UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TALAL AL-ZAHRANI, *et al.*, Plaintiffs, v. DONALD RUMSFELD, *et al*. and UNITED STATES, Defendants.	Case No. 09-cv-00028 (ESH)

MOTION FOR RECONSIDERATION IN LIGHT OF NEWLY-DISCOVERED EVIDENCE

Plaintiffs Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami, in their individual capacities and as representatives of their deceased sons Yasser Al-Zahrani and Salah Al-Salami, by and through their counsel, respectfully submit this motion for reconsideration of the Court's Order and Memorandum Opinion of February 16, 2010, which granted Defendants' motions to dismiss and motion for substitution.[1] Plaintiffs bring this motion pursuant to Fed. R. Civ. P. 59(e) on the basis of newly-discovered evidence that was not available to Plaintiffs until after the close of briefing on Defendants' motions, which dramatically alters the contours of this case and compels reconsideration of the Court's Opinion.[2]

[1] Pursuant to LCvR 7(m), Plaintiffs' counsel have conferred with Defendants about this motion and Defendants oppose.

[2] Concurrent with this motion, pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiffs file a motion for leave to amend their Amended Complaint to incorporate the newly-discovered evidence.

PROCEDURAL HISTORY

Plaintiffs filed their Amended Complaint on January 29, 2010, alleging claims under the Due Process Clause of the Fifth Amendment, the Eighth Amendment, the Alien Tort Claims Act ("ATCA"), and the Federal Tort Claims Act ("FTCA"). Defendants filed motions to dismiss and a motion for substitution on June 26, 2009, Plaintiffs filed their opposition on October 5, 2009, and Defendants' filed their replies on December 4, 2009. On February 16, 2010, the Court issued its Order and Memorandum Opinion granting Defendants motions to dismiss and motion for substitution (dkt. no. 26).

BACKGROUND

Since the Parties completed briefing on Defendants' motions to dismiss and motion for substitution, extraordinary and disturbing facts have come to light concerning the deaths of Yasser Al-Zahrani and Salah Al-Salami through four former soldiers who were stationed at Guantanamo at the time of the deaths and came forward because they could no longer stay silent. Were it not for these soldiers, the information would likely have remained hidden behind the secrecy that surrounds Guantanamo and because of the particular difficulties of investigating this case, given that Plaintiffs' sons are deceased and that we are nearly four years removed in time from their deaths.

Until these revelations, virtually the only information available about Al-Zahrani and Al-Salami's deaths was the final report of an investigation by the military's Naval Criminal Investigation Service ("NCIS"), which took two years to complete, despite the fact that the Pentagon took no time to declare the deaths "suicides" and describe in detail how the men had fashioned nooses from their bed sheets and hanged themselves in their cells. The final NCIS report supported the account originally advanced by the Pentagon, portions of which were

released in June 2008 only because the government was compelled through Freedom of Information Act ("FOIA") litigation.[3]

The NCIS report, as the primary source of available information about Al-Zahrani and Al-Salami's detention, treatment and ultimate deaths, served as the basis for Plaintiffs' Complaint and Amended Complaint. While Plaintiffs' have always questioned the official account of their son's deaths, they premised their complaint on the argument that even assuming the government's conclusions were true, federal officials charged with the custody and care of their sons would still be responsible for their arbitrary detention, abuse and ultimate deaths. Living with the government's account and their own unanswered questions for four years has caused Plaintiffs' great pain and suffering, however, not only because of the notion that their sons took their own lives, and the disparaging and public manner in which Defendants' discussed the "suicides," but also because suicide is prohibited under the tenets of their Islamic faith.

In early 2009, as Plaintiffs' Amended Complaint was pending before this Court, a former soldier by the name of Joe Hickman approached the law school of Seton Hall University, which had produced several reports dealing with the deaths and whose work Hickman had followed. Hickman was a decorated Army officer who had served a distinguished tour of duty at Guantanamo from March 2006 to March 2007 and had been on duty as sergeant of the guard the night Al-Zahrani and Al-Salami died. Hickman said he had decided to come forward with his story because what he had seen "was "haunting me" and he thought that "with a new administration and new ideas I could actually come forward." While he did not want to speak to the press, he felt that "silence was just wrong."

