UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No: 04-1864 (RMU)
	)	
DONALD RUMSFELD, et al.,	)	
	)	
Defendants	)	
	)	

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

On February 6, 2006, this Court entered an Order granting the defendants' motion to dismiss in part and deferring ruling in part pending additional briefing. *Rasul v. Rumsfeld*, ___ F.Supp.2d ___, 2006 WL 266570 (D.D.C.). In that Order the Court dismissed outright plaintiffs' international law claims, finding that those claims are barred by the Liability Reform Act. *Id.* at *4. Although the Court reserved judgment on the underlying question of "whether the Guantanamo detainees enjoy Fifth and Eighth Amendment protections," it dismissed plaintiffs' constitutional tort claims under the qualified immunity doctrine because it was not clearly established that the Constitution applies in Guantanamo. *Id.* at *12-15.

The only remaining issue in this case concerns plaintiffs' claim under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. As to that claim the Court ordered additional briefing on: (1) whether RFRA applies to aliens detained at Guantanamo; and (2) if so, whether defendants nonetheless are entitled to qualified immunity on plaintiffs' RFRA claim.

See Rasul v. Rumsfeld, 2006 WL 266570 at *16 (noting Justice Scalia's assertion in dissent in *Rasul v. Bush*, 542 U.S. 466, 500 (2004), that "if the Court is right about that, not only [28 U.S.C.] § 2241 but presumably *all* United States law applies [at Guantanamo]").

As to the first question, this Court should hold that RFRA does not apply to aliens detained at Guantanamo. The opinion of the Court in *Rasul v. Bush* was narrowly limited to interpreting the federal habeas corpus statute, 28 U.S.C. § 2241. Although Justice Scalia's dissent cited consequences that he believed could flow from the Court's decision depending on how it was interpreted, the opinion of the Court did not mention RFRA and did not hold or even suggest that any federal statute other than § 2241 applied at Guantanamo. Moreover, even if *Rasul v. Bush* were to be extended so that the Constitution or other federal statutes were held to apply at Guantanamo, the particular history and focus of RFRA would preclude application of RFRA to aliens detained at Guantanamo.

As to the second question, this Court should hold that defendants are entitled to qualified immunity even if this Court were to hold that RFRA applies to aliens detained at Guantanamo. First, given that the Court in *Rasul v. Bush* focused on the special nature of § 2241 and did not even consider whether other federal laws apply at Guantanamo, it cannot logically be argued that the Court's decision clearly establishes that RFRA applies there. Second, even if (contrary to fact) *Rasul v. Bush* clearly established that RFRA applies to aliens detained at Guantanamo, that decision cannot defeat qualified immunity here because it was issued *after* the conduct at issue. Lastly, even if (contrary to fact) it had been clearly established at the time of the conduct at issue that RFRA applied at Guantanamo, this Court's construction of RFRA in *Larsen v. United States Navy*, 346 F.Supp.2d 122, 138 (D.D.C. 2004), and the recent approval of that analysis in *Omar v.*

Casterline, ___ F.Supp.2d ___, 2006 WL 31832 (W.D. La.), demonstrate that it is not clearly established that RFRA applies to the type of alleged intentional religious discrimination at issue here.

I. RFRA DOES NOT APPLY TO ALIENS DETAINED AT GUANTANAMO

A. The opinion of the Court in *Rasul v. Bush* is expressly limited to the discrete and narrow question of "whether the habeas statute [28 U.S.C. § 2241] confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Rasul v. Bush*, 542 U.S. at 475.[1] The D.C. Circuit has recognized that the Court in *Rasul v. Bush* decided only the "'narrow' question" of jurisdiction under § 2241. *Hamdan v. Rumsfeld*, 415 F.3d 33, 39 (D.C. Cir.) (quoting *Rasul v. Bush*, 542 U.S. at 470), *cert. granted*, 126 S. Ct. 622 (2005). The opinion of the Court in *Rasul v. Bush* did not address, let alone decide, whether the Constitution or any other substantive law of the United States would apply to aliens detained at Guantanamo. *See Hamdan*, 415 F.3d at 37 (stating after *Rasul v. Bush* that "there is doubt that someone in Hamdan's position [*i.e.*, an alien detained at Guantanamo] is entitled to assert such a constitutional claim"); *Khalid v. Bush*, 355 F.Supp.2d 311, 321 (D.D.C.) (*Rasul v. Bush* "only answer[ed] the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their [constitutional] claims"), *appeal docketed sub nom. Boumediene v. Bush*, Nos. 05-5062 and consolidated case 05-5063 (D.C. Cir. Mar. 2,

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[1] Indeed, the Supreme Court's grant of the writ of certiorari was expressly "limited to the following Question: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *See Rasul v. Bush*, 540 U.S. 1003 (2003).

