CASE NO. 06-5209, 06-5222

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL, et al.,

Plaintiffs-Appellants/Cross-Appellees

v.

DONALD H. RUMSFELD, et al.,

Defendants-Appellees/Cross-Appellants

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

PLAINTIFFS-APPELLANTS' RESPONSE AND REPLY BRIEF

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Dated: March 9, 2007

CERTIFICATE AS TO PARTIES RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), appellants Shafiq Rasul, et al., certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

1. **Plaintiffs:**

   Shafiq Rasul

   Asif Iqbal

   Rhuhel Ahmed

   Jamal Al-Harith

2. **Defendants:**

   Former Secretary of Defense Donald Rumsfeld

   Air Force General Richard Myers

   Army Major General Geoffrey Miller

   Army General James T. Hill

   Army Major General Michael E. Dunlavey

   Army Brigadier General Jay Hood

   Marine Brigadier General Michael Lehnert

   Army Colonel Nelson J. Cannon

   Army Colonel Terry Carrico

   Army Lieutenant Colonel William Cline

   Army Lieutenant Colonel Diane Beaver

3. **Intervenors:**

   None

4. **Amici:** There were no Amici in the District Court.

   Two groups of Amici filed briefs in support of plaintiffs-appellants in Case No. 06-5209. The first group consists of: the National Institute of Military Justice, Brigadier General (Ret.) David M. Brahms, Lieutenant Commander (Ret.) Eugene R. Fidell, Commander (Ret.) David Glazier, Elizabeth L. Hillman, Jonathan Lurie, and Diane Mazur. The second group consists of: Susan Benesch, Lenni B. Benson, Christopher L. Blakesley, Arturo J. Carillo, Roger S. Clark, Marjorie Cohn, Rhonda

Copelon, Angela B. Cornell, Constance de la Vega, Martin Flaherty, Hurst Hannum, Dina Haynes, Deena Hurwitz, Ian Johnstone, Daniel Kanstroom, Bert Lockwood, Beth Lyon, Jenny S. Martinez, Carlin Myer, Noah Benjamin Novogrodsky, Jamie O' Connell, Jordan J. Paust, Naomi Roht-Arriaza, Meg Satterthwaite, Ron Slye, Beth Van Schaack, David Weissbrodt, and Ellen Yaroshefsky, The Center for Justice and Accountability, Human Rights Watch, The Allard K. Lowenstein International Human Rights Clinic, and Physicians for Human Rights.

Plaintiffs-appellants are aware that certain Amici intend to file briefs in support of plaintiffs-appellants' position in Case No. 06-5222, but are not aware of the precise signatories.

B. RULINGS UNDER REVIEW

The rulings under review were entered by the U.S. District Court for the District of Columbia (Urbina, J).

February 6, 2006	Memorandum Opinion Granting in Part and Deferring Ruling in Part on Defendants' Motion to Dismiss, 414 F. Supp. 2d 26 (D.D.C. 2006), App. 82-115.
July 10, 2006	Order Granting Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 54(b) and Directing Final Judgment as to Counts I-VI of the Complaint, App. 140.
July 20, 2006	Final Judgment on Counts I-VI of the Complaint, App. 141.
May 8, 2006	Memorandum Opinion Denying the Defendants' Motion to Dismiss the Religious Freedom Restoration Act Claim
May 8, 2006	Order Denying the Defendants' Motion to Dismiss Religious Freedom Restoration Act Claim

C. RELATED CASES

Rasul v. Rumsfeld is currently before this Court on plaintiffs' appeal, Case No. 06-5209, and defendants' interlocutory appeal as of right, Case No. 06-5222. These cases are related to each other, but are not related to any other case pending before this Court or any other court.

These cases have not previously been before this Court or any other court (other than the district court). Plaintiffs are not parties to any other proceeding, in this Court or any other court, raising the same or substantially similar issues.*

* According to Circuit Rule 28(a)(1)(C), a case is related to another case if it involves "substantially the same parties and the same or similar issues." The description in defendants' certificate of the procedural history of *Al Odah v. United States*, D.C. Cir. Nos. 05-5064, 05-5095, 05-5116, *decided sub nom*, *Boumediene v. Bush*, No. 05-5062, demonstrates that the instant appeals are not related to *Al Odah*. None of the plaintiffs is a party to the *Al Odah* cases.

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MISCELLANEOUS

GLOSSARY

1.	Compl.	Plaintiffs' Complaint
2.	Def. Br.	Defendants-Appellees/Cross-Appellants' Principal Brief
3.	FTCA	Federal Tort Claims Act, 28 U.S.C. §§ 2671-80
4.	Geneva Convention on Civilian Detainees	Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
5.	Geneva POW Convention	Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135
6.	Guantánamo	U.S. Naval Base at Guantánamo Bay Naval Station
7.	MCA	Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in relevant part at 10 U.S.C. § 949)
8.	Res Add	Addendum to Plaintiffs' Response and Reply Brief
9.	RFRA	Religious Freedom Restoration Act, 42 U.S.C. § 2000(b)(b)
10.	Pl. Br.	Plaintiffs-Appellants' Principal Brief
11.	UCMJ	Uniform Code of Military Justice
12.	Westfall Act	Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in relevant part at 28 U.S.C. § 2679)

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

Plaintiffs[1] respectfully refer the Court to the Statement of Issues Presented for Review in their principal brief. With respect to defendants' interlocutory appeal (No. 06-5222), plaintiffs submit the following issues for review:

1. Whether the District Court correctly determined that the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb, *et seq.*, applies at the United States Naval Station, Guantánamo Bay, Cuba.
2. Whether the District Court correctly determined that the application of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb, *et seq.*, to the defendants' conduct was clearly established at the time of plaintiffs' detention at the United States Naval Station, Guantánamo Bay, Cuba.

[1] Appellants/cross appellees use the terms "plaintiffs" and "defendants" as set forth in their principal brief. Pl. Br. at 1, n. 1.

STATEMENT OF THE CASE

Plaintiffs respectfully refer the Court to the Statement of the Case contained in their principal brief. In addition, plaintiffs state the following:

Following the dismissal of Counts I-VI of the complaint, the district court requested supplemental briefing concerning plaintiffs' claim under RFRA. App. at 116. On May 8, 2006, the district court denied defendants' motion to dismiss the RFRA claim on the grounds that, by its plain terms, the statute applied to defendants' conduct at Guantánamo, and the applicability of RFRA at Guantánamo was clearly established at the time of plaintiffs' detention. App. at 139. Defendants filed a notice of interlocutory appeal of this order. Defendants' appeal (No. 06-5222) was subsequently consolidated with plaintiffs' appeal of the dismissal of Counts I-VI of the complaint (No. 06-5209).

STATEMENT OF FACTS

Plaintiffs respectfully refer the Court to the Statement of Facts contained in their principal brief. In addition, plaintiffs state the following:

Defendants' cruel and degrading treatment of plaintiffs at Guantánamo reflected both a deliberate intent to harass and hinder plaintiffs in the exercise of their religion, and an apparent indifference to the incidental effect of even neutral policies on plaintiffs' religious practices. For example, defendants ordered and/or authorized the shaving of plaintiffs' beards and facial hair. App. at 30 (Compl. ¶¶58, 60). Defendants used denial and desecration of religious items, including the Koran, and denial of prayer as part of their interrogation and disciplinary techniques. App. at 37, 40, 42-43 (Compl. ¶¶92, 105, 117). Plaintiffs were incarcerated in conditions that prevented prayer, App. at 35-36 (Compl. ¶85). They were denied prayer mats and copies of *The Koran*, and their attempts to pray five times a day, as mandated by their

Muslim faith, were banned or crassly interrupted by defendants. App. at 34, 37, 42-43, 57-58 (Comp. ¶¶78, 92, 94, 117, 206). Plaintiffs were denied appropriate clothing which was necessary for prayer. App. at 57-58 (Compl. ¶206). Most horrendously, defendants and persons acting on their orders desecrated *The Koran*, Islam's most holy book, by throwing it into the detainees' toilet bucket, kicking it, soaking it with water, and otherwise treating it in deliberately offensive ways. App. at 34, 45 (Compl. ¶¶78, 134-135).

SUMMARY OF ARGUMENT

Stripped of euphemism, defendants' brief asserts a series of legal propositions that are anathema to the Constitution, the rule of law, and the entire common law tradition. Defendants would have the Court forget that this case is about torture. While scrupulously avoiding use of the word torture, defendants proffer these astonishing assertions:

- Because torture is "precisely the 'kind' of conduct [defendants] were employed to perform," Def. Br. at 15, or, alternatively, torture "is at least 'incidental' to those duties," Def. Br. at 18, the Westfall Act immunizes defendants against plaintiffs' international law claims;
- The Geneva Conventions do not provide a remedy to victims of torture;
- The power of the executive branch and the military to detain and abuse non-enemy aliens is unchecked by judicial oversight;
- Defendants enjoy immunity against plaintiffs' constitutional tort claims because they had no way of knowing that they could not torture with impunity until June of 2004, when the Supreme Court handed down its decision in *Rasul v. Bush,* 542 U.S. 466 (2004); and

- Despite the unambiguous language of RFRA, detainees can be denied religious observance and have their holy books thrown in the toilet bucket because: (i) as aliens, detainees are not "persons;" (ii) RFRA only sought to restore a Constitutional test for the Free Exercise Clause; and (iii) non-resident aliens in U.S. custody have no religious rights whatever, statutory or Constitutional, unless they are physically within U.S. borders.

It is shameful that the Department of Justice, acting here for these defendants, would seek to enshrine these propositions in the body of American law. But beyond shame, defendants' arguments are unsupported and unsupportable.

First, torture is *never* authorized and the torturer is universally reviled as "*hostis humani generis,* an enemy of all mankind," *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). Thus, it is never within the scope of a government employee's responsibilities – or incidental to those responsibilities – to torture. This truism is reflected in the legislative history of the Westfall Act, where Congress expressly notes its intent to deny immunity to government employees who engage in "egregious misconduct." And even if torture could under some circumstances be within the scope of employment, it is certainly not for the court to presume as a matter of law.

Second, plaintiffs' detention and torture at Guantánamo violated the 1949 Geneva POW Convention and the Geneva Convention on Civilian Detainees. These Conventions provide specific rights to individuals and are enforceable here.

Third, there are no "special factors" that support denial of a remedy to plaintiffs, despite defendants' protestation that this case seeks to extend *Bivens* and to intrude on matters within the exclusive purview of the executive branch and the military. This case is a typical *Bivens* action

and does not present any interference with the political branches of the government or the military.

Fourth, defendants knew, as any civilized person would know, that torture is wrong and violates fundamental rights wherever it takes place. They brought detainees to Guantánamo rather than to a detention facility in the continental United States in a calculated attempt to avoid accountability for the criminal acts they intended to commit. Defendants' gamble that Guantánamo might be recognized as a haven for torture should not be rewarded by conferring qualified immunity. *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("There has never been ...a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages").

Fifth, the district court correctly found that RFRA by its terms applies to military conduct at Guantánamo. The statute applies to all territories and possessions of the United States, and, in construing an analogous statute, the Supreme Court in *Vermilya-Brown Co., v. Connell*, 335 U.S. 377 (1948), made clear long ago that military bases like Guantánamo are territories and possessions for these purposes. The limitations argued by defendants appear nowhere in the statute or its legislative history, and the Court should not infer them. Moreover, because RFRA applies to the military wherever it serves, it is axiomatic that RFRA applies to the defendants' religious abuse of plaintiffs while they were imprisoned at Guantánamo.

ARGUMENT

I. THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' INTERNATIONAL LAW CLAIMS SHOULD BE REVERSED.

The district court made a fundamental error in deciding that defendants were entitled to Westfall immunity for plaintiffs' international law claims. The court improperly assigned plaintiffs the burden of *proving*, at the motion to dismiss stage, that defendants acted outside the scope of their employment. Defendants fail to address this fundamental error, which requires reversal and remand to allow discovery. Instead, they assert that discovery would be "intrusive" – a novel ground for ignoring settled law. In addition, defendants incorrectly argue that the egregiousness of their conduct has no import in the scope of employment analysis, a proposition that also is implicit in the decision below. Finally, defendants assert that "civil action" means "claim" in the context of the Westfall Act, an argument erroneously accepted by the court below. Because of these errors, this Court should reverse the decision below and remand for discovery and a full evidentiary hearing regarding whether ordering torture was within the scope of defendants' employment.

A. It Is Undisputed That Plaintiffs Do Not Bear The Burden Of Proof On A Motion To Dismiss.

Upon review of the Attorney General's Westfall certification, the court below dismissed Plaintiffs' international law claims on the ground that plaintiffs had "failed to meet their *burden of proving* that the individual defendants acted outside the scope of their employment." App. at 103 (emphasis added). This utterly misstates plaintiffs' burden at the motion to dismiss stage.

This Court has provided clear guidance concerning how to evaluate a motion to dismiss predicated on a Westfall certification:

- To survive a motion to dismiss, plaintiffs only need to allege "sufficient facts that, if true, would rebut the [Attorney General's] certification, *proof is not required*;"
- A Westfall certification is entitled to no particular evidentiary weight; and
- Discovery is ordinarily necessary to enable plaintiffs to discharge their burden.

Stokes v. Cross, 327 F.3d 1210, 1214-16 (D.C. Cir. 2003) (emphasis added). Contrary to this Court's directive and despite the fact that the complaint and supplemental material submitted by plaintiffs clearly demonstrated a factual dispute regarding whether torture was within the scope of defendants' employment, the district court decided this issue as a matter of law and failed to allow discovery.

Defendants do not dispute that the district court granted their motion to dismiss in reliance on an incorrect evidentiary standard. Accordingly, this Court should reverse and remand this claim for discovery and an evidentiary hearing on the scope of defendants' employment. *See Stokes*, 327 F.3d at 1215-16 (plaintiff alleging sufficient facts to rebut certification is entitled to discovery and evidentiary hearing); *Kimbro v. Velten*, 30 F.3d 1501, 1508-09 (D.C. Cir. 1994) (discovery and evidentiary hearing required on scope of employment "regardless of the content of the certification"); *Majano v. United States*, 469 F.3d 138, 140-41 (D.C. Cir. 2006) (scope of employment best determined by finder of fact).

B. Whether Defendants' Conduct Was Within The Scope Of Their Employment Cannot Be Decided As A Matter Of Law.

Like the district court's opinion, defendants' opposition brief relies on a fundamental misreading of District of Columbia law on scope of employment. Defendants argue that, because certain intentional torts have been found to be within the scope of employment after a full trial on the merits, the court below was correct to hold – as a matter of law – that the acts of torture and cruelty alleged in the complaint were necessarily within defendants' job responsibilities. Defendants further mischaracterize plaintiffs' argument concerning the scope of employment, stating, "contrary to plaintiffs' claim . . . an[] act is not outside the scope of employment just because it is a serious crime." Def. Br. at 20.

Plaintiffs have never made such an assertion. To the contrary, plaintiffs acknowledge that criminal acts *may* be within the scope of employment. Pl. Br. at 20. What plaintiffs do assert, and defendants ignore, is that the determination of whether a particular serious crime is within the scope of a particular person's employment is a question of fact not a matter of law. *See Majano*, 469 F.3d at 140-41; *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976); *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986). Indeed, in the leading cases cited by both plaintiffs and defendants, this Court *reverses* decisions regarding the scope of employment that were rendered as a matter of law. *See e.g.*, *Majano*, 469 F.3d at 141 (reversing determination on summary judgment that conduct was outside scope of employment); *Lyon*, 533 F.2d at 650-51 (reversing determination as a matter of law that conduct was outside scope of employment); *Stokes*, 327 F.3d at 1214-16 (same). These cases stand squarely for the proposition that under D.C. law finders of fact have a wide berth to decide the scope of employment on a full factual record.

Nevertheless, defendants assert that a federal court applying D.C. law and reviewing an Attorney General's certification may determine scope of employment as a matter of law. Def. Br. at 14. In particular, they rely on *Haddon v. United States*, 68 F.3d 1420 (D.C. Cir. 1996), a case in which an employee's threat was determined to be *outside* the scope of his employment as a matter of law. Defendants cite no case where an employee's action has been found on the pleadings to fall *within* the scope of employment. Nor could they. As this Court noted, "on the infrequent occasions when courts have resolved scope of employment questions as a matter of law. . . it has generally been to hold that the employee's action was *not* within the scope of her employment and thus to absolve the employer of any liability." *Majano*, 469 F.3d at 141 (emphasis in original). *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006) ("*CAIR*"), on which defendants heavily rely, is a case in point. In *CAIR*, the district court was confronted with the question of whether an alleged libel fell within the scope of employment for a Congressman. Rather than determining the issue as a matter of law (as the court below did here), the court permitted discovery on the issue and held a hearing. *Id.* at 663. This is the procedure the district court should have adopted in the instant case.

Defendants ultimately do not dispute that scope of employment is an issue of fact. instead Defendants argue that, in this case, discovery is "unnecessary" and that "the issue of scope can and should be resolved without an evidentiary hearing." Def Br. at 25. The law of this Circuit is clear that, where the question of scope of employment is disputed at the motion to dismiss stage, discovery and an evidentiary hearing are required. Here, the allegations of the complaint demonstrate that the scope of defendants' employment is disputed. Plaintiffs specifically allege that torture was unauthorized and outside the scope of defendants' employment. In addition, plaintiffs proffered additional evidence of previous statements by the

United States that torture is unauthorized and outside the scope of an officer's employment. The cases reversing district courts that rule on scope of employment as a matter of law are myriad. Failure to grant discovery and a hearing is clear error which must be reversed.

C. Intrusiveness Does Not Bar Discovery.

Defendants do not dispute that questions such as whether torture, cruelty and degradation are "ordinarily permitted" and whether it was "expectable" that military officers and the Secretary of Defense would order torture are relevant to the scope of employment issue. Under the relevant law, these factual questions bear directly on whether tourture was incidental to defendants' employment and whether it was expectable or foreseeable by their employer. *See* Restatement (Second) of Agency §§ 228 (whether use of force is "not unexpectable"), 229 (whether act was authorized, whether act was a departure from the normal method of accomplishing the result, whether act is one commonly done), 231 (whether act was a serious crime), 245 (whether use of force is "not unexpectable"). Yet, defendants argue that the district court's decision should be affirmed because discovery "would entail the most intrusive of investigations." Def. Br. at 25. This "intrusiveness defense" is invented out of thin air, and defendants cite no law in support of their claim that it prevents discovery on clearly relevant factual issues.

