

ORAL ARGUMENT SCHEDULED FOR DECEMBER 2, 2002

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 02-5284, 02-5288

MAMDOUH HABIB, *et al.*,
Petitioners-Appellants,

v.

GEORGE WALKER BUSH, *et al.*,
Defendants-Appellees.

SHAFIQ RASUL, *et al.*,
Petitioners-Appellants,

v.

GEORGE WALKER BUSH, *et al.*,
Respondents-Appellees.

**On Appeal from the United States District Court
for the District of Columbia**

**BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED
EDUCATIONAL FOUNDATION, AND THE JEWISH INSTITUTE FOR
NATIONAL SECURITY AFFAIRS AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES, URGING AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. PARTIES AND *AMICI*

All parties, intervenors, and *amici* appearing before the district court and/or in this Court are listed in the Brief for Appellees, except for the following *amici curiae* supporting Appellees: Washington Legal Foundation, Allied Educational Foundation, and the Jewish Institute for National Security Affairs; and the following *amici curiae* supporting Appellants: National Association of Criminal Defense Lawyers, International Centre for the Legal Protection of Human Rights (motion for leave to file pending, in No. 02-5251), Bar Human Rights Committee of England & Wales, Center for Economic and Social Rights, Center for Justice and Accountability, Human Rights Watch, International Human Rights Law Group, William J. Aceves, Arturo Carillo, Joan Fitzpatrick, Garth Meintjes, Jordan J. Paust, John Quigley, Naomi Roht-Arriaza, and Beth van Schaack.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the brief for Appellees.

C. RELATED CASES

By order of the Court dated September 13, 2002, these appeals have been consolidated with the related case of *Al Odah v. United States*, No. 02-5251. The consolidated cases have not previously been before this Court. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), appeal pending (9th Cir. No. 02-55367), raises similar issues; it was filed by another group of plaintiffs who challenge the detention of all detainees at Guantanamo Bay, including the detainees at issue here.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and the Jewish Institute for National Security Affairs are non-profit corporations; they have no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

Richard A. Samp

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GLOSSARY

Appellants Br.	Brief for Appellants
APA	Administrative Procedure Act
ATS	Alien Tort Statute
FTCA	Federal Tort Claims Act
ICCPR	International Covenant of Civil and Political Rights
Slip Op.	July 30, 2002 District Court Opinion
TVPA	Torture Victim Protection Act
U.S. Br.	Brief for Appellees

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the accompanying Notice of Intent to File Brief.

Amici are concerned that, if the federal courts attempt to exert jurisdiction over the types of claims raised in these cases, the Executive Branch will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. *Amici* do not mean to denigrate the important liberty interests being asserted by Appellants. Nonetheless, *amici* do not believe that the federal court system is the proper forum for reviewing those interests.

ISSUE PRESENTED FOR REVIEW

Whether United States courts have jurisdiction to consider challenges to the legality of the detention of aliens captured abroad in connection with the ongoing hostilities in Afghanistan and held outside the sovereign territory of the United States at the Naval Base at Guantanamo Bay, Cuba.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement of the Case contained in the Brief for Appellees.

In brief, this is an appeal from the district court's denial of petitions for

writs of habeas corpus filed by four men (two Australian citizens and two British citizens) being detained by Appellees (hereinafter "the United States") at the Naval Base at Guantanamo Bay, Cuba, and also by various of their relatives.¹ The district court held that it lacked subject matter jurisdiction over the petitions.

The court ruled initially that habeas corpus is the sole means by which an individual may challenge his detention by the United States and thus that the other jurisdictional bases cited by Appellants (including the ATS and the APA) added nothing to their claims. Slip Op. 11-12. The court added that, in any event, Appellants could not proceed under the ATS or the APA in the absence of a showing that the United States had waived its sovereign immunity from such suits. *Id.* at 15-16 n.11.

The court then concluded that jurisdiction over Appellants' habeas corpus claims was precluded by *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Court has consolidated the appeals with *Al Odah v. United States*, No. 02-5251.

