[Oral Argument Held September 14, 2007]

CASE NO. 06-5209, 06-5222

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL, et al.,
Appellants/Cross-Appellees
v.
RICHARD MYERS, AIR FORCE GENERAL, et al.,
Appellees/Cross-Appellants.

On Remand from the United States Supreme Court
Appeal from the United States District Court
For the District of Columbia, C.A. No. 1:04CV01864 (RMU)
The Honorable Ricardo M. Urbina, District Judge

SUPPLEMENTAL REPLY BRIEF ON REMAND OF APPELLANTS/CROSS-APPELLEES RASUL, ET AL.,

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Dated: March 23, 2009

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MISCELLANEOUS

Appellees' supplemental brief argues that the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), changes nothing. In fact, it changed everything:

- The basis for this Court's decision in the instant case was its hard and fast rule that aliens without property or presence in the United States have no constitutional rights. In *Boumediene*, the Supreme Court unequivocally rejected that rule.

- Appellees proffer an analytical distinction between the Suspension Clause, which inarguably applies to Guantánamo detainees, and other fundamental rights. Yet nothing in the Supreme Court's decision supports any such distinction, and in its own *Boumediene* decision, this Court flatly declared that "this is no distinction at all." *Boumediene v. Bush*, 476 F. 3d 981, 993 (D.C. Cir. 2007).

- Appellees point to nothing that would support their contention that granting relief would improperly "intrude" upon legitimate "sovereign prerogatives ... in contexts involving national security and foreign policy." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), has long been applied to suits by prisoners in federal custody, and torturing prisoners is plainly impermissible in any context.

- This Court's decision that appellants are not "persons" in the constitutional sense simply cannot be reconciled with the Supreme Court's decision in *Boumediene* that Guantánamo detainees do have constitutional rights and thus are "persons" in precisely that sense.

- *Boumediene* also destroys appellees' argument that it was reasonable for senior government officials to believe that they had successfully created a legal black hole where they could torture prisoners or throw their Korans in filthy toilet buckets with impunity. This is not new law. *Boumediene* pointed out that for more than a century, it has been clear that the power of government officials to act outside U.S. borders is not "absolute and unlimited." 128 S. Ct. at 2259.

Far from being irrelevant to the instant case, *Boumediene* compels this Court to reconsider and reverse its now vacated ruling and to permit this case to go forward.

I. THE CORE PREMISE OF *KIYEMBA* CANNOT BE RECONCILED WITH *BOUMEDIENE*.

Stripped to its essentials, appellees' position is that *Kiyemba* v. *Obama*, 555 F.3d 1022 (D.C. Cir. 2009), as intervening authority, is controlling, making it unnecessary even to consider the impact of *Boumediene* on this case, as the Supreme Court directed. Appellees are silent as to whether they endorse the analysis in *Kiyemba*, whether *Kiyemba* is analytically consistent with *Boumediene*, and whether, after *Boumediene*, it can be correct that aliens detained at Guantánamo have no constitutional due process rights.

Appellants must state their position respectfully but unambiguously: To the extent that *Kiyemba* addresses the power of the Judiciary to order the Executive to bring an alien into the United States, it is irrelevant to the instant case. To the extent that *Kiyemba* maintains a categorical rule that aliens without property or presence can be tortured because they have no constitutional rights (other than the specific right to habeas corpus), it is fundamentally in conflict with *Boumediene* and analytically unsound for reasons that this Court recognized in its colloquy with the dissent in its now-

overruled decision in *Boumediene*. *See* App'ts' Suppl. Br. at 8-9. Appellees' facile invocation of *Kiyemba* as precluding any further analysis invites error.

II. NO SPECIAL FACTORS WARRANT DISMISSAL OF APPELLANTS' *BIVENS* CLAIMS.

Skipping over the core constitutional issues by invoking *Kiyemba*, appellees devote much of their supplemental brief to subsidiary issues in an attempt to avoid accountability. First, they cite "special factors" as a self-created fail-safe from *Bivens* liability. Under well established law, this is not a case where special factors apply:

