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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARKAN MOHAMMED ALI, *et al.*, *Appellants*,

v.

DONALD H. RUMSFELD, *et al*., *Appellees*.

APPELLANTS' PETITION FOR INITIAL HEARING *EN BANC* AND OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

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Pursuant to Rule 35 of the Fed. R. App. P. and the Rules of this Court, Appellants respectfully submit this petition for initial hearing *en banc* and oppose Appellees' motion for summary affirmance.

1. As more fully set forth below, Appellants submit that the instant appeal should be heard *en banc* so the Court may reconsider its recent decision in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul II*"), *pet. for reh'g en banc denied*, March 26, 2008[1] and the cases on which it relies. Such initial *en banc* hearing is warranted because of the exceptional importance of the issues presented, the Court's misreading of Supreme Court precedent and an inconsistency in this Court's panel decisions.

Among the questions of exceptional importance presented in this appeal are whether fundamental constitutional norms under the Fifth and Eighth Amendments – specifically, the categorical right of a person under the exclusive custody and control of the U.S. military not be subjected to torture – can be enforced against high-ranking government officials who are alleged to have adopted and condoned practices and policies of abusing and torturing detainees. The position of the United States government, and the necessary result of district court's holding, is that *no* judicial remedy for officially-authorized torture is available to these innocent civilians subjected to systematic and officially-authorized abuse. As the government starkly conceded at oral argument in the district court, even genocide committed as official policy would be

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[1] "*Rasul II*" refers to this Court's decision in *Rasul v. Myers*, a damages case brought by Guantanamo detainees for torture and other mistreatment, in order to distinguish that decision from the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004) ("*Rasul I*"), a habeas action challenging detention at Guantanamo, which is discussed below.

beyond judicial scrutiny:

> Court: Would you take the same position if the claim was one of genocide by the military? ...
>
> Counsel [for Defendant Rumsfeld and the United States]: … Obviously, genocide is worst [sic]... I think the same principal [sic] of law we're proposing would apply.

Transcript at 13-14 (excerpt attached). Our Nation's commitment to the rule of law does not countenance that result, and the precedents of the Supreme Court do not permit it.

2. In the alternative, as set forth in Part II below, Appellants oppose the motion for summary affirmance of the district court's decision. While we acknowledge that the *Rasul II* decision controls *some* of the issues raised in the instant case, that decision does not, as Appellees recognize, address all of the issues presented in this appeal. Thus, Appellees have failed to meet the "heavy burden of establishing that the merits of [the] case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987).

I. *EN BANC* HEARING IS WARRANTED BECAUSE THE INSTANT PROCEEDING INVOLVES QUESTIONS OF EXCEPTIONAL NATIONAL IMPORTANCE CONCERNING THE ACCOUNTABILITY OF HIGH-RANKING GOVERNMENT OFFICIALS AND THE ENFORCEMENT OF FUNDAMENTAL CONSTITUIONAL PROHIBITIONS IN THE BATTLE AGAINST TERRORISM.

The fundamental issue in this case is whether government officials are subject to the constitutional prohibition against torture when innocent foreign civilians are incarcerated under the complete control and authority of the United States. The decisions of this Court on which the Appellees rely have misconstrued Supreme Court precedents about the applicability of the U.S. Constitution to government actions outside the geographic boundaries of the United States. *Rasul II* and other rulings of this Court

suggest that the Constitution does nothing to constrain U.S. government officials from violating even the most fundamental personal rights of non-U.S. citizens abroad. The Court should reconsider those rulings, both because they misapprehend the Supreme Court's teachings and because it is imperative to affirm the core principles of the Constitution at a time when new revelations continue to expose the role of high-ranking government officials in condoning, authorizing and ordering interrogation policies and practices that violate the fundamental norms of civilized conduct and the essential protections embodied in our Constitution.[2]

A. This Court's Categorical Denial of Constitutional Protections to Foreign Nationals Outside the United States, on Which *Rasul II* Relied, Is Erroneous and Warrants *En Banc* Hearing.

