

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 10-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TALAL AL-ZAHRANI, et al.,
Plaintiffs-Appellants,
v.

DONALD RUMSFELD, et al.,
Defendants-Appellees.

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

OPENING BRIEF FOR APPELLANTS

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**CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND
RELATED CASES**

(A) **Parties.** Appellants (Plaintiffs below) are Talal Al-Zahrani in his individual capacity and as the representative of Yasser Al-Zahrani's estate and Ali Abdullah Ahmed Al-Salami in his individual capacity and as representative of Salah Ali Abdullah Ahmed Al-Salami's estate. Appellees (Defendants below) are Donald Rumsfeld, General Richard Myers, Gen. Peter Pace, General James T. Hill, General Bantz Craddock, Major General Michael Lenhart, Major General Michael E. Dunlavey, Major General Geoffrey Miller, Brigadier General Jay Hood, Rear Admiral Harry B. Harris, Jr., Colonel Terry Carrico, Colonel Adolph McQueen, Brigadier Nelson J. Cannon, Colonel Mike Bumgarner, Colonel Wade Dennis, Esteban Rodriguez, William Wikenwerder, Jr., M.D., David M. Tornberg, M.D., Vice Admiral (Ret.) Michael L. Cowan, M.D., Vice Admiral Donald C. Arthur, M.D., Captain John S. Edmondson, M.D., Captain Ronald L. Sollock, M.D., Rear Admiral Thomas K. Burkhard, M.D., Rear Admiral Thomas R. Cullison, M.D., John Does 1-100, military, medical and civilian personnel involved in the abuses of plaintiffs and Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami, in

their individual capacities and the United States. No amici filed in the district court and Appellants are not aware of any entities or individuals who will seek leave to appear as amici before this Court.

(B) Rulings Under Review. Plaintiffs seek review of the September 29, 2010 order of the district court, Honorable Ellen Segal Huvelle, denying Plaintiffs' Motion for Reconsideration. The opinion is at pages 25-42 of the Appendix. Plaintiffs also seek review of the February 16, 2010 order of the district court granting Defendants' motion to dismiss. The opinion is at pages 12-24 of the Appendix and is reported as *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010).

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

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GLOSSARY

Proposed Second Am. Compl.	Proposed Second Amended Complaint
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ATS	Alien Tort Statute
FTCA	Federal Tort Claims Act
UCMJ	Uniform Code of Military Justice
NCIS	Navy Criminal Investigative Service

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity jurisdiction), 28 U.S.C. § 1346 and § 2674 (Federal Tort Claims Act), and 28 U.S.C. § 1350 (Alien Tort Statute) and directly under the U.S. Constitution. This Court has appellate jurisdiction under 28 U.S.C. § 1291 over the final decisions of the district court granting Defendants' motion to dismiss as well as denying Plaintiffs' motion for reconsideration and motion for leave to amend.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in concluding on the basis of *Rasul II* that "special factors" categorically bar a *Bivens*' remedy for the alleged killings of Appellants' relatives, when courts routinely adjudicate cases that implicate foreign policy and national security?
2. Whether the district court erred 1) in failing to address whether Appellants had alleged a violation of the Fifth Amendment because of reliance on *Rasul II* and 2) in concluding that *Rasul II* controls this case and protects Defendants for alleged conduct through June 2006?
3. Whether the district court abused its discretion in beginning and ending its scope of employment inquiry with whether Defendants were "on the

job” when Appellants had raised multiple prongs of the Restatement test in light of their new evidence?

4. Whether grave violations of international law can ever be within the scope of employment of U.S. officials?

5. Whether the district court abused its discretion in denying Appellants the opportunity to amend their complaint with the new evidence of the killing and cover-up of the deaths of their relatives?

STATEMENT OF FACTS

Approximately five years ago, on June 9-10, 2006, three men died at Guantanamo. They were Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami, whose father and brother, respectively, are parties to this appeal, and Mani Al-Utaybi. Each man had been detained by the United States for over four years without charge or judicial review of his detention. Mr. Al-Zahrani and Mr. Al-Salami had gone on long hunger strikes to protest their imprisonment and treatment; military officials described Mr. Al-Salami as “a long and dedicated striker, perhaps being tube fed longer than any other detainee in the camp.” Am. Compl. ¶ 143.

The morning following the deaths, the U.S. Southern Command issued an announcement reporting that three detainees had died of "apparent suicides" and that the Naval Criminal Investigative Service ("NCIS"), the main law enforcement arm of

the U.S. Navy, had initiated an investigation to determine the "cause and manner" of death. Despite the initiation of an investigation, officials were quick to provide further details to the press: the men had hung themselves in their cells with their clothes and bedsheets. Guards had found them in their cells shortly after midnight and attempts to resuscitate them had failed. In a dissonant statement considering the subject matter at hand, the top commander at Guantanamo, Rear Adm. Harry Harris, called the deaths an "act of asymmetric warfare." Am. Compl. ¶ 4. Another commander, Col. Mike Bumgarner, stated that there was "not a trustworthy son of a ... in the entire bunch." Am. Compl. ¶ 121.

Mr. Al-Zahrani and Mr. Al-Salami's remains were subsequently repatriated. According to their families, Mr. Al-Zahrani had injuries to his chest and signs of trauma on his face, and his neck organs—critical to understanding his cause of death—had been removed. Am. Compl. ¶ 118. Mr. Al-Salami's body was badly bruised with marks resembling chemical burns, and his neck organ and matter had also been removed. Am. Compl. ¶ 176. The families had learned of the deaths second-hand—from television reports, in the case of Mr. Al-Zahrani's family—and were bewildered and disbelieving. After repeated unanswered requests to U.S. authorities for an explanation of the condition of the bodies, they sought second autopsies from independent pathologists, which were also impeded; without the missing body parts and more information, a meaningful medical opinion would be

impossible. Am. Compl. ¶¶ 120, 178. In Mr. Al-Salami's case, a formal detailed request for information was forwarded to the U.S. military pathologist who conducted the original autopsy, who responded that he was not authorized to assist. Military officials later denied that a formal request by the independent pathologists had ever been received.

As the first reported deaths at Guantanamo, the deaths also generated considerable public attention and concern, with repeated calls for information and transparency from different directions. Despite these efforts, no information was made available to the families or the public for a full two years following the deaths, beyond the initial official announcement and statements to the press.

In June 2008, compelled only by Freedom of Information Act litigation filed by attorneys for two of the deceased, the NCIS released its findings, concluding in a heavily-redacted report that the men had committed suicide by hanging. Am. Compl. ¶ 4. For the purposes of this case, the relevant findings include:

That the men were each discovered in their cells in "Camp 1," one of four smaller camps contained within "Camp Delta," in early the morning of June 10, Am. Compl. ¶¶ 101, 165;

That guards discovered the first detainee, Mr. Al-Zahrani, between approximately 12:28 and 12:39 a.m., Am. Compl. ¶ 101;

That a team of guards carried each detainee on a backboard from his cell to the camp medical clinic, where attempts were made to resuscitate the men. Mr. Al-Salami died at the clinic. Mr. Al-Zahrani died at the camp hospital, where he had been transported from the clinic. Am. Compl. ¶¶ 103, 105, 107, 112, 169-170, 172.

Despite the duration of the investigation and the volume of its findings, the report contains significant gaps and inconsistencies and leads to a conclusion that, ironically, for all the government's criticism of the new evidence discussed herein, is itself questionable or implausible in certain respects. According to an analysis of the full report by Seton Hall University Law School, questions include:

If the men had been dead for more than two hours before they were discovered as the investigation found, how three bodies could have hung in mesh-wire cells undetected for two hours, when the cells were under constant supervision, both by video camera and guards continually walking the corridors guarding only 28 detainees;

Relatedly, why there is no indication that guards or medics walking the block that night observed anything out of the ordinary, when the process the deceased would have had to undergo to hang themselves in the manner described in the report would have required each detainee to: braid a noose by

tearing up his sheets and/or clothing, make a mannequin of himself so it would appear to guards that he was asleep in his cell, hang sheets to block vision into the cell (a violation of the SOPs), tie his feet together, tie his hands together, hang the noose from the metal mesh of his cell wall and/or ceiling, climb up onto the sink, put the noose around his neck and release his weight to result in death by strangulation, hang until dead, and hang for at least 2 hours completely unnoticed by guards;

Why the two-year investigation failed to review information as critical as, for example, the guard roster for alpha block that night;

Why the findings indicate that certain alpha block guards were advised that they were suspected of making false statements or failing to obey direct orders;

Why there is not a single sworn statement from a guard, a medic or any other personnel about the events of that night, as required after such incidents

by Standard Operating Procedures at Guantanamo, and why the findings indicate that Colonel Bumgarner told guards not to provide such statements.¹

On January 29, 2009, the fathers of Yasser Al-Zahrani and Salah Ali Abdullah Al-Salami filed an action in the district court on the premise of the NCIS report, disbelieving its findings but seeking a remedy for the torture, arbitrary detention and ultimate deaths of their sons even if they had taken their own lives. Finding their allegations factually similar to and foreclosed by *Rasul v. Myers*, the district court dismissed their complaint with prejudice on February 16, 2010.

