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

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ARKAN MOHAMMED ALI, et al.,
Plaintiffs-Appellants,
v.

DONALD H. RUMSFELD, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia in Civil Case No. 06-145 Hon. Thomas F. Hogan, United States District Judge

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BRIEF *AMICI CURIAE* OF CONCERNED RETIRED MILITARY OFFICERS AND MILITARY LAW AND HISTORY SCHOLARS AND THE NATIONAL INSTITUTE OF MILITARY JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici curiae*, retired military officers, military law and history scholars and the National Institute of Military Justice certify the following:

A. Parties and *Amici.* Except for the following, all *amici* appearing before the district court and in this court are listed in the Brief for Appellants Arkan Mohammed Ali, et al.

1. *Amici*: *Amici* are the National Institute of Military Justice and the former military officers and scholars of military law and military history listed below:

Brigadier General (Ret.) David M. Brahms

Commander (Ret.) David Glazier

Professor Elizabeth L. Hillman

Professor Jonathan Lurie

Professor Diane Mazur

Lieutenant Colonel (Ret.) Gary D. Solis

National Institute of Military Justice

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Appellants Arkan Mohammed Ali., et al.

C. Related Cases. References to related cases appear in the Brief for Appellants Arkan Mohammed Ali., et al.

/s/ Stephen A. Saltzburg
Stephen A. Saltzburg

CERTIFICATE PURSUANT TO CURCUIT RULE 29

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* retired military officers, military law and history scholars and the National Institute of Military Justice certify that, as of the date of this certification, the only other brief *amicus curiae* of which we are aware is the Brief of *Amici Curiae* on behalf of human rights groups and torture victims groups in Support of Plaintiffs-Appellants. These two briefs could not be joined as a single memorandum because the perspectives and analyses provided in these two briefs are totally different. In this brief, *amici* describe the well-established prohibition on torture and inhumane treatment under military law and tradition, the law of war and the doctrine of command responsibility, and the reasons why, in this unique military setting, the conduct alleged could not be within the scope of Appellees' employment under the Westfall Act or justify the imposition of qualified immunity. The other amicus brief focuses on torture and human rights law. Their brief does not address the military law and military doctrine that are the focus of this brief. Any overlap between the two briefs is insignificant. Accordingly, we did not consider it practical to consolidate this brief with the other *amici***.**

Dated: September 22, 2010.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the National Institute of Military Justice ("NIMJ") makes the following disclosure:

NIMJ is a non-profit corporation whose members are law professors and experts in military law, most of whom have served as military lawyers. No parent companies or publicly held companies have 10% or greater ownership in NIMJ.

GLOSSARY OF ABBREVIATIONS

AR	U.S. Army Regulation
ATS	Alien Tort Statute
BG	Brigadier General
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Cmdr.	Commander
Col.	Colonel
DTA	Detainee Treatment Act
DOD	Department of Defense
FM	U.S. Army Field Manual
FTCA	Federal Tort Claims Act
GC	Geneva Convention Relative to the Treatment of Civilians
GPW	Geneva Convention Relative to the Treatment of Prisoners of War
Maj.	Major
MG	Major General
NIMJ	National Institute of Military Justice
SAF/GC	Air Force General Counsel
UCMJ	Uniform Code of Military Justice

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OTHER AUTHORITIES

Amici submit this brief in support of Appellants and urge reversal of the district court's judgment dismissing Appellant's claims for damages resulting from the violation of their rights under the Constitution and international law. *Amici* show that the district court's conclusion that Appellees were immune from suit conflicts with military tradition, law and regulation, and fundamental principles of command responsibility. The Plaintiffs-Appellants have consented to the filing of this Brief. The Defendants-Appellees were contacted with a request for consent to the filing of *amici's* Brief. Counsel for the United States and Secretaries of Defense Rumsfeld and Gates consented. The other Defendants-Appellees responded that they will not oppose the filing of this Brief. This Brief is filed pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.

Interest of *Amici*

Amici are retired military officers, scholars of military law and history, and the National Institute of Military Justice. They have an interest in the maintenance of our nation's military tradition of humane treatment of detainees captured in armed conflict and strict enforcement of military, domestic and international law requiring such treatment.

Brigadier General (Ret.) David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. Among other positions, he was the principal legal advisor for prisoner of war (POW) matters at Headquarters Marine Corps, and the senior uniformed lawyer for the Marine Corps, retiring as the Staff Judge Advocate to the Commandant of the Marine Corps.[1]

Commander (Ret.) David Glazier served twenty-one years as a United States Navy surface warfare officer and is now a Professor of Law and Lloyd Tevis Fellow at Loyola Law School Los Angeles, where he teaches the law of war, constitutional law, and foreign relations law.