The primary and erroneous holding of *Rasul II* on which Appellees rely is the blanket pronouncement that "aliens without property or presence in the United States"

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[2] Since the district court ruling, the media have reported that high-level officials including Defendant Rumsfeld met "dozens of time" beginning in 2002 to discuss and approve abusive interrogation methods to be used on detainees under U.S. custody and control. *See* ABC News, Sources: Top Bush Advisors Approved "Enhanced Interrogation," Apr. 9, 2008, *available at* http://abcnews.go.com/TheLaw/LawPolitics/Story?id=4583256&page=1. Documents recently released under the Freedom of Information Act confirm that government officials adopted a policy of torture and abuse, *see* Memorandum from John Yoo, Deputy Assistant Attorney General for William J. Haynes II, General Counsel of the Dep't of Defense, 38, Mar. 14, 2003 *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (opining that conduct would not amount to torture unless it inflicted pain of a level associated with "death, organ failure, or serious impairment of bodily functions"), and further document the systemic abuse of prisoners in Afghanistan. *See* Criminal Investigation Division File on Gardez abuse, 185, 207-08, 623 (2004) *available at* http://www.aclu.org/safefree/torture/34922res20080416.html (describing allegations that U.S. special forces beat, burned and doused Afghan prisoners with water, and recording death of Afghan prisoner Jamal Nasser in U.S. custody, as well as admissions of officers that they used abusive "SERE"methods).

have no rights under the U.S. Constitution. 512 F.3d at 663.[3] That categorical assertion relies primarily on this Court's decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), which is now under review in the Supreme Court. That fact alone warrants this Court holding the instant appeal until the Supreme Court issues its ruling in *Boumediene*, presumably before July. But wholly apart from whether this appeal should await further guidance from the Supreme Court, *Rasul II*, like *Boumediene*, is based on the conclusion that three earlier decisions, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), compel holding that detainees in U.S. military custody at Guantanamo Bay (and hence in other areas outside the sovereign territory of the United States) do not have any rights under the Fifth Amendment.

Those cases do not support that sweeping pronouncement. Contrary to this Court's findings, the Supreme Court has never announced a categorical rule that the Constitution does not apply to the conduct of U.S. government officials outside the United States. To the contrary, the core teaching of the Insular Cases is that fundamental constitutional protections apply to *both* citizens and non-citizens overseas. The Supreme Court has consistently recognized that while a particular constitutional provision may or may not apply in a given situation if it is not deemed fundamental, "[t]he guaranties of certain *fundamental personal rights* declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law," apply

[3] Appellants recognize that the Court denied a Petition for Rehearing *En Banc* in *Rasul II* itself. That petition focused significantly on the claim under the Religious Freedom Restoration Act and arose from a district court opinion that did not as exhaustively address the constitutional and international law issues presented in this case.

in territories under U.S. control. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (emphasis added).

First and critically, *Eisentrager* does not support a holding that non-U.S. citizens outside the United States have no constitutional rights. In *Eisentrager*, the Supreme Court was careful to cabin its Fifth Amendment holding. The petitioners were German prisoners of war whom the United States had captured in China. They were convicted of war crimes by U.S. military commissions in China, established with the consent of the Chinese government, and were committed to serve life sentences at a U.S. military base in Germany. 339 U.S. at 766. The petitioners challenged their convictions on Fifth Amendment due process and other constitutional grounds. *Id*. at 767. The Supreme Court rejected the petitioners' claims and held that they were not entitled to any process greater than what they received in their military commission trials. *Id*. at 785. *Eisentrager* does not, however, hold categorically that non-citizens are not entitled to any constitutional rights outside the United States. Rather, the Supreme Court took pains to enumerate all of the factors on which its holding depended:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

339 U.S. at 777.

In *Rasul v. Bush*, 542 U.S. 466 (2004) ("*Rasul I*"), the Supreme Court emphasized that "the Court in *Eisentrager* made quite clear that all *six of the facts* critical to its

disposition were relevant to the question of the prisoners' *constitutional* entitlement to habeas corpus." 542 U.S. at 476 (emphasis added in part). In contrast, the plaintiffs in the instant case are distinguishable from the convicted prisoners in *Eisentrager* in key respects. Appellants here are innocent civilians, are not hostile to the United States, were never charged as such, and have had no forum in which to assert their substantive claims. They are not seeking a writ of habeas corpus and they do not ask the Court to determine whether they were properly detained by the United States military. Under the Supreme Court's analysis in *Rasul I*, *Eisentrager* cannot govern the outcome of the claims in this case.

