**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **YUKSEL CELIKGOGUS, *et al.*,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 06-CV-1996 (HHK)** |
| **DONALD RUMSFELD, *et al.*,** | ) | |
| **Defendants.** | ) | |

**REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendants, former Secretary of Defense Donald Rumsfeld, former Chairman, Joint Chiefs of Staff General Richard Myers, former Chairman, Joint Chiefs of Staff General Peter Pace, General James T. Hill, General Bantz J. Craddock, Major General Michael Lehnert, 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 General Nelson J. Cannon, Colonel Michael I. Bumgarner, Colonel Wade F. Dennis, and Mr. Esteban Rodriguez, respectfully submit this reply in further support of their motion to dismiss the Second Amended Complaint (SAC) as a matter of law, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

**ARGUMENT**

Plaintiffs' opposition neither distinguishes the United States Court of Appeals for the District of Columbia Circuit's holding in Rasul v. Myers, 563 F.3d 527 (D.C. Cir.) (Rasul II), cert. denied, 130 S. Ct. 1013 (2009) (reaffirming Rasul v. Myers, 512 F.3d 644 (D.C. Cir.) (Rasul I), vacated and remanded, 129 S. Ct. 763 (2008)), from their claims, nor does it overcome the

fact that Rasul II forecloses recovery for Plaintiffs on any and all claims raised. Defendants rely on the Court of Appeals' holding in Rasul as authority to dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because it is a case which this Court held was related to the instant action and which resulted in a stay of these proceedings pending the outcome of that appeal. Moreover, Rasul II reaffirms existing Supreme Court and Circuit precedent squarely in the context of non-resident aliens detained outside United States sovereign territory who are suing federal employees solely in their individual capacities.

Plaintiffs' entire 40-page opposition can be summed up in one phrase; *a distinction without a difference*. Plaintiffs spend an inordinate amount of time explaining that Hasam and Muhammad were declared "not enemy combatants" by a Combatant Status Review Tribunal (CSRT) yet detained beyond that classification in an attempt to distance their claims from the ones that were dismissed by both this District Court and the Court of Appeals in Rasul I and Rasul II. In fact, Plaintiffs hang their opposition almost exclusively on this premise. What they fail to recognize, however, is that the relevant legal determinations in Rasul resulting in dismissal of the claims there did not hinge in any way on whether or not the plaintiffs were determined to be enemy combatants. Instead, the dismissal in Rasul was based solely on the fact that, at the time of the alleged conduct, it was not clearly established that non-resident alien detainees held outside sovereign United States territory enjoy protections under the various provisions of the Bill of Rights. In sum, this Court need look no further than that to resolve this case. See, e.g., United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either we, sitting en banc, or the Supreme Court, overrule it").

The gist of the matter is that the Plaintiffs cannot escape the fact they assert six claims *identical* to those asserted by the Rasul plaintiffs and three more which are sufficiently covered by Rasul II. First, the shared claims arise under the Fifth Amendment, the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq., ("RFRA"), and the Geneva Conventions and are no different from those Rasul II dismissed.[1] Compare SAC Counts I, II, III, IV, VII and VIII with Rasul Compl. Counts I, II, III, IV, VI and VII. Indeed, many of the allegations underlying these causes of action in the two complaints are almost verbatim. Compare SAC ¶¶ 190-92, 194, 196-98, 201-05, 208-10, 223-29, 232-36 with Rasul Compl. ¶¶ 163-65, 168-71, 174-78, 181-83, 193-96, 198-200, 204-08. Second, although the Plaintiffs raise causes of action under the First Amendment, the Vienna Convention on Consular Relations and the Federal Civil Rights Act, 42 U.S.C. § 1985(3) (see SAC Counts V, VI and IX) which were not raised by the Rasul plaintiffs, those claims do not change the fact that the Defendants' underlying conduct which the Plaintiffs allege violated their rights is *identical* in both actions and the sole basis for *all* the causes of action in each matter. Compare generally SAC with Rasul Compl.; see also Rasul I, 512 F.3d at 649, 651-52. Therefore, it cannot simply be ignored that both matters assert that the *same* detention policies implemented by the Defendants–the entire basis for the claims against the Defendants–brought about the violation of their rights. Ultimately, the important and unavoidable similarities between the two actions is conclusive.