SUMMARY OF ARGUMENT

The Supreme Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950),

¹ The consolidated appeal, *Al Odah v. United States*, No. 02-5251, was filed by 12 citizens of Kuwait and their relatives; they appeal from the identical district court order, which similarly dismissed their challenges to their detention at Guantanamo Bay.

that the federal courts are closed to the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. *Eisentrager* dictates that the district court's dismissal of this case on jurisdictional grounds be affirmed. There is no factual basis for asserting that the United States exercises sovereignty over Guantanamo Bay, Cuba (where Appellants are being held), and no amount of physical control over that site by the United States is sufficient to render *Eisentrager* inapplicable. Nor is it relevant that Appellants deny that they are enemy combatants; *Eisentrager* denies access to the federal courts to *any* overseas aliens seeking release from detention, not simply those who admit to taking up arms against this country. Nor has *Eisentrager* been rendered obsolete by Senate ratification of various human rights treaties; none of those treaties grant rights enforceable by individuals in the federal courts.

Because habeas corpus is the sole means by which individuals may challenge the fact of their confinement, Appellants' resort to other jurisdictional statutes does not provide them with a way around *Eisentrager*. In any event, Appellants' reliance on the Alien Tort Statute (ATS), 28 U.S.C. § 1350, is wholly misplaced. The ATS grants jurisdiction over the aliens' tort claims

alleging violation of "the law of nations," but that term was defined quite narrowly at the time of the ATS's adoption in 1789 and does not encompass Appellants' claims. Finally, review is precluded under the APA because the United States has not waived sovereign immunity from claims of this type.

ARGUMENT

I. APPELLANTS' CHALLENGE TO THEIR DETENTION IS PRECLUDED BY *JOHNSON v. EISENTRAGER*, WHICH HELD THAT FEDERAL COURTS LACK JURISDICTION OVER HABEAS CLAIMS FILED BY ALIENS OUTSIDE THE COUNTRY

More than 50 years ago, the Supreme Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the federal courts are closed to the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. In the ensuing years, the Supreme Court has on numerous occasions cited *Eisentrager* with approval, and has given no indication that its continued vitality is in doubt.

At no relevant times have Appellants had any meaningful connection with the United States. They were taken into custody in Afghanistan/Pakistan and later transferred to Cuba. None of the Appellants makes any claim to American citizenship, to resident alien status, or to any other connection with this country.

Accordingly, *Eisentrager* dictates a finding that the federal courts lack jurisdiction over Appellants' challenge to their continued detention. Appellants numerous efforts to distinguish *Eisentrager* are unavailing.

A. *Eisentrager* Applies without Regard to the Extent of the Physical Control the United States Exercises Over Guantanamo Bay

Appellants concede that the Naval Base at Guantanamo Bay is not territory over which the United States exercises sovereignty; they recognize that the area is part of Cuba. They argue nonetheless that *Eisentrager* does not preclude the exercise of federal court jurisdiction in this case because Guantanamo Bay is under "effective control" of the United States. Appellants Br. 12.

Appellants' argument is without merit. American control of Guantanamo Bay does not serve to distinguish *Eisentrager*; were it true that federal courts have jurisdiction over habeas claims filed by any alien held in territory under "effective [American] control," then the federal courts would be available to *all* aliens -- because by definition any alien being detained in United States custody is being held at a location that is under the effective control of the United States. The petitioners in *Eisentrager* were being held in a military prison in post-World War II Germany that was under the control of the United States, but that fact did not prevent the Supreme Court from ruling that the federal courts lacked jurisdiction

over their claims on grounds that the petitioners were outside territories over which the United States exercised sovereignty.

Eisentrager repeatedly expressed the limits on federal court jurisdiction not in terms of "control," but in terms of whether aliens seeking access to the courts are within the territorial jurisdiction of the United States. For example, in describing the historical limits of federal court jurisdiction, the Court explained:

[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; * * *." (Italics supplied.) 118 U.S. 356 [(1886)].

Eisentrager, 339 U.S. at 771.

Similarly, in explaining its refusal to open the federal courts to the petitioners, the Court stated:

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in this country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scene of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of the United States.

Id. at 777-78.

In later decisions, the Supreme Court has stood by its refusal to open the federal courts to aliens who allege that the federal government has violated their rights but who are outside the country. For example, in declining to exercise jurisdiction over the claims of an alien who asserted that he was being improperly excluded from the country (and who was being detained at Ellis Island because he could find no other country willing to admit him), the Court stated:

[A]n alien on the threshold of initial entry stands on a different footing [from an alien already present within the United States]: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. [537], 544 [(1950)]. . . . "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government." [*Id.* at] 543. In a case such as this, courts cannot retry the determination of the Attorney General.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953).