Defendants did not raise "intrusiveness" below and do not support it here with any specifics. Defendants make no argument that information relevant to the scope of their employment is voluminous, classified, or even confidential. The Court should not decide this question in a vacuum. In any event, it is within the province of the district court to supervise discovery within sensible parameters; an unsupported, categorical assertion of "intrusiveness" is hardly grounds for depriving the victims of torture of a valid remedy.

D. The District Court Misconstrued And Misapplied The Relevant Substantive Law Regarding Scope Of Employment.

In rendering its decision as a matter of law, the district court also failed to apply the relevant provisions of the Restatement, instead assuming that egregious conduct necessarily falls within the scope of employment under D.C. Law. In addition, it discounted relevant law holding that torture cannot be within an executive's duties. These errors warrant a reversal.

1. The court failed to apply the multi-factor analysis required by the Restatement.

In addition to its failure to employ the proper evidentiary standard for determining the scope of employment on a motion to dismiss, the district court misconstrued the substantive *respondeat superior* law of the District of Columbia, failing to employ the established multi-factor analysis required by the Restatement (Second) of Agency. Thus, the court erroneously found that "courts in the District of Columbia categorize practically any conduct as falling within the scope of, or incidental to, that authorized by their employer so long as the action has some nexus to the action authorized." App. at 94. This is incorrect.

First, D.C. courts do not characterize any particular conduct as *necessarily* falling within a person's employment. *See* Pl. Br. at 26-27. Rather, D.C. courts recognize that many types of conduct, including intentional torts, could *potentially* fall within a person's employment, but that this determination is to be left to the finder of fact on a developed record. *Id.*

Second, D.C. Courts do not merely require "some nexus" to authorized employment activities. D.C. courts apply the multi-factor test set forth in the Restatement (Second) of Agency *Columbia Plaza Corp. v. Security Nat'l Bank*, 676 F.2d 780, 788 (D.C. Cir. 1982); *Boykin v. District of Columbia*, 404 A.2d 560, 563 (D.C. 1984). The district court in the instant case read the Restatement too narrowly, applying only the four factors enumerated in

Restatement §228 and ignoring other relevant provisions of the Restatement.[2] The court also should have applied Sections 229, 231 and 245 in its consideration of whether the defendants' conduct was authorized or incidental to authorized conduct, and whether it was "expectable" or foreseeable by the employer. *See* Pl. Br. at 20-21, 24-28. Under these Sections, the intentionally criminal nature of defendants' acts strongly militates against such acts being within the scope of employment. *See* Restatement (Second) of Agency §§ 229(2)(j) (whether act was seriously criminal), 231 cmt. a (same). The district court did not discuss any of these additional factors, and defendants make no attempt to demonstrate that the court considered them or that, if considered, these factors would not be of critical relevance to the issue presented here.

The district court's failure to consider the seriously criminal nature of the defendants' conduct was apparently based on an implicit assumption that the egregiousness of plaintiffs' allegations is immaterial to the question of immunity. The district court appeared to conclude that torture is somehow a logical or expected extension of detention or interrogation. App. at 95 ("torture is a foreseeable consequence of the military's detention of suspected enemy combatants"). It is not. It is a hallmark of a civilized society governed by the rule of law that clear distinctions are made between interrogation and torture, and the use of torture is unequivocally rejected.

Yet defendants go even further, averring that interrogation and torture are not only on the same continuum but essentially identical. Thus, defendants specifically assert that "the alleged conduct [that is, torture]... was precisely the 'kind' of conduct they were employed to perform."

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[2] Defendants disingenuously suggest that plaintiffs have "waived" arguments as to the other factors relevant to defendant's conduct. Def. Br. at 15. This argument, which appears to be part of defendants' strategic attempt to shoehorn the entire analysis required by District of Columbia scope of employment law into the first factor of Restatement (Second) of Agency §228, overlooks plaintiffs' discussions of the district court's error in failing to consider whether defendants' torture of persons in custody was expectable or foreseeable by their employer. *See, e.g.*, Pl. Br. at 20-21, 24-28.

Def. Br. at 15. This is a shocking and abhorrent proposition that falls to this Court decisively to refute.

Even the more modest formulation, that torture, if not authorized, is nevertheless "incidental" to ordinary detention and interrogation is an insult to our men and women in uniform. The U.S. military, since its inception, has set the standard for the world in requiring humane treatment for detained prisoners, even when not classed as prisoners of war. *See Brief* Amici Curiae *of Retired Military Officers, Military Law and History Scholars and the National Institute for Military Justice in Support of Plaintiff-Appellants and Urging Reversal* at 4-5. It was not and could not be foreseeable that defendants would violate international law, the Geneva Conventions, the U.S. Constitution, the U.S. Army Field Manual, and the Uniform Code of Military Justice in designing and implementing a program of torture and cruel, inhuman and degrading treatment. Indeed, Defendants' conduct is in express contravention of assurances of President Bush and the Department of State in official submissions to the United Nations that "[t]he U.S. Government does not permit, tolerate, or condone torture." App. at 73, ¶4. To suggest that torture is a "direct outgrowth" of the principles to which the U.S. military has hewed for more than 200 years is plain error. Certainly, it was error to make this determination as a matter of law.

2. As a matter of law, torture cannot be within the scope of employment for executive officers.

In addition, the district court summarily dismissed extensive law reflecting that torture cannot be within the scope of employment for executive branch officers. Although this proposition has been so obvious to American courts when they have considered the actions of foreign officials that they frequently have seen no need to justify it, Amici International Law Scholars and Human Rights Organizations explain the reason why torture is different from the

other common torts covered by the Westfall Act. Unlike ordinary torts, torture is a non-derogable *jus cogens* norm. The *jus cogens* nature of torture means that it is different *in kind* from ordinary criminality, not to mention lawful acts of detention and interrogation. *See Brief of* Amici Curiae *International Law Scholars and Human Rights Organization in Support of Plaintiffs-Appellants* at 10-12. As the Second Circuit memorably declared, "[f]or purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d at 876, 890 (2d Cir. 1980); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting same); and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (quoting same).

Defendants offer no explanation why the reasoning in these cases is inapplicable here. Although both the defendants and the district court suggest that the cases are distinguishable because they relate to the Foreign Sovereign Immunities Act ("FSIA") rather than Westfall, none of the cases turns on any technical aspect of the FSIA, or any issues unique to foreign (as opposed to domestic) sovereign immunity. Moreover, these cases are, at the very least, relevant to whether torture could have come within the scope of defendants' employment.

Defendants cite no case in support of their proposition that U.S. officials should be held to a different standard than foreign officials. Instead, defendants rely largely on *Schneider v. Kissinger*, 310 F. Supp.2d 251 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005), and *Bancoult v. McNamara*, 370 F. Supp.2d 1 (D.D.C. 2004), *aff'd on other grounds*, 445 F.3d 427 (D.C. Cir. 2006). Neither case supports defendants' position here.

In this case, plaintiffs challenge the district court's dismissal as a matter of law, in light of (1) plaintiffs' allegations that defendants' conduct was unauthorized by the President or by U.S. law and outside the scope of defendants' duties, and (2) plaintiffs' proffer of previous

inconsistent statements of the United States that persons who engage in torture are acting outside the scope of their official duties. In contrast, in *Schneider*, it was the plaintiffs who alleged that the conduct at issue was authorized by the President. *Schneider*, 310 F. Supp. 2d at 266. Accordingly, the district court found as a matter of law that the conduct was within the scope of Kissinger's employment. *Id.* Whatever the correctness of this holding in *Schneider*, it has no applicability in the instant case, in which plaintiffs assert that the relevant conduct was *unauthorized* and, indeed, specifically prohibited by the President.

The district court's decision in *Bancoult* is no more persuasive. In *Bancoult*, Judge Urbina (the judge below in the instant case) made precisely the same error he committed here of resolving disputed issues of material fact concerning the scope of employment as a matter of law and without an evidentiary hearing. Once again, this decision directly violated the directions this Circuit has given the district courts. *See Majano*, 469 F.3d at 140-41; *Stokes*, 327 F.3d at 1214-15. This Court did not, however, reach this error, because it determined that the federal courts lacked jurisdiction over the dispute pursuant to the political question doctrine.

This Court did not endorse the district court's analysis of the scope of employment issue in either case. This Court affirmed only on the alternative ground that the cases raised nonjusticiable political questions. *Bancoult*, 445 F.3d at 429; *Schneider*, 412 F.3d at 193. Defendants have not suggested that the instant case presents a political question, and any such assertion would be unfounded. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (plurality) (affirming role of judiciary in reviewing detentions at Guantánamo). Thus, the holdings of *Schneider* and *Bancoult* are not relevant to the resolution of the instant case.

E. Defendants Are Not Entitled To Immunity Because They Were Purportedly Acting Within The Chain Of Command.

Defendants assert that they are entitled to immunity because their actions were taken within the chain of command. Def. Br. at 20-21. This argument, which eerily echoes defenses raised at Nuremberg, avails defendants nothing. An order to torture is illegal, and every military officer is under a duty to disobey such an order.[3] *See United States v. Calley,* 22 USCMA 534, 544 (Mil. App. 1973) (no justification for obeying palpably illegal order). Members of the military have specific command responsibilities that make them personally responsible for war crimes carried out in their chain of command. *See In re Yamashita*, 327 U.S. 1 (1946) (commander of Japanese forces in Philippines responsible for war crimes carried out by troops). Surely, if the Secretary of Defense had ordered the summary execution of all detainees, that would not be seen as within the scope of defendants' employment simply because the order was carried out through the chain of command. *Id.* (soldiers are presumed to know that they cannot kill unarmed civilians under their control); *United States v. Kinder*, 14 C.M.R. 742, 773-775 (Air Force Bd. of Review 1954) (order to kill prisoner palpably illegal); *United States v. Griffen*, 39 C.M.R. 586, 590 (Army Bd. of Review 1968) (same).

F. Plaintiffs' Claims Come Within The Westfall Act's Exception For Civil Actions Asserting Constitutional Claims.

Defendants assert that "civil action" for the purposes of the exceptions to the Westfall Act, 28 U.S.C. §2679(b)(2), does not mean "civil action" as that term is used in other statutes and in the Federal Rules of Civil Procedure. Def. Br. at 27-29. Rather, defendants argue that "civil action" should be read to mean "claim." This argument ignores the fact that the terms "claim" and "civil action" are used differently in the FTCA. *Compare* 28 U.S.C. §2679(b)(2)(A)

[3] Torture, force and inhumane treatment are specifically prohibited by the Army Field Manual 34-5, Ch. 1. App at 46-47 (Compl. ¶¶142-43).

(Westfall immunity "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution") *with* 28 U.S.C. §2680 (providing for exceptions to the FTCA for "claims" arising in particular contexts). It also runs afoul of one of the core canons of statutory interpretation, which the Supreme Court has recently applied to the FTCA. "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* §46.06, p. 194 (6th rev. ed. 2000)).

Defendants further argue that reading "civil action" to mean the entire action in 28 U.S.C. §2679(b)(1) and (d)(1), is contrary to Congressional intent in passing the Westfall Act. At best, this argument concedes that "civil action" is an ambiguous term. Where a statutory term is ambiguous, the courts are permitted to look to legislative history to determine Congressional meaning. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991).

The legislative history makes is clear that Congress did not intend to provide immunity for serious crimes committed by government officers. Defendants argue that the Westfall Act's plain language "grants absolute immunity for 'wrongful' acts taken within the scope of employment, whether or not they are illegal or egregious." Def Br. at 19. Although some courts have held that the phrase "wrongful act," as used in 28 U.S.C. §2679(b)(1), covers intentional torts, the FTCA was passed with "garden-variety torts in mind." *Sosa,* 542 U.S. at 707 n.4.[4] It was not intended to immunize officials for deliberate violations of *jus cogens* norms of international law.

[4] The cases that have come before this Court reflect the quotidian torts to which Westfall was intended to apply. *Majano*, 469 F.3d 138 (D.C. Cir. 2006)(simple battery); *CAIR,* 444 F.3d 659 (D.C. Cir. 2006)(defamation); *Stokes*, 327 F.3d 1210 (D.C. Cir. 2003)(defamation and destruction of property); *Kimbro*, 30 F.3d 1501 (D.C. Cir. 1994)(simple battery).

Reflecting precisely this intent, the House Report on the Westfall Act stated that "[i]f an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant." H.R. Rep. No. 100-700 at 3, 5 (1988), *reprinted* in 1988 U.S.C.C.A.N. 5945, 5946, 49 (claims subject to Westfall Act would include "suits for clerical negligence"); 134 Cong. Rec. H4718-03 (June 27, 1988) (statement of Rep. Frank) ("we are not talking about intentional acts of harming people"). This reading of the Westfall Act is entirely supported by the Amicus Brief filed by its sponsor, United States Representative Barney Frank, in *Harbury v. Hayden*. Brief of Amicus Curiae United States Rep. Barney Frank In Support of Appellant Jennifer K. Harburg, Case No. 06-5282 (D.C. Cir. Mar. 9, 2007). In sum, the Westfall Act was intended to confer absolute immunity on government employees who commit ordinary torts in the performance of their duties. It was never meant to immunize torture, cruel and degrading treatment, or war crimes.

Given this clear Congressional intent, defendants' argument that the Westfall Act should be read to immunize them from certain claims, but not others, arising out of their torture of and intentional cruelty towards plaintiffs makes little sense. The policy underlying official immunity is that the disruption to the social good that results from inhibiting officials in carrying out their duties through threat of civil liability is generally greater than the harm done by those officials who may commit "garden variety" misdeeds. *See Barr v. Mateo*, 360 U.S. 564, 571-72 (1959). This balancing of social harms equally requires that no immunity be made available to officials who commit acts so egregious that the harm caused by those acts outweighs the potential social harm of holding the officials liable for their conduct. This is just such a case. The defendants here engaged in systematic criminal efforts to create a lawless enclave where they hoped to commit acts of torture, cruelty and humiliation that violate US law, international law, and all

notions of decency. The social good favors holding these officials responsible.

II. PLAINTIFFS ARE ENTITLED TO ASSERT CLAIMS UNDER THE GENEVA CONVENTIONS.

Recognizing that they have no basis to dispute that plaintiffs' detention and torture at Guantánamo violated the 1949 Geneva Conventions, defendants rely on this Court's decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (2005), to argue that the Geneva Conventions do not support a private right of action.[5] Following the Supreme Court's reversal of *Hamdan*, 126 S.Ct. 2749 (2006), this argument is unavailing.

The Supreme Court unambiguously rejected this Court's reasoning in *Hamdan* as unpersuasive and reversed its decision. Most importantly, the Supreme Court permitted Hamdan to invoke the Geneva Conventions as a source of rights guaranteed to him *as an individual*. *Hamdan*, 126 S. Ct. at 2793-4. The Supreme Court further held that, even assuming that the Conventions were not themselves individually enforceable, Hamdan could still invoke their protection as part of the law of war. *Id.* Finally, *Hamdan* makes clear that detainees at Guantánamo are protected, at a minimum, by Common Article 3 to the Geneva Conventions, which guarantees minimal protections against torture, cruel treatment, and outrages on personal dignity, in addition to certain procedural rights. *Id.* at 2757

Contrary to defendants' contentions here, the Supreme Court did not accept – much less hold – that the 1949 Conventions standing alone cannot be individually enforced. The Supreme Court pointedly refused to adopt that position. *Hamdan*, 126 S. Ct. at 2793-94. Instead, the Supreme Court cited authority in footnotes 57 and 58 strongly suggesting that the Conventions are a source of individual rights. *Id.* at 2794 nn. 57 & 58. Defendants' contention that Supreme Court's *Hamdan* decision supports their argument that the Geneva Conventions are not

[5] Defendants fail to address plaintiffs' argument that the Geneva Conventions are self-executing, contending only that the Conventions do not provide a rule by which the plaintiffs' rights may be determined.

individually enforceable, and therefore this Court's *Hamdan* decision remains good law, is simply untenable.

Defendants' argument also overlooks the plain language of the 1949 Conventions, which clearly and unambiguously state that individuals may not waive "the rights secured to them" therein. Geneva POW Convention, Article 7; Geneva Convention on Civilian Detainees, Article 8. Obviously, an individual cannot waive a right that he does not have; nor can an individual waive a right solely guaranteed to, and enforceable by, a sovereign nation.

Defendants refer to a purported lack of contemporary commentary to support their contention that the 1949 Conventions did not create or secure individual rights. Defendants postulate that recognizing individual rights "could scarcely have failed to excite contemporary comment." Def. Br. at 31-32. This argument proceeds from a demonstrably false premise. There was extensive commentary concerning the 1949 Conventions' guarantee of rights to individuals precisely because the drafters of those Conventions recognized that the diplomatic measures contained in the 1929 Conventions were inadequate and had failed badly in wartime. *See* 3 Int'l Comm. Of Red Cross, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War* 632 (1960) ("Red Cross Commentary"). Pertinent examples of the commentary include:

- "It was not ... until the Conventions of 1949 ... that the existence of 'rights' conferred in prisoners of war was affirmed." 3 Red Cross Commentary 91;
- "A prisoner does not merely have rights: he is also provided with the means of ensuring they are respected." *Id.* at 91-2;

- The 1949 Conventions were written "first and foremost to protect individuals, and not to serve State interests." 4 Int'l Comm. of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 21 (1958); and
- "It should be possible in States which are parties to the Convention ... for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation." *Id.* at 79.

The commentators thus clearly recognized that the Conventions were enforceable by individuals. Defendants cannot seriously contend that the 1949 Conventions were signed and ratified, as they assert, "without any indication," Def. Br. at 31-32, that they are individually enforceable through national courts.

Finally, contrary to defendants' assertions, the Military Commissions Act of 2006 does not "reaffirm[] [a] longstanding consensus," Def. Br. 32, concerning the Geneva Conventions. The MCA was enacted in an attempt to overrule the Supreme Court's decision in *Hamdan*, which permitted individuals to rely on the Geneva Conventions as a source of rights. Thus, to the extent there was any consensus when the MCA was passed, it favored individual enforcement of the Conventions. But regardless of whether it "reaffirmed" or modified existing law, the MCA is not relevant to this case, because its provision concerning the Geneva Conventions is not retroactive. Pl. Br. at 33 n.5.

