[ORAL ARGUMENT NOT SCHEDULED]

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE 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

JOINT BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appellants-plaintiffs are Arkan Mohammed Ali, Mehboob Ahmad, Najeeb Abbas Ahmed, Ali H., Sherzad Kamal Khalid, Haji Abdul Rahman, Thahe Mohammed Sabar, Mohammed Karim Shirullah, and Said Nabi Siddiqi.

Appellees-defendants are Donald Rumsfeld, Colonel Thomas Pappas, Colonel Janis Karpinski, Lieutenant General Ricardo Sanchez, and the United States.

Amici filings were made in the district court by "Concerned Retired Military Officers" and "Military Law and History Scholars," and J. Herman Burgers and Theo van Boven.

On appeal, amicus briefs were filed by "Human Rights and Torture Treatment Organizations" (Advocates for Survivors of Torture and Trauma; Bellevue/NYU Program for Survivors of Torture; Center for Justice and Accountability; Center for Victims of Torture; International Center for Transitional Justice; National Religious Campaign Against Torture; Program for Torture Victims; and Survivors of Torture International) and "Concerned Retired Military Officers and Military Law History Scholars, and the National Institute of Military Justice" (Brigadier General (Ret.) David M. Brahms; Commander (Ret.) David Glazier; Elizabeth L. Hillman; Jonathan Lurie; Diane Mazur; Lieutenant Colonel (Ret.) Gary D. Solis; and National Institute of Military Justice)

B. Rulings Under Review

Appellants-Plaintiffs are appealing the district court's March 27, 2007 dismissal of four separate cases filed against the individual defendants and the United States. These four cases were consolidated in the district court under Misc. No. 06-0145-TFH, assigned to the Honorable Thomas F. Hogan, then-Chief Judge of the United States District Court for the District of Columbia, and collectively styled *In Re: Iraq and Afghanistan Detainees Litigation*. The Memorandum Opinion and Order dismissing these cases are published at 479 F. Supp. 2d 85 (D.D.C. 2007).

C. Related Cases and Earlier Rulings in this Case

On March 26, 2010, this Court denied the appellants' request for initial *en banc* consideration of this case. On May 6, 2010, the Court denied appellees' motion for summary affirmance.

The undersigned counsel is aware of no other cases involving substantially the same parties and the same or similar issues, pending before this Court or any other court.

_/s/_____
Robert M. Loeb

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Plaintiffs-Appellants,
v.
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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT BRIEF FOR DEFENDANTS-APPELLEES

STATEMENT OF JURISDICTION

Plaintiffs sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1350. On March 27, 2007, the district court entered final judgment, dismissing the amended complaint. App. 111-143; *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007). On May 24, 2007, plaintiffs filed timely notices of appeal (App. 8, 12, 16, 20). *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court correctly dismissed the *Bivens* claims on the ground that it would be improper to recognize a common-law damages action that permits persons detained by the military in a war zone during an armed conflict to sue military officials for money damages for alleged mistreatment during their military detention.

II. Given that it was not clearly established in 2003 that nonresident aliens detained by the military in Iraq and Afghanistan, as part of a military conflict, possessed Fifth and Eighth Amendment rights under the U.S. Constitution, whether the district court properly dismissed plaintiffs' *Bivens* claims as barred by qualified immunity.

III. Where there is no dispute that establishing and/or implementing military policies regarding the detention and interrogation of aliens in a foreign war zone in the course of ongoing hostilities was incidental to defendants' employment, whether the district court properly held that plaintiffs' international law claims are barred by the Westfall Act.

IV. Whether the district court properly dismissed plaintiffs' claim for declaratory relief, where the complaint fails to show a real and imminent threat of harm in the future.

STATEMENT OF THE CASE

Plaintiffs originally filed separate civil actions in four different jurisdictions. By an order of the Judicial Panel on Multidistrict Litigation dated June 17, 2005, the four cases were transferred to this District of Columbia for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On April 4, 2006, the district court issued a case management order, which, *inter alia*, granted plaintiffs' motion to consolidate all future filings, and designated the four cases collectively as *In re: Iraq and Afghanistan Detainees Litigation*. On January 5, 2006, the plaintiffs filed a joint amended complaint. Defendants moved to dismiss the amended complaint, and on March 27, 2007, the district court granted the defendants' motions (App. 111-143). On May 24, 2007, plaintiffs filed timely notices of appeal (App. 8, 12, 16, 20).

PROVISIONS AT ISSUE

As relevant here, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, better known as the "Westfall Act," provides absolute immunity from tort claims for federal employees acting within the scope of their employment, as follows:

> The remedy against the United States [under the Federal Tort Claims Act] 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.

28 U.S.C. § 2679(b)(1).

STATEMENT OF FACTS

A. This appeal involves claims for money damages and declaratory relief brought by plaintiffs,[1] nine nonresident-aliens who allege that they were detained in Iraq and Afghanistan by the U.S. military in the course of ongoing hostilities in those countries. Plaintiffs originally filed separate civil actions in four different jurisdictions: the District of Connecticut, the Northern District of Illinois, the District of South Carolina, and the Southern District of Texas. By an order of the Judicial Panel on Multidistrict Litigation dated June 17, 2005, the four cases were transferred to this district for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

[1] Plaintiffs Arkan Mohammed Ali, Thahe Mohammed Sabar, Sherzad Kamal Khalid, and Najeeb Abbas Ahmed are Iraqi citizens who claim they were detained in 2003 at Abu Ghraib prison or other military facilities in Iraq. Plaintiffs Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah, and Haji Abdul Rahman are Afghani citizens who claim that they were detained in 2003 at military facilities in Afghanistan. *See In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 88 (D.D.C. 2007).

Thereafter, plaintiffs filed a consolidated-amended complaint. App. 22-109. In the amended complaint, they asserted that the former Secretary of Defense and other high-ranking military officers are liable for torture and abuse allegedly inflicted on plaintiffs during their detention by the U.S. military in 2003. *Iraq Detainees Litigation*, 479 F. Supp. at 88-90. Relying upon *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), plaintiffs asserted five claims for monetary relief. Specifically, they claimed violations of (1) the Fifth Amendment right to due process; (2) the Fifth Amendment and Eighth Amendment prohibitions against cruel and unusual punishment; (3) the law of nations prohibition against torture; (4) the law of nations prohibition against cruel, inhuman or degrading treatment; and (5) the Fourth Geneva Convention. *Id*. at 91. In addition to seeking damages, plaintiffs sought declaratory relief. *Ibid*.

B. On March 27, 2007, the district court dismissed all of plaintiffs' claims as a matter of law. In dismissing plaintiffs' constitutional *Bivens* claims, the court cited three independent grounds. First, the district court held that precedent from the Supreme Court and this Court established "that the Constitution's reach is not so expansive that it encompasses these non-resident aliens who were injured extraterritorially while detained by the military in foreign countries where the

United States is engaged in wars." *Iraq Detainee Litig*., 479 F. Supp. 2d at 95. Second, the court held that even if aliens detained by the United States during military operations abroad hold some constitutional rights, special factors "warrant leaving to Congress the determination whether a damages remedy should be available under the circumstances presented here." *Id*. at 107. Third, the court held that, even assuming that the plaintiffs could assert rights under the Fifth and Eighth Amendments, defendants are entitled to qualified immunity because it was not "clearly established at the time the alleged injurious conduct occurred" that nonresident aliens outside the United States possessed such rights. *Id*. at 108-10.