A month prior to the termination of their case, new information had come to light—the first and only information that has ever come from individuals who were closer to their relatives the night of their deaths than Appellants could ever be, and who were willing to talk. Four soldiers stationed at Guantanamo and on duty the night of the deaths—Army Staff Sergeant Joe Hickman, Specialist Tony Davila, Army Specialist Christopher Penvose, and Army Specialist David Carroll—had come

¹ See Seton Hall University Law School, Center for Policy and Research, “Death in Camp Delta” (2009), available at http://law.shu.edu/programscenters/publicintgovserv/policyresearch/upload/gtmo_death_camp_delta.pdf.

forward to tell their accounts of that night, because, as Joe Hickman said, he felt that “silence was just wrong.” Mot. for Recon. at 3. Their accounts, against the backdrop of existing questions about the NCIS investigation, undercut key findings of the NCIS report, provide direct evidence of a cover-up by officials of a key aspect of the cause of death even assuming it was suicide, and recount observations that suggest that rather than taking their own lives in their cells, the men were transported to an unofficial location outside the perimeter of "Camp America," within which military detainees are housed and interrogated, and died there or from events occurring there at the hands of the authorities.

According to the men’s direct observations, as published in Harper's Magazine on January 18, 2010, App. at 43 (*Harper’s Magazine* article):

Between approximately 6-8 p.m. on June 9, Hickman observed the van used to transport detainees drive up to the camp where the deceased were held three separate times in short succession. Each time, guards escorted a detainee from the camp to the van and drove away in the direction of Camp No. By the third time he saw the van approach the deceased’s camp, Hickman decided to drive ahead of the vehicle in the direction of Camp No to confirm where it was going. From his vantage point shortly thereafter, he saw the van approach and turn toward Camp No, eliminating any question in his mind about its destination. See Mot. for Recon. at 4.

Camp No is an unnamed and officially unacknowledged facility located outside the perimeter of the area enclosing the prison complex at Guantanamo. Guards nicknamed the facility “Camp No” because anyone who asked if it existed would be told, “No, it doesn’t.” Hickman was never briefed about the site, despite frequently being put in charge of security for the entire prison. He reported once hearing a “series of screams” coming from the facility. *See id.* at 5.

At approximately 11:30 p.m., from his position in a watch tower, Hickman watched the van he had seen transporting the detainees to Camp No return to the camp. This time, the van backed up to the entrance of the medical clinic, as if to unload something. *See id.*

At approximately 11:45 p.m., nearly an hour before the NCIS claims the first dead body was discovered in the cells, Army Specialist Christopher Penvose was approached by a senior navy officer who appeared to be extremely agitated and instructed Penvose to go the prison chow hall, identify a specific officer who would be dining there, and relay a specific code word. Penvose did as he was instructed. The petty officer leapt up from her seat and immediately ran out of the chow hall. *See id.*

At approximately 12:15 a.m. on June 10, Hickman and Penvose reported that the camp was suddenly flooded with lights and the scene of a frenzy of activity. Hickman headed to the medical clinic, which appeared to be the center of activity, and was told by a medical corpsman there that three dead prisoners had been delivered to the clinic, that they had died because they had rags stuffed down their throats, and that one of them was severely bruised. *See id.*

According to Specialist Tony Davila, guards he talked to also said the men had died as the result of having rags stuffed down their throats. *See id.*

While the NCIS report's narrative is that the deceased were found dead in their cells and transported from there to the medical clinic, Penvose, who was on guard duty in a watch tower at the time the deceased would have been transported to the clinic, had an unobstructed view of the walkway between the camp and the clinic, which was the path by which any detainee would be delivered to the clinic. Penvose reported that he saw no detainees being moved from the camp to the clinic. *See id.*

Army Specialist David Carroll, who was also on guard duty in another watchtower at the time the NCIS report says the deceased would have been transported to the clinic, also had an unobstructed view of the alleyway that

connected the men's specific cell block to the clinic. He similarly reported that he had seen no detainees transferred from the cell block to the clinic that night. *See id.*

By dawn, the news had circulated through the prison that three detainees had committed suicide by swallowing rags. *See id.*

On the morning of June 10, Defendant Mike Bumgarner, Commander of the Joint Detention Group at Guantanamo at the time, called a meeting of the guards during which he announced that three detainees had committed suicide during the night by swallowing rags, causing them to choke to death. Defendant Bumgarner said that the media would instead report that the detainees had committed suicide by hanging themselves in their cells. He said that it was important that the guards make no comments or suggestions that in any way undermined the official report, and reminded them that their phone and email communications were being monitored. This account of the meeting was corroborated by various guards in independent interviews conducted by Harper's. *See id.* at 6.

On the evening of June 10, Defendant Harry Harris, Commander of the Joint Task Force at Guantanamo and Defendant Bumgarner's superior at the time, read this statement to reporters: "An alert, professional guard noticed something out of the

ordinary in the cell of one of the detainees. ... When it was apparent that the detainee had hung himself, the guard force and medical teams reacted quickly to attempt to save the detainee's life. The detainee was unresponsive and not breathing. [The] guard force began to check on the health and welfare of other detainees. Two detainees in their cells had also hung themselves." *See id.*

In a press interview at the time, Defendant Bumgarner, contrary to his own admonition to the guards, let slip that each deceased detainee "had a ball of cloth in their mouth either for choking or muffling their voices." *See id.*

As soon as Defendant Bumgarner's interview was published, Defendant Harris called him for a meeting and told him that the article "could get me relieved." The same day, an investigation was launched to determine whether classified information had been leaked from Guantanamo. Defendant Bumgarner was subsequently suspended. *See id.*

Hickman and Davila later learned that Defendant Bumgarner's home was raided by the FBI over a concern that he had taken classified materials and was planning to send them to the media or use them for writing a book. *See id.*

The only apparent discrepancy between Defendant Bumgarner's interview and the official Pentagon narrative was on one point: that the deaths had involved cloth being stuffed into the detainees' mouths. *See id.*

For several months after Hickman first came forward, he and his attorneys attempted to pursue an investigation through the Department of Justice. Their first meeting was on February 2, 2009, where they related a detailed account of Hickman's observations and later handed over a list of corroborating witnesses with contact information. The Justice Department ultimately closed its investigation on November 2, 2009, concluding without explanation that "the gist of Sergeant Hickman's information could not be confirmed" and his conclusions "appeared" to be unsupported. *See id.*

In this context of this case, where Appellants' relatives are dead and the government holds effectively exclusive control of the information about the events of June 9-10, the accounts and courage of Joe Hickman, Tony Davila, Christopher Penvose, and David Carroll are indeed rare, material and warrant reconsideration of the termination of this lawsuit.

SUMMARY OF ARGUMENT

The district court abused its discretion in denying reconsideration of Appellants' *Bivens* claims. The court held that the claims, even as amended, are categorically barred by this Court's decisions in *Rasul v. Myers*, 512 F.3d 664 (D.C. Cir. 2008) ("*Rasul I*"), and in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"), and in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), because they have national security implications. This sweeping reading of the case law directly conflicts with Supreme Court precedent permitting an implied damages remedy in national security-related cases and requiring courts to engage in a fact-specific balancing to determine whether creation of a remedy is appropriate in a particular case. The new allegations, which contend that the deaths of Appellants' relatives occurred outside the bounds of authorized detention and interrogation policies, factually distinguish this case from *Rasul I* and *II* and *Sanchez-Espinoza* and the concerns that animated those decisions, and should be treated accordingly.

Appellants' constitutional claims are further not barred because Defendants are not protected by qualified immunity. In dicta in both its underlying dismissal and its denial of reconsideration, the district court held that Appellants' claims were again barred by *Rasul* because any constitutional violations Appellants may have alleged could not have been clearly established during the period of the deceased's detention ending in June 2006. The district court erred 1) in concluding based on an erroneous

reliance on *Rasul* that it was unnecessary to reach the constitutional question and 2) in holding that the qualified immunity holding of *Rasul* controls this case, given that *Rasul* considered the state of “clearly-established” law as of March 2004, and in concluding that Appellants’ asserted Fifth Amendment due process rights therefore were not clearly established even by the time of the deceased's deaths in 2006.

The district court abused its discretion in denying reconsideration of its substitution of the United States for the individual Defendants pursuant to the Westfall Act by concluding that Defendants were still acting within the scope of their employment despite the new evidence. The court applied only part of the test required under the Restatement (Second) of Agency § 228 and concluded on the basis of that incomplete inquiry that the new evidence was not sufficient to rebut the government's certification. If the court had considered the new evidence with respect to each of the Restatement factors, it is clear that new evidence would have warranted reconsideration.

To the extent the district court applied the proper test, Appellants submit that the grave violations of international law evidenced in their motion for reconsideration and alleged in their underlying complaint can never be within the scope of employment of U.S. officials. Granting immunity for such conduct under the Westfall Act would pervert the purpose of the act, as shown by its legislative history, and would also run afoul of the principle that requires interpretation of federal

statutes in a manner that would not violate the law of nations. While the district court relied on this Court's decision in *Rasul* in denying these arguments in its underlying dismissal order, Appellants respectfully submit that *Rasul* should be reconsidered.

Lastly, because the court should have granted Appellants' motion for reconsideration, the court abused its discretion in denying Appellants' motion for leave to amend their complaint with the new evidence. Appellants' new and amended claims are not "clearly futile" such that they clearly would not withstand a motion to dismiss.