III. NO SPECIAL FACTORS WARRANT DISMISSAL OF PLAINTIFFS' *BIVENS* CLAIMS.

Pressing an argument here that the district court did not accept below, defendants claim that plaintiffs are not entitled to a remedy pursuant to *Bivens v. Six Unknown Fed. Narcotics*

Agents, 403 U.S. 388 (1971). According to defendants, recognizing a *Bivens* remedy in this case would: (i) require an "extension" of the *Bivens* doctrine; (ii) enmesh the Court in national security and foreign affairs, powers that are committed to the political branches of government; and (iii) interfere with military operations. None of these purported "special factors" justifies denying plaintiffs a *Bivens* remedy to vindicate their Constitutional claims.

A. This Case Does Not Require An "Extension" Of *Bivens*.

In *Bivens*, the Supreme Court held that federal officers may be sued for damages by victims whose constitutional rights they have violated. *Id.* at 395. Defendants argue that plaintiffs' constitutional claims require an "extension" of the *Bivens* doctrine. They do not. Plaintiffs were prisoners in federal custody. 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). Not only are plaintiffs' allegations typical of *Bivens* actions challenging conditions of confinement, *Hudson v. McMillian*, 503 U.S. 1, 8 (1992), but virtually all of the conduct alleged in the complaint has been ruled unconstitutional in cases directly on point. *See* Pl. Br. at 38-39. Thus, this case is a straightforward application of the *Bivens* doctrine, not an extension.

B. The Executive Powers Cited By Defendants Do Not Preclude This Court From Considering Plaintiffs' *Bivens* Claims.

Seizing upon the Supreme Court's admonition that "special factors" in a particular case may "counsel[] hesitation" in granting a remedy, *Bivens*, 403 U.S. at 396, defendants urge that a variety of such factors exist here. In the past, courts have found special factors where there are elaborate procedural remedies already available to address the claims asserted, *see Bush v. Lucas*, 462 U.S. 367 (1983) (civil service scheme), *Schweiker v. Chilicky*, 487 U.S. 412 (1988)

(social security scheme), *Chappell v. Wallace*, 462 U.S. 296, 302-303 (1983) (military grievance procedures), *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (USDA meat inspection regulations); or where there was an unacceptable risk to the public treasury were a remedy to be implied. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 486 (1994).[6] None of these factors is remotely present here.

Defendants argue for "hesitation" on a ground not recognized under *Bivens* jurisprudence, namely that their conduct occurred as part of the exercise of the Executive's powers to wage war, protect national security, and conduct foreign policy. This argument comes perilously close to being an *apologia* for the torture and degradation experienced by the plaintiffs. It flies in the face of express U.S. treaty obligations that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." United Nations Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/139/51 (1984), U.S. ratification 1994 at Article 2, pt. 2, Ex. 1; *see also* U.S. Department of State, Initial Report of the United States of America at to the U.N. Committee Against Torture at ¶ 100 (1999) (App. at 67) ("Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer").

And almost three years ago, the Supreme Court rejected defendants' argument. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). As Justice O'Connor wrote for the plurality, "whatever 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

[6] Defendants also cite two cases refusing to extend *Bivens* remedies to cases against government agencies and private contractors. *FDIC v. Meyer*, 510 U.S. 471 (1994); *Correctional Svc. Corp. v. Malesko*, 534 U.S. 61 (2001). These cases are irrelevant to the instant proceeding, which is against individual government officers.

three branches when individual liberties are at stake." *Id.* The extensive analyses in the other *Hamdi* opinions – Justices Souter and Ginsburg (concurring) and Justices Scalia and Stevens (dissenting) – reflect the implicit agreement of at least eight justices that the separation of powers doctrine does not circumscribe the Court's power to rule upon the Executive's actions in detaining purported "enemy combatants" in connection with the conflict in Afghanistan. As the Supreme Court has stated, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit," and, further, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). *Accord Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("Even the war power does not remove constitutional limitations safeguarding essential liberties"); *Ex parte Milligan*, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.").

Defendants' reliance on *Hirabayashi v. United States*, 320 U.S. 81 (1943), as support for their argument that the judicial branch should defer to the political branches, is wholly misplaced. In fact, *Hirabayashi* is an object lesson as to why the courts should not abandon their role "when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. *Hirabayashi* was a pre-*Korematsu* case challenging the enforcement of curfew and evacuation laws against Japanese Americans during World War II. Hirabayashi, a U.S. citizen and student at the University of Washington, challenged his confinement on equal protection grounds. Responding to arguments

similar to those urged by defendants here, the Supreme Court declined to interfere with the clearly unconstitutional detention of Hirabayashi and thousands of others similarly confined.

The Nation has long regretted that restraint. The Japanese internment, and the judicial decisions that permitted it, including *Hirabayashi*, remain a stain on the rule of law in America. In 1988, President George H.W. Bush and the Congress formally apologized to the affected Japanese Americans. 50 App. U.S.C. §1998a. Congress passed and the President signed legislation specifically acknowledging that the internment was a "fundamental violation[] of the basic civil liberties and constitutional rights of these individuals," resulting from "racial prejudice, wartime hysteria, and a failure of political leadership." *Id.* Far from supporting defendants' arguments, *Hirabayashi* and its progeny stand as a cautionary tale for courts charged with maintaining Constitutional principles in another time of political strain. *Cf. Hamdi*, 542 U.S. at 535 (citing dissent in *Korematsu* in support of judiciary's "constitutionally mandated roles of reviewing and resolving claims" of Guantánamo detainees).

Defendants' argument that permitting plaintiffs' *Bivens* action to go forward threatens the Executive Branch's foreign policy is also belied by the facts of this case. Plaintiffs' complaint seeks redress for their prolonged arbitrary detention and the torture and degradation inflicted upon them by the defendants and others under their direction while plaintiffs were in custody at Guantánamo. Plaintiffs' claims are not about the correctness of the United States' invasion of Afghanistan or its manner of doing so, and they do not implicate foreign policy and methods of war. *See Hamdi*, 542 U.S. at 534 (drawing distinction between acts committed "on the battlefield" and continuing detention of plaintiffs away from war zone). Accordingly, defendants' reliance on cases like *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985),

which concerned the government's policy decision to fund the Nicaraguan Contras, is entirely inapposite.[7] No deference to the political branches is required or warranted in the instant case.[8]

C. Military Officials Do Not Have A Special Exemption From *Bivens* Liability.

Contrary to defendants' argument, the fact that some of the defendants are military officers does not preclude recognition of a *Bivens* remedy here.[9] Although the Supreme Court has held that deference to military discipline precludes a *Bivens* action by an enlisted soldier against a senior officer, *Chappell v. Wallace*, 462 U.S. 296 (1983), the courts have not hesitated to recognize a *Bivens* action by a civilian against a military officer. *See e.g.*, *Saucier v. Katz*, 533 U.S. 194 (2001) (*Bivens* action by civilian protester against military officer); *Willson v. Cagle*, 711 F. Supp. 1521, 1525-26 (N.D. Cal. 1988), *aff'd sub nom. Willson v. Hubbard* 900 F.2d 263 (9th Cir. 1990) (same). Indeed, *Saucier* – which involved an excessive force case against a military police officer by a civilian protester – illustrates that a *Bivens* action may be brought by a civilian for injuries suffered while in military custody. *Saucier*, 533 U.S. at 209. Thus, there is no categorical insulation of military officers from *Bivens* liability.

Nor do the Ronald W. Reagan Nat'l Defense Authorization Act for Fiscal Year 2005 ("Def. Auth. Act") and DOD Directive 2310.01E preclude recognition of a *Bivens* action in the instant case. Def. Br. at 38-39. Defendants' own brief concedes that the conduct at issue here has been disapproved by Congress and is expressly prohibited by DOD regulations and

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[7] Plaintiffs' claims concerning the conditions of their confinement also do not implicate or impinge on this country's ability to "function effectively in the company of sovereign nations" as was the situation in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

[8] Defendants' argument that recognizing a Bivens action here would somehow elevate foreign detainees over U.S. soldiers is jingoistic and incorrect. American soldiers have an elaborate and readily accessible regulatory process through which they can vindicate their rights. *See Chappell v. Wallace*, 462 U.S. 296, 302 (1983); *United States v. Stanley*, 483 U.S. 669 (1987). Plaintiffs are left with a *Bivens* action precisely because Congress has created no such remedy for them.

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

directives. *Id.* Thus, there is no argument that recognition of a *Bivens* remedy in the present case will conflict with any policy determination of the political branches.[10]

The scope and limits of recent Congressional action with respect to Guantánamo detainees suggest that plaintiffs' *Bivens* action should be permitted to go forward. In 2005, Congress passed the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2740-41, 2005 H.R. 2863 (to be codified at 10 U.S.C. § 801), and just last year Congress passed the Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2680. Each of these acts seeks to preclude Guantánamo detainees from filing certain types of petitions in U.S. courts.[11] Yet neither statute precludes the action filed in this case – one for damages by detainees who were released without ever having been determined to be enemy combatants. Given that Congress has chosen to legislate what kinds of claims may be brought by certain categories of detainees, the Court may infer from the absence of legislation affecting plaintiffs' claims that Congress had no intent to preclude a *Bivens* action by persons situated like plaintiffs. *See Carlson v. Green*, 446 U.S. 14, 24-25 (1980); *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992).

D. The Policies Behind *Bivens* Favor Recognition Of Plaintiffs' Claims.

Finally, the long-standing policies underlying *Bivens* – remedying an injury to the plaintiff and deterring wrongful conduct by federal officers – favor its application here. Plaintiffs have been released, so declaratory or injunctive relief would be meaningless. For the plaintiffs here, like the plaintiff in *Bivens*, it is "damages or nothing." *Davis*, 442 U.S. at 245; *Bivens*, 403 U.S. at 410 (Harlan, J. concurring). And the United States has a strong policy interest in deterring torture by its officials. This country is a signatory to the U. N. Convention

[10] The legislation and directive also do not create any remedial procedures for detainees. Thus, they do not preclude a *Bivens* action. *See Davis v. Passman*, 442 U.S. 228, 245 (1979)

[11] There are numerous pending cases challenging the scope and constitutionality of these statutes. *See, e.g., Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb 20, 2007), *cert. pending*, No. 06-1195.

Against Torture, as both the Congress and the Defense Department have recently acknowledged. *See* Def. Auth. Act at §§ 1091-92; DOD Directive 2310.01E (Sept. 5, 2006). Individual suits for damages are an effective deterrent to illegal conduct. *Butz v. Economou*, 438 U.S. 478, 505 (1978). As the Supreme Court recognized in *Carlson v. Green*, a *Bivens* action imposing individual liability is a far more effective deterrent than an action against the United States under the FTCA. 446 U.S. at 20-21 (1980). Given the powerful condemnation of torture by Congress, the President, and the American people, the individual deterrence available from a *Bivens* action is clearly warranted.

Recognition of a *Bivens* remedy in the instant case requires no extension of the doctrine; it would support rather than undermine executive and congressional policies; and it would provide a substantial deterrent to acts of torture by U.S. officials. Under these circumstances, there are no special factors that would support denial of plaintiffs' right to pursue damages under *Bivens* claims.

IV. QUALIFIED IMMUNITY IS NOT AVAILABLE FOR TORTURE.

At least two issues are not in dispute in this proceeding. First, the complaint describes acts of torture long recognized as violative of rights guaranteed by the U.S. Constitution. Second, the right to be free from torture is fundamental. Because of these self-evident truths, defendants are forced to defend their acts of torture on the basis of plaintiffs' status and location. Defendants do not contest that that they knew that torture was wrong, and that they could not legally torture other persons (*e.g.*, U.S. citizens, federal prisoners, soldiers under their command). They continue to assert, however, that they had no warning that it was wrong to torture detainees in their custody at Guantánamo. These arguments are unavailing and ignore the

primary purpose of qualified immunity, which is to protect government officials who act in good faith, not those who intentionally seek to avoid the law.

A. Plaintiffs' Status And Location Do Not Deprive Them Of All Protection Under The U.S. Constitution.

Reduced to its essentials, defendants' brief asserts that the Constitution does not prohibit U.S. officials from torturing aliens, provided they do so outside of the United States. According to defendants, the Constitution does not restrain the conduct of U.S. officials extraterritorially, even in an area such as Guantánamo, where the United States "exercises complete and exclusive control." *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (internal citation omitted). The proper test under *Eisentrager* and its progeny, defendants argue, is not the level of control the United States exercises over the territory where torture occurs but whether the United States is the titular sovereign over that territory. Under defendants' formulation, U.S. officials are free to torture, degrade, kill, or sell into slavery persons in their custody so long as they avoid the United States borders and its citizens.

This license to violate the fundamental rights of persons under their jurisdiction and control is certainly not granted to defendants by *Eisentrager*. Plaintiffs' situation differs fundamentally from the *Eisentrager* prisoners for the purpose of determining their right to constitutional protection. Unlike the *Eisentrager* prisoners, plaintiffs:

- Are "friendly aliens," not citizens of a county at war with the United States;
- Were transported by U.S. officials into a territory where the United States is the sole legal authority;

- Were held for more than two years without being charged with, let alone convicted of, any crime against the United States or its allies; and
- Had no opportunity to challenge their detention in front of any tribunal.

See Rasul v. Bush, 542 U.S. at 476.

Neither *Eisentrager* nor any other case cited by defendants holds that fundamental rights do not apply to aliens under these circumstances. *Eisentrager* only decided the availability of *habeas corpus* to convicted enemy agents held by the U.S. in their native land.[12] Similarly, *Verdugo-Urquidez* deals, not with torture, but with the application of a procedural right in a territory where a different sovereign exercised exclusive jurisdiction and control. As Justice Kennedy notes in his vital concurrence "all would agree . . . . the dictates of the Due Process Clause of the Fifth Amendment protect the defendant" who, like plaintiffs, was detained within the jurisdiction and control of the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990). And, contrary to its citation by defendants, *Zadvydas v. Davis,* 533 U.S. 678 (2001), confirms that aliens have certain constitutional rights, although their scope is dependent on the situation. Even Justice Scalia, who would have held that the *Zadvydas* plaintiffs enjoyed only minimal constitutional protections, is still "sure they cannot be tortured." *Id.* at 704 (Scalia, J. dissenting).

More recently, the Supreme Court's opinion in *Rasul* accepts unequivocally that the Constitution applies to the Guantánamo detainees, noting that the allegations of indefinite

[12] This Court's recent decision in *Boumediene v. Bush*, should be similarly limited to its facts. No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007), *cert. pending,* No. 06-1195. To the extent that decision *in dicta* rejects the right of Guantánamo detainees to the fundamental protections of the Constitution, it is in direct contradiction of *Rasul* and therefore wrongly decided.

arbitrary detention and cruel and degrading treatment in that proceeding "*unquestionably* describe 'custody in violation of the Constitution.'" *Rasul, 466* U.S. at 484 n.15 (emphasis added). Thus, the Supreme Court has now confirmed the obvious – Guantánamo is not a lawless enclave, where there is no restraint on the conduct of U.S. officials. Those under the sole control of U.S. officials have enforceable rights.

B. Defendants Had Ample Notice That Torture Of Persons In Their Custody Violated Fundamental Rights.

The right of every person not to be tortured is well established. It is a violation of U.S. criminal law, the U.S. Constitution, international law, the UCMJ, federal prison regulations, and every other source of law known to plaintiffs. Defendants do not dispute that the right to be free from torture is a fundamental right. *See Brown v. Mississippi*, 297 U.S. 278, 285-87 (1932). The fact that this Court had not previously been called upon to rule that it was (and is) wrong to torture prisoners at Guantánamo does not entitle the defendants to qualified immunity for their acts of developing, implementing and supervising a systematic program of torture, cruelty and degradation. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (liability does not depend on previous cases involving materially similar facts); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (qualified immunity can be denied although "the very action in question has not previously been held unlawful"); *United States v. Lanier*, 520 U.S. 259, 271 (1997) (defendant not entitled to qualified immunity for conduct so egregious that its unlawfulness was obvious); *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992) (same).

Defendants do not deny that, in creating a prison at Guantánamo, they were attempting to circumvent the laws and Constitutional provisions that precluded them from torturing plaintiffs and the other detainees. Defendants then point to their uncertainty about whether they were truly free to torture on Guantánamo as the ground for their claim of immunity. Defendants' argument

- that their own imperfect evasion of the law entitles them to qualified immunity - turns the policy on its head. The purpose of qualified immunity is to "preserve the ability of government officials to serve the public good." *Richardson v. McKnight,* 521 U.S. 399, 408 (1997) (internal quotations and citations omitted). Qualified immunity is not intended to shield defendants who engage in deliberately unlawful conduct, *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *McIntyre v. United States*, 336 F. Supp. 2d 87, 123-26 (D. Mass. 2004), or "active deception." *Polk v. Dist. of Columbia*, 121 F. Supp. 2d 56, 70 (D.D.C. 2000). It is intended to protect a defendant who "makes a mistake in judgment" or "fails to anticipate subsequent legal developments." *Id.* at 71 (internal quotations omitted). Defendants knowingly flouted every applicable legal standard when they tortured plaintiffs, including the Constitution, which unquestionably prohibits their conduct. *Brown*, 297 U.S. at 285-87. The district court's dismissal on qualified immunity ground should be reversed.

V. THE DISTRICT COURT PROPERLY UPHELD PLAINTIFFS' CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

The district court correctly held that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C., §§2000bb, *et seq.*, applies to defendants' conduct at Guantánamo. The court properly rejected defendants' assertion of qualified immunity against plaintiffs' RFRA claims. These decisions should be affirmed.

A. The Plain Language Of RFRA Manifests Congressional Intent That It Apply At Guantánamo, Where The United States Exercises Jurisdiction And Has Complete Control.

RFRA precludes the federal government, its officers, and any official of a "covered entity" from infringing on a person's religious freedom, unless the restriction is the "least restrictive means of furthering a compelling governmental interest." 42 U.S.C. §2000bb-1(b)(2)

and 2; Sen. Rep. 103-111, at 2, *as reprinted in* 1993 U.S.C.C.A.N. at 1893 (Res Add. 001).[13] In defining the term "covered entity" to include the "District of Columbia, the Commonwealth of Puerto Rico, and *each territory and possession* of the United States." 42 U.S.C. §2000bb-2(2) (emphasis added). RFRA clearly reaches conduct of federal officials that occurs not only within the continental United States, but also within its territories and possessions. *See, e.g., Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (applying RFRA to conduct occurring in Guam).

Defendants nonetheless argue that RFRA operates only in territories and possessions where the United States is "sovereign" because the statute does not contain a "clear statement to the contrary." Def. Br. at 52. The district court correctly rejected this unfounded limitation as making "little sense," instead finding that, by its plain terms, RFRA broadly applies to "each territory and possession of the United States" without regard to technical sovereignty. The court further found that "if that language is to have any meaning, it must include lands such as Guantánamo over which the United States exercises . . . complete jurisdiction and control." This finding is fully supported by applicable Supreme Court precedent and should be upheld.

