denying qualified immunity to a military police officer who allegedly used excessive force in arresting a protester. The Supreme Court explained that courts must conduct a two-step qualified immunity inquiry. *Saucier*, 533 U.S. at 201. First, courts must determine whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* If a constitutional violation is properly alleged, courts must then determine "whether the right was clearly established . . . in light of *the specific context* of the case, [and] *not as a general proposition* . . ." *Ibid.* (emphasis added). The *Saucier* Court found the Ninth Circuit failed to properly conduct the second inquiry:

> The approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." If the law did not put the officer on notice that his conduct would be clearly unlawful summary judgment based on qualified immunity is appropriate.

Id. at 202 (citations omitted). The Court then determined that the officer was entitled to qualified immunity because the propriety of his actions was at least debatable.

> A reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate responses . . . [N]either respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule.

Id. at 208-09.

Applying the qualified immunity test to the plaintiffs' Fifth and Eighth Amendment claims in the present case, there is no question that the defendants are entitled to immediate dismissal. Plaintiffs have failed to allege a violation of any constitutional right, let alone the violation of a clearly established right.

1. The Eighth Amendment Does Not Cover The Plaintiffs' Military Detention.

The plaintiffs' claim that their Eighth Amendment rights were violated in the course of their confinement in Guantanamo is easily resolved. It is axiomatic that the Eighth Amendment only protects convicted prisoners from cruel or excessive punishment for their crimes. *See Bell v. Wolfish*, 441 U.S. 520, 579 (1979) (Eighth Amendment "protects individuals convicted of crimes from punishment that is cruel and unusual," but does not serve as source of substantive rights for pre-trial detainees); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). Since the plaintiffs were detainees at Guantanamo and not convicted prisoners serving a sentence, they cannot assert an Eighth Amendment claim.

2. The Plaintiffs' Fifth And Eighth Amendment Claims Should be Dismissed Because Those Amendments Do Not Govern Actions Against Aliens In Military Operations Abroad.

The plaintiffs' constitutional claims also should be rejected because it is well-settled that the Constitution does not apply extraterritorially to protect non-resident aliens from U.S. military operations outside the country. *See Verdugo-Urquidez*, 494 U.S. at 269-74; *Eisentrager*, 339 U.S. at 784-790; *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1182-83 (D.C. Cir. 2004); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (rejecting due process claim because plaintiffs "have demonstrated neither a property interest nor a presence in this country"); *People's Mojahedin Org.*, 182 F.3d at 22 ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."); *Cuban-Am. Bar Assoc., Inc.,* 43 F.3d at 1428-29.

In *Al Odah v. United States*, 321 F.3d 1134, 1135-36 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 124 S.Ct. 2686 (June 28, 2004), the D.C. Circuit held that the Guantanamo Bay detainees were not entitled to a writ of habeas corpus because it could not "see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not." *Id.* at 1141. The Court further stated: "If the Constitution does not entitle the detainees to due process, *and it does not*, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty." *Id.* (emphasis added). During the course of plaintiffs' detention, therefore, the D.C. Circuit explicitly ruled that the Guantanamo detainees were not entitled to constitutional protections.

Plaintiffs may argue that when the Supreme Court held in *Rasul v. Bush* that the Guantanamo detainees could pursue habeas corpus relief in federal court it implicitly overruled

the constitutional analysis in *Al Odah* and a long line of Supreme Court and D.C. Circuit precedent. Even if this were true, and it is not, the *Rasul* decision could not save the plaintiffs' constitutional claims in this case. The plaintiffs acknowledged in their complaint that they were released from detention in May 2004, *before* the Supreme Court issued its decision in *Rasul*. As previously discussed, qualified immunity shields government officials from liability so long as their conduct does not violate clearly established rights of which a reasonable official would have known at the time of the conduct. *Harlow*, 457 U.S. at 818-19; *Wardlaw v. Pickett*, 1 F.3d 1297, 1304 (D.C. Cir. 1993). Federal officials cannot be held liable based on developments in the law after their actions. Accordingly, the *Rasul* decision is irrelevant to the instant analysis of qualified immunity. The defendants here are entitled to qualified immunity because their actions were well supported at the relevant time by then-existing case law, including *Al Odah*.

Even if *Rasul* had been decided prior to plaintiffs' release, it still would not support their effort to recover damages from the named defendants. *Rasul* did not provide non-resident aliens detained at Guantanamo with constitutional rights enforceable under *Bivens*. In fact, the *Rasul* Court avoided the complex problems raised by extraterritorial application of the Constitution and limited its decision instead to the "narrow" question of statutory jurisdiction over the plaintiffs' habeas actions. *Rasul v. Bush*, 124 S.Ct. at 2690, 2693.