Elizabeth L. Hillman is a former Air Force Captain and is now a Professor of Law at the University of California, Hastings College of Law, where she teaches military justice, legal history and constitutional law. She previously taught those courses at Rutgers Law School-Camden and military history at the United States Air Force Academy.

Jonathan Lurie, Professor Emeritus of History and Law at Rutgers University, teaches legal history and military legal history. He was awarded a Fulbright Lectureship in Sweden, where he taught courses on military

[1] References to each *amicus'* institutional or organizational affiliations are for identification purposes only.

justice, including a course on War, National Security, and the Rule of Law. He is the author of a two-volume history on the United States Court of Appeals for the Armed Forces.

Diane Mazur served as a United States Air Force officer from 1979 to 1983, achieving the rank of Captain. She is the Gerald A. Sohn Research Scholar and Professor of Law at the University of Florida College of Law, where she teaches courses in Civil-Military Relations, Professional Responsibility, Constitutional Law, and Evidence. She is a member of the Board of Advisors for the National Institute of Military Justice and a Senior Editor of the *Journal of National Security Law and Policy*. Professor Mazur has written numerous articles on military law and is the author of a 2010 book on civil-military relations, *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (Oxford University Press).

Lieutenant Colonel (Ret.) Gary D. Solis retired from the United States Marine Corps after twenty-six years on active duty and serving two combat tours in Vietnam. He was a judge advocate for eighteen years, during which time he was a military judge in hundreds of courts-martial. He has a doctorate in the law of war from the London School of Economics and Political Science. In addition to numerous articles, papers, and book

chapters, he has written several books on law in combat, including *The Law of Armed Conflict: International Humanitarian Law* (2010).

The National Institute of Military Justice[2] ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty, but nearly all of whom have served as military lawyers.

Statement of the Issue

Whether the Secretary of Defense and military officers are entitled to immunity under the Westfall Act or qualified immunity from Appellant's claims of torture and other inhumane acts allegedly inflicted on them while they were detained in Iraq and Afghanistan.

Introduction and Summary of Argument

Appellants allege that they were subjected to torture and cruel, inhumane and degrading treatment during their detention in U.S. military custody in Iraq and Afghanistan. Appellants seek damages and declaratory and injunctive relief, claiming that Appellees – Secretary of Defense Donald

[2] The following NIMJ Directors and Advisors did not have any role in the drafting or filing of this *amicus curiae* brief: Eugene Fidell, Victor Hansen, Michael Navarre, and John Carr.

Rumsfeld, Major General Ricardo Sanchez, Brigadier General Janis Karpinski and Colonel Thomas Pappas – authorized or encouraged such conduct or failed to prevent it when they knew or should have known it was occurring.

Amici submit that the district court's dismissal of these claims based on Westfall Act immunity and qualified immunity conflicts with the long-established prohibition on torture and inhumane treatment under military law, regulation and tradition, as well as federal and international law, and the doctrine of command responsibility.

Appellees were not only obligated to adhere strictly to these standards themselves, but as persons in positions of command, were obligated to instruct their subordinates that torture and inhumane treatment were forbidden and to prevent such conduct. Accountability for the conduct of military personnel under Appellees' commands is fundamental to military law, discipline and the law of war. Enforcement of those standards of the law of war that govern the humane treatment of persons detained in armed conflict is critical, for deviations from those standards threaten the safety and well-being of our own military personnel who fall into enemy hands, expose military personnel to sanctions under military, domestic and

international law, undermine military discipline, and damage the reputation of our nation.

It is inconceivable that the alleged conduct falls within Appellees' "scope of employment." Similarly, qualified immunity should not be available to government officials who were on notice that their actions and omissions were clearly unlawful and so plainly violated their command responsibilities.

Argument

I.

APPELLEES' ALLEGED CONDUCT WAS STRICTLY PROHIBITED UNDER MILITARY LAW AND POLICY AND THE LAW OF WAR, AS WELL AS DOMESTIC AND INTERNATIONAL LAW

The conduct alleged violates the U.S. Constitution, federal statutes, treaties and customary international law, and most importantly long-standing military law, regulation and policy, the law of war and the fundamental doctrine of command responsibility. The absolute prohibition of torture and inhumane treatment, in particular, and the responsibility of those in command to prevent it are essential to the discipline of our military members, their reputation, their protection from criminal liability, and their safety, should they fall into enemy hands.