The Supreme Court on several occasions in recent years has cited *Eisentrager* with approval. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), the Court held that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico. In support of that holding, the Court cited *Eisentrager* for the proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the

United States." *Id.* at 269. Just last year, the Court cited both *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

In sum, Appellants' lengthy arguments regarding the extent of American control over Guantanamo Bay amount to nothing. In the absence of evidence that Guantanamo Bay is now United States territory over which its sovereignty is recognized, *Eisentrager* cannot be distinguished based on the location of Appellants' detention.

B. *Eisentrager* Applies Without Regard to Whether Appellants Are Properly Classified as Enemy Combatants

The United States is detaining Appellants because it has determined them to be enemy combatants captured in the Afghanistan theater. *Eisentrager* unquestionably precludes judicial second-guessing of such military decisions; it explained:

It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict

between judicial and military opinion highly comforting to the enemies of the United States.

Eisentrager, 339 U.S. at 779.

Appellants nonetheless insist that *Eisentrager* is distinguishable because while they deny that they are enemy combatants, the petitioners in *Eisentrager* had been determined by a military tribunal to be German combatants who had been convicted of violating the laws of war. They insist that *Eisentrager* applies only to those aliens whose status as "enemy aliens" or "enemy combatants" is not in question. Appellants Br. 14.

Appellants are mistaken; *Eisentrager* is not so limited. If it were, *any* overseas alien challenging his detention by military authorities could evade *Eisentrager* entirely simply by denying that he is an enemy combatant. Such a rule would eviscerate one of the principal purposes of *Eisentrager*: to prevent aliens from using the federal courts to "fetter[]" our field commanders and from fomenting "conflict between judicial and military opinion." *Id.* Indeed, even the *Eisentrager* petitioners would be granted access to the federal courts under Appellants' interpretation of the decision, because they challenged the propriety of the military tribunals which had tried them and thus denied the validity of their

convictions.²

This Court has explicitly rejected efforts to confine *Eisentrager* to cases in which the petitioners' status as enemy combatants is unchallenged. *See Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd on other grounds sub nom., Christopher v. Harbury*, 122 S. Ct. 2179 (2002). In *Harbury*, the plaintiff sought to sue high government officials for violations of her alien husband's Fifth Amendment rights, alleging that they were complicit in his torture and death while he was in Guatemala. The Court relied on *Eisentrager* and *Verdugo-Urquidez* in holding that the plaintiff could not raise her Fifth Amendment claims in federal court. *Id.* at 604. The Court rejected the plaintiff's argument that *Verdugo-Urquidez* was distinguishable because its discussion of the Fifth

² *Eisentrager* took as a given that the petitioners were "enemy aliens." *Eisentrager*, 339 U.S. at 777. But that statement needs to be understood in light of the Court's definition of "enemy aliens" or "alien enemies." The Court explained that "an alien enemy is the subject of a foreign state at war with the United States." *Id.* at 769 n.2. The petitioners thus qualified as alien enemies simply by virtue of their German citizenship. The Court made clear that access to the federal courts did *not* hinge on a petitioner being able to demonstrate that he was not an alien enemy. To the contrary, the Court recognized that "resident enemy alien[s]" (*i.e.*, those living in the United States) generally *are* permitted to invoke the protections of the federal courts, while "nonresident enemy alien[s]" generally are not. *Id.* at 776. Thus, it was the *Eisentrager* petitioners' nonresidency -- not their status as enemy aliens -- that was fatal to their claims. Indeed, if physical presence in the United States were not the key determinant, then *Ex parte Quirin*, 317 U.S. 1 (1942), would have been decided differently. In *Quirin*, the Supreme Court exercised jurisdiction over the habeas corpus claims of German citizens being held captive in Washington, D.C., despite undisputed evidence that they not only were enemy aliens but also were enemy combatants.

Amendment was *dicta* (the case involved Fourth Amendment claims) and that *Eisentrager* was distinguishable because it involved the rights of enemy aliens in wartime. This Court explained:

Harbury also correctly observes that *Eisentrager* -- the case relied on by *Verdugo-Urquidez* [for its pronouncement that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," *Verdugo-Urquidez*, 494 U.S. at 269] -- concerned rights of enemy aliens during wartime. But the Supreme Court's extended and approving citation of *Eisentrager* suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited.