[3] Plaintiffs also pursued their own FOIA request in November 2007, as revised on February 12, 2010, which is still being considered by the Department of Defense.

NEWLY-DISCOVERED EVIDENCE

On January 18, 2010, Hickman's account and interviews from three other soldiers under his supervision – Specialist Tony Davila, Army Specialist Christopher Penvose, and Army Specialist David Caroll – were reported by Harper's Magazine. *See* Scott Horton, *The Guantánamo "Suicides": A Camp Delta sergeant blows the whistle*, Harper's Magazine, Jan. 18, 2010 (Ex. A).[4] The article, which serves as the source for this motion and Plaintiffs incorporate in full herein, was the first time Plaintiffs and their counsel became aware of the soldiers' accounts.

Those accounts are dramatically at odds with the official version of events on June 9-10, 2006. The soldiers describe a cover-up initiated by the authorities within hours of the deaths and say they were affirmatively told not to speak out. Despite having first-hand observations of camp activity that night, they were never approached or interviewed for the NCIS investigation. While the official account of the deaths concluded that Al-Zahrani, Al-Salami and the third deceased, Mani Al-Utaybi, had hanged themselves in their cells, the soldiers' accounts strongly suggest that the men were transported from their cells to an undisclosed, unofficial "black site" nicknamed "Camp No" that was outside the perimeter of the main prison camp, and died there or from events that transpired there.

Specifically, according to the soldiers' reported accounts:

- 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.

[4] This article was originally released on Harper's website on January 18, 2010. It was published in print form in the March issue of Harper's Magazine.

- 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.

- 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.

- 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.

- 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.

- 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.

- 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.

- Army Specialist David Caroll, who was also on guard duty in another watch tower 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.

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

- 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.

- 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."

- 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."

- 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.

- 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.

- 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.

- 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.

Plaintiffs were in the process of amending their Amended Complaint in light of this evidence and preparing to submit a request for a status conference to discuss next steps in this case just prior to February 16, 2010, when the Court issued its decision. Plaintiffs' counsel were conferring with Defendants about their request for a status conference when the decision was issued.

STANDARDS FOR RECONSIDERATION

Pursuant to Fed. R. Civ. P. 59(e), a district court may grant a motion for reconsideration if it finds that there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam) (citation omitted); *Koretoff v. Vilsack*, 626 F. Supp. 2d 4, 5 (D.D.C. 2009) (citation omitted).

District courts have substantial discretion in ruling on motions for reconsideration, whether under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b). *See Black v. Tomlinson*, 235 F.R.D. 532, 533 (D.D.C. 2006). Rule 59(e) motions may be granted in "extraordinary circumstances." *Koretoff*, 626 F. Supp. 2d at 6.

ARGUMENT

In light of the extraordinary revelations concerning this case, which came to light only after the Parties had completed briefing on Defendants' motions to dismiss and motion for substitution, and which qualitatively affect this Court's decision dismissing Plaintiffs' claims, the Court should grant Plaintiffs' motion for reconsideration.

Specifically, Plaintiffs seek reconsideration of the Court's dismissal of Plaintiffs' claims under the Fifth Amendment Due Process Clause and the Eighth Amendment, and their ATCA claims alleging torture, cruel, inhuman and degrading treatment, and violations of the

Geneva Conventions. Am. Compl., Counts II-VI. In dismissing these claims, the Court relied primarily on the D.C. Circuit's decisions in *Rasul v. Myers*. 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*"); 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"). For the reasons discussed below, the newly-discovered evidence discussed herein distinguishes Plaintiffs' claims from the *Rasul* plaintiffs in significant respects and compels a separate analysis.

Plaintiffs do not address the Court's conclusion in dicta about the continuing vitality of 28 U.S.C. § 2241(e)(2), since the Court reserved ruling on Plaintiffs' challenge to the constitutionality of that provision and held that, even assuming the Court had jurisdiction, special factors counseled against a remedy for Plaintiffs' *Bivens* claims under *Rasul v. Myers*. Mem. Op. at 7-11. Plaintiffs also do not address the Court's dismissal of their FTCA claims on the basis of the "foreign country exception" to the act.[5]

I. The Newly-Discovered Evidence Alters the Contours of this Case and Compels a New Balancing Inquiry before the Court Can Determine If *Rasul* Bars a *Bivens* Remedy Here.