The doctrine of command responsibility's purpose is to incentivize those in command to protect persons in custody from maltreatment by holding them accountable if they fail to prevent such treatment by their subordinates. Where those in command, instead, authorize or condone such actions, immunizing them from liability diminishes that incentive and undermines a central tenet of military policy.

A. Torture and Inhumane Treatment Have Long Been Forbidden by Military Law and Policy and the Law of War

Since the Revolutionary War, the United States military has maintained a tradition of treating captured combatants humanely. After the Battle of Trenton, George Washington ordered his troops to treat hundreds of surrendering Hessian soldiers "with humanity," and to "[l]et them have no reason to complain of our copying the brutal example of the British army." David Hackett Fischer, *Washington's Crossing*, 377-79 (2004). In an early treaty, the U.S. included language on the subject of POW treatment in Article 24 of the 1785 Treaty of Amity with Prussia – language that saw Germany and the U.S. accord each others' prisoners more favorable treatment than other belligerents.[3]

[3] Treaty of Amity and Commerce between the Kingdom of Prussia and the United States of America (September 10, 1785), available at http://avalon.law.yale.edu/18th_century/prus1785.asp, last visited Sept. 16, 2010.

President Lincoln continued this tradition when signing General Orders No. 100, also known as the Lieber Code. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, U.S. War Dep't Gen. Orders No. 100 (April 24, 1863). The Lieber Code forbade the "intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" upon a prisoner of war, and specified that, while prisoners of war may be confined "such as may be deemed necessary on account of safety," they "are to be subjected to no other intentional suffering or indignity" and "treated with humanity." *Id.* at § III, art. 56, 75-76. The Code expressly forbade using violence to interrogate enemy captives. *Id.* at § I, art. 16 ("Military necessity does not admit of cruelty . . . nor of torture to extort confessions.").

During the 19th century, the Lieber Code served as the foundation for instruction on the law of war at the United States Military Academy. *See* Col. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 Mil. L. Rev. 112, 114 (2004).

It also formed "the basis of every convention and revision" of international law concerning the treatment of prisoners of war, including the Hague Conventions of 1899 and 1907, the first multilateral codification of

the modern law of war. BG J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40, 42 (1950). The brutality of the First World War prompted the United States and more than forty other countries to enter into the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. After the Second World War, the laws of war were revisited, resulting in the adoption in 1949 of the four Geneva Conventions.[4]

The United States military has long trained its officers to observe the laws of war and the standards of the Hague and Geneva conventions. *See generally* Finnegan, 181 Mil. L. Rev. 112; U.S. Dep't of the Army, Field Manual 27-10, *The Laws of Land Warfare* (July 1956) ("FM 27-10"). The four Geneva Conventions of 1949 provide comprehensive standards for the treatment of persons detained in armed conflicts. The Geneva Convention Relative to the Treatment of Prisoners of War ("GPW" or "Third Convention") addresses the treatment of prisoners of war. Common Article 3 – so denominated because it is common to all four Geneva Conventions –

[4] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively, the "1949 Geneva Conventions"). All four conventions were ratified by the United States in 1955. *See* 101 Cong. Rec. 9,958-73 (1955).

addresses the treatment of persons detained in armed conflicts that do not involve conflicts between nations, such as civil wars. Common Article 3 prohibits "violence to life and person . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment" against *all* detainees. *See*, *e.g.*, GPW, Art. 3.

Article 75 of Protocol I to the Geneva Conventions prohibits torture, "violence to the life, health, or physical or mental well-being," and "outrages upon personal dignity, in particular humiliating and degrading treatment" of any detainees. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Prot. of Victims of Int'l Armed Conflicts, Art. 75 at ¶ 2, June 8, 1977, 1125 U.N. 3, ("Protocol I"). The United States has not adopted Protocol I, but "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003).[5]

The United States military has maintained its commitment to provide humane treatment to detainees, even if detainees do not qualify for treatment as "prisoners of war" under the Third Convention. During the Vietnam War, the United States extended the Convention's prisoner of war protections to

[5] Mr. Taft was Legal Adviser to the Department of State from 2001 to 2005.

all captives – including Viet-Cong, who did not follow the laws of war. *See* United States Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in* Charles I. Bevans, ed., *Contemporary Practice of the United States Relating to Int'l Law*, 62 Am. J. Int'l L. 754, 766-67 (1968).[6]

During the 1970s the United States Army adopted the "implementation of the Geneva Conventions" as the main objective of enemy POW operations in place of the "acquisition of maximum intelligence information." *See* Gebhardt, *The Road to Abu Ghraib*, at 44, 50.

