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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 Consolidated with
Nos. 02-5284, 02-5288

Argued December 2, 2002
Decided March 11, 2003

KHALED A. F. AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

THOMAS B. WILMER and JOSEPH MARGULIES argued the cause for appellants. With them on the briefs were NEIL H. KOSLOWE, MICHAEL RATNER, BETH STEPHENS, and L. BARRETT BOSS.

WILLIAM J. ACEVES was on the briefs of amici curiae The International Centre for the Legal Protection of Human Rights and International Human Rights Organizations and Law Scholars in support of appellants.

DAVID P. SHELDON was on the brief of amicus curiae National Association of Criminal Defense Lawyers in support of appellants.

PAUL D. CLEMENT, Deputy Solicitor General, U.S. Department of Justice, argued the cause for appellees. With him on the brief were ROSCOE C. HOWARD, JR., U.S. Attorney, GREGORY G. KATSAS, Deputy Assistant Attorney General, U.S. Department of Justice, GREGORY G. GARRE and DAVID B. SALMONS, Assistants to the Solicitor General, DOUGLAS N. LETTER, ROBERT M. LOEB and KATHERINE S. DAWSON, Attorneys.

DANIEL J. POPEO, RICHARD A. SAMP and PAUL D. KAMENAR were on the brief for amici curiae Washington Legal Foundation, et al., in support of appellees.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*:

Through their "next friends," aliens captured abroad during hostilities in Afghanistan and held abroad in United States military custody at the Guantanamo Bay Naval Base in Cuba brought three actions contesting the legality and conditions of their confinement. The ultimate question presented in each case is whether the district court had jurisdiction to adjudicate their actions.

I.

The Constitution, as its preamble also declares, empowers Congress to "provide for the common Defence." *U.S. CONST. art. I, § 8.* To that end, the Constitution gives Congress the power "To raise and support Armies," "To provide and maintain a Navy," "To declare War, grant

Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.* To that end as well, the Constitution invests the President with the "executive Power," and makes him "Commander in Chief" of the country's military. *Art. II, § § 1 & 2; see Ex parte Quirin, 317 U.S. 1, 25-26, 87 L. Ed. 3, 63 S. Ct. 2 (1942).*

In response to the attacks of September 11, 2001, and in the exercise of its constitutional powers, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). The President declared a national emergency, Proclamation No. 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, *66 Fed. Reg. 48,199* (Sept. 14, 2001), and, as Commander in Chief, dispatched armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected it. During the course of the Afghanistan campaign, the United States and its allies captured the aliens whose next friends bring these actions.

In one of the cases (*Al Odah v. United States*, No. 02-5251), fathers and brothers of twelve Kuwaiti nationals detained at Camp X-Ray in Guantanamo Bay brought an action in the form of a complaint against the United States, President George W. Bush, Secretary of Defense Donald H. Rumsfeld, Chairman of the Joint Chiefs of Staff Gen. Richard B. Myers, Brig. Gen. Rick Baccus, whom they allege is the Commander of Joint Task Force 160, and Col. Terry Carrico, the Commandant of Camp X-Ray/Camp Delta. None of the plaintiffs' attorneys have communicated with the Kuwaiti detainees. The complaint alleges that the detainees were in Afghanistan and Pakistan as volunteers providing humanitarian aid; that local villagers seeking

bounties seized them and handed them over to United States forces; and that they were transferred to Guantanamo Bay sometime between January and March 2002. A representative of the United States Embassy in Kuwait informed the Kuwaiti government of their whereabouts. Invoking the Great Writ, *28 U.S.C. § § 2241-2242*; the *Alien Tort Act*, *28 U.S.C. § 1350*; and the *Administrative Procedure Act*, the *Al Odah* plaintiffs claim a denial of due process under the *Fifth Amendment*, tortious conduct in violation of the law of nations and a treaty of the United States, and arbitrary and unlawful governmental conduct. They seek a declaratory judgment and an injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families.

Rasul v. Bush (No. 02-5288) is styled a petition for a writ of habeas corpus on behalf of three detainees, although it seeks other relief as well. The next friends bringing the petition are the father of an Australian detainee, the father of a British detainee, and the mother of another British detainee. Respondents are President Bush, Secretary Rumsfeld, Col. Carrico, and Brig. Gen. Michael Lehnert, who is alleged to be the Commander of Joint Task Force 160. The petition claims that the Australian detainee was living in Afghanistan when the Northern Alliance captured him in early December 2001; that one of the British detainees traveled to Pakistan for an arranged marriage after September 11, 2001; and that the other British detainee went to Pakistan after that date to visit relatives and continue his computer education. The next friends learned of their sons' detention at Guantanamo Bay from their respective governments. The *Rasul* petitioners claim violations of due process under the *Fifth* and *Fourteenth Amendments*, international law, and military regulations; a violation of the *War Powers Clause*; and a violation of *Article I of the Constitution* because of the President's alleged suspension of the writ of habeas corpus. They seek a writ of habeas corpus,

release from unlawful custody, access to counsel, an end to interrogations, and other relief.

Habib v. Bush (No. 02-5284) is also in the form of a petition for writ of habeas corpus and is brought by the wife of an Australian citizen, acting as his next friend. Naming President Bush, Secretary Rumsfeld, Brig. Gen. Baccus, and Lt. Col. William Cline as defendants, the petition alleges that Habib traveled to Pakistan to look for employment and a school for his children; that after Pakistani authorities arrested him in October 2001, they transferred him to Egyptian authorities, who handed him over to the United States military; and that the military moved him from Egypt to Afghanistan and ultimately to Guantanamo Bay in May 2002. Australian authorities visited Guantanamo and issued a press release confirming Habib's presence there. The *Habib* petition, like the other two cases, invokes the *Due Process Clause of the Fifth Amendment* and other constitutional provisions, the *Alien Tort Act*, the Administrative Procedure Act, due process under international law, and United States military regulations. Habib seeks a writ of habeas corpus, legally sufficient process to establish the legality of his detention, access to counsel, an end to all interrogations of him, and other relief.

The district court held that it lacked jurisdiction. Believing no court would have jurisdiction, it dismissed the complaint and the two habeas corpus petitions with prejudice. *Rasul v. Bush, 215 F. Supp. 2d 55, 56 (D.D.C. 2002).* In the court's view all of the detainees' claims went to the lawfulness of their custody and thus were cognizable only in habeas corpus. *Id. at 62-64.* Relying upon *Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950)*, the court ruled that it did not have jurisdiction to issue writs of habeas corpus for aliens detained outside the sovereign territory of the United States. *Rasul, 215 F. Supp. 2d at 72-73.*

II.