In dismissing Plaintiffs' *Bivens* claims, the Court held that it was bound by the D.C. Circuit's decision in *Rasul II*, which concluded that "[t]he danger of obstructing U.S. national security policy" was a special factor counseling against a *Bivens* remedy for the plaintiffs in that case. Mem. Op. at 12-13. The Court noted that "many of plaintiffs' allegations in *Rasul* are identical" to Plaintiffs' allegations in their Amended Complaint. *Id*. at 12 n.4.

In the absence of any alternative, existing process for protecting the constitutional interest at issue, however, which is undisputed here, the question of whether to recognize a *Bivens* remedy is ultimately "a subject of judgment." *Wilkie v. Robbins*, 551 U.S. 537, 550

[5] Plaintiffs reserve the right to timely appeal any claims not included for reconsideration here.

(2007); *Navab-Safavi v. Broadcasting Board of Governors*, 650 F. Supp. 2d 40, 66 (2009) (quoting *Wilkie*, 551 U.S. at 550). The federal courts "'must make the kind of remedial determination that is appropriate for a common-law tribunal' … weigh[ing] reasons for and against the creation of a new cause of action the way common law judges have always done." *Wilkie*, 551 U.S. at 550, 554 (quoting *Bush v. Lucas*, 462 U.S. 367 (1983); see *Munsell v. Dep't of Agric.*, 509 F.3d 572, 590-91 (D.C. Cir. 2007) (engaging in balancing inquiry where claim implicated the Administrative Procedures Act); *Navab-Safavi*, 650 F. Supp. 2d at 73 (citing *Wilkie*, 551 U.S. at 554). Courts must "pay[] particular heed … to any special factors counseling hesitation" in their calculus. *Wilkie*, 551 U.S. at 550 (quoting *Lucas*, 462 U.S. at 378). The common-law balancing test set forth in *Wilkie* is reflected in the case-by-case approach to determining whether to recognize a *Bivens* remedy that characterizes the current law. *Compare Hartman v. Moore*, 547 U.S. 250 (2006), *with Wilkie*, 551 U.S. 537; *Davis v. Passman*, 442 U.S. 228 (1979), *with Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Carlson v. Green*, 446 U.S. 14 (1980), *with Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

Plaintiffs assert as an initial matter that the factual record in this case is in significant respects false and incomplete, and that critical facts about their treatment and deaths at Guantanamo have been covered up and misrepresented for years and remain unknown. As such, because of Defendants' obstruction, the Court is without a sufficient understanding of the contours of this case to be able to determine if the D.C. Circuit's special factors analysis in *Rasul II* indeed applies, or if the reasons for recognizing a remedy in the specific context of this case outweigh the reasons against. While there are areas of overlap between *Rasul* and aspects of Plaintiffs' Amended Complaint that are unaffected by the newly-discovered evidence, those similarities need not and should not end the inquiry. *See United States v.*

Stanley, 483 U.S. 669, 681 (1987) (discussing "varying levels of generality at which one may apply 'special factors' analysis"); *Navab-Safavi*, 650 F. Supp. 2d at 66 ("[T]he question of whether to recognize a *Bivens* remedy is context-specific"), citing *FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1994) ("For example, a *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others.")). The Court must be able to assess the relevant factors in light of the specific facts and circumstances of this particular case before it can exercise the remedial judgment required by *Wilkie*.

That said, what the Court does currently know about this case in light of the newly-discovered evidence should militate against barring Plaintiffs at the courtroom door without further inquiry. The fact that Defendants' fought to keep secret virtually all information concerning the cause and circumstances of Al-Zahrani and Al-Salami's deaths from their families, the public and the courts until compelled by FOIA litigation in 2008, and that details of an elaborate, high-level cover-up of likely homicide at a "black site" at Guantanamo are only now emerging nearly four years after the fact, should disturb the Court and caution it against permitting unspecified national security concerns to trump all other factors in this case without question.