B. The Uniform Code of Military Justice and the Military's own Regulations Forbid the Mistreatment of Detainees

The conduct of military personnel vis-à-vis individuals detained during conflict is governed by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 801 *et seq.*, and field manuals issued by the Armed Forces. The UCMJ and the field manuals have consistently prohibited the mistreatment of detainees.

The UCMJ prohibits a member of the military from committing acts of "cruelty toward, or oppression or maltreatment of, any person subject to his orders." 10 U.S.C. § 893. For example, the United States Court of

[6] During the Korean War, the United States adhered to the Third Convention even though it had not yet ratified it. *See* Maj. James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, Military Review, Jan.-Feb. 2005, at 2, 15.

Appeals for the Armed Forces recently affirmed the conviction of a prison guard assigned at Abu Ghraib for violating § 893, cruelty and maltreatment of a detainee. *United States v. Harman*, 68 M.J. 325 (C.A.A.F. 2010). Actual and attempted murder, manslaughter, rape, maiming and assault are punishable under the UCMJ. 10 U.S.C. §§ 880, 918-920, 924, 928. Extorting or threatening a detainee for information is also prohibited. 10 U.S.C. §§ 927, 934.

FM 27-10 contains the Army's interpretation of the law of war, which incorporates international conventions – including the 1949 Geneva Conventions – and the customary law of war. Importantly, FM 27-10 incorporates Common Article 3. *See* FM 27-10, § 11; *see also id.* at §§ 246, 248, 271, 446.

Army Field Manual 34-52, *Intelligence Interrogation* (September 1992) ("FM 34-52")[7], which set forth the United States Army's official position on acceptable interrogation techniques and prohibited conduct at the time of the acts alleged by Appellants, provides that interrogators must operate "within the constraints" established by the UCMJ and the Geneva Conventions. FM 34-52, *preface* at iv. FM 34-52 emphasizes that the

[7] On September 6, 2006, FM 34-52 was replaced with Field Manual 2-22.3, *Human Intelligence Collector Operations* (Sept. 2006) ("FM 2-22.3"). This manual contains the same prohibitions on torture and mistreatment of detainees as FM 34-52 and re-emphasizes the military's commitment to the Geneva Conventions and, in particular, to Common Article 3. *See, e.g.*, FM 2-22.3 at 5-26.

Geneva Conventions and United States 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." *Id.* at 1-8; *see also id.* at 1-12 (threats constitute coercion).[8]

FM 34-52 also emphasizes the doctrine of command responsibility: commanders must act to insure that their subordinates abide by the Geneva Conventions and are personally accountable for their subordinates' violations. FM 34-52 specifies that the Geneva Conventions impose an "affirmative duty upon commanders to insure their subordinates are not mistreating protected persons or their property. The *command* and the government will ultimately be held responsible for any mistreatment." FM 34-52, D-1 (emphasis added). These principles apply regardless of whether a detainee is an enemy POW, a captured insurgent, or a civilian detainee. *Id.* at 1-7. Army personnel know that "improper" or "unlawful" interrogation techniques may harm critical intelligence gathering efforts and "send U.S. soldiers to prison." *Id.* at C-4.

Against this background, in 2003, the Judge Advocates General for the Navy, Army and Air Force expressed concern over the suggested

[8] The manual includes as examples of physical and mental torture: infliction of pain through chemicals or bondage; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; any form of beating; mock executions; and abnormal sleep deprivation. *Id.* at 1-8; *see also id.* at D-1-2.

authorization of aggressive interrogation techniques in a draft report for Secretary Rumsfeld. Brigadier General Kevin M. Sandkuhler, warned that authorizing such techniques would have a number of adverse effects, including "Criminal *and Civil Liability* of DOD Military and Civilian Personnel in Domestic, Foreign, and International Forums." Memorandum from BG Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, to Gen. Counsel of the Air Force (Feb. 27, 2003) *reprinted in* 151 Cong. Rec. S8794 (emphasis added). Similarly, Major General Jack L. Rives suggested that the report contain the following:

> U.S. Armed Forces are continuously trained to take the legal and moral 'high-road' in the conduct of our military operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. *Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful.*

Memorandum from MG Jack L. Rives, Deputy Judge Advocate General of the U.S. Air Force, to SAF/GC (Feb. 6, 2003) *reprinted in* 151 Cong. Rec. S8794-95 (emphasis added).

Likewise, Major General Thomas J. Romig noted that some of the "aggressive counter-resistance interrogation techniques" then being

considered by the Department of Defense failed to "comport with Army doctrine as set forth in Field Manual (FM) 34-52 Intelligence Interrogation." Memorandum from MG Thomas J. Romig, U.S. Army, Judge Advocate Gen., to Gen. Counsel of the Air Force (Mar. 3, 2003), *reprinted in* 151 Cong. Rec. S8794.