2005).[2]

In holding that § 2241 applied to detentions at Guantanamo, the Court based its reasoning on the substantive nature, content, and historical background of that statute and the unique status of Guantanamo Bay. The majority emphasized that federal habeas corpus presents special jurisdictional considerations because "'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.'" *Rasul v. Bush*, 542 U.S. at 478 (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973)). The Court also focused on the broad jurisdictional scope of the writ of habeas corpus at common law, stating:

> Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."

542 U.S. at 481-82 (citations and footnotes omitted). Thus, the Court did not conclude that Guantanamo is itself a federal territory.[3] Rather, the Court extended the reach of section 2241 to

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[2] *See also Rasul v. Bush*, 542 U.S. at 485 ("Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.").

[3] The Supreme Court has yet to recognize that RFRA applies even to areas expressly identified as federal territories under established law. *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2218 n.2 (2005) (the Supreme Court "has not had occasion to rule on the matter" of whether RFRA is

Guantanamo based on the location of the detainee's custodian within the United States and the unique historical reach of the writ of habeas corpus under common law to areas under the sovereign's plenary and exclusive control. It is apparent based on the Supreme Court's reasoning in *Rasul v. Bush* that the exercise of federal habeas court jurisdiction over a federal official acting as a custodian of others – whether within or without the country – is a unique analysis that has no logical relevance to RFRA.

Justice Scalia's dissent in *Rasul v. Bush* criticized the majority opinion on a variety of grounds. In particular, this Court cited Justice Scalia's statement that "not only § 2241 but presumably *all* United States law applies [at Guantanamo] – including, for example, the federal cause of action recognized in *Bivens*." *See* 2006 WL 266570 at *16 (quoting *Rasul v. Bush*, 542 U.S. at 500 (Scalia, J., dissenting)). The sentence excerpted by this Court, however, was written in the conditional; Justice Scalia asserted that the quoted "presumed" consequence would follow "*if* the Court is right about that." *Rasul v. Bush*, 542 U.S. at 500 (emphasis added). The "that" to which Justice Scalia was referring was the majority's assertion, as characterized by Justice Scalia, that the doctrine against extraterritorial application of federal statutes "has no application to Guantanamo Bay." *See id.* But far from interpreting the majority's decision as turning solely on the status of Guantanamo, Justice Scalia criticized the majority's interpretation of § 2241 as turning on the presence of the custodian in the United States, which, in Justice Scalia's view, made the majority's discussion of the status of Guantanamo "entirely irrelevant." *See id.*; *see also id.* at 488 (Scalia, J., dissenting) ("The Court today holds that the habeas statute, 28 U.S.C. § 2241, extends to aliens detained by the United States military overseas, outside the sovereign

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operative as to "federal territories and possessions.").

borders of the United States and beyond the territorial jurisdictions of all its courts."). And far from asserting that the majority had held that all U.S. law applies at Guantanamo, Justice Scalia merely identified that result as an implication of what he perceived as dictum in the majority's "irrelevant discussion." *Id.* In short, neither the majority opinion nor the dissent in *Rasul v. Bush* mentioned RFRA or purported to hold that any federal law other than § 2241 applied at Guantanamo, and that decision thus provides no basis for this Court to hold that RFRA governed plaintiffs' detention at Guantanamo.[4]

B. For the reasons just explained, *Rasul v. Bush* is limited to the unique statute at issue in that case, § 2241, and does not suggest that any other federal statute, or federal law as a general matter, applies at Guantanamo. Even if this Court disagrees and believes that, under *Rasul v. Bush*, federal laws other than § 2241 could apply at Guantanamo, the Court should hold in light of the history and purpose of RFRA that RFRA does not apply to aliens detained at Guantanamo.

