IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v. Case No. 04cv02022-PLF
ORAL ARGUMENT IS REQUESTED

Hon. GEORGE W. BUSH,

et al.,

Respondents.

PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION UNDER RELIGIOUS FREEDOM RESTORATION ACT

On November 1, 2005, petitioner moved this honorable Court for an order requiring release to him of a Bible and other books at the prison at Guantanamo Bay. Docket 72. On November 11, 2005, he filed his affidavits, which due to the cumbersome communications mandated by the protective order in this case had not been available sooner, showing that he had been denied a Bible despite repeated requests, that he had not been allowed to attend a religious service since his seizure in July, 2003, and that he

had not had access to a chaplain of any tradition, much less one of his own faith, Islam. On November 15, 2005, respondents filed their opposition. Dockets 77, 78, and 79.

On December 7, 2005, this Court reaffirmed its stay of the case as previously entered March 23, 2005, and declined to refer any of the pending motions to Magistrate Judge Kay.

On May 8, 2006, Judge Urbina of this Court ruled in *Rasul v. Rumsfeld,* No. 04cv1864-RMU, that the Religious Freedom Restoration Act applies to the prisoners at Guantanamo.

On June 29, 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld*, No. 05-184, that the United States was bound to apply, as a minimum, the provisions of Common Article 3 of the Geneva Conventions of August 12, 1949, to all prisoners.

On July 7, 2006, the D.C Circuit, in *Chaplaincy of Full Gospel Churches v. England*, Nos. 05-5143 and -5144, ruled that any violation of the Establishment Clause is an irreparable harm satisfying the first test for a preliminary injunction *pendente lite.*

In light of these new rulings, petitioner renews his motion for release of a Bible and further moves for the appointment of an Islamic chaplain for the prisoners at Guantanamo, or, as a minimum alternative, that Islamic chaplains be allowed to visit the prison at Guantanamo. Petitioner does not at this time make specific demands about the holding of services or communal prayers. He anticipates that if an Islamic chaplain is allowed access to the prison, as was allowed in the past, satisfactory arrangements for such services will be made.

Respondents will oppose this motion.

Respectfully submitted, September 22, 2006

_____/s/_____

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ATTACHMENTS:

Exhibit A: Affidavits of some available imams:
Mutahhir Sabree, September 16, 2006.
Shakeel Syed, August 26, 2006.
Ismail el-Saeed, September 5, 2006.
Exhibit B: Affidavit of counsel, exhaustion of remedies.
Exhibit C: Statement of support, Council on American-Islamic Relations, September 13, 2006.

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POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION UNDER RELIGIOUS FREEDOM RESTORATION ACT

This motion addresses but a small corner of Saifullah Paracha's global challenge to the treatment he has suffered for the last three years. Paracha has alleged he is held at Guantanamo Naval Base without basis in fact and in contravention of international law and the laws of the United States. 1/ He further alleges that even if he were an enemy

1 / "Petitioners' allegations -- that, although they have engaged neither in combat nor in

combatant, which he denies, he should be treated as such and not like a convicted criminal undergoing punishment for breaking prison rules. Because this case is stayed 2/, and because of the government's intransigence in complying with the Supreme Court's rulings 3/ on the subject, the conditions of Paracha's confinement *pendente lite* take on great importance, but this motion addresses only one discrete aspect of his conditions of confinement: the access of Paracha (and the other prisoners by implication) to the consolations of religion.

This is a motion for a preliminary injunction, without prejudice to the numerous other motions, demands, etc., pending in this case. The familiar criteria for a preliminary injunction are all satisfied: 1) The movant will suffer irreparable harm if he must await final judgment; 2) There is no countervailing harm to the opposing party; 3) The movant can show a strong likelihood that he will prevail on the merits; and 4) The public interest requires immediate relief. *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 104 U.S. App. D.C. 106 (1958).

Petitioner's argument for a preliminary injunction rests largely on the Religious Freedom Restoration Act of 1993, 42 USC 2000bb (the RFRA), and is greatly strengthened by the Supreme Court's ruling of February 21, 2006, affirming the grant of a

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acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing -- unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U. S. C. §2241(c)(3)." *Rasul v. Bush*, 542 U.S.466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004), footnote 15.

2 / Order of March 23, 2006, docket 49.