While these cases were pending, the Ninth Circuit affirmed an order dismissing a habeas corpus petition for all Guantanamo detainees on the ground that those bringing the action clergy, lawyers, and law professors - were not proper "next friends." *Coalition of Clergy, Lawyers & Law Professors v. Bush, 310 F.3d 1153, 1165 (9th Cir. 2002).* In the cases before us, the government does not question the "next friend" status of the individuals prosecuting the actions, at least insofar as they seek writs of habeas corpus. There is a long history, going back to the 1600s in England, of "next friends" invoking the Great Writ on behalf of prisoners who are unable to do so because of their inaccessibility. *Whitmore v. Arkansas, 495 U.S. 149, 162, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990).* For the federal courts, Congress codified the practice in 1948: a habeas corpus petition now may be brought "by the person for whose relief it is intended or by someone acting in his behalf." *28 U.S.C. § 2242.* The next friends in these cases have demonstrated through affidavits that they are "truly dedicated to the best interests of these individuals," that they have a "significant relationship" with the detainees, and that the named detainees are inaccessible. *Whitmore, 495 U.S. at 163-64.* We shall therefore treat the cases as if the detainees themselves were prosecuting the actions. *Id. at 163.*

In each of the three cases, the detainees deny that they are enemy combatants or *enemy* aliens. Typical of the denials is this paragraph from the petition in *Rasul*:

> The detained petitioners are not, and have never been, members of Al Qaida or any other terrorist group. Prior to their detention, they did not commit any violent act against any American person, nor espouse any violent act against any American person or property. On information and belief, they had no involvement, direct or

> indirect, in either the terrorist attacks on the United States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group.

(As the district court pointed out, an affidavit from the father of the Australian detainee in *Rasul* admitted that his son had joined the Taliban forces. *Rasul, 215 F. Supp. 2d at 60 n.6.*) Although the government asked the district court to take judicial notice that the detainees are "enemy combatants," the court declined and assumed the truth of their denials. *Id. at 67 n.12.*

This brings us to the first issue: whether the Supreme Court's decision in *Johnson v. Eisentrager*, which the district court found dispositive, is distinguishable on the ground that the prisoners there were "enemy aliens." In the two and a half years leading up to the 1950 *Eisentrager* decision, "German enemy aliens confined by American military authorities abroad" filed more than 200 habeas corpus petitions invoking the Supreme Court's original jurisdiction. *339 U.S. at 768 n.1.* The Court denied each petition, often with four Justices announcing that they would dismiss for lack of jurisdiction. *Id.*; *see* Charles Fairman, *Some New Problems of the Constitution Following the Flag, 1 STAN. L. REV. 587, 593-600 (1949).* Justice Jackson, the author of the *Eisentrager* opinion, recused himself from each of the cases, doubtless because of his service (after his appointment to the Court) as Representative and Chief Counsel at the Nazi war crime trials in Nuremberg from 1945 to 1946. *See* Telford Taylor, *The Nuremberg Trials, 55 COLUM. L. REV. 488 (1955).*

Eisentrager differed from the earlier World War II habeas petitions. The case started not in the Supreme Court, but in a district court; and the Germans seeking the writ had not been convicted at Nuremberg. After Germany's surrender on May 8, 1945, but before the surrender of Japan, twenty-one German nationals in China assisted Japanese forces

fighting against the United States. The Germans were captured, tried by an American military commission headquartered in Nanking, convicted of violating the laws of war, and transferred to the Landsberg prison in Germany, which was under the control of the United States Army. *339 U.S. at 765-66.* One of the prisoners, on behalf of himself and the twenty others, sought writs of habeas corpus in the United States District Court for the District of Columbia, claiming violations of the Constitution, other laws of the United States, and the 1929 Geneva Convention. *Id. at 767.* The district court dismissed for lack of jurisdiction, but the court of appeals reversed. *Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961 (D.C. Cir. 1949).*

The Supreme Court, agreeing with the district court, held that "the privilege of litigation" had not been extended to the German prisoners. *339 U.S. at 777-78.* (Although *Eisentrager* discussed only the jurisdiction of federal courts, state courts do not have jurisdiction to issue writs of habeas corpus for the discharge of a person held under the authority of the United States. *Tarble's Case, 80 U.S. (13 Wall.) 397, 20 L. Ed. 597 (1872).*) The prisoners therefore had no right to petition for a writ of habeas corpus: "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *339 U.S. at 778.* Moreover, "trials would hamper the war effort and bring aid and comfort to the enemy." *Id. at 779.* Witnesses, including military officials, might have to travel to the United States from overseas. Judicial proceedings would engender a "conflict between judicial and military opinion" and "would diminish the prestige of" any field commander as he was called "to account in his own civil courts" and would "divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.*

The detainees here are quite right that throughout its opinion, the Supreme Court referred to the *Eisentrager*

prisoners as "enemy aliens." The petitioners in *Habib* and *Rasul* distinguish themselves from the German prisoners on the ground that they have not been charged and that the charges in *Eisentrager* are what rendered the prisoners "enemies." For this they rely on Justice Brennan's dissenting opinion in *United States v. Verdugo-Urquidez, 494 U.S. 259, 290-91, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990).* Brief for Appellants at 29 (No. 02-5284 et al.). *Eisentrager*, Justice Brennan wrote, "rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers." *494 U.S. at 291* (Brennan, J., dissenting). This seems to us doubly mistaken. In the first place, the German prisoners were not alleged to be "soldiers." They were civilian employees of the German government convicted of furnishing intelligence to the Japanese about the movement of American forces in China. *Eisentrager, 339 U.S. at 765-66*; *Eisentrager, 174 F.2d at 962.* In the second place, it was not their convictions - which they contested - that rendered them "enemy aliens." The Supreme Court made this explicit: "It is not for us to say whether these prisoners were or were not guilty of a war crime," *339 U.S. at 786*; "the petition of these prisoners admits[ ] that they are really alien enemies," *id. at 784.* The Court's description of the prisoners as "enemy aliens" rested instead on their status as nationals of a country at war with the United States. *Id. at 769 n.2* (quoting *Techt v. Hughes, 229 N.Y. 222, 229, 128 N.E. 185 (1920)* (Cardozo, J.)). (Although Germany surrendered in 1945, the state of war with Germany did not end until October 19, 1951. Pub. L. No. 82-181, 65 Stat. 451; *see United States ex rel. Jaegeler v. Carusi, 342 U.S. 347, 348 (1952)* (per curiam).) This is the time-honored meaning of the term. "Every individual of the one nation must acknowledge every individual of the other nation as his own enemy - because the enemy of his country." *The Rapid, 12 U.S. (8 Cranch) 155, 161, 3 L. Ed. 520 (1814)*; *see Guessefeldt v. McGrath, 342 U.S. 308, 96 L. Ed. 342, 72 S. Ct. 338 (1952)*; *Lamar v. Browne, 92 U.S.*