As to the international law and treaty claims asserted under the ATS, the district court held that plaintiffs' claims were barred by the Westfall Act. The court rejected plaintiffs' argument that the alleged misconduct was outside the scope of defendants' employment, and thus not covered by the Westfall Act: "As military officials commanding Armed Forces serving our country during a war, there can be no credible dispute that detaining and interrogating enemy aliens would be incidental to their overall military obligations." *Iraq Detainee Litig*., 479 F. Supp. 2d at 114. The court also held, *see id*. at 111-12, that plaintiffs' ATS claims did not fall within the Westfall Act's exception for an "action against an employee of the Government * * * which is 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). Because the Westfall Act applied to plaintiffs' ATS claims,[2] the district court substituted the United States as defendant as to those claims and then dismissed them for lack of jurisdiction. *Iraq Detainee Litig*., 479 F. Supp. 2d at 115.

Finally, the district court dismissed the claims for declaratory relief, holding that plaintiffs had not shown a real and imminent threat of harm in the future. *Iraq Detainee Litig*., 479 F. Supp. 2d at 117-19.

C. Plaintiffs filed timely notices of appeal (App. 8, 12, 16, 20), and this Court consolidated the appeals. On October 25, 2007, the Court held the appeals in abeyance, and ordered the parties to file "motions to govern further proceedings within thirty days of this Court's decision in *Rasul v. Rumsfeld*, No. 06-5209 (D.C. Cir.)." The appeals were then, through several additional orders, held in abeyance during the pendency of further proceedings in *Rasul*.

After the *Rasul* case reached its final disposition, *see Rasul v. Meyers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (*Rasul II*), *cert. denied*, 130 S.Ct. 1013 (2009), this Court denied both plaintiffs' request for initial *en banc* consideration in this case

[2]The court noted that the Attorney General had certified that each defendant acted within the scope of his or her employment at the time of the alleged violations. *Iraq Detainee Litig*., 479 F. Supp. 2d at 114.

(seeking reconsideration of *Rasul II*) and defendants' motion for summary affirmance, and then set the case for briefing.

SUMMARY OF ARGUMENT

As the United States stated in its opposition to the petition for the writ of certiorari filed in *Rasul*, "torture is illegal under federal law, and the United States government repudiates it." Cert. Opp., *Rasul v. Myers*, No. 09-227 (S. Ct.), 11. "But the availability of claims for monetary damages against individual officials raises distinct questions." *Ibid.* In this case, the district court properly rejected plaintiffs' claims, and, as explained below, that decision should be affirmed.

I. The district court properly refused to create a common-law cause of action for monetary damages against the former Secretary of Defense and other military officials in this context, where the claims stem from detention and interrogation by the military in a foreign war zone during an armed conflict. The district court's ruling is well founded, consistent with controlling Circuit precedent, and should be affirmed.

The Supreme Court and the courts of appeals have consistently been reluctant to extend *Bivens* remedies to new contexts. Where there are special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact

legislation authorizing a private damage action if it so chooses. Thus, it comes as little surprise that the courts consistently hold that is not appropriate for the judiciary to create a *Bivens* common-law damage remedy where claims directly implicate matters of armed conflict or national security.

There can be little question that the claims here directly implicate both military authority and national security. Plaintiffs' claims stem from detention in a foreign war zone, and explicitly challenge alleged detention and interrogation policies allegedly issued by the Secretary of Defense and military commanders. As a result, their claims cannot proceed without inquiry into the military's detention and interrogation policies that applied in an active foreign war zone. The district court here properly refused plaintiffs' invitation to recognize a common-law damage action in this highly sensitive context, absent congressional authorization.

The district court's ruling is fully supported by this Court's ruling in *Rasul II*. There, this Court rejected *Bivens* claims asserted by former Guantanamo detainees. The Court held that, in light of the sensitive context presented, "[we] must stay our hand in the creation of damage remedies." *Rasul II*, 563 F.3d at 532 n.5 (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir.1985)). That holding is directly applicable here. Indeed, plaintiffs admit as much. *See* Ali

Br. 35. They ask this Court to "abandon" the *Rasul II* ruling. *Ibid*. Plaintiffs' criticisms of *Rasul II*'s special factor holding are without merit. In any event, there can be no question that *Rasul II*'s special factors holding is the law of the Circuit and controls here.

II. A. The district court also properly held, in the alternative, that plaintiffs' *Bivens* claims are barred by qualified immunity. Again, this issue is controlled by *Rasul II*, where this Court held that military officials facing similar claims asserted by Guantanamo detainees were "entitled to qualified immunity." *Rasul II*, 563 F.3d at 532. And once again, plaintiffs are forced to concede that *Rasul II* controls, but ask this Court to "abandon" that controlling precedent. *See* Ali Br. 23. *Rasul II* is, however, both controlling and correct.

Boumediene v. Bush, 128 S. Ct. 2229 (2008), cited by plaintiffs, is not to the contrary. Indeed, it fully supports *Rasul II*'s holding that it was not clearly established in 2003 that nonresident aliens held outside the United States had constitutional due process or Eighth Amendment rights. In *Boumediene*, the Court held that those detained at Guantanamo have a habeas right, but also squarely recognized that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have *any rights* under our Constitution." *Id*. at 2262 (emphasis

added). Thus, B*oumediene* confirms that plaintiffs' claimed constitutional rights were not clearly established in 2003.

B. As in *Rasul II*, there is no need to address the constitutional issue presented. If this Court does reach the issue, however, the law of the Circuit is clear. This Court recently reaffirmed that the law of the Circuit remains that nonresident aliens detained outside of the United States have no constitutional due process rights.

III. The district court's dismissal of plaintiffs' international law claims, asserted under the Alien Tort Statute, should also be affirmed. In *Rasul II*, this Court held that the Westfall Act applies to international law claims of torture and abuse, asserted under the Alien Tort Statute, brought by former Guantanamo detainees. The Court explained, "the underlying conduct-here, the detention and interrogation of suspected enemy combatants-is the type of conduct the defendants were employed to engage in * * *. While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence." *Rasul v. Myers*, 512 F.3d 644, 658-59 (D.C. Cir.) (*Rasul I*), *vacated and remanded*, 129 S.Ct. 763 (2008), *reinstated in relevant part*, 563 F.3d 527 (D.C. Cir.), *cert. denied*, 130

S.Ct. 1013 (2009). The same is true here. Indeed, plaintiffs' amended complaint alleges that defendants' official duties included formulating and/or implementing policies and practices relating to the detention, treatment, and interrogation of military detainees held in Afghanistan and Iraq during the relevant time period.

Like the *Rasul* plaintiffs, plaintiffs here contend that the alleged conduct should not be deemed within the scope of the Westfall Act because the Act was not intended to cover violations of *jus cogens* norms (such as the prohibition against torture). This Court rejected this same argument in *Rasul*, *see* 512 F.3d at 658-60, and *Harbury v. Hayden*, 522 F.3d 413 421-22 (D.C. Cir.), *cert. denied*, 129 S.Ct. 195 (2008). Those decisions are correct and controlling here.