[1] The Rasul plaintiffs also advanced a cause of action under the Eighth Amendment which was dismissed but is not claimed here. Rasul Compl. Count V.

The Plaintiffs previously conceded as much in this litigation. To be exact, in requesting a stay of all proceedings, the Plaintiffs stated that Rasul and Boumediene v. Bush, 128 S. Ct. 2229 (2008) "are directly relevant to the issues raised by this case." See Doc. 25 at 2. And although the Plaintiffs argued that Rasul may be *factually* different from the instant matter, they freely admitted that the *legal* issues are "sufficiently similar" to warrant a stay. Id. at n.3. The Plaintiffs explained in that regard:

> [A] reversal in Rasul would affect the resolution of several issues in this case, including: (1) whether Guantanamo detainees are "persons" under Religious Freedom Restoration Act ("RFRA"); (2) whether defendants' conduct falls within the scope of their employment; and (3) whether qualified immunity would apply to any or all of their conduct.

See Doc. 35 at 4-5. Based on these assertions the Court granted the Plaintiffs' motion for further stay until the Supreme Court's decision in Boumediene issued or the exhaustion of appeals in Rasul, whichever occurred later. See Doc. 04/01/2008 Minute Order. Having previously relied on continuing efforts to overturn the outcome in Rasul–efforts that have now ended without success–the Plaintiffs can no longer avoid the consequences of that decision.

**I. Plaintiffs' constitutional claims are barred by qualified immunity.**

In the opening brief the Defendants timely and properly raised the doctrine of qualified immunity. See Doc. 43 at 7-8. Because the Supreme Court has repeatedly stressed that courts should apply qualified immunity "at the earliest possible stage of litigation," see Saucier v. Katz, 533 U.S. 194, 201 (2001) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)), modified in part by Pearson v. Callahan, 129 S. Ct. 808 (2009) (adding flexibility to Saucier two-step, qualified-immunity analysis), the question whether the Defendants are entitled to qualified

immunity must be answered before any other issue in this case is addressed. The Plaintiffs' attacks on qualified immunity fail for the following reasons.

**A. The CSRT classification is irrelevant particularly in light of the Court of Appeal's ruling regarding whether the law was clearly established at the time.**

As shown in the opening memorandum and above, the facts, issues and claims in this matter are significantly related to Rasul II such that its holding forecloses recovery here. The favorable CSRT classification for two of the five Plaintiffs is not relevant to this analysis. The Rasul plaintiffs were detained at Guantanamo from early 2002 until their release in 2004. Rasul Compl. ¶¶ 4-5; Rasul I, 512 F.3d at 650. Celikgogus, Mert and Sen were first detained at Guantanamo in mid-January 2002. See SAC ¶ 45. Celikgogus and Sen were released in November 2003 and Mert in April 2004. Id. Only Hasam and Muhammad–who were first detained at Guantanamo in June and August 2002, respectively–were released after the Rasul plaintiffs, in mid-November 2006. Id. Over one year after the last Plaintiff was released, Rasul I was decided. Rasul I, 512 F.3d at 644. Even later, in April 24, 2009, Rasul II solidified the decision that constitutional rights for alien detainees at Guantanamo were not clearly established at the time. Before the date of Rasul II, it would not–in fact it could not–be reasonable thought that it was clear that alien detainees at Guantanamo were entitled to constitutional rights. The Court of Appeals specifically stated "even if those rights had been violated, qualified immunity shields the defendants because the asserted rights were not clearly established at the time of plaintiffs' detention." Rasul II, 563 F.3d at 528. More importantly, it stated without reservation that the Supreme Court in Boumediene (the sole reason Rasul I was remanded to the Court of Appeals):

> acknowledged that *it had never before determined that the Constitution protected aliens detained abroad*, id. at 2262, and explicitly confined its constitutional holding "only" to the extraterritorial reach of the Suspension Clause, id. at 2275. The Court stressed that its decision "does not address the *content of the law* that governs petitioners' detention." Id. at 2277 (emphasis added). With those words, the Court in Boumediene *disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions*, other than the Suspension Clause.