In July 2004, Alberto Mora, then General Counsel of the Navy, criticized the interrogation techniques authorized Secretary Rumsfeld's December 2, 2002, memorandum,[9] stating:

> [These techniques] should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture . . . . Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute 'cruel, inhuman, or degrading treatment, another class of unlawful treatment.

See Memorandum from Alberto J. Mora to Inspector Gen., U.S. Dep't of the Navy at 6 (July 7, 2004).[10]

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[9] Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def., to Donald Rumsfeld, Sec'y of Def. (Nov. 27, 2002) (approved by Sec'y Rumsfeld on Dec. 2, 2002), available at http://www.slate.com/features/whatistorture/LegalMemos.html, last visited Sept. 10, 2010.

[10] The memorandum is available at http://www.gwu.edu/~nsarchiv/torturingdemocracy//documents/20040707-1.pdf, last visited Sept. 10, 2010. *See also*, Jane Mayer, The Dark Side at 213-37 (2008).

C. The Prohibition On Torture Is Also Well-Established in Civilian Law

In addition to the military law and policy discussed above, there are civilian prohibitions on torture and cruel, inhuman and degrading treatment. Congress and the Executive have clearly communicated their understanding that federal courts are competent to enforce domestic and international standards prohibiting torture and other mistreatment – in short, that the enforcement of these laws does not present a political question.

The United States is also bound by several international treaties that prohibit torture and inhumane treatment. In 1955, the Senate ratified the 1949 Geneva Conventions (101 Cong. Rec. 9,958-73 (1955)). The United States is bound by the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39146, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) ("CAT"). CAT prohibits torture and cruel, inhuman and degrading treatment.[11] Specifically, CAT prohibits "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a

[11] In ratifying the CAT, the United States expressed the reservation that cruel, inhuman and degrading treatment was limited to conduct that violated the Fifth, Eighth, and Fourteenth Amendments to the Constitution. *See* United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, § I.(1), available at http://www2.ohchr.org/english/law/cat-reserve.htm, last visited Sept. 10, 2010. In most cases that is likely to be the same conduct forbidden by the Convention.

person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." CAT, art. 1. Such torture cannot be justified by any circumstances: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." CAT, art. 2(2).

Notably, in ratifying CAT, the Senate noted that the prohibition against torture was "a standard for the protection of all persons, in time of peace as well as war." S. Exec. Rep. No. 101-30, at 11 (1990). Moreover, the United States was required under CAT to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . ." CAT, art. 14(1). The Convention Against Torture required the United States to "ensure that all acts of torture are offences under its criminal law." CAT, art. 4(1). Likewise, the 1949 Geneva Conventions also required contracting parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" grave breaches of the Conventions. *See* GPW, art. 129; GC, art. 146.

Congress has made torture and cruel, inhuman and degrading treatment subject to prosecution in federal courts by enacting legislation criminalizing violations of these international standards. In 1994, Congress enacted legislation implementing CAT. *See* 18 U.S.C. §§ 2340, 2340A. Section 2340A makes it a felony for any U.S. national or any person present in the United States to commit or attempt to commit torture outside the United States. 18 U.S.C. § 2340A. Section 2340 defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). Severe mental pain or suffering, in turn, is defined as the mental harm caused by or resulting from these actions:

> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. at 2340(2).[12]

In 1996, Congress enacted the War Crimes Act (WCA), 18 U.S.C. § 2441, thus reaffirming its intent to criminalize torture and cruel, inhuman and degrading treatment, punishable in the civilian courts. The WCA makes it a felony for any member of the Armed Forces of the United States or any U.S. national to violate Common Article 3 of the Geneva Conventions of 1949, which expressly forbids torture and other degrading treatment or the commission of "grave breaches" of the 1949 Geneva Conventions. Under the Geneva Conventions, "torture or inhuman treatment" constitutes "grave breaches." *See* GPW, art. 130 (defining "grave breaches" under the Convention); GC, art. 147 (same). In enacting the WCA, Congress observed that torture and attempted torture were already crimes punishable under federal law by 18 U.S.C. § 2340A. *See* H.R. Rep. No. 104-698, at 4 (1996). In enacting Sections 2340A and 2441 of title 18 of the United States Code, Congress clearly intended the civilian courts to enforce these criminal prohibitions against torture and cruel and inhuman treatment.