U.S. District Judge Richard Leon recently recognized the extremely limited scope of the *Rasul* decision in *Khalid v. Bush*, when he rejected habeas corpus petitions filed by seven aliens detained at Guantanamo. 2005 WL 100924 (D.D.C. Jan. 19, 2005), *appeal docketed*, No. 05-5063 (D.C. Cir. March 4, 2005). Judge Leon determined that "the Supreme Court [in *Rasul*] chose to only answer the [statutory] question of jurisdiction, and not the question of whether

these same individuals possess any substantive rights on the merits of their [constitutional] claims." *Id.* at *8. Judge Leon addressed this constitutional question in *Khalid*, and concluded that "non-resident aliens captured and detained outside the United States have no cognizable constitutional rights." *Id.* at *6. Judge Leon explained that:

> The petitioners in this case are neither United States citizens nor aliens located within sovereign United States territory. To the contrary, they are non-resident aliens, captured in foreign territory, and held at a naval base, which is located on land subject to the "ultimate sovereignty" of Cuba. Due to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the petitioners possess no cognizable constitutional rights.
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> * * *
>
> Nothing in *Rasul* alters [that prior analysis].... The Supreme Court majority in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to a judicial review of the legality of their detention under the habeas statute, ... and, therefore, did not concern itself with whether the petitioners had any independent constitutional rights.

Id. at *6, *7.

That is not to suggest that *Khalid* is unchallenged on this issue. A few days after publication of *Khalid*, U.S. District Judge Joyce Hens Green reached a contrary conclusion, finding that Guantanamo Bay "must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply," and that aliens detained at the U.S. military facility there have cognizable rights under the Fifth Amendment. *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.*, 2005 WL 195356 *38 (D.D.C. Jan. 31, 2005).[8] Like *Rasul*, *In re Guantanamo Detainee Cases* was decided after plaintiffs were released from Guantanamo.

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[8] A notice of appeal was entered on March 15, 2005. *See In re Guantanamo Detainee Cases*, No. 02-CV-0299, *et al.*, 2005 WL 195356 (D.D.C. Jan. 31, 2005), Docket No. 165.

Therefore, it could not have put defendants on notice that their actions were unlawful. As a subsequent development in the law, it cannot defeat defendants' entitlement to qualified immunity. *Anderson*, 483 U.S. at 640; *Bailey v. Bd. of County Comm'rs of Alachua County, Fla.*, 956 F.2d 1112, 1123 (11th Cir. 1992) ("In deciding whether a constitutional right is clearly established, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law.").

In all events, the defendants respectfully suggest that Judge Leon's decision in *Khalid* correctly analyzes the constitutional question now before this Court. *Khalid* is supported by a host of Supreme Court and D.C. Circuit decisions. This binding precedent stands in stark contrast to the concurring opinions that shaped *In re Guantanamo Detainee Cases*.[9] The long line of precedent supporting *Khalid*, from *Eisentrager* to *Verdugo*, confirms that the Constitution does not apply to non-resident aliens outside the country.

In *Johnson v. Eisentrager*, the Supreme Court rejected constitutional claims seeking habeas corpus relief brought by German prisoners who were captured on the battlefield during World War II, tried and convicted of war crimes by a military tribunal, and imprisoned in Germany in a facility under the control of the United States Army. 339 U.S. at 763, 765-66. In finding that the prisoners were not entitled to constitutional protections, the Court explained that an essential requirement for extending rights to aliens is their presence "in a territory over which the United States is *sovereign*." *Id.* at 778 (emphasis in original). It was not enough that the aliens were confined in a facility under exclusive control and supervision of the U.S. military.

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[9] Judge Green appears to rely on a trio of concurring opinions – by Justice Harlan in *Reid v. Covert* and by Justice Kennedy in both *Verdugo* and *Rasul* – to guide her interpretation of *Rasul*. *Id.* at 28, 33-36.

The Supreme Court broadened its *Eisentrager* analysis in *United States v. Verdugo-Urquidez*, a federal criminal prosecution against a Mexican citizen who was extradited to California for trial. 494 U.S. at 259, 266. The Court rejected the Mexican citizen's attempt to exclude evidence in his trial that was obtained by federal agents in a warrantless search of his home in Mexico, reasoning that the alien lacked sufficient connection to this country to secure Fourth Amendment protections. *See also Zadvydas*, 533 U.S. at 678 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *Jifry*, 370 F.3d at 1182 ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); *Pauling v. McElroy*, 278 F.2d 252, 254 n. 3 (D.C. Cir. 1960) ("The non-resident aliens here plainly cannot appeal to the protection of the Constitution or the law of the United States.").