> 1. For more than 25 years, the Supreme Court has recognized the right of prisoners in federal custody to bring *Bivens* actions when their constitutional rights are violated by their jailers. *See Carlson v. Green*, 446 U.S. 14 (1980); *McCarthy v. Madigan*, 503 U.S. 140 (1992);
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> 2. Military officials are not generally exempt from *Bivens* liability.[1] Although deference to military discipline precludes a *Bivens* action by enlisted soldiers against senior officers, *Chappell v. Wallace*, 462 U.S. 296 (1983), the courts have recognized *Bivens* actions by civilians against military officers. *See e.g., Saucier v. Katz*, 533 U.S. 194 (2001). Indeed, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court recognized that challenges to detentions at Guantánamo do not implicate the "concerns about military discipline" described in *Chappell*. *Id.* at 587;
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> 3. There are no elaborate procedural remedies already available to address the claims asserted. *See Bush v. Lucas*, 462 U.S. 367 (1983)

[1] There is no similar argument for a bar to a *Bivens* remedy against former Secretary Rumsfeld. *See Butz v. Economou*, 438 U.S. 478, 506-07 (1978).

(civil service scheme), *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (social security scheme), *Chappell*, 462 U.S. at 302-03 (military grievance procedures);

4. Appellants' complaint seeks redress for torture and religious abuse at Guantánamo. This action is not about the correctness of the United States' invasion of Afghanistan, and does not implicate foreign policy or methods of war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (distinguishing between acts committed "on the battlefield" and continuing detention outside war zone). Appellees' reliance on cases like *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), which concerned the policy decision to fund the Nicaraguan Contras, is entirely misplaced. No deference to the political branches is warranted in the instant case.

App'ts' Resp. and Reply Br. at 21-28.

Appellees' argument is yet another iteration of the continuing refrain that the detention of Guantánamo detainees is committed to the Executive alone and the Judiciary has no role to play. The Supreme Court has repeatedly rejected this assertion of Executive prerogative. As Justice O'Connor wrote for the plurality in *Hamdi*, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. at 536. Similarly, in *Hamdan*, the Supreme Court rejected the argument that the courts should abstain from consideration of the legality of military commissions at Guantánamo. In affirming the importance of judicial oversight at Guantánamo, the Supreme Court invoked "the public

importance of the questions raised by the cases and . . . the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty . . . ." *Hamdan*, 548 U.S. at 588 (quoting *Ex Parte Quirin*, 317 U.S. 1, 19 (1942)).

The policies behind *Bivens*, moreover, strongly favor recognition of appellants' claims. Appellants have been released, so declaratory or injunctive relief would be meaningless. For appellants here, like the plaintiff in *Bivens*, it is "damages or nothing." *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Appellees' argument that recognizing a *Bivens* action would "increase the likelihood that officials will make decisions based on fear of litigation rather than appropriate military policy" is specious. The conduct at issue here is clearly illegal under military and federal criminal law. Thus, federal and military officers already were at risk of military discipline and criminal prosecution for the conduct alleged in the complaint. The threat of civil liability cannot conceivably have a greater effect on their actions than the threat of incarceration. But to the extent that potential civil liability would deter military and cabinet officers from ordering and approving torture, that is entirely salutary. Suits for damages are an effective deterrent to illegal conduct. *Butz*, 438 U.S. at 505. When government officials are torturing

prisoners, it is unworthy to invoke facile bromides about "sovereign prerogatives" or officials inhibited by "fear of litigation." Torturers should fear litigation.

III. TORTURERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Appellees invite this Court to ignore the issue of whether detainees have a right not to be tortured or religiously abused in light of *Boumediene* and instead to focus only on whether such rights were clearly established at the time of the conduct at issue, citing *Pearson v. Callahan*, 129 S. Ct. 808 (2009). Yet *Pearson* did not address the circumstance presented here, in which this Court already has ruled on the existence of a constitutional right and its decision has been vacated by the Supreme Court and remanded for reconsideration. Having already addressed the constitutional issue, it is incumbent upon the Court to reconsider its analysis in light of *Boumediene* as the Supreme Court directed.

None of the concerns set out in *Pearson* that might counsel against reaching the constitutional issue is present here. This is not a case in which the issue "is so fact-bound that the decision provides little guidance for future cases," the constitutional question is pending before a higher court, the constitutional issue rests on an "uncertain interpretation of state law," or the constitutional question is poorly presented. *Id.* 819-20. Indeed, as the

United States argued as an amicus in *Pearson*, in cases such as this one which "provide useful clarification to future courts and to government officials" and involve questions of "general application and recurring importance," the constitutional issue *should* be decided first.[2] There is no better vehicle than this case for the determination of an issue of central importance – whether prisoners in custody at Guantánamo Bay have a right not to be tortured. The Court should decline appellees' invitation to avoid the constitutional questions presented here.