Harbury, 233 F.3d at 604. Appellants seek to dismiss this language from

Harbury as "*dicta*." Appellants Br. 33 n.10. Appellants are mistaken -- the

quoted language was unquestionably part of the Court's holding; the Court refused to hear the plaintiff's torture claims even though her husband was neither an enemy alien nor an enemy combatant. While recognizing that *Verdugo-Urquidez*'s discussion of the Fifth Amendment was "*dicta*," the Court nonetheless deemed the *dicta* "authoritative" and thus relied on it in dismissing the plaintiff's Fifth Amendment claim. *Id.* at 604. In sum, *Eisentrager* cannot be distinguished on the ground that the Appellants deny that they are enemy combatants.

C. Treaties Ratified by the United States Since *Eisentrager* Was Decided in 1950 Have Done Nothing to Undermine The Decision

Appellants also argue that *Eisentrager* has been overcome by subsequent events and no longer governs federal court jurisdiction. Appellants assert:

[*Eisentrager*] was decided long before modern international human rights treaties became part of the Supreme Law of the Land. Even if its *dicta* might have been construed in 1950 as broadly as the district court now proposes, the habeas corpus statute cannot today be construed to oust jurisdiction over aliens incarcerated abroad in territory under exclusive United States jurisdiction and effective control. Under the rule of construction first enunciated by Chief Justice Marshall, a United States statute "ought never to be construed to violate the law of nations, if any other possible construction remains. . ." *The Charming Betsy*, 6 U.S. (2 Cranch) 34, 67, 2 L.Ed. 208 (1804).

Appellants Br. 15.

Appellants are wrong on all counts. *Amici* note initially that the *Charming*

Betsy rule of statutory construction is inapplicable to questions of federal court jurisdiction.³ Regardless what the law of nations may have to say about Appellants' continued detention at Guantanamo Bay, it can have absolutely nothing to say about the scope of federal court jurisdiction, which is strictly limited by the U.S. Constitution and federal statute. Courts uniformly caution that statutes conferring jurisdiction on the federal courts are to be strictly construed. *See, e.g., Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986); *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1373 (Fed. Cir. 1994) ("Statutes purporting to confer federal subject matter jurisdiction must be narrowly construed, with ambiguities resolved against assumption of jurisdiction.").

Appellants note that the statute establishing habeas corpus jurisdiction, 28 U.S.C. § 2241, does not explicitly exclude jurisdiction over claims raised by overseas aliens. Citing the Supreme Court's rule that Congress will not be deemed to have repealed habeas jurisdiction unless it "articulate[s] specific and

³ *The Charming Betsy* was an admiralty case involving a ship seized by the American Navy and brought to Philadelphia, and thus there was no question that the federal courts possessed subject matter jurisdiction. *See* Const., Art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."). The issue before the Court involved construction of a federal statute that prohibited American ships from trading with France or its dependencies.

unambiguous statutory directives to effect a repeal," *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), Appellants argue that Congress should not be deemed to have repealed habeas jurisdiction over claims filed by overseas aliens who are not enemy combatants. Appellants Br. 23, 25-26. But this is not a case, like *St. Cyr*, in which the government contends that Congress has intended to repeal pre-existing jurisdiction. Rather, *Eisentrager* makes clear that the federal courts *have never possessed* subject matter jurisdiction over habeas claims filed by overseas aliens. Accordingly, *St. Cyr*'s presumption against repeals of jurisdiction by implication has no bearing on this case.

Nor have any of the human rights treaties ratified by the United States in the past decade had any effect on *Eisentrager*'s continued vitality. Appellants assert that "international law today differs dramatically from th[e] era" in which *Eisentrager* was decided, and that treaties such as the International Covenant on Civil and Political Rights (ICCPR) obligate the United States to open its courts to habeas claims from overseas aliens. Appellants Br. 41-46. Appellants note that the habeas corpus statute grants jurisdiction over claims by detainees that they are being detained in violation of "treaties of the United States." *Id.* 46. But as the United States pointed out in its brief, the Senate made clear in ratifying each of

the treaties in question that rights created under those treaties were not enforceable in federal court. *See* United States Br. 40-41 (discussing ICCPR).