Likewise, *United States v. Verdugo-Urquidez*, on which *Rasul II* and other decisions of this Court rely, also had a narrow holding that does not apply in this Fifth Amendment case. The key distinction is that *Verdugo-Urquidez* was a case about the Fourth Amendment's warrant clause. 494 U.S. at 266. Moreover, *Verdugo-Urquidez* rested upon practical considerations. As the Supreme Court noted, application of the Fourth Amendment's warrant requirement to searches in other countries would plunge courts into a "sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Id.* at 274. The Court further noted that any warrant issued by a magistrate "would be a dead letter outside the United States." *Id.* [4]

[4] *See also id.* at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."); *id.* at 279 (Stevens, J., concurring in the judgment) ("I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.").

Notwithstanding the fact that *Verdugo-Urquidez* was a Fourth Amendment case, the *Rasul II* panel and *Boumediene* read *Verdugo-Urquidez* as supporting a holding that the *Fifth* Amendment categorically does not apply to persons in U.S. military custody outside the United States. But Justice Kennedy, who provided the necessary fifth vote in *Verdugo-Urquidez*, wrote separately to explain the limited scope of that decision.[5] Moreover, and of special significance, Justice Kennedy's analysis makes clear that the Constitution may apply to government actions against a foreign national even in the sovereign territory of another country (in that case Mexico). He endorsed a flexible test articulated by Justice Harlan in *Reid v. Covert*, 354 U.S. 1 (1957) – that a given constitutional provision should apply extraterritorially when it is not "impracticable and anomalous" to do so. *Id.* at 277-78 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 74 (Harlan, J., concurring in the judgment)). *See also Rasul I*, 542 U.S. at 483 n.15 (citing Justice Kennedy's *Verdugo* concurrence with approval).

Finally, *Rasul II* cites to *Boumediene*, which in turn cites *Zadvydas v. Davis*, for the proposition that "*certain* constitutional protections available to persons inside the United States are unavailable to aliens outside our geographical borders." 512 F.3d at 664 (emphasis added). This is undoubtedly an accurate statement of the law, but it does not support the conclusion that the Fifth Amendment *never* protects persons in the

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[5] In writing the opinion of the Court, Chief Justice Rehnquist stated that the Fifth Amendment does not apply to non-U.S. citizens outside the sovereign territory of the United States. *Id.* at 269. That statement was clearly *dicta*, as *Verdugo-Urquidez* was a Fourth Amendment case and raised no Fifth Amendment issues. Moreover, Chief Justice Rehnquist's broad statements about both the Fourth and Fifth Amendments did not garner a majority of the Court, as Justice Kennedy, who provided the fifth vote for the majority, emphasized in his concurring opinion that he did not agree with any categorical rules about the applicability of the Constitution outside the United States. *Id.* at 277-78 (Kennedy, J., concurring).

exclusive custody and control of the U.S. military against torture by U.S. military personnel. The Supreme Court's statement in *Zadvydas* simply emphasized that once a non-citizen enters the United States, he or she has *full* protection under all provisions of the Constitution. 533 U.S. at 693. The Court had no occasion to address the scope of constitutional protections applicable to foreign nationals outside the United States.