187, 194, 23 L. Ed. 650 (1875); J. Gregory Sidak, *War, Liberty, and Enemy Aliens, 67 N.Y.U. L. REV. 1402, 1406 (1992)*; *see also* The Alien Enemy Act of 1798, *50 U.S.C. § § 21-24*. Despite the government's argument to the contrary, it follows that none of the Guantanamo detainees are within the category of "enemy aliens," at least as *Eisentrager* used the term. They are nationals of Kuwait, Australia, or the United Kingdom. Our war in response to the attacks of September 11, 2001, obviously is not against these countries. It is against a network of terrorists operating in secret throughout the world and often hiding among civilian populations. An "alien friend" may become an "alien enemy" by taking up arms against the United States, but the cases before us were decided on the pleadings, each of which denied that the detainees had engaged in hostilities against America.

Nonetheless the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States. For the reasons that follow we believe that under *Eisentrager* these factors preclude the detainees from seeking habeas relief in the courts of the United States.

The court of appeals in *Eisentrager* had ruled that "any person who is deprived of his liberty by officials of the United States, acting under the purported authority of that Government," and who can establish a violation of the Constitution, "has a right to the writ." *174 F.2d at 963*. This statement of law, unconstrained by the petitioner's citizenship or residence, by where he is confined, by whom or for what, "necessarily" followed - thought the court of appeals - from the *Fifth Amendment's* application to "any person" and from the court's view that no distinction could be made between "citizens and aliens." *Id. at 963-65*. As the Supreme Court described it, the court of appeals thus treated

the right to a writ of habeas corpus as a "subsidiary procedural right that follows from the possession of substantive constitutional rights." *339 U.S. at 781.*

In answer the Supreme Court rejected the proposition "that the *Fifth Amendment* confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," *id. at 783*. The Court continued: "If the *Fifth Amendment* confers its rights on all the world ... [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in our *First Amendment*, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the *Fourth*, as well as rights to jury trial as in the *Fifth* and *Sixth Amendments.*" *Id. at 784.* (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See, e.g.*, http://www.archives.gov/iwg/declassified_records/oss_records_ 263_wilhelm_hoettl.html.) The passage of the opinion just quoted may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens. That is how later Supreme Court cases have viewed *Eisentrager.*

In 1990, for instance, the Court stated that *Eisentrager* "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.* After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens "our rejection of the extraterritorial application of the *Fifth Amendment* was emphatic." *Id.* By analogy, the Court held that the *Fourth Amendment* did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. Citing *Eisentrager* again, the Court explained that to extend the

Fourth Amendment to aliens abroad "would have serious and deleterious consequences for the United States in conducting activities beyond its borders," particularly since the government "frequently employs Armed Forces outside this country," *id. at 273*. A decade after *Verdugo-Urquidez*, the Court - again citing *Eisentrager* - found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis, 533 U.S. 678, 693, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001).*

Although the Supreme Court's statement in *Verdugo-Urquidez* about the *Fifth Amendment* was dictum, our court has followed it. In *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 604 (D.C. Cir. 2000), rev'd on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002)*, we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy, 107 U.S. App. D.C. 372, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960)*, that "non-resident aliens ... plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of the circuit now is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. v. Dep't of State, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999); see also 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002).*

The consequence is that no court in this country has jurisdiction to grant habeas relief, under *28 U.S.C. § 2241*, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they

cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions: "in 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." *339 U.S. at 771*. Thus, the "privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." *Id. at 777-78* (emphasis added). In arguing that *Eisentrager* turned on the status of the prisoners enemies, the detainees do not deny that if they are in fact in that category, if they engaged in international terrorism or were affiliated with al Qaeda, the courts would not be open to them. Their position is that the district court should have made these factual determinations at the threshold, before dismissing for lack of jurisdiction. But the Court in *Eisentrager* did not decide to avoid all the problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place.

It is true that after deciding jurisdiction did not exist, the Supreme Court, in part IV of its *Eisentrager* opinion, went on to consider and reject the merits of the prisoners' claims. From this the detainees reason that the Court's holding must have been merely that the military courts, rather than the civilian courts, had jurisdiction to try charges of war crimes, not that the district court lacked jurisdiction to adjudicate the habeas petition. We find it impossible to read the Court's statements - many of which we have already quoted - about the courts not being open to the prisoners as so limited. The discussion in part IV of the Court's opinion was extraneous. The dissenting Justices viewed it as such, calling part IV "gratuitous," "wholly irrelevant," lending "no support whatever to the Court's holding that the District Court was without jurisdiction." *339 U.S. at 792, 794* (Black, J., joined by Douglas and Burton, JJ., dissenting). There is a ready

explanation for the *Eisentrager* Court's method. Before *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)*, the Supreme Court (and the lower federal courts) were not always punctilious in treating jurisdiction as an antecedent question to the merits. The Court in *Steel Co.* acknowledged as much. *See 523 U.S. at 101*. Part IV of *Eisentrager*, whether an advisory opinion (*see 523 U.S. at 101*) or an alternative holding, does not detract from the central meaning of the decision that the district court did not have jurisdiction to issue writs of habeas corpus.

We have thus far assumed that the detainees are not "within any territory over which the United States is sovereign," *Eisentrager, 339 U.S. at 778*. The detainees dispute the assumption. They say the military controls Guantanamo Bay, that it is in essence a territory of the United States, that the government exercises sovereignty over it, and that in any event *Eisentrager* does not turn on technical definitions of sovereignty or territory.

The United States has occupied the Guantanamo Bay Naval Base under a lease with Cuba since 1903, as modified in 1934. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 *(6 Bevans 1113)* ("1903 Lease"); Relations With Cuba, May 9, 1934, U.S.-Cuba, T.S. No. 866 *(6 Bevans 1161)* ("1934 Lease"). In the 1903 Lease, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the naval base. 1903 Lease, art. III. The term of the lease is indefinite. 1903 Lease, art. I; 1934 Lease, art. III ("So long as the United States of America shall not abandon the said naval station at Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has....").