3 / There was no ambiguity in the Supreme Court's remand in Rasul: "we reverse the judgment of the Court of Appeals and remand these cases for the District Court to consider in the first instance the merits of petitioners' claims. It is so ordered." *Rasul, supra,* concluding sentence, 542 U.S. 466, 485, 159 L. Ed.2d 548, 563.

preliminary injunction under that statute in *Gonzales v. O Centro Espirita*, 546 U.S. ____, 126 S. Ct. 1211, 163 L. Ed. 2d 1017. This was a suit by a small religion of Brazilian-Americans seeking to force the DEA to let them import an hallucinogenic brew for sacramental purposes. This request was far more disruptive than anything ever asked for by the Guantanamo prisoners, but the new Chief Justice, writing for the whole Court, rejected the government's arguments and sustained the preliminary injunction.

The RFRA, the Court said, shifts the burden of persuasion once the plaintiff has shown that a government program substantially burdens the practice of his religion. 42 USC 2000bb-1(a) and (b), 163 L. Ed.2d 1017, 1030. Once the plaintiff has made that showing, the government may defeat an injunction only by "demonstrating" that the program being defended is necessary for a "compelling governmental interest", and is "the least restrictive means" to that end. 42 USC 2000bb-1(b). The statute says that "demonstrate" means to meet both "the burdens of going forward with the evidence and of persuasion". 42 USC 2000bb-2(3). The burdens spelled out in the statute apply not only at the trial, but also at the preliminary injunction stage. *Gonzales v. O Centro Espirita*, 163 L. Ed.2d 1017, 1030, slip opinion 7-8. The Court held that these provisions modify the "well established principle" that the party seeking a preliminary injunction bears the burden of persuasion on every point. *Id.*, 1030, slip opinion 6-7. Once the plaintiff has shown a "substantial burden on the practice of religion", a preliminary injunction must issue unless the government comes forth with a preponderance of evidence in defense of its measures. *Id.*, 1030-31, slip opinion 8.

Petitioner Paracha has shown beyond dispute that his incarceration in almost solitary confinement, without a Bible, with no chaplain, and without the weekly Islamic

Jumu'ah is a substantial burden on the practice of his religion. The government has no interest, compelling or otherwise, in sustaining this deprivation, so a preliminary injunction must issue without delay.

I. PETITIONER IS SUFFERING CONTINUING AND IRREPARABLE HARM.

Confining Paracha without access to the practice of his religion also satisfies the first criterion for a preliminary injunction, even outside the area protected by the RFRA, that the harm the movant is suffering be irreparable.

Chaplaincy of Full Gospel Churches v. England, D.C. Circuit, Nos. 05-5143 and -5144, July 7, 2006, was an appeal from the District Court's denial of a preliminary injunction where the plaintiffs, a group of "non-liturgical Protestant" military chaplains, had discovered that mandatory retirement ages had been waived for Catholic chaplains and for no others. The District Court had denied the injunction because any tangible harm to the plaintiffs, such as diminished salaries, would not be irreparable. The D.C. Circuit, per Brown, C.J., agreed the tangible harms were not irreparable, but went on to consider the intangible harms.

This case interpreted the dicta in *Elrod v. Burns,* 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed.2d 547 (1976), "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," 427 U.S. 347, 373, and expressly applied them to say that any violation of the Establishment Clause is an irreparable harm. The D.C. Circuit noted that *Elrod* had been a free speech case, and much case law had followed limiting the presumption of irreparable harm to situations where the movant could show that some specific free speech was actually suffering a chilling effect. The Court ruled that the Establishment Clause is different. The chilling effect of a

government endorsement or favoritism of a particular religion is automatic and inevitable, so any impermissible government endorsement or favoritism is an irreparable harm. *Chaplaincy of Full Gospel Churches v. England,* section II.B, slip opinion 13-23.

The Free Exercise clause is covered by the same principle, except the argument is much stronger. While a reasonable person might shrug off a government endorsement of a rival religion because it was under challenge, or be willing to await a remedy from litigation, an immediate or ongoing limitation on the exercise of one's own religion is much more serious, and irreparably so.