ARGUMENT

I. NATIONAL SECURITY CONCERNS DO NOT BAR THE AVAILABILITY OF A *BIVENS* REMEDY IN THIS CASE.

In denying appellants' motion for reconsideration, the district court held that their damages claims are categorically barred by this court's decisions in *Rasul I* and *II* and in *Sanchez-Espinoza* because they have national security implications.² This

² See App. at 34-25 (Mem. Op. and Order (Sept. 29, 2010) at 10-11 ("Simply put, plaintiffs' claims – even as amended. . . – involve the treatment of detainees held at Guantanamo Bay, and, therefore, national security concerns.")). The district court dismissed Appellants' constitutional claims on special factors grounds, determining that it was unnecessary and preferable not to resolve the subject-matter jurisdictional issues because of the court's disposition of the claims under Defendants' Fed. R. Civ. P. 12(b)(6) motion and because the government did not brief the issues in full. App. at 17 (*Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111 (D.D.C. 2010) (citing *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (citing *Steel Co.*, 523 U.S. at 96-97 & n.2)) ("[T]he Supreme Court has 'explicitly recognized the propriety of addressing the merits where doing so made it possible to avoid a doubtful issue of statutory jurisdiction'").

sweeping reading of the case law directly conflicts with Supreme Court precedent permitting an implied damages remedy in national security-related cases and requiring courts to engage in a fact-specific balancing to determine whether creation of a remedy is appropriate in a particular case. Because “[a] district court by definition abuses its discretion when it makes an error of law,” *Koon v. United States*, 518 U.S. 81, 100 (1996), the district court’s misapplication of the “special factors” doctrine requires reversal.

As the Supreme Court explained in *Bivens v. Six Unnamed Federal Agents*, “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” 403 U.S. 388, 392 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The Court emphasized that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, wherever he receives an injury.” *Id.* at 397 (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)). Given the significance of the rights at stake, a *Bivens* remedy is available to address the violation of constitutional rights by federal officers, unless there are “special factors counseling hesitation in the absence of affirmative action by Congress.”³ The district

³ The second exception to the availability of *Bivens*—the existence of a Congressionally-created alternative remedial scheme—is inapplicable here. See *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

court found that national security matters constitute a “special factor” that bars judicial consideration of a *Bivens* remedy in this case.

Contrary to the district court’s holding, however, Federal officials’ invocation of national security concerns has never stood as an absolute bar to the creation of a *Bivens* remedy. In *Mitchell v. Forsyth*, the Court implied a damages remedy for governmental abuses committed during intelligence-gathering related to a plot to blow up the tunnels linking federal buildings. 472 U.S. 511 (1985). The Court specifically rejected the argument that national security claims should immunize Federal officials from damages liability for constitutional violations:

“Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate” This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Id. at 524. Similarly, in *Saucier v. Katz*, the Court permitted a *Bivens* claim against a military police officer for using excessive force in defending the Vice President. 533 U.S. 194 (2001). The Court has also approved of the use of *Bivens* remedies for civilian plaintiffs seeking redress for injuries caused by military personnel, even in times of war.⁴ And the Court has not shied away from awarding

⁴ See *Beckwith v. Bean*, 98 U.S. 266, 274 282-84, 292 (1878) (refusing to dismiss damages suit against Union army officer even when the tortious acts were done “under the authority of orders of the President”); *Mitchell v. Harmony*, 54 U.S. 115, 135-37 (1851) (affirming damages award against Army officer for wrongful seizure

damages for injuries inflicted on foreign civilians during wartime.⁵ The Court's precedent is thus clear that the *Bivens* special factor analysis is not susceptible to broad generalizations by subject matter.

Once the categorical bar to *Bivens* remedies in cases involving national security is removed, it is clear that the new allegations (which the district court accepted as true for purposes of the special factors analysis) factually distinguish this case from the *Rasul* and *Sanchez-Espinoza* cases upon which the district court relied. Both of those cases are animated by the desire to avoid judicial interference with the executive's authority to conduct foreign policy and to protect the national security. In *Sanchez-Espinoza*, Nicaraguan plaintiffs filed suit seeking redress for injuries committed by Contra forces fighting the Nicaraguan government. Plaintiffs claimed

of a U.S. merchant's goods during the Mexican war); *Luther v. Borden*, 48 U.S. 1, 45-46 (1849) (permitting trespass claim against officers acting "in a state of war"); *The Eleanor*, 15 U.S. (2 Wheat) 345, 357-58 (1817) (reviewing claim of libel and trespass against a ship commander); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170, (1804) (affirming the availability of damages for unlawful trespass against the commander of a warship for unlawful trespass).

⁵ See *Little*, 6 U.S. (2 Cranch) at 179 (awarding damages for an illegal presidential seizure of a ship during war with France); *Mitchell*, 54 U.S. at 115 (adjudicating liability of U.S. soldier for seizing plaintiff's goods in Mexico during Mexican War); *Ford v. Surget*, 97 U.S. 594, 607 (1878) (finding no exemption from liability for soldiers' tortious acts not "directly connected with the mode of prosecuting the war"); *The Paquete Habana*, 175 U.S. 677, 713-14 (1900) (imposing damages for illegal wartime seizure of Spanish fishing vessels by United States naval forces); *Koohi v. U.S.*, 976 F.2d 1328, 1331 (9th Cir. 1992) (permitting damages to the deceased passengers and crew of a civilian aircraft shot down by a U.S. warship because "[t]he Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.").

the defendants violated the Fourth and Fifth Amendments by financing, supporting and assisting the Contras' acts of terrorism, including murder, torture, and rape. In that context, the "special needs of foreign affairs must stay our hand in the creation of damages remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign citizens abroad" where doing so would risk permitting foreign citizens to "use[] the courts . . . to obstruct the foreign policy of our government" *Id.* at 208-09.

The concerns underpinning the court's decision in *Sanchez-Espinoza* are not present in this case. The claim in that case directly challenged President Reagan's decision to fund the Contras in their fight against the Nicaraguan government. This court held that an adverse judgment in that case might very well have undermined this executive directive and "obstruct[ed] the foreign policy of our government." *Id.* at 208-09. In general, *Sanchez-Espinoza* holds that in some circumstances allowing challenges to executive actions that occurred on foreign soil open up the possibility of embarrassing the nation and impeding our foreign relations. *Id.* at 209. As the Supreme Court has repeatedly recognized, however, Guantánamo is different. *See e.g., Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (holding that the habeas statute applies at Guantánamo as within the territorial jurisdiction of the United States); *Boumediene v. Bush*, 553 U.S. 723, 769 (2008) ("In every practical sense, Guantánamo is not abroad; it is within the constant jurisdiction of the United

States.”). Adjudication of Appellants’ claims in this case will not frustrate or embarrass the Executive in its foreign relations with Cuba, nor will they impede the nation’s foreign policy any more than if these incidents had occurred on U.S. soil.⁶ To the extent, therefore, that *Sanchez-Espinoza* proscribes *Bivens* relief for injuries occurring outside the United States, it is inapposite here, as “Guantánamo Bay is in every practical respect a United States territory.” *See Rasul*, 542 U.S. at 487 (Kennedy, J. concurring in judgment). Given that a *Bivens* remedy would not automatically be precluded by special factors had the injury occurred within the United States, it should not be barred in this case.⁷

⁶ The desire to avoid the possible embarrassment, at home or abroad, that accompanies the exposure of wrongdoing by federal officials surely cannot, in and of itself, be grounds for denying a *Bivens* remedy. Such a holding would vitiate the doctrine, as misconduct by representatives of our government could always be deemed “embarrassing.” Therefore, *Sanchez-Espinoza* must be read more narrowly, on the particular facts of that case, as precluding a remedy for unconstitutional actions occurring overseas where redress would interfere with the Executive’s conduct of the military.

⁷ The success of *Bivens* claims alleging mistreatment in the prosecution of the “War on Terror” has been mixed, reflecting the fact-specific nature of the *Bivens* analysis and a developing split in the jurisprudence as to whether the implication of national security concerns constitutes a special factor barring *Bivens* relief. *Compare Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (*rev’d in part on other grounds sub nom Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (permitting non-citizens detained on immigration charges after 9/11 to bring *Bivens* claims vindicating “the right not to be subjected to needlessly harsh conditions of confinement and the right to be free from the use of excessive force.”)); *Vance v. Rumsfeld*, 694 F.Supp.2d 957 (N.D. Ill. 2010) (permitting U.S. citizens detained by the United States in Iraq to bring *Bivens* claims against Donald Rumsfeld for authorizing their detention and abuse); *Padilla v. Yoo*, 633 F.Supp.2d 1005 (N.D. Cal. 2009) (permitting U.S. citizen detained as an enemy

This case is also distinguishable from this court's decisions in *Rasul I and II*. The *Rasul* case involved allegations of torture "tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein." *Rasul I*, 512 F.3d at 656. In a brief footnote in *Rasul II*, this court relied on *Sanchez-Espinoza* in denying plaintiffs the ability to pursue their *Bivens* claim. *See Rasul II*, 563 F.3d at 532 n. 5. Although the court's discussion of the special factors analysis in *Rasul II* was truncated, it referenced to Judge Brown's more extensive treatment of the special factors issue in her concurrence in *Rasul I*. *Id.* In *Rasul I*, Judge Brown explained that national security concerns barred a court inquiry into the plaintiffs' allegations because to do so would require the examination and exposure of U.S. interrogation and detention policies, which could frustrate the Executive in its management of the country's national security. *See Rasul I*, 512 F.3d at 673 ("The present cases involve the method of detaining and interrogating enemy combatants during a war – a matter with grave national security implications.") (internal quotation marks omitted).

combatant in the U.S. as part of the "war on terror" to bring a *Bivens* suit against John Yoo for authorizing his detention and torture).; with *In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85, 104-07 (2007) (finding that special factors barred *Bivens* claims by non-citizens alleging torture and abuse while detained in Iraq and Afghanistan); *Lebron v. Rumsfeld*, 2011 U.S. Dist. LEXIS 16192 (D.S.C. Feb. 17, 2011) (denying *Bivens* remedy to U.S. citizen); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (denying *Bivens* remedy based on special factors to non-citizen alleging extraordinary rendition).