The detainees think criminal cases involving aliens and United States citizens for activities at Guantanamo Bay support their position. But those cases arose under the special maritime and territorial jurisdiction, *see 18 U.S.C. §*

7. In *United States v. Lee, 906 F.2d 117 (4th Cir. 1990)* (per curiam), a Jamaican national was charged with committing a crime at Guantanamo. The indictment invoked the special maritime and territorial jurisdiction of the United States pursuant to *18 U.S.C. § 7* and *18 U.S.C. § 3238. Id. at 117 n.1.* Extension of federal criminal law pursuant to these provisions does not give the United States sovereignty over Guantanamo Bay any more than it gives the United States sovereignty over foreign vessels destined for this country because crimes committed onboard are also covered. *See 18 U.S.C. § 7(8).*

The text of the leases, quoted above, shows that Cuba - not the United States - has sovereignty over Guantanamo Bay. This is the conclusion of *Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995).* The Eleventh Circuit there rejected the argument - which the detainees make in this case - that with respect to Guantanamo Bay "'control and jurisdiction' is equivalent to sovereignty." *Id. at 1425.* The Supreme Court reached the same conclusion in *Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381, 93 L. Ed. 76, 69 S. Ct. 140 (1948).* In holding that a naval base in Bermuda, controlled by the United States under a lease with Great Britain, was outside United States sovereignty, the Court took notice of the lease with Cuba for the Guantanamo Bay Naval Base and the fact that it granted the United States "substantially the same rights as it has in the Bermuda lease." *Id. at 383.* The "determination of sovereignty over an area," the Court held, "is for the legislative and executive departments." *Id. at 380.* The contrary decision of the Second Circuit, on which the detainees rely - *Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot, Sale v. Haitian Centers Council, Inc., 509 U.S. 918, 125 L. Ed. 2d 716, 113 S. Ct. 3028 (1993)* - has no precedential value because the Supreme Court vacated it. The decision was, in any event, at odds with the Supreme Court's reasoning not only in *Vermilya-Brown*, but also in *Spelar v. United States, 338 U.S. 217, 94 L. Ed. 3, 70*

S. Ct. 10 (1949). The Second Circuit's result rested in very large measure on its extraterritorial application of the *Fifth Amendment* to non-resident aliens, *see 969 F.2d at 1342-43*, a position we rejected in *People's Mojahedin Org. v. Dep't of State, 182 F.3d at 22*, and in *Harbury v. Deutch, 233 F.3d at 604*, and a position we reject again today. And the Second Circuit thought it important that the United States controlled Guantanamo Bay. *969 F.2d at 1342-44*. But under *Eisentrager*, control is surely not the test. Our military forces may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany.

We also disagree with the detainees that the *Eisentrager* opinion interchanged "territorial jurisdiction" with "sovereignty," without attaching any particular significance to either term. When the Court referred to "territorial jurisdiction," it meant the territorial jurisdiction of the United States courts, as for example in these passages quoted earlier: "in 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" (*339 U.S. at 771*); and "the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of United States courts" (*id. at 778*). Sovereignty, on the other hand, meant then - and means now - supreme dominion exercised by a nation. The United States has sovereignty over the geographic area of the States and, as the *Eisentrager* Court recognized, over insular possessions, *id. at 780.* Guantanamo Bay fits within neither category.

As against this the detainees point to *Ralpho v. Bell, 186 U.S. App. D.C. 368, 569 F.2d 607 (D.C. Cir. 1977)*. After World War II, the United Nations designated the United States as administrator of the Trust Territory of Micronesia. *Id. at 612*. No country had sovereignty over the region, but the court treated Micronesia as if it were a territory of the United States, over which Congress could and did exercise

its power under *Article IV of the Constitution.* (The United States did not hold the Trust Territory "in fee simple ... but rather as trustee," a difference the court considered irrelevant. *Id. at 619.*) The court therefore described the residents of Micronesia as being "as much American subjects as those in other American territories." *Id.* In the *Micronesian Claims Act*, Congress established a commission to distribute a fund for claims against the United States for damages suffered during World War II. Because Congress intended the Micronesia Trust Territory to be treated as if it were a territory of the United States, the court held that the right of due process applied to the commission's actions. *Id. at 629-30.* Given the premises on which the court acted, its holding is hardly surprising. "Fundamental personal rights" found in the Constitution apply in territories. *See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 312-13, 66 L. Ed. 627, 42 S. Ct. 343 (1922)*; *see also Dorr v. United States, 195 U.S. 138, 148, 49 L. Ed. 128, 24 S. Ct. 808 (1904)* (considering the law applicable in the Philippines); *48 U.S.C. § 1421b* (Guam). *Ralpho* thus establishes nothing about the sort of *de facto* sovereignty the detainees say exists at Guantanamo. And its reasoning does not justify this court, or any other, to assert habeas corpus jurisdiction at the behest of an alien held at a military base leased from another nation, a military base outside the sovereignty of the United States.

III.

In addition to seeking relief explicitly in the nature of a habeas corpus, the detainees sued for injunctions and declaratory judgments under the Alien Tort Act, *28 U.S.C. § 1350*, alleging that the United States is confining them in violation of treaties and international law. The holding in *Eisentrager* - that "the privilege of litigation" does not extend to aliens in military custody who have no presence in "any territory over which the United States is sovereign" (*339 U.S. at 777-78*) - dooms these additional causes of

action, even if they deal only with conditions of confinement and do not sound in habeas. *See Wolff v. McDonnell, 418 U.S. 539, 554-55, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974)*; *Brown v. Plaut, 327 U.S. App. D.C. 313, 131 F.3d 163, 167 (D.C. Cir. 1997).*

At the time of *Eisentrager*, the writ of habeas corpus extended to prisoners "in custody in violation of the Constitution or of a law or treaty of the United States," *28 U.S.C. § 453 (1946).* The current habeas statute, *28 U.S.C. § 2241(c)(3)*, is very much the same. The prisoners in *Eisentrager* alleged violations of the Constitution, federal laws, and a treaty. So here. Each of the detainees alleges violations of the Constitution, treaties, and laws of the United States. The Alien Tort Act is a "law of the United States" and, the detainees believe, so is some international law. As to the latter, the theories are that federal common law incorporates "customary international law" and that the Alien Tort Act not only provides jurisdiction but also creates a cause of action theories the Second Circuit promulgated in *Filartiga v. Pena-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980).* But as we have decided, the detainees are in all relevant respects in the same position as the prisoners in *Eisentrager.* They cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them. Whatever other relief the detainees seek, their claims necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute, and are therefore beyond the jurisdiction of the federal courts. Nothing in *Eisentrager* turned on the particular jurisdictional language of any statute; everything turned on the circumstances of those seeking relief, on the authority under which they were held, and on the consequences of opening the courts to them. With respect to the detainees, those circumstances, that authority, and those consequences differ in no material respect from *Eisentrager.*

IV.