B. *En Banc* Consideration Is Warranted Because the Court Did Not Properly Apply The Insular Cases.

This Court's conclusion in *Rasul II* and *Boumediene* – that non-citizens outside the United States have no constitutional rights – is contrary to long-standing Supreme Court precedent holding that certain "fundamental" constitutional rights should always apply to constrain government action. In the Insular Cases of the early twentieth century, the Supreme Court confronted various constitutional claims arising out of newly acquired territories of the United States. Prior to those cases, the Supreme Court had held that the Constitution "appli[es] only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad…. The constitution can have no operation in another country." *Ross v. McIntyre (In re Ross)*, 140 U.S. 453, 464 (1891). In the Insular Cases, the Supreme Court rejected the *Ross* rule and instead evaluated the specific circumstances of each case to determine whether a constitutional provision applies outside the United States, with particular emphasis on the nature of the right asserted. In *Downes v. Bidwell*, 182 U.S. 244 (1901), the Supreme Court noted that the "personal rights" of territorial inhabitants could not be "unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress." *Id.* at 283. Although the Court ultimately rejected the plaintiff's efforts to recover tariffs and reserved opinion on the exact

contours of protected rights, it emphasized that citizens and non-citizens alike are protected against violations of fundamental constitutional rights. *Id.* at 268, 282-83. "Even if regarded as aliens," the residents of the territories "are entitled under the principles of the Constitution to be protected in life, liberty, and property." *Id.* at 283.

In subsequent Insular Cases, the Supreme Court repeatedly assessed whether an asserted constitutional right is "fundamental" in determining whether it constrains government action outside the United States.[6] In *Balzac*, the Court emphasized that while a non-fundamental constitutional right may or may not apply in a given situation, "[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without the due process of law," must always apply. 258 U.S. at 312-13. *See also Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (noting that in the Insular Cases, the Court held that for "territories destined for statehood from the time of acquisition, … the Constitution … applied … with full force," while in unincorporated territories, "only 'fundamental' constitutional rights were guaranteed to the inhabitants"). Thus, in all the Insular Cases adjudicating criminal procedure rights, the Court's holdings flowed from the accepted premise that fundamental constitutional rights apply outside the United States.

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[6] For example, in *Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Court confronted claims by criminal defendants in the newly acquired territories of Hawaii, the Philippines and Puerto Rico, respectively, that their constitutional right to trial by jury had been violated. In all three cases, the Court emphasized, as it had in *Downes v. Bidwell*, that fundamental constitutional rights apply outside the United States. In *Mankichi*, the Court rejected the petitioner's claim on the ground that the asserted rights "are not fundamental in their nature." 190 U.S. at 218. In *Dorr v. United States*, the Court cited its earlier opinions in noting that if the right to a jury trial were "fundamental," it had to apply within the territory. 195 U.S. at 148.

Without detailed analysis, *Rasul II* dismissively rejected the Insular Cases, stating in a brief footnote that they concerned territories of the United States. In doing so, the *Rasul II* panel ignored relevant Supreme Court caselaw demonstrating that the fundamental rights doctrine of the Insular Cases is not limited to territories of the United States. Later in the twentieth century, the Supreme Court cited the fundamental rights doctrine from the Insular Cases when it had occasion to consider the application of the Constitution in a sovereign foreign country. In *Reid v. Covert*, 354 U.S. 1 (1957), the petitioners, civilian spouses of U.S. servicemen stationed on U.S. military bases in Japan and England, asserted that court-martial proceedings had violated their Fifth Amendment right to indictment by grand jury and Sixth Amendment right to trial by petit jury.

As in the Insular Cases, the Court's analysis in *Reid* focused on the importance of the constitutional right asserted rather than on the location of the alleged constitutional violation. Based on that standard, the Court upheld the claims of the petitioners and enforced their fundamental constitutional rights. While *Reid* concerned the constitutional rights of U.S. citizens abroad, it makes clear that the Insular Cases' fundamental rights doctrine is not limited to annexed or occupied territories of the United States, but may be applicable to any place the U.S. government acts, including foreign sovereign countries. Indeed, Justice Kennedy's concurrence in *Verdugo-Urquidez* recognized precisely that point, and the Supreme Court's endorsement of his concurrence in *Rasul I* is especially telling. In short, this Court's central proposition in *Rasul II* that the Insular Cases apply only when the alleged constitutional injury occurs in an annexed territory of the United States cannot be reconciled with the Supreme Court's rulings.