Judge Brown's concerns have less force in this case. *Rasul I* involved an explicit challenge to the detention and interrogation policies issued by the Secretary of Defense. Here, Appellants allege conduct—killing—that fell far outside those policies, that took place in a location that was not authorized for military detention and interrogation, and that was covered up for that reason.⁸ Moreover, to the extent Judge Brown was concerned that the alleged conduct in *Rasul* would risk “multifarious pronouncements by various departments on one question,” because where to draw the line with torture is the “subject of acrimonious debate between the executive and legislative branches,” *Rasul I*, 512 F.3d at 673 (Brown, J., concurring), the line is eminently clear here. Homicide clearly exceeds the bounds of permissible official conduct in the treatment of detainees in U.S. custody and demands accountability. *See, e.g.*, Memorandum for the Secretary of Defense, Department of Defense, from A.T. Church, III, Vice Admiral, U.S. Navy, Review of Department of Defense Detention Operations and Detainee Interrogation Techniques 228 (Mar. 7, 2005) (concluding that the interrogation techniques causing the December 2002 deaths of two detainees at the U.S. Air Base at Bagram, Afghanistan were “clearly abusive, and clearly not in keeping with any approved interrogation policy of guidance.”); Jim Garamone, Rumsfeld Accepts Responsibility for Abu Ghraib,

⁸ Indeed, nothing would seem more contrary to advancing the goal of intelligence-gathering than the killing of the subject.

American Foreign Press Service, May 7, 2004, available at <http://www.defense.gov/news/newsarticle.aspx?id=26511> (Defendant Rumsfeld describing the abuses at Abu Ghraib, which included the death of a detainee, as “inconsistent with the values of our nation, inconsistent with the teachings of the military, and . . . fundamentally un-American”).

The district court thus erred in holding that additional discovery would be of no help to plaintiffs in distinguishing this case from *Rasul II*. See App. at 35 (Mem. Op. and Order (Sept. 29, 2010) at 11). *Rasul II* does not categorically bar all *Bivens*’ claims by prisoners held at Guantanamo Bay. See *FDIC v. Meyer*, 510 U.S. 471, 484 n. 9 (1994) (“[A] *Bivens* action alleging a violation of Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others.”)). To impose this categorical bar is in direct contravention of the Supreme Court’s most recent *Bivens* decision, *Wilkie v. Robbins*, 551 U.S. 537 (2007), which requires that courts “weigh[] reatives for and against the creation of a new cause of action, the way common law judges have always done.” *Id.* at 554. Appellants should, therefore, be permitted discovery to determine whether their relatives’ deaths occurred outside the bounds of authorized detention and interrogation policies before the decision is made as to whether *Rasul* bars their damages suit. Without this information, the court cannot properly conduct the balancing of factors that *Bivens* requires. See *Navab-*

Safavi v. Broadcasting Board of Governors, 650 F.Supp.2d 40, 66 (2009) (“[T]he question whether to recognize a Bivens remedy is context-specific.”).

To the extent the brief footnote in *Rasul II* can be read to bar all claims by foreign citizens held at Guantanamo,⁹ Appellants submit that the court should reconsider this aspect of its special factors ruling for the rearelatives stated herein. Appellants’ allegations do not raise the same concerns that animated the court’s decision in *Rasul II* and *Sanchez-Espinoza*, and therefore do not require the same treatment. Even if the court concludes, however, that the district court correctly denied the motion to amend to include the new allegations of killing, Appellants maintain that the more limited reading of *Rasul II*—barring a *Bivens*’ remedy for allegations of official torture and arbitrary detention occurring at Guantanamo—was also erroneous and should be reconsidered.

Permitting these claims to go forward to investigate the deaths and alleged cover-up would not expose the details of the Executive’s counterterrorism strategy, nor would it embarrass the country in its foreign policy. Appellants’ allegations thus do not raise the same concerns that animated the court’s decision in *Rasul II* and *Sanchez-Espinoza*, and should be treated accordingly. Allowing a *Bivens*’ remedy in

⁹ The sweeping language of the footnote in *Rasul II* could be read to equate *Sanchez-Espinoza* and *Rasul* only with respects to the particular facts of the *Rasul* case, which alleged official torture, or more broadly. *See Rasul II*, 563 F.3d at 532 n. 4 (“We see no basis for distinguishing this case from *Sanchez-Espinoza*.”).

this case would permit the investigation and redress of clear and discrete violations of the law. Appellants have alleged that they were subjected to conduct “so brutal and so offensive to human dignity” as to exceed the permissible limits of the Constitution. *Rochin v. California*, 342 U.S. 65, 174 (1952). Nonetheless, they have no other remedy other than this suit for the egregious injuries that have been alleged, nor are they likely to receive one through the legislative process.¹⁰ Their claims thus go to core purpose of *Bivens*, which is to permit the redress of harms that would otherwise go unacknowledged and to deter federal officers from engaging in egregious unconstitutional acts. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

II. DEFENDANTS ARE NOT PROTECTED BY QUALIFIED IMMUNITY.

In denying Appellants’ reconsideration motion, the district court further concluded—in dicta, mirroring the dicta in its underlying order—that Defendants are entitled to qualified immunity against Appellants’ *Bivens*’ claims.¹¹ Relying on *Rasul II*, the court repeated its prior conclusion that Defendants could not have had fair

¹⁰ “[T]he victims of most of the government’s more egregious post-September 11th abuses have no real political constituency” such that “legislative remedies would be the last measure of redress that they would be able to obtain” Stephen Vladeck, *National Security and Bivens After Iqbal*, 24 LEWIS & CLARK L. REV. 255, 276 (2010).

¹¹ As previously discussed, the district court relied on special factors in denying Plaintiffs’ *Bivens* claims. App. at 36-37 (Mem. Op. and Order of Sept. 29, 2010, at 12 n.5 (stating that it “need not reach plaintiffs’ arguments concerning qualified immunity”)); App. at 18 (*Al-Zahrani*, 684 F. Supp.2d at 112 n.5). *See Gersman v. Group Health Ass’n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992).

notice of the rights claimed on behalf of the deceased, even by the time of their deaths in 2006, because it was not until the Supreme Court decided *Boumediene* in 2008 that any reasonable government official could have known that men detained at Guantanamo had any constitutional rights. App. at 36-37 (Mem. Op. and Order (Sept. 29, 2010) at 12 n.5 (citing *Rasul II*, 563 F.3d at 530)); App. at 18 (*Al-Zahrani*, 684 F. Supp.2d at 112 n.5 (same)). The district court erred, first, in failing to address the question of whether Appellants' original and amended allegations of the torture, killing and arbitrary detention of their relatives state a constitutional deprivation and, second, in concluding—despite a century of Supreme Court precedent rejecting the view that the Constitution's reach is limited by rigid territorial boundaries, as reflected in the Supreme Court's ruling in *Rasul v. Bush* in 2004 and reaffirmed in *Boumediene*—that Defendants could not have known the answer to that question even by the time of the men's deaths in 2006.

Because the court's reasoning and legal errors regarding qualified immunity in its underlying dismissal and denial of reconsideration are the same, Appellants address the two orders together.

A. Torture and Arbitrary Killing and Detention of Men Detained at Guantanamo Is Unconstitutional.

As an initial matter, the district court should have addressed whether Appellants' allegations make out a violation of the Fifth Amendment due process

rights claimed on behalf of their relatives.¹² The district court's implicit conclusion that such an inquiry was unnecessary, since regardless of whether or not torture and arbitrary killing and detention violate the due process rights of men detained at Guantanamo, Defendants could not have had reasonable notice of any such rights at the time of their alleged conduct, was based on an erroneous reliance on *Rasul II*. As discussed more fully below, the qualified immunity holding in that case was based on the state of the law as of March 2004 and does not control here. *Rasul II*, 563 F.3d at 529-532. In considering Appellants' claims in the first instance, the court should have addressed the question whether Appellants had alleged a violation of the Fifth Amendment before turning to the question whether that right was "clearly established" at the time of Defendants' alleged conduct, pursuant to the traditional two-step sequence in *Saucier*.¹³

Although the Supreme Court in *Pearson v. Callahan* granted courts the discretion to skip the first prong of the *Saucier* test and proceed directly to the second "clearly-established" prong, the Court "continue[d] to recognize that the *Saucier* protocol is "often beneficial" and "often appropriate" depending on the particular case

¹² Appellants claimed violations under the Fifth and Eighth Amendments in the proceedings below. They do not appeal the dismissal or denial of reconsideration of their Eighth Amendment claim.