We have considered and rejected the other arguments the detainees have made to the court. The judgment of the district court dismissing the complaint in No. 02-5251 and the petitions for writs of habeas corpus in Nos. 02-5284 and 02-5288 for lack of jurisdiction is *Affirmed.*[*]

RANDOLPH, *Circuit Judge*, concurring:

I write separately to add two other grounds for rejecting the detainees' non-habeas claims. But first some words are in order regarding the Alien Tort Act, *28 U.S.C. § 1350*:

> 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.

Three courts of appeals have decided that *§ 1350* not only provides a federal forum but also creates a cause of action for violations of the "law of nations." The Second Circuit, in the decision launching this development, held first, that *§ 1350* conferred jurisdiction over an action by citizens of Paraguay against another citizen of that country for torts allegedly committed in Paraguay; and second, that "customary international law" is part of federal common law. *Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).* The same court of appeals later reiterated that *§ 1350* provided jurisdiction and gave aliens - in this instance, Muslim and Croat citizens of Bosnia-Herzegovina - a cause of action against the leader of the Bosnia Serbs for violations of "the

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[*] Although Judges Garland and Williams have not joined Judge Randolph's concurring opinion, they do not intend thereby to express any view about its reasoning. They believe the issues addressed need not be reached.

law of nations" and treaties. *Kadic v. Karadzic, 70 F.3d 232, 241-44 (2d Cir. 1995)*; *see Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92-93 (2d Cir. 2000).* The Ninth Circuit followed suit, holding that *§ 1350* gave a district court jurisdiction over the estate of the former Philippine President Marcos although all plaintiffs and defendants were Philippine nationals and although the torts, alleged to violate international law, occurred entirely in the Philippines. *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d 493, 499 (9th Cir. 1992)*; *see also Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos, Human Rights Litigation), 25 F.3d 1467, 1473 (9th Cir. 1994)*; *Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998).* The Eleventh Circuit joined these courts of appeals in holding that *§ 1350* not only confers jurisdiction, but also gives federal courts the power to "fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996).*

The meaning of *§ 1350* has been an open question in our court. *See Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774, 777 (D.C. Cir. 1984)* (Edwards, J., concurring); *id. at 800* (Bork, J., concurring); *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 20-07 (D.C. Cir. 1985).* But what *§ 1350* does not mean has been decided. In the *Tel-Oren* case both Judge Bork and Judge Robb, in their separate concurring opinions, rejected the Second Circuit's *Filartiga* decision, Judge Bork on the ground that *§ 1350* does not create a cause of action, Judge Robb on the ground that *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *See 726 F.2d at 801* (Bork, J.); *id. at 826 n.5* (Robb, J.). Since then some of the opinions following *Filartiga* maintain that Congress ratified its interpretation of *§ 1350. See, e.g., Kadic, 70 F.3d at 241*; *Hilao, 25 F.3d at 1475*; *Abebe-Jira, 72 F.3d at 848*; *see also* William S. Dodge, *The Historical*

Origins of the Alien Tort Statute: A Response to the "Originalists," 19 HASTINGS INT'L & COMP. L. REV. 221, 224, 256 (1996). The ratification argument rests on enactment of the *Torture Victim Protection Act of 1991*, which provides a cause of action for damages to anyone - aliens and citizens alike who suffered torture anywhere in the world at the hands of any individual acting under the law of any foreign nation. *28 U.S.C. § 1350* note. The Torture Victim Act does not contain its own jurisdictional provision. But it is clear that any case brought pursuant to that statute would arise under federal law and thus come within *28 U.S.C. § 1331*, the grant of general federal question jurisdiction. (I mean to imply nothing about the constitutionality of the statute.) The Alien Tort Act is thus beside the point: it confers jurisdiction only over suits by aliens and only for violations of treaties and the law of nations. The House Report on the torture victim bill did state that *§ 1350* "should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law." Torture Victim Protection Act of 1991, H.R. REP. NO. 102-367, pt. 1, at 4 (1991). But the statement of one congressional committee is by no means a statement of "Congress," as some have supposed; the wish expressed in the committee's statement is reflected in no language Congress enacted; it does not purport to rest on an interpretation of *§ 1350*; and the statement itself is legislative dictum.

The detainees, or at least some of them, nevertheless have urged us to follow the *Filartiga* line of cases. I see a number of problems in doing so, in addition to those mentioned by Judges Bork and Robb in *Tel-Oren*. To hold that the Alien Tort Act creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty

violations only if the treaty is self-executing. *See, e.g., Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415 (1829) (Marshall, C.J.); McKesson HBOC, Inc. v. Islamic Republic of Iran, 348 U.S. App. D.C. 160, 271 F.3d 1101, 1107 (D.C. Cir. 2001); Princz v. Federal Republic of Germany, 307 U.S. App. D.C. 102, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994); Holmes v. Laird, 148 U.S. App. D.C. 187, 459 F.2d 1211, 1220 (D.C. Cir. 1972); Tel-Oren, 726 F.2d at 808-10* (Bork, J., concurring). To illustrate, the detainees in this case claim that the military is confining them in violation of the Geneva Convention of 1949. But the second Geneva Convention, like the first, *see Eisentrager, 339 U.S. at 789 n.14*, is not self-executing for the reasons stated by Judge Bork in *Tel-Oren, 726 F.2d at 808-09*, and by the Fourth Circuit in *Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003)*. No American citizen, therefore, has a cause of action under this treaty. Yet on the basis of *Filartiga*, and the theory that the Alien Tort Act itself creates a cause of action, aliens could bring suit for its violation. *Martinez, 141 F.3d at 1383-84*, illustrates the point. The Ninth Circuit, relying on *§ 1350*, sustained such a suit, brought by an alien against the City of Los Angeles for actions occurring in Mexico in violation of the "customary international law." The court of appeals derived this "customary international law" partly from the International Covenant on Civil and Political Rights. But the court neglected to mention that this multilateral agreement creates no judicially enforceable rights and that the Senate ratified the treaty on the basis that it "will not create a private cause of action in U.S. courts." S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1992). I find it hard to believe the First Congress, which enacted the Alien Tort Act in 1789, intended to extend to aliens rights of actions withheld from the citizens of this country.