The Senate has adopted virtually identical reservations, understandings, and declarations (hereinafter referred to as "RUDs") with respect to each of the major human rights treaties it has ratified in the past 15 years. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PENN L. REV. 399, 400-01, 413-422 (2000). These treaties include, in addition to the ICCPR, the Genocide Convention,⁴ the Torture Convention,⁵ and the International Convention on the Elimination of All Forms of Racial Discrimination.⁶ In light of the RUDs adopted in connection with Senate ratification of each of these treaties and Congress's subsequent failure to adopt implementing legislation, courts have refused to exercise jurisdiction over suits challenging the United States's alleged non-compliance with these four treaties. Christian G. Vergonis, *The Federalism Implications of International Human*

⁴ The Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277.

⁵ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature*, Dec. 10, 1984, 23 I.L.M. 1027.

⁶ The International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

Rights Law (The Federalist Society 2002) at 8.

This Court has made clear that federal courts lack jurisdiction to hear claims arising in connection with alleged treaty violations "absent a statute granting such jurisdiction." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1175 n.1 (D.C. Cir. 1994). Treaties "provide no basis for private lawsuits unless implemented by appropriate legislation or intended to be self-executing." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C. Cir. 2001).⁷ When Congress intends to allow private suits in federal court to enforce international law, it has had no difficulty expressing its intent. For example, in 1992 Congress adopted the Torture Victim Protection Act (TVPA), 106 Stat. 73, which creates a cause of action on behalf of anyone (including an alien or his personal representative) who has been the victim of torture or "extrajudicial killing" "under color of law of any foreign nation." TVPA § 2(a), 28 U.S.C. § 1350 *note*.⁸ The federal courts may hear such claims regardless where in the world the torture or killing occurred, provided only that the plaintiff

⁷ A treaty cannot be deemed self-executing when the ratification instrument includes RUDs stating that the treaty is *not* self-executing and barring private enforcement of the treaty in federal court.

⁸ Of course, the TVPA can have no application in this case regardless of the alleged conditions of Appellants' confinement, because the TVPA applies only to actions taken under color of *foreign* law.

has exhausted all "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA § 2(b). The absence of any similar statute authorizing federal court suits by private parties alleging that *the United States* is violating its treaty obligations is a strong indication that Congress has not authorized such suits. Accordingly, in the absence of any evidence that Congress intended to permit private enforcement in the federal court of the human rights treaties adopted over the last 15 years, those treaties do not undermine *Eisentrager* or otherwise strengthen Appellants' case.

II. THE DISTRICT COURT ACTED PROPERLY IN DISMISSING THE ALIEN TORT STATUTE CLAIM FOR LACK OF JURISDICTION

Appellants rely on the Alien Tort Statute (ATS), 28 U.S.C. § 1350, as an alternate basis for invoking subject matter jurisdiction in the federal courts. The ATS, adopted by Congress in 1789, provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The district court correctly determined that Appellants add nothing to their jurisdictional claims by invoking the ATS. Slip Op. 11. As the court noted, the sole means by which one detained by the government may challenge the fact of his detention is by filing a habeas corpus petition. *Chatman-Bey v. Thornburgh*,

864 F.2d 804, 807 (D.C. Cir. 1988) (*en banc*). Thus, regardless how many different statutes Appellants cite in support of their claims, those claims must ultimately be judged by rules applicable to habeas corpus proceedings. If (as demonstrated above in connection with this case) a litigant challenging the fact of his detention is denied access to the federal courts under rules applicable to habeas cases, then he may not enter the federal courts through the back door by attempting to invoke another statutory basis for jurisdiction.

Moreover, Appellants would gain nothing even if the Court were to accept their contention that they are entitled to challenge the fact of their detention through alternate means. Appellants have presented no reasons why *Eisentrager's* rationale should not apply just as strongly to ATS claims as it does to habeas corpus claims. *Eisentrager* was grounded on the principle (later adopted in *Verdugo-Urquidez*) that, in general, the federal courthouse doors are not open to overseas aliens who are unhappy with the overseas conduct of American government officials. *Eisentrager*, 339 U.S. at 783-85. That principle applies just as strongly to claims of those seeking to invoke jurisdiction under the ATS as it does to those seeking to invoke jurisdiction under 28 U.S.C. § 2241.

The district court also correctly determined that it lacked subject matter jurisdiction over claims arising under the ATS because the federal government has

not waived sovereign immunity for such claims. Slip op. 15 n.11. As more fully explained in Section III, *infra*, the APA does not constitute such a waiver.