Plaintiffs argue that the international law claims asserted under the Alien Tort Statute fall within the Westfall Act's exception for federal "statutes" that authorize recovery against federal employees. That argument has been rejected by every court that has addressed the issue. This exception to the Westfall Act does not apply to all federal statutes, but rather only to federal statutes that provide both a cause of action and the substantive law which the employee is alleged to have violated. The ATS fails on both accounts.

IV. Finally, the district court correctly held that there is no claim of ongoing harm that could support declaratory relief in this case.

STANDARD OF REVIEW

The district court's grant of the motion to dismiss is subject to *de novo* review. *See Barr v. Clinton*, 370 F.3d 1196, 1201 (D.C. Cir. 2004). The question whether special factors preclude a *Bivens* claim also is subject to *de novo* review. *See Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE *BIVENS* CLAIMS ON THE GROUND THAT IT WOULD BE IMPROPER TO CREATE A COMMON-LAW DAMAGE ACTION IN THIS CONTEXT.

The district court dismissed plaintiffs' *Bivens* claims on the ground that such an action should not be recognized in this context. That ruling is correct and fully supported by controlling Circuit precedent, and should be affirmed.

In *Rasul v. Meyers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (*Rasul II*), *cert. denied*, 130 S.Ct. 1013 (2009), this Court addressed the *Bivens* claims of former Guantanamo detainees, claiming that they had been illegally held and tortured while at Guantanamo and that the defendant federal officials had authorized or approved their mistreatment. This Court affirmed the dismissal of the claims. In addition to holding that the claims were barred by qualified immunity (*see* pp. 29-39, *infra*), this Court held that "federal courts cannot fashion a *Bivens* action when

'special factors' counsel against doing so." *Rasul II*, 563 F.3d at 532 n.5 (citations omitted). Citing *Sanchez-Espinoza*, 770 F.2d at 209, the *Rasul II* Court held that the "danger of obstructing U.S. national security policy is one such factor." *Ibid*. The Court held the rationale of *Sanchez-Espinoza* was equally applicable in *Rasul*: "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Ibid.* (quoting *Sanchez-Espinoza*, 770 F.2d at 209). The Court concluded that the "*Bivens* claims are therefore foreclosed * * *." *Ibid*.

That ruling is directly applicable here and bars plaintiffs' claims. As we explain below, *Rasul II* is correct and well founded, and plaintiffs' challenges to this Court's controlling precedent are unavailing.

A. Courts Should Not, Without Congressional Authorization, Recognize A Common-Law *Bivens* Action To Permit Aliens Detained By The Military In A Foreign War Zone During An Armed Conflict To Sue Military Officials For Money Damages

1. A Court Must Pay Heed To Special Factors Counseling Hesitation

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have

violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009). The *Bivens* Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common law action, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-97.

Subsequent to *Bivens*, the Supreme Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). *See Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1119-20 (9th Cir. 2009). Indeed, in "the 38 years since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by prison officials, *Carlson* [*v. Green*, 446 U.S. 14 (1980)]." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (*en banc*), *cert. denied*, 130 S.Ct. 3409 (2010). *See also Wilson v. Libby*, 535 F.3d 697, 705 (D.C. Cir. 2008). In most instances, however, the Court has "found a *Bivens* remedy unjustified." *Wilson*, 535 F.3d at 705 (*quoting Wilkie v. Robbins*, 551U.S. 537,

550 (2007). Indeed, "the Supreme Court has 'consistently refused to extend *Bivens* liability to any new context or new category of defendants.'" *Western Radio Services Co.*, 578 F.3d at 1119 (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). "The [Supreme] Court has focused increased scrutiny on whether Congress intended the courts to devise a new *Bivens* remedy, and in every decision since *Carlson*, across a variety of factual and legal contexts, the answer has been 'no.'" *Western Radio Services Co.*, 578 F.3d at 1119.

The Supreme Court has explained that, because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," if it is to be exercised at all, it must be undertaken with great caution. *Correctional Services Corp. v. Malesko*, 534 U.S. at 67-70. In *Malesko*, the Supreme Court observed that, in *Bivens*, the Court "rel[ied] largely on earlier decisions implying private damages actions into federal statutes," decisions from which the Court has since "retreated" and that reflect an understanding of private rights of action that the Court has since "abandoned." 534 U.S. at 67 & n.3. "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly v. Scott*, 434 F.3d 287, 220 (4th Cir. 2006) (internal quotation marks omitted). *See also Iqbal*, 129 S.Ct. at 1948

(*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"). The Eighth Circuit has described the Supreme Court's recent decisions as erecting a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees." *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (internal quotation marks omitted).

In deciding whether to recognize a *Bivens* claim in this case, the district court properly held that the relevant question here is not whether there would be an alternative remedy or remedial scheme. Of course, where there is "'any alternative, existing process for protecting' the plaintiff's interests, such an alternative remedy would raise the inference that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and freestanding remedy in damages.'" *Western Radio Services Co.*, 578 F.3d at 1120 (quoting *Wilkie*, 551 U.S. at 550, 554). The lack of such an alternative remedy does not, however, answer the distinct question of whether the context presents special factors that counsel against recognizing a *Bivens* action. Most recently, in *Wilkie v. Robbins*, the Supreme Court made clear that courts should hesitate to fashion a

Bivens remedy, even in the absence of an "alternative, existing process." *Wilkie*, 551 U.S. at 550. The Supreme Court explained that, in deciding whether to permit a *Bivens* action, courts still must make an assessment "appropriate for a common-law tribunal" and should "pay[] particular heed * * * to any special factors counseling hesitation." *Ibid*. *See also United States v. Stanley*, 483 U.S. 669, 683 (1987) ("it is irrelevant to a special factors analysis whether the laws currently on the books afford * * * an adequate federal remedy"). Where, as here, there are special considerations or sensitivities raised by a particular context, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562.

2. Claims Arising Out of Military Detention In A Foreign War Zone During An Armed Conflict Raise Special Factors Precluding the Recognition of a Common-Law *Bivens* Action in this Case

The question presented here is whether a court should, without congressional authorization, recognize a common-law *Bivens* action to permit aliens detained by the military in a foreign war zone during an armed conflict to sue military officials for money damages for alleged mistreatment during their

detention. In deciding whether the district court properly rejected the invitation to create such a common-law damage action in this context, it is notable that, even outside the context of implied *Bivens* actions, the courts generally recognize that matters intimately related to war and "national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) ("[w]e cannot intrude into our government's decision to grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor's sales"); *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking."); *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004) ("the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining

which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies"); *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) ("it is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir.1997) (court cannot adjudicate claims brought by Turkish sailors alleging injuries and wrongful death suffered as a result of missiles fired by a United States Navy vessel during North Atlantic Treaty Organization training exercises); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (refusing to adjudicate claim that bombing of Cambodia during the Vietnam conflict required separate Congressional authorization); *Da Costa v. Laird*, 448 F.2d 1368 (2d Cir. 1971) (court was not competent to judge significance of mining and bombing of North Vietnam's harbors and territories for purposes of determining whether Congressional authorization was required).