Filartiga's theory that federal common law incorporates customary international law also raises many issues. The theory was necessary to sustain the constitutionality of *§ 1350* as the Second Circuit interpreted and applied it. Early

in our history the Supreme Court held unconstitutional, in violation of *Article III*, the conferring of federal jurisdiction over suits by an alien against an alien. *Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304, 3 L. Ed. 108 (1809).* In holding that federal common law somehow incorporates customary international law, the *Filartiga* court placed the case before it on the "arising under" head of jurisdiction without mentioning *Hodgson. See Illinois v. City of Milwaukee, 406 U.S. 91, 100, 31 L. Ed. 2d 712, 92 S. Ct. 1385 (1972).* This avoided the difficulty the Supreme Court's decision posed, but it created quite a few difficulties of its own.

For one thing, *Article I, section 8, clause 10 of the Constitution* gives Congress the power to "define and punish ... Offenses against the Law of Nations." The Framers' original draft merely stated that Congress had the power to punish offenses against the law of nations, but when Gouverneur Morris of Pennsylvania objected that the law of nations was "often too vague and deficient to be a rule," the clause was amended to its present form. III ELLIOT'S DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 604 (James McClellan & M.E. Bradford eds., rev. ed. 1989). I believe this clause in *Article I, section 8*, particularly in light of the history just recounted, makes it abundantly clear that Congress - not the Judiciary - is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts. Yet under *Filartiga*, it is the courts, not Congress who decide both questions. It is no answer to say that early Supreme Court cases looked to the "law of nations." The "law of nations" may have been part of the general federal common law in the days before *Erie R.R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, but even then "the law of nations" did not present "any Federal question." *N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87, 23 L. Ed. 709 (1875); see Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442-43, 68 L. Ed. 778,*

44 S. Ct. 390 (1924). And for good reason. The political branches of our government may influence but they by no means control the development of customary international law. To have federal courts discover it among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers. As Judge Robb put it, the courts "ought not serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations." *Tel-Oren, 726 F.2d at 827* (Robb, J., concurring). Nothing in the Constitution expressly authorizes such free-wheeling judicial power. After *Erie* brought an end to "general federal common law," federal common law has been mostly interstitial or generated by the need for uniformity throughout the States. *See generally* HENRY J. FRIENDLY, BENCHMARKS 155-95 (1967). A federal common law of customary international law is justified by neither consideration. Congress, when it ratifies treaties, often does so with reservations in order to avoid altering domestic law. Yet treating customary international law as federal law would alter domestic law because of the *Supremacy Clause.* All of these problems, and more, including the lack of historical support for the *Filartiga* theory, are spelled out in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815 (1997),* and in a later article by the same authors, *Federal Courts and the Incorporation of International Law, 111 HARV. L. REV. 2260 (1998). But see* Harold Hongju Koh, *Is International Law Really State Law?, 111 HARV. L. REV. 1824 (1998).*

As to the history of the Alien Tort Act, Judge Friendly wrote: this "old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came." *IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).* The original version read:

> the district courts ... shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

1 Stat. 73, 76-77 (1789). Two former members of our court thought that *§ 1350* might have been meant to cover only private, nongovernmental acts taken against aliens such as piracy. *Sanchez-Espinoza, 770 F.2d at 206 (Scalia, J.)*; *Tel-Oren, 726 F.2d at 813-14, 822* (Bork, J., concurring). "More recent research of a competent scholar" (*Erie R.R., 304 U.S. at 72*) has shed new light on the origin of *§ 1350* and the purpose of the First Congress in enacting it. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).* Professor Sweeney marshals a vast amount of historical research on eighteenth century "prize law," which allowed private vessels having a marque to capture enemy ships. When the Articles of Confederation were in effect, state courts adjudicated claims by alien shipowners seeking the return of their captured vessels and reparations for the damages caused by the seizure. Adoption of the Constitution and the passage of the First Judiciary Act gave the federal courts exclusive jurisdiction in admiralty and thus exclusive jurisdiction over suits brought to recover ships captured in prize. There was still a question whether state courts had jurisdiction over cases in which the alien sued not for return of the ship, but only for reparations. It was only these cases, Professor Sweeney postulates, that the Alien Tort Act's author, Oliver Ellsworth, and his congressional colleagues, intended to cover by making clear that if the alien shipowner's suit sought only reparations, the state courts would have jurisdiction concurrent with the federal courts. Hence the words in the statute "for a tort only." If Professor

Sweeney is correct, the Alien Tort Act today is moribund, as in fact it had been for nearly two hundred years until the Second Circuit resuscitated it.

In view of my doubts about *Filartiga*, and the *Tel-Oren* majority's rejection of it, we might go ahead in this case and decide what *§ 1350* does mean. But it is unnecessary to do so, not only because *Eisentrager* disposes of the cases, but also because the detainees' treaty and international law claims are barred by sovereign immunity. Before explaining why, I need to add a disclaimer. At oral argument, the question arose whether next friend status may be recognized for suits under *§ 1350*. "Some courts have permitted 'next friends' to prosecute actions outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents." *Whitmore v. Arkansas, 495 U.S. 149, 162 n.4, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990).* Here, the argument for the next friend device is that the detainees are allegedly barred from talking with anyone about bringing lawsuits on their behalf. The parties have not briefed the questions this argument raises and I express no opinion on its validity.

The United States or its officers may be sued only if there is a waiver of sovereign immunity. *See, e.g., Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260, 142 L. Ed. 2d 718, 119 S. Ct. 687 (1999).* We have held that the Alien Tort Act, whatever its meaning, does not itself waive sovereign immunity. *Industria Panificadora, S.A. v. United States, 294 U.S. App. D.C. 137, 957 F.2d 886, 886 (D.C. Cir. 1992)* (per curiam); *Sanchez-Espinoza, 770 F.2d at 207*; *see Canadian Transp. Co. v. United States, 214 U.S. App. D.C. 138, 663 F.2d 1081, 1092 (D.C. Cir. 1980).* The detainees therefore rely on the waiver provision in the Administrative Procedure Act, *5 U.S.C. § 702*, which states: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity ... shall

not be dismissed ... on the ground that it is against the United States...."