As noted by the district court, the statutory language "territory or possession of the United States" has long been interpreted to include leased military bases. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 389-90 (1948); *see also Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). In *Vermilya*, employees of private contractors working on a U.S. military base in Bermuda brought suit under the Fair Labor Standards Act ("FLSA") to recover unpaid overtime wages. *Vermilya-Brown*, 385 U.S. at 378-79. Like RFRA, the FLSA applied to each "territory or possession of the United States." *Id.* And like Guantánamo, the base in Bermuda was leased from a foreign government, and the lease did not transfer sovereignty over the leased areas to the

[13] The House and Senate Reports are included in the Addendum to this brief. Res Add 001-033.

United States. *Id.* at 378-380. Nonetheless, the Supreme Court held that the FLSA applied at the leased base in Bermuda because the length of the lease term and the United States' total control of the property during its occupancy made the base a "possession." *Id.* at 390.[14] The same analysis applies to the application RFRA at Guantánamo in the instant case.[15]

To be sure, the Supreme Court's decision in *Vermilya* also relied on its review of the purposes of the FLSA, and its determination that application at military bases like Bermuda and Guantánamo was consistent with those purposes. The purposes of RFRA similarly support its application at Guantánamo. Both the plain text of the statute and the legislative history of RFRA evidence that Congress intended RFRA to apply to the conduct, regulations and policies of the United States military and all military officers. 42 U.S.C. § 2000bb-2(1) (applying RFRA to all federal officials); S. Rep. No. 103-111, at 12 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1901; H.R. Rep. No. 103-88 (1993), 1993 WL 158058 (discussing application of RFRA to U.S. military). In the legislative history, Congress expressly stated that RFRA would set a unitary federal standard for religious freedom claims, including claims by and against the military, and Congress discussed at some length the existing case law and statutes governing free exercise in respect of the military. S. Rep. No. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901 (Res Add. 008); H.R. Rep. No. 103-88, 1993 WL 158058 (Res Add. 025-26).

Congress specifically considered whether this application would overly burden the military. Both the House and Senate Reports considered whether application of RFRA to the military would adversely affect military discipline. S. Rep. No. 103-111, at 12, *as reprinted in*

[14] The Supreme Court's decision in *Vermilya* was based not only on the United States' control over the Bermuda and Guantánamo bases but also on Congress' use of the term "possession" in other statutes. The Court noted that Congress had included express language in several statutes that reflected its understanding that the term "possession" included Guantánamo. *E.g.,* 42 U.S.C. §1651 (a)(2)&(3) (1927) (territory or possession defined to include Guantánamo); 42 U.S.C. §1701 (b)(1)(c) (1942) (same)

[15] Indeed, *Vermilya* relied on the lease of the Guantánamo base as evidence that Bermuda (whose lease was virtually identical) was considered a U.S. "possession."

1993 U.S.C.C.A.N. at 1901; H.R. Rep. No. 103-88, 1993 WL 158058. Despite these expressed concerns, Congress enacted RFRA with no exclusion or special provisions applicable to the military. In connection with the enactment of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*, which amended RFRA in 2000 (before plaintiffs were detained), Senator Strom Thurmond formally objected to the continuing application of RFRA to the military, citing, as an example, that, under RFRA, soldiers stationed in Saudi Arabia might object to restrictions precluding any display of religious symbols, that were imposed in deference to Saudi Arabia's laws and religious decrees. Statement of Sen. Strom Thurmond, Sept. 5, 2000, 146 Cong Rec S7991, S7993. This series of statements evidences that Congress specifically considered the fact that RFRA's broad language would apply to the military, and that Congress enacted RFRA with full awareness that the statute could and would be applied to military conduct overseas.

Given this legislative history, it cannot be seriously disputed that Congress intended RFRA to cover United States military bases worldwide, including Guantánamo. Congress is aware that the United States military is an international body. When Congress legislates for the military, in the absence of express statutory language, there is no reason to presume that Congress intends for different standards to apply to bases abroad than apply domestically.[16] And no such presumption could be applied to RFRA in any case, given that the legislative history plainly evidences an intent to create a single, consistent standard applicable to the military and the federal government as a whole. Sen. Rep. 103-11, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901 (Res Add. 008).

[16] When Congress does not want a statute that applies to the military to have extraterritorial effect, Congress can and certainly knows how to limit its application. *See, e.g.*, The Federal Tort Claims Act, 28 U.S.C. § 2680(k) (exception to FTCA for "[a]ny claim arising in a foreign country.").

Since it was decided in 1948, *Vermilya* has been reaffirmed and remains an important precedent in statutory interpretation. *See, e.g., Foley Bros., Inc.*, 336 U.S. at 285; *United States v. Spelar*, 338 U.S. 217, 221-22 (1949); *Pfeiffer v. Wrigley Jr. Co.*, 755 F.2d 554, 558-59 (7th Cir. 1985); *Cruz v. Chesapeake Shipping Inc.*, 932 F.2d 218, 224 (3d Cir. 1991). As the court below noted, the Supreme Court recently relied on the terms of this lease in ruling that Guantánamo detainees were "within the territorial jurisdiction of the United States." App. at 126-27. RFRA's legislative history further supports this finding. The district court correctly concluded that by including officials of "each territory or possession" of the United States, RFRA was meant to apply to conduct of federal officials at Guantánamo.

B. RFRA Was Intended To Have Broad Application.

Defendants also argue that RFRA was not intended to apply beyond U.S. borders because, its sole purpose was restore the *status quo ante* the Supreme Court's holding in *Department of Human Resources v. Smith*, 494 U.S. 872 (1990). This, too, was correctly rejected by the district court. Although reversing the *Smith* decision was a motive for the enactment of RFRA, *see* Sen. Rep. 103-111, at 2, *as reprinted in*, 1993 U.S.C.C.A.N. at 1893 (Res Add. 001), as the district court noted, the statute itself indicates an explicit purpose "to provide a claim or defense to persons whose religious exercise is burdened by government." App. at 13 n.7 (quoting 42 U.S.C. §2000bb (b)). The legislative history of RFRA reinforces that Congress had multiple purposes in adopting RFRA, including overruling legislatively the decisions in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which permitted prison officials to deny Muslim prisoners the right to attend services, and *Goldman v. Weinberger*, 475 U.S. 503 (1986), which approved an Air Force regulation prohibiting the wearing of a yarmulke while in

uniform. S. Rep. 103-11 at 9-12 *as reprinted in* 1993 U.S.C.C.A.N. 1892 at 1898-1901 (Res Add. 006-08); H.R. Rep No. 103-88 (1993) WL 158058 (Res Add. 025). Treatment of these cases in RFRA's legislative history demonstrates that the intent of RFRA was not merely to overturn *Smith*, but to create and implement a uniform federal standard for regulating religious conduct in all territories and possessions of the U.S., specifically including prisons and military bases.

C. Application Of RFRA At Guantánamo Raises No Concerns Of Extraterritoriality.

Citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258 (1991) ("*ARAMCO*"), defendants argue that RFRA should be "presumed not to operate outside the sovereign jurisdiction of the United States" because it does not contain a clear statement to the contrary." Def. Br. at 52.[17] Defendants overlook the clear statement in RFRA that it applies in all U.S. territories and possessions. In addition, defendants' assertion misapplies the doctrine of extraterritoriality, which addresses two primary concerns: 1) a desire to avoid international clashes of law; and 2) the presumption that Congress has primarily domestic concerns. *ARAMCO*, 499 U.S. at 248; *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993). Neither concern is relevant to the application of RFRA at Guantánamo.

1. There is no possibility of conflict with the laws of another sovereign at Guantánamo.

As evidenced by the United States' lease agreement with the Cuban government, no other sovereign has the right to legislate within Guantánamo. The government certainly does not contend that Cuban law applies or that RFRA conflicts with an obligation arising under Cuban

[17] Opinion is divided on whether the application of a statute like RFRA to U.S. territories and possessions is in fact "extraterritorial." *Compare Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 558-59 (7th Cir. 1985) (suggesting that *Vermilya* represented a "very modest extraterritorial" application of the FLSA to military base in Bermuda), *with Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (no extraterritoriality analysis). Here the district court agreed with the latter view, and did not undertake an exterritorial analysis.

law. *See In re Guantánamo Detainees*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005), *rev'd on other grounds sub nom Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007), *cert. pending*, No. 06-1195. ("American authorities are in full control at Guantánamo Bay, their activities are immune from Cuban law.")

Moreover, there is no potential for conflict because RFRA restricts, rather than expands, the rights and privileges of the United States government and its officials. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S.Ct. 1211, 1216 (2006). While foreign governments may regulate the conduct of U.S. government officials within their territory, RFRA creates only additional obligations – not privileges or immunities – for government officials and therefore *cannot* conflict with or displace an obligation arising under foreign law. Further, RFRA does not create obligations or liabilities for foreign and/or private entities that would conflict with privileges or obligations existing under any foreign law. *See* 42 U.S.C. § 2000bb-1. Thus, there is no danger that application of RFRA at Guantánamo will lead to conflict with another sovereign.

2. Application of RFRA at Guantánamo does not require Congress to legislate outside its proper sphere.

In *ARAMCO*, the Supreme Court expressed concern regarding the application of US statutes "beyond places over which the United States has sovereignty *or has some measure of legislative control*." *ARAMCO*, 499 U.S. at 248 (emphasis added) (quoting *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The United States unquestionably exercises legislative control over Guantánamo. *See Rasul v. Bush*, 542 U.S. at 475. The recently enacted Detainee Treatment Act and Military Commission Act further confirms that Congress believes it has authority to regulate conduct at the base. Pub. L. No. 108-148, 119 Stat. 2680; Pub L. No. 109-366, 120 Stat. 2600. § 801. Where, as here, Congress has concluded that the United States

exercises legislative control over Guantánamo, *ARAMCO* neither suggests nor requires that the courts apply a presumption that U.S. statutes do not apply there.

Even if the Court were to determine that RFRA does not apply at Guantánamo, RFRA clearly controls the conduct of the defendants in the United States. As this Court has recently held, "[e]ven where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993). *See also Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66 (D.D.C. 2003) ("The presumption [against extraterritoriality] is inapplicable . . . to federal agency actions within the United States that have extraterritorial effects."). The decisions to devise and implement a program of religious humiliation and oppression were undertaken by the Secretary of Defense and senior officers in the United States. Congress clearly has legislative authority here.

The district court correctly found that by its terms RFRA applies to military conduct at Guantánamo. This decision should be affirmed.

D. Defendants Are Not Entitled To Qualified Immunity Against Plaintiffs' RFRA Claims.

Having determined that, by its plain terms, RFRA applies at Guantánamo, the district court correctly further held that defendants are not entitled to qualified immunity for plaintiffs' RFRA claims. Defendants challenge this holding, claiming that the applicability of RFRA to Guantánamo was not clearly established at the time of plaintiffs' incarceration. In order to prevail on their qualified immunity defense, defendants ask this Court to: 1) ignore the plain language of RFRA, its legislative history and Supreme Court precedent; 2) ignore the other regulations and laws prohibiting the same conduct; 3) read into RFRA a geographic exclusion of

Guantánamo that appears nowhere in its text; and/or 4) read into RFRA a restriction on standing, excluding aliens detained by the military, which also appears nowhere in the statute. Reliance on non-existent exclusions and exemptions provides for no basis for a defense of qualified immunity defense, and none should be recognized by this Court.

1. Plaintiffs Have Stated a Valid Claim Under RFRA.

Defendants do not dispute that, if RFRA applies at Guantánamo, plaintiffs have stated a claim under RFRA. They also do not contend that their religious abuse of plaintiffs constituted the "least restrictive means" of accomplishing their goals. Thus, that the complaint satisfies RFRA's legal requirements is not at issue here.

The complaint details a wide range of practices, punishments, and policies that were intended to, or had the effect of, burdening plaintiffs' religious practice, harassing plaintiffs in the practice of their religion, and ultimately, preventing plaintiffs from observing their religion *in toto*. For instance, the complaint asserts that defendants confiscated and withheld religious items, enforced schedules and discipline that intentionally conflicted with plaintiffs' prayer, prohibited communications among prisoners so as to interfere with prayer and the call to prayer, enforced the shaving of facial hair, and desecrated the Koran. App. at 30, 34-37, 40, 42-43, 45, 57-58 (Compl. ¶¶58, 60, 78, 85, 92, 94, 105, 117, 134-35, 206). Far from being narrowly tailored to serve a compelling state interest, defendants' actions were gratuitously broad and invasive. The district court found that the religious harassment defendants employed when torturing defendants, including "[f]lushing the Koran down the toilet and forcing [them] to shave their beards falls comfortably within the conduct prohibited from government action by RFRA." App. at 134-35. This behavior unquestionably imposed a substantial hardship on plaintiffs' religious practice. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001)

(recognizing potential RFRA claim related to grooming policies requiring shaving and short hair as applied to Rastafarian and Sunni Muslim prisoners); *Taylor v. Cox*, 912 F. Supp. 140 (E.D. Pa. 1995) (seizure of Koran stated a claim under RFRA); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), *on remand*, 151 F.3d 1033 (7th Cir. 1998) (Table) (right to participate in Ramadan observances covered by RFRA).

Rather than dispute this conclusion, defendants argue that RFRA does not protect plaintiffs because the term "persons" in RFRA does not include aliens outside of U.S. borders. This exclusion appears nowhere in the statute. The term "person" is general one and should be interpreted broadly. *See Estrandz v. Ahrens*, 296 F. 2d 690, 695 (11th Cir. 1961). Indeed, this Court has, considered that use of the word "person" rather than "citizen" in the APA weighed in favor of allowing a non-resident alien to challenge an agency decision. *Constructores Viviles de Centroamerica S.A. v. Hannah,* 459 F.2d 1183, 1190 (D.C. Cir. 1972). Similarly, in reaching the conclusion that the term "person" in FOIA included non-resident aliens, one court noted that, unlike FOIA:

> The Privacy Act does specify that its provisions apply only to "a citizen of the United States or an alien lawfully admitted." Congress thus distinguishes between a "citizen" and "any person" when it wishes to do so.

O'Rourke v. Dep't, of Justice, 684 F.Supp. 716, 718 (D.D.C. 1988) (internal citations omitted). The fact that RFRA, by its terms, applies to U.S. territories and possessions, logically presupposes that persons within those areas – whether citizen or alien – are entitled to its protections.

Congress has demonstrated repeatedly that, where it intends to restrict standing to citizens or residents, it knows how to include express language to this effect. *See, e.g.*, The Civil Rights Act of 1991, 42 U.S.C. § 2000e-1 ("this subchapter shall not apply to an employer with

respect to the employment of aliens outside any State . . . .") ("Title VII"); The Jones Act, 46 U.S.C. § 688 (restricting standing to "citizen or permanent resident alien of the United States at the time of the incident giving rise to the action" unless no other remedy would be available to the); The Federal Tort Claims Act, 28 U.S.C. § 2680(k) (exception for "[a]ny claim arising in a foreign country"). Where statutory language is clear, as is the case here, this Court "must presume that Congress meant precisely what it said." *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001).

Given that RFRA contains no express restrictions analogous to those found in the Jones Act and Title VII, if this Court were to find such restrictions, it could do so only if it created them judicially. There is no statutory basis for such restrictions, nor is there any basis in the legislative history of the statute. The Supreme Court's treatment of the habeas statute in *Rasul v. Bush* strongly suggests that this Court should avoid judicially creating distinctions in statutes that have none. The Court said,

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

542 U.S. at 467-68 (internal citation omitted). No less so here. This Court should not reach out to create restrictions out of whole cloth to exclude Muslim detainees, a discrete and insular minority, from the protections of religious freedom. There is no reason to presume that Congress intended such a misguided step.[18]

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[18] Given that RFRA was intended to abrogate *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which had upheld prison restrictions that prevented Muslim prisoners from attending Friday services, it would be inherently unreasonable to conclude, without a shred of support in the text of the statute or the legislative history, that Congress intended to exclude from RFRA's coverage Muslim detainees in a U.S. "possession," who are seeking exactly the same protections as the *O'Lone* plaintiffs.

2. Plaintiffs' rights under RFRA were clearly established.

Plaintiffs' RFRA claims fall directly within the terms of the statute. In the words of the district court, "to be absolutely clear, the plaintiffs are not alleging some novel statutory violation, one in which the defendants can reasonably claim qualified immunity." The district court found that the allegations in the complaint "constitute a direct affront to one of this nation's most cherished constitutional traditions." App. at 137. Hence, the district court properly rejected "defendants' attempts to escape liability by means of qualified immunity." *Id.* at 138.

At the time that defendants deliberately and substantially burdened plaintiffs' practice of their religion, any reasonable person in their position would have known that such egregious conduct violated clearly established statutory rights. Given RFRA's plain language and the relevant case law, defendants had "fair warning" that that the statute applied to the actions of military officers regardless of where they were stationed, that Guantánamo detainees had rights under the RFRA statute, and that defendants' conduct violated these rights.

There is no question that RFRA applies to the military. In the 14 years since it was passed, RFRA has been repeatedly invoked to preclude, or obtain remedies for, acts, regulations and policies of the military and of military officers. *E.g.*, *Veitch v. Danzig*, 135 F. Supp. 2d 32 (D.D.C. 2001); *Rigdon v. Perry*, 962 F. Supp. 150, 152-53 (D.D.C. 1997); *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002). It is equally well-established that RFRA applies to restrict the actions of prison authorities. *E.g., Jackson*, 254 F.3d at 265; *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003); *Taylor v. Cox*, 912 F. Supp. 140 (E.D. Pa. 1995); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), *on remand* 151 F.3d 1033 (7th Cir. 1998) (Table). Given this clarity, defendants' position that they are entitled to qualified immunity because they could not

have know that RFRA would apply to prisons run by the military defies logic and finds no support in the statute.

The fact that RFRA had not previously been applied at Guantánamo does not change this analysis. *See Anderson*, 483 U.S. at 640; *Hope*, 536 U.S. at 739. As the Second Circuit recently held, "the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established." *Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d. Cir. 2001). At the time of plaintiffs' imprisonment, it was clearly established that RFRA applied to the actions of military officers and by its terms applied to federal conduct at Guantánamo. That is all that is required to defeat a claim of qualified immunity.