Rasul II, 563 F.3d at 529 (emphasis added). In fact, as the Court of Appeals recognized, the Supreme Court in Boumediene forecloses once and for all any recovery for Plaintiffs. First, citing to Rasul I, it emphatically stated:

> *No reasonable government official would have been on notice* that plaintiffs had any Fifth Amendment or Eighth Amendment rights. Id. at 666. At the time of their detention, neither the Supreme Court nor this court *had ever held* that aliens captured on foreign soil and detained beyond sovereign U.S. territory *had any constitutional rights–under the Fifth Amendment,* Eighth Amendment, *or otherwise*.

Rasul II, 563 F.3d at 530 (emphasis added). The Court of Appeals continued:

> The [Supreme] Court in Boumediene recognized just that: "It is true that before today *the Court has never held* that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty *have any rights under our Constitution*."

Rasul II, 563 F.3d at 530 (emphasis added). To hold otherwise as Plaintiffs request would require this Court to reject outright Supreme Court and Circuit precedent based on nothing more than an illusory and irrelevant distinction; a distinction Plaintiffs do not even argue applies to their constitutional claims.

In the end the analysis returns to the Court of Appeals' holding, consistent with Supreme Court and Circuit precedent, that the Bivens claims are barred by qualified immunity because it was not clearly established at the time of the alleged misconduct that aliens outside sovereign United States territory possessed constitutional rights. Rasul I, 512 F.3d at 665-67; Rasul II, 563 F.3d at 530-32. No legal authority could "support[] a conclusion that military officials would

have been aware, in light of the state of the law at the time [2002-2004], that detainees [in Cuba] should be afforded the [constitutional] rights they now claim." Rasul I, at 666-67; see also Rasul II, 563 F.3d at 530 n.3.[2]

**B. The Court should not address the first prong of qualified immunity.**

The Plaintiffs want the Court to ignore not only the holding in Rasul II, but also the fact the Court of Appeals used its discretion under Pearson to address only the second prong of qualified immunity to reach that holding.[3] See Doc. 45 at 25-28. The Plaintiffs request that this Court contradict the approach taken by the Court of Appeals and actually decide whether alien detainees at Guantanamo Bay are entitled to constitutional protections even if this Court determines that such rights were not clearly established at the time such that the Plaintiffs' claims must be immediately dismissed.[4] Such an approach cannot be justifiable under the circumstances. There is no question that in a case like this–where the D.C. Circuit has already

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[2] See In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85 (D.D.C. 2007) (Hogan, C.J.); see also Al-Zahrani v. Rumsfeld, slip op. No. 09-0028, 2010 WL 535136 at 13 n.5 (D.D.C. Feb. 16, 2010) (Huvelle, J.) ("Even if plaintiffs' claims were not foreclosed under the Bivens special factors analysis, their claims would fail because under Rasul II, defendants would be entitled to qualified immunity.").

[3] With regard to the Bivens claims, the Court of Appeals held that in light of Pearson it no longer needed to reach the constitutional issue (i.e., whether detainees at Guantanamo possess constitutional rights), but rather could simply rule that at the time in question such rights were not clearly established. Rasul II, 563 F.3d at 530-32. In addition to affirming the dismissal of the Bivens claims based on qualified immunity, id. at 532, the Court of Appeals also held that "special factors" (i.e., national security, foreign affairs, and military policy) were another, alternative ground for rejecting the constitutional claims. Id. at 532 n.5. The Court of Appeals then concluded that the "Bivens claims are therefore foreclosed on this alternative basis ...." Id.