For one, courts have long considered cases that involve foreign policy or national security interests, including in the Guantanamo context. In *Boumediene v. Bush*, the Supreme Court rejected legislative efforts to strip the courts of jurisdiction over Guantanamo detainees despite the fact that the Court's exercise of judicial review plainly affected the executive's detention of hundreds of foreign detainees and a centerpiece of the "war on terror." *Boumediene v. Bush*, 553 U.S. 723 (2008). The Court refused to find these concerns

dispositive. *Id.*; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in establishing procedures for designating "enemy combatants."). Courts have allowed *Bivens* claims by detainees in the post-9/11 context to proceed as well despite the presence of national security factors. *See 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"); *Ertel v. Rumsfeld*, No. 06-6964, 2010 U.S. Dist. LEXIS 20023 (N.D. Ill. Mar. 5, 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 combatant" in the United States as part of the "war on terror" to bring *Bivens* suit against John Yoo for authorizing his detention and torture). The D.C. Circuit has not also found national security concerns to be the decisive factor in a special factors analysis. *See Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008) (relying primarily on its finding of the availability of a comprehensive remedial scheme for breaches of privacy under the Privacy Act in dismissing a *Bivens* suit). Indeed, as these cases demonstrate, the presence of national security concerns need not compel a conclusion that a *Bivens* remedy is unavailable. *See Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) ("[H]esitation is a pause, not a full stop, or an abstention; and to counsel is not to require.").

Moreover, the courts should scrutinize bald assertions of national security and secrecy because the government's account of the risks has in many cases been overblown. As an apt

case in point, after years of dire warnings to justify the indefinite detention of Guantanamo detainees and forestall court review, the government has by now released the majority of detainees without incident, including approved dozens of detainees for transfer on the eve of habeas review. *See also Padilla v. Hanft*, 432 F.3d 582, 584-87 (4th Cir. 2005) (observing that the government had "steadfastly maintain[ed] that it was imperative in the interest of national security" to hold Padilla in military custody for three and a half years, yet abruptly changing course on the doorstep of Supreme Court review, seeking to move him into criminal custody, at a "substantial cost to the government's credibility before the courts"); Brief for Respondents, *Hamdi*, 542 U.S. 507 (2004) (arguing that military necessity required Hamdi's indefinite detention, yet releasing him to Saudi Arabia seven months later). Indeed, as the wisdom of hindsight shows in these cases, "[n]ational security tasks … are carried out in secret. … Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985) (rejecting argument that national security requires dismissal of *Bivens* suit against the attorney general for wiretaps of suspected terrorists).

The national security and foreign affairs concerns raised by the D.C. Circuit in *Sanchez-Espinoza* and Judge Brown's concurrence in *Rasul I*, which were cited by the Circuit in *Rasul II* – that suits such as this have the ability to produce "embarrassment of our government abroad" through "multifarious pronouncements by various departments on one question" – have less force here. *See Rasul I*, 512 F.3d at 673 (Brown, J., concurring); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). If Judge Brown was not persuaded that the U.S. government's unanimous condemnation of torture answers this concern, "since where to draw that line is the subject of acrimonious debate between the

executive and legislative branches," *Rasul I*, 512 F.3d at 673 (Brown, J., concurring), our branches of government must surely agree that homicide 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) ("the Church report") (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*, 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 resulting from harsh interrogation techniques, as "inconsistent with the values of our nation, inconsistent with the teachings of the military, and … fundamentally un-American").

On the other side of the scale, weighing in favor of recognizing a remedy here, the Court must assume at this stage that Plaintiffs have suffered grievous constitutional harm for which there should be some opportunity for redress. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (quoting *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803)). By any measure, the conduct Plaintiffs allege may be deemed "so brutal and so offensive to human dignity" as to exceed the permissible limits of the constitution. *Rochin v. California*,

342 U.S. 165, 174 (1952). As Judge Posner wrote for the Seventh Circuit with respect to a *Bivens* action:

> [I]f ever there were a strong case for "substantive due process," it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the Fourth Amendment – as no one doubts – and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the Eighth Amendment – as no one doubts – it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process.

Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989).

Yet Plaintiffs have no other remedy for the shocking conduct they allege at the hands of Defendants. Like the plaintiffs in *Bivens*, *Davis* and *Carlson*, "it is damages or nothing" for the deceased. *Bivens*, 403 U.S. at 410. Their claims go to the core purpose of a *Bivens* remedy: to redress grievous harm where there is no other remedy, and to deter federal officers who commit unconstitutional acts. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001). In the nearly 40 years since *Bivens* was decided, the Supreme Court has rejected *Bivens* claims based on special factors only three times. *See Wilkie*, 551 U.S. 537; *Stanley*, 483 U.S. 669; *Chappell*, 462 U.S. 296. In every other case, the Court determined that a remedial scheme established by Congress displaced a judicial remedy. The situation was not one where plaintiffs, as here, would be left without any protection at all. *See Butz v. Economou*, 438 U.S. 478, 485 (1978) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.").

* * *

While the Court's alternate reasoning on qualified immunity was not the rationale for its dismissal of Plaintiffs' *Bivens* claims and, thus, dicta, Plaintiffs briefly submit that

significant legal developments had occurred between March 2004, the point in time considered by the D.C. Circuit in *Rasul II*, and the time of the homicides alleged herein on or about June 10, 2006, that would have given Defendants' fair warning of the unconstitutionality of their alleged misconduct.

Most notably, in June 2004, the Supreme Court issued its landmark decision in *Rasul v. Bush*, roundly rejecting the notion that Guantanamo detainees are in a zone beyond the protection of U.S. laws and strongly suggesting that detainees can assert constitutional violations. 542 U.S. 466, 483 n.15 (2004) (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'" (citing 28 U.S.C. § 2241(c)(3)).

In October 2004, Congress passed the Reagan Act in response to reports of abuse of foreign detainees in U.S. military custody abroad. *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)). While the act was triggered by the abuse of non-citizens held by the U.S. military at the Abu Ghraib prison in Iraq, it applies equally to 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

> ensure that 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 the United States;
>
> 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 April 2006, in a report to the United Nations Committee Against Torture on the United States' compliance with the prohibition on torture, the State Department could not have been clearer in stating the government's position – that the U.S. Constitution and laws constrain the actions of federal officials without exception:

> [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).

In light of the state of law and policy by June 10, 2006, therefore, when Plaintiffs allege Defendants committed murder, it would have been clear to any reasonable officer in Defendants' position that his conduct was unlawful. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

II. The Newly-Discovered Evidence Demonstrates that Defendants' Alleged Conduct Was Outside the Scope of their Employment.

A. Defendants' Alleged Conduct Was Not Pursuant to Sanctioned Policies and Procedures, as Distinguished from *Rasul*

In granting Defendants' motion for substitution, the Court held that it was bound by the D.C. Circuit's decision in *Rasul I*, which held that defendants' allegedly torturous and abusive conduct was "foreseeable" and "motivated or occasioned by … the conduct then and there for the employer's business even though it was seriously criminal." Mem. Op. at 15 (citing *Rasul I*, 512 F.3d a 660). As the Court noted, however, central to this conclusion was the Circuit's finding that the plaintiffs in *Rasul* "concede[d] that the torture, threats, physical and psychological abuse inflicted on them … were intended as interrogation techniques to be used on detainees," and that the plaintiffs "[did] not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence." Mem. Op. at 15-16 (citing *Rasul I*, 512 F.3d at 658-59). In concluding that the Circuit's holding in *Rasul* compelled the same here, the Court observed that "[t]he individual defendants' conduct in this case, like the conduct in *Rasul*, was 'pursuant to standard operating procedures' and was 'use[d] in connection with interrogations at Guantanamo.'" Mem. Op. at 16.

