Nos. 07-5178, 07-5185, 07-5186, 07-5187

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARKAN MOHAMMED ALI, et al.,

Appellants,

v.

DONALD H. RUMSFELD, et al.,

Appellees.

On Appeal from the
United States District Court
for the District of Columbia

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Appellants (Plaintiffs below) are Arkan Mohammed Ali, Thahe Mohammed Sabar, Sherzad Kamal Khalid, Ali H., Najeeb Abbas Ahmed, Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman. Appellees (Defendants below) are Thomas Pappas, Donald Rumsfeld, Janis Karpinski and Ricardo Sanchez and, as a consequence of a certification by the Attorney General and the district court's ruling that the defendants named by Plaintiffs were entitled to substitution under the Westfall Act, the United States. On this appeal, current U.S. Secretary of Defense Robert Gates is an additional Appellee pursuant to Fed. R. App. P. 43(c)(2) as Defendant Rumsfeld was sued in both his official and individual capacities. Amici in the district court below were J. Herman Burgers, Theo Van Boven, Brigadier General (Ret.) David M. Brahms, Commander (Ret.) David Glazier, Professor Elizabeth L. Hillman, Professor Jonathan Lurie, Professor Diane Mazur, Brigadier General (Ret.) Richard M. O'Meara and Lieutenant Colonel (Ret.) Gary D. Solis. It is expected that the National Institute of Military Justice and district court amici Brahms, Glazier, Hillman, Lurie, Mazur, O'Meara and Solis will seek leave to appear as amici before this Court. Appellants also anticipate

that a number of human rights organizations will seek leave to file an amicus brief.

(B) Rulings Under Review. Plaintiffs seek review of the March 27, 2007 order of the district court, Honorable Thomas F. Hogan, granting Defendants' motions to dismiss. The opinion is at pages 110-43 of the Appendix and is reported as *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

(C) Related Cases. There are no related cases.

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TABLE OF AUTHORITIES*

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Federal Statutes

Federal Rules

Legislative History

Other Authorities

GLOSSARY

Am. Compl.	Consolidated Amended Complaint for Declaratory Relief and Damages
App.	Appendix
ATS	Alien Tort Statute
CPA	Coalition Provisional Authority
FTCA	Federal Tort Claims Act
TVPA	Torture Victims Protection Act

INTRODUCTION

Plaintiffs are innocent foreign nationals who suffered horrific mistreatment and torture in U.S. military custody in Iraq and Afghanistan. Among other abuses, they were subjected to electric shock, burned, beaten, hung upside down for extended periods, stripped naked, locked in a coffin-like box, and anally probed. They alleged in exhaustive detail that their abuse was directly caused by Defendants' actions and policies.[1] They seek a judgment to hold Defendants accountable and to obtain compensation.

After the abuses at Abu Ghraib first came to light, Defense Secretary Rumsfeld invited the world to "judge us by our actions." He testified before Congress: "Watch how Americans, watch how a democracy, deals with wrongdoing…." He endorsed "appropriate compensation," exposure of wrongdoing and enforcing the rule of law.[2]

But now Defendant Rumsfeld and the other Defendants seek to avoid that accountability. They have not contested the facts, denied their

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[1] At all times relevant to this case, Defendant Rumsfeld was the U.S. Secretary of Defense and Defendants Sanchez, Karpinski and Pappas were high-ranking U.S. Army commanders in Iraq. App. 34-36 (Am. Compl. ¶¶ 26-30).

[2] *See Review of Department of Defense Detention and Interrogation Operations: Hearings Before the Senate Committee on Armed Services*, 108th Cong. 6-7 (May 7, 2004) (testimony of Donald H. Rumsfeld), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:96600.wais.pdf.

responsibility, or attempted to justify their actions. Instead they argue that the Constitution does not apply in this case, that it was not clearly established that a policy of torture violated the Constitution, and that Plaintiffs should be denied the opportunity to prove the facts and to seek compensation.

As the district court acknowledged, this is a 'lamentable" case about a systemic departure from fundamental American values and laws. Absent the judicial remedy that Plaintiffs seek, Defendants will not be held accountable and the rule of law will be diminished.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1350 (Alien Tort Statute) and directly under the U.S. Constitution. This Court has appellate jurisdiction under 28 U.S.C. § 1291 over the final decision of the district court granting Defendants' motions to dismiss.

STATEMENT OF ISSUES

1. Whether, in light of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the district court erred in holding that the Fifth and Eighth Amendments do not govern the conduct of the former U.S. Secretary of Defense and high-ranking U.S. Army commanders in setting policies and

practices that directly caused the torture of detainees under the exclusive control of the U.S. military in Iraq and Afghanistan.

2. Whether the district court erred in holding that Defendants were entitled to qualified immunity for their policies and practices that they knew or reasonably should have known would cause the torture of detainees in U.S. military custody, in violation of the Constitution, U.S. laws and the law of nations.

3. Whether the district court erred in declining to recognize a *Bivens* remedy based on the availability of other remedies and special factors, when Plaintiffs' fundamental right not to be tortured was violated at facilities under the exclusive jurisdiction and control of the U.S. military and away from the exigencies of combat.

4. Whether the district court erred in holding that Defendants were entitled to have the United States substituted as a defendant for purposes of Plaintiffs' Alien Tort Statute claims under the Westfall Act, when (a) that Act applies to claims of "wrongful" conduct by government officials and Defendants' conduct was not merely "wrongful" but rather constituted egregious torts that violated *jus cogens* norms; (b) this case falls within the Westfall Act's express exception for civil actions "brought for violation of a

statute"; and (c) the Westfall Act did not apply at all because Defendants' unlawful conduct was not within the scope of their employment.

5. Whether the district court erred in dismissing Plaintiffs' claims for declaratory relief for lack of standing when the allegations in the complaint demonstrated that Plaintiffs were at risk of future injury even though they engaged in no wrongdoing.

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' constitutional claims. The district court held first that the Fifth and Eighth Amendment prohibitions against torture did not apply because Plaintiffs were "aliens without property or presence in the United States." 479 F. Supp. 2d at 99 (quoting *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007)). That ruling cannot stand as it rested on a D.C. Circuit opinion that has been reversed. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). In *Boumediene*, the Supreme Court reaffirmed that there is no categorical rule against extraterritorial application of the Constitution. Under the proper Supreme Court test, it is not "impracticable and anomalous" to apply the constitutional prohibition on torture here, particularly where the U.S. exercises exclusive jurisdiction and control.

The district court also erred in holding that even if Plaintiffs had a constitutional right against torture, that right was not clearly established at the time of Defendants' conduct and therefore Defendants were entitled to qualified immunity. Any reasonable official in Defendants' position should have known that promulgating policies and practices that would cause or permit subordinates to torture detainees violates the U.S. Constitution. The district court erred in adopting Defendants' argument that even though it was clear that such conduct was prohibited, the law was not clear because there were no precedents holding that detainees in U.S. military custody overseas could assert constitutional claims. That notion turns qualified immunity doctrine on its head, permitting officials to engage knowingly in unlawful conduct merely because their victims' right to sue is not clearly established.

The district court also erred in holding that a *Bivens* action was precluded because of alternative remedies and special factors. The statutes the district court pointed to—the Detainee Treatment Act and the Reagan Act—neither provide a remedy nor demonstrate Congress's intent to preclude *Bivens* actions. Nor are there special factors counseling against a *Bivens* remedy. Plaintiffs seek damages against Defendants who are no longer in office. Compensating Plaintiffs for their devastating injuries will

not interfere with military operations but rather will hold Defendants to existing duties under the universal laws against torture.

Finally, the district court erred in holding that Defendants were entitled to have the United States substituted as a defendant under the Westfall Act and in dismissing Plaintiffs' international law claims brought under the Alien Tort Statute. The Westfall Act grants immunity to federal officials who commit "wrongful" acts. That statutory term is ambiguous on its face, but the legislative history makes clear that Congress aimed at "garden-variety" torts and never intended to immunize torture, an egregious tort in violation of a *jus cogens* norm. The district court also erred in concluding that actions brought under the Alien Tort Statute do not fall within the Westfall Act's exception for actions asserting violations of a statute. And finally, Defendants' acts are not within the scope of employment as required for Westfall Act immunity because the U.S. government would never expect or permit a federal official to engage in such egregious conduct.

ARGUMENT

I. THE U.S. CONSTITUTION PROHIBITED DEFENDANTS FROM IMPLEMENTING POLICIES AND PRACTICES CAUSING THE TORTURE OF PERSONS IN U.S. MILITARY CUSTODY

A. Whether Plaintiffs Can Assert the Fifth and Eighth Amendment Prohibitions on Torture Turns on Whether Recognizing that Right Would Be "Impracticable and Anomalous"

While acknowledging that it might be "appealing … to infer a *Bivens* remedy to vindicate injuries caused by federal officials committing abuses as severe as those alleged here, which otherwise might not be fully redressed," the district court dismissed the *Bivens* claims on the ground that "the Fifth and Eighth Amendments do not apply" to Plaintiffs. *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 95 (D.D.C. 2007). The district court reached this conclusion based upon its reading of four cases: *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), *Zadvydas v. Davis*, 533 U.S. 678 (2001), and this Court's decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). 479 F. Supp. 2d at 95. Since the district court issued its decision, however, the Supreme Court reversed *Boumediene* and definitively rejected the notion that noncitizens outside the United States categorically have no

rights under the U.S. Constitution. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008).[3]

In *Boumediene*, the Supreme Court held that the Suspension Clause, U.S. Const. art. I, § 9 cl. 2, applied to detainees in U.S. military custody at Guantanamo, and that a federal statute purporting to strip the federal courts of jurisdiction to hear Guantanamo detainees' habeas petitions violated the Suspension Clause. 128 S. Ct. at 2262, 2275. Rejecting this Court's "constricted reading of *Eisentrager*," the Supreme Court in *Boumediene* traced "a common thread uniting" its decisions in *Eisentrager*, the Insular Cases, and *Reid v. Covert*, 354 U.S. 1 (1957)—all of which, the Supreme Court explained, viewed "extraterritoriality [questions as] turn[ing] on objective factors and practical concerns, not formalism." 128 S. Ct. at 2258. Based upon this line of precedents, *Boumediene* reaffirmed that whether a constitutional provision has extraterritorial effect depends upon the particular circumstances of the case and specifically whether judicial enforcement of the provision at issue would be 'impracticable and

[3] The district court also erred in relying on *Zadvydas v. Davis*. *Zadvydas* is consistent with the Supreme Court's *Boumediene* decision, noting "that *certain* constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." 533 U.S. at 693 (emphasis added). To the extent *Zadvydas* opines about the prohibition on torture, it supports Plaintiffs' view. *See* 533 U.S. at 704 (Scalia, J., dissenting) (opining that while procedural due process does not apply to alien seeking admission, torture would be prohibited).

anomalous.'" *Id.* at 2255 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)); *see also id.* at 2255-56 (citing *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring)).