Although relying on the APA's waiver for agencies, the detainees do not identify which "agency" of the United States they have in mind. They have sued the President in each case, but the President is not an "agency" under the APA and the waiver of sovereign immunity thus does not apply to him. *See Franklin v. Massachusetts, 505 U.S. 788, 800-01, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992)*; *Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 289 (D.C. Cir. 1991).* This leaves the military. The APA specifically excludes from its definition of "agency" certain functions, among which is "military authority exercised in the field in time of war or in occupied territory." *5 U.S.C. § § 551(1)(G), 701(b)(1)(G)*; *see id. § § 553(a)(1) & 554(a)(4)*, exempting military "functions" from the APA's requirements for rulemaking and adjudication; *United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 375 n.2 (2d Cir. 1968)* (Friendly, J.). The district court ruled, in an alternative holding, that because of the military function exclusion, the APA does not waive sovereign immunity. *Rasul v. Bush, 215 F. Supp. 2d 55, 64 n.10 (D.D.C. 2002).* I believe this is correct.

Each of the detainees, according to their pleadings, was taken into custody by American armed forces "in the field in time of war." I believe they remain in custody "in the field in time of war." It is of no moment that they are now thousands of miles from Afghanistan. Their detention is for a purpose relating to ongoing military operations and they are being held at a military base outside the sovereign territory of the United States. The historical meaning of "in the field" was not restricted to the field of battle. It applied as well to "organized camps stationed in remote places where civil courts did not exist," *Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 274, 4 L. Ed. 2d 268, 80 S. Ct. 297 (1960)* (Whittaker, J., joined by Stewart, J., concurring in part and dissenting in part). To allow judicial inquiry into

military decisions after those captured have been moved to a "safe" location would interfere with military functions in a manner the APA's exclusion meant to forbid. We acknowledged as much in *Doe v. Sullivan, 291 U.S. App. D.C. 111, 938 F.2d 1370, 1380 (D.C. Cir. 1991)*, when then-Judge Ruth Bader Ginsburg stated for the court that the APA's military function exclusion applied to cases in which a court was asked to "review military commands made ... in the aftermath of [ ] battle." It is also of no moment that the detainees were captured without Congress having declared war against any foreign state. "Time of war," as the APA uses it, is not so confined. The military actions ordered by the President, with the approval of Congress, are continuing; those military actions are part of the war against the al Qaeda terrorist network; and those actions constitute "war," not necessarily as the Constitution uses the word, but as the APA uses it. *See Campbell v. Clinton, 340 U.S. App. D.C. 149, 203 F.3d 19, 29-30 (D.C. Cir. 2000)* (Randolph, J., concurring in the judgment); *Mitchell v. Laird, 159 U.S. App. D.C. 344, 488 F.2d 611, 613 (D.C. Cir. 1973)*. The detainees are right not to contest this point. To hold that it is not "war" in the APA sense when the United States commits its armed forces into combat without a formal congressional declaration of war would potentially thrust the judiciary into reviewing military decision-making in places and times the APA excluded from its coverage.

I would therefore hold that the detainees cannot invoke the APA's waiver of sovereign immunity and that the district court correctly dismissed their claims under the Alien Tort Act for this additional reason.

I would also hold that the judicial review provisions of the APA, including the waiver of sovereign immunity, do not apply because the military decisions challenged here are "committed to agency discretion by law." *5 U.S.C. § 701(a)(2)*. This exclusion applies when "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney, 470 U.S. 821,*

830, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). The military's judgment about how to confine the detainees necessarily depends upon "'a complicated balancing of a number of factors which are particularly within its expertise.'" *Lincoln v. Vigil, 508 U.S. 182, 193, 124 L. Ed. 2d 101, 113 S. Ct. 2024 (1993)* (quoting *Heckler, 470 U.S. at 831*). The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause - these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain. *See Nat'l Fed'n of Fed. Employees v. United States, 284 U.S. App. D.C. 295, 905 F.2d 400, 406 (D.C. Cir. 1990)*; *Schonbrun, 403 F.2d at 375 n.2.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 Consolidated with
Nos. 02-5284, 02-5288
Filed: June 2, 2003

KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Before: GINSBURG, *Chief Judge*, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

ORDER

Upon consideration of appellants' joint petition for rehearing en banc in case No. 02-5284 and No. 02-5288, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 Consolidated with
Nos. 02-5284, 02-5288
Filed: June 2, 2003

KHALED A. F. AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

ORDER

Upon consideration of appellants' joint petition for rehearing in case No. 02-5284 and No. 02-5288, filed April 25, 2003, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
COLUMBIA

SHAFIQ RASUL,
SKINA BIBI, as Next Friend
of Shafiq Rasul, et al.,
Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,
Respondents.

FAWZI KHALID
ABDULLAH FAHAD
AL ODAH, et al.,
Plaintiffs,

v.

UNITED STATES OF
AMERICA, et al.,
Defendants

Civil No. 02-299 (CKK),
Civil No. 02-828 (CKK)

MEMORANDUM OPINION
(July 30, 2002)

I. INTRODUCTION

Presently before the Court are two cases involving the federal government's detention of certain individuals at the United States Naval Base at Guantanamo Bay, Cuba. The question presented to the Court by these two cases is whether aliens held outside the sovereign territory of the United States can use the courts of the United States to pursue claims brought under the United States Constitution. The Court answers that question in the negative and finds that it is without jurisdiction to consider the merits of these two cases. Additionally, as the Court finds that no court would have jurisdiction to hear these actions, the Court shall dismiss both suits with prejudice.

Throughout their pleadings and at oral argument, Petitioners and Plaintiffs contend that unless the Court assumes jurisdiction over their suits, they will be left without any rights and thereby be held *incommunicado*. In response to this admittedly serious concern, the government at oral argument, conceded that "there's a body of international law that governs the rights of people who are seized during the course of combative activities." Transcript of Motion Hearing, June 26, 2002 ("Tr.") at 92. It is the government's position that "the scope of those rights are for the miliary and political branches to determine--and certainly that reflects the idea that other countries would play a role in that process." *Id.* at 91. Therefore, the government recognizes that these aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the claims raised by these aliens.[1] While these two cases provide no

[1] The Court notes that, at least for Petitioner David Hicks in the *Rasul* case, diplomatic efforts by the Australian government have already commenced. First Am. Pet. for Writ of Habeas Corpus ("Am. Pet."), Ex. C., "Affidavit of Stephen James Kenny," Attach. 2 (Letter from Robert Cornall, Australian Attorney-General's Office to Stephen Kenny, counsel

opportunity for the Court to address these issues, the Court would point out that the notion that these aliens could be held *incommunicado* from the rest of the world would appear to be inaccurate.