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[12] The legislation did not separately create any private right of action for torture committed outside the United States. *See* S. Rep. No. 103-107, at 59 (1993). Nonetheless, this does not mean that there is no remedy for torture committed in foreign countries. In its discussion concerning the type of claims that could be brought under the Alien Tort Claims Act, the Supreme Court indicated that the prohibition against torture is a recognized norm of international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

In 2005, Congress enacted the Detainee Treatment Act, which provides, in relevant part, that "[n]o 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." 42 U.S.C. § 2000dd(a) ("DTA"). The DTA defines such treatment to mean the "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution." *Id.* at 2000dd(d). While that statute does not provide for any private right of action, its legislative history indicates that Congress did not intend to exclude otherwise available private causes of action.

> Thus, Senator Levin stated:
> It has never been my understanding that the McCain amendment [to the Detainee Treatment Act] would, by itself, create a private right of action. I do not believe that the amendment was intended either to create such a private right of action, or to eliminate or undercut any private right of action such as a claim under the Alien Tort Statute that is otherwise available to an alien detainee.

151 Cong. Rec. S14, 269 (2005). Similarly, Senator McCain observed that "these provisions do not eliminate or diminish any private right of action otherwise available." *Id.* Senator Warner recognized that, while the DTA did not provide for this, civil actions may be brought under "other statutes."

Id. As a result, it is clear Congress understood that civilian courts would hear civil and criminal cases involving torture and cruel, inhuman and degrading treatment – including such conduct by U.S. soldiers – and Congress did not view having civilian courts hear these cases as subverting military authority. There is, thus, no basis for concluding that federal courts are not competent to enforce the humanitarian standards adopted by law, treaty and military regulation.

Appellees rely on cases like *Schneider v. Kissinger*, which concluded that it would be inappropriate for the courts to address the alleged impropriety of the Executive Branch's assisting a coup d'état in Chile. 310 F.Supp.2d 251, 270 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005). But there, the court reasoned that, as part of its power to set national policy in the matters of foreign affairs, the Executive could properly exercise discretion to engage in such conduct. *Id.* at 260-61. Other cases cited by Appellees, such as *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), and *Bancoult v. McNamara*, 370 F. Supp.2d 1, 8 (D.D.C. 2004), *aff'd*, 445 F.3d 427, 2006 (D.C. Cir. 2006) (Sanchez Mo. at 6-8; Karpinski Mo. at 37-41; Pappas Mo. at 17), similarly involved the Executive's discretion in the conduct of foreign affairs. Here, neither the civilian Executive nor the uniformed military leadership has discretion to

authorize or order conduct that has long been prohibited in domestic, international and military law, and in military regulation and tradition.

II.

APPELLEES ARE NOT ENTITLED TO ANY IMMUNITY

The district court's holding that Appellees are entitled to Westfall Act and qualified immunity conflicts with the principle that those in command of our armed forces have a duty to train their subordinates to refrain from torture and inhumane treatment and must accept responsibility for their failure to prevent such conduct where it is in their power to do so. Here it is alleged that Appellees not only violated that duty but authorized or condoned such illegal conduct.

A. Appellees Are Not Entitled To Immunity Under the Westfall Act

The district court found that Appellees' alleged conduct falls within their "scope of employment," as that term is used in the Westfall Act, and is, therefore, immunized. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp.2d 85, 109-114 (D.D.C. 2007). This decision is erroneous, especially in light of Appellees' command responsibilities. It ignored the unique command responsibilities imposed on Appellees for the alleged conduct of subordinates who inflicted torture and inhuman and degrading treatment on detainees in their custody. The claim that Appellees not only

failed to prevent such conduct by their subordinates but authorized or encouraged it runs so completely counter to the legal responsibilities and duties of their official positions that it cannot reasonably be deemed to fall within the scope of their employment.

1. Appellees' Command Responsibilities Require That They Be Accountable For the Conduct Alleged Here

Under United States military law and the law of war, those in command are legally responsible for the unlawful conduct of their subordinates, if they direct it, fail to take measures within their power to prevent it, or fail to investigate and punish violations of which they are or should be aware.[13] This doctrine of command responsibility has been recognized in international law at least since a proclamation of Charles VII of France in 1439,[14] and is embedded in the law of war[15] and United States military regulations.

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[13] *See, e.g., Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002); Protocol I, *supra*, art. 86(2).

[14] *See* L.C. Green, *Command Responsibility in Int'l Humanitarian Law*, 5 Transnat'l L. & Contemp. Probs. 319, 320-21 (1995).

[15] *See, e.g.,* Protocol I of the Geneva Conventions of 1949, *supra*, art. 86(2); Rome Statute of the Int'l Criminal Court, art. 28, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Statute of the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 7, May 25, 1993, U.N. Doc. S/25704; Statute of the Int'l Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of Int'l Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighboring States Between Jan. 1, 1994 and Dec. 31, 1994, art. 6, Nov. 8, 1994, 33 I.L.M. 1598.