¹³ *Saucier* requires that a court first determine whether the facts allege a violation of a constitutional right. If there is a violation, the court must then determine whether the right was "clearly established" at the time of the violation. 533 U.S. at 201.

at hand. 129 S.Ct. 808, 818 (2009) (emphasis added). This is not a case where it is “plain” that a constitutional right is not clearly established, rendering consideration of the first question an “academic exercise” that would have no bearing on consideration of the second, or where other factors would justify deviating from the otherwise preferable traditional analysis.¹⁴ *Id.* Yet, the district court assumed as much based on an erroneous reliance on *Rasul II*.

If the court had addressed the initial question, it would have been clear that Appellants have alleged grievous unconstitutional harm. That torture and arbitrary killing and detention by government officials constitute conduct long prohibited by the Fifth Amendment is plain, *Rochin*, 342 U.S. at 172, as is the force of those prohibitions at Guantanamo. As established by a long line of Supreme Court precedent culminating in *Boumediene*, whether a constitutional provision has extraterritorial effect “turns on objective factors and practical concerns, not formalism.” *Boumediene*, 553 U.S. at 764 (tracing a “common thread uniting” *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Insular Cases and *Reid v. Covert*, 354 U.S. 1 (1957)). The question depends on the particular circumstances of a case and whether

¹⁴ For example, this is not a case where the factual basis for claims is difficult to identify; where the constitutional question is “so fact bound” that resolution would provide “little guidance for future cases;” or where a constitutional decision rests on an “uncertain interpretation of state law” that is of “doubtful precedential importance.” *See id.* at 819. The *Pearson* Court further recognized that the traditional sequencing is “especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” *Id.*

judicial enforcement of the provision at issue would be “impracticable and anomalous.” *Id.* at 759 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)); *see also id.* at 759-760 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)). Applying that functional test to the detentions at Guantanamo, the Court in *Boumediene* found that there is nothing about the citizenship of the detainees, the characteristics of Guantanamo or the nature of the rights at issue that should deprive the men detained of the constitutional right to habeas corpus review. 553 U.S. at 766-771.

The *Boumediene* Court’s reasoning compels the same result with respect to the Fifth Amendment due process clause, even if its ultimate holding were limited to the Suspension Clause. There is nothing less fundamental about the nature of the rights at issue here, *see Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (torture is inconsistent with “fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions” (internal quotations and citation omitted)), or more “impracticable about their application at Guantanamo, than in *Boumediene*, 553 U.S. at 768-69 (finding that “[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.” (citing *Rasul v. Bush*, 542 U.S. at 480)).

While this Court stated in *Kiyemba v. Obama* that “the due process clause does not apply to aliens without property or presence in the sovereign territory of the

United States,” 555 F.3d 1022, 1026-27 & n.9 (D.C. Cir. 2009), reinstated with modifications on remand, 605 F.3d 1046 (D.C. Cir. 2010), that reasoning was unequivocally rejected by the Supreme Court in *Boumediene* and the precedents it affirmed. *Boumediene*, 553 U.S. at 762-764 (rejecting a formalistic reading of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that “would have marked not only a change in, but a complete repudiation of, the Insular Cases’ (and later *Reid*’s) functional approach to questions of extraterritoriality); *see also Kiyemba*, 555 F.3d at 1038 (Rogers, J., concurring); *compare Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (applying “impracticable and anomalous” test). There is no analytical distinction between the Suspension Clause, which inarguably applies to men detained at Guantanamo, and other fundamental rights.¹⁵ To the extent *Kiyemba* maintains a categorical rule that non-citizens without property or presence in the United States can be tortured and killed by U.S. officials because they have no constitutional rights (other than the specific right to habeas corpus), it is fundamentally in conflict with *Boumediene*, analytically unsound and should be abandoned.

¹⁵ In its own *Boumediene* decision, this Court itself flatly declared as to the claim that “the Suspension Clause is a limitation on congressional power rather than a constitutional right,” “this is no distinction at all.” *Boumediene v. Bush*, 476 F. 3d 981, 993 (D.C. Cir. 2007); *see also id.* at 993 (“There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, ‘people,’ ‘person,’ and ‘the accused’) That cannot be right.”).

B. Defendants Had Fair Notice by 2006 that the Alleged Killing of Appellants' Relatives Was Unconstitutional.

The district court further erred in concluding that no reasonable government official could have had notice that the alleged torture and arbitrary killing and detention of Appellants' relatives was unconstitutional even by the time of the men's deaths in June 2006 because the Supreme Court had not yet decided *Boumediene*. App. at 18 (*Al-Zahrani*, 684 F. Supp.2d at 112 n. 5); App. at 36-37 (Mem. Op. and Order (Sept. 29, 2010), at 12-13 n.5). But the "clearly established" prong does not mean that "the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985)). The dispositive inquiry, rather, is whether "in the light of pre-existing law[,] the unlawfulness [was] apparent." *Hope*, 536 U.S. at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

As discussed above, the *Boumediene* decision was rooted in over a century of Supreme Court jurisprudence considering extraterritoriality questions and answering them the same way; it did not declare a new rule. *See* 533 U.S. at 799 (Souter, J., concurring) ("But whether one agrees or disagrees with today's decision, it is no bolt out of the blue."). The Court noted that it had discussed the issue of the Constitution's extraterritorial application "on many occasions" and that its prior precedent "undermined" the Government's argument "that, at least as applied to

noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.” *Boumediene*, 553 U.S. at 755 (emphasis added).

Even under a more constrained reading of this jurisprudence, the district court failed to consider significant legal developments that took place after the period of the alleged conduct considered in *Rasul II*, which would have put Defendants on further notice of the deceased’s rights. Most notably, in June 2004, the Supreme Court decided *Rasul v. Bush*, roundly rejecting any unreasonable and unsupported notion that the prison at Guantanamo exists in a zone beyond the reach of U.S. laws. The Court held that the presumption against extraterritoriality had no application at Guantanamo, because petitioners were being “detained within ‘the territorial jurisdiction’ of the United States.” *Rasul*, 542 U.S. at 480 (citation omitted); *see also id.* at 476 (finding that “the United States exercises exclusive jurisdiction and control” at Guantanamo); *id.* at 487 (Kennedy, J., concurring) (“Guantanamo Bay is in every practical respect a United States territory.”). In holding that non-citizens detained at Guantanamo have the right to petition for writs of habeas corpus pursuant to the federal habeas statute, the Court also strongly implied that those detainees can assert constitutional violations. *Id.* at 483 n.15 (stating that “[p]etitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years ... without access to counsel and without being charged with any

wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’ 28 U.S.C. § 2241(c)(3). Cf. *Verdugo-Urquidez*, 494 U.S. at 277-278 (Kennedy, J., concurring), and cases cited therein’); see also Brief of Amici Curiae Certain Former Federal Judges in Support of Petitioner, *Hamdan v. Rumsfeld*, No. 05-184 (U.S. 2006) at 3, available at www.hamdanvrumfeld.com/FormFedJudges_HamdanAmicusFinal.pdf (“The Court’s references to access to counsel and the right to be charged once imprisoned suggest that the Court found that the petitioners had legitimately asserted constitutional violations. The Court’s reference to Justice Kennedy’s concurrence in *Verdugo-Urquidez* makes this clear.”).¹⁶

¹⁶ In the first judicial decision considering the constitutional rights of Guantanamo detainees following *Rasul*, the district court held that

careful examination of the specific language used in *Rasul* reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases. . . . [T]here can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation . . . is one of the most fundamental rights recognized by the U.S. Constitution. In light of the Supreme Court’s decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.

In re Guantanamo Detainee Cases, 335 F. Supp.2d 443, 461, 464 (D.D.C. 2005). Although this Court vacated the district court’s decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), reversed by *Boumediene*, 553 U.S. at 723, the district court decision was not vacated until 2007, after the period of the alleged conduct here.

Moreover, additional sources would have given Defendants fair notice of the unconstitutionality of their alleged conduct.¹⁷ In October 2004, Congress passed the Reagan Act in response to reports of the abuse of detainees in U.S. military custody in Iraq. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091, 118 Stat. 1811, 1091 (codified at 10 U.S.C. § 801 note (2005)). The Act applies to all detainees “in the custody or under the physical control of the United States as a result of armed conflict.” § 1091(c). The Act expressly provides that

the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States; and

no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of United States.

The Act also states that it is “the policy of the United States to

¹⁷ “[T]he absence of a Supreme Court or circuit decision is not, as defendants suggest, by itself dispositive of qualified immunity.” *Fletcher v. United States Parole Comm’n*, 550 F. Supp. 2d 30, 43 (D.D.C. 2008) (citing *Hope*, 536 U.S. at 739). “Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established.” *Inouye v. Kemma*, 504 F.3d 705, 714 (9th Cir. 2007) (quoting *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996)); *see also* *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902-04 (6th Cir. 2004) (“Other sources [besides case law] can also demonstrate the existence of a clearly established constitutional right.”); *see, e.g., Hope*, 536 U.S. at 743-44 (citing state correctional regulations); *Groh v. Ramirez*, 540 U.S. 551, 564 & n. 7 (2004) (citing police department guidelines); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (citing state regulations).

investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States; and

ensure that all personnel of the United States Government understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment.

§§ 1091(a)(6),(8) and 1091 (b)(1)-(3).