The line of cases culminating in *Boumediene* began with the Insular Cases, in which the Supreme Court considered whether various constitutional provisions had force overseas. The Insular Cases rejected the view that the U.S. Constitution never applies outside the United States and considered, on a case-by-case basis and with an eye to "practical considerations," whether various constitutional provisions had force beyond our national boundaries. *See Boumediene*, 128 S. Ct. at 2254-55 (citing cases). The Insular Cases also established that constitutional provisions may apply outside the United States to noncitizens as well as citizens. *See Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903) (considering rights of noncitizen); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (U.S. citizen); *Dorr v. United States*, 195 U.S. 138 (1904) (noncitizen).

In *Reid v. Covert*, the Supreme Court elaborated upon the Insular Cases, expressly noting the repudiation of the 19th-century "approach that the Constitution has no applicability abroad." 354 U.S. at 12. The *Reid* plurality went further and criticized the Insular Cases for appearing to limit the extraterritorial application of the Constitution to "fundamental" rights,

id. at 8-9, observing that "we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments," *id.* at 9. Justices Harlan and Frankfurter separately concurred, also rejecting the notion that the Constitution has no application overseas. *Id.* at 74 (Harlan, J., concurring); *id.* at 53-54 (Frankfurter, J., concurring). In addition, Justice Harlan first articulated the "impracticable and anomalous" test that the Supreme Court explicitly adopted in *Boumediene* to determine whether, in a particular case, a constitutional provision applies extraterritorially.[4] *Id.* at 75 (Harlan, J., concurring).

After the Supreme Court's decision in *Boumediene*, this Court suggested that the "impracticable and anomalous" test should be limited to determining whether just one constitutional provision, the Suspension

[4] Although the Court did not explicitly adopt the "impracticable and anomalous" test until *Boumediene*, two earlier opinions referred to it. In *Verdugo-Urquidez*, Justice Kennedy provided the fifth vote for the majority opinion and wrote separately to explain that "the Government may act only as the Constitution requires, whether the actions in question are foreign or domestic," and that he would reach the judgment by applying the "impracticable and anomalous" test. 494 U.S. at 277 (Kennedy, J., concurring). And in *Rasul v. Bush*, the Court cited Justice Kennedy's *Verdugo-Urquidez* concurrence in holding that a habeas petition filed by Guantanamo detainees had "unquestionably describe[d] custody in violation of the Constitution or laws or treaties of the United States." 542 U.S. 466, 483 n.15 (2004) (citation and internal quotation marks omitted).

Clause, applies outside the United States. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) ("*Rasul II*"). That statement was dicta, however, as this Court expressly declined to decide whether the Fifth and Eighth Amendments applied to the detainees at Guantanamo, and instead affirmed the dismissal of the detainees' constitutional claims on qualified immunity grounds. *Id.* at 528 ("There is another reason why we should not decide whether *Boumediene* portends application of the Due Process Clause and the Cruel and Unusual Punishment Clause to Guantanamo detainees—and it is on this [qualified immunity] ground we will rest our decision on remand."). Thus, *Rasul II*'s statement curtailing *Boumediene*'s application to the Suspension Clause is not binding in this case. *See Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992).

More fundamentally, *Rasul II*'s attempt to limit the impracticable and anomalous test to the Suspension Clause is incorrect. Although it is true that the specific constitutional provision at issue in *Boumediene* was the Suspension Clause, its analysis was not limited to that context; rather, its analysis drew on the Insular Cases, *Reid*, and *Verdugo-Urquidez*, which involved various constitutional provisions. 128 S. Ct. at 2253-58. *Boumediene* made it clear that the "impracticable and anomalous" test had general application, noting that under a line of precedents, "questions of

extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258. The Court stated broadly that *"[o]ur basic charter* cannot be contracted away" by the U.S. government's particular agreements with a foreign sovereign in a given case. *Id.* at 2259 (emphasis added). And it emphatically rejected the notion that "the political branches have the power to switch *the Constitution* on or off at will." *Id.* (emphasis added). Thus, the Supreme Court's analysis in *Boumediene* was expressly not limited to any single provision of the Constitution, but rather applies whenever a court must determine whether a constitutional provision applies outside the United States.

Thus, under Supreme Court authority, this Court must abandon its statement in *Kiyemba v. Obama* that "the due process clause [of the Fifth Amendment] does not apply to aliens without property or presence in the sovereign territory of the United States," 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *reinstated with modifications on remand*, 605 F.3d 1046 (D.C. Cir. 2010). *Kiyemba* adopts precisely the "constricted reading" of *Eisentrager* that the Supreme Court rejected in *Boumediene*. 128 S. Ct at 2258. *See also Kiyemba*, 555 F.3d at 1038 (Rogers, J., concurring) ("[I]n *Boumediene*, the Supreme Court rejected this territorial rationale as to Guantanamo….") (citation omitted). The *Kiyemba* majority sought to avoid *Boumediene* by

stating, without explanation, that *Boumediene* "specifically limited its holding to the Suspension Clause." *Id.* at 1032. That is not so, for the reasons explained above. Rather, *Boumediene* clarified the correct way to read *Eisentrager* and the Supreme Court's other extraterritoriality cases *generally*, and this Court is bound to adhere to that reading.

This Court acknowledged as much in *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). *Al Maqaleh* recognized that *Boumediene*, apart from its holding on the Suspension Clause, "explored the more general question of [the] extension of constitutional rights and the concomitant constitutional restrictions on governmental power exercised extraterritorially and with respect to noncitizens." *Id*. at 93. This Court in *Al Maqaleh* then went on to do what it should have done in *Kiyemba*, applying *Boumediene*'s "impractical and anomalous" test to the detainees' claims. Notably, at the time *Al Maqaleh* was decided, the *Kiyemba* decision had been vacated by the Supreme Court, *see Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (mem.), and was of no precedential value. This Court only reinstated its opinion in *Kiyemba after Al Maqaleh* was decided. *See Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010). To the extent *Al Maqaleh* and *Kiyemba* espouse conflicting readings of the Supreme Court's decision in *Boumediene*, the prior decision—*Al Maqaleh*—is controlling. *See Indep. Cmty. Bankers of*

Am. v. Bd. of Governors of Indep. Cmty. Bankers of Am., 195 F.3d 28, 34 (D.C. Cir. 1999) (citing *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996); *Texaco v. Louisiana Land & Exploration Co*., 995 F.2d 43, 44 (5th Cir. 1993)) (considering conflicting panel opinions and concluding that earlier ones controlled).

B. It Is Not Impracticable and Anomalous To Apply the Fifth and Eighth Amendments to This Case.

The Court should hold that it is not impracticable and anomalous to apply the Fifth and Eighth Amendment prohibitions against torture to Defendants' conduct setting detention and interrogation policies that directly caused the torture and abuse of Plaintiffs while they were under exclusive U.S. custody and jurisdiction in U.S. military facilities in Iraq and Afghanistan in 2003-04. It is not impracticable and anomalous to hold a U.S. Secretary of Defense and high-ranking U.S. Army commanders to their absolute duties arising under not only the Fifth and Eighth Amendments, but also U.S. military regulations, federal statutes, the Geneva Conventions, and *jus cogens* norms of international law that apply to military commanders everywhere in the civilized world.

First, the fundamental nature of the constitutional right against torture weighs heavily in Plaintiffs' favor. From the Insular Cases to *Boumediene*, the Supreme Court has been particularly careful to recognize "fundamental

personal rights declared in the Constitution." *Boumediene*, 128 S. Ct. at 2255 (quoting *Balzac*, 258 U.S. at 312). The prohibition against torture and cruel and unusual treatment is among the most fundamental of rights. It is one of the most basic principles of our legal system, dating back to the English Bill of Rights of 1689. *See Gregg v. Georgia*, 428 U.S. 153, 169 (1976). For more than three centuries, Anglo-American jurisprudence has rejected the use of torture and cruelty as a means of extracting information, *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944), or of inflicting punishment, *Gregg*, 428 U.S. at 173. The Supreme Court has declared that some other regimes may "seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture," but "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Ashcraft*, 322 U.S. at 155.

The Constitution's prohibition against torture and cruel mistreatment is embodied in the Due Process Clause of the Fifth Amendment, which bars the government from subjecting individuals to treatment that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). The Due Process Clause guarantees "protection against torture, physical or mental" to all who are subject to government power. *Palko v. Connecticut*, 302 U.S.