Defendants rely on this Court's decision in *Al Odah v. United States*, 321 F.3d at 1134 (D.C. Cir. 2003) to refute the assertion that RFRA's application at Guantánamo was clearly established. However, *Al Odah* involved the interpretation of the federal habeas statute, which, unlike RFRA, was silent as to its application in areas like Guantánamo, where the U.S. has exclusive control, but not sovereignty. Not so RFRA, which includes express language imposing restrictions on the government officers acting in US territories and possessions, thus evidencing a Congressional intent that RFRA apply to conduct within those territories and possessions. Whatever the reach of the federal habeas statute under *Al Odah*, the reach of statutes like RFRA has been settled for more than fifty years. *See Vermilya,* 335 U.S. 377; *Foley Bros., Inc.,* 336 U.S. 281.

Moreover, in addition to violating RFRA, defendants' conduct violated the terms of the Geneva Conventions as well as Army Regulation 190-8, both of which require the United States to permit free exercise of religion by detained persons. Geneva POW Convention Art. 34, Add.

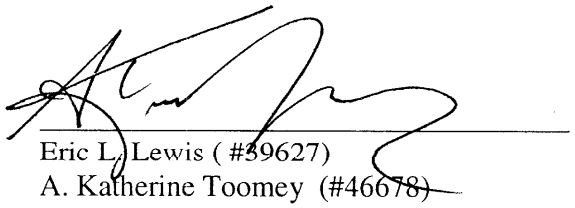
at 66, and Army Reg. 190-8 1-5(g)(l), Add. at 41, ("[Enemy Prisoners of War] and [Retained Persons] will enjoy latitude in the exercise of their religious practices"), and 6-7(d)(1), Add. at 48, ("[Civilian Internees] will enjoy freedom of religion"). As noted above, defendants were undoubtedly aware that their conduct was illegal for purposes of the qualified immunity defense. *Hope*, 536 U.S. at 743-44; *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002).

Plaintiffs have enforceable rights under RFRA, and the complaint clearly demonstrates that defendants violated these rights when they used religious abuse as part of their torture and humiliation of detainees at Guantánamo. The district court correctly decided that these rights were clearly established at the time of plaintiffs' imprisonment and denied defendants qualified immunity. This ruling should be upheld.

CONCLUSION

WHEREFORE, for the reasons stated herein and in the plaintiffs' principal brief, plaintiffs submit that the district court's decision dismissing Counts I-VI of the complaint should be reversed, its decision denying the defendants' motion to dismiss Count VII should be affirmed, and the case remanded for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief contains 13,820 words.

ADDENDUM

TABLE OF CONTENTS

**1892 P.L. 103-141, RELIGIOUS FREEDOM RESTORATION ACT OF 1993

DATES OF CONSIDERATION AND PASSAGE

House: May 11, November 3, 1993
Senate: October 27, 1993
Cong. Record Vol. 139 (1993)
House Report (Judiciary Committee) No. 103-88, May 11, 1993 (To accompany H.R. 1308)
Senate Report (Judiciary Committee) No. 103-111, July 27, 1993 (To accompany S. 578)

SENATE REPORT NO. 103-111
July 27, 1993
[To accompany S. 578]

The Committee on the Judiciary, to which was referred the bill (S. 578) to protect the free exercise of religion, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. CONTENTS

**1893 *2 II. PURPOSE

S. 578, the Religious Freedom Restoration Act of 1993, responds to the Supreme Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith [FN1] by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest.

III. LEGISLATIVE HISTORY

The Religious Freedom Restoration Act (S. 578) was introduced in the 103d Congress by Senators Kennedy and Hatch on March 11, 1993. It is cosponsored by Senators Akaka, Bennett, Bond, Boxer, Bradley, Breaux, Brown, Bumpers, Campbell, Coats,

Cohen, Danforth, Daschle, DeConcini, Dodd, Dorgan, Durenberger, Exon, Feingold, Feinstein, Glenn, Graham, Gregg, Harkin, Hatfield, Inouye, Jeffords, Kassebaum, Kempthorne, Kerrey, Kerry, Kohl, Lautenberg, Levin, Lieberman, Lugar, Mack, McConnell, Metzenbaum, Mikulski, Moseley-Braun, Moynihan, Murray, Nickles, Packwood, Pell, Pryor, Reid, Riegle, Rockefeller, Sarbanes, Sasser, Specter, Wellstone, and Wofford.

Substantially similar legislation was first introduced as S. 3254 in the 101st Congress, and then reintroduced as S. 2969 in the 102d Congress. A hearing on S. 2969 was held by the Committee on the Judiciary on September 18, 1992, at which testimony was presented by William Nouyi Yang of Worcester, MA; Dallin H. Oaks, quorum of the twelve apostles, Church of Jesus Christ of Latter-Day Saints; Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs; Douglas Laycock, professor, University of Texas School of Law; Mark E. Chopko, general counsel, U.S. Catholic Conference; Bruce Fein, Esquire; Forest D. Montgomery, counsel, office of public affairs, National Association of Evangelicals; Michael P. Farris, president, Home School Legal Defense Association; Nadine Strossen, president, American Civil Liberties Union; and James Bopp, Jr., general counsel, National Right to Life Committee, Inc.

On May 6, 1993, a reporting quorum being present, the Committee on the Judiciary ordered S. 578 reported to the full Senate by a rollcall vote of 15-1.

IV. TEXT OF S. 578

A BILL To protect the free exercise of religion

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings.-The Congress finds that-

***3** (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes.-The purposes of this Act are-

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General.-Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection(b).

(b) Exception.-Government may burden a person's exercise of religion only if it

demonstrates that application of the burden to the person-
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(c) Judicial Relief.-A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) Judicial Proceedings.-Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".
(b) Administrative Proceedings.-Section 504(b)(1)(C) of title 5, United States Code, is amended-
(1) by striking "and" at the end of clause (ii);
(2) by striking the semicolon at the end of clause (iii) and inserting "and"; and
(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

***4** SEC. 5. DEFINITIONS.

As used in this Act-
(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) In General.-This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
(b) Rule of Construction.-Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.
(c) Religious Belief Unaffected.-Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

****1893** V. DISCUSSION

A. BACKGROUND AND NEED

Many of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe ****1894** one's faith, free from Government interference, is among the most treasured birthrights of every American.

That right is enshrined in the free exercise clause of the first amendment, which provides that "Congress shall make no law *** prohibiting the free exercise [of religion]." This fundamental constitutional right may be undermined not only by Government actions singling out religious activities for special burdens, [FN2] but by governmental rules of general applicability which operate to place ***5** substantial burdens on individuals' ability to practice their faiths. Indeed, throughout much of our history, facially neutral laws that operated to burden the free exercise of religion were often upheld by the courts, and severely undermined religious observance by many Americans. [FN3]

Meaningful constitutional protection against these abuses began 30 years ago, with the Supreme Court's landmark decision in Sherbert v. Verner. [FN4] In his opinion for the Court, Justice William J. Brennan, Jr., recognized that a facially neutral rule of general applicability (in that case a State law requiring all persons seeking unemployment benefits to be available to work every day of the week except Sunday) could place unacceptable pressure on an individual (there a Sabbatarian) to abandon the precepts of her religion. Where such a burden is placed upon the free exercise of religion, the Court ruled, the Government must demonstrate that it is the least restrictive means to achieve a compelling governmental interest.

For 27 years following the Sherbert decision, the Supreme Court, with few exceptions, employed the compelling governmental interest test in determining the constitutionality of facially neutral laws that substantially burdened the free exercise of religion. [FN5] In its 1990 decision in Employment Division v. Smith, a closely divided Court abruptly abandoned the compelling interest standard and dramatically weakened the constitutional protection for freedom of religion.

The Smith case arose when two Native American employees at a private drug and alcohol rehabilitation facility were fired and denied unemployment benefits after they admitted ingesting peyote as a sacrament during a religious ceremony of the Native American Church of which both were members. The employees filed suit disputing the denial of unemployment benefits and questioning the constitutionality of the controlled substance law as applied to ban their use of peyote in religious observances. Following protracted litigation, the Oregon Supreme Court ruled that the prohibition on sacramental peyote use violated the free exercise clause.

The U.S. Supreme Court reversed, holding that the free exercise clause of the first amendment did not forbid the State of Oregon to ban sacramental peyote use through its general criminal prohibition ****1895** on ingestion of the drug, or to deny unemployment benefits to persons dismissed from their jobs for such religiously inspired use. ***6** Six Justices agreed with this result, but the Court was more closely divided on the level of scrutiny to be applied when a law of general applicability burdens religious observance.

In an opinion by Justice Scalia (joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy), the Court repudiated the use of the compelling interest test, holding that facially neutral laws of general applicability that burden the exercise of religion require no special justification to satisfy Free Exercise scrutiny. Justice Scalia wrote that:

> [T]he sounder approach [to challenges having to do with an across-the-board criminal prohibition on a particular form of conduct], and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like this ability to carry out other aspects of public policy," cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988). To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"-permitting him, by virtue of his beliefs," to become a law unto himself," Reynolds v. United States, 98 U.S. 145, 167 (1878)-contradicts both constitutional tradition and common sense. [FN6]

The majority sought to distinguish Sherbert and its progeny by asserting that the compelling governmental interest test had been applied only where either the Government regulation at issue burdened a constitutional right in addition to the free exercise of religion or where State unemployment compensation rules had conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his or her religion. The Court found that the test was appropriate for that context because it lent **1896 itself to individualized governmental assessment of the reasons for the relevant conduct. [FN7]

The majority found that it would be inappropriate to apply the compelling interest test outside those limited contexts because doing so would lead to judicial determination of the "centrality" of religious beliefs; "anarchy" resulting from the supposed inability of many laws to meet the test; and exemption from a variety of civic duties. Justice Scalia stated:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," Braunfeld v. Brown, 366 U.S. 599, 606 (1961), and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. [FN8]

*7 In a strongly worded concurrence in the judgment, Justice O'Connor took sharp issue with the Court's abandonment of the compelling interest test. [FN9] She noted that the first amendment does not distinguish between the extreme and rare law that specifically targets religion and the generally applicable law that burdens religious practice:

> [F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. [FN10]

Justice O'Connor reviewed the Court's precedents and found that they confirmed that the compelling interest standard is the appropriate means to protect the religious liberty guaranteed by the first amendment:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling State interest and by means narrowly tailored to achieve that interest. [FN11]

The reasoning of the Smith decision was also sharply criticized by Justice Souter in his concurrence in the judgment in Church of **1897 Lukumi Babalu Aye v. Hialeah in June 1993. Justice Souter urged the Court to reconsider the Smith rule, stating:

> The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government. [FN12]

B. IMPACT OF THE SMITH DECISION

The effect of the Smith decision has been to hold laws of general applicability that operate to burden religious practices to the lowest level of scrutiny employed by the courts: the "rational relationship *8 test," which requires only that a law must be rationally related to a legitimate State interest. By lowering the level of constitutional protection for religious practices, the decision has created a climate in which the free exercise of religion is jeopardized. [FN13] At the committee's hearings, the Rev. Oliver S. Thomas, appearing on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee, testified:

> Since Smith was decided, governments throughout the U.S. have run roughshod over

religious conviction. Churches have been zoned even out of commercial areas. Jews have been subjected to autopsies in violation of their families' faith. *** In time, every religion in America will suffer. [FN14]

State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right. As the Supreme Court said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [FN15]

To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation **1898 is needed to restore the compelling interest test. As Justice O'Connor stated in Smith, "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in pluralistic society. For the Court to deem this comment a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights."' [FN16]

C. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest. The committee expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the *9 least restrictive means have been employed in furthering a compelling governmental interest.

Pre-Smith case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act. [FN17] The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions. [FN18] And, while the committee expresses neither approval nor disapproval of that case law, pre-Smith case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources. [FN19]

The committee wishes to stress that the act does not express approval or disapproval of the result reached in any particular court decision involving the free exercise of religion, including those cited in the act itself. This bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to Smith. [FN20]

D. APPLICATION OF THE ACT TO PRISONERS' FREE EXERCISE CLAIMS

The Religious Freedom Restoration Act would establish one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the relevant circumstances in each case.

A long series of Supreme Court decisions has examined the unusual status of prisoners for first amendment purposes. [FN21] The **1899 Court has recognized that prisoners possess first amendment rights, including the right to freely exercise their religions. [FN22]

As applied in the prison and jail context, the intent of the act is to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in O'Lone v. Estate of Shabazz. [FN23] Prior to O'Lone, courts used a balancing test in cases where an inmate's free exercise rights were burdened by *10 an institutional regulation; only regulations based upon penological concerns of the "highest order" could outweigh an inmate's claims. As articulated by

the U.S. Court of Appeals for the Sixth Circuit:

While recognizing that the courts may not substitute their judgments for those of prison administrators in matters of prison procedure and management, it nonetheless remains true that the "asserted justification of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights," and "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." We are of the opinion that the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health of safety in order to establish that its interest are of the "highest order." [FN24]

O'Lone weakened this standard, holding that prison rules that burden prisoners' religious practices satisfy the free exercise clause if they are "reasonably related to legitimate penological interests." [FN25] The intent of the act is to restore traditional protection afforded to prisoners' claims prior to O'Lone, not to impose a more rigorous standard than the one that was applied.

The committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating **1900 the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources. [FN26]

At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements.

Whether in the context of prisons or outside it, courts have considered a myriad of claims made under the umbrella of religious rights which are, in reality, designed primarily to obtain special privileges. As the fifth circuit observed in a prison case:

While it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged, such difficulties have proved to be no hinderance to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religions sincerity. [FN27]

*11 The courts have rejected religious status, under the first amendment, for a number of prisoner-devised belief systems. [FN28] Moreover, when a prisoner attempted to object to participation in an anti-alcoholism program as compelling a belief because it referred to "the care of God as we understand him," a court had little difficulty in finding that the Chemical Dependency Recovery Program was not a religion. [FN29]

Existing analytical tools are also adequate to uncover false religious claims that are actually attempts to gain special privileges or to disrupt prison life. [FN30] Indeed, courts have been blunt enough in their examinations to find that a claimed religion, such as the "Church of the New Song," is, in reality, "a masquerade designed to obtain First Amendment protection." [FN31] The act has no effect on this settled jurisprudence, thus permitting the courts to make these assessments as they have in the past.

The committee is confident that the compelling interest standard established set forth in the Act will not place undue burdens on prison authorities. Instead, it reestablishes a standard that is flexible enough to serve the unique governmental interests implicated in the prison context. Accordingly, the committee finds that application of the act to prisoner-free exercise claims will provide a workable balancing of the legitimate interests of prison administrators with the Nation's tradition of protecting the free exercise of religion.

For all these reasons, the committee concludes the first amendment doctrine is sufficiently sensitive to the demands of prison **1901 management that a special exemption for prison free exercise claims under the act is unnecessary. The act would return to a standard that was employed without hardship to the prisons in several circuits prior to the O'Lone decision. The standard proved workable and struck a proper balance between one of the most cherished freedoms secured by the first amendment and the compelling governmental interest in orderly and safe operation of prisons.

E. APPLICATION OF THE ACT TO THE MILITARY

In Goldman v. Weinberger, [FN32] the Supreme Court carved out an exception to the compelling interest test for military regulations that burden religious practices. When a Jewish Air Force officer brought suit challenging a regulation prohibiting him from wearing a yarmulke while on duty, the Court upheld the prohibition. Taking the same deferential approach it would later take in its 1987 O'Lone decision, the Court held that the regulation reasonably satisfied ***12** the military's need for uniformity and therefore satisfied the free exercise clause. In so doing, the Court made clear that a less protective standard was to be applied in free exercise cases involving persons in the armed forces than for those involving civilians. In 1986, Congress overruled the result reached in Goldman by statute. [FN33]

Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test. The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security. The courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.

F. NO RELEVANCE TO THE ISSUE OF ABORTION

There has been much debate about this act's relevance to the issue of abortion. Some have suggested that if Roe v. Wade [FN34] were reversed, the act might be used to overturn restrictions on abortion. While the committee, like the Congressional Research Service, is not persuaded that this is the case, [FN35] we do not seek to resolve the abortion debate through this legislation. Furthermore, the Supreme ****1902** Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, [FN36] which describes the way under the Constitution in which claims pertaining to abortion are resolved, means that discussions about this act's application to abortion are academic. To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's free exercise jurisprudence under the compelling governmental interest test prior to Smith.

G. OTHER AREAS OF LAWS ARE UNAFFECTED

Although the purpose of this act is only to overturn the Supreme Court's decision in Smith, concerns have been raised that the act could have unintended consequences and unsettle other areas of the law. Specifically, the courts have long adjudicated cases determining the appropriate relationship between religious organizations and government. In particular, Federal courts have repeatedly been asked to decide whether religious organizations may participate in publicly funded social welfare and educational programs or enjoy exemptions from income taxation pursuant to 26 U.S.C. 501(c)(3) and similar laws. Such cases have been decided under the establishment clause and not the free exercise clause. In fact, a free exercise challenge to Government aid to a religiously affiliated college was rejected by the Supreme Court in Tilton v. Richardson. [FN37] This act does not change the law governing these cases. Several ***13** provision have been added to the act to clarify that this is the intent of the committee. These include the provision providing for the application of the article III standing requirements; a section which provides that the granting of benefits, funding, and exemptions, to the extent permissible under the establishment clause, does not violate the Religious Freedom Restoration Act; and a further clarification that the jurisprudence under the establishment clause remains unaffected by the act.

Ordinary article III rules are to be applied in determining whether a party has standing to bring a claim pursuant to this act. In the past, the courts have interpreted the Constitution's article III standing provision to preclude taxpayers from attaining standing to challenge on free exercise grounds the tax-exempt status

of religious institutions. The committee intends that these issues continue to be resolved under article III standing rules and establishment clause jurisprudence. The act would not provide a basis for standing in situations where standing to bring a free exercise claim is absent.

With respect to that part of section 7 that provides that granting benefits, funding, or exemptions, to the extent permissible under the establishment clause, does not violate this legislation, the act makes clear that the term "granting" should not be misconstrued ****1903** to include "denying." Thus, parties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in Sherber. The act does not, however, create rights beyond those recognized in Sherbert.