C. The Court Should Grant Initial Hearing *En Banc* To Correct and Reconcile Its Own Precedents.

The categorical denial of constitutional rights also reflects inconsistent Circuit precedent. As *Rasul II* notes, this Court has issued several broadly worded rulings that "non-resident aliens plainly cannot appeal to the protection of the Constitution or laws of the United States," and that "a foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." 512 F.3d at 665 (quoting *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)). Neither *Pauling* nor *People's Mojahedin Org.* remotely supports a blanket holding that the fundamental precepts of the Constitution cannot apply outside the United States. *Pauling* did not concern any fundamental constitutional right and did not squarely implicate the issue of non-citizens' constitutional rights outside the United States.[7] In *People's Mojahedin Org.*, the Court based its ruling on the same categorical assumption that constitutional rights can never be asserted.[8]

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[7] In *Pauling*, plaintiffs including citizens and non-citizens sought an injunction against nuclear weapons testing by the U.S. government. This Court held that the plaintiffs had no standing because they did not allege a specific injury to themselves, and added in dicta in a footnote, without any explanation, that "non-resident aliens here plainly cannot appeal to the Constitution or laws of the United States." *Pauling*, 278 F.2d at 254 n.3.

[8] The plaintiffs, who were foreign entities and not individuals, sought statutory review of their designation as "foreign terrorist organizations" under a federal statute. Some of the plaintiff organizations argued that the statute violated the Due Process Clause. This Court rejected the constitutional claim by citing *Verdugo-Urquidez*'s *dicta*, which garnered only four votes in the Supreme Court, that non-citizens "receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country." *People's Mojahedin Org.*, 182 F.3d at 22 (quoting *Verdugo-Urquidez*, 494 U.S. at 271) (alteration in original).

Moreover, the Court has not been consistent in its analysis and has recognized the significance of the Insular Cases in some cases. In *Harbury v. Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000), *vacated on other grounds*, 2002 WL 1905342 (D.C. Cir. Aug. 19, 2002), this Court properly recognized the Insular Cases' analytical framework and, moreover, expressly noted its applicability to "occupation zones after war." *Harbury* explained first that the Insular Cases "demonstrate that aliens abroad may be entitled to certain constitutional protections against mistreatment by the U.S. Government . . . [.]" *Id.* at 603. This Court then noted that "inhabitants of nonstate territories controlled by the U.S.—such as unincorporated territories or *occupation zones after war*—are entitled to certain 'fundamental rights.'" *Id.* (emphasis added). Though *Harbury* ultimately rejected application of the Constitution on the particular facts in the case, the Court recognized the long line of cases upholding application of certain fundamental constitutional rights on behalf of foreign nationals, including under circumstances where "the United States exercise[d] de facto political control." *Id.* at 604. *See also Ralpho v. Bell*, 569 F.2d 607, 618 n.69 (D.C. Cir. 1977) (noting that under fundamental rights doctrine, applicability of Constitution abroad is considered "provision-by-provision").[9]

The contrast between *Harbury*, on the one hand, and *Rasul II* and *Boumediene*, on the other, demonstrates that this Court has used inappropriately broad language to reject the applicability of the Constitution in cases like *Pauling* and *People's Mojahedin Org.*,

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[9] In different circumstances, different rights may or may not be considered "fundamental." *See*, *e.g.*, *Ralpho v. Bell*, 569 F.2d at 618-19 (Fifth Amendment Takings Clause protects non-U.S. citizen residents of Pacific Trust Territories, which are administered by United States but not part of sovereign territory of United States); *Juda v. United States*, 6 Cl. Ct. 441, 457 (1984) (holding that residents of Marshall Islands had fundamental right under Fifth Amendment to seek compensation from United States for losses incurred during atomic bomb testing). The right not to be tortured is a fundamental right under any circumstance.

and then used those decisions to extrapolate a blanket conclusion that the Constitution never applies to non-citizens outside the United States. That categorical pronouncement is inconsistent with *Harbury*'s more nuanced approach and with the Supreme Court precedents that gave rise to that approach. In light of the important issues presented in this appeal, this case presents an appropriate vehicle for the Court to reconsider its recent decisions and to bring them into compliance with the Supreme Court's rulings.