319, 326 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969); *see also Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (plurality); *County of Sacramento v. Lewis*, 523 U.S. 833, 846-847 (1998). The Eighth Amendment also prohibits "'torture(s)' and other 'barbar(ous)' methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted); *see also Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("punishments of torture … [and] unnecessary cruelty[] are forbidden by that [a]mendment to the Constitution").[5]

In light of the universal condemnation of torture, no branch of the U.S. government could contend that torture should be permitted for the sake of wartime expediency, and Defendants do not do so here. Both the Executive Branch and Congress have emphatically stated views affirming that the prohibition against torture applies to U.S. officials ordering,

[5] The district court held that the Eighth Amendment was inapplicable to Plaintiffs because it "applies only to convicted criminals," whereas Plaintiffs were detained without charge. 479 F. Supp. 2d at 103 (citing *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). In so holding, the district court failed to acknowledge that Plaintiffs pled their Eighth Amendment claim in the alternative, alleging that their torture and abuse were a "form of *summary punishment for perceived or alleged wrongdoing* and constituted imposition of sentence of Plaintiffs without an adjudication of guilt." App. 103 (Am. Compl. at ¶ 244) (emphasis added). Under *Ingraham*, Plaintiffs' Eighth Amendment claim is cognizable and should not have been dismissed under Rule 12(b)(6). *See* 430 U.S. at 669 n.37 (noting that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment").

allowing, or condoning torture at home *and abroad*. The Executive Branch has condemned torture in its official statements.[6] Congress also has condemned the torture and inhumane treatment of detainees in U.S. military custody overseas. In relation to Iraq specifically, Congress has made clear that such conduct, even when committed abroad, is prohibited by the Constitution, laws, and treaties of the United States. *See* Reagan National Defense Authorization Act for Fiscal Year 2005 ("Reagan Act"), Pub. L. No. 108-375, § 1091(a)(6), 118 Stat. 1811, 2068 (codified at 10 U.S.C. § 801 note) ("the Constitution, laws, and treaties of the United States … prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners *held in custody by the United States*") (emphasis added); Detainee Treatment Act, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd(a)) ("No individual in the custody or under the physical control of the United States Government, *regardless of nationality or physical location*, shall be subject to cruel, inhuman, or degrading treatment or punishment.") (emphasis added); *see also id.* § 1003(b) (codified at 42 U.S.C. § 2000dd) ("Nothing in this section shall be construed to impose any geographical limitation on the applicability of the

[6] *See, e.g.*, U.S. Dep't of State, *Second Periodic Report of the United States of America to the Committee Against Torture*, at ¶¶ 5-8 (May 6, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm.

prohibition against cruel, inhuman, or degrading treatment or punishment under this section."). Thus, it cannot be said that any practical considerations counsel against applying the fundamental constitutional prohibition against torture in the particular circumstances of this case.

Indeed, this case presents far fewer practical concerns than *Boumediene* or other cases in which the Supreme Court has held that a constitutional provision applies outside the United States. *Boumediene* acknowledged that the detainees' noncitizen status weighed against them and that recognizing habeas jurisdiction over claims by Guantanamo detainees could impose burdens on the military. 128 S. Ct. at 2261. Nonetheless, the Supreme Court recognized the petitioners' rights to bring a habeas action challenging their custody. *Id.* In this case, permitting Plaintiffs to assert their rights through a *post hoc* damages action would impose far fewer burdens, if any. This case does not raise issues about the lawfulness of detention, which may involve probing into the sufficiency of military justifications. Rather, Plaintiffs seek to enforce the universal prohibition against torture, which Defendants were duty-bound to observe in all places and at all times. Unlike the *Boumediene* petitioners, Plaintiffs seek a *post hoc* remedy, which is less likely than a habeas action to interfere with ongoing military operations, and would simply reinforce the universal

law that military commanders may not promulgate policies causing torture of detainees.[7] Nor would permitting a damages case to go forward against Defendants "cause friction with the host government" where the U.S. military facilities were located. *See Boumediene*, 128 S. Ct. at 2261.

In light of Defendants' exclusive jurisdiction and control in Iraq and Afghanistan, App. 38-39 (Am. Compl. ¶¶ 37-39), it would not be impracticable and anomalous to recognize the right not to be tortured. In *Boumediene* and earlier cases, the Supreme Court examined the level of U.S. control in the locations where plaintiffs suffered their constitutional injuries. Here, as alleged in the Complaint: Plaintiffs were tortured and abused in facilities under the exclusive jurisdiction and control of the United States; the U.S. military controlled all access to detainees; and the United States and the U.S. military under the control of Defendant Rumsfeld exercised exclusive jurisdiction and authority over Iraq and Afghanistan, under authority conferred by domestic and international law. App. 38-39 (Am. Compl. ¶¶ 37-39).

[7] This is particularly true given that the individual-capacity Defendants are no longer in command in Iraq or Afghanistan, 479 F. Supp. 2d at 118, and in light of changed circumstances on the ground. In any event, the district court may exercise its discretion to manage the litigation to minimize the burdens, if any, on ongoing military operations. *See infra* Part III.

During the time period at issue (2003-04), the United States exercised pervasive control in Iraq and Afghanistan. U.S. personnel in both countries were governed only by U.S. law, enjoying special protections and immunities from local civil and criminal law. In Afghanistan, U.S. personnel were not subject to Afghan criminal law, and any "[c]laims by third parties arising out of the acts or omissions of any United States personnel" were to be "dealt with and settled by the United States Government," at its discretion, "in accordance with United States law."[8] And in Iraq, the United States exercised plenary authority throughout the country through the Coalition Provisional Authority ("CPA").[9] Thus, in

[8] Embassy of the United States, Diplomatic Note No. 202 ¶¶ 2, 7, 9 (Sept. 26, 2002), *filed in Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 222 (D.D.C. 2009), *available at* http://sites.google.com/a/ijnetwork.org/maqaleh-v--gates/test-joint-appendix. *See also* 604 F. Supp. 2d at 222 (discussing Diplomatic Note), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010). Although this Diplomatic Note was not before the district court below, this Court may take judicial notice of it. *See* Fed. R. Evid. 201(b), (f); *see also Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003).

[9] The CPA governed Iraq from April 2003 through June 2004, when it transferred sovereignty to the Iraqi Interim Government. *See* Coalition Provisional Authority, *An Historic Review of CPA Accomplishments* (June 28, 2004), *available at* http://www.iraqcoalition.org. The CPA "exercise[d] powers of government" in Iraq, CPA Reg. No. 1, § 1(1) (May 16, 2003), and was recognized by the U.N. Security Council as the governing authority in Iraq. *Id.* (citing S.C. Res. 1483, U.N. Doc. S/Res/1483 (May 22, 2003)). The CPA's rules provided that all "executive, legislative, and judicial authority necessary to achieve [the CPA's] objectives "shall be exercised by the CPA Administrator," CPA Reg. No. 1 § 1(2), and the Administrator was appointed by and reported directly to Defendant Rumsfeld, and not to any

both countries, Plaintiffs could seek no relief from their own government or any other power. Under such circumstances, it was not impracticable and anomalous to hold that the constitutional prohibition against torture applied.

Although this Court has found in another case that the Suspension Clause did not apply at Bagram Air Force base in Afghanistan, *Al Maqaleh*, 605 F.3d at 96-97, that holding does not apply here. Whether it is impracticable and anomalous to permit the *Al Maqaleh* petitioners to challenge their current custody through a habeas corpus proceeding is an entirely different question from whether the Fifth and Eighth Amendment prohibitions against torture should apply in the context of a *Bivens* action here. While *Al Maqaleh* found on the allegations before it that the United States' degree of control over the Bagram air base was insufficient to justify holding that the Suspension Clause reached there, that finding is not applicable to other plaintiffs who allege different facts. The "impracticable and anomalous" test necessarily entails careful consideration of the facts in each case. As noted above, Plaintiffs here have made detailed allegations about the circumstances of their torture and abuse in U.S. military facilities under the exclusive control and jurisdiction of the United States. They are

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foreign or international official or entity. *Id.* Copies of the CPA regulations are available at http://www.iraqcoalition.org/regulations.

entitled to a determination on those facts. No court has ever made that determination.

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFFS' RIGHTS WERE CLEARLY ESTABLISHED UNDER NUMEROUS SOURCES OF CONTROLLING LAW

The district court held in the alternative that even if Plaintiffs had rights under the Fifth and Eighth Amendments, Defendants were entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

> Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.

Id. Here, the district court's ruling amounted to a judgment that a former U.S. Secretary of Defense and high-ranking U.S. Army commanders acted "reasonably" in promulgating affirmative policies that they knew would cause the torture of civilians in U.S. custody because the laws prohibiting that conduct were not clearly established. That ruling was erroneous

because it was readily apparent from pre-existing law that Defendants' actions were unlawful. It has long been settled that the Constitution forbids the torture of any detainee, and it was equally well-settled that Defendants had a constitutional duty to stop and prevent torture if they knew or had reason to know it was happening. These constitutional mandates, which are also reflected in U.S. Army manuals and regulations, put Defendants on notice that it was unlawful to authorize or to allow their subordinates to torture Plaintiffs. The doctrine of qualified immunity does not permit a federal official to escape liability when he knew that his conduct was unconstitutional, merely because it was not clear whether his victim had a right to sue for damages. This Court should abandon its holdings to the contrary, *see Rasul II*, 563 F.3d at 530, as they are inconsistent with Supreme Court authority.

A. It Has Long Been Clearly Established that the U.S. Constitution, as Well as Military Laws and *Jus Cogens* Norms, Prohibits Torture

Plaintiffs' constitutional claims are premised on long-established laws that forbid government officials from engaging in torture. First, torture is absolutely prohibited under the Fifth and Eighth Amendments to the U.S. Constitution. Because Plaintiffs have already addressed the longstanding constitutional basis for the prohibition against torture, we do not repeat that

discussion here. *See supra* Part I(B) (citing, *inter alia*, *Gregg v. Georgia*, 428 U.S. 153 (1976); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Palko v. Connecticut*, 302 U.S. 319 (1937)). Defendants were therefore on notice that their conduct violated the U.S. Constitution.