A. The ATS's Grant of Jurisdiction Over Violation of the Law of Nations Does Not Encompass the Activities of Which Appellants Complain

There is an additional reason why Appellants cannot proceed under the ATS: Congress intended the ATS as a grant of jurisdiction in a quite limited number of cases, not as a broad-ranging license to enforce all forms of international law, as envisioned by Appellants.

The ATS provides federal court jurisdiction over tort claims filed by aliens alleging a violation of either: (1) "the law of nations"; or (2) "a treaty of the United States." The "treaty of the United States" language is of no benefit to Appellants; *amici* explained above why none of the human rights treaties relied upon by Appellants provide them with any rights enforceable in the federal courts. Accordingly, if Appellants are to invoke the ATS to obtain federal court jurisdiction not otherwise available, it must be based on an alleged violation of "the law of nations."

Appellants claim that the phrase "the law of nations," as used in the ATS, is synonymous with what is known today as "customary international law." Appellants Br. 48 n.35. Appellants thus contend that the ATS grants jurisdiction

over alleged violations of customary international law; and as the concept of customary international law keeps expanding, so too does the ATS's jurisdictional grant.

Appellants' interpretation of the ATS is not faithful to the intent of the Congress that drafted the statute in 1789. At that time, the phrase "law of nations" had a quite restricted meaning. As one commentator has explained:

Eighteenth-century courts applied the law of nations (as general common law) to matters where the conduct of private citizens *touched upon relations between nations*, such as where one nation's citizens injured or affronted the dignity of another nation or its officers or citizens. Blackstone provided examples of such matters, noting that "the principal offence against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68, 72. Another area in which the law of nations regulated the conduct of private individuals was the field of prize, whereby warring nations (and their citizens) captured enemy merchant vessels.

Vergonis, *supra*, at 15-16 (emphasis added). Two former judges of this Court have suggested a similarly restrictive reading of the ATS's use of the phrase "law of nations." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring) ("One might suppose that [the offenses listed by Blackstone] were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations."), *cert. denied*, 470 U.S. 1003 (1985); *id.* at 822 ("the statute probably was intended

to cover only a very limited set of tort actions, none of which is capable of adversely affecting foreign policy."); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J.) (the ATS "may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of nations -- the most prominent examples being piracy and assaults upon ambassadors."). Judge Bork rejected the notion that the ATS grants federal courts jurisdiction over the entire field of customary international law:

It will not do simply to assert that the statutory phrase, the "law of nations," whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers' general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.

Tel-Oren, 726 F.3d at 812 (Bork, J., concurring).

In sum, the claims alleged by Appellants are far afield from the types of claims Congress had in mind in 1789 when it granted federal court jurisdiction over violations of the "law of nations." The ATS cannot be used to support Appellants' efforts to invoke the jurisdiction of the federal courts.

B. The ATS Would Violate Article III Limitations on Federal Court Jurisdiction Were It Construed as Granting Jurisdiction Over All Claims Arising Under Customary International Law

Amici recognize that several other Circuits have given a far broader reading

to the ATS than the one espoused here. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). However, the scope of the ATS is still an open question in this Circuit. Indeed, although no majority opinion was issued in *Tel-Oren*, two of the three judges on that panel rejected *Filartiga's* broad reading of the ATS. *Tel-Oren*, 726 F.3d at 811-12 (Bork, J., concurring); *id.* at 826 n.5 (Robb, J., concurring).

More importantly, the ATS would be unconstitutional if interpreted in the broad manner espoused by Appellants and *Filartiga*. Article III of the Constitution does not grant federal courts jurisdiction over all issues of international law. While it does grant jurisdiction over specific aspects of that law,⁹ no plausible reading of Article III suggests that the framers intended to grant federal courts the power to decide a case solely because it involves a matter of customary international law. Accordingly, the ATS would be inconsistent with Article III if its use of the phrase "law of nations" were interpreted as granting jurisdiction to hear any case raising an issue of customary international law.