In light of the new revelations about the cover-up and circumstances of Al-Zahrani and Al-Salami's deaths, however, this case can be distinguished from *Rasul*. Plaintiffs allege

that Defendants' conduct here – direct involvement in homicides at a "black site" at Guantanamo and subsequent efforts to conceal their conduct – fell outside of sanctioned policies and standard procedures governing Defendants' actions vis-à-vis the deceased. While Plaintiffs maintain that seriously criminal conduct such as torture cannot be within the scope of employment of government officials as a matter of law, their argument for reconsideration here is based not on the nature of the tort, but on facts that demonstrate that Defendants' conduct was prohibited by the military's own rules. *See Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006) (quoting *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986)) (scope of employment analysis "focuses on the underlying dispute or controversy, not on the nature of the tort"). At a minimum, Plaintiffs have come forward with sufficient facts to create a material dispute about whether Defendants' conduct fell within the scope their employment, which warrants an evidentiary hearing.

As an initial matter, the fact of Defendants' cover-up itself undercuts the argument that their conduct vis-à-vis the deceased was permissible. After all, Defendants and the Department of Justice have had no problem taking the position that torturous and abusive conduct such as that alleged in Plaintiffs' Amended Complaint – solitary confinement, sleep deprivation, exposure to temperature extremes, beatings, short-shackling, threats of rendition to torture, sexual harassment, humiliation, rape or threats of rape, denial of medical care, and religious and cultural abuse – are within the scope of authorized conduct at Guantanamo. *See* Am. Compl. ¶ 61. If the conduct that led to Al-Zahrani and Al-Salami's deaths could be similarly defended, there would presumably have been no need for Defendants to go to such lengths to hide the true cause and circumstances of the deaths and fabricate a cover story. Conduct that requires its perpetrators to conceal their behavior can hardly be said to be "a

direct outgrowth of the employee's instructions or job assignment" and thus "incidental" to authorized conduct. *Rasul I*, 512 F.3d at 657 (quoting *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995)). The D.C. Circuit recognized as much when it observed that a cover-up surrounding the nature of employees' conduct suggests that defendants "had maliciously acted contrary to their employer's interest and, therefore, outside the scope of their employment." *Id*. at 662 (quoting *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003)).

Moreover, the fact that Al-Zahrani and Al-Salami *died* as the result of Defendants' conduct is an outcome expressly prohibited by official policies and procedures for the interrogation and treatment of detainees at Guantanamo. At the time of the men's deaths in June 2006, the interrogation techniques approved for use at Guantanamo were governed by an authorization issued by Defendant former Secretary of Defense Donald Rumsfeld on April 16, 2003.[6] The authorized techniques were subject to limitations in Army Field Manual 34-52, which specifically prohibits assault through incorporation of the Uniform Code of Military Justice ("UCMJ").[7] 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*." FM 34-52 at A-2 (emphasis added). Any force likely to result in death would therefore *per se* fall outside the scope of authorized interrogation techniques because such force was prohibited by the very language of the April 16, 2003 authorization.[8] The authorization

[6] This authorization continued to be in effect at Guantanamo until September 2006, at which point it was supplanted by the issuance of Army Field Manual 2-22.3. Dep't of Justice, Office of the Inspector General, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 57-59 (2009).

[7] The Field Manual specifically notes that "techniques of interrogation are to be used within the constraints [of] … [t]he Uniform Code of Military Justice." FM 34-52 at iv.

[8] In its January 15, 2003 Memorandum upon which Defendant Rumsfeld relied when issuing the April 16th authorization, the Defense Department Working Group notes that the federal criminal assault statute also applies at Guantanamo, and defines assault to include "bodily injury which involves a substantial risk of death." Memorandum for the General Counsel of the Department of Defense, *Working Group Report on Detainee*

additionally provided that "the purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner." April 16, 2003 Authorization at Tab B. If the deaths occurred in connection with an interrogation, the fact that the men left the interrogation site dead or dying obviously indicates that Defendants exceeded the limits of permissible conduct. The prescriptions of the authorization prohibiting the use of force likely to produce death and requiring interrogations to be conducted in a lawful and humane manner were not aspirational goals; they were official policy directives that Defendants clearly breached.