The doctrine was recognized by the Supreme Court in *In re Yamashita*, 327 U.S. 1 (1946), which held that General Yamashita, the commander of Japanese forces in the Philippines, was properly charged under the law of war for atrocities committed by troops under his command. *Id.* at 17. Yamashita argued that he could not be tried by military commission because he had not been charged with a violation of the law of war, as required by the statute authorizing the commission. *Id.* at 14. The Court disagreed, finding the charge that he failed to take measures to prevent atrocities committed by forces under his command satisfied the statute, because "the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war . . . ." *Id.* at 14-15.[16]

Most importantly, United States Army regulations and field manuals embrace the doctrine of command responsibility. A soldier who exercises command authority in the United States military "[is] responsible for everything [his or her] command does or fails to do." U.S. Dep't of Army, Army Regulation 600-20, *Army Command Policy*, §2-1b (June 2006). A

[16] *See also*, *e.g.*, *Ford ex rel. Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002); *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 776-78 (9th Cir. 1996); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 171-73 (D. Mass. 1995).

commander assumes "the legal and ethical obligation . . . for the actions, accomplishments, or failures of a unit." U.S. Dep't of Army, Field Manual 101-5, *Staff Org. and Operations*, 1-1 (May 1997) ("FM 101-5"). As a matter of official military policy, the "ultimate authority, responsibility, and accountability" for the acts of subordinates "rest wholly with the commander." *Id.* at 1-2.[17]

Command responsibility, a fundamental of military discipline and effectiveness, provides incentives for commanders to control their subordinates and for subordinates to follow the orders of commanders who they know are accountable for them. *See* U.S. Dep't of Army, Field Manual 22-100, *Military Leadership*, §§ 3-22 – 3-23 (Aug. 1999) ("FM 22-100")[18]; Cmdr. Roger D. Scott, *Kimmel, Short, McVay: Cases Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 Mil. L. Rev. 52, 169-170 (1998) ("command responsibility is the bedrock upon which all military discipline rests") (quoting Sen. Malcolm Wallop (R-WY)); *Prosecutor* v. *Delalić, et al.*, Case No. IT-96-21-T, Judgment, ¶ 647

[17] Command responsibility does not absolve subordinates from liability for obeying manifestly illegal orders. Subordinates who comply with such orders remain responsible for their actions.

[18] In October 2006, the U.S. Army replaced FM 22-100 with Field Manual 6-22, *Army Leadership* (Oct. 2006) ("FM 6-22"), which reaffirms the same doctrines of command responsibility as FM 22-100. *See* FM 6-22, §§ 2-10 – 2-12, 4-16 – 4-17, 6-22.

(Nov. 16, 1998) ("The doctrine of command responsibility is . . . a species of vicarious responsibility through which military discipline is regulated and ensured.").

Moreover, for the United States military, command responsibility is more than an effective way to promote discipline; it is an essential moral value:

> The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority. Nowhere else does a boss have to answer for how subordinates live and what they do after work. Our society and the institution look to commanders to make sure the missions succeed, that people receive proper training and care, that values survive.

FM 22-100, §1-16. It is integral to United States military tradition that, before a military commander is considered fit to exercise this sacred trust, he or she must internalize, accept and *embody* certain core values, including loyalty, duty, respect, and integrity. *See id.* at §§1-1 – 1-4, 2-4 – 2-39. Pursuant to these values, a leader "take[s] full responsibility for [his] actions and those of [his] subordinates." *Id.* at §2-14.

Thus, the doctrine of command responsibility is wholly inconsistent with the district court's ruling.

2. The Conduct Alleged Is Not Within Appellees' Scope of Employment Because It Is Directly Contrary To Their Command Responsibilities

In determining whether Appellees' conduct fell within the scope of their employment, the D.C. Circuit looked to cases in the Court of Appeals for the District of Columbia elaborating on "the scope of employment." *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp.2d 85, 114-115 (D.D.C. 2007) (*citing* Restatement (Second) of Agency § 228 (1957)). The district court's holding rested on an analysis of the first prong of the "scope of employment" rule from Restatement (Second) Agency: whether conduct is of the kind an employee is employed to perform. *Id.* at 115. The district court concluded that "detaining and interrogating enemy aliens were the kinds of conduct the defendants were employed to perform." *Id.* The district court felt that the Appellants' argument relied on the "nature of the tort, a tactic the D.C. Circuit expressly rejected." *Id.*