In some exceptional instances not applicable here, the courts are required, by constitutional necessity or by a clear grant of authority by Congress, to adjudicate matters directly pertaining to war and national security. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The general rule, however, as stated by the Supreme Court in *Dep't of*

Navy v. Egan, 484 U.S. 518, 530 (1988), is that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[3]

Given this well-established general rule, and given the strong presumption, discussed above (pp. 15-18), against extending *Bivens* actions to new and sensitive contexts, it is hardly surprising that courts have deemed it inappropriate to fashion a common-law *Bivens* money-damages remedy in contexts directly implicating armed conflict and/or national security. *See Stanley*, 483 U.S. at 678-85 ("the Constitution confers authority over the Army, Navy, and militia upon the political branches. All this counsels hesitation in our creation of damages remedies in this field"); *Arar*, 585 F.3d at 574-75 ("[i]t is a substantial understatement to say that one must hesitate before extending *Bivens* into such a context"); *Wilson v. Libby*, 535 F.3d at 710 ("if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994) ("The unreviewability of the

[3] Refusal to adjudicate a claim directly implicating matters of war and national security, however, "does not leave the executive power unbounded." *Schneider*, 412 F.3d at 200. While the aggrieved party may have no remedy for damages, "the nation has recompense, and the checks and balances of the Constitution have not failed * * *. If the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Ibid.*

security clearance decision is a 'special factor counselling hesitation,' which precludes our recognizing a *Bivens* claim"); *Sanchez-Espinoza*, 770 F.2d at 205 (refusing to recognize a *Bivens* action against "military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.").

Employing a properly cautious approach to *Bivens* actions, this Court has consistently held that a *Bivens* action should not be recognized where there are "special factors" counseling hesitation, which suggest that Congress, not the courts, should decide whether to provide a damage action in the particular context or class of cases. The "special factors" counseling such hesitation "relate not to the merits of the particular remedy, but 'to the question of who should decide whether such a remedy should be provided.'" *Sanchez-Espinoza*, 770 F.2d at 208 (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). "Where, for example, the issue 'involves a host of considerations that must be weighed and appraised,' its resolution 'is more appropriately for those who write the laws, rather than for those who interpret them.'" *Id.*, 770 F.2d at 208 (quoting *Bush*, 462 U.S. at 380).

Adhering to *Sanchez-Espinoza*, the district court correctly held that it would be inappropriate to recognize a *Bivens* action in the context here, where the claims stem from plaintiffs' detention by the military abroad in an active war zone and involve an explicit challenge to alleged detention and interrogation policies issued

by the Secretary of Defense. *Iraq Detainee Litig*., 479 F. Supp. 2d at 103-08. *See also Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111-12 (D.D.C. 2010) (rejecting *Bivens* claims brought by families of detainees who died while in detention at Guantanamo). The district court explained, "[t]here is no getting around the fact that authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests." *Iraq Detainee Litig*., 479 F. Supp. 2d at 105.

The district court correctly observed that in both *United States v. Stanley*, *supra*, and *Chappell v. Wallace*, 462 U.S. 296 (1983), "the Supreme Court held that the need for unhesitating and decisive action by military officers, in conjunction with recognition of Congress' constitutionally-vested authority over military affairs, required the judiciary to abstain from inferring *Bivens* remedies against military officials for injuries arising out of, or in the course of, activities incident to military service." *Iraq Detainee Litig*., 479 F. Supp. 2d at 106. The district court further recognized that, in *Sanchez-Espinoza*, this Court "decreed that the same rationale applies when courts consider whether to infer *Bivens* remedies against military officials for constitutional violations involving aliens abroad." *Ibid.* The district court quoted from *Sanchez-Espinoza*: "Just as the

special needs of the armed forces require the courts to leave to Congress the creation of damage remedies against military officers for allegedly unconstitutional treatment of soldiers * * *, *so also the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad*." *Ibid.* (quoting *Sanchez-Espinoza*, 770 F.2d at 208-209) (emphasis added by the district court).

The district court correctly held that "the same considerations are at play in this case and counsel hesitation in the creation of *Bivens* causes of action and remedies" here. *Iraq Detainee Litig.*, 479 F. Supp. 2d at 107. The court explained, "[t]he hazard of such multifarious pronouncements – combined with the constitutional commitment of military and foreign affairs to the political branches and the Court's previously expressed concerns about hindering our military's ability to act unhesitatingly and decisively – warrant leaving to Congress the determination whether a damages remedy should be available under the circumstances presented here." *Ibid*.

The district court's rationale is sound and fully consistent with Circuit and Supreme Court precedent. Indeed, as we discuss below, this Court has already resolved this very issue in *Rasul II*. That decision is controlling and mandates affirmance of the district court's special factor holding here.

3. *Rasul II*'s Special Factors Holding Is Controlling Here

a. Consistent with the long line of cases refusing to recognize a common-law *Bivens* claim where the claims involve matters of armed conflict and/or national security, and adhering to *Sanchez-Espinoza*, this Court in *Rasul II* held that it would be improper to recognize a *Bivens* action to adjudicate money damages claims asserted by former Guantanamo Bay detainees, claiming torture and abuse caused by federal officials. *Rasul II*, 563 F.3d at 532 n.5 ("federal courts cannot fashion a *Bivens* action when 'special factors' counsel against doing so * * *. The danger of obstructing U.S. national security policy is one such factor."). That holding is dispositive of the *Bivens* claims here.

In *Rasul II*, nonresident aliens detained at the Guantanamo Bay detention facility brought claims against former Secretary of Defense Rumsfeld and military officers for their alleged detention and torture. Here, the claims are largely identical to those in *Rasul II*, other than the fact that plaintiffs in this case were allegedly detained by the military in Iraq or Afghanistan, while the *Rasul II* plaintiffs were held in Guantanamo. As in *Rasul II*, plaintiffs' claims here stem from their military detention abroad and involve an explicit challenge to alleged military detention and interrogation policies issued by the Secretary of Defense and military commanders. Given that special factors were deemed to bar

recognition of a common-law *Bivens* action in *Rasul II*, it would plainly be improper to recognize such an action here. As in *Rasul II*, the context presented by the claims here – implicating military and national security matters – clearly counsels against the recognition of a *Bivens* action.

Indeed, *Rasul II* applies, *a fortiori*, to the claims here. *Rasul II* addressed persons detained during an ongoing armed conflict at the U.S. detention facility at Guantanamo Bay. In recognizing a habeas right for those detained at Guantanamo, the Supreme Court relied, in part, on both Guantanamo's status as *de facto* U.S. sovereign territory and that Guantanamo was far from the active war zone. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2253, 2261-62 (2008). If it is inappropriate, as this Court held post-*Boumediene* in *Rasul II*, for a court to create a common-law damages action for alleged torture brought by those formerly detained in *de facto* sovereign territory, far from the war zone, then certainly it is improper to recognize an identical *Bivens* claim asserted by plaintiffs here who were detained in an active foreign war zone by the U.S. military. *See Al Maqaleh v. Gates*, 605 F.3d 84, 87, 97 (D.C. Cir. 2010) (discussing that Bagram remains in an active war zone, and relying upon that fact, in part, in rejecting the Bagram detainees' claimed habeas right).