Thus the first of the preliminary injunction criteria is no longer in issue. Here, in any event, there is no question that petitioner would be even now reading the Bible, saying the five daily prayers in a group, and attending a weekly Jumu'ah led by a chaplain of his tradition, if he were allowed to do so, and the obstacles respondents are placing in his way work continuing and irreparable harm. *Sample v. Lappin,* 424 F. Supp.2d 187, 192 (D.C., March 31, 2006) says, "The exercise in question need not be mandatory" in the petitioner's religion; even optional features of the petitioner's tradition are protected under the RFRA, citing *Levitan v. Ashcroft,* 281 F.3d 1313, 350 U.S. App. D.C. 181 (D.C. Cir., 2002), which rejected the idea that Catholic prisoners could be denied sacramental wine because it is not for the laity an essential part of the communion rite.

II. GRANTING RELEIF WOULD IMPOSE NO SUBSTANTIAL BURDEN TO RESPONDENTS.

Up till about mid-2003 there was a full-time Muslim chaplain at the Guantanamo prison. On information and belief there are about a dozen Muslim chaplains in the armed services. The cost of assigning a member of the chaplain corps for the more than 400

Muslims remaining at Guantanamo cannot have been more than a miniscule item in the substantial expenses of building and running the prison there.

There can be no legitimate penological interest in a blanket deprivation of their religion from prisoners. In most cases involving religious freedom of prisoners, disruption is the only issue. *Cf., O'Lone*, discussed below. Petitioner here, however, asks only for flexible remedies. Once one or more imams are allowed access to Guantanamo, services can be arranged so as to minimize disruption, expense, or any impact on the running of the prison.

III. THE MOVANT HAS A CLEAR LIKELIHOOD OF EVENTUAL SUCCES.

a. The Religious Freedom Restoration Act guarantees petitioner's right to a chaplain.

In *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed.2d 1020 (May 31, 2005), the Supreme Court upheld the Religious Land Use and Institutionalized Persons Act of 2000, 42 USC 2000cc (the RLUIPA), and reversed a holding by the Sixth Circuit that the Act transgressed the Establishment Clause, *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir., 2003). Justice Ginsburg, wrote for a unanimous Court, and reaffirmed more than two centuries of law and practice maintaining that it is not an impermissible establishment of religion when governments pay for chaplains for soldiers, prisoners, and others required to be isolated or remote from the general population. *Cutter*, 125 S. Ct., 2121-2122, and footnote 10. The Court specifically cited *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir., 1985), upholding the Army program of paid and commissioned chaplains. *Cutter*, 125 S. Ct., 2122.

The complaint in *Cutter* was from followers of minority religions who claimed that the Ohio prisons were " . . . denying them the same opportunities for group worship that are granted to adherents of mainstream religions, . . . and failing to provide a chaplain trained in their faith." 125 S. Ct. 2113, 2117. The Court agreed with the plaintiffs that the free exercise of religion can include " . . . physical acts [such as] assembling with others for a worship service . . . ", 125 S. Ct., 2113, 2121, quoting *Employment Division v. Smith,* 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). Thus the remand for further proceedings in *Cutter* is closely analogous to the relief petitioner asks here.

Cutter was under the RLUIPA, which uses the spending power and the commerce clause and applies only to state and local governments. 42 USC 2000cc-5(4)(A). The Guantanamo prisoners are covered by the similar language and identical purposes of the Religious Freedom Restoration Act of 1993, 42 USC 2000bb, which applies to all activities of the Federal government. 42 USC 2000bb-2(1). The D.C. Circuit has explained:

> Congress enacted RFRA in 1993 in response to the Supreme Court's decision in *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The *Smith* decision had held that ''neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.'' *City of Boerne v. Flores*, 521 U.S. 507, 514, 117 S. Ct. 2157, 2161, 138 L. Ed. 2d 624 (1997). In passing RFRA, Congress expressed its purpose as being "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed.2d 15 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened.'' 42 U.S.C. § 2000bb.
>
> Although the *City of Boerne* case held the RFRA unconstitutional as applied to state government action, we have held that without doubt

> ‘‘the portion [of RFRA] applicable to the federal government . . . survived the Supreme Court’s decision striking down the statute as applied to the States.’’ *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

Holy Land Foundation v. Ashcroft, 333 F.3d 156, 166-67, 357 U.S. App. D.C. 35, 45-46 (2003).

The Supreme Court in *Cutter* did nothing to disturb this doctrine:

> RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. See *O'Bryan v. Bureau of Prisons*, 349 F. 3d 399, 400-401 (C.A.7 2003); *Guam v. Guerrero*, 290 F. 3d 1210, 1220-1222 (C.A.9 2002); *Kikumura v. Hurley*, 242 F. 3d 950, 958-960 (C.A.10 2001); *In re Young*, 141 F. 3d 854, 858-863 (C.A.8 1998). This Court, however, has not had occasion to rule on the matter.