Numerous other binding laws put Defendants on notice that their conduct was unlawful. The law of nations is absolute in its prohibition against torture. The torturer, "like the pirate and slave trader before him," is "*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). For decades, this fundamental prohibition has been recognized by U.S. courts as a core *jus cogens* norm.[10] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

Torture has also long been prohibited under U.S. military laws, regulations, and training materials. The Uniform Code of Military Justice, 10 U.S.C. § 890 *et seq*, criminalizes acts that constitute torture and other cruel treatment of detainees, and the Army's regulations categorically prohibit such treatment. Army regulations state in absolute terms that inhumane treatment is "not justified by the stress of combat or with deep

[10] *Jus cogens* norms prohibit a "'handful of heinous actions'" including "'torture, summary execution, genocide, and slavery.'" *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (citation omitted); *see also* Restatement (Third) of Foreign Relations Law § 702, cmt. n (identifying the prohibition of torture as a *jus cogens* norm).

provocation," U.S. Dep't of the Army, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(4) (1997) and that torture and other inhumane treatment are "not authorized and will not be condoned by the US Army." U.S. Dep't of the Army, Field Manual 34-52, Intelligence Interrogation ("Interrogation Field Manual"), ch. 1 at 1-8 (1992).[11] These authorities reinforce the constitutional prohibition against torture and serve to put military commanders and personnel on notice of the sorts of actions that the Constitution prohibits. *Cf. Hope v. Pelzer*, 536 U.S. 730, 741-42, 743-44 (2002) (state regulations put prison officials on notice that challenged practice was unconstitutional); *Groh v. Ramirez*, 540 U.S. 551, 564 & n.7 (2004) (police department guidelines put defendant officer on notice that search warrant was unlawful); *Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (police manual embodying constitutional principles relevant to defeating qualified immunity even though "[s]tanding alone" an internal procedure "might not" be sufficient).[12]

[11] Field Manual 34-52 has been superseded by U.S. Army Dep't of the Army, Field Manual 2-22.3, Human Intelligence Collector Operations. However, the relevant principles remain unchanged.

[12] *See generally Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902-04 (6th Cir. 2004) (explaining that "[o]ther sources [besides case law] can also demonstrate the existence of a clearly established constitutional right," and relying in part on training received by police officers to conclude that

More specifically, it has long been established that the Constitution prohibits military commanders from ordering torture or setting policies that cause torture, and obligates commanders to prevent and prohibit torture by their subordinates. The Fifth Amendment imposes liability on a supervisor when a subordinate commits torture or other abuse that shocks the conscience if the supervisor (1) was responsible for supervising the subordinates; (2) knew or had reason to know under the circumstances that it was highly likely that the constitutional violation would occur; and (3) failed to instruct the subordinate to prevent the constitutional violation. *See*, *e.g.*, *Int'l Action Center v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004); *Haynesworth v. Miller*, 820 F.2d 1245, 1261-62 (D.C. Cir. 1987), *abrogated on other grounds*, *Hartman v. Moore*, 547 U.S. 250 (2006). Similarly, a supervisor is responsible for an Eighth Amendment violation if he knows of and disregards a substantial risk of harm to a detainee, *Farmer v. Brennan*, 511 U.S. 825, 837, 842 (1994), or when the supervisor is deliberately

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defendants had violated the clearly established right against excessive force); *Beier v. City of Lewiston*, 354 F.3d 1058, 1069-70 (9th Cir. 2004) (relying in part on state statute and police training to conclude that defendant police officers had acted in violation of clearly established law); *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) (noting that "[p]rison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established," and relying on regulations to conclude that defendants' use violated clearly established law).

indifferent to a subordinate's unlawful use of force, *Riley v. Olk-Long*, 282 F.3d 592, 595 (8th Cir. 2002).

Likewise, under military law, when a commander "knew or should have known" that his subordinates "had committed, were committing or planned to commit" acts of torture, the commander has a duty "to prevent the commission" and "to punish the subordinates." *Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002). *See also In re Yamashita*, 327 U.S. 1, 16 (1946) commanders have an "affirmative duty to take such measures as [are] within [their] power and appropriate in the circumstances to protect prisoners of war"). The command responsibility doctrine provides that under such circumstances, the commander is liable for acts by his subordinates. The Army Field Manual provides that a commander is "responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof." Dep't of the Army, Field Manual 27-10, The Law of Land Warfare, ch. 8, § 2, art. 501 (1956). *See also* Interrogation Field Manual, ch. 1 at 1-9 ("The commander is

responsible for ensuring that the forces under his command comply with [the Geneva Conventions].").

B. It Was Clearly Established at the Time of Defendants' Actions that the Constitution's Applicability Was Not Limited to the United States' Territorial Boundaries

Regardless of how clearly established the substantive right against torture was, the district court held that it was not clearly established at the time of Defendants' actions that the right applied *extraterritorially,* and that Defendants were therefore immune from suit. This, too, is incorrect. First, the Supreme Court's *Boumediene* opinion makes clear that its analysis was a reaffirmation of decades-old caselaw and not the announcement of a new rule. The *Boumediene* Court noted that it "ha[d] discussed the issue of the Constitution's extraterritorial application on *many occasions*," and that its prior "decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." 128 S. Ct. at 2253 (emphasis added). Indeed, "as early as *Balzac* [*v. Porto Rico*, 258 U.S. 298] in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants guaranties of certain

fundamental personal rights declared in the Constitution." *Id.* at 2255 (internal quotation marks and citations omitted). *See also id*. at 2258.[13]

In light of the Supreme Court's repeated affirmation that constitutional rights are not limited to U.S. sovereign territory, the district court here was wrong to say that it was "'not until the Supreme Court decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (granting Guantanamo detainees the right to counsel) and *Rasul v. Bush*, 542 U.S. 466 (2004) (granting federal courts jurisdiction to hear Guantanamo detainees' habeas petitions)" that "military personnel [were] provided their first indication that detainees may be afforded a degree of constitutional protection." 497 F. Supp. 2d at 109 (citation omitted). True, at the time of the torture alleged here, no court had yet been confronted with the specific question whether the

[13] Several other authorities put Defendants on notice that the Due Process Clause does not stop at U.S. borders. *See Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (holding that due process applied in Micronesia and noting that "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law[.]'") (citation omitted); *Juda v. United States*, 6 Cl. Ct. 441, 457-58 (Cl. Ct. 1984) (noting in case arising in Marshall Islands that "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are to be applied selectively on a territorial basis cannot be justified in the 1980's."); *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1040-41 (E.D.N.Y. 1993) (noting with respect to Haitian refugees interdicted on high seas that "constitutional and other fundamental rights apply to citizens and noncitizens outside the United States who encounter official U.S. action") (vacated by Stipulated Order Approving Class Action Settlement Agreement, *see Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1424 (11th Cir. 1995)).

constitutional protections against torture applied to detainees being held in U.S. custody in military installations abroad. But for purposes of defeating a claim to qualified immunity, it is not necessary to show that "the *very action in question* has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). Rather, the dispositive question is whether "in the light of pre-existing law[,] the unlawfulness … [of the action was] apparent." *Id*. By the time Defendants perpetrated the acts at issue, it had already been firmly established by decades of Supreme Court caselaw that constitutional protections did, in some circumstances, apply abroad.[14] In light of that caselaw and the absolute prohibition on torture

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[14] This Court's decision in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004), is not to the contrary. In *Al Odah*, this Court held that the district court did not have habeas jurisdiction to review claims of unlawful detention by detainees at Guantanamo. The district court in the present case cited *Al Odah* as evidence that it was not clearly established at the time of Defendants' actions that detainees could assert constitutional rights outside the territorial United States. But *Al Odah*, which was reversed by the Supreme Court, does not support the district court's holding for three reasons. First, many of Defendants' unlawful acts here occurred *before* the D.C. Circuit decided *Al Odah*. They authorized detainee abuse in violation of U.S. and international law as early as November 2002 and continued in their unlawful activities throughout early 2003, before the *Al Odah* decision was issued. App. 42-47 (Am. Compl. ¶¶ 49, 51-67). Second, the *Al Odah* case involved very different legal claims—fact-based claims about wrongful detention and collateral issues such as detainees' lack of access to family members and counsel. *See* 321 F.3d at 1136-37. Third, one incorrect decision is not enough to upset otherwise clearly established law. *See Safford Unified Sch.*

under every source of law, no reasonable military commander could have thought—and no Defendant here claims—that he could lawfully promulgate a policy of torture for U.S. military prisoners in Iraq and Afghanistan.

C. Qualified Immunity Was Never Meant to Apply in These Circumstances, When Any Reasonable Official in Defendants' Position Should Have Known His Actions Were Unlawful

The district court never questioned that Defendants' acts, as alleged in the amended complaint, were unlawful under the foregoing authorities. Rather, the qualified immunity holding boils down to the notion that Defendants should be immune from suit because they could not reasonably have known that noncitizens outside the United States could *bring an action for redress* for the torture they suffered. The district court's focus on the

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Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2644 (2009) ("[T]he fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear."); *Inouye v. Kemna*, 504 F.3d 705, 716 (9th Cir. 2007) ("lack of complete unanimity does not mean that a legal principle has not been clearly established."). *Al Odah* diverged from the Supreme Court's decades-long insistence on a functional approach to the extraterritorial application of constitutional provisions, and the Supreme Court has since made clear that *Al Odah*'s categorical rule against extraterritorial application of the Constitution was inconsistent with clearly established law. *See Boumediene*, 128 S. Ct. at 2253, 2255, 2258; *Rasul v. Bush*, 542 U.S. at 483 n.15 (stating that noncitizen's allegations regarding detention outside United States "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States").

availability of a remedy, rather than the right itself, is fundamentally at odds with the doctrine of qualified immunity.