[4] Pearson, 129 S. Ct. at 818 ("[T]he rigid Saucier procedure ... sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.").

provided a veritable road-map dictating dismissal on qualified immunity grounds–that there is no basis for this Court to undertake a complicated and far-reaching constitutional analysis that the Court of Appeals recently declined to take under Pearson on identical claims.[5]

**II. Plaintiffs' constitutional claims are also barred by the special factors doctrine.**

The Plaintiffs also misread the Court of Appeals' acceptance of Judge Brown's concurrence in Rasul I regarding special factors counseling hesitation against fashioning Bivens claims in this context. See Doc. 45 at 36-37; Rasul II, 563 F.3d at 532 n.5. The Plaintiffs again rely on the irrelevant CSRT classification of Hasam and Muhammad and claim that Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), is distinguishable because there is no dispute between Congress and Executive Branch at issue here. See Doc. 45 at 37. But the gist of Sanchez-Espinoza, as recognized by Judge Brown is that "[p]ermitting damage suits by detainees may allow our enemies to 'obstruct the foreign policy of our government.'" Rasul I, 512 F.3d at 673 (Brown, J., concurring) (citation omitted). The special factors analysis is not premised on some perceived political dispute.

As previously shown (see Doc. 43 at 8-9) judicial "intrusion" into military affairs is "inappropriate" regardless whether Congress has provided an adequate remedy for a plaintiff's injuries. Iraq Detainees Litig., 479 F. Supp. 2d at 106 (quoting United States v. Stanley, 483 U.S. 669, 683 (1987)). Because this Court is presented with nearly identical claims and contexts as

[5] Given that dismissal on the second prong of the qualified immunity doctrine is effectively mandated in this case by Rasul II, the Defendants have avoided briefing the underlying constitutional question in the interest of economy and brevity. However, should this Court depart from the approach followed by the D.C. Circuit and consider the underlying constitutional question, the Defendants believe additional briefing should first be ordered on that difficult and important issue.

raised in Rasul II, it would be improper to provide a money damage remedy here. Rasul II, 563 F.3d at 532 n.5. The inherent special factors in this case fully support the finding that the Plaintiffs' Bivens claims must be dismissed.[6]

**III. Scope of employment certification under Westfall Act.**

The Plaintiffs claim that the scope of employment certification may be challenged because alleged torture following the CSRT's determination that Hasam and Muhammad were not enemy combatants[7] is outside the scope of the Defendants' employment. This argument again focuses on only two of the five Plaintiffs and it is also foreclosed by the Rasul II decision.

Rasul II addressed the scope issue straight-on and concluded the Rasul plaintiffs, like the Plaintiffs here, premised their ATS and Geneva Conventions (as well as their Vienna Convention) claims "on alleged tortious conduct within the scope of defendants' employment." Rasul II, 563 F.3d at n.1. The Court of Appeals then summarily dismissed those claims for failure to exhaust the administrative remedies, which are a jurisdictional prerequisite for proceeding on tort claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80. Id.; see also Rasul I, 512 F.3d at 660, 663.

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[6] See also Al-Zahrani, 2010 WL 535136 at 13 ("The D.C. Circuit's conclusion that special factors counsel against the judiciary's involvement in the treatment of detainees held at Guantanamo binds this Court and forecloses it from creating a Bivens remedy for plaintiffs here.").

[7] Hasam, an Uzbek refugee who fled to Tajikistan because of religious persecution and was living in Afghanistan, presumably did not want to return to Uzbekistan upon his release. See SAC ¶¶ 12, 124, 146. Muhammad, an Algerian refugee voluntarily living in Pakistan, chose to stay in Albania rather than be returned to Algeria. Id. ¶¶ 13, 148, 172. Therefore, it reasonably appears any post-classification delay in releasing Hasam and Muhammad was due to their desire not to return to their homeland but to be released to some other country which would accept them and for which coordination and specific arrangements had to be made.