Indeed, in a report to the United Nations Committee Against Torture on the United States' compliance with the prohibition on torture in April 2006, two months before the deaths of Appellants' relatives, the State Department stated the government's long-standing position clearly and unequivocally:

[T]he U.S. government is clear in the standard to which all entities must adhere. ... all components of the U.S. government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment, as defined in U.S. law. The U.S. government does not permit, tolerate, or condone unlawful practices by its personnel or employees under any circumstances. ...

U.S. policy regarding the care and treatment of detainees under its control is clear. Alberto Gonzales, then Counsel to the President, stated: " ... [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable."

United States Written Response to Questions Asked by the Committee Against

Torture 20, 24 (April 28, 2006), *available at*

<http://www.state.gov/g/drl/rls/68554.htm>.

Finally, there should also have been no question for Defendants about the unequivocal prohibition of the nature of the alleged conduct itself—of torture and arbitrary killing and detention—under the Constitution, the law of nations, and U.S. military laws and regulations.¹⁸

In light of the state of law and policy at least by June 10, 2006, when Appellants allege their relatives were killed, it would have been clear to any reasonable officer in Defendants' position that his conduct was unlawful. *Saucier*, 533 U.S. at 202.

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

A. The Evidence of the Off-Site Killing of Appellants' Relatives Creates a Material Dispute about Whether Defendants Were Acting within the Scope of their Employment.

1. The Evidence Should Have Been Considered against the Full Scope of Employment Test.

In denying reconsideration of its prior holding that Defendants are entitled to immunity pursuant to the Westfall Act, the district court concluded in a single cursory paragraph that “nothing” in the eye-witness accounts of the four soldiers was

¹⁸ *Jus cogens* norms prohibit a “handful of heinous actions” including torture and summary execution. *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (citation omitted); *see also* Restatement (Third) of Foreign Relations Law § 702 cmt. N. U.S. military laws proscribe similar prohibitions. *See, e.g.*, The Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. § 890 *et seq.*; U.S. Dep’t of the Army, Army Reg 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-5(a)(4) (1997); U.S. Dep’t of the Army, Army Field Manual 43-52, Intelligence Interrogation, ch. 1 at 1-8 (1992).

“inconsistent with the conclusion that defendants were acting within the scope of their duties in connection with their ‘positions as military, medical, and civilian personnel in connection’ with Guantanamo” or “demonstrates that the individually named defendants were not ‘on the job’ when committing the alleged conduct.” App. 40 (Mem. Op. and Order (Sept. 29, 2010), at 16) (citing *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008)).

The truncated test applied by the court—which was dicta in *Harbury*—does not reflect the full scope-of-employment inquiry required under D.C. law and argued by Appellants below, and was an abuse of discretion. The test requires examination not only of whether alleged conduct is similar to or an outgrowth of a defendant’s authorized duties—or, in the words of the district court, whether Defendants’ alleged conduct was “in connection with their positions” and demonstrated that they were “on the job”—but of several additional factors, each of which must be satisfied for conduct to fall within the scope. *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) (“consistent with the Restatement’s use of the conjunctive, both remaining prongs must favor Ballenger if we are to find that he acted within the scope of employment”); see *Healy v. United States*, 435 F. Supp. 2d 157, 163, 164 (D.D.C. 2006) (discussing as separate prongs with separate analyses whether the alleged conduct occurred while the defendant was “on the job,” acting within the authorized time and space limits, and actuated by a purpose to serve the employer).

Indeed, a defendant can be “on duty” and acting in connection with his authorized duties, and still commit an act that falls outside the scope of his employment if the conduct occurs outside authorized premises, if it does not serve his employer’s interest, or, where he uses intentional force, the use of force is far beyond what would be “expectable.” *Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006) (citing *M.J. Uline v. Cashdan*, 171 F.2d 132 (D.C. Cir. 1949)) (“Even though the hockey player was playing hockey, the conduct for which he was employed, and was doing so at the time and place he was employed to play, still we found that a reasonable jury could yet determine that he was not acting out of a desire to serve his employer when he struck the blow and was thus not acting within the scope of his employment.”).

The Restatement (Second) of Agency § 228 (1958) provides the appropriate framework in this case for determining whether Defendants’ conduct is within the scope. *See Majano*, 469 F.3d at 141. According to Restatement § 228(1):

The conduct of an employee is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

In their motion for reconsideration, Appellants argued that the new evidence raised a material question about whether Defendants were acting pursuant to their authorized duties, within authorized space limits, in their employer’s interest, and

using a permissible degree of force. A material dispute about any of these issues would have been enough to warrant their request. The district court abused its discretion in applying only part of the test required and in concluding on the basis of that incomplete inquiry, despite the grave and material questions raised by the new evidence and its extraordinary nature, that Defendants were protected because they were ostensibly still “on the job.”

2. Under the Proper Test, the New Evidence Warrants Reconsideration.

If the district court had undertaken the correct inquiry, it would have been clear that the new evidence creates a material dispute about whether Defendants were acting within the scope of their authorized duties and warrants reconsideration. This case is not like *Rasul*, where this Court found that “nothing would be gained” by conducting an evidentiary hearing given that the district court had assumed the truth of the allegations and still held that it was within the scope of Defendants’ authorized duties. *Rasul I*, 512 F.3d at 660. Assuming the truth of Appellants’ proposed amendments, which raise material questions about each aspect of the Restatement test, but which Appellants have been denied the opportunity to plead, the same cannot be said here.

As an initial matter, the government’s scope-of-employment certification for the individual Defendants “does not conclusively establish as correct the substitution

of the United States.” *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). The certification has “no particular evidentiary value” and is entitled to only “prima facie effect.” *Kimbro*, 30 F.3d. at 1509 (citing *Melo v. Hafer*, 13 F.3d at 747). If a plaintiff presents specific facts rebutting the certification and raising a material dispute about the scope issue, the court must hold an evidentiary hearing. *See Kimbro v. Velton*, 30 F.3d 1501, 1509 (D.C. Cir. 1994); *see also Wuterich v. Murtha*, 562 F.3d 375, 378 (D.C. Cir. 2009) (describing burden as “minimal”); *Lyon v. Carey*, 533 F.2d 649, 651 (D.C. Cir. 1976) (scope of employment is issue of fact that generally cannot be determined at motion to dismiss stage); *Majano*, 469 F.3d at 141 (“On the infrequent occasions when courts have resolved scope of employment questions as a matter of law ... it has generally been to hold that the employee’s action was not within the scope of her employment and thus to absolve the employer of any liability.”).

As discussed above, the new evidence here is nothing less than the eyewitness accounts of four decorated soldiers who were on duty at Guantanamo the night Appellants’ relatives died and were compelled by their consciences to come forward four years later at great professional and personal risk to reveal what they had seen. Their direct observations undercut key findings of the NCIS report and provide evidence of a cover-up, and point to a different set of circumstances under which the men died not by their own hands in their cells, but at the hands of the authorities at an

off-site facility outside of those authorized for military detention and interrogation. The accounts of these soldiers are material, credible and extraordinary under the circumstances, and certainly enough to merit reconsideration of the court's prior holding—one that was premised on a materially different set of facts.

The accounts are also “newly-discovered” for the purposes of Appellants’ reconsideration motion. While the district court expressly declined to resolve this question, App. 25 (Mem. Op. and Order (Sept. 29, 2010)), Appellants submit that their failure to present the evidence to the district court prior to its dismissal order was not for lack of due diligence, but because of it. *See* Reply in Support of Mot. for Recon. at 2-5 (discussing the context in which Defendants’ arguments should be considered and specific steps taken by Appellants after discovery of the evidence). Unlike this case, in all of the cases cited by Defendants to keep the evidence out of court, the plaintiffs claimed inadvertence or offered no plausible explanation at all for their delay, and the time between the availability of the evidence and its presentation to the court ranged from several months to several years. *Id.* at 3-4 (discussing cases). In the single case Defendants cited from this Circuit, the plaintiff himself conceded that the five-month-old evidence was not “new” for reconsideration purposes. *Id.* at 4.

Applying the proper test to the evidence, the conduct at issue must be of the “same general nature” as that authorized or “incidental” to it in order to satisfy the

first prong of § 228(1). *See Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995) (citing Restatement § 228). In *Rasul I*, this Court affirmed the district court’s conclusion that the defendants’ alleged torture of the plaintiffs was “incidental to the conduct authorized” because it found—as the Court noted the plaintiffs themselves alleged—that the torture was “intended as interrogation techniques to be used on detainees” and was “tied exclusively to the plaintiffs’ detention in a military prison and to the interrogations conducted therein.” *Rasul I*, 512 F.3d at 656. Critically, Appellants’ proposed amendments do not allege that their relatives’ deaths occurred in connection with their interrogations pursuant to official policies. App. at 122-135 (Proposed Second Am. Compl. ¶¶ 219, 221, 223-228, 230, 241, 246, 250, 255, 259, 269-271) (alleging that Defendants “acted outside of official policies and standard procedures”). To the contrary, they submit evidence and allege that the deaths occurred in a context beyond that authorized for the men’s “detention in a military prison and the interrogations conducted therein.” App. at 121-122 (*id.* ¶¶ 216, 219) (alleging that “Camp No” was an “unofficial black site” separate from the “official detention facility at Guantanamo”); *see* Restatement § 229 cmt. e. (“the fact that the act is done at an unauthorized place or time or is actuated by a purpose not to serve the master indicates that the act is not within the scope of the employment”); *see also Haddon*, 68 F.3d at 1425 (“While our dissenting colleague correctly observes that the

dispute here relates to the *employer's* business, ... D.C. law also requires that the *alleged tort* arise from the *employee's* authorized duties.”) (emphasis in original).