In this sensitive context, where the claims involve detention in a foreign war zone and an explicit challenge to alleged detention and interrogation policies

issued by the Secretary of Defense and military commanders, if the former detainees are to be afforded a money damages action, such authorization must come from Congress, not through a common-law action recognized by the courts. This is especially true here, where creating such a remedy would involve courts in litigation over interrogations, living conditions, and treatment of detainees at overseas military detention facilities. Detainees could subject military officials to the full range of suits brought by civilian prisoners in the United States, requiring the judiciary to pass judgment on the allocation of resources for overseas prison facilities, the command structures for carrying out official policies, the reporting structures for ensuring compliance with those policies, and (as in this case) the validity of specific detention and interrogation practices.

Where, as here, there are special considerations or sensitivities raised by a particular context, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," *See Wilkie*, 551 U.S. at 562 (*quoting Bush*, 462 U.S. at 389). In any such legislation, Congress could "tailor any remedy," and take steps to reduce the possible harmful effects of such civil damage claims. *Ibid.* But in the absence of such legislation, courts may not extend private rights for damage actions against federal officials in this context. *See Arar*, 585 F.3d at 581 ("if Congress wishes to create a remedy for individuals * * *, it can enact legislation that includes

enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded").

b. Plaintiffs here grudgingly are forced to admit that this Court's *Rasul II* ruling is controlling on this issue. *See* Ali Br. 35. They ask this Court to "abandon that cursory ruling." *Ibid*. But there can be no question that *Rasul II*'s special factor holding is law of this Circuit and controls here. Notably, this Court has already denied plaintiffs' request for initial *en banc* review in this case to revisit *Rasul II*. In any event, for all of the reasons set forth above, plaintiffs' criticism of *Rasul II*'s special factor holding are not well taken, and the district court's dismissal of the *Bivens* claims should be affirmed.

II. THE DISTRICT COURT ALSO PROPERLY HELD THAT PLAINTIFFS' *BIVENS* CLAIMS ARE BARRED BY QUALIFIED IMMUNITY

The district court also held, in the alternative, that plaintiffs' *Bivens* claims are barred by qualified immunity.[4] Like the special factor ruling, this issue is directly controlled by *Rasul II*, which held that the federal officials facing similar claims asserted by Guantanamo detainees are "entitled to qualified immunity against plaintiffs' *Bivens* claims." *Rasul II*, 563 F.3d at 532. Again, plaintiffs are

[4] Defendants note that there are additional grounds supporting dismissal that were not reached by the district court. For example, the district court decision here was issued prior to both *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Because the district court did not reach the issue of whether the complaint adequately pleads a claim of supervisory liability under *Iqbal* and *Twombly*, we do not address that argument on appeal. Defendants' brief on appeal, however, should not be construed as conceding that argument, which would be an issue to be addressed if the case were to return to the district court.

If the claims were to return to the district court, defendants would also have the opportunity to demonstrate that the claims are also barred under § 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which amends 28 U.S.C. § 2241(e). The amendment bars federal court review of any claim that relates "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(2). As this Court has recognized, *Boumediene* had no effect on § 2241(e)(2). *See Kiyemba v. Obama*, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009). Thus, if this case were to return to the district court, defendants would then have an opportunity to demonstrate that this provision applies by submitting documentation demonstrating that each plaintiff was, at the relevant time, "determined by the United States to have been properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(2). As in *Rasul II*, however, there is no need for such further proceedings in this case because, even without regard to MCA § 7(a), the claims are properly dismissed.

forced to concede that *Rasul II* controls, but ask this Court (notwithstanding the denial of initial *en banc* review) to "abandon" this controlling precedent. *See* Ali Br. 23. *Rasul II* is, however, controlling and correct. Plaintiffs' invitation to abandon this recent Circuit precedent is unfounded.

A. The Qualified Immunity Doctrine.

Generally, government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To defeat qualified immunity, the constitutional right invoked and its application to the context at issue must be "clearly established" at the time the officer acted, such that it would have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Importantly, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Underlying the right to qualified immunity is a recognition that damages actions "can entail substantial social costs" and "unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638; *see also Harlow*, 457 U.S. at 807. The immunity stems from the potential injustice "of subjecting to liability

an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974). It also ensures that able candidates for government office are not deterred by the threat of damage suits from entering public service. *Harlow*, 457 U.S. at 814.

The usual first step in determining whether an official has qualified immunity is to inquire whether a plaintiff has alleged the violation of a constitutional right at all. *See Saucier*, 533 U.S. at 201. If the court finds the violation of a constitutional right, the court must then proceed to the second step and address whether the specific constitutional right, as applied to the context presented, was "clearly established" at the time of the conduct alleged – *i.e.*, whether reasonable officials could have, at that time, disagreed about whether that constitutional right was established and applied to the context presented. *Ibid.*

Recently, however, the Supreme Court held that a court, addressing a qualified immunity defense, has discretion to bypass the threshold question of whether there was a constitutional violation and instead simply hold that the law was not clearly established at the time in question. *See Pearson v. Callahan*, 129 S.Ct. 808, 818 (2008) ("the district court and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of

the qualified immunity analysis should be addressed"). The discretion recognized in *Pearson* permits a court, where appropriate, to adhere to the general rule of constitutional avoidance – the rule that a court should not pass on questions of constitutionality, unless such adjudication is necessary. *Id.* at 821. That course was deemed appropriate in *Rasul II*, and is likewise appropriate here. *See Rasul II*, 563 at F.3d at 530.

B. *Rasul* Mandates Dismissal of The Bivens Claims Here Based on Qualified Immunity

1. In *Rasul*, nonresident aliens detained at the Guantanamo Bay detention facility brought claims against former Secretary of Defense Rumsfeld and military officers for their alleged detention and torture. *Rasul I*, 512 F.3d at 650-51. The plaintiffs advanced *Bivens* claims for alleged violations of the Fifth and Eighth Amendments. *Id*. at 651. This Court initially affirmed dismissal of those claims, holding, *inter alia*, that the Constitution did not confer rights on nonresident aliens detained abroad. *Id.* at 663-65. The Court further held that, even if plaintiffs could assert constitutional rights, the military official defendants were entitled to qualified immunity because it was not clearly established in 2003 that nonresident aliens detained by the military abroad held constitutional Fifth and Eighth Amendment rights claimed by the plaintiffs. *Id.* at 665-67.

In December 2008, the Supreme Court granted the petition for writ of *certiorari* filed in *Rasul*, vacated the judgment and remanded the case for "further consideration in light of *Boumediene v. Bush*," where the Supreme Court held the detainees at Guantanamo possess a right under the Suspension Clause to petition for habeas corpus review to challenge the lawfulness of their detentions. *See Rasul v. Myers*, 129 S.Ct. 763 (2008). On remand from the Supreme Court, this Court reaffirmed the district court's dismissal of the *Bivens* claims in that case based on qualified immunity. *Rasul II*, 563 F.3d at 529-32. This Court held that, in light of *Pearson v. Callahan*, *supra*, it no longer needed to reach the constitutional issue (*i.e.*, whether detainees at Guantanamo possessed constitutional Fifth and Eighth Amendment rights), but rather could simply rule that at the time in question such rights were not clearly established. *Id*. at 530-32. Plaintiffs in *Rasul* then petitioned for Supreme Court review, asserting the same types of arguments pressed by plaintiffs here, and the Supreme Court denied the petition. *Rasul v. Myers*, 130 S.Ct. 1013 (2009).