II. THE MOTION FOR SUMMARY AFFIRMANCE SHOULD BE DENIED.

Even if the petition for initial hearing *en banc* is not granted, the motion for summary affirmance should be denied. Appellees argue that the Court should summarily affirm the decision below on the ground that *Rasul II* controls this case. However, Appellees acknowledge that at least two of the issues in this appeal were not addressed in *Rasul II*. First, the decision does not address whether the Westfall Act's exception for "statutes" applies to the ATS and Geneva Convention claims raised by plaintiffs.[10] *See* Appellees' Motion for Summary Affirmance ("Mo. Sum. Aff.") at 11 ("[o]ne argument raised by plaintiffs in the district court relating to the Westfall Act was not addressed in

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[10] *See* Appellants' Statement of Issues to be Raised, filed July 5, 2007 ("App. Statement"):

> Whether the district court erred as a matter of law in holding that appellees were entitled under the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694 ("Westfall Act") to absolute immunity against appellants' claims under the law of nations and the Fourth Geneva Convention governing the treatment of civilians in wartime, (a) when the Westfall Act provides for an exception to immunity when a federal statute provides a remedy for the alleged conduct, when Congress provided such a statutory remedy in the form of the Alien Tort Statute, 28 U.S.C. § 1350, and (b) when courts have construed the Westfall Act's use of the word "statute" to include ratified treaties such as the Fourth Geneva Convention, under which appellants brought claims.

Id. at 2.

Rasul.").[11] Likewise, *Rasul II* does not address Appellants' submission that the district court committed legal error by holding that Plaintiffs lack standing for declaratory relief from torture and cruel, inhuman and degrading treatment.[12] *See* Mo. Sum. Aff. at 14 (making no argument that *Rasul II* addressed the question).

Further, even as to the issues that *Rasul II* does address, some are discussed only in a cursory fashion that does not squarely consider the district court's analysis in this case. For example, in dismissing Appellants' claims under the Fourth Geneva Convention, the district court analyzed whether that treaty provides a private right of action and concluded that it does not. *Rasul II* addresses a similar Geneva Convention claim, but it contains no analysis of whether the treaty is self-executing.[13]

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[11] Insofar as Appellees may now rely on the recent decision of a panel of this Court in *Harbury v. Hayden*, __ F.3d __, 2008 WL 1722094; 2008 U.S. App. LEXIS 8007 (April 15, 2008), that further supports Appellants' petition for initial *en banc* hearing.

[12] *See* App. Statement at 2-3:

> Whether the district court erred as a matter of law in holding that Plaintiffs do not have standing to seek declaratory relief from torture and cruel, inhuman and degrading treatment on the ground that Plaintiffs have not made a sufficient showing that they face a real and imminent threat of future harm under the Lyons doctrine, when Plaintiffs alleged specific facts showing that they are subject to torture and cruel mistreatment again in the future, including the facts that some of them have already been detained multiple times and one was specifically threatened by U.S. forces with future torture.

[13] *Medellin v. Texas*, 128 S.Ct. 1346 (2008), does not resolve this issue because the Court addressed only whether an international tribunal's decision interpreting and applying the Vienna Convention on Consular Relations in a dispute between two sovereigns (the United States and Mexico) was self-executing and therefore automatically enforceable in U.S. courts by an individual plaintiff. Here, Appellants bring a cause of action directly under specific provisions of a different treaty, the Fourth Geneva Convention, that explicitly creates rules governing the protection of individual civilians, like Appellants, against the abuse at issue here.

In short, *Rasul II* does not address several key issues raised in this appeal and the entire case should be scheduled for full briefing and argument. Insofar as *Rasul II* or other Circuit precedent forecloses any of plaintiffs' claims, Appellants respectfully submit that the petition for initial *en banc* hearing of this appeal should be granted for the reasons set forth above.