Moreover, the shocking and explicitly prohibited nature of the conduct evidenced here, and that it was prohibited in multiple respects, is clearly a consideration in scope-of-employment analysis.¹⁹ Restatement § 230 cmt. c (“the prohibition by the employer ... accentuates the limits of the servant’s permissible action and hence makes it more easy to find that the prohibited act is beyond the scope of employment”); Restatement § 229 cmt. e (“the fact that the act is unauthorized in more than one respect is considered ... a number of slight departures from the authorized conduct may place the entire activity beyond the scope of employment”). The Restatement provides a list of ten “matters of fact” that should be considered in determining whether conduct, “although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment.” Restatement § 229(2). Appellants argued in the district court that at least five of these factors were at issue in light of the new evidence. *See* Reply in Support of Mot. for Recon. (citing Restatement § 229(a-b), (f-g), (i-j)) (discussing whether the act is commonly done; its place and purpose; its similarity in quality to

¹⁹ *See* Mot. for Recon. at 19 (citing Army Field Manual 34-52’s specific prohibition on assault through incorporation of the UCMJ, where assault in the UCMJ is defined to include, *inter alia*, “assault with a dangerous weapon or other means or force *likely to produce death or grievous bodily harm*” (emphasis added)).

that authorized; the extent of its departure from the normal method; and whether it is seriously criminal).²⁰

The nature of the conduct also relates to a separate prong of the Restatement test prohibiting the use of more than “expectable” force, which must additionally be satisfied for conduct to be within the scope. Restatement § 228(1)(d); *see Weinberg v. Johnson*, 518 A.2d 985, 990 (D.C. Cir. 1986) (“[t]he tort must be actuated, at least in part, by a purpose to further the master’s business *and not be unexpected in view of the servant’s duties*”) (emphasis added); Reply in Support of Mot. for Recon. at 9 (citing Restatement § 229, cmt. b) (arguing that an act must be “within the ultimate objective of the principal *and* an act which it is not unlikely that such a servant would do” to be within the scope) (emphasis added).

Had the court considered the evidence against the multiple factors implicated in Restatement § 229(2) and the additional requirement of “expectable” force, and recognized as well that the ultimate allegations here are not premised on official or authorized underlying conduct as in *Harbury* and *Rasul*, it is clear that the court

²⁰ Even in *Johnson v. Weinberg*, a case regularly cited as support for the proposition that criminal acts can be within the scope of employment, extensive pre-trial discovery was conducted. 434 A.2d 404, 406 (D.C. 1981). This Court has also recognized that *Johnson* and *Lyons* are at the outer edges of conduct that can be considered incidental. *See Haddon*, 68 F.3d at 1425 (citing *Boykin v. District of Columbia*, 484 A.2d 560, 563 (D.C. 1984)) (“[T]he court acknowledged that *Lyon* and *Johnson* mark the outer limits of scope of employment.”).

would not have reflexively held that Defendants were still “on the job” despite the new evidence.

Whether conduct occurs substantially within authorized time and space limits, in addition to factoring into the analysis above, is a separate prong of the Restatement test. *See, e.g., CNA v. United States*, 535 F.3d 132, 146-47 (3d Cir. 2008) (upholding a district court decision based on Restatement § 228 that the defendant’s “conduct was outside the scope of his employment because it occurred in an unauthorized time and space,” and looking to Army regulations prohibiting the conduct at issue). Appellants submit evidence that their relatives were transported to a location outside the perimeter of the main prison camp at Guantanamo that was not authorized for military detention and interrogation, and died there or from events occurring there.

A “substantial” departure is not only measured by physical distance, however: where conduct is authorized only on the “employer’s premises ... an intentional departure from the premises, even for a comparatively slight distance, would remove servants so acting from within the scope of employment.” Restatement (Second) Agency § 234 cmt. d. (“as where operatives in a factory, without the master’s knowledge, transfer their activities to an adjacent street”). That the military designated specific facilities for the detention and interrogation of detainees, and that Camp No was not one of them, raises further questions about whether the conduct occurred within authorized space limits. *See* Mot. for Recon. at 21 (citing Standard

Operating Procedures at Guantanamo providing that authorized interrogations can only be held in one of three specific locations within Camp Delta).

Even where conduct is foreseeable and occurs within permissible space limits, it must also be motivated by a purpose to serve the employer for it to be within the scope. *See Majano*, 469 F.3d at 142 (“[e]ven though the hockey player was playing hockey, the conduct for which he was employed, and was doing so at the time and place he was employed to play, still we found that a reasonable jury could yet determine that he was not acting out of a desire to serve his employer when he struck the blow and was thus not acting within the scope of his employment.”); *Jordan v. Medley*, 711 F.2d 211, 214 (D.C. Cir. 1983) (“foreseeability must be combined with a purpose to further the employer's interest”) (citations omitted).

The nature of conduct and other “manifestations of the servant and the circumstances” are important as evidence of intent. *Schecter v. Merchs. Home Delivery, Inc.*, 892 A.2d 415 (D.C. Cir. 2006) (citing Restatement § 235 cmt. a). In *Jordan*, this Court found that while the act of brandishing a semi-automatic weapon during a heated dispute over a matter related to the employer’s business might well be foreseeable, the nature of the act permitted “the imputation of a purely personal motivation,” and the trial court had erred in instructing the jury that the employee was acting within the scope of employment. 711 F.2d at 216 (quoting *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27, 31 (D.C. Cir. 1979)); Restatement §

235, cmt c (“[T]he fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer’s business.”). As the Court observed, in the case of an intentional tort in particular, “a directed verdict would be particularly rare ...[because] its nature is willful and thus more readily suggests personal motivation.” *See Jordan*, 711 F.2d at 215; *see also Lyon*, 533 F.2d at 655 (“[i]t is, then, a question of fact for the trier of fact, rather than a question of law for the court, whether the assault stemmed from purely and solely personal sources or arose out of the conduct of the employer’s business”).

Evidence of the cover-up of wrongful conduct can also suggest a motive divorced from serving the employer. *See Chandler v. Wackenhut Corp.*, 2010 U.S. Dist. LEXIS 3509 (W.D. Mich. Jan. 19, 2010) (“Assuming the factual truth of plaintiff’s allegations ... [regarding a conspiracy] to cover up the decedent’s rape and murder, his actions cannot be said to have been committed within the scope of his authority or course of his employment by defendant.”); *Johnson v. Knorr*, 2005 U.S. Dist. LEXIS 28706 (E.D. Pa. Nov. 9, 2005) (“[I]t is not clear that the interests of defendant’s employer were served by defendant’s decision to assault plaintiff, rather than to help a seizure victim ... and then to manufacture evidence of a fictitious assault committed by plaintiff”).

The intent analysis also focuses on a defendant's intent *at the moment* of the tort, meaning that a tortfeasor who is originally motivated by a purpose to serve his employer can "turn aside" from that purpose by the time of the act. *See Majano* 469 F.3d at 142 (citing *Schechter*, 892 A.2d at 427) ("[T]he moment the agent turns aside from the business of the principal and commits an independent trespass, the principal is not liable."). In *Uline*, the Court found that while a hockey player who struck a spectator during an active game could have been motivated by a desire to win the game or make it interesting, thus serving his employer, a reasonable jury could also have concluded that, "at the moment when he struck the blow," the player was "completely indifferent to the work he was employed to do and actuated only by anger or hostility" toward the spectator, and that the jury should have been allowed to determine the player's intent. *M.J. Uline, Co.*, 171 F.2d at 134; *see also* Restatement § 235, cmt. a) ("Even if appears to be done for the purpose of serving the master, it's the state of mind that's material.").

In light of the evidence of a cover-up of the cause and circumstances of Appellants' relatives' deaths, and that they may actually have been killed at an unofficial, off-site facility, it would not be unreasonable to posit, even assuming that Defendants' underlying motive was proper, that at some point Defendants departed from that original purpose. If the district court had considered the question of intent, the evidence would have warranted reconsideration.

Taken together, the evidence was clearly sufficient to raise a material dispute about whether Defendants were acting within the scope of their employment. The district court abused its discretion in failing to consider the evidence within the full framework of the Restatement test and, in so doing, denying reconsideration on the basis of only a partial application of the proper test.

3. *Rasul* Would Not Bar Appellants' Proposed Amended Claims.

In dicta, the district court observed that the alleged conduct, even if unauthorized, would still fall within the scope of employment under *Rasul* and other decisions of this Circuit, since “even activities that are ‘forbidden’ by an employer are ‘within the scope of employment when actuated, at least in part, by a purpose to serve the [employer].” App. at 40-41 (Mem. Op. and Order (Sept. 29, 2010), at 16-17 n.9). In suggesting that Appellants’ amended claims would also be precluded, the court again mischaracterized the proper test for scope of employment under D.C. law and misapplied the holding of *Rasul*.