Qualified immunity was never meant to excuse knowing violations of the law based on a *post hoc* argument that the victim's legal *remedies* were not certain at the time the violation was committed. Rather, its purpose is to protect an officer who could not reasonably have known that his *conduct* was unlawful and who makes a "mere mistake[]" as to the lawfulness of his conduct. *Butz v. Economou*, 438 U.S. 478, 507 (1978); *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001) (qualified immunity test is "whether it would be clear to a reasonable officer that his *conduct was unlawful* in the situation he confronted") (emphasis added), *abrogated on other grounds*, *Pearson*, 129 S. Ct. 808 (2009); *Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.") (emphasis added). The torture alleged here was not close to the line. It was unquestionably unlawful. Defendants should not be shielded from liability for their knowingly unlawful acts merely because courts had not previously recognized detainees' right to seek monetary damages for such abuses. Such a ruling falls well outside the parameters of qualified immunity doctrine and indeed turns the law on its head.

III. THIS CASE PRESENTS NO FACTORS MILITATING AGAINST A *BIVENS* REMEDY

The district court also dismissed Plaintiffs' constitutional claims on the grounds that Congress has provided an alternative remedy by statute and there are "special factors" counseling against a *Bivens* remedy. 479 F. Supp. 2d at 103-07; *see Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (in determining whether to recognize *Bivens* remedy, courts should look to whether there is "alternative, existing process for protecting [the plaintiff's] interest" and whether there are "special factors counseling hesitation"). These rulings were incorrect.

First, the district court erred when it suggested in a footnote that the Detainee Treatment Act and the Reagan Act indicate that Congress intentionally has declined to provide a remedy for detainees such as Plaintiffs. *See* 479 F. Supp. 2d at 107 n.23 (citing the Detainee Treatment Act and Reagan Act)). These enactments are significant for these purposes only if they "plainly answer no to the question" whether a *Bivens* remedy should be available, *Wilkie*, 551 U.S. at 554, or if they comprise a "comprehensive statutory relief scheme," making it clear that no *Bivens* remedy should be available, *Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) (en banc). This is not the case here. To the contrary, the two statutes support the availability of a *Bivens* action. The text of the Detainee

Treatment Act expressly provides that "[n]othing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States." Detainee Treatment Act § 1002(c), 10 U.S.C. § 801 note. Indeed, the Act contemplates that officials may be liable "[i]n any civil action or criminal prosecution" and merely provides a limited affirmative defense. *Id* § 1004(a), 42 U.S.C. § 2000dd note. Similarly, the Reagan Act reiterates the prohibition on "cruel, inhuman or degrading treatment" by any U.S. civilian or military official and affirmatively supports Plaintiffs' submission that the constitutional prohibition against torture applies in this case. *See* Reagan Act § 1091(a)(6), 10 U.S.C. § 801 note ("the Constitution, laws, and treaties of the United States … prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States."). Thus, neither of these statutes "plainly answers no" to the question whether a *Bivens* remedy is available here.[15]

[15] This conclusion is reinforced by the Westfall Act's language expressly preserving the *Bivens* remedy for constitutional violations while generally immunizing individual officials for ordinary negligence. *See* Federal Employees Liability Reform and Tort Compensation Act of 1998, Pub. L. No. 100-694, 102 Stat. 4563 (codified in relevant part at 28 U.S.C. §§ 2671, 2674, 2679) ("Westfall Act") § 5 (providing that the Federal Tort Claims Act's remedy against the United States is the exclusive remedy except in the case of actions brought "against government officials for a violation of the Constitution of the United States").

The district court's finding of special factors precluding a *Bivens* remedy is also incorrect. In *Bivens*, the Supreme Court explained that a damages remedy should be available unless there are "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. In another case, this Court held in a passing footnote that the special factors doctrine barred a *Bivens* suit brought by noncitizens detained at Guantanamo Bay, Cuba. *See Rasul II*, 563 F.3d at 532 n.5. Upon consideration of Plaintiffs' claims and binding precedents, the Court should abandon that cursory ruling.

The district court found as a special factor that recognizing a damages remedy here would "invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation." 479 F. Supp. 2d at 105. This conclusion is insupportable given the particular circumstances of this case. Plaintiffs' claims do not require a court to review any battlefield decisions, to interfere with day-to-day military decisionmaking, or to pass judgment on foreign policy choices properly within the discretion of the political branches. Plaintiffs are civilians who were detained in facilities away from the exigencies of combat and under the exclusive control and jurisdiction of the U.S. military. App. 29-34 (Am. Compl. at ¶¶ 16-25). Their mistreatment occurred at a time when they posed

no threat to the United States, were fully subdued, and were incarcerated. App. 28, 29-34, 71, 92-99 (Am. Compl. at ¶¶ 10, 16-25, 169, 211-26). This suit thus has nothing to do with judicial oversight over any military decisions undertaken in a field of battle or that otherwise had to be made "without hesitation." To the contrary, Defendants made deliberate policy decisions and implemented them over a period of years. Universal laws against torture dictated that Defendants *should* have hesitated before taking these actions and indeed should have refrained altogether. Plaintiffs seek only the enforcement of the non-discretionary requirements of the Constitution in accord with the laws and regulations that have constrained the conduct of U.S. military detention operations for decades, and that manifestly prohibit the policies of torture and abuse alleged here.

Against this backdrop, the district court's conclusion that a *Bivens* remedy is inappropriate because the process of litigation will interfere with military affairs or chill effective decisionmaking by individual military officers was in error. First, the district court improperly failed to consider that torture and abuse are already categorically prohibited by the military's own rules and regulations. *See supra* Part II(A). Defendants therefore cannot credibly argue that a civil damages remedy will engender unwarranted caution since they are already under a duty not to engage in

torture. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("We do not believe that the security of the Republic will be threatened if [public officials] [are] given incentives to abide by clearly established law."). For the same reason, the district court's suggestion that holding high-ranking military officials liable for torture would undermine obedience by subordinates, 479 F. Supp. 2d at 105, was also unfounded. Since Nuremberg, military personnel have been held responsible for acts of torture regardless of whether they were merely following orders.

Moreover, from our nation's earliest days, the Supreme Court has adjudicated damages claims in cases in which national security interests were at issue, even those involving war or exigent circumstances. *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.) (holding U.S. Navy captain liable in damages to Danish ship owner for illegal seizure of his vessel during war against France); *The Paquete Habana*, 175 U.S. 677, 714 (1900) (awarding damages to foreign citizens for the wrongful actions of U.S. military authorities arising out of U.S. naval blockade during Spanish-American War). At common law, courts (including the Supreme

Court) allowed an array of damages actions against military officials for tortious conduct, even during times of war.[16]

In recent cases brought by detainees in connection with ongoing U.S. military actions abroad, the Supreme Court has continued to reaffirm that claims asserting fundamental individual rights are appropriate for judicial review and has expressly rejected reasoning closely analogous to that of the district court below and this Court's *Rasul II* opinion. These precedents demonstrate that—contrary to the district court's conclusion—concerns that the process of litigation might be burdensome to the government's military efforts are not reasons for the courts to abdicate their constitutional role.

In *Boumediene*, for example, the Supreme Court held that alleged enemy combatant detainees were entitled to habeas corpus review of the lawfulness of their detention. In so holding, the Court emphasized: "Our

[16] *See, e.g.*, *Beckwith v. Bean*, 98 U.S. 266, 274 (1878) (reviewing damages award against Union Army officer for assault and battery and false imprisonment of plaintiff during Civil War); *Mitchell v. Harmony*, 54 U.S. 115, 135-37 (1851) (affirming damages award against Army officer for wrongful seizure of a U.S. merchant's goods while in Mexico during the Mexican War, finding that the seizure was not justified by military necessity); *Smith v. Shaw*, 12 Johns. 257 (N.Y. 1815) (affirming damages award against the commanding officer of an Army station for assault and battery and false imprisonment of plaintiff who was charged with being a spy); *McConnell v. Hampton*, 12 Johns. 234 (N.Y. 1815) (remanding for a new determination of the amount of damages in an action for assault and false imprisonment against a military commander for arresting the plaintiff on treason charges).

opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch." *Boumediene*, 128 S. Ct. at 2277. Likewise, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court rejected the government's arguments that litigation "half a world away" against military officers "engaged in the serious work of waging battle" would mean that they would be "unnecessarily and dangerously distracted by litigation." *Id.* at 531-32. *See also id.* at 535-36 ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances…. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). *Cf. Rasul v. Bush*, 542 U.S. at 484 ("[N]othing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts"). These decisions firmly dispel the notion that a case like this one must be dismissed because of concern that it might interfere with military operations.[17]

[17] For the same reasons, the district court's reliance on *Johnson v.*

Boumediene and *Hamdi* also demonstrate that the district court below erred in concluding that a *Bivens* remedy should be barred in order to protect Defendants from the burdens of discovery. 479 F. Supp. 2d at 105. *Hamdi* rejected the government's contention that "discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war," on the ground that "proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U.S. at 533. The district court may "proceed with caution … engaging in a factfinding process that is both prudent and incremental." *Hamdi*, 542 U.S. at 538-39. *See also Boumediene*, 128 S. Ct. at 2275-76.

Notably, *Hamdi* and *Boumediene* reaffirmed the judiciary's role in safeguarding individual rights of detainees even though both cases presented a far *greater* risk of intrusion into military operations than this case does. *Hamdi* and *Boumediene* each sought immediate habeas corpus relief, which necessarily must be litigated with urgency and, if successful, can directly compel release of the individual from U.S. custody. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2269-71. Damages claims, in contrast, present a context in which the litigation can be managed and tailored by the court to address the

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Eisentrager, 339 U.S. 763 (1950), to conclude that a damages suit should not be permitted here was misplaced. 479 F. Supp. 2d at 105.

needs of the parties. Moreover, because a damages case is retrospective in nature, the passage of time may alleviate any potential interference with urgent military tasks or battlefield duties. In this case, for example, the district court found that Defendants no longer had any command responsibilities in Iraq and Afghanistan at the time of its decision. 479 F. Supp. 2d at 118. In any event, if Defendants present any specific problems, the district court is obliged to manage the litigation to avoid them.[18]

The cases relied upon by the district court as support for its conclusion that special factors counsel against a remedy here are entirely distinguishable. The district court cited *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987). But those cases declined to infer a *Bivens* remedy for suits *by U.S. soldiers* incident to their military service because such suits would interfere with "the unique disciplinary structure of the military establishment" and "the peculiar and special relationship of the soldier to his superiors." *Chappell*, 462 U.S. at 304 (punctuation and citation omitted); *see also Bois v. Marsh*, 801 F.2d

[18] *See* Servicemembers Civil Relief Act, 50 App. U.S.C. § 522(b)(2) (2003) (authorizing stay of proceedings if current military duty prevents appearance); *see also* 50 App. U.S.C. § 521(d). Federal courts have routinely ordered stays in civil cases involving military litigants. *See*, *e.g.*, *White v. Black*, 190 F.3d 366, 368-69 (5th Cir. 1999) (staying constitutional damages action because defendant was on active duty).