Conferring immunity raises policy questions, such as the societal benefits of conferring immunity weighed against the benefits of insisting on accountability. In that context, such considerations may dictate a narrower definition of "scope of employment." Here, it was central to Appellees' job function to educate and train soldiers under their command to refrain from torture and inhumane treatment and to do all within their power to prevent

such practices. Instead, Appellees are alleged to have authorized or condoned those actions. Accordingly, Appellees' conduct was a renunciation of their employment function. They allegedly failed to perform the duties they were employed to carry out. Granting officials immunity for such conduct conflicts with and threatens to undermine military policy, which imposes command responsibility as the foundation of military discipline. That policy is especially important where implementing the military's prohibition on torture or inhumane treatment is concerned, for aside from their illegality and the suffering they inflict on detainees, such practices threaten our soldiers' safety, severely damage our military's standing and incite hostility against the United States.

The Secretary of Defense, as the civilian official at the apex of the military hierarchy, and the other Appellees, as officers with command responsibilities for the military personnel who are alleged to have directly inflicted abusive treatment on Appellants in their custody, were obligated not only to refrain from authorizing or encouraging such conduct but also to prevent it, to the extent they knew or had reason to know that it was taking place. Appellees' alleged conduct was not the type they were employed to perform. The district court's decision misconceives the nature of Appellees' special responsibilities. It was precisely Appellees' job to make

unequivocally clear to those within their command the prohibitions against the use of such "aggressive" techniques under military regulations and the law of war – and the severe consequences to themselves, the military and the nation of violations for those prohibitions – so that military personnel conducting interrogations would *not* succumb to the "stresses and pressures of war" and employ aggressive techniques that violated these prohibitions.

It could not, and should not, be expected or foreseen that Appellees would authorize or encourage such conduct or create such confusion about the proper standards that those conducting the interrogations or directly responsible for the conditions of custody would not know what was or was not forbidden. And it certainly was not expected that these Appellees would give in to the pressures they were obligated to train others to resist. Hence, Appellees' alleged conduct was neither incidental to their employment nor foreseeable and therefore, not within the scope of their employment.

B. Appellees Are Not Entitled To Qualified Immunity Because They Were on Notice That the Conduct Alleged Was Unlawful and Violated Their Command Responsibilities

The district court ruled that Appellees were entitled to qualified immunity for the alleged constitutional violations claimed by Appellants. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp.2d 85, 108 (D.D.C. 2007). The district court held that "there can be no constitutional

violation where no constitutional rights inure in the first place." *Id.* *Amici* submit that senior civilian and military officials are not entitled to qualified immunity for allegedly authorizing or condoning torture, even if the constitutional rights of the victims were not yet "clearly established at the time the alleged injurious conduct occurred."

The purpose of qualified immunity is to protect public officials "from undue interference with their duties and from potentially disabling threats of liabilities." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). But this policy should not apply where Appellees knew at the time that authorizing or condoning torture or inhumane treatment of detainees was criminal and a violation of their duties. Qualified immunity protects officials exercising their discretion where they, in good faith, believe that their conduct is lawful. Appellees could not have acted in good faith if they engaged in conduct long prohibited by military, domestic and international law merely because they might have believed that these Appellants, under complete control of the United States, nevertheless, were not entitled to constitutional protections from torture and inhumane treatment.

The purposes of qualified immunity are hardly served by immunizing Appellees from liability for conduct they knew was unlawful and in

violation of their command responsibilities merely because it was unclear that these Appellants could seek a remedy for their injuries. Military law and policy are specifically designed to prevent the conduct at issue here, providing no reason to shelter it from the threat of litigation.

Conclusion

For the reasons set forth above, the Court should reverse the district court's judgment.

Dated: September 22, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 AND CIRCUIT RULE 32

I, Stephen A. Saltzburg, hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a) that, according to the word-count feature of Microsoft Word 2002, the foregoing appellate brief contains 6,864 words (exclusive of the certificates required by Circuit Rules 26.1,28(a)(l) and 29(d), the glossary, the table of contents, the table of authorities, the certificate of service and this certificate) and therefore complies with the 7,000 word limit for *amicus* briefs in the Federal Rules of Appellate Procedure and the Rules of this Court.

Dated: September 23, 2010

/s/ Stephen A. Saltzburg
Stephen A. Saltzburg

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2010, I electronically filed the BRIEF *AMICI CURIAE* OF CONCERNED RETIRED MILITARY OFFICERS, MILITARY LAW AND HISTORY SCHOLARS AND THE NATIONAL INSTITUTE OF MILITARY JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL 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.

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.

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