For one, acts that are forbidden by an employer *can be* within the scope of employment if they are actuated by a purpose to serve the master *and* incidental to authorized conduct. Restatement § 228(1)(a), (c); *Weinberg*, 518 A.2d at 990 (“[t]he tort must be actuated, at least in part, by a purpose to further the master’s business *and* not be unexpected in view of the servant’s duties”) (emphasis added). As discussed above, where acts are unauthorized, the Restatement provides several

factors that should be considered in determining whether an act is nevertheless sufficiently similar or incidental to authorized conduct. *See supra* Pt. III.A.2. To be within the scope of employment, forbidden acts must also be within authorized time and space limits and any intentional force must not be “unexpected.” Restatement § 228(1)(b), (d).

Second, in *Rasul*, the Court’s finding that “allegations of serious criminality” did not alter its conclusion that the alleged torture of the plaintiffs was incidental to defendants’ authorized conduct was dependent upon finding that the torture was “intended as interrogation techniques to be used on detainees” and was “tied exclusively” to their military detention and interrogations, as the plaintiffs themselves alleged. *Rasul I*, 512 F.3d at 658; *see also Harbury*, 522 F.3d at 422; (allegations that defendants’ authorized duties gave rise to the alleged conduct). As discussed above, Appellants do not allege this predicate fact. They allege that their relatives were transported to an off-site facility that was not authorized for the military detention or interrogation of detainees at Guantanamo, and died there or from events occurring there. *See Johnson v. Knorr*, 2005 U.S. Dist. LEXIS 28706 (E.D. Pa., Nov 9, 2005) (scope of employment analysis driven by the unique facts of a particular case).

Furthermore, *Rasul* considered only whether conduct that is “seriously criminal” could be “of the kind” the defendants were employed to perform. *Rasul II*, 414 F. Supp. 2d at 34. The plaintiffs in *Rasul* did not raise the additional factors of

Restatement 229 that should be considered in determining whether unauthorized conduct is within the scope of employment, or the remaining factors of Restatement 228, as Appellants raise here. *See Rasul II*, 414 F. Supp. 2d at 34.

B. Grave Violations of the Law of Nations Cannot Be within the Scope of Employment of U.S. Officials.

To the extent the Court finds that the district court's truncated test properly articulated and applied the Restatement factors raised by Appellants in their request for reconsideration, Appellants submit that the extrajudicial killing evidenced here, and the torture, cruel and degrading treatment, prolonged arbitrary detention, and violations of the Geneva Conventions alleged in their amended complaint, can never be within the scope of employment of U.S. officials. Such grave violations of international law cannot be said to be "incidental" to their authorized duties or "expectable" in view of those duties. *See* Restatement § 231, cmt. a ("The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but *serious crimes are not only unexpected but in general are in nature different fro what servants in a lawful occupation are expected to do.*" (emphasis added)).²¹ Granting immunity for such conduct under the Westfall Act

²¹ To the extent that *Rasul I* and *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), held that torture and arbitrary detention are within the scope of employment for federal officials, this Court should reconsider those decision because they transplanted several outlier cases from the District of Columbia regarding *respondeat superior* to a context that the doctrine was never intended to cover. *See, e.g., Rasul I*,

would pervert Congress's intent in enacting the law.²² It would also violate the principle that federal statutes should be construed in a manner that would not violate the law of nations. *Port Auth. Of N.Y. & N.J. v. DOT*, 479 F.3d 21, 31 (D.C. Cir. 2007) (“[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains.”) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). Although the district court relied on this Court's holdings in *Rasul* and *Harbury* in granting the United States' motion to substitute, Appellants respectfully submit that those holdings should be reconsidered .

IV. APPELLENTS SHOULD BE ALLOWED TO AMEND THEIR COMPLAINT WITH THE NEW EVIDENCE REGARDING THE DEATHS OF THEIR RELATIVES.

The district court abused its discretion in denying Appellants the opportunity to amend their complaint with the new evidence. Once the more stringent standard of Rule 59(e) is satisfied, the liberal standard of Rule 15(a) governs. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Under Rule 15(a), leave to amend

512 F.3d at 660 (citing *Lyon*, 533 F.2d at 649); *see also Lyon*, 533 F.2d at 651 (noting that its holding in *Lyon* that a rape and stabbing of a customer was within the scope of employment was “perhaps at the outer boundaries of respondeat superior”).

²² Congress never intended the Westfall Act to immunize federal officials for egregious conduct such as torture, killing or arbitrary detention. *See, e.g.*, H.R. Rep. No. 100-700, at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949 (“[I]f an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.”).

“shall be freely given when justice so desires.” Fed. R. Civ. P. 15(a). It is an abuse of discretion to deny leave to amend unless there is a sufficient reason, such as “undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments ... [or] futility of amendment.” *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). None of these rearguments justify denial of Appellants’ motion. The district court abused its discretion in denying Appellants’ motion for reconsideration and in thus failing to consider and denying Appellants’ motion for leave to amend.

As an initial matter, the absence of any explanation by the district court for its decision to deny leave to amend, beyond finding that Appellants’ new evidence did not warrant reconsideration, was an abuse of discretion. While, “the grant or denial of an opportunity to amend is within the discretion of the District Court,” the “outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.” *Foman*, 371 U.S. at 182.

Appellants have demonstrated that amendment would not be futile because it is not clear that Appellants’ claims “would not survive a motion to dismiss.” *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004). Although the district court did not explain whether it believed that Appellants’

proposed new and amended claims would be futile, it would be an abuse of discretion to find that they necessarily would not survive a motion to dismiss.

Appellants' proposed amended *Bivens*' claims would not clearly be barred by special factors, and Defendants' would not be entitled to qualified immunity. As argued above, that a claim implicates national security does not necessarily foreclose a *Bivens* remedy, and the concerns that animated the special factors holdings in *Sanchez Espinoza* and *Rasul II* are not at issue here. *See supra* Pt. I.

Further, *Rasul II* does not clearly lead to a conclusion that defendants are entitled to qualified immunity. Appellants allege that their relatives were killed at Guantanamo in 2006, two years after the time of the allegations the court considered in *Rasul v. Bush*. In light of key legal developments during that two-year time period and the state of the law long before, which made clear that the question of the extraterritorial reach of the constitution does not depend on formal notions of sovereignty, it strains credulity to say that no reasonable federal officer at Guantanamo in 2006 could have had fair notice that the killing of detainees was unconstitutional. *See supra* Pt. II. B. The lack of a Supreme Court or a circuit court opinion on the very action in question is not dispositive of qualified immunity. *See Anderson*, 483 U.S. at 640.

Neither would Defendants clearly be entitled to Westfall immunity for the conduct alleged in Appellants' new and amended ATS and claims. To the contrary,

the alleged conduct distinguishes this case from *Rasul II* in important respects and, at the very least, creates a material dispute about whether defendants were acting within the scope of their employment, vis-à-vis each prong of the Restatement test. *See supra* Pt. III. It is similarly not clear that Defendants would have Westfall immunity for the conduct alleged in Appellants' new spoliation of evidence claim brought under D.C. law; even if the substitution of the United States were granted, it is not clear that the claim would be dismissed under the foreign country exception to the FTCA, since the civil action harmed by the alleged spoliation of evidence is this action in the District of Columbia.

Appellants also propose a new claim under 42 U.S.C. § 1985(3) that similarly survives Rule 15(a)'s futility standard. That claim is not barred by any territorial limitation, as the plain language of the statute applies to "any State or territory" and Guantanamo is *de facto* and juridical U.S. territory. *Boumediene*, 553 U.S. at 769. It does not implicate the headquarters doctrine in *Sosa*, as the statute here establishes liability whenever there is a *conspiracy* in any State or territory, and Appellants allege that a *conspiracy* concerning their relatives occurred in part in Washington, DC. App. 94-95 (Proposed Second Am. Compl. ¶ 103). And qualified immunity is no defense, as the statute has no state action requirement and does not protect nor intend to protect the discretionary functions of public officials. *See Griffin v.*

Breckenridge, 403 U.S. 88 (1971). Indeed, the government cannot cite any binding authority for the proposition that such a defense is available to a § 1985(3) claim.

Appellants' amended and new claims are not clearly futile, and their motion for leave to amend should have been granted. The district court's denial of that opportunity was an abuse of its discretion.

CONCLUSION

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

Dated: June 13, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32. It contains 12,358 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: June 13, 2011

/s/ Pardiss Kebriaei

Pardiss Kebriaei

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I hereby certify that on June 13, 2011, I electronically filed the BRIEF OF APPELLANTS and APPENDIX with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system.

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

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

Dated: June 13, 2011

/s/ Pardiss Kebriaei

Pardiss Kebriaei

ADDENDUM – STATUTES AND REGULATIONS

1. 28 U.S.C. § 1350 (Alien Tort Statute)
2. 28 U.S.C. § 2679 (Westfall Act)

ADDENDUM 1

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*** CURRENT THROUGH PL 112-14, APPROVED 5/26/2011 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

Go to the United States Code Service Archive Directory

28 USCS § 1350

§ 1350. Alien's action for tort

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

ADDENDUM 2

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 171. TORT CLAIMS PROCEDURE

Go to the United States Code Service Archive Directory

28 USCS § 2679

Review expert commentary from The National Institute for Trial Advocacy

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this *title* [28 USCS § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this *title* [28 USCS §§ 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

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

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

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

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

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

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

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition

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

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this *title [28 USCS § 1346(b)]* and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this *title [28 USCS § 2675(a)]*, such a claim shall be deemed to be timely presented under section 2401(b) of this *title [28 USCS § 2401(b)]* if--

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

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

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 [28 USCS § 2677], and with the same effect.