After reviewing the extensive briefings in these cases, considering the oral arguments of the parties and their oral responses to the Court's questions, and reflecting on the relevant case law, the Court shall grant the government's motion to dismiss in both cases on the ground that the Court is without jurisdiction to entertain these claims.[2]

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for Petitioner Terry Hicks) ("Australia has indicated to the United States that it is appropriate that Mr. Hicks remain in US military custody with other detainees while Australia works through complex legal issues and conducts further investigations. . . . Australian authorities have been granted access to Mr. Hicks and will be granted further access if required.").

[2] In reaching its decision in the *Rasul* case, the Court considered the First Amended Petition for Writ of Habeas Corpus, the Exhibits to the Amended Petition for Writ of Habeas Corpus, the Memorandum in Support of the Amended Petition for Writ of Habeas Corpus, Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus, Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss, and Respondents' Reply in Support of Their Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus. In reaching its decision in the *Odah* case, the Court considered the Amended Complaint, Plaintiffs' Motion for a Preliminary Injunction, Plaintiffs' Request for Expeditious Hearing on Plaintiffs' Motion for a Preliminary Injunction and Supporting Statement of the Facts that Make Expedition Essential, Defendants' Motion to Dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction, Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction, Defendants' Reply in Support of Motion to Dismiss, Plaintiffs' Opposition to Defendants' Motion for Leave to Late File Their Reply In Support of Defendants' Motion to Dismiss and Response to Plaintiffs' Request for Expeditious Hearing, Plaintiffs' Consent Motion for Leave to File Post-Argument Brief Correcting Erroneous Statements by Defense Counsel at Oral Argument, Defendants' Response to Plaintiffs' Post-Argument Brief, and Plaintiffs' Reply to Defendants' Response to Plaintiffs' Post-Argument Brief.

II. PROCEDURAL HISTORY

Petitioners in *Rasul v. Bush*, Civil Action No. 02-299, filed their case on February 19, 2002, and have styled their action as a petition for writ of habeas corpus. Petitioner Shafiq Rasul and Asif Iqbal are citizens of the United Kingdom and are presently held in Respondents' custody at the United States Naval Base at Guantanamo Bay, Cuba. Am. Pet. PP 10, 14. Petitioner David Hicks is an Australian citizen who is also detained by Respondents at the military base at Guantanamo Bay. *Id.* P 5. Also included in the Petition are Skina Bibi, mother of Shafiq Rasul, Mohammed Iqbal, father of Asif Iqbal, and Terry Hicks, father of David Hicks. Petitioners request, *inter alia*, that this Court "order the detained petitioners released from respondents' unlawful custody," "order respondents to allow counsel to meet and confer with the detained petitioners, in private and unmonitored attorney-client conversations," and "order respondents to cease all interrogations of the detained petitioners, direct or indirect, while this litigation is pending." Am. Pet., Prayer for Relief, PP 4-6.

Plaintiffs in *Odah v. United States*, Civil Action No. 02-828, filed their action on May 1, 2002. The *Odah* case involves the detention of twelve Kuwaiti nationals who are currently being held in the custody of the United States at the United States Naval Base at Guantanamo Bay, Cuba. Am. Compl. at 4. The action is concurrently brought by twelve of their family members who join the suit and speak on behalf of the individuals in United States custody. *Id.* Unlike Petitioners in *Rasul*, the *Odah* Plaintiffs disclaim that their suit seeks release from confinement. Rather, Plaintiffs in *Odah* ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access

to the courts or some other impartial tribunal." *Id.* P 40.[3] Plaintiffs' Amended Complaint contains three counts. First, Plaintiffs contend that Defendants' conduct denies the twelve Kuwaiti nationals due process in violation of the Fifth Amendment to the Constitution. *Id.* P 37. Second, Plaintiffs argue that Defendants' actions violate the Alien Tort Claims Act, *28 U.S.C. § 1350. Id.* P 38. Lastly, Plaintiffs allege that

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[3] After full briefing and oral argument on Defendants' Motion to Dismiss in the *Odah* case, Plaintiffs filed an Amended Complaint, which they filed as of right pursuant to Rule 15 of the Federal Rules of Civil Procedure. In a conference call with the Court, Plaintiffs represented that there were three specific differences between the Amended Complaint and the original Complaint. First, the Amended Complaint added two new plaintiffs to the action, a Kuwaiti national held at the military base at Guantanamo Bay and a member of his family who brings the suit on his behalf. Originally, there had only been twenty-two Plaintiffs. *Compare* Compl. PP 3, 4, *with* Am. Compl. PP 3, 4. Second, Plaintiffs abandoned their request that the Court order Defendants to turn Plaintiffs, held at the military base at Guantanamo Bay, over to the Kuwaiti government. Compl. P 44. Third, Plaintiffs made an effort to clarify the four specific requests for relief that they seek in this case. *Compare* Compl. P 42, *with* Am. Compl. P 40.

Ordinarily, when the Court receives an amended complaint after a defendant files a motion to dismiss, it denies the motion to dismiss without prejudice and requests that the defendant re-file the motion based on the allegations presented in the amended complaint. In this case, based on the Court's review of the Amended Complaint, it appears that such a procedure would be a useless exercise since the legal theories underlying Defendants' present motion to dismiss will not be affected by the filing of the Amended Complaint. Defendants agree with the Court and contend that the amendments will not impact upon the Court's ruling on the motion to dismiss. Accordingly, the Court will apply Defendants' motion to dismiss to Plaintiffs' Amended Complaint. *See Nix v. Hoke, 62 F. Supp. 2d 110, 115 (D.D.C. 1999)* (citing cases); *see also* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1476 (2d ed. 1990) ("Defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading. To hold otherwise would be to exalt form over substance.").

Defendants' conduct constitutes arbitrary, unlawful, and unconstitutional behavior in violation of the Administrative Procedure Act, *5 U.S.C. § § 555,* 702, 706. *Id.* P 39.

In the *Rasul* case, Respondents moved to dismiss the First Amended Petition for Writ of Habeas Corpus on March 18, 2002. This motion was fully briefed on April 29, 2002. On May 1, 2002, the *Odah* case was filed and Plaintiffs designated it as related to the *Rasul* matter. Thus, *Odah* was assigned to this Court. Plaintiffs in *Odah* moved