CONCLUSION

For the reasons cited above, Appellants respectfully submit that the instant appeal should be heard *en banc* or, in the alternative, that the Motion for Summary Affirmance should be denied and the case set for briefing and argument.

Respectfully submitted,

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* Representing Appellants in No. 07-5178 only.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing PETITION FOR INITIAL HEARING EN BANC AND OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE were served by first-class mail and by e-mail upon each of the following:

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this 25th day of April, 2008.

_____

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Addendum

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IN RE: IRAQ AND AFGHANISTAN DETAINEES LITIGATION	.
	. Docket No. MS 06-145
	. Washington, D.C.
	. December 8, 2006
Defendant.	.

TRANSCRIPT OF ORAL ARGUMENTS

BEFORE THE HONORABLE CHIEF JUDGE THOMAS F. HOGAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: ARTHUR B. SPITZER, ESQUIRE
LUCAS GUTTENTAG, ESQUIRE
PAUL HOFFMAN, ESQUIRE
DEBORAH PEARLSTEIN, ATTORNEY AT LAW
CECILLIA D. WANG, ATTORNEY AT LAW

For the Defendants: MICHAEL L. MARTINEZ, ESQUIRE
C. FREDERICK BECKNER III, ESQUIRE
JOSHUA A. KLEIN, ESQUIRE
ARYEH S. PORTNOY, ESQUIRE
MARK E. NAGLE, ESQUIRE

Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 6427, U.S. District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001
(202) 354-3246

Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

case focused on the enemy combatant's acts, whether he was doing something that was unlawful, not the acts of the military. They were not going to be putting into dispute what the military was doing.

Here, that's exactly what they want to do. They want to put into dispute the military policies that were adopted. They want to challenge the interrogation techniques that the military adopted. They want to challenge how those were implemented. They want to challenge the use of military intelligence officers versus military police in carrying out those policies. They want to challenge how senior military officials supervise interrogation techniques and military in Afghanistan and Iraq. And we submit that those are exactly the kind of concerns that the Court would recognize.

THE COURT: Would you take the same position if the claim was one of genocide by the military? They've argued this less cogent concept in various parts of this case. But assume the claim is not a debated issue about what is torture and what is not torture, assume it's a recognized, what we would call, I think, malum in se, an evil in itself committed, and then you're saying there can be no inquiry done by the individuals affected by those actions, even though they're aliens, assumed civilian nonresident aliens, about the military's operation?

MR. BECKNER: I take your point, your Honor, but our position is it's still always possible for an alien to allege

that act of torture is a violation of just cause in international norms. Obviously, genocide is worst, but these are serious allegations. And I think the same principal of law we're proposing would apply. It's always easy to allege that the military has done something that is unlawful and violates international norms. Those allegations would necessarily have the Court, when they're focused at military action, interfering with military judgement about how military policies were carried out, hauling our leaders into domestic Article III court, and potentially chilling their conduct for fear of tort liability.

Now, of course, those allegations aren't made here. And I would also add that the Sanchez-Espinoza case from the D.C. Circuit forecloses this very claim. There the allegations were U.S. was affecting torture, rape, murder, all sorts of brutal crimes by the cantreds. Judge Scalia, then on the D.C. Circuit, expressly held, "The special needs of foreign affairs must stay our hands in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment for subjects causing injury abroad."

The government would submit that holding by itself foreclose their Bivens claim. But that's also very consistent with the Supreme Court's decision in Stanley, which came after Sanchez-Espinoza. The Supreme Court expressly recognizes that, "congressionally uninvited intrusion into military affair by the judiciary is inappropriate."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARKAN MOHAMMED ALI, *et al.*, Appellants, v. DONALD H. RUMSFELD, *et al.*, Appellees.	**No. 07-5178** and consolidated cases Nos. 07-5185, 07-5186 & 07-5187 D.D.C. No. 05-cv-1378 (TFH)

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*.