Nothing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964. [FN38] Furthermore, where religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place, and manner restrictions are permissible consistent with first amendment jurisprudence. Finally, it should be noted, where a facially neutral prohibition of general applicability that substantially burdens the exercise of religion satisfies the compelling interest test, the severity of the remedy or sanction imposed for violating the prohibition is not itself subject to the compelling interest requirement. [FN39]

H. CONSTITUTIONAL AUTHORITY TO ENACT THE ACT

Congress has the constitutional authority to enact S. 578. The 14th amendment provides that no State shall "deprive any person of *** liberty *** without due process of law ***." The 14th amendment's "fundamental concept of liberty *** encompasses the liberties guaranteed by the First Amendment," which of course, ***14** include a right to practice one's faith free of laws prohibiting the free exercise of religion. [FN40]

Section 5 of the 14th amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions" of the amendment. Section 5 gives Congress "the same broad powers expressed in the necessary and proper clause" with respect to State governments and their subdivisions. [FN41] "Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view," is within the power of Congress, unless prohibited by some other provision of the Constitution. [FN42]

Thus, congressional power under section 5 to enforce the 14th amendment includes congressional power to enforce the free exercise clause. Because the Religious Freedom Restoration Act is clearly designed to implement the free exercise clause-to protect religious liberty and to eliminate laws "prohibiting the free exercise" of religion-it falls squarely within Congress' section 5 enforcement power. [FN43]

VI. VOTE OF THE COMMITTEE

On May 6, 1993, a reporting quorum being present, the Committee on the Judiciary ordered S. 578 reported to the full Senate by ****1904** a rollcall vote of 15-1. Voting in favor of reporting the bill were the chairman and Senators Kennedy, Metzenbaum, DeConcini, Leahy, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Grassley, Specter, Brown, and Pressler. Voting against reporting the bill was Senator Simpson.

VII. SECTION-BY-SECTION ANALYSIS

Section 1. This section provides that the title of the act is the Religious Freedom Restoration Act of 1993.

Section 2. In this section, Congress finds that the framers of the Constitution recognized that religious liberty is an inalienable right, protected by the first amendment, and that government law may burden that liberty even if they are neutral on their face. Congress also determines that the Supreme Court's decision in Employment Division v. Smith eliminated the compelling interest test for evaluating free exercise claims previously set forth in Sherbert v. Verner and Wisconsin v. Yoder, and that it is necessary to restore that test to preserve religious freedom. The section recites that the act is intended to restore the compelling interest test

and to guarantee its application in all cases where the free exercise of religion is substantially burdened.

Section 3. This section codifies the compelling interest test as the Supreme Court had enunciated it and applied it prior to the Smith decision. The bill permits Government to place a substantial burden on the exercise of religion only if it demonstrates a compelling ***15** State interest and that the burden in question is the least restrictive means of furthering the interest. It permits persons whose religious exercise has been substantially burdened in violation of the act to assert that violation as a claim or defense in a judicial proceeding and to obtain appropriate relief against a government. Standing to assert such a claim or defense is to be governed by the general rules of standing under article III of the Constitution.

Section 4. This section amends attorneys' fees statutes to permit a prevailing plaintiff to recover attorneys' fees in the same manner as prevailing plaintiffs in other kinds of civil rights or constitutional cases.

Section 5. This section defines the terms "government", "State", "demonstrates", and "exercise of religion". "Government" includes any agency, instrumentality or official of the United States, any State or any subdivision of a State. "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and every territory and possession of the United States. "Demonstrates" means to meet the burden of production and persuasion." "Exercise of religion" means the exercise of religion under the first amendment.

****1905** Section 6. This section states that the act applies to all existing State and Federal laws, and to all such laws enacted in the future. It also provides that authority it confers on the government should not be construed to permit any government to burden any religious belief.

Section 7. This section makes it clear that the legislation does not alter the law for determining claims made under the establishment clause of the first amendment. It also confirms that granting Government funding, benefits or exemptions, to the extent permissible under the establishment clause, does not violate the act; but the denial of such funding, benefits or exemptions may constitute a violation of the act, as was the case under the free exercise clause in Sherbert v. Verner.

VIII. COST ESTIMATE

U.S. Congress,

Congressional Budget Office,

Washington, DC, May 7, 1993.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 578, the Religious Freedom Restoration Act of 1993, as ordered reported by the Senate Committee on the Judiciary on March 11, 1993. CBO estimates that implementation of S. 578 would result in no significant cost to the federal government or to state or local governments.

Under current law, a unit of local, state, or federal government can infringe upon a person's exercise of religion if such infringement bears a rational relationship to furthering a government interest. S. 578 would allow a unit of government to infringe upon a person's exercise of religion only if such infringement furthers a compelling government interest and is the least restrictive means of furthering that interest.

***16** Enactment of S. 578 may affect direct spending because private parties affected by this bill may seek judicial relief; if they successfully claim that their free exercise of religion has been burdened by the federal government, attorney's fees may be awarded and would be paid out of the Claims, Judgments and Relief Acts account. Therefore, this bill would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. However, attorney's fees are permitted under current law, the federal

government rarely loses cases of this type, and there is no reason to expect that the number of cases lost or the amount of attorney's fees awarded would change significantly under S. 578.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne Mehlman.

Sincerely,
James L. Blum

(For Robert D. Reischauer, Director).

****1906** IX. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have direct regulatory impact.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 578 as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

SECTION 722 OF THE REVISED STATUTES OF THE UNITED STATES

Sec. 722. (a) The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92 318, The Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

***17** (c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.

UNITED STATES CODE

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TITLE 5-GOVERNMENT ORGANIZATION AND EMPLOYEES

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CHAPTER 5-ADMINISTRATIVE PROCEDURE

Subchapter 1-General Provisions

S 504. Costs and fees of parties

(a)(1) ***

* * * * * * *

(b)(1) For the purposes of this section-
(A) ***

* * * * * * *

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), [and] (iii) any hearing conducted under chapter 38 of title 31[;], and (iv) the Religious Freedom Restoration Act of 1993;

* * * * * * *

****1906 *18** XI. ADDITIONAL VIEWS OF SENATOR SIMPSON

While I basically support the Religious Freedom Restoration Act, I have one very serious concern about its application to claims brought by prison inmates. At a time when every State and Federal jurisdiction in the country is faced with overcrowded prison facilities and an unrelenting barrage of inmate lawsuits, Congress is preparing to consider the Religious Freedom Restoration Act, legislation which will allow inmates to sue prison administrators with greater frequency. I am convinced by the appeals from the majority of state Attorneys General that the Religious Freedom Restoration Act will dramatically increase the number of inmate-generated lawsuits against the State and Federal Governments.

Not only will the raw number of suits increase, the bill will make it extremely difficult to quickly dismiss frivolous or undeserving inmate challenges. Such inmate challenges will no longer be resolved by summary judgment; rather, full-blown evidentiary hearings will be required to determine whether the prisons have any other means available to accommodate the prisoners-means available regardless of the cost.

S. 578 will expand inmate litigation, make inmate litigation more successful-even in cases brought solely to obtain special privileges-and allow inmates to relitigate issues which were already determined by the State and Federal courts in past decisions, all at considerable cost of resources to the federal and state governments.

INCREASE IN INMATE LITIGATION

Inmate challenges to the State and local government are at an all-time high and the enactment of this S. 578 bill will further expand the numbers. In 1992, for example, inmates filed a total of 49,939 civil lawsuits against the government in Federal courts-an astonishing 22% of all civil suits filed in Federal court. Over the same period, a total of 48,538 criminal cases were brought in Federal court. In 1992 inmates brought 1,401 more cases against the federal government than the federal government brought against criminals.

In addition, S. 578 will necessarily mean that-unless we hire more prosecutors-there will be fewer criminal prosecutions in the future. As the Statistical Report, United States Attorneys' Offices, Fiscal Year 1992 at page two States:

While the civil caseload is numerically larger, roughly two-thirds (2/3) of the United States Attorney office personnel are dedicated to criminal cases and roughly one-third (1/3) of the personnel are dedicated to civil litigation matters and appellate practice. More than 80% of work hours ****1907 *19** in Court are devoted to criminal prosecutions and less than 20% are devoted to civil and appellate litigation.

If Congress passes legislation which increases the raw number of inmate lawsuits,

it necessarily follows that government litigators will be diverted from criminal prosecutions. As the civil caseload increases, the number of criminal prosecutions will fall.

S. 578 will expand the number of inmate cases for several reasons. First, cases determined in the state and federal court systems will be subject to relitigation since the bill lowers the standard by which all religious claims will be measured, giving all religious claims-including inmate claims-a higher likelihood of success. Second, since the bill's standard includes the requirement that the prison officials use the "least restrictive means" when restricting the behavior of inmates. In many cases alternatives allowing inmate behavior are available but at great cost to the state or federal government. In other cases, the least restrictive means can disrupt the security and order of the prisons. Third, since other first amendment claims by prisoners are evaluated by the courts with a reasonable standard which is easier for prisons to meet, prisoners will begin to bring all first amendment claims (including those for special privileges) under the guise of the exercise of their religions.

A. RELITIGATION OF PREVIOUSLY DESCRIBED CLAIMS

S. 578 is intended to overturn Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), [FN1] and O'Lone v. Estate of Shabazz, 478 U.S. 342 (1987). All claims in federal and state courts decided pursuant to these two bills can be relitigated and some will succeed under the bill's standard which favors the claimant.

B. THE IMPACT OF THE LEAST RESTRICTIVE MEANS TEST

S. 578 guarantees that prison administrators will always be required to find the least restrictive means of achieving legitimate penological goals.

A recent case in California provides a good example of how this new test will be used by the courts. The Warden of San Quentin, noticing patterns in escape attempts, banned certain types of civilian clothing within the prison. Inmates, always quick to challenge prison authority, argued that the right to wear clothing of one's choice is a liberty guaranteed by the Constitution and immediately sued the Warden.

The trial court agreed with the inmates and enjoined enforcement of the prison regulation, based upon the least restrictive means provision in the California state constitution and specifically found that the Warden had not met his burden of providing the absence of less restrictive alternatives to the ban on civilian clothing. ****1908 *20** In short, given a choice between inconveniencing the prisoners and inconveniencing the taxpayer, the taxpayer lost.

This result provides an indication of what we can expect from S. 578. Rather than tampering with the inmates' "right" to wear clothing of their choice, the judge focused on the alternative of strengthening security measures to prevent escapes.

San Quentin is already one of the most unassailable maximum security institutions in the country; nevertheless, the argument can always be made that it could be made even more secure. Indeed, there is no shortage of methods by which security could be improved, including hiring additional staff, creating more checkpoints, initiating more "pat-down searches" or modifying the physical plant of San Quentin itself.

The common theme of these options is a requirement that the government spend more money. After protracted, costly litigation the trial court's decision was eventually overturned on appeal. In re Alcala, 222 Cal. App. 3d 345, 271 Cal. Rptr. 674 (Cal 1990). S. 578, however, provides inmates with a winning argument-if an inmate argues that his or her "religion" requires a certain type of clothing, courts would be required by the new statute to allow such clothing. The prison, in turn, would be required to pay enormous costs to permit this conduct.

The new test proposed by S. 578 is not simply a less restrictive means, it is the least restrictive means. Hence, S. 578 will become a social blueprint for judges to establish their vision of how prisons should be run by forcing state or Federal government to allow increasingly burdensome forms of inmate conduct. In the process, the nation's prisons will not only become more expensive to administer, they will become infinitely more dangerous to operate.

C. PRISONERS WILL OPT FOR EASIER FREE EXERCISE CLAIMS

It is easy to imagine that creative and industrious inmates will discover that a Free Exercise challenge, with the higher strict scrutiny/least restrictive means standard proposed by the Religious Freedom Restoration Act, might provide success where other types of claims have failed. Current cases reveal that prisoners will bring challenges to get special privileges for everything imaginable such as the services of prostitutes, the right to own and use nunchucks (weapon used in the martial arts), Abdool-Rashad v. Seiter, No. 84-3816 (6th Cir. Aug. 8, 1985) (unpublished opinion), and a special diet of organically-grown produce washed in distilled water, Udey v. Kastner, 805 F.2d 1218 (5th Cir. 1986).

It is not unusual for inmates, especially those with considerable "time on their hands", to create "religions" just to obtain special benefits or to avoid certain prison requirements. In Theriault v. Silber, [FN2] inmates requested Chateaubriand and Harveys Bristol Cream every other Friday as part of the practice of their religion. The Committee Report correctly states that courts have found in some cases that a claimed religion is, in reality, "a masquerade designed to obtain First Amendment protection." What the Committee Report fails to say is that, under the bill's standard of review **1909 *21 of religion claims, even the most thinly veiled attempts to use religion to get special benefits or to otherwise circumvent prison rules, cannot be disposed of without extensive and expensive procedures and appeals (See next section.)

MORE DIFFICULT FOR COURTS TO DISPOSE OF UNDESERVING CLAIMS

S. 578 will do more than simply increase the raw number of inmate lawsuits; it will also dramatically affect the manner in which these cases are resolved.

The linchpin of S. 578 is the least restrictive means test. Disputes involving prison regulation of conduct will turn in every instance on whether the regulation is indeed the least restrictive method of achieving the desired result. As the Supreme Court stated in one of the cases that will be overruled by S. 578, "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." Turner v. Safley, 482 U.S. 76 (1987).

Thus, evidentiary hearings will be necessary in almost every instance to determine whether there is a less restrictive method of achieving the government's purpose. Furthermore, in almost every situation, there will be a less restrictive means-it will simply entail the spending of additional taxpayer funds.

In response to the claims of increased and burdensome litigation, the Committee Report also states that "[e]xisting analytical tools are also adequate to uncover false religious claims that are actually attempts to gain special privileges or to disrupt prison life." Page 12. The Committee Report then cites an interesting and informative case, Green v. White, 525 F. Supp. 81, 83 (E.D. Mo. 1981), aff'd 693 F.2d 45 (8th Cir. 1982), cert. denied, 462 U.S. 1111 (1983). This case perfectly demonstrates my point that the bill creates unnecessary and endless procedures for prison claims under the compelling state interest/least restrictive means test.

Green involved a hearing before a trial court, an appeal to the Eighth Circuit Court of Appeals, a remand to the trial court, another appeal to the Eighth Circuit, and a subsequent remand-seven separate appearances before Federal courts. On the final remand, the trial court judge made the following statement: "The time and resources expended by state and federal officials in coping with plaintiff's litigation barrage is enormous. At the evidentiary hearing, plaintiff gloated over this fact. He proudly announced that he has suits pending in every United States Court of Appeals and that he has sued every prison system in the country. He estimated that he has filed close to one thousand lawsuits on his own behalf and on behalf of others in the past ten years." Not content with this response, the inmate appealed yet again and then appealed to the Supreme Court.

The Committee Report's model of how well the system is working is, in fact, a model of how time-consuming and costly it is to dispose of underserving claims. As the "Statistical Report, United States' Attorneys' Offices," at page eight, makes quite clear: "These appeals are time-consuming and require a thorough review of the entire record in the case; filing of a Brief and Reply Brief; and, in **1910 *22 most cases, an oral argument requiring travel to the city where the Court of Appeals

for the Circuit is situated."

THE SUPREME COURT'S REASONABLENESS STANDARD IS APPROPRIATE FOR PRISONS

I agree with the Supreme Court that prison practices which keep order, safety and security for all within the prison walls, both inmates and prison workers, must be evaluated with a reasonableness standard and be given due deference, even against prisoners' religious claims.

While the Supreme Court has determined that prisoners have First Amendment rights, including the right to freely exercise their religion, [FN3] it is equally clear that the Court has established that penological interests should be given considerable deference. In the case of O'Lone v. Estate of Shabazz, (one of the cases which the Majority on this Committee seeks to overturn) a five-Justice majority, in rejecting prisoners' claim that they had the right to attend Muslim services held at times otherwise conflicting with prison functions, held that the prison authorities must merely behave reasonably, thus giving prison officials considerable deference.

While I do not assert that a prisoner has no right to exercise his or her religion or other constitutional rights, the Supreme Court has held that there are limits to those rights. [FN4] Prison authorities should not be required to accommodate practices which significantly interfere with the operation of the prisons. Neither should prison authorities be required to prove that no reasonable method exists by which prisoners' religious rights can be accommodated without creating unreasonable costs or bona fide security problems. O'Lone, 482 U.S. at 2405.

Though the availability of alternatives to accommodate a prisoner's religious practices is relevant to the reasonableness inquiry, the Supreme Court rejected the notion that "prison officials***have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." Turner v. Safley, at 90-91.

The Supreme Court recognized that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform." "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government." Turner, at 84-85. In prisons, "rules *** far different from those imposed on society at large must prevail within prison walls," and judges "are ****1911 *23** not equipped by experience or otherwise to 'second guess' the decisions" of legislators or administrators "except in the most extraordinary circumstances." Wolff v. McDonnell, 418 U.S. 539, 561 (1974).

Prisons are, by their very nature, designed to be closed societies. Within these closed societies, there must be rules to protect all within the prison walls. NOt only can an inmate's religious practices undermine the security and administration of a prison, but it might well impinge on or offend another's religious or moral beliefs or conduct. See Dettmer v. Landon, 799 F. 2d 929 (4th Cir. 1986) (where inmates requested the tools to practice witchcraft); McCorkle v. Johnson, 881 F. 2d 993 (11th Cir. 1989) (where inmate alleged infringement of right to exercise the satanic religion, including access to "The Satanic Bible"). Other cases in state courts include the request for protection of the following "religions": Aryan Nations, a white racist organization; the Ku Klux Klan; and the followers of Yahweh Ben Yahweh, who promotes violent retaliation against white racism (and whose followers wish to circulate racially-charged materials).

As I stated before, the reasonableness standard has been applied by the Supreme Court for all other First Amendment challenges in the prison context. In each case, the Court has refused to apply the very standard which S. 578 seeks to apply, and has instead adopted a reasonableness standard.

The Committee Report states that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, of post-hoc rationalizations will not suffice.***" However, in some cases it may be impossible to prove with any degree of certainty the impact of allowing certain types of behavior. [FN5]

The Committee Report states that "[T]he Committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators ***[.]" Page 11. Instead of making an exception to

the bill for prisoner claims, the Majority leaves this task to the Courts. But under S. 578 there is little discretion for the courts, unless they choose to ignore the Act, since the plain meaning of "least restrictive means" can hardly be misinterpreted to allow due deference to a prison administrator's analysis of a particular issue.

CONCLUSION

In conclusion, I remain troubled by the prospect of Congress forcing the states to commit even more of their law enforcement budgets to inmate litigation. The Federal Bureau of Prisons has slightly over 87,000 inmates in its care. The states, by contrast, are responsible for nearly 900,000 inmates. Should we pass S. 578 unamended, the lion's share of the bill's burden will fall directly on the states. At the Committee hearings, there was not a single witness ****1912 *24** called to speak on the issue on behalf of the state Attorneys General or the correctional administrators.