2. This Court's ruling in *Rasul II* mandates affirmance of the dismissal of the *Bivens* claims here based on qualified immunity. In *Rasul II*, this Court held that even if the detainee plaintiffs in that case had constitutional rights under the Fifth and Eighth Amendments, the *Bivens* claims still would be barred by qualified immunity. Citing prior Supreme Court and Circuit precedent, the Court held that

it was not clearly established at the time of the alleged misconduct that nonresident aliens outside sovereign United States territory possessed the constitutional rights claimed by the plaintiffs. *Rasul I*, 512 F.3d at 665-67;[5] *Rasul II*, 563 F.3d at 530-32. Rejecting plaintiffs' contention that a reasonable person would have been on notice because the "prohibition on torture is universally accepted," the Court emphasized that "[t]he issue we must decide * * * is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established at the time." 512 F.3d at 666 (emphasis in original). This Court recognized that no legal authority could "support a conclusion that military officials would have been aware, in light of the state of the law at the time [2003], that detainees [in Cuba] should be afforded the [constitutional] rights they now claim." *Ibid* (quotation marks omitted).

The district court in this case reached the same conclusion: "Even assuming that the plaintiffs could establish that they are entitled to assert rights under the Fifth and Eighth Amendments, the Court finds that those rights were not clearly established at the time the alleged injurious conduct occurred." *Iraq Detainee Litig.*, 479 F. Supp. 2d at 108. Like this Court in *Rasul*, the district court stressed

[5] The *Rasul II* ruling adopted this aspect of the *Rasul I* opinion. *See Rasul II*, 560 F.3d 530 ("Our vacated opinion explained why qualified immunity insulates the defendants from plaintiffs' *Bivens* claims. *Rasul I*, 512 F.3d at 665–67. *Boumediene* does not affect what we wrote.")

that "the cases make clear that what must be 'clearly established' is the constitutional right," *id.* at 109 (citing *Harlow*, 457 U.S. at 814), and that "[t]he focus is on whether '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Ibid*. (*quoting Anderson*, 483 U.S. 635, 640). The district court explained that at the time of the alleged violations it was not clear plaintiffs could invoke *any* constitutional rights; "as a result, no reasonable official could have understood that what he was doing violated the Fifth Amendment * * *." *Ibid.* (emphasis added).

The district court's ruling is clearly correct under *Rasul II*. Plaintiffs here – nonresident aliens who claim that they were detained by the military as part of the armed conflicts in Iraq or Afghanistan – cannot claim that their constitutional rights were more clearly established than those of the *Rasul* plaintiffs, who were nonresident aliens who had been detained at Guantanamo by the military during an armed conflict.

That conclusion is fully supported by the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). In *Boumediene*, the Court recognized a habeas right for those detained at Guantanamo, but stated it was not addressing whether the detainees possess other constitutional rights. *Id.* at 2277. *See also Kiyemba v. Obama*, 555 F.3d 1022, 1032 (D.C. Cir. 2009) ("as the

[Supreme] Court recognized, it had never extended any constitutional rights to aliens detained outside the United States; *Boumediene* therefore specifically limited its holding to the Suspension Clause"), *vacated and remand,* 130 S.Ct. 1235, *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010). While the Supreme Court treated Guantanamo as *de facto* sovereign territory, the B*oumedien*e Court also squarely recognized that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have *any rights* under our Constitution." 128 S. Ct. at 2262 (emphasis added). Thus, B*oumedien*e confirms that the constitutional rights claimed by plaintiffs here were not clearly established in 2003.

That conclusion is further reinforced by this Court's ruling in *Al Maqaleh v. Gates*, *supra*. After *Boumediene*, this Court in *Al Maqaleh* held that alien detainees held by the United States at the detention facility in Bagram, Afghanistan, do not even possess the constitutional right to seek habeas review to challenge their detention, the right deemed by the Supreme Court to be "a right of first importance" (*Boumediene*, 128 S.Ct. at 2277). *See Al Maqaleh*, 605 F.3d at 99 ("the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war"). *A fortiori*, alien military detainees held in Afghanistan or Iraq do not have clearly established Fifth and Eighth Amendment rights.

Thus, there can be no question that defendants are entitled to qualified immunity for the constitutional *Bivens* claims in this case. If a reasonable military officer could have thought in 2003 that those detained at Guantanamo Bay were not entitled to assert constitutional rights, as this Court held in *Rasul*, then it necessarily follows that a reasonable military officer in 2003 could have believed that aliens detained in the course of military operations in Iraq or Afghanistan were not entitled to such protections.

For these reasons, the district court's qualified immunity holding is plainly correct and controlled by *Rasul*, and should be affirmed.

C. Controlling Circuit Precedent Forecloses Plaintiffs' Argument That Aliens Detained By the Military In Iraq And Afghanistan During An Armed Conflict Have Due Process and Eighth Amendment Rights Under the Constitution

The dismissal of the *Bivens* claims here can and should be affirmed on the ground that the special factors counsel against the recognition of such an action, or, in the alternative, on the ground that the constitutional rights asserted were not clearly established at the time. Doing so allows this Court to decide the case without reaching the question of whether plaintiffs here can invoke constitutional rights. That was the approach adopted by this Court in *Rasul II*, and the same approach should be followed here, as well. Resolving the *Bivens* claims in this manner, without reaching the underlying constitutional issues, is consistent with

the Supreme Court's recent decision in *Wilkie v. Robbins*, 551 U.S. at 550, 554, where, without reaching the constitutional issues, the Court dismissed the *Bivens* action based on the special factors presented by the context there. It is also consistent with the well-established rule that courts should avoid deciding difficult or novel constitutional claims where the issues can be more easily resolved on non-constitutional grounds. *See Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also Pearson v. Callahan*, 129 S.Ct. at 821 (citing the avoidance principle in recognizing that a court ruling on a claim of qualified immunity may decide the case without resolving the constitutional issue).

If this Court were to reach the constitutional issue, however, the law of the Circuit is clear. After *Boumediene v. Bush*, *supra*, this Court reaffirmed that the binding law of the Circuit remains that nonresident aliens detained outside of the United States have no constitutional due process rights. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated and remand,* 130 S.Ct. 1235, *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010). That is the law of the Circuit and applies, *a fortiori*, to plaintiffs here – "non-resident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars." *Iraq Detainee Litig*., 479 F. Supp. 2d at 95.

As discussed above, if, as this Court has held post *Boumediene*, the military detainees at Guantanamo (which was deemed by the Supreme Court to be de facto sovereign territory, and is far from the war zone) have no constitutional rights, beyond the Suspension Clause right to petition for habeas review, then plainly plaintiffs here (held in a locale where the detainees do not, under the law of this Circuit (*al Maqaleh*, *supra*), even possess the Suspension Clause right to pursue a habeas claims) have no colorable claim to Fifth or Eighth Amendment rights under the U.S. Constitution.

III. THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' INTERNATIONAL LAW CLAIMS IS CONTROLLED BY *RASUL* AND SHOULD BE AFFIRMED.

As to plaintiffs' international law claims, asserted under the Alien Tort Statute, the district court properly held that the claims were barred by the Westfall Act, 28 U.S.C. § 2679.[6] The court held that Westfall Act immunity plainly applies here because "[a]s military officials commanding Armed Forces serving our country during a war, there can be no credible dispute that detaining and interrogating enemy aliens would be incidental to their overall military obligations." *Iraq Detainee Litig.*, 479 F. Supp. 2d at 114. This holding is correct

[6] In the district court, plaintiffs also asserted claims under the Fourth Geneva Convention and argued that those claims were exempt from the Westfall Act. On appeal, plaintiffs have expressly waived such claims. Ali Br. 45 n.20 ("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").

and controlled by *Rasul* (as plaintiffs acknowledge, Ali Br. 57), and should be affirmed.

A. Under the Westfall Act, the Federal Tort Claims Act is "exclusive of any other civil action or proceeding for money damages" for any tort committed by a federal official or employee "while acting within the scope of his office or employment." *See Rasul I*, 512 F.3d at 655 (quoting 28 U.S.C. § 2679(b)(1)). *See also Rasul II*, 563 F.3d at 528-29 (reinstating *Rasul I*'s ruling on the international law and treaty claims). If the Attorney General, or his designee, certifies that an employee was acting within the scope of federal employment at the time of the relevant alleged incident, the employee is "dismissed from the action and the United States is substituted as defendant." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); *see* 28 U.S.C. § 2679(d)(1). The Attorney General's certification is entitled to "'prima facie effect," and it is the plaintiff's burden to show that the defendant was not acting within the scope of his employment. *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). Unless the court determines that the plaintiff has carried this burden, "the employee becomes absolutely immune from actions for money damages arising from the same incident; plaintiff's only recourse is to proceed against the federal government under the Federal Tort Claims Act." *Haddon v. United States*, 68 F.3d 1420, 1422-23 (D.C. Cir. 1995). That is true even if, as here, defenses under the FTCA

would preclude judgment against the United States. *United States v. Smith*, 499 U.S. 160, 166 (1991); *see* 28 U.S.C. § 2679(d)(4).

Applying District of Columbia law,[7] and based on plaintiffs' allegations that defendants' official duties included formulating and/or implementing policies and practices relating to the detention, treatment, and interrogation of military detainees held in Afghanistan and Iraq during the relevant time period, *see, e.g.*, App. 1, 34-35, the district court properly held that the Westfall Act applies to and requires dismissal of plaintiffs' international law claims. *Iraq Detainee Litig.*, 479 F. Supp. 2d at 113-15. Indeed, the district court's dismissal of these claims based on Westfall Act immunity is mandated by this Court's rulings in *Rasul*.

In *Rasul*, this Court held that the Westfall Act applies to international law claims, asserted under the Alien Tort Statute, of torture and abuse brought by nonresident alien detainees against military officers because the alleged wrongful acts were "tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein." 512 F.3d at 658 (internal quotation marks omitted). The alleged torts therefore were "incidental to the defendants' legitimate employment duties" in detaining and interrogating suspected enemy combatants.

[7] The Westfall Act, the scope "of office or employment" issue is determined by reference to local *respondeat superior* law, *see Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003), which the district court held (and which plaintiffs do not contest) is District of Columbia law in this case. *Iraq Detainee Litig.*, 479 F. Supp. 2d at 113.

Id. at 659.[8] This Court held that "the underlying conduct — here, the detention and interrogation of suspected enemy combatants — is the type of conduct the defendants were employed to engage in." *Id.* at 658.

This Court's rulings in *Rasul I* and *Rasul II* fully support the district court's Westfall Act holding here. Notably, plaintiffs in this case do not, and cannot, argue that the detention and interrogation of military detainees were, as a general matter, beyond the scope of defendants' official functions. Indeed, plaintiffs' own amended complaint alleges that defendants' official duties included formulating and/or implementing policies and practices relating to the detention, treatment, and interrogation of military detainees held in Afghanistan and Iraq during the relevant time period. *See, e.g.,* App. 1, 34-35. The amended complaint further asserts that defendants' alleged actions were committed pursuant to policies "deliberately formulated and adopted in the United States over a long period of time." App. 28. *Cf. Rasul I*, 512 F.3d at 658 ("The plaintiffs concede that the 'torture, threats, physical and psychological abuse inflicted' on them, which were

[8] As this Court subsequently explained in *Harbury*, this aspect of the *Rasul* decision rested in large part "on several D.C. cases holding that seriously criminal and violent conduct can still fall within the scope of a defendant's employment under D.C. law-including sexual harassment, a shooting, armed assault, and rape." *Harbury*, 522 F.3d at 422. *See also id.* at 422 n.4 ("The scope-of-employment test often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort").

allegedly approved, implemented, supervised and condoned by the defendants, were 'intended as interrogation techniques to be used on detainees.'").

As this Court held in *Rasul*, "the underlying conduct-here, the detention and interrogation of suspected enemy combatants-is the type of conduct the defendants were employed to engage in * * *. [T]he detention and interrogation of suspected enemy combatants is a central part of the defendants' duties as military officers charged with winning the war on terror * * *. While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence." 512 F.3d at 658-59.

As in *Rasul*, instead of arguing that detention, interrogation, and treatment of detainees were as a general matter beyond the scope of defendants' duties, plaintiffs here instead exclusively contend that the alleged conduct should be exempted from Westfall Act immunity because the Act was not intended to cover violations of *jus cogens* norms (such as the prohibition against torture) or "seriously criminal" conduct. Ali Br. 44-58. This Court rejected this same argument in *Rasul*, *see* 512 F.3d at 658-60. That decision is correct and controlling here.

As an initial matter, plaintiffs' argument runs directly counter to the language of the Westfall Act itself. That statute applies to any action "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." 28 U.S.C. § 2679(b)(1). Under this plain language, "wrongful" conduct is covered by the Act. "[E]gregious or seriously criminal acts" are, of course, "wrongful" conduct by any definition, and therefore fall within the ambit of the statute. Indeed, as this Court has recognized, "if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be completely abrogate[d].'" *Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (internal quotations omitted). *Cf. Duffy v. United States*, 966 F.2d 307, 313 (7th Cir. 1992) ("We are unwilling to accept that intentional torts do not fall under the rubric of wrongful acts.").[9] Congress could have added an exception to the Westfall Act for all seriously criminal or egregious torts. It did not do so, and this Court must apply the statutory language enacted, not the language that plaintiffs or the amicus wish had been enacted.