The appellants in these consolidated appeals, who were the plaintiffs below, are Arkan Mohammed Ali, Thahe Mohammed Sabar, Sherzad Kamal Khalid, Ali H., Najeeb Abbas Ahmed, Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman. They are Iraqi or Afghanistani nationals who were subjected to torture while imprisoned by United States military forces in Iraq or Afghanistan.

The appellees are Donald H. Rumsfeld, formerly United States Secretary of Defense; Ricardo Sanchez, formerly commander of U.S. ground forces in Iraq; Janis Karpinski, formerly commander of the Abu Ghraib prison in Iraq; and Col. Thomas Pappas, formerly the commander of military intelligence personnel at the Abu Ghraib prison. Each defendant was sued in his or her individual capacity. Defendant Rumsfeld was also sued in his official capacity.

Two briefs of *amici curiae* supporting the plaintiffs were filed in the district court,

one by a group of retired military officers and military law and history scholars (Brigadier General (Ret.) David M. Brahms, Commander (Ret.) David Glazier, Prof. Elizabeth L. Hillman, Prof. Jonathan Lurie, Prof. Diane Mazur, Brigadier General (Ret.) Richard M. O'Meara and Lieutenant Colonel (Ret.) Gary D. Solis) and one by international law scholars J. Herman Burgers and Theo van Boven. No *amici* have yet appeared in this Court but appellants anticipate that the same *amici* are likely to appear here.

Disclosure Required by Circuit Rule 26.1. Inapplicable. All parties to these appeals, other than the United States of America, are natural persons.

B. Ruling Under Review. The ruling under review is the final order of the district court (Thomas F. Hogan, C.J.) entered on March 27, 2007, granting the defendants' several motions to dismiss in whole or in part, denying parts of some defendants' motions to dismiss as moot, and dismissing all of plaintiffs' claims. The ruling is reported at 479 F. Supp. 2d 85 (D.D.C. 2007).

C. Related Cases.

The cases on review were originally filed in United States district courts in four other jurisdictions. On June 17, 2005, the Judicial Panel on Multidistrict Litigation ordered them to be transferred to the United States District Court for the District of Columbia for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Iraq and Afghanistan Detainees Litigation*, 374 F. Supp. 2d 1356 (J.P.M.L. 2005)

Ali v. Rumsfeld was originally filed in the United States District Court for the Northern District of Illinois, where it had docket no. 1:05C-1201 (JBG).

Ali v. Sanchez was originally filed in the United States District Court for the Southern District of Texas where it had docket no. 7:05-065 (RHH).

Ali v. Karpinski was originally filed in the United States District Court for the District of South Carolina where it had docket no. 9:05-654-PMD.

Ali v. Pappas was originally filed in the United States District Court for the District of Connecticut where it had docket no. 3:05-cv-371 (SRU).

There are no other cases involving the same or substantially the same plaintiffs.

Counsel for appellants are aware of three other pending cases involving the United States or federal officials as defendants that involve the same or similar issues, to wit, whether provisions of the United States Constitution designed to protect individual rights apply to United States government conduct against non-United States citizens outside the United States:

1. *Boumediene v. Bush*, No. 06-1195 (Supreme Court of the United States). This case and the consolidated case of *Al Odah v. United States* were decided by this Court on February 20, 2007, Nos. 05-5062 and 05-5064, and are reported at 476 F.3d 981. The Supreme Court has heard oral argument and the case is pending decision.

2. *Rasul v. Myers*, Nos. 06-5209 & 06-5222 (D.C. Cir.). These cases were decided by this Court on January 11, 2008, and are reported at 512 F.3d 644. A petition for rehearing en banc was denied on March 26, 2008. The case remains pending because the time in which to file a petition for certiorari remains open.

3. *Harbury v. Hayden*, No. 06-5282 (D.C. Cir.). This case was decided by this Court on April 15, 2008 and is reported at 2008 WL 1722094 and 2008 U.S. App. LEXIS 8007. The case remains pending because the time in which to file a petition for rehearing or for certiorari remains open.

Respectfully submitted,

_____
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April 25, 2008

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this 25th day of April, 2008.

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