The Rasul II decision on scope of employment had nothing whatsoever to do with the CSRT classification determinations of the plaintiffs in that case. Instead, it is based on the clear and compelling principle that the actions allegedly taken to hold and interrogate alien detainees by military authorities at Guantanamo Bay were, by their very nature, performed on behalf of the United States and cannot fairly be characterized as the private conduct of individual officers. While it is always conceivable that federal officials involved in that operation may have made misjudgments or even grave errors on occasion that violated official policies and practices, such misconduct is not so divorced from their duties as to present a logical scope of employment issue. Under those standards, the Plaintiffs' claim here that two of them were improperly held at Guantanamo Bay and mistreated even after they received favorable CSRT classifications does not constitute a legitimate challenge to the scope of employment certification filed by the United States for the Defendants in this case.

**IV. The RFRA claim is also barred by Rasul II.**

The Plaintiffs effectively concede that the Rasul holding also summarily forecloses their RFRA claim. See Doc. 45 at 38. Still, Plaintiffs state "nothing supports the Rasul II court's limitation that the term 'religious exercise' as used in RFRA would not encompass plaintiffs' claims." Id. at 39. Although the Plaintiffs rely on Judge Brown's concurring opinion in their criticism of the majority's RFRA analysis, even Judge Brown agreed that the RFRA claim could not proceed in these circumstances. Rasul II, 563 F.3d at 533 n.6 ("In the alternative, for the reasons stated in Judge Brown's initial concurring opinion, defendants are entitled to qualified immunity against plaintiffs' RFRA claim.").

**V. Plaintiffs cannot claim a conspiracy to deny them equal protection of the law under the Federal Civil Rights Act.**

The Plaintiffs' equal protection claim under the Federal Civil Rights Act is also clearly barred on qualified immunity grounds. Defendants cannot be held liable for engaging in an alleged conspiracy to deprive Plaintiffs of their rights to equal protection because, as demonstrated above, it was not clearly established at the time of the alleged misconduct that aliens outside sovereign United States territory possessed constitutional rights. Moreover, Plaintiffs' conclusory allegations that Defendants "conspired" and "acted in concert with intent" (see SAC ¶¶ 6, 187, 239), even in the light most favorable to the Plaintiffs, are "insufficient to establish a court's jurisdiction under the conspiracy theory[]" of 42 U.S.C. § 1985(3). Islamic American Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 59 (D.D.C. 2005), aff'd in part, 477 F.3d 728 (D.C. Cir. 2007). See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-51 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). Accordingly, Plaintiffs' Federal Civil Rights Act claim should also be dismissed.

**VI. Plaintiffs are not entitled to equitable relief.**

Finally, the Plaintiffs failed to contest the argument that equitable relief is not available here because the Defendants are sued only in their individual capacities mainly on Bivens theories of recovery. See SAC ¶¶ 6, 14-29. As explained in the opening brief Bivens claims are limited to damages awards personally against current and former federal employees and do not encompass equitable relief, which may only be obtained on official capacity claims. See Doc. 43 at 13-14. The Plaintiffs also lack standing as to the requested equitable relief because they are no longer detainees, do not face future injury and the Defendants no longer hold the positions

alleged. For these reasons and because Plaintiffs do not contest these arguments, equitable relief is not available to Plaintiffs in this action.

**CONCLUSION**

As demonstrated in the Defendants' opening brief and this reply, the Plaintiffs' claims are squarely foreclosed by Rasul, as well as Supreme Court and Circuit precedent. Accordingly, the Court lacks subject matter jurisdiction to hear Plaintiffs' claims under Rule 12(b)(1) and/or the Plaintiffs have failed to state claims upon which relief may be granted under Rule 12(b)(6). Defendants therefore, respectfully request that the Court dismiss Plaintiffs' Second Amended Complaint with prejudice.

Dated: May 21, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on May 21, 2010, a true and correct copy of the foregoing "REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS" was filed with this Court electronically and served by mail on any party to this action unable to accept electronic filing. Notice of this filing will be sent by electronic mail (e-mail) to Plaintiffs' counsel and all parties by operation of the Court's electronic filing system (ECF) or by mail to any party unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF System. This reply is filed electronically pursuant to LCvR 5.4 and comports with LCvR 7.

*/s/ James G. Bartolotto*
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