Cutter v. Wilkinson, 125 S. Ct. 2113, 2118, footnote 2.

To the same effect, see *Sample v. Lappin*, 424 F. Supp.2d 187, 192 (D.C., March 31, 2006), footnote 3.

RFRA constrains all Federal government activities, 42 USC 2000bb-1(a), -2(1), wherever located, and expressly provides:

> 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.

42 USC 2000bb-1(c).

Judge Urbina has recently applied the RFRA to the prison at Guantanamo in his well-reasoned opinion of May 8, 2006, in *Rasul v. Rumsfeld*, 04cv1864-RMU. Between that and the cases discussed above, *Gonzales v. O Centro Espirita*, 546 U.S. ____, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (February 21, 2006) and *Chaplaincy of Full Gospel Churches*

v. England, D.C. Circuit, Nos. 05-5143 and -5144, July 7, 2006, petitioner's likelihood of success comes close to certainty.

a. The earlier Constitutional cases and long-standing custom, tradition, and penological practice all support petitioner's right to a chaplain.

Because of the firm and ineluctable statutory ground for the claim asserted here, petitioner need not rely on the cases asserting rights under the Free Exercise clause of the Constitution, such as *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed.2d 282 (1987). Nevertheless, these cases support his claim. The Muslim prisoners in *O'Lone*, for instance, were allowed to congregate for prayer almost any time except during working hours, "and the state-provided imam has free access to the prison." 482 U.S. 342, 352. The weekly service, the Jumu'ah, was regularly held. The only dispute was how far the prison had to go in adjusting work schedules and cumbersome security routines so all the Muslim prisoners could get to it. In case after case, regardless of the practice or privilege being disputed, we find access to a chaplain and religious services recited as one of the benefits already allowed. E.g., *Weir v. Nix,* 114 F. 3d 817 (8th Cir., 1997), where the prisoner was allowed two hours of week of worship in his own style and once a month was visited by a chaplain of his own persuasion. Chaplains are a well-established feature of prison administration. 28 CFR 548.12 provides for contract chaplains in the Federal prisons, and 548.19 allows for visits from outside chaplains.

IV. THE PUBLIC INTEREST SUPPORTS THE APPOINTMENT OF AN ISLAMIC CHAPLAIN FOR GUANTANAMO AND OTHER MEASURES TO FACILITATE THE PRACTICE OF RELIGION AMONG THE PRISONERS.

Appointment of a chaplain will discourage further suicides, encourage patience with the delays of litigation, and improve the good order of the prison. It is an

embarrassment to the United States' reputation as a pluralistic nation that these prisoners no longer have a chaplain of their faith. The public interest requires a preliminary injunction requiring that a chaplain be appointed or that outside chaplains be allowed to visit.

Respectfully submitted, September 22, 2006

_____/s/_____

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CERTIFICATE OF CONFERRING

I hereby certify that on September 21, 2006, I conferred with Andrew Warden, Esq., attorney for respondents, in an attempt to narrow the issues raised by the within motion. Respondents will oppose this motion.

_____/s/_____ September 21, 2006

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A PROPOSED ORDER FOLLOWS:

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Respondents.

(PROPOSED) ORDER

On consideration of petitioner's motion, and the opposition thereto, and the entire record,

IT IS HEREBY ORDERED:

That within thirty days of the date of this order, respondents will have stationed at Guantanamo Bay, Cuba, a full-time chaplain credentialed in the faith of the majority of the prisoners held there, and will give that chaplain reasonable access to the prison and to the prisoners, unless with ten days of the date of this order respondents have indicated their unwillingness or inability to comply with that aspect of this order, in which case respondents will allow regular and frequent visits to the base, and reasonable access to

the prison and to the prisoners, by outside civilian clergy of the faith of the majority of the prisoners.

FURTHER ORDERED:

That petitioner Saifullah Paracha be allowed to have in his cell a copy of the Bible in English.

FURTHER ORDERED:

That petitioner Saifullah Paracha be allowed to have all other published books sent to him by his relatives or by counsel, unless respondents report to counsel and to this Court specific reasons for objecting to a given publication within ten days of its arrival at the base.

IT IS SO ORDERED.

_____ _____

Date United States District Judge

Notify counsel:

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