The Supreme Court's decision in *Verdugo* is especially instructive because it recognized more than a mere territorial limitation on the application of the Constitution to aliens. The alien in that case was present in the United States and seeking to assert constitutional rights in a federal criminal prosecution against him. Nonetheless, the Court rejected his claim because he lacked a "substantial connection" to the Nation, having been brought into the country against his will. 494 U.S. at 269-71. Although the contours of the substantial connection test have yet to be well defined in the case law, *Verdugo* makes clear that courts should evaluate whether aliens are entitled to the benefit of constitutional protection in terms of whether they have assumed the burdens of societal obligations. *See Jifry*, 370 F.3d at 1183 (noting that *Verdugo-Urquidez* holds that an alien may have constitutional rights once he or she has "'accepted some societal

obligations'").[10]

Although the clear weight of authority indicates that Guantanamo is foreign territory for constitutional purposes,[11] the non-resident aliens held there would not be entitled to constitutional protections under *Verdugo* even if the base was within United States territory. The Guantanamo detainees were taken there involuntarily and have established no meaningful connections to this country. Their status is directly analogous to the alien in *Verdugo*, who was brought to California against his will for trial on a federal indictment. In fact, the military detention of aliens captured abroad constitutes an even less substantial basis to trigger constitutional protections. The detainees at Guantanamo are confined wholly apart from society in a highly secured facility that is distant and separate from the mainland. Alien criminal defendants, on the other hand, have far greater entanglements with our society.

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[10] The seeds for the substantial connection test were planted in *Eisentrager*. There, the Court distinguished between resident aliens "who have submitted themselves to our laws," and nonresident aliens who "remained with, and adhered to, enemy governments." 399 U.S. at 769. It pointed out that, as an alien "increases his identity with our society," he is "accorded a generous and ascending scale of rights." *Id.* at 770.

[11] *See, e.g, Al Odah*, 321 F.3d at 1143 (ruling that "Cuba – not the United States – has sovereignty over Guantanamo"); *Cuban-Am. Bar Assoc., Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir.), *cert. denied*, 516 U.S. 913 (1995) ("[W]e again reject the contention that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functional[ly] equivalent' to being land borders or ports of entry of the United States or otherwise within the United States."); *United States v. Spelar*, 338 U.S. 217, 219 (1949) (leased U.S. military installations abroad lie outside the sovereign territory of the United States); *Khalid v. Bush*, 2005 WL 100924 at *6 (finding that the military detainees at Guantanamo are "are neither U.S. citizens nor aliens located within sovereign United States territory"); *but see In re Guantanamo Detainee Cases*, 2005 WL 195356 *35; *see also Gherebi v. Bush*, 374 F.3d 727, 736 (9th Cir. 2004) (Guantanamo is within the "territorial jurisdiction" of the United States, which is "enough" for "habeas jurisdiction"); *Rasul v. Bush*, 124 S.Ct. at 2693 (since "plenary and exclusive jurisdiction" rather than "ultimate sovereignty" is all that is necessary under the habeas statute, the courts have jurisdiction over habeas actions filed by Guantanamo detainees).

In sum, the plaintiffs' constitutional claims fail as a matter of law. As aliens detained outside the United States, they were entitled to no constitutional protections. Also, the plaintiffs lacked sufficient connections to this Nation to be afforded constitutional protections even if they had been held on territory within the United States.

At the very least, the plaintiffs' claims must be dismissed on qualified immunity grounds. The case law in this Circuit at the time of the defendants' alleged actions overwhelmingly indicated that the plaintiffs were not entitled to any constitutional protections. It cannot reasonably be argued that the defendants violated plaintiffs' "clearly established" Fifth or Eighth Amendment rights. The contrasting opinions in *Khalid* and *In re Guantanamo Detainee Cases* amply demonstrate that the law in this area is not clearly established in plaintiffs' favor, even today.[12] Although Judges Green and Leon issued their decisions within a few days of each other, their opinions could not have been more diametrically opposed. This split in opinion confirms that defendants are entitled to qualified immunity. "If judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

III. The Religious Freedom Restoration Act Does Not Apply Extraterritorially

The plaintiffs assert a claim in count VII for damages under RFRA. To proceed, the plaintiffs must demonstrate that Congress intended for RFRA to apply extraterritorially to their military detention in Guantanamo. *See Cuban-Am. Bar Assoc., Inc.*, 43 F.3d at 1425 ("any

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[12] Judge Green acknowledged as much when she wrote that she would have "welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights of the" Guantanamo detainees, *In re Guantanamo Detainee Cases*, 2005 WL 195356 *18, especially given the "continuing murkiness" surrounding the concept of extraterritorial application of the U.S. Constitution. *Id.*

statutory or constitutional claim made by the individual Cuban plaintiffs [detained at Guantanamo] must be based upon an extraterritorial application of a statute or constitutional provision"). There is no case law supporting such a construction of RFRA, and there are compelling reasons to conclude Congress did not intend for it to have extraterritorial application.