I was the single "nay" vote when the Judiciary Committee approved this legislation. I stated to the Committee at that time that I intended to offer an amendment to address my concerns about the application of the bill in the prison context and was assured by my colleagues that language in the committee report would ease those concerns-concerns which, I would add, were shared with all members of the committee in a letter, dated May 5, 1993, signed by twenty-six States' Attorneys General. (See attached letter.)

The letter from the Attorneys General stated that S. 578 would be seriously disruptive of the effective administration of prisons unless it were amended to provide for a prison exception. The Attorneys General asked the committee to include language which stated that religious practices could be "burdened" if the restrictions served "legitimate penological interests." [FN6] The Executive Director of the Association of State Correctional Administrators has written that all state correctional administrators share the Attorneys General concern about the adverse effects of S. 578. (See attached letters.)

Since the bill was considered by the House of Representatives before the impact of the bill on prisons was raised, many House members supported the bill without exception. However, several House members have already stated that, should the Senate exempt the prisons from the bill, they would support such an amendment. See attached letter.

Not only was I disappointed in the Committee's failure to address the legitimate concerns raised by many of our chief law enforcement officials, I was also puzzled that, in addition to overruling the single case of Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the committee intended also to overrule the O'Lone decision. I object most strongly to that-especially in light of the fact that the touted purpose of this, in my view, ill-advised legislation, was to overrule only the Smith case.

Despite my colleagues' assurances to the contrary, the Committee Report not only fails to ease my concerns, but flatly states that it is the clear intent of the legislation to overrule the United States Supreme Court decision which established in the law exactly the standard of review which I-and many Attorneys General-were supporting during all of the committee's deliberation.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

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FN1 494 U.S. 872 (1990).

FN2 See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 61 U.S.L.W. 4587, No. 91-948 (U.S. June 11, 1993) (striking down city ordinance that prohibited killing of animals in religious rituals while permitting killing animals in other circumstances).

FN3 See written testimony of Prof. Douglas Laycock, U.S. Senate Committee on the Judiciary, Sept. 18, 1992, pp. 2-5 (citing examples).

FN4 374 U.S. 398 (1963).

FN5 See Church of Lukumi Babalu Aye v. Hialeah, supra, slip op. at 12-13 (Souter, J., concurring in part and concurring in the judgment) (collecting cases). See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying the compelling interest standard, the Court held that the free exercise clause barred application of a State law requiring school education of adolescents to Old Order Amish); Thomas v. Review Board, Indiana Employment Security Commission, 450 U.S. 707 (1981) (applying compelling interest standard, the Court held that a State could not deny unemployment benefits to a Jehovah's Witness who became unemployed because his interpretation of the Bible precluded him from working on an armaments production line).

Similarly, the Court has used the compelling interest test and upheld the disputed government statute or regulation. See, e.g., United States v. Lee, 455 U.S. 252 (1982) (upholding application to Amish employer of requirement that employer pay portion of Social Security taxes); Bob Jones University v. United States, 461 U.S. 574 (1983) (upholding denial of tax exemption to a religious college whose racially discriminatory practices were claimed to be mandated by religious belief); Hernandez v. Commissioner, 490 U.S. 680 (1989) (upholding denial of tax deduction to members of the Church of Scientology for payments they made to branch churches for "auditing" and "training" services).

FN6 Id. at 885.

FN7 Id. at 883-84.

FN8 Id. at 888 (emphasis in original).

FN9 Justice O'Connor concurred in the judgment on the ground that application of the Oregon criminal statute to the Native American respondents satisfied the Sherbert standard because uniform application of the criminal prohibition was "essential" to accomplish the State's "compelling interest in prohibiting the possession of peyote by its citizens". Id. at 905.

FN10 Id. at 894 (citations omitted).

FN11 Id. at 894 (citations omitted and emphasis added).

FN12 Slip op. at 20.

FN13 See, e.g., You Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (reversing earlier decision upholding Hmong religious objection to autopsy, in light of Smith); Minnesota v. Hershberger, 462 N.W. 2d 393 (Minn. 1990) (after Smith, the Supreme Court of Minnesota, upon remand from the U.S. Supreme Court, relied on State instead of Federal constitutional grounds to uphold the Amish's free exercise right not to display fluorescent emblems on their horse-drawn buggies).

FN14 Hearing at 44.

FN15 West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

FN16 Smith, 494 U.S. at 903 (citation omitted).

FN17 See Smith, 494 U.S. at 897-98 (O'Connor, J., concurring in the judgment) (discussing prior cases).

FN18 For instance, the act does not prohibit neutral and compelling land-use regulations, such as fire codes, that may apply to structures owned by religious institutions but have not substantial impact on religious practices.

FN19 In Bowen v. Roy, 476 U.S. 693 (1986), and Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court held that the manner in which the

Government manages its internal affairs and uses its own property does not constitute a cognizable "burden" on anyone's exercise of religion. Specifically, Bowen held that a statutory requirement that a State use a Social Security number in administering Federal food stamps and AFDC programs does not burden the free exercise rights of Native Americans who believe the use of the numbers would harm their souls. Similarly, the Court ruled in Lyng that the construction of mining or timber roads over public lands which were sacred to the Native American religion did not constitute a burden on the Native Americans' free exercise rights triggering the compelling interest test.

FN20 For example, it would remain for the courts to determine whether or not a facially neutral statute which prohibits killing animals that is applied so as to substantially burden the ability of a religion's adherents to engage in animal sacrifice meets the compelling interest standard. Contrast Church of Lukumi Babalu Aye v. Hialeah, supra (striking down a law banning only religiously motivated killing of animals, while assuming, without deciding, that governmental interests in avoiding cruelty to animals are compelling).

FN21 See, e.g., Bell v. Wolfish, 441 U.S. 520 (1979); Cruz v. Beto, 405 U.S. 319 (1972); Price v. Johnston, 334 U.S. 266 (1948).

FN22 O'Lone, 482 U.S. at 348; Bell v. Wolfish, 441 U.S. at 545; Cruz v. Beto, 405 U.S. 321; Cooper v. Pate, 378 U.S. 546 (1964).

FN23 482 U.S. 342 (1987).

FN24 Weaver v. Jago, 675 F.2d 116, 119 (6th Cir. 1982) (citations omitted).

FN25 482 U.S. at 349 (citing Turner v. Safley, 482 U.S. 76, 89 (1987)).

FN26 See, e.g., Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

FN27 Thereiault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974), cert. denied, 434 U.S. 871 (1977) (footnote omitted).

FN28 See e.g., Johnson v. PA. Bureau of Corrections, 661 F. Supp. 425, 436-37 (M.D. Pa. 1987) (rejecting "The Spiritual Order of Universal Beings"); See also Jacques v. Hilton, 569 F. Supp. 730, 736 (D.N.J. 1983), aff'd, 738 F.2d 422 (3d Cir. 1984) (rejecting "United Church of Saint Dennis").

FN29 Stafford v. Harrison, 766 F. Supp. 1014, 1017 (D. Kan. 1991).

FN30 For example, in Green v. White, 525 F. Supp. 81, (E.D. Mo 1981), aff'd 693 F.2d 45 (8th Cir. 1982), cert. denied, 462 U.S. 1111 (1983), the courts rejected the claim that the Human Awareness Life Church was a religion and focused on the prisoner's demands, under a religious guise, for conjugal visits, banquets, and payment as a chaplain. See also, United States ex rel. Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972) (rejecting claim for religious rights that prisoner has never practiced before).

FN31 Theriault v. Silber, 453 F. Supp. 254, 260 (W.D. Tex. 1978), appeal dismissed, 579 F.2d 302 (5th Cir. 1978), cert. denied, 440 U.S. 917 (1979).

FN32 475 U.S. 503 (1986).

FN33 Public Law 100-180, section 508(a)(2), 101 Stat. 1086 (Dec. 4, 1987), 10 U.S.C. 774.

FN34 410 U.S. 113 (1973).

FN35 D. Ackerman, "CRS Report for Congress-The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis," 92-366A (Apr. 17, 1992).

FN36 112 S. Ct. 2791 (1992).

FN37 403 U.S. 672 (1971).

FN38 See 42 U.S.C. 200e(j).

FN39 For example, a convicted criminal defendant having failed in a defense based on the act, could not then use the act to challenge the severity of the sentence impose on the grounds less severe sanctions were available. The enforcement of permissible general prohibitions could be rendered wholly ineffective if every defendant claiming religious motivation could ask the court to speculate on the efficacy of alternative remedies or less sanctions that might be less restrictive means of controlling the prohibited behavior. Of course, any remedy or sanction remains subject to the constitutional rule that government may not discriminate against religious practices. See Church of Lukumi Babalu Aye v. Hialeah, supra.

FN40 Cantwell v. Connecticut, 310 U.S. 296 (1940).

FN41 Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

FN42 Ex parte Virginia, 100 U.S. 339, 345 (1879).

FN43 While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion, except where such action is the least restrictive means of furthering a compelling governmental interest.

FN1 In the case which the bill seeks to overturn, Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Supreme Court held that generally applicable laws, as long as they are not motivated by a governmental desire to affect religion, are enforceable even if they burden religion. Last month, the Court in Church of Lukumi Babalu Aye v. Hialeah, in striking down a city ordinance prohibiting animal sacrifice, applied the compelling state interest test since the law is not neutral nor of general application. Clearly, the Supreme Court has not totally thrown out the compelling state interest/least restrictive test in all Free Exercise cases, as S. 578 and the Committee report would indicate.

FN2 453 F. Supp. 254, 260 (W.D. Tex. 1978) appeal dismissed 579 9 F.2d 302 (5th Cir. 1978), cert. denied, 440 U.S. 917 (1979).

FN3 Bell v. Wolfish, 441 U.S. 520, 545, 99 S Ct. 1861, 1877, 60 L. Ed. 2d 447 (1979); See Turner v. Safely, 482 U.S. 78, 84, 107 S. Ct. 2254, 2259, 96 L. Ed. 2d 64 (1987); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129, 97 S. Ct. 2532, 2539-40, 53 L. Ed. 2d 629 (1977). Inmates clearly retain protections afforded by the First Amendment, Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495 (1974), including its directive that no law shall prohibit the free exercise of religion.

FN4 "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948). The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives-including deterrence of crime, rehabilitation of prisoners, and institutional security. Pell v. Procunier, supra, 417 U.S., at 822-823, 94 S. Ct., at 2804; Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct., 1800, 1810-11, 40 L. Ed. 2d 224 (1974).

FN5 For example, prison violence is a serious problem, particularly at higher security facilities. While a warden may have a legitimate fear that a particular publication will incite violence, he will rarely be able to prove a likelihood of

violence or disorder as a result of the admission of a particular publication. The inability to prove the existence of a substantial security risk in a particular case does not necessarily mean that the warden's fears are exaggerated. Requiring a strict scrutiny review could result in the admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder.

FN6 The phrase "legitimate penological interests" is a term of precise meaning. It is derived from the United States Supreme Court's decision in the case O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

S. REP. 103-111, S. Rep. No. 111, 103RD Cong., 1ST Sess. 1993, 1993 U.S.C.C.A.N. 1892, 1993 WL 286695 (Leg.Hist.)

END OF DOCUMENT

P.L. 103-141, RELIGIOUS FREEDOM RESTORATION ACT OF 1993
DATES OF CONSIDERATION AND PASSAGE
House: May 11, November 3, 1993
Senate: October 27, 1993
Cong. Record Vol. 139 (1993)
House Report (Judiciary Committee) No. 103-88, May 11, 1993 (To accompany H.R. 1308)
Senate Report (Judiciary Committee) No. 103-111, July 27, 1993 (To accompany S. 578)

HOUSE REPORT NO. 103-88
May 11, 1993
[To accompany H.R. 1308]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1308) to protect the free exercise of religion, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

SUMMARY AND PURPOSE

H.R. 1308, the Religious Freedom Restoration Act of 1993, responds to the Supreme Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith [FN1] by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability.

HEARINGS

Hearings were held before the Subcommittee on Civil and Constitutional Rights during the 102d Congress on May 13 and 14, 1992 on H.R. 2797, a similar bill; no hearings were held during the 103d Congress.

COMMITTEE VOTE

On March 24, 1993, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 1308 reported to the full House by a vote of 35-0.

DISCUSSION

BACKGROUND AND NEED

The Free Exercise Clause of the First Amendment states in relevant part that "Congress shall make no law ... prohibiting the free exercise [of religion]." However, the clarity of the Constitution has not prevented government from burdening religiously inspired action. Though laws directly targeting religious practices have become increasingly rare, facially neutral laws of general applicability have nefariously burdened the free exercise of religion in the United States throughout American history. Such laws, often upheld by the courts, undermined the exercise of religion by various groups. [FN2]

Not until the Supreme Court used the compelling governmental interest test in the free exercise context did decisions more protective of religious liberty evolve. In Sherbert v. Verner, [FN3] the Supreme Court stated the principle that a neutral law that burdens the free exercise of religion may only be upheld if the government can demonstrate that such law is justified by a compelling governmental interest and is the least restrictive means of achieving that interest. For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test. The Smith majority's abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.

The Smith case began as an unemployment compensation dispute involving two Native American employees at a private drug and alcohol rehabilitation facility. The employees were fired and denied unemployment benefits after they admitted ingesting peyote-a sacrament of the Native American Church of which both were members-during a religious ceremony. The Oregon Employment Division believed that the State had a compelling interest in proscribing the use of certain drugs pursuant to a controlled substance law.

The employees filed a case disputing the denial of unemployment benefits and questioning the constitutionality of the controlled substance law as it applied to their religious practice. The case proceeded through the State and Federal courts until, on remand from the United States Supreme Court, the Oregon Supreme Court found that the State statute did not exempt the religiously inspired use of peyote. However, the court also invalidated the prohibition on sacramental peyote use under the Free Exercise Clause of the First Amendment and reaffirmed its previous ruling that the State could not deny unemployment benefits. The United States Supreme Court granted certiorari, again.

In its second review of the case, the United States Supreme Court was required to determine whether the Free Exercise Clause of the First Amendment permitted the State of Oregon to prohibit sacramental peyote use through its general criminal prohibition on use of that drug, and thus permitted the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

The parties did not ask the Court to render a decision on the level of scrutiny applicable when a law of general applicability allegedly infringes upon an individual's rights under the Free Exercise Clause, nor did the Court request briefing or argument on this well settled issue. Nevertheless, the Smith opinion focused on the standard of review.

In an opinion written by Justice Scalia, the Court determined that the Free Exercise Clause of the First Amendment does not absolve any person of the duty to adhere to a law which incidentally forbids or requires the performance of an act that a person's religion requires or forbids, if that law is not specifically directed to religious practice. Citing Minersville School Dist. Bd. of Educ. v. Gobitis, [FN4] the Court stated that it had "never held that an individual's religious beliefs excuse[d] him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." [FN5] According to the Smith majority, the only decisions in which it held "that the First Amendment bar[red] application of a neutral, generally applicable law to religiously motivated action involved ... the Free Exercise Clause in conjunction with other constitutional protections." [FN6] The Court maintained that the case did not present such a "hybrid" situation, only a free exercise claim unconnected with any other constitutional right.

The Court then repudiated the use of the compelling governmental interest test. Justice Scalia wrote that:

> [T]he sounder approach [to challenges having to do with an across-the-board criminal prohibition on a particular form of conduct], and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development,' Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988). To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"-permitting him, by virtue of his beliefs, 'to become a law unto himself,' Reynolds v. United States 98 U.S. 145, 167 (1878)-contradicts both constitutional tradition and common sense. [FN7]

The majority reached this conclusion after finding that the applicability and success of the compelling governmental interest test stretched only as far as invalidating state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his or her religion. The Court found that the test was appropriate for that context because it lent itself to individualized governmental assessment of the reasons for the relevant conduct.

Conversely, according to the majority, the test would be inappropriate outside

that context and would lead to a "parade of horribles" such as judicial determination of the "centrality" of religious beliefs; "anarchy" resulting from the supposed inability of many laws to meet the test; and exemption from a variety of civic duties. Justice Scalia stated:

Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," Braunfield v. Brown, 366 U.S. 599, 606 (1961), and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. [FN8]

Finally, the Court asserted that the free exercise of religion may be protected through the political process. According to the majority, its inability to find constitutional protection for religiously inspired action burdened by generally applicable laws does not mean statutory exemptions to such laws are not permitted or even desired. However, the majority noted:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs. [FN9]

To reach its decision in the Smith case, the majority had to strain its reading of the First Amendment and ignore years of precedent in which the compelling governmental interest test was applied in a variety of circumstances. In a strongly worded concurrence, [FN10] Justice O'Connor noted that the First Amendment of the Constitution does not distinguished between religious belief and conduct, and that conduct can be burdened both by the extreme and rare law that specifically targets religion as well as the generally applicable law:

[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. * * *

***A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. [FN11]

Citing numerous cases, Justice O'Connor clarified that in the course of reviewing generally applicable laws, the Court had recognized that the right to engage in conduct is not absolute and had "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." [FN12] Furthermore, use of the compelling governmental interest test had not been confined to "hybrid" or unemployment compensation cases as suggested in the majority opinion. Prior to Smith, the Court consistently relied upon the Free Exercise Clause in a variety of circumstances and even when the Court upheld the burden on religion, it did so only after employing strict scrutiny. [FN13]

IMPACT OF THE SMITH DECISION

The effect of the Smith decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the "rational relationship test" only requires that a law must be rationally related to a legitimate state interest, the Smith decision has created a climate in which the free exercise of religion is continually in jeopardy; facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion. [FN14] After Smith,

claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute. As the Supreme Court itself said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [FN15]

The Committee believes that the compelling governmental interest test must be restored. As Justice O'Connor stated in Smith, "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights."' [FN16]

THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The legislative response to the Smith decision is H.R. 1308, the Religious Freedom Restoration Act of 1993. The bill restores the compelling governmental interest test previously applicable to First Amendment Free Exercise cases by requiring proof of a compelling justification in order to burden religious exercise. In so doing, the definition of governmental activity covered by the bill is meant to be all inclusive. All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill. In this regard, in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.

It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to Smith for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. Furthermore, by enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, the test generally should not be construed more stringently or more leniently than it was prior to Smith.

In terms of the specific issue addressed in Smith, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest. It is worth emphasizing that although this bill is applicable to all Americans, including Native Americans and their religions in keeping with the Congressional policy set in the American Indian Religious Freedom Act of 1978, the Committee recognizes that this bill will not necessarily address all First Amendment problems by itself. Native Americans have unique First Amendment concerns that Congress may need to address through additional legislation.