Standard operating procedures ("SOPs") for Camp Delta, which govern all aspects of the treatment and care of detainees and apply to "all services and agencies that function in, and in support thereof, detainee operations at JTF-GTMO in general and Camp Delta specifically," also prohibit "abuse, or any form of corporal punishment" of detainees. Joint Task Force – Guantanamo, Camp Delta Standard Operating Procedures 1.2 (Mar. 1, 2004).[9] The SOPs further provide that "inhumane treatment of detainees is prohibited and is never justified. … [A]nyone who treats a detainee inhumanely, or fails to report such an incident, is subject to punishment under the Uniform Code of Military Justice and/or other applicable laws and statutes." *Id.* at 1.4. Any conduct that would have caused Al-Zahrani and Al-Salami's deaths was therefore *ultra vires* of governing SOPs, regardless of whether the conduct occurred in connection with interrogations or not.

In addition, Camp No, where Plaintiffs allege their sons died or the events leading to their deaths transpired, is an unofficial, secret site outside the scope of facilities authorized for

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Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 17 (January 15, 2003).

[9] Standard Operating Procedures for Guantanamo are classified. The SOPs issued March 1, 2004, were leaked to the public in December 2007 and are the most recent SOPs available.

interrogations by the SOPs. *See* Joint Task Force – Guantanamo, Camp Delta Standard Operating Procedures 10.2 (Mar. 1, 2004) (providing that authorized interrogations can only be held in one of three specific locations within Camp Delta). Whereas in *Rasul*, the D.C. Circuit observed that plaintiffs' alleged torture and abuse "[was] tied *exclusively* to the plaintiffs' detention *in a military prison and to the interrogations conducted therein*," and "took place within the time *and place limitations* sanctions [sic] by the United States," *Rasul I*, 512 F.3d at 656 (citing *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 34 (D.D.C. 2006)) (emphasis added), the alleged conduct here occurred outside the official prison at Guantanamo, in an unofficial "black site" that fell outside the sanctioned facilities and procedures that governed Al-Zahrani and Al-Salami's detention and interrogations and the duties of those charged with the men's custody and care.

Separate from the alleged conduct that led to Plaintiffs' deaths, Defendants' acts of concealing evidence and obstructing the military's investigation into the deaths also fall outside the scope of Defendants' employment. SOPs governing Camp Delta indeed provided that deaths of detainees must be investigated and evidence must be preserved. *See* Joint Task Force – Guantanamo, Camp Delta Standard Operating Procedures 5.7-5.8, 32.5 (Mar. 1, 2004). At minimum, as discussed below, the D.C. Circuit has held that cover-ups of conduct allegedly outside the scope of defendants' employment warrant an evidentiary hearing. *See Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003).

B. At a Minimum, Plaintiffs Have Presented Sufficient New Facts To Create a Material Dispute about Defendants' Scope of Employment and Warrant Limited Discovery

In denying Plaintiffs' request for an evidentiary hearing, the Court noted that "Plaintiffs have not provided any facts to buttress a claim that defendants were acting outside

of their employment, and therefore, no purpose would be served by having an evidentiary hearing." Mem. Op. at 17, n.7. In light of the newly-available evidence, Plaintiffs have at a minimum presented sufficient facts to rebut the government's certification and raise a material factual dispute as to the scope of Defendants' employment.

While certification constitutes *prima facie* evidence that defendants acted within the scope of their employment, *Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C. Cir. 2009), plaintiffs are entitled to "immediate judicial investigation" upon raising a factual dispute as to the scope. *Osborn v. Haley*, 549 U.S. 225, 247 (2007). *See also Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003) ("Because the plaintiff cannot discharge this burden [of challenging certification] without some opportunity for discovery, the district court may permit limited discovery and hold an evidentiary hearing to resolve a material factual dispute regarding the scope of the defendant's employment."); *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994) ("If there is a material dispute as to the scope issue the district court must resolve it at an evidentiary hearing."). In meeting their burden, plaintiffs are "not required to allege the existence of evidence [they] might obtain through discovery;" they are "merely required to plead sufficient facts that, if true, would rebut the certification." *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003) (internal citation omitted).