It is apparent from Congress' justification for enacting RFRA that the statute was not meant to have extraterritorial application. Congress passed RFRA in direct response to the Supreme Court decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1989), a case holding that the First Amendment did not preclude application of Oregon drug laws to the ingestion of peyote in religious rites. Congress concluded that the *Smith* decision applied less rigorous scrutiny to the protection of religious activity under the Free Exercise Clause than had previously prevailed in the case law and sought to restore the prior analysis. *See Meyer v. Fed. Bureau of Prisons*, 929 F.Supp. 10, 14 (D.D.C. 1996) ("'[T]he purpose of [RFRA] is only to overturn the Supreme Court's decision in *Smith*'" and to thereby "restore the compelling interest test previously applicable to free exercise cases.'") (citing S.Rep. No. 103-111); (citation omitted); *see also Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 661 (1999) (Stevens, J., dissenting) ("In RFRA Congress sought to overrule the Court's interpretation of the First Amendment."); H.R. Rep. No. 103-88.

The *Smith* decision had nothing whatsoever to do with the extraterritorial application of the First Amendment; it instead involved the exercise of religion in the United States. Also, as discussed in Section II, the Constitution has long been recognized not to apply extraterritorially to non-resident aliens, and there is no precedent for applying the Free Exercise Clause to protect religious practices by such individuals outside the country. Given that RFRA's intent was merely

to restore the religious protections thought to have been jeopardized by *Smith*, the statute could not logically be construed as a source of substantive rights for aliens abroad. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) ("Congress enacted RFRA to protect one of 'the most treasured birthrights of every *American*.'") (emphasis added) (citing S.Rep. No. 103-111, at 4 (1993)); *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. at 638; H.R. Rep. No. 103-88.

The conclusion that RFRA does not apply extraterritorially is also supported by an important and controlling principle of statutory construction. There is a strong presumption that federal statutory law does "not have extraterritorial application," and that presumption may be rebutted only when a contrary "intent is clearly manifested." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); s*ee also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1344-45 (D.C. Cir. 2004) ("'[A]ll statutes, without exception, [should] be construed to apply within the United States only, unless a contrary intent appears.'"); *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53, 66 (D.D.C. 2003) ("There is a general presumption against extraterritorial application of American statutes in the absence of 'affirmative intention of the Congress clearly expressed' to extend the scope to extraterritorial conduct"). Moreover, this presumption has "special force when [courts] are construing ... provisions that may involve foreign and military affairs for which the President has unique responsibility," *Sale*, 509 U.S. at 188, which are the precise concerns at stake here.

There is nothing in the plain language or legislative history of RFRA that even remotely rebuts the strong presumption against extraterritoriality, let alone "clearly manifest[s]" a congressional intent that the statute should apply outside the country. As noted, the legislative

history of RFRA demonstrates that it was enacted to address perceived flaws in the *Smith* decision regarding the exercise of religion in the United States. Congress was not attempting to expand application of the First Amendment to foreign lands, and certainly not to aliens captured and held abroad by this Nation's armed forces. Nor is there anything in the language of RFRA that might support such a radical construction. The text of the statute is silent regarding any extraterritorial application and does not mention foreign lands or military operations.

Even were this Court to conclude that Congress intended RFRA to apply extraterritorially to the military detention of the plaintiffs in this case, the defendants would still be entitled to qualified immunity. As previously discussed in detail in Section II(B), federal officials are entitled to immunity from suit for damages unless they violate clearly established rights. There is no case law applying RFRA to the exercise of religion by aliens abroad in any context, much less in the context of military operations in war-time. Nor does the plain language or legislative history of the statute clearly establish its extraterritorial application, especially considering the strong presumption that is broadly applied by the courts against such a construction of federal statutory law. At a minimum, the application of RFRA to aliens in military custody abroad is subject to reasonable legal debate, which is all that is required for qualified immunity purposes.

CONCLUSION

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

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