Filartiga attempted to avoid this Article III problem by decreeing that customary international law is really "part of the law of the land" and a "part of

⁹ *See, e.g.,* Const., Art. III, § 2, cl. 2 (extending the "judicial Power" to "all Cases affecting Ambassadors, other public Ministers, and Consuls").

our law." *Filartiga*, 630 F.2d at 887. That conclusion finessed the Article III problem, because if one assumes that international law is part of the common law of the United States, then ATS claims based on customary international law qualify as claims "arising under . . . the Laws of the United States" within the meaning Article III, § 2. But that assumption clearly is *not* correct. Federal common law, at least since *Erie Railroad*, has been a very limited concept and certainly does not include the entire field of customary international law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Numerous Supreme Court cases have so held. *See, e.g., N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875) (holding that "the law of nations" does not present "any Federal question"); *Oliver American Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924).¹⁰

At the very least, the constitutionality of the ATS would be open to question if "the law of nations" as used therein were defined as being synonymous with modern-day customary international law. In order to avoid that

¹⁰ *Filartiga* cited a pre-*Erie* case in support of its claim that federal common law includes the entire body of customary international law. *Filartiga*, 630 F.2d at 887 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). That pre-*Erie* pronouncement cannot reasonably be assumed to have survived *Erie*. Moreover, *The Paquete Habana* was an admiralty case, so the Court's exercise of Article III jurisdiction over the case was not dependent on a finding that the international law issues raised therein were a part of the federal common law.

constitutional dilemma, the Court should interpret "the law of nations" narrowly so as not to encompass claims such as Appellants'.

III. SECTION 701(b)(1)(G) OF THE APA PRECLUDES JUDICIAL REVIEW OF THE DETAINEES' CONFINEMENT

As a general rule, the Administrative Procedure Act (APA) waives sovereign immunity and allows courts to review final agency action. Assuming that the detention of the aliens in this case in Guantanamo Bay is final action, the APA nevertheless expressly excludes certain entities or authorities from the definition of "agency," and exempt from judicial review.

In particular, in addition to exempting from the definition of "agency" the "Congress," 5 U.S.C. § 701(b)(1)(A), and "the courts of the United States," 5 U.S.C. § 701(b)(1)(B), the APA specifically exempts "courts martial and military commissions," 5 U.S.C. § 701(b)(1)(F), and "military authority exercised in the field in time of war or in occupied territory," 5 U.S.C. § 701(b)(1)(G). *Amici* submit that the district court correctly concluded that the capture of Appellants in Afghanistan, and their subsequent detention in Guantanamo Bay, is the result of "military authority exercised in the field in time of war"; accordingly, such

authority is exempt from the definition of "agency" under the APA.¹¹

A. The Capture and Detention of the Aliens in Cuba Were Made "In Time of War"

There is no dispute that the capture and detention of Appellants were made "in the time of war." As the district court correctly concluded, "the Plaintiffs were captured in areas where the United States was (and is) engaged in military hostilities pursuant to the Joint Resolution of Congress." Slip op. at 15 n.11.

As the United States noted in its brief, the detention of Appellants, regardless of their geographical location, is "directly related to and intended to advance the ongoing war effort," including gathering "potentially critical intelligence that may both aid the military in the field and protect the Nation from future attacks." U.S. Br. at 52, citing *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). Indeed, as a result of intelligence recently obtained from the detainees in Guantanamo, it was reported today that the Nation has been put on heightened alert, warning of possible terrorist attacks on transportation and energy facilities within the United States. "Railroads May Be Targeted, FBI Says," *Washington*

¹¹ To the extent that the Appellants seek APA review of action by the President, that effort must fail because the President is not an "agency" for purposes of the APA. His actions as Commander-in-Chief in ordering the capture and detention of the Taliban and al Qaeda as enemy combatants are not subject to review under the APA. See *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

Post, Oct. 25, 2002, at A14.

The courts have broadly defined the term "time of war" as that term has been used in contexts similar to § 701(b)(1)(G). For example, in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), the court held that government could not be liable under the Federal Tort Claims Act (FTCA) for the accidental downing of civilian aircraft because the accident occurred during "time of war," and therefore, fell within an exception of the FTCA's waiver of sovereign immunity. In that case, an airliner was accidentally shot down during the "tanker war" between Iran and Iraq.

Formal declarations of war are not necessary to trigger the "in time of war" exception. Rather, "when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation * * * a 'time of war' exists." *Id.* at 1335. And as this Court recognized in *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), the President may not only engage in war approved by Congress (as is the case here), but also may "in a grave emergency * * * without Congressional approval, take the initiative to wage war. Otherwise the country would be paralyzed." *Id.* at 613.