This Court correctly concluded in its February 6 decision, 2006 WL 266570 at *16, that "the historical development of RFRA . . . belies any assertion that Congress intended RFRA to have extra-territorial application. The plaintiffs have not pointed to any case law persuading this court of Congress' intentions to apply the Act extra-territorially, and the court finds no such reason to do so now." It is clear from the limited and special rationale for enacting RFRA that it was intended only to have domestic application. Congress passed RFRA to respond to "the

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[4] Even if Justice Scalia had squarely asserted that it followed from the majority opinion that all U.S. law applies at Guantanamo, that would not make it so. It is the opinion of the Court that contains the Court's holding; where the Court carefully and expressly limits its decision to a narrow jurisdictional question, the Court cannot be deemed to have decided additional questions *sub silentio* simply because a dissenter predicts that the decision will have certain consequences. *Cf. Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

Supreme Court's decision in [*Employment Div., Dept. Of Human Resources v.*] *Smith*," 494 U.S. 872 (1989), which held that the First Amendment did not preclude application of Oregon drug laws to the ingestion of peyote in religious practices. *Meyer v. Fed. Bureau of Prisons*, 929 F.Supp. 10, 14 (D.D.C. 1996). By addressing *Smith*, Congress sought to "restore the compelling interest test previously applicable to free exercise cases" under the First Amendment, *id.* (citing S. Rep. No. 103-111 (1993)), and thereby protect one of "the most treasured birthrights of every American." *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (quoting S. Rep. No. 103-111 at 4) (emphasis added). Given that limited purpose, RFRA cannot logically be construed to cover the alleged conduct in this case.

Because RFRA was intended to restore and protect Americans' free exercise rights, it would not be in accord with Congress' intent to apply RFRA to aliens detained at Guantanamo, even if federal statutory law was generally held to apply there.

II. DEFENDANTS ARE AT LEAST ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFFS' RFRA CLAIM

Even if this Court were to hold that RFRA applies to aliens detained at Guantanamo, this Court should dismiss plaintiffs' RFRA claim under the doctrine of qualified immunity because it was not clearly established at the time of the conduct at issue here that RFRA applies to aliens detained at Guantanamo. Qualified immunity affords federal officials broad protection from the entirety of the litigation process when the law did not provide them with clear notice that their alleged actions violated the federal constitutional or statutory right asserted. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity "shield[s officials] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). The qualified immunity

doctrine casts such a wide net that it is said to protect all but the "plainly incompetent or [those who] knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To overcome defendants' immunity in this case, plaintiffs must show that they possessed clearly established rights under RFRA at the time of their detention at Guantanamo. *See Zweibon v. Mitchell*, 720 F.2d 162, 172-73 (D.C. Cir. 1983) (defining a clearly established right as an "indisputable" or "unquestioned" right); *see also Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004) (per curiam) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."). Plaintiffs cannot satisfy that burden.

A. First, given that the Supreme Court in *Rasul v. Bush* focused on the special nature of § 2241 and did not even consider whether RFRA or any other federal laws might apply at Guantanamo, it cannot logically be argued that the Supreme Court's decision clearly establishes that RFRA applies there. Even if this Court were to interpret *Rasul v. Bush* as suggesting that federal law in addition to § 2241 applies at Guantanamo, or as laying the foundation for such an extension of other federal laws, the only proposition that *Rasul v. Bush* clearly establishes is that § 2241 applies there. And as explained above, RFRA is easily distinguishable from § 2241 with respect to whether it should be held to apply at Guantanamo. Section 2241, the *Rasul v. Bush* Court emphasized, does not focus on the location of the detainee but rather the custodian, *see* 542 U.S. at 478-79, and the unique "historical reach of the writ of habeas corpus" heavily influenced the Court's decision, *id.* at 481. RFRA has no equivalent longstanding common-law basis, *see id.* at 473 ("Habeas corpus is . . . a writ antecedent to statute") (quotation omitted), and Congress enacted it in order to undo a Supreme Court decision that had nothing to do with any issues

relating to territoriality or extraterritoriality, *see supra* at 6-7. Accordingly, even if *Rasul v. Bush* could be thought to suggest that federal laws analogous to § 2241 apply to aliens at Guantanamo, that would say nothing about RFRA.