In addition to the new factual allegations discussed herein, which the Court must at this procedural stage accept as true, Plaintiffs submit as additional support for their challenge to the government's certification that it was made during an ongoing investigation into Hickman's account, several months prior to the close of the investigation. As alleged above, Sergeant Hickman related his account to the Justice Department on February 2, 2009. On February 4, 2009, the head of the Criminal Division's Domestic Security Section of the

Justice Department formally initiated an investigation into the circumstances surrounding the deaths of Al-Zahrani and Al-Salami based on this information. The investigation was summarily closed on or about November 2, 2009. The certification by the Torts Branch of the Civil Division of the Justice Department, however, was made on June 10, 2009 – nearly five months before the close of the investigation. The fact that the Justice Department made the certification months before it had the conclusions of its own investigation, particularly given the extraordinary nature of Hickman's account, suggests that certification was more akin to a rubber stamp than the result of a diligent process and further supports Plaintiffs' challenge.

While Plaintiffs have alleged several new facts that raise a material dispute as to the scope of Defendants' employment and warrant limited discovery, the D.C. Circuit has granted discovery as to scope on the basis of an alleged cover-up alone. In *Stokes*, the plaintiff alleged a cover-up by defendants and argued, as Plaintiffs do here, that if discovery were permitted he would seek evidence that would indicate that defendants "had maliciously acted contrary to their employer's interest and, therefore, outside the scope of their employment." *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003). The Circuit Court granted Stokes discovery on that basis. In *Rasul*, in denying plaintiffs' request for discovery, the Circuit distinguished *Stokes* by observing that "plaintiffs [here] concede that the alleged torture and detention were 'intended as interrogation techniques to be used on detainees.'" *Rasul I*, F.3d at 662. As discussed above, however, Plaintiffs here make no such concession with respect to the newly-available evidence concerning Defendants' conduct. At a minimum, therefore, Plaintiffs should be granted limited discovery with respect to the alleged cover-up to show, as the plaintiff in *Stokes*, that Defendants here "acted contrary to their employer's interest and,

therefore, outside the scope of their employment." *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003).

C. There Is a Heightened Need for Review of Defendants' Scope of Employment Because Substitution Presents a Complete Bar to Plaintiffs' Claims

The need for the Court's review of the scope of employment issue is imperative given that Plaintiffs have no other remedy for their claimed violations. The government's scope of employment determination under the Westfall Act is certainly judicially reviewable. *See Stokes v. Cross*, 327 F.3d 1210, 1213 (D.C. Cir. 2003) (citing *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 420 (1995)); *see also Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C. Cir. 2009). The need for judicial review of the certification is, however, "magnified" in cases where the United States would retain immunity upon substitution of the defendants. *Stokes*, 327 F.3d at 1213 (citing *Lamagno*, 515 U.S. at 429-30) ("Upon certification in a case such as this one, the United States would automatically become the defendant and, just as automatically, the case would be dismissed…. This strange course becomes all the more surreal when one adds to the scene the absence of an obligation on the part of the Attorney General's delegate to conduct a fair proceeding, indeed, any proceeding."). *Lamagno*, 515 U.S. at 429.

This is such a case. After granting the government's motion to substitute itself as defendant as to Plaintiffs' ACTA claims, which then converted to FTCA claims pursuant to the *Westfall* Act, the Court proceeded to dismiss Plaintiffs' FTCA claims on the basis of the "foreign country" exception to the FTCA. Mem. Op. at 19. Plaintiffs would thus "receive no judicial audience" for the harms they allege. *Lamagno*, 515 U.S. at 429. Because

certification here presents a complete bar to the claims, thereby "disarm[ing] plaintiffs," *Id.* at 427, the need for close scrutiny of the government's certification is especially critical.

For the foregoing reasons, Plaintiffs' motion for reconsideration should be granted.

Dated: March 16, 2010

Respectfully submitted,

/s/ Pardiss Kebriaei
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William Goodman (Pursuant to LCvR 83.2(g))
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TALAL AL-ZAHRANI, *et al.*, Plaintiffs, v. DONALD RUMSFELD, *et al.* and UNITED STATES, Defendants.	Case No. 09-cv-00028 (ESH)

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Reconsideration in Light of Newly-Discovered Evidence, it is hereby ORDERED that the motion is GRANTED.

SO ORDERED, this _____ day of _____ 2010.

_____
Hon. Ellen S. Huvelle
United States District Judge