Appellees' argument that *Boumediene* is not relevant to the qualified immunity analysis because it was decided after the underlying conduct at issue misconstrues the very basis for the Supreme Court's decision. As the Supreme Court made clear, the recognition of fundamental rights to persons living under U.S. control is not a new doctrine. It is grounded in well-settled principles based on a century-long line of authority. 128 S. Ct. at 2254. That the rights at issue here are fundamental has been well-established for decades if not centuries. The prohibition on torture and abuse of prisoners dates back to the founding of the Republic. No U.S. officer reasonably could have believed that U.S. government officials could legally torture detainees or persecute them on the basis of their religion.

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[2] Brief for the U.S. as Amicus Curiae Supporting Petitioners, *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (No. 07-751) at 24, 25.

IV. RFRA APPLIES AND THERE IS NO BASIS FOR RFRA QUALIFIED IMMUNITY.

None of appellees' arguments as to why *Boumediene* does not affect this Court's analysis of RFRA withstands scrutiny. First, and foremost, *Boumediene* precludes this Court's conclusion that appellants are excluded from the "persons" entitled to RFRA protection because they have no constitutional rights. Second, contrary to appellees' argument, RFRA by its terms does not have as its single purpose to restore the *status quo ante* the Supreme Court's holding in *Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990). An equally important explicit purpose of RFRA was "to provide a claim or defense to persons whose religious exercise is substantially burdened by Government," 42 U.S.C. § 2000bb(b)(2), a purpose ignored by appellees. This second purpose is unbounded by constitutional or geographic limitations. It reflects that RFRA was designed to create and implement a uniform federal standard for regulating religious conduct in all territories and possessions of the U.S. including prisons and military bases.[3]

Appellees' argument that they could not have reasonably known that these detainees were "persons" with the right not to have their Korans

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[3] RFRA, by its express terms, encompasses claims arising in U.S. possessions like Guantánamo, *see Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 389-90 (1948), and claims by *and against* the military. App'ts' Resp. and Reply Br. at 33-35.

thrown in the toilet bucket is similarly insupportable. Certainly detainees are "persons" under any ordinary definition of the word. There can be no doubt that appellants knew that what they were doing burdened appellants' religious practices. The district court found that the allegations in the complaint "constitute a direct affront to one of this nation's most cherished constitutional traditions." *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 71 (D.D.C. 2006). Appellees do not assert that their actions were necessary and that there was no less burdensome alternative. Thus, appellees are left to argue that they thought "persons" excluded Guantánamo detainees, an exception that appears nowhere in RFRA. Yet, before this Court so ruled, there were no judicial decisions restricting the broad term "persons" in RFRA, and numerous cases had previously interpreted "persons" to include non-resident aliens. App'ts' Reply Br. at 41. That a federal officer unilaterally assumed an unstated exception in clear statutory language is not reasonable conduct and does not support a claim for qualified immunity.

Finally, appellees cannot credibly contend that they acted in good faith in thinking they were free to defile the Koran at Guantánamo because they believed appellants did not fit neatly within RFRA's meaning of "persons." That appellees knowingly violated military law in torturing and humiliating these detainees cannot be disputed on this record. Hence, they

simply cannot raise a claim of good faith on which qualified immunity depends.

CONCLUSION

Any fair reading of *Boumediene* must concede that it fundamentally rejected the core principles on which this Court's decision in this case rests. Guantánamo detainees do have constitutional rights. Detainees are "persons" under either constitutional or statutory analysis. Their constitutional rights are not limited to habeas corpus but rather extend to those fundamental rights that it would not be impractical or anomalous to apply. It is time for this Court to affirm that rights at the core of human dignity – the right not to be tortured or to be humiliated for one's religious beliefs – are rights that unequivocally belong to those in custody at Guantánamo Bay.

Respectfully submitted,

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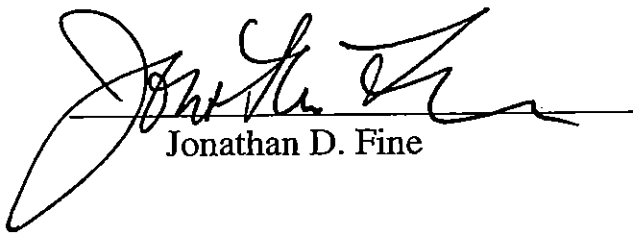

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