462, 471 (D.C. Cir. 1986) (reasoning adopted in *Chappell* and related cases "turned on the need to preserve discipline within our Nation's Armed Forces"). None of the cases stands for the sweeping proposition that suits against the military *by civilians or others outside the military* are barred and there is no such doctrine.

Indeed, even service members may bring damages actions against military officials where the injuries complained of were not "incident to service." *Compare Wilkie*, 551 U.S. at 550 (describing *Stanley* and *Chappell* as involving "harm to military personnel through activity incident to service") *with United States v. Brown*, 348 U.S. 110, 112 (1954) (veteran could recover damages for negligence of military doctors that occurred *after* his discharge from military service because "[t]he injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline"), *and Brooks v. United States*, 337 U.S. 49, 51-52 (1949) (allowing servicemen to bring damages claims for injuries caused by Army personnel while they were off duty). As the Supreme Court explained in *United States v. Muniz*, 374 U.S. 150 (1963), where it declined to extend the incident-to-service doctrine to suits by federal civilian *prisoners*, the reason for barring damages was grounded in the "'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such

suits on discipline." *Id.* at 162. *See also Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1056 (D.C. Cir. 2002) (same). When civilians bring suit against the military, the concerns expressed in *Chappell* and *Stanley* are inapplicable and courts have permitted *Bivens* actions to go forward. *See, e.g.*, *Saucier*, 533 U.S. 194 (*Bivens* action against military police officer for excessive force during demonstration at army base); *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (en banc) (*Bivens* action challenging detention by Army during the occupation of Wounded Knee).[19]

This case does not present debatable questions of military policy, like *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), which was cited by the district court. *Sanchez-Espinoza* involved allegations by noncitizens, along with members of Congress, that the President had initiated an unauthorized war and in so doing injured the plaintiffs. The case concerned a political disagreement about which foreign policy choices would best safeguard American interests. In *Sanchez-Espinoza*, this Court was concerned about the danger of "multifarious pronouncements by various

[19] *See also Trueman v. Lekberg*, No. 97-1018, 1998 WL 181816 (E.D. Pa. April 16, 1998) (*Bivens* suit against a Navy captain for false arrest and false imprisonment at a Naval Air Station); *Vu v. Meese*, 755 F. Supp. 1375 (E.D. La. 1991) (*Bivens* claim against members of the U.S. Coast Guard for unlawful search and seizure of plaintiff's vessel); *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973) (*Bivens* suit against military personnel arising out of actions taken to detain plaintiffs at an Air Force Base during a visit by the President).

departments on one question." *Id.* at 209. Although the district court in this case pointed to the same concern, 479 F. Supp. 2d at 107, here the Executive and Congress have uniformly condemned the torture and abuse of foreign nationals in U.S. custody, *see supra* Part I(B), and Plaintiffs' suit to enforce these legal norms is entirely consistent with those views.

Further, unlike the situation in *Sanchez-Espinosa*, resolution of the question presented here does not require the Court to review or analyze issues outside core areas of judicial expertise. *Cf. Boumediene*, 128 S. Ct. at 2277; *Hamdi*, 542 U.S. at 535. This case has nothing to do with policy decisions to wage war in Afghanistan and Iraq or to deploy military force abroad, or the military's power to detain civilians as part of the war effort. Rather, the case involves the application of clear and settled Fifth and Eighth Amendment law to persons under the exclusive jurisdiction of U.S. laws. These are questions well within the competence of the federal judiciary and arise in countless cases.

IV. DEFENDANTS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY UNDER THE WESTFALL ACT

The district court dismissed Plaintiffs' claims under the Alien Tort Statute for violations of their rights under *jus cogens* norms of international

law.[20] Despite the fact that Defendants' actions, as alleged in the Complaint, contravened the universal prohibition against torture in U.S. and international law, the Attorney General of the United States certified under the Westfall Act that in ordering and condoning torture, Defendants were acting within the scope of their employment. Rejecting Plaintiffs' request for discovery on the subject, the district court approved the Attorney General's certification and determined that Defendants could claim immunity for their "wrongful" conduct under the Westfall Act. Re-characterizing Plaintiffs' claims as mere "intentional torts" rather than egregious torts in violation of the *jus cogens* norm prohibiting torture, 479 F. Supp. 2d at 110, the district court determined that: The Westfall Act applied to Plaintiffs' claims; Defendants acted within the scope of their employment under state law *respondeat superior* standards; Plaintiffs' claims under the ATS should be converted into an action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 ("FTCA"), with the United States substituted as defendant; and the United States was entitled to dismissal of the international law claims because Plaintiffs had failed to exhaust

[20] The district court also dismissed Plaintiffs' separate cause of action brought directly under the Fourth Geneva Convention. Plaintiffs do not appeal that ruling and do not raise any claims under the Fourth Geneva Convention on appeal, either directly or under the ATS.

administrative remedies under the FTCA. These rulings were erroneous for three reasons.

A. The Westfall Act Cannot Be Construed To Grant Immunity to Government Officials for Egregious Torts in Violation of *Jus Cogens* Norms

The district court erred in interpreting the Westfall Act to cover egregious torts that violate *jus cogens* norms. The Westfall Act grants immunity to federal employees for a "negligent or wrongful act or omission." 28 U.S.C. § 2679(b)(1). The district court held that the ordinary and plain meaning of the word "wrongful" in the Westfall Act encompasses egregious torts that violate *jus cogens* norms. That reading, while perhaps plausible, is not "the only possible—or even the most plausible reading"; thus, the statute is ambiguous. *See United States v. Villenueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008). Indeed, on two occasions the Supreme Court has indicated that the word "wrongful" in an almost identical provision in the FTCA is ambiguous enough to warrant looking to legislative history for guidance. *See Dalehite v. United States*, 346 U.S. 15 (1953); *Laird v. Nelms*, 406 U.S. 797, 799 (1972).

Moreover, a longstanding canon of statutory construction requires looking behind the words of the statute to the legislative history when "the literal application [of the statute's words] produce[s] a result demonstrably

at odds with the intentions of the drafters." *United States v. Ron Pair Enterpr.*, 489 U.S. 235, 242 (1980) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). And when the "plain meaning" of the statute would lead to "absurd or futile results" or an "unreasonable one plainly at variance with the policy of the legislation as a whole," courts should examine the purpose behind the enactment. *United States v. Am. Trucking Co.*, 310 U.S. 534, 543 (1940) (citation and internal quotation marks omitted); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (declining to follow plain meaning of statute because it would lead to the absurd result of criminalizing innocent conduct); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation … is not necessarily controlling in statutory construction…. Interpretation of a word or phrase depends upon reading the whole statutory text [and] considering the purpose and context of the statute….").

Courts therefore may look to the legislative history of a statute in order to determine whether the "ordinary meaning" of the statutory language is inconsistent with Congress's express intent. The Supreme Court recently applied this principle in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009). Although the majority determined that the "ordinary meaning" of the sentence at issue was grammatically unambiguous, it acknowledged that

"the inquiry into a sentence's meaning is a contextual one" and that a "special context" might call for a different interpretation. *Id*. at 1891. The majority therefore looked beyond the text to see whether there were any indicia of legislative intent, including the statute's express purpose and legislative history, sufficient to "overcome the ordinary meaning" of the statute. *Id*. at 1892-94.[21] *See also United States v. Cox*, 577 F.3d 833, 837-38 (7th Cir. 2009) (citing legislative history and holding that "congressional intent" to provide "minors [with] … special protection against sexual exploitation" presented a "special context" justifying a departure from the grammatical plain meaning of the statute).

Applying this principle to the instant case, it becomes clear that the district court's reading of the word "wrongful" to encompass egregious torts such as torture was completely at odds with Congress's intent in enacting the Westfall Act. According to the House Report, the overall purpose of the Westfall Act is the establishment of "legislated standards to govern the immunity of Federal employees who have allegedly committed *state*

[21] Justice Scalia's concurrence criticized the majority's departure from the strictly textual statutory interpretation. Justice Scalia noted that "the Court is not content to stop at the statute's [unambiguous] text" and he refused to join the portion of the majority's opinion inquiring into whether the legislative record would overcome the ordinary meaning of the plain language. *Id*. at 1894 (Scalia, J., concurring in part and concurring in the judgment).

common law torts." H.R. Rep. No. 100-700, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946 (emphasis added). The legislative history is replete with similar statements reflective of Congressional intent to address state law tort liability. The sponsor of the Westfall Act stated that it would protect federal employees against "*common garden variety type* negligence suits." 134 Cong. Rec. 15,963 (statement of Rep. Frank) (emphasis added). Other members of Congress consistently expressed this view. *See, e.g.*, 134 Cong. Rec. 29,933 (1988) (statement of Sen. Heflin) (describing *Westfall v. Erwin*, 484 U.S. 292 (1988), which Congress overrode with the Westfall Act, as stripping federal employees of their "longstanding immunity from *State common law tort actions*") (emphasis added); 134 Cong. Rec. 15,963 (1988) (statement of Rep. Wolf) (supporting Westfall Act because "it addresses a serious problem affecting the liability of Federal employees for *State common law torts*") (emphasis added). This legislative history demonstrates that Congress intended to immunize federal employees who committed minor torts, such as "suits for clerical negligence." H.R. Rep. No. 100-700, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946.