Prior to 1987, courts evaluated free exercise challenges by prisoners under the compelling governmental interest test. The courts considered the religiously inspired exercise, as well as the difficulty of the prison officials' task of maintaining order and protecting the safety of prison employees, visitors and inmates. Strict scrutiny of prison regulations did not automatically assure

prisoners of success in court. However, in O'Lone v. Estate of Shabazz, [FN17] the Supreme Court articulated the standard currently applicable in free exercise cases involving prisoners. The test developed by the Supreme Court requires prison regulations to be reasonably related to legitimate penological interests, the existence of alternative means to exercise the constitutional right despite the regulations, and an examination of the impact of accommodation of the asserted right(s) on other inmates, prison personnel, and allocation of prison resources, generally. Under this test, burdens on prisoners' free exercise of their religion are more easily upheld.

In Goldman v. Weinberger, [FN18] the Supreme Court carved out an exception to the compelling governmental interest test applicable to review of military regulations burdening religious practices. When a Jewish psychologist sought to ear a yarmulke while on duty, the Court, foreshadowing its 1987 Shabazz decision, cited the differences between civilian society and the specialized military society as justification for upholding the military dress code. The Court decided that judicial review must be much more deferential to the military than review of similar laws affecting civilians.

Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of prisoners and military personnel under the compelling governmental interest test. Seemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest. However, examination of such regulations in light of a higher standard does not mean the expertise and authority of military and prison officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings. Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order.

There has been much debate about this bill's relevance to the issue of abortion. Some have suggested that if Roe v. Wade were reversed, the bill might be used to overturn restrictions on abortion. The Congressional Research Service is unpersuaded that this would be the case, [FN19] and the Committee is similarly unpersuaded. In short, the abortion debate will be resolved in contexts other than this legislation. Furthermore, the Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), which describes how to resolve claims relating to abortion under the Constitution, renders discussions about the bill's application to abortion increasingly academic. To be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to Smith.

Although the purpose of this Act is to overcome the effects of the Supreme Court's decision in Smith, concerns have been raised that the bill could have unintended consequences and unsettle other areas of the law. Specifically, the courts have long adjudicated cases determining the appropriate relationship between religious organizations and government. In particular, Federal courts have repeatedly been asked to decide whether religious organizations may participate in publicly funded social welfare and educational programs or enjoy exemptions from income taxation pursuant to 26 U.S.C. S 501(c)(3) and similar laws. Such cases have been decided under the Establishment Clause and not the Free Exercise Clause. In fact, a free exercise challenge to government aid to a religiously affiliated college was rejected by the Supreme Court in Tilton v. Richardson. [FN20]

The bill includes several provisions which clarify that the bill does not change the law governing these cases. These include the provision providing for the application of the Article III standing requirements; a section which provides that the granting of benefits, funding, and exemptions, to the extent permissible under the Establishment Clause, does not violate the Religious Freedom Restoration Act; and, further clarification that the jurisprudence under the Establishment Clause remains unaffected by the bill.

Ordinary Article III rules are to be applied in determining whether a party has standing to bring a claim pursuant to this bill. In the past, the courts have interpreted the Constitution's Article III standing provision to preclude taxpayers

from attaining standing to challenge on free exercise grounds the tax-exempt status of religious institutions. The Committee intends that these issues continue to be resolved under Article III standing rules and Establishment Clause jurisprudence. The Act would not provide a basis for standing in situations where standing to bring a free exercise claim is otherwise absent.

With respect to that part of Section 7 that provides that granting benefits, funding, or exemptions, to the extent permissible under the Establishment Clause, does not violate this legislation, the bill makes clear that the term "granting" should not be misconstrued to include "denying." Thus, parties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in Sherbert.

Nothing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964. Furthermore, where religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place and manner restrictions are permissible consistent with First Amendment jurisprudence.

Finally, the Committee believes that Congress has the constitutional authority to enact H.R. 1308. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. [FN21] However, limits to congressional authority do exist. Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision. Because H.R. 1308 is well within these limits, the Committee believes that in passing the Religious Freedom Restoration Act, Congress appropriately creates a statutory right within the perimeter of its power.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The short title of the bill is the "Religious Freedom Restoration Act of 1993."

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES

This section sets forth both the background and the purpose for enacting the Religious Freedom Restoration Act of 1993.

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED

Pursuant to H.R. 1308, the government cannot burden a person's free exercise of religion, even if the burden results from a rule of general applicability, unless the burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that interest.

A person may assert a free exercise violation as a claim or defense in a judicial proceeding. To bring a claim, a person or organization must meet the requirements for standing under article III of the Constitution.

SECTION 4. ATTORNEYS FEES

The bill provides that courts may, in their discretion, allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs. Furthermore, this section provides for costs and fees during an adversary adjudication.

SECTION 5. DEFINITIONS

The terms "government", "State", "demonstrates", and "exercise of religion" are defined.

SECTION 6. APPLICABILITY

H.R. 1308 applies to all Federal, State and local law, including the implementation of that law, whether or not it was adopted before or after the enactment of the Act. However, Federal laws adopted after enactment may not be subject to the Act if the law, by reference to the Act, explicitly excludes application. Nothing in this bill shall authorize any government to burden any religious belief.

SECTION 7. ESTABLISHMENT CLAUSE UNAFFECTED

The Religious Freedom Restoration Act does not in any way affect the Establishment Clause of the First Amendment.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 1308, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

U.S. Congress,

Congressional Budget Office,

Washington, DC, March 26, 1993.

Hon. Jack Brooks,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 1308, the Religious Freedom Restoration Act of 1993, as ordered reported by the House Committee on the Judiciary on March 24, 1993. CBO estimates that implementation of H.R. 1308 would result in no significant cost to the federal government or to state or local governments.

Under current law, a unit of local, state, or federal government can infringe upon a person's exercise of religion if such infringement bears a rational relationship to furthering a government interest. H.R. 1308 would allow a unit of government to infringe upon a person's exercise of religion only if such infringement furthers a compelling government interest and is the least restrictive means of furthering that interest.

Enactment of H.R. 1308 may affect direct spending because private parties affected by this bill may seek judicial relief; if they successfully claim that their free exercise of religion has been burdened by the federal government, attorney's fees

may be awarded and would be paid out of the Claims, Judgments and Relief Acts account. Therefore, this bill would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. However, attorney's fees are permitted under current law, the federal government rarely loses cases of this type, and there is no reason to expect that the number of cases lost or the amount of attorney's fees awarded would change significantly under H.R. 1308.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne Mehlman, who can be reached at 226-2860.

Sincerely,
Robert D. Reischauer, Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1308 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 722 OF THE REVISED STATUTES OF THE UNITED STATES

Sec. 722. (a) The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, The Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.

SECTION 504 OF TITLE 5, UNITED STATES CODE

S 504. Costs and fees of parties

(a) * * *
(b)(1) For the purposes of this section-
(A) * * *

* * * * * * *

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or

otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), [and] (iii) any hearing conducted under chapter 38 of title 31[;]; and (iv) the Religious Freedom Restoration Act of 1993

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ADDITIONAL VIEWS OF HON. HENRY J. HYDE, HON. F. JAMES SENSENBRENNER, HON. BILL MCCOLLUM, HON. HOWARD COBLE, HON. CHARLES T. CANADY, HON. BOB INGLIS, HON. ROBERT W. GOODLATTE

The purpose of H.R. 1308 is to overturn the 1990 decision of the United States Supreme Court in Oregon Employment Services Division v. Smith 494 U.S. 872. The "Religious Freedom Restoration Act" (hereinafter RFRA) seeks, by statute, to replicate the "compelling state interest test" for the adjudication of free exercise claims which was in place prior to the Supreme Court's decision in Smith.

In Smith, the Supreme Court held that neutral laws of general application that have the incidental effect of burdening religion do not violate the free exercise clause of the First Amendment to the United States Constitution. [FN1] The Smith case involved two drug rehabilitation workers who sued to obtain unemployment benefits after they were discharged for ingesting peyote during a service of Native American Church, of which both workers were members.

Justice Scalia, writing for the majority, rejected the "compelling state interest" test for adjudication of free exercise claims. Previously, government action which burdened religious exercise could only be upheld if it furthered a compelling governmental interest and was the least restrictive means of furthering that interest. This test was first articulated by the Supreme Court in the context of unemployment benefits in Sherbert v. Verner, 374 U.S. 398 (1963). In Sherbert, a Seventh-Day Adventist who had refused to work on her religion's Sabbath was awarded unemployment compensation which had previously been denied.

When this legislation was considered by the Subcommittee on Civil and Constitutional Rights and the full Judiciary Committee in the 102nd Congress, Congressman Henry J. Hyde (Ill.) offered several amendments. These amendments were designed to alleviate concerns that had been raised with respect to (1) abortion-related claims, (2) third-party challenges to government-funded social service programs run by religious institutions and (3) third-party challenges to the tax-exempt status of religious institutions. Since that time, each of these concerns has been resolved either through explicit statutory language or has been addressed in the Committee report.

CHANGES MADE TO H.R. 1308

A major issue of contention in the 102nd Congress was whether the bill was a true "restoration" of the law as it existed prior to Smith or whether it sought to impose a statutory standard that was more stringent than that applied prior to Smith. [FN2]

As introduced in the 102nd Congress, the RFRA purported to "restore the compelling state interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder." [FN3] The "compelling state interest" test as applied in Sherbert and Yoder, however, was far stronger than the court had been applying prior to Smith. Those two cases represent the zenith of free exercise jurisprudence, where religious plaintiffs who sought to have their individual claims balanced against government interests actually prevailed. In reality, in recent years it has been quite difficult, if not impossible, for plaintiffs bringing constitutional free exercise claims to prevail.

Several changes were made to the bill during the Judiciary Committee markup in late September of 1992 and prior to the bill's introduction in 103rd Congress. These changes resolved the ambiguity about the standard to be applied and made it clear that the bill does not reinstate the free exercise standard to the high water mark as found in Sherbert v. Verner and Wisconsin v. Yoder, but merely returns the law to the state as it existed prior to Smith.

Briefly the changes are as follows:

Section 2 of the legislation, the "Congressional Purposes" was amended to delete the specific reference to "Sherbert v. Verner and Wisconsin v. Yoder" in setting forth the statutory standard. This section now states that the purpose of the Act is to: "restore the compelling interest test as set forth in Federal court cases before Employment Division of Oregon v. Smith."

Section 3, the operative language of the bill, which sets forth the standard of the bill, was fundamentally changed. The language had required that the government must prove that any neutral regulation which burdened free exercise was "essential to" a compelling governmental interest. The bill was amended to require only that the government show that its action "furthers" a compelling governmental interest.

Section 5 added a new subsection which states: "the term 'exercise of religion' means exercise of religion under the First Amendment to the Constitution of the United States.

Section 7 was amended to add the following language:

Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause of the First Amendment, shall not constitute a violation of this Act. As used in this section, the term 'granting government funding, benefits, or exemptions' does not include a denial of government funding, benefits, or exemptions.

The amendments to Sections 2, 3, and 5 make clear that the purpose of the statute is to "turn the clock back" to the day before Smith was decided. In interpreting the statute, courts are not to look exclusively to the compelling state interest test as applied in Sherbert and Yoder, but to all prior "Federal court cases." The government's action or regulation need not be "essential" to a compelling state interest, but merely should "further" a compelling government interest. Finally, the language added to Section 5 makes clear that the bill does not create a new statutory definition of the free exercise of religion, but incorporates the constitutional definition of the free exercise of religion.

The intended standard of the bill was of particular concern in the area of abortion rights. We have been concerned that the Religious Freedom Restoration Act would create an independent statutory basis to challenge abortion restrictions that does not exist under current law. Because the bill now clearly imposes a statutory standard that is to be interpreted as incorporating all "federal court cases" prior to Smith, and free exercise challenges to abortion restrictions were ultimately unsuccessful prior to Smith, we are confident that although such claims may be brought pursuant to the Act, they will be unsuccessful. [FN4]

The amendments to Section 7 are intended to resolve the concerns that have been raised regarding the application of the Act to third-party challenges to government-funded social service programs run by religious institutions and third-party challenges to the tax-exempt status of religious institutions. The new language makes clear that such claims are not the appropriate subject of litigation under the Religious Freedom Restoration Act.

The changes made to the bill as introduced in the 103rd Congress make clear that the Religious Freedom Restoration Act is not seeking to impose a new, invigorated compelling state interest standard, but is seeking to replicate, by statute, the same free exercise test that was applied prior to Smith.

WILL THE RFRA WORK?

In justification of the need for this legislation, proponents have provided the Committee with long lists of cases in which free exercise claims have failed since Smith was decided. Unfortunately, however, even prior to Smith, it is well known that the "compelling state interest" test had proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations. [FN5] Restoration of the pre-Smith standard, although politically practical, will likely prove, over time, to be an insufficient remedy. It would have been preferable, given the unique opportunity presented by this legislation, to find a solution that would give solid protection to religious claimants against unnecessary government intrusion. [FN6]

In reality, the Act will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight. It will

perpetuate, by statute, both the benefits and frustrations faced by religious claimants prior to the Supreme Court's decision in Smith. Although we have this remaining concern, we support enactment of the legislation.

Henry J. Hyde.

Bill McCollum.

Charles T. Canady.

Bob Goodlatte.

F. James Sensenbrenner.

Howard Coble.

Bob Inglis.

FN1 494 U.S. 872 (1990).

FN2 See written testimony of Professor Douglas Laycock, House Civil and Constitutional Rights Subcommittee, May 14, 1992, pp. 2-5.

FN3 374 U.S. 398 (1963).

FN4 310 U.S. 586 (1940). Gobitis, overruled three years later by West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), upheld the requirement that Jehovah's Witnesses salute the flag. The Gobitis decision precipitated widespread violence against Jehovah's Witnesses including the beating of Jehovah's Witness children on school grounds.

FN5 Smith, 494 U.S. at 878.

FN6 Id. at 881.

FN7 Id. at 885.

FN8 ID (at 888 italic in original).

FN9 Id. at 890.

FN10 Justice O'Connor concurred in the judgment by finding against the dismissed employees based on the Court's established free exercise jurisprudence.

FN11 Id. at 895 (quoting Wisconsin v. Yoder, 406 U.S. 205, 219-20).

FN12 Id. at 894.

FN13 See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (using strict scrutiny, Court held that the free exercise interests of the Old Order Amish outweighed the interests of the state compulsory education statute); Thomas v. Review Board, Indiana Employment Security Commission, 450 U.S. 707 (1981) (using strict scrutiny, Court held that a State could not deny unemployment benefits to a Jehovah's Witness who became unemployed because his interpretation of the Bible precluded him from working on an armaments production line).

Similarly, the Court has used the compelling governmental interest test and upheld the disputed government statute or regulation. See, e.g., United States v. Lee, 455 U.S. 252 (1981) (Amish employer not constitutionally entitled to an exemption from paying the employer's portion of Social Security taxes); Bob Jones University v. United States, 461 U.S. 574 (1983) (tax exemption denied to a religious college whose racially discriminatory practices were claimed to be mandated by religious belief); Hernandez v. Commissioner, 490 U.S. 680 (1989) (tax deduction denied to members of the Church of Scientology for payments they made for

"auditing" and "training" services).

FN14 See, e.g., You Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (court reversed earlier decision upholding Hmong religious objection to autopsy, in light of Smith); Saint Bartholomew's Church v. City of New York and Landmarks Preservation Commission, 914 F.2d 348 (2d Cir. 1990) (relying heavily on Smith, court applied landmarking ordinances to church-owned buildings); Minnesota v. Hershberger, 462 N.W. 2d 393 (Minn. 1990) (after Smith, the Supreme Court of Minnesota, upon remand from the United States Supreme Court, relied on state instead of Federal constitutional grounds to the Amish's free exercise right not to display fluorescent emblems on their horse-drawn buggies); Ryan v. United States Department of Justice, 950 F.2d 458 (7th Cir. 1991) cert. denied., 112 S. Ct. 2309 (1992) (court cited Smith and upheld FBI's dismissal of an employee whose religious beliefs compelled him not to investigate two pacifist groups).

FN15 Barnette, 319 U.S. at 638.

FN16 Smith, 494 U.S. at 903 (citation omitted).

FN17 482 U.S. 78 (1987).

FN18 475 U.S. 503 (1986).

FN19 D. Ackerman, "CRS Report for Congress-The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis," 92-366A (April 17, 1922).

FN20 403 U.S. 672, 689 (1971).

FN21 See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Thornburgh v. Gingles, 478 U.S. 30 (1986).

FN1 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. ..." U.S. Const. Amend. I. The Free Exercise Clause of the First Amendment was made applicable to the States by incorporation into the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

FN2 H.R. 2797, 102nd Cong., 1st Sess. (1991).

FN3 Wisconsin v. Yoder, 406 U.S. 205 (1972).
Of course, the label "restoration" in this context is inappropriate. Congress writes laws-it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to "restore" a prior interpretation of the First Amendment.

FN4 The one successful district court free exercise challenge to an abortion funding restriction, was thrown out by the United States Supreme Court in Harris v. McRae, 448 U.S. 297. (1980) "The named appellees ... lack standing to challenge the Hyde Amendment on free exercise grounds because none alleged, much less proved, that she sought an abortion under compulsion of religious belief." 448 U.S. at 321.

FN5 In EEOC v. Townley Engineering, 859 F.2d 610 (9th Cir. 1988), for example, Judge John Noonan, in a dissenting opinion, noted that in sixty-five of the seventy-two decisions by the federal circuit courts of appeals involving free exercise challenges to federal statutes the religious claimants lost.

FN6 An attempt was made to cure these deficiencies through an amendment offered in the Subcommittee markup in the 102nd Congress. The amendment would have focused the attention of courts on those interests which are truly "compelling." The amendment defined the term "compelling state interest" as, "an interest in the nondiscriminatory enforcement of generally applicable and otherwise valid civil or criminal law directed to: (a) the protection of an individual from death or serious bodily harm, (b) the protection of the public health from identifiable risks of

infection or other public health hazards, (c) the protection of private or public property, (d) the protection of individuals from abuse or neglect, or discrimination on the basis of race or national origin, or (e) the protection of national security, including the maintenance of discipline in the Armed Forces of the United States.

This amendment would have set forth statutory standards for determining whether a government's stated interest was "compelling" rather than allowing unlimited judicial discretion. The amendment was not adopted by the Subcommittee.

H.R. REP. 103-88, H.R. Rep. No. 88, 103RD Cong., 1ST Sess. 1993, 1993 WL 158058 (Leg.Hist.)

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