Appellants' reliance on *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), is misplaced. In *Doe*, this Court was asked to review a challenge to a rule issued by the Food and Drug Administration (FDA) allowing the use of unapproved drugs on military personnel during the Gulf War. As this Court noted, it was not a challenge to "military commands made in combat zones or in preparation for, or in the aftermath of, battle." *Id.* at 1380. It was only under those circumstances that this Court found § 701(b)(1)(G) inapplicable. Here, by sharp contrast, Appellants directly challenge "military commands made in combat zones . . . or in the aftermath of battle," namely, the military command to detain the aliens on a military facility at Guantanamo Bay, and the related series of commands that they be given certain treatment while in military custody.

Accordingly, *amici* submit that the current state of hostilities in Afghanistan and other places around the world easily satisfy the "time of war" prong of the § 701(b)(1)(G) exemption.

B. The Detention of the Aliens in Cuba is Military Authority Exercised "In the Field"

In addition to the exercise of military authority "in time of war," the district court correctly concluded that the detention of Appellants in Cuba was also made "in the field," and thus, clearly satisfy the second prong of the

§ 701(b)(1)(G) exemption.

First, there can be no doubt that the capture of the detainees in Afghanistan was done by military authority "in the field" in "time of war." Furthermore, the decision as to where to confine those captured was also made "in the field" as that term is properly understood. For example, courts have held that "in the field" not only refers to geographical areas where the United States is physically involved in combat, but also those areas far removed from actual combat where the military may simply be training its troops. *See Hines v. Mikell*, 259 F. 28 (4th Cir. 1919) (a military training camp in South Carolina was "in the field" and a civilian could be prosecuted under the Article of War (now Uniform Code of Military Justice)); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944) (a ship on the high seas transporting supplies to troops abroad was "in the field"); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943) (same); *Ex parte Gerlach*, 247 F. 616 (S.D.N.Y. 1917) (same). Accordingly, the exercise of military authority in Cuba is "in the field" because of the nature of the activity being conducted in that location, namely, the detention of enemy combatants while hostilities continue.

The naval base in Guantanamo Bay is also "in the field" because civil

courts are unavailable in that location. Thus, in *Kinsella v. Singleton*, 361 U.S. 234 (1960), the Supreme Court considered whether a military court-martial had jurisdiction over a military dependent at an overseas base. Justice Whittaker, commenting on "what is really meant by the term 'in the field,'" stated:

Historically, the term has been thought to include armed forces located at points where the civil power of the Government did not extend or where its civil courts did not exist. . . . In 1814, the Attorney General expressed the opinion that civilian employees of the navy were subject to punishment by court-martial for offenses committed on board vessels beyond the territorial jurisdiction of our civil courts. The term "in the field" was thought to apply to organized camps stationed in remote places where civil courts did not exist or were not functioning.

361 U.S. at 273-275 (Whittaker, J., concurring in part and dissenting in part)

(citations and footnotes omitted). Thus, because there are no civil courts in Guantanamo Bay and because it is "beyond the territorial jurisdiction" of any federal court as established by Congress, the detention facilities in Cuba are "in the field" for purposes of the APA.

C. The Legislative History of § 701(b)(1)(G) Supports Its Application Here

Amici submit that while the legislative history is sparse, what does exist supports the district court's conclusion that the § 701(b)(1)(G) exemption applies here.

Section 701(b)(1)(G) was first enacted as § 2(a)(3) of the APA. Pub. L. No. 404, 79th Cong., 2d Sess. (1946), *reprinted in* Administrative Procedure Act Legislative History, 79th Cong., 1944-46 at 1 (1946). The legislative history indicates that Congress intended to "remove any question of the applicability of the measure to purely military functions." *Id.* at 44; *see also id.* at 355 ("Purely military and naval functions should obviously be exempt."); Report of the Committee on Administrative Procedure, Appointed by the Attorney General, S. Doc. 8, 77th Cong., 1st Sess. 196, 225, 232 (1941).

Congress amended the APA in 1976 to include waiver of sovereign immunity. A report submitted by the Administrative Conference cautioned that such an amendment would not "allow the courts to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." Sovereign Immunity, Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, S. 3568, 91st Cong., 2d Sess. 135 (1970). Accordingly, the legislative history of § 701(b)(1)(G) demonstrates that the Congress wanted to exempt military decisions of the kind being challenged here from judicial review under the APA.

CONCLUSION

Amici curiae respectfully request that the Court affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2002, two copies of the foregoing brief of *amici curiae* WLF, *et al.*, in support of Defendants-Appellees were deposited in the U.S. mail, with first-class postage affixed, addressed as follows:

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I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,982, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

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