Indeed, Congress specifically intended that "[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. The Act's sponsor said, "[W]e are not talking about intentional acts of harming people…."[22] 134 Cong. Rec. 15,963 (statement of Rep. Frank). The sponsor's statements carry particular weight in establishing legislative intent. *Brock v. Pierce County*, 476 U.S. 253, 263 (1986); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). And the legislative history shows that the sponsor's view was uncontroversial. *See* Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 100th Cong. 79 (1988) (prepared statement of Robert L. Willmore, Deputy Assistant Att'y Gen., Civil Division, DOJ) ("[E]mployees accused of egregious misconduct—as opposed to mere negligence or poor judgment—will not generally be protected from personal liability for the results of their actions.").

Interpreting the Westfall Act not to grant immunity for egregious torts in violation of *jus cogens* norms is also compelled by the long-settled principle that statutes should be construed to be consistent with international

[22] The Westfall Act's sponsor has subsequently reaffirmed that in enacting Westfall, Congress never intended to immunize officials against torture. *See* Br. for U.S. Rep. Barney Frank as *Amici Curiae* Supporting Appellant at 2, *Harbury v. Hayden* (D.C. Cir. 2008) (No. 06-5282).

law: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Port Auth. of N.Y. & N.J. v. DOT*, 479 F 3d 21, 31 (D.C. Cir. 2007) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). Since Nuremberg, international law has required states to hold perpetrators accountable for human rights violations not only through criminal punishment, but also through redress to victims.[23] If this Court were to construe the Westfall Act to immunize Defendants, the statute would be at odds with this fundamental principle of international law, in violation of these canons of statutory construction.

[23] *See* Robert H. Jackson, Final Report to the President on the Nuremberg Trials, Oct. 7, 1946, U.S. Dep't of State Bull. vol. XV, nos. 366-391, Oct. 27, 1946, at 771, 774; Universal Declaration on Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), art. 8; International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171, art. 2(3), 9(5); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, art. 14(1). International law requires governments to open their legal systems to claims by victims and survivors of human rights abuses. *See, e.g.*, U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, paras. 2(b), 2(c), and 3(d), U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

B. Plaintiffs' Claims Under the Law of Nations Fall Within the Westfall Act's Exception for Actions Based Upon Violation of a Statute

Even if the Westfall Act's general grant of immunity for "negligent or wrongful acts" somehow could be read to encompass egregious torts that violate *jus cogens* norms, another provision of the statute makes an exception for any action "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). This exception for statutory violations applies because Plaintiffs' claims are brought under a federal statute, the Alien Tort Statute ("ATS"). The ATS provides for federal court jurisdiction over claims asserting violations of the law of nations. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Because Plaintiffs' claims are brought under the ATS, the Westfall Act's exception for actions brought under a federal statute authorizing the action should apply.

The district court held that the Westfall Act's statutory violation exception does not apply, relying upon the Supreme Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that the ATS is a jurisdictional statute that does not independently establish a cause of action. Thus, the

district court reasoned, Plaintiffs' claims were not for a violation of the ATS and the statutory violation exception did not apply. 479 F. Supp. 2d at 112. That reasoning is inconsistent with the Westfall Act.

Whether the ATS should fall within the Westfall Act's exception for actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized" is not obvious from the plain language of the statute. Thus, the Court should look to the legislative history of the Westfall Act to determine Congress's intent. That legislative history demonstrates that when Congress enacted the Westfall Act, it specifically understood ATS actions to be encompassed within the statutory violation exception. The Supreme Court's *Sosa* decision—which reversed the prevailing view of the ATS and established definitively that it was merely jurisdictional—postdated the Westfall Act and therefore does not shed light on what Congress meant to include in the statutory violation exception.

At the time Congress passed the Westfall Act in 1988, both the prevailing caselaw and contemporaneous congressional understanding was that the ATS provided *both* jurisdiction and a substantive cause of action for

noncitizens bringing actions for violations of fundamental rights.[24] *See, e.g.*, *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987). Although some judges of the D.C. Circuit had expressed a minority view, contrary to all other federal courts, that the ATS was only a jurisdictional statute, *Tel-Oren v. Libya*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring); *id.* at 827 (Robb, J., concurring), Congress accepted the prevailing view. This congressional understanding is reflected most clearly in the legislative history of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note 2(a), which was considered by Congress contemporaneously with the Westfall Act. The House Judiciary Committee's 1989 report on the TVPA made clear that Congress considered the ATS to provide a substantive cause of action. *See* H.R. Rep. No. 101-55, 101st Cong., 1st Sess., pt. 1 at 3 (1989)

[24] The fact that Congress expressly intended for the ATS to provide a cause of action for torture distinguishes the instant case from *United States v. Smith*, 499 U.S. 160 (1991). *Smith* held that the Gonzalez Act, which immunized military medical personnel from personal liability for malpractice, did not provide a cause of action and therefore did not fall within the statutory violation exception to the Westfall Act. *Id.* at 174-75. The Supreme Court reasoned that the Gonzalez Act could not be "violated" because it did not "impose[] any obligations or duties of care upon military physicians"; to the contrary, the Gonzalez Act was intended to *immunize* those federal employees. *Id.* In contrast, the ATS was intended to provide a cause of action and contains no immunity provision.

(noting that TVPA "would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)" and that TVPA would augment the availability of a remedy for torture for persons not covered by the ATS (*i.e.*, U.S. citizens)) (emphasis added); H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991) (same); S. Rep. No. 249, 102d Cong., 1st Sess. (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the title 28…."). Thus, at the time Congress considered both the TVPA and the Westfall Act, it understood that the ATS provided a substantive cause of action for violations of the law of nations or treaties of the United States. That the Supreme Court *later* held to the contrary sheds no light on what Congress meant when it drafted the Westfall Act. The statutory violation exception to the Westfall Act should therefore be read to include Plaintiffs' ATS claims for violations of the law of nations.

C. The Westfall Act Does Not Apply Because Defendants Cannot Be Deemed To Have Acted Within the Scope of Their Employment

In the proceedings below, the Attorney General triggered the application of the Westfall Act by certifying that Defendants were acting within the scope of their employment. In approving that certification, the

district court erred. Although this Court has adopted the district court's analysis, *see Rasul v. Myers*, 512 F.3d 644, 657-60 (D.C. Cir. 2008), *reinstated on remand after vacatur*, 563 F.3d 527, 528-29 (D.C. Cir. 2009) ("*Rasul II*"); *Harbury v. Hayden*, 522 F.3d 413, 422 (D.C. Cir. 2008), Plaintiffs maintain the issue here to preserve it.

As a matter of law, torture can never fall within the scope of employment of the U.S. Secretary of Defense and high-ranking U.S. Army commanders. In determining whether conduct falls within the scope of employment, the Court looks to the law of the jurisdiction where the employment relationship existed—in this case, D.C. law, which refers to the Restatement (Second) of Agency (1957). *See Majano v. United States,* 469 F.3d 138, 141 (D.C. Cir. 2006). Under section 231 of the Restatement, "serious crimes" generally do not fall within the scope of employment. *See also Boykin v. Dist. of Columbia*, 484 A.2d 560, 563 (D.C. 1984) (citing § 245 of Restatement). This is consistent with settled caselaw holding that when an employee's actions are not foreseeable to the employer—as it was not foreseeable that the U.S. Secretary of Defense and high-ranking U.S. Army commanders would promulgate policies causing torture in contravention of U.S. laws, the law of nations, and military regulations and policies—the employee does not act within the scope of employment and it

is not fair to hold the employer liable. *See Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995) (to be foreseeable, "it is not enough that an employee's job provides an opportunity to commit an intentional tort."). Violations of the *jus cogens* prohibition against torture constitute such serious and unforeseeable illegal activity that they are not within the scope of employment and fall outside the Westfall Act's grant of immunity.[25] Indeed, to hold otherwise would effectively render the Restatement's "serious crimes" exception meaningless: If torture does not qualify as a serious crime, it is difficult to imagine what sort of conduct would.

Plaintiffs therefore respectfully submit that this Court's decisions to the contrary in *Rasul II* and *Harbury* are not well-founded and should be reconsidered. At the least, Plaintiffs should have been permitted to take discovery on the scope of employment issue. *See Lyon v. Carey*, 533 F.2d 649, 651 (D.C. Cir. 1976) (scope of employment is issue of fact that

[25] Indeed, the U.S. Army has taken the position in responding to an administrative claim under the Foreign Claims Act and Military Claims Act that torture and mistreatment of detainees "appear[] to be clearly outside the scope of duty required of a military member to arrest and detain someone." *See* http://www.aclu.org/files/projects/foiasearch/pdf/DOD045906.pdf; http://www.aclu.org/files/projects/foiasearch/pdf/DOD045924.pdf (documents produced by U.S. Department of Defense in response to FOIA request). Similarly, the U.S. Department of State has reported to the U.N. Committee Against Torture that torture does not fall within the scope of employment of members of the military. *See* U.S. Dep't of State, *Initial Report of the United States of America to the U.N. Committee Against Torture* at 6, 109 (1999), *available at* http://www.state.gov/www/global/human_rights/torture_toc99.html.

generally cannot be determined at motion to dismiss stage); *Majano*, 469 F.3d at 141; *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003).

In summary, the Westfall Act's grant of immunity should not apply to Plaintiffs' claims of torture brought under the ATS.

