[Oral Argument Held September 14, 2007]

CASE NO. 06-5209, 06-5222

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

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

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Dated: March 12, 2009

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On December 15, 2008, the United States Supreme Court granted certiorari, vacated this Court's earlier decision, and remanded this case for further consideration in light of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The *Boumediene* decision requires this Court to reconsider the essential premises of its decision and to rule that appellants have the constitutional right not to be tortured and the right under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), to practice their religion without abuse or interference.

In *Boumediene*, the Supreme Court rejected this Court's categorical rule denying constitutional rights to Guantánamo detainees who are without property or presence in the United States. Applying a functional test, the Supreme Court held that detainees are entitled to fundamental constitutional rights unless circumstances make it "impracticable and anomalous" to recognize such rights. 128 S. Ct. at 2255-61. The rights at issue here are unquestionably fundamental, and there is nothing to suggest that it would be impracticable or anomalous to recognize such rights for Guantánamo detainees.

This Court should also rule that appellants are entitled to protection under RFRA. Even accepting, *arguendo*, this Court's conclusion that the word "persons" as used in that statute must be construed under constitutional

rather than statutory principles, the Supreme Court's decision in *Boumediene* requires reversal of this Court's prior conclusion that appellants are not "persons" entitled to the protections of RFRA. Because the Supreme Court confirmed in *Boumediene* that appellants have fundamental constitutional rights, they must be considered "persons" under any mode of construction.

Finally, applying the recent *Boumediene* decision, this Court should rule that appellees are not entitled to qualified immunity. The Supreme Court's holding that Guantánamo detainees are entitled to fundamental constitutional rights, and its rejection of this Court's erroneously constricted reading of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), rest on the century-old *Insular Cases*. Given that longstanding line of authority, it was patently unreasonable for appellees to have concluded that they could freely torture and violate the religious freedom of detainees at Guantánamo. *See Boumediene*, 128 S. Ct. at 2259 (it would be "a striking anomaly" to suggest that the Executive can "switch the Constitution on or off at will"). Moreover, as set forth in appellants' initial briefing, torture and religious humiliation are illegal, not solely under the Constitution, but also under every other source of law applicable at Guantánamo. No qualified immunity should be available to shield appellees from responsibility for their

egregious and obviously illegal conduct. *United States v. Lanier*, 520 U.S. 259, 271 (1997).

I. THIS COURT'S DECISION IN THE INSTANT CASE

In its earlier decision here, this Court held that appellants "lack constitutional rights because they are aliens without property or presence in the United States." *Rasul v. Myers*, 512 F.3d 644, 663 (D.C. Cir. 2008), *vacated*, 129 S. Ct. 763 (2008) (hereinafter "*Rasul II*"). The Court expressly rested this conclusion on its own, now-overruled decision in *Boumediene*. *Boumediene v. Bush*, 476 F.3d at 981 (D.C. Cir. 2007). There, as here, this Court rejected the application of the analytic framework laid out in the *Insular Cases*,[1] in favor of a rigid rule of formal territorial sovereignty derived from its reading of *Eisentrager*. 512 F.3d at 664-66.[2]

This Court applied a similar analysis in reversing the district court's holding that appellants had stated a claim under RFRA. RFRA extends a cause of action to all "persons" improperly burdened in the exercise of their religion. Yet the panel majority held appellants "do not fall with[in] the

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[1] *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

[2] The district court described that analytic framework in *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005), which this Court reversed in its *Boumediene* decision.

definition of 'person[s]'" under RFRA and, therefore, lacked standing to invoke RFRA's protections. 512 F.3d at 672. Although acknowledging that "persons" is a broad term, *id.* at 668, the majority concluded that RFRA was a codification of constitutional free exercise principles and that RFRA's use of "person" should be "interpreted as it is in constitutional provisions." *Id.* at 671. Again invoking *Eisentrager* and its own decision in *Boumediene*, the Court held that, because appellants were non-resident aliens held outside the United States, they lacked constitutional rights and, because RFRA merely codified such rights, appellants are not "persons" under RFRA. *Id.* at 671-72.[3]

II. THE SUPREME COURT'S DECISION IN *BOUMEDIENE*

In *Boumediene*, the Supreme Court rejected the core premise underlying each aspect of this Court's decision in the instant case – its categorical rule that aliens without property or presence in the United States have no constitutional rights – ruling unequivocally that detainees at Guantánamo have constitutional rights, in that instance a right to habeas corpus. 128 S. Ct. at 2262. The Supreme Court did not base its conclusion on an historical analysis of the geographic scope of the writ or on

[3] As set forth in their initial briefing in this case, appellants respectfully submit that the Court erred in substituting a constitutional analysis for an application of the plain terms of the statute and also in holding that RFRA was solely a codification of rights protected by the First Amendment.

constitutional features peculiar to the writ. Instead, it held more broadly that fundamental constitutional rights had long been extended to aliens living under U.S. control, as recognized under the *Insular Cases*, which it strongly reaffirmed. *Id.* at 2253-58. As the Supreme Court noted, for nearly one hundred years the Court has taken for granted "that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id.* at 2255.

The Supreme Court also directly addressed *Eisentrager* and held that it established no inflexible rule against extraterritorial application of the Constitution, but turned on "practical considerations." *Id.* at 2257. Particularly pertinent here, the Supreme Court unequivocally rejected any construction of *Eisentrager* as having "adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause," because such an approach would represent "a complete repudiation" of the "functional approach" taken in the *Insular Cases* and *Reid v. Covert*, 354 U.S. 1 (1957). *Boumediene*, 128 S. Ct. at 2258. The Supreme Court characterized this Court's constricted reading of *Eisentrager* as overlooking the "common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that

questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258.

As a result, in *Boumediene*, the Supreme Court reaffirmed its holding in *Rasul v. Bush*, 542 U.S. 466 (2004) ("*Rasul I*") that Guantánamo is for all practical purposes U.S. territory and that detainees are not to be denied constitutional rights because they have no property or presence in the United States proper. It elaborated a functional test, directing courts to apply objective factors, including the citizenship and status of the detainee, the nature of the detention site, and any practical obstacles to extension of the right, 128 S. Ct. at 2259, to determine if recognition of a constitutional right in a particular circumstance is "impracticable and anomalous." *Id.* at 2255. Applying these factors to its examination of detentions at Guantánamo, the Supreme Court held that detainees have a constitutional right to habeas corpus. *Id.* at 2262.

Importantly, the Supreme Court summarily dismissed the idea that the executive branch could create a legal black hole where the government could act without constitutional constraint or reasonable judicial oversight:

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial

> governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.

Id. at 2259 (internal citations omitted).

III. THE EFFECT OF *BOUMEDIENE* ON THIS CASE

The Supreme Court has directed that this Court reconsider its decision here in light of *Boumediene*. At the outset, appellants acknowledge that, even after the Supreme Court issued this directive in the instant case, this Court has continued to insist upon application of its inflexible "property or presence" rule in denying constitutional rights to Guantánamo detainees. *See Kiyemba v. Obama*, No. 08-5424 (D.C. Cir. Feb. 18, 2009).[4] Yet the principles announced by the Supreme Court in *Boumediene* wholly vitiate this Court's reasoning and compel reversal here.

A. Appellants Have Fifth Amendment Rights.

The central premise in the Supreme Court's *Boumediene* decision is that Guantánamo detainees have fundamental constitutional rights notwithstanding that they lack property or presence in the United States. Applying its functional test to the detentions at Guantánamo, the Supreme Court held there is nothing about the citizenship of the detainees, the

[4] This Court's assertion in *Kiyemba* that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States" (slip. op. at 3) simply cannot be harmonized with the Supreme Court's ruling in *Boumediene*.

characteristics of Guantánamo, or the nature of the rights at issue that should deprive them of the constitutional right to habeas corpus review. The Supreme Court's reasoning mandates the same result with respect to the Fifth Amendment due process rights at issue here.

This Court has itself repeatedly held that there is no analytic distinction between a constitutional right to habeas corpus and the extension of other constitutional rights to Guantánamo detainees. *E.g.*, *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd on other grounds by Rasul I,* 542 U.S. 466 (2004). As this Court observed in its own *Boumediene* decision:

> [T]he dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power. Consider the First Amendment. Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law . . . ." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly. . . . There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, "people," "person," and "the accused")... That cannot be right.

476 F.3d at 993 (internal citations omitted). The Supreme Court took a similar view, expressly applying the standards of the Due Process Clause as well as the Suspension Clause in evaluating the legal sufficiency of

Guantánamo's Combatant Status Review Tribunal processes. *Boumediene*, 128 S. Ct. at 2269-70.[5]

But even if *Boumediene*'s holding were limited to the Suspension Clause, its functional test compels the same result with respect to the Fifth Amendment due process clause. The Supreme Court has already applied the first two factors of the test to Guantánamo detainees, holding that neither their citizenship nor their incarceration at Guantánamo deprives them of constitutional rights. Therefore, under the *Boumediene* analysis, appellants can be denied Fifth Amendment rights only if i) the right to be free from torture is not fundamental; or ii) application of such a right at Guantánamo would be impractical. Plainly neither is the case.

As long ago as 1936, the Supreme Court held that the right not to be tortured is "fundamental." *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, the Court held that torture is inconsistent with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 286. Torture "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 285. As Justice Scalia recognized in dissent in

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[5] Indeed it is difficult to conceive of a right of habeas without a corresponding right to due process. In the absence of due process, by what standard is detention to be judged?

Zadvydas v. Davis, 533 U.S. 678, 704 (2001), this norm is so obvious that, even in the case of aliens who may be entitled to only minimal constitutional protection, it is certain that "they cannot be tortured." In sum, it has long been established that there is an irreducible constitutional minimum that government officials owe to human beings under their control – whether citizen or alien – that necessarily includes the prohibition of torture.

There is nothing about Guantánamo that would make enforcement of the Fifth Amendment right not to be tortured more "impracticable and anomalous" than the right of habeas corpus. 128 S. Ct. at 2255. Guantánamo remains, as it was in *Boumediene*, "an isolated and heavily fortified military base." *Id.* at 2261. And, as in *Boumediene*, there can be no suggestion that recognition of Fifth Amendment rights could cause "friction with the host government." *Id.* Recognition of the right to habeas corpus, which, as the Supreme Court acknowledged in *Boumediene*, may entail cost to the government and require compliance with judicial process, is far more impracticable than recognition of the right at issue here. Torture is already prohibited at Guantánamo by the Uniform Code of Military Justice, U.S. Army Regulation 190-8, and U.S. criminal law; thus, there would be no additional practical burden on the government if the Constitution also applies to prohibit the conduct. Accordingly, this Court should reverse its

prior holding and hold that appellants have an enforceable right under the Fifth Amendment not to be tortured.[6]

B. Appellants Are "Persons" With Rights Under RFRA.

The same reasoning compels the conclusion that appellants have an enforceable right under RFRA to sue for religious humiliation and abuse. The Supreme Court's decision in *Boumediene* makes clear that the premise of this Court's analysis is untenable because detainees at Guantánamo have enforceable constitutional rights. Accordingly, even applying principles of constitutional rather than statutory construction, appellants are "persons" under RFRA because they have fundamental constitutional rights that must be protected unless to do so would be "impracticable or anomalous."

The inviolability of religious worship is at the core of the American ideal. *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Not only is it enshrined in the First and Fourteenth Amendments, but, through RFRA,

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[6] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), is not to the contrary. Application of the Fourth Amendment's protections in Mexico would have been "impracticable and anomalous" due to the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Id.* at 278 (Kennedy, J., concurring). As *Boumediene* held, recognizing constitutional rights at Guantánamo does not require this Court to apply U.S. law in a jurisdiction in which it would not otherwise apply or where there is an incompatible overlapping legal regime. 128 S. Ct. at 2261-62.

this principle has been reinforced and extended by Congress. RFRA mandates a broad and unitary standard for the entire federal government, including military officers and federal prison officials, requiring accommodation and respect for worship, and it creates a specific cause of action to hold federal officials liable for its violation. Permitting the systematic abuse of a discrete, insular group of Muslim men at Guantánamo conflicts fundamentally with the constitutional precepts underlying our Republic and with the text and purpose of RFRA. Under the Supreme Court's reasoning in *Boumediene*, the right to be free from official religious abuse at Guantánamo is fundamental, and its recognition would not be "impracticable and anomalous." Respect for detainee religious rights is, moreover, already required under other law and military regulations applicable at Guantánamo. *See e.g.*, Army Reg. 190-8(1-5)(4)(g). Accordingly, this Court should reinstate appellants' RFRA claim.

C. Previous Circuit Precedent Has Been Abrogated To The Extent It Conflicts With The Analysis Of *Boumediene*.

This analysis is also dispositive of this Court's direction to the parties to address the effect of *Boumediene* in light of other Circuit precedent. *Boumediene* plainly abrogates this Court's other prior decisions to the extent that they categorically deny constitutional protections to aliens without "property or presence" in the United States, *e.g.*, *Jifry v. FAA*, 370 F.3d

1174, 1183 (D.C. Cir. 2004); *People's Mojahedin Org. v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), and the Court may no longer rely on those decisions as precedent for this proposition. It undercuts as well the "property or presence" premise on which the majority decided *Kiyemba*. Moreover, *Boumediene* demonstrates that neither *Verdugo* nor *Eisentrager* precludes recognizing fundamental constitutional rights at Guantánamo.

Lower courts are bound not only by the holdings of higher court decisions but also by their "mode of analysis." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989). When a Supreme Court decision undermines the reasoning of a lower court's prior decisions, the lower court, whether it sits as a panel or en banc, must follow the Supreme Court and not its prior precedents. *See, e.g.*, *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66-67 (1st Cir. 2004); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 n.7 (4th Cir. 1996); *Dawson v. Scott*, 50 F.3d 884, 892 n.20 (11th Cir. 1995); *White v. Estelle*, 720 F.2d 415, 417 (5th Cir. 1983); *Cf. United States v. Carson*, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006) (panel must "follow circuit precedent absent contrary authority from an en banc court *or the Supreme Court*" (emphasis added)).

D. Appellees Are Not Entitled to Qualified Immunity.

The Supreme Court's *Boumediene* opinion makes clear that detainees at Guantánamo have fundamental rights and that those rights are rooted in a line of cases that dates back more than a century. The Supreme Court viewed this Court's interpretation of *Eisentrager* as untenable precisely because it would represent "a complete repudiation" of the longstanding functional approach adopted in the *Insular Cases* and confirmed in *Reid.*

Similarly, the Supreme Court found the notion that a lawless enclave can exist where the Constitution does not operate to be wholly at odds with long established doctrines. Quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885), the Court noted: "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" *Boumediene*, 128 S. Ct. at 2259. Thus, far from announcing a new rule, the Supreme Court has based fundamental rights for detainees on well-settled legal principles. The right not to be tortured has been recognized as fundamental for more than seventy years. The *Insular Cases* which extended constitutional rights to aliens without property or presence here have been established law for more than a century. No reasonable official could conclude that he could "switch the Constitution on and off at will" or successfully create a legal black hole

where he could torture with impunity. *Id.* Appellants knew that they were violating every law and regulation that could apply at Guantánamo. They had to know, at a minimum, that aliens in detention "cannot be tortured." *Zadvydas*, 533 U.S. at 704 (Scalia, J. dissenting). To ignore all the applicable law barring such conduct and rely on a "constricted" reading of a single inapposite case which would represent a "complete repudiation" of long-established precedents does not supply a basis for qualified immunity.[7] *Boumediene*, 128 S. Ct at 2236; *see Lanier*, 520 U.S. at 271.

Respectfully submitted,

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Dated: March 12, 2009

[7] Appellants respectfully submit as well that committing a crime in violation a "principle of justice so rooted in the traditions and conscience of our people," *Brown*, 297 U.S. at 286, cannot reasonably be within the scope of employment for a government official. Torture is not an expected consequence of national security. It is deeply offensive to U.S. military personnel, whose tradition of treating prisoners humanely stretches back to Washington's command of American forces, to suggest that torture is within the scope of their employment.

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Supplemental Brief on Remand of Appellants/Cross Appellees Rasul, et al., was served on the following on March 12, 2009 as indicated below:

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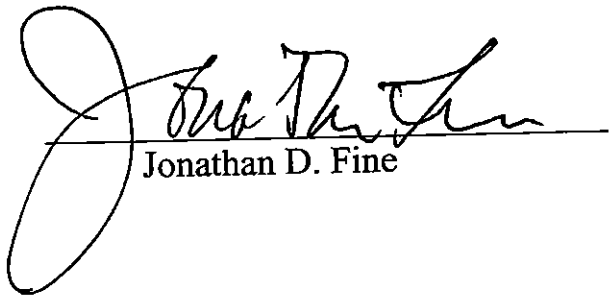

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