For qualified immunity purposes, the bottom line is that no decision of which the defendants are aware, either before or after *Rasul v. Bush*, holds that RFRA applies at Guantanamo or at any other location over which the United States is not sovereign. That proposition thus is far from clearly established even today.

B. Even if the proposition that RFRA applies at Guantanamo were clearly established today, defendants would be entitled to immunity because that proposition plainly was not clearly established at the relevant time. Plaintiffs allege that they were released from custody in May 2004. Compl., ¶¶ 5, 138. *Rasul v. Bush* was decided on June 28, 2004, *after* the alleged conduct at issue, so that decision cannot defeat the defendants' immunity. *See, e.g., DeBauche v. Trani*, 191 F.3d 499, 505-06 (4th Cir. 1999) (federal officials cannot be held liable based on developments in the law after their actions); *Bailey v. Board of County Comm'rs of Alachua County*, 956 F.2d 1112, 1123 (11th Cir. 1992) ("we must judge the contours of the law at the time the [ ] decision was being made, irrespective of subsequent developments in the law"); *cf. Wilson v. Layne*, 526 U.S. 603, 614-18 (1999).

This Court recognized as much when it dismissed plaintiffs' constitutional claims, holding that "plaintiffs have provided no case law, and the court finds none, supporting a conclusion that military officials would have been aware, *in light of the state of the law at the time*, that detainees should be afforded the rights they now claim." 2006 WL 266570 at *15 (emphasis added). Just as disagreements in the case law persisting in 2006 concerning whether

aliens detained at Guantanamo have certain rights under the Constitution underscores, rather than overcomes, defendants' qualified immunity on plaintiffs' *Bivens* claims, so too any uncertainty in the wake of *Rasul v. Bush* concerning the applicability of RFRA at Guantanamo does not defeat immunity. At the time of the alleged conduct at issue in this case, the controlling law in this circuit on the applicability of federal law at Guantanamo was *Al Odah v. United States*, 321 F.3d at 1142-45, which held that aliens detained at Guantanamo could not invoke the jurisdiction of the federal courts to test the legality of restraints on their liberty. The Supreme Court's subsequent reversal of that decision, after plaintiffs were released, is a subsequent development in the law that is irrelevant to the immunity inquiry.

C. Finally, even if it had been clearly established at the time of the conduct at issue here that RFRA applied at Guantanamo, it is not clear that plaintiffs' allegations come within the scope of RFRA. Plaintiffs allege intentional religious discrimination, but this Court held in *Larsen v. United States Navy*, 346 F.Supp.2d 122, 138 (D.D.C. 2004), that RFRA applies only to facially neutral policies that are alleged to burden religious exercise and not to intentional religious discrimination. Recently, another court approved the essence of this Court's *Larsen* analysis, stating that RFRA "does not appear to have any effect on the scheme by which First Amendment free exercise claims are adjudicated outside the context of neutral laws of general applicability." *Omar v. Casterline*, ___ F. Supp.2d ____, 2006 WL 318632 (W.D. La. Feb. 8, 2006) (page numbering not yet available); *see also Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (since the regulations at issue "are not neutral and generally applicable, we need not

address" RFRA).[5] The issue here is not whether the *Omar* and *Larsen* decisions are correctly decided, but only whether RFRA coverage can fairly be said to be clearly established under the circumstances. In light of these decisions, it cannot.

Accordingly, *Rasul v. Bush* and questions of the applicability of RFRA at Guantanamo aside, it is not clearly established that RFRA applies to the type of alleged intentional religious discrimination at issue in this case. For that additional reason, this Court should hold that, at the very least, plaintiffs' RFRA claim fails to state a clearly established violation and defendants therefore are entitled to qualified immunity.

CONCLUSION

For all the reasons discussed above, defendants request immediate dismissal of the plaintiffs' RFRA claim.

Dated: March 23, 2006

Respectfully submitted,

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[5] Although this Court issued an order on April 29, 2005 directing the parties to provide supplemental briefing addressing *Larsen*, it did not discuss *Larsen* in its February 6, 2006 decision.

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