III. PLAINTIFFS HAVE STANDING TO SEEK DECLARATORY RELIEF

The district court dismissed Plaintiffs' claims for declaratory relief on the grounds that Defendants were no longer in command positions in Iraq and Afghanistan, and that Plaintiffs had been at liberty for more than two years without re-arrest and therefore did not have standing to pursue declaratory relief under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). This ruling was erroneous for two reasons. First, Plaintiffs sued Defendant Rumsfeld in his official (as well as individual) capacity and therefore his successors in office automatically were substituted as defendants. Fed. R. Civ. P. 25(d); Fed. R. App. P. 43(c)(2) Second, Plaintiffs alleged facts showing that they were at risk of re-detention even if they engaged in no wrongdoing, including that three of them were actually re-detained and two were explicitly threatened with re-detention. App. 39, 68, 70, 72, 74, 76, 78, 80, 82, 84-85, 90, 92, 101 (Am. Compl. ¶¶ 38, 161, 162, 172, 176, 180, 184, 188, 192, 193, 197, 198, 207, 208, 210, 233, 234). Taking these allegations as true as required on a Rule 12(b)(6) motion, *Lyons* does not apply.

Through their claim for declaratory relief, Plaintiffs seek an effective remedy that will allay the risk of future injury from Defendants' unlawful conduct.[26] The district court erred in dismissing that claim.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Dated: September 15, 2010

Respectfully submitted,

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[26] To the extent that the Court would hold that the passage of time has weakened Plaintiffs' claim to declaratory relief, it is all the more important to hold that they are entitled to pursue a *Bivens* remedy. If the Court concludes that declaratory relief is unavailable, it should structure the qualified immunity analysis to permit a clear holding that Plaintiffs' constitutional rights were violated based on the allegations in the complaint. *See supra* Part II; *Pearson v. Callahan*, 129 S. Ct. 808, 821-22 (2009) (noting that courts may skip to "clearly established" prong of qualified immunity test when actions for injunctive relief are available).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32. It contains 13,725 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Dated: September 15, 2010

/s/ Cecillia D. Wang
Cecillia D. Wang

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2010, I electronically filed the BRIEF OF APPELLANTS and APPENDIX with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Furthermore, I certify that I sent eight copies of the BRIEF OF APPELLANTS and seven copies of the APPENDIX by First Class U.S. Mail to the Clerk of the Court.

I certify that all participants in the case are registered CM/ECF users and that service to the following parties will be accomplished by the CM/ECF system.

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I declare under penalty of perjury that the above is true and correct.

Dated: September 15, 2010
San Francisco, CA

s/ Lorena Fernandez
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ADDENDUM – Statutes and Regulations

1. 28 U.S.C.A. § 1350 (Alien Tort Statute)
2. 28 U.S.C.A. § 2679 (Westfall Act)
3. Excerpts from Dep't of the Army, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5(a)(4) (1997)
4. Excerpts from Dep't of the Army, Intelligence Interrogation, Field Manual 34-52, Ch. 1 at 1-8, 1-9 (1992)
5. Excerpts from Dep't of the Army, Field Manual 27-10, The Law of Land Warfare, ch.8, § 2, art. 501 (1956)

ADDENDUM 1

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)
§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 934.)

Current through PL 111-237 (excluding P.L. 111-203, 111-211, and 111-226) approved 8-16-10

END OF DOCUMENT

ADDENDUM 2

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 171. Tort Claims Procedure (Refs & Annos)
§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of

his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub.L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, Pub.L. 100-694, §§ 5, 6, 102 Stat. 4564.)

Current through PL 111-237 (excluding P.L. 111-203, 111-211, and 111-226) approved 8-16-10

END OF DOCUMENT

ADDENDUM 3

Army Regulation 190–8
OPNAVINST 3461.6
AFJI 31-304
MCO 3461.1

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

UNCLASSIFIED

medical annex of OPLANS, OPORDS and contingency plans. It includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U. S. Army Criminal Investigation Command (USACIDC). USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 195-2.

1–5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1–6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

ADDENDUM 4

FM 34-52

INTELLIGENCE INTERROGATION

HEADQUARTERS, DEPARTMENT OF THE ARMY

The GWS, GPW, GC, and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.

Such illegal acts are not authorized and will not be condoned by the US Army. Acts in violation of these prohibitions are criminal acts punishable under the UCMJ. If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question.

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.

Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied PWs does not justify using methods of interrogation specifically prohibited by the GWS, GPW, or GC, and US policy.

Limitations on the use of methods identified herein as expressly prohibited should not be confused with psychological ploys, verbal trickery, or other nonviolent or noncoercive ruses used by the interrogator in the successful interrogation of hesitant or uncooperative sources.

The psychological techniques and principles in this manual should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, physical or mental torture, or any other form of mental coercion to include drugs that may induce lasting and permanent mental alteration and damage.

Physical or mental torture and coercion revolve around eliminating the source's free will, and are expressly prohibited by GWS, Article 13; GPW, Articles 13 and 17; and GC, Articles 31 and 32. Torture is defined as the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure.

Examples of physical torture include—

- Electric shock.
- Infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape).
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time.
- Food deprivation.
- Any form of beating.

Examples of mental torture include—

- Mock executions.
- Abnormal sleep deprivation.
- Chemically induced psychosis.

Coercion is defined as actions designed to unlawfully induce another to compel an act against one's will. Examples of coercion include—

- Threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty.
- Intentionally denying medical assistance or care in exchange for the information sought or other cooperation.
- Threatening or implying that other rights guaranteed by the GWS, GPW, or GC will not be provided unless cooperation is forthcoming.

Specific acts committed by US Army personnel may subject them to prosecution under one or more of the following punitive articles of the UCMJ:

- Article 78 - Accessory after the fact.
- Article 80 - Attempts (to commit one of the following offenses).
- Article 81 - Conspiracy (to commit one of the following offenses).
- Article 93 - Cruelty and maltreatment.
- Article 118 - Murder.
- Article 119 - Manslaughter.
- Article 124 - Maiming.

- Article 127 - Extortion.
- Article 128 - Assault (consummated by battery; with a dangerous weapon; or intentionally inflicting grievous bodily harm).
- Article 134 - Homicide, negligent:

-- Misprision of a serious offense (taking some positive act to conceal a serious crime committed by another).

-- Soliciting another to commit an offense.

-- Threat, communicating.

See Appendix A for the text of these offenses.

While using legitimate interrogation techniques, certain applications of approaches and techniques may approach the line between lawful actions and unlawful actions. It may often be difficult to determine where lawful actions end and unlawful actions begin. In attempting to determine if a contemplated approach or technique would be considered unlawful, consider these two tests:

- Given all the surrounding facts and circumstances, would a reasonable person in the place of the person being interrogated believe that his rights, as guaranteed under both international and US law, are being violated or withheld, or will be violated or withheld if he fails to cooperate.
- If your contemplated actions were perpetrated by the enemy against US PWs, you would believe such actions violate international or US law.

If you answer yes to either of these tests, do not engage in the contemplated action. If a doubt still remains as to the legality of a proposed action, seek a legal opinion from your servicing judge advocate.

The approaches, psychological techniques, and other principles presented in this manual must be read in light of the requirements of international and US law as discussed above.

Authority for conducting interrogations of personnel detained by military forces rests primarily upon the traditional concept that the commander may use all available resources and lawful means to accomplish his mission and to protect and secure his unit.

It is the stated policy of the US Army that military operations will be conducted in accordance with the law of war obligations of the US. The GWS, GPW, and GC establish specific standards for humane care and treatment of enemy personnel captured, retained, or detained by US military forces and its allies. Suspected or alleged violations of these standards will be reported, investigated and, if appropriate, referred to competent authority for trial or other disposition. Violations of the GWS, GPW, or GC committed by US personnel normally constitute violations of the UCMJ.

The commander is responsible for ensuring that the forces under his command comply with the GWS, GPW, and GC. Should violations occur in the conduct of warfare, the commander bears primary responsibility for investigating and prosecuting violations.

SECURITY

The interrogator, by virtue of his position, possesses a great deal of classified information. He is aware his job is to obtain information, not impart it to the source. He safeguards military information as well as the source of that information.

This becomes very clear when one considers that among those persons with whom the interrogator has contact, there are those attempting to collect information for the enemy. The interrogator is alert to detect any attempt made by the source to elicit information.

DEFINITION OF PRISONER OF WAR AND ENEMY PRISONER OF WAR

A PW is a US or allied person detained by an enemy power. An EPW is a person detained by US or allied powers. The first issue interrogators must deal with is who must be afforded PW treatment. Figure 1-3 paraphrases Article 4 of the GPW. In addition, the following personnel shall be treated as PWs: Persons belonging, or having belonged, to the armed forces of the occupied country, if—

- The occupying power considers it necessary by reason of such allegiance to intern them; in particular, if—
- Such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat; or

ADDENDUM 5

FM 27-10

DEPARTMENT OF THE ARMY FIELD MANUAL

THE LAW OF LAND WARFARE

DEPARTMENT OF THE ARMY • JULY 1956

GC, art. 99). However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.

d. When and How Employed. Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices. They should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded, in which event a subordinate commander may order appropriate reprisals upon his own initiative. Ill-considered action may subsequently be found to have been wholly unjustified and will subject the responsible officer himself to punishment for a violation of the law of war. On the other hand, commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of unlawful acts.

e. Form of Reprisal. The acts resorted to by way of reprisal need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the enemy.

f. Procedure. The rule requiring careful inquiry into the real occurrence will always be followed unless the safety of the troops requires immediate drastic action and the persons who actually committed the offense cannot be ascertained.

g. Hostages. The taking of hostages is forbidden (*GC*, art. 34). The taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden. (See *GC*, art. 33.)

Section II. CRIMES UNDER INTERNATIONAL LAW

498. Crimes Under International Law

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

a. Crimes against peace.
b. Crimes against humanity.
c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned, only with those offenses constituting "war crimes."

499. War Crimes

The term "war crime" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.

500. Conspiracy, Incitement, Attempts, and Complicity

Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable.

501. Responsibility for Acts of Subordinates

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.