[9] Because the statutory language is clear, there is no need to resort to legislative history. *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

In any event, plaintiffs' argument is foreclosed by *Rasul*. This Court held that military detainees' allegations of torture, and alleged policies and implementation of policies that allegedly led to the claimed torture, did not preclude application of Westfall Act immunity. The *Rasul* Court explained that, under the relevant standard, if the alleged serious criminal conduct was triggered or motivated or occasioned by the conduct of the employer's business, it is covered by Westfall Act immunity. *See Rasul I*, 512 F.3d at 660. Because the conduct alleged in *Rasul* was not wholly "personal" and was related to the defendants' official duties, this Court held that "the allegations of serious criminality do not alter our conclusion that the defendants' conduct was incidental to authorized conduct," and therefore subject to Westfall Act immunity. *Ibid*.

This holding is both controlling here and fully consistent with D.C. Circuit precedent. *See Bancoult v. McNamara*, 445 F.3d 427, 429, 431, 437 (D.C. Cir. 2006) (where the Court had "little trouble rejecting the claim that Appellees' acts fell outside the scope of their employment," despite "serious allegations" of criminal and international law violations); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1261, 1264 (D.C. Cir. 2006) (where the Court specifically rejected the contention that he acted "outside the scope of his employment" notwithstanding allegations of *jus cogens* international law violations). Moreover, the clear holding of *Rasul I*, that Westfall immunity is not foreclosed by allegation of

torture or other serious criminal conduct, was thereafter reaffirmed in *Harbury v. Hayden*, 522 F.3d at 421-22, and then reinstated in *Rasul II*. Thus, *Rasul* is correct, consistent with Circuit precedent and directly controlling here. Accordingly, this Court should affirm the district court's dismissal of plaintiffs' international law claims.

B. One argument raised by plaintiffs relating to the Westfall Act was not, however, addressed by this Court in *Rasul*. There is an exception under the Westfall Act for an "action * * * which is 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). Plaintiffs here argue that the ATS falls within this exception for federal "statutes" that authorize recovery against federal employees. Ali. Br. 52-54. That argument was rejected by the district court here,[10]

[10] *Iraq Detainee Litig.*, 479 F. Supp. 2d at 112-13.

the district court in *Rasul*,[11] and by every court that has addressed the issue.[12] The only reason it was not addressed by this Court in *Rasul* is that the plaintiffs there (recognizing that the argument held no merit) did not even raise it on appeal. *Rasul I*, 512 F.3d at 661.

The Supreme Court has held that this exception to the Westfall Act does not apply to all federal statutes, but rather only to federal statutes that provide both a cause of action and the substantive law which the employee is alleged to have violated. *See United States v. Smith*, 499 U.S. 160, 174 (1991) (holding that there could be no "violation" of the Gonzalez Act because it imposed no duties or obligations, and therefore, it did not fall within the Westfall Act exception). As every court that has addressed the issue has recognized, ATS claims clearly do not qualify for this exception because the ATS "is a jurisdictional statute creating no new causes of action." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

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[11] *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 38 (D.D.C. 2006).

[12] *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 632 (9th Cir. 2003) (*en banc*), *other holdings rev'd on other grounds, Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Bansal v. Russ*, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007); *Harbury v. Hayden*, 444 F.Supp.2d 19, 38-39 (D.D.C. 2006), *aff'd on other grounds*, 522 F.3d 413(D.C. Cir. 2008); *Turkmen v. Ashcroft*, 2006 WL 1662663, *49-*50 (E.D.N.Y. 2006); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 9-10 (D.D.C. 2004), *aff'd on other grounds*, 445 F.3d 427 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1125 (2007); *Jama v. U.S.I.N.S.*, 343 F.Supp.2d 338, 355 (D.N.J. 2004); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768 (2006).

Under *Sosa*, it is indisputable the ATS is not a federal statute that is capable of being violated.

As in the district court, plaintiffs again on appeal "ask the Court simply to ignore the Supreme Court's holding in *Sosa* because '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.'" *Iraq Detainee Litig.*, 479 F. Supp. 2d at 112. The district court correctly observed that this argument "plainly is untenable given the binding effect *Sosa* has on this Court." *Ibid.*

Notably, plaintiffs' argument is also contrary to the Ninth Circuit ruling in *Sosa*. The Court of Appeals in *Sosa* expressly held that ATS claims are subject to substitution under § 2679. *See Alvarez-Machain v. United States*, 266 F.3d 1045, 1053-54 (9th Cir. 2001). That aspect of the court of appeals' ruling was left intact by the Ninth Circuit sitting *en banc* and by the Supreme Court.[13] The Ninth Circuit panel reached that result even presuming – incorrectly – that the ATS provided a cause of action. The Ninth Circuit panel held that although the ATS provided a cause of action, the substantive law for an ATS claim was provided by

[13] *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (*en banc*) ("[W]e agree with the three-judge panel's conclusion that the exemption does not apply here, and that the United States was properly substituted for the individual DEA agents.")

international law, not statute. Accordingly, the Court concluded that because the "language of § 1350 creates no obligations or duties," ATS claims do not fall within the exception for claims "brought for a violation of a statute." 28 U.S.C. § 2679(b)(2)(B).

In so holding, the Ninth Circuit relied upon the Supreme Court's reasoning in *United States v. Smith*, *supra*. In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a federal statute. The Supreme Court explained: "[n]othing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174. The Ninth Circuit reasoned that the same was true of the ATS.

Now that the Supreme Court has clarified that the ATS does not provide a cause of action, the holding of the Ninth Circuit panel and the district court here are even more clearly correct. The ATS does not provide a cause of action; nor does the statute itself impose any obligations or duties of care. Thus, under *Smith*, the ATS claims do not fall within the Westfall Act's exception for claims "brought for a violation of a statute." 28 U.S.C. § 2679(b)(2)(B).

Accordingly, the district court's rejection of plaintiffs' argument is plainly correct, and consistent with every court to have addressed the issue, and should be affirmed.

IV. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' DECLARATORY JUDGMENT CLAIM.

The district court properly held that there is no claim of ongoing harm that could support declaratory relief in this case. *See Iraq Detainee Litig.*, 479 F. Supp. 2d at 103-18. To establish standing for declaratory relief under Article III, it is not enough to allege past injuries, as plaintiffs have here. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Rather, to have standing to seek prospective relief, a plaintiff would have to show that "he was likely to suffer future injury." *Ibid.* As the district court explained, plaintiffs clearly failed to meet that standard. *See Iraq Detainee Litig.*, 479 F. Supp. 2d at 118. In so holding, the district court noted that "Congress has taken action to prohibit such policies and provide remedies for violations, and the plaintiffs have been at liberty for more than two years without re-arrest [as of March 27, 2007]." *Ibid*. Thus, a declaratory judgment in this case "would have no practical enforcement effect or serve as anything other than an [advisory] opinion * * *." *Ibid*. Here, where plaintiffs have only alleged a past injury, the district court's ruling is indisputably correct and should be affirmed.

Moreover, to the extent plaintiffs assert an official capacity claim against the Secretary of Defense (App. 34-35), such a claim would also be barred by 5 U.S.C. § 701(b)(G) (exempting from review "military authority exercised in the field in time of war or in occupied territory").

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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_/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, I filed and served the foregoing brief with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that on October 18, 2010, I will cause eight copies to be delivered to the Court via hand delivery. I also hereby certify that all participants in the case are registered CM/ECF users and will be served via the CM/ECF system, with the exception of the participants listed below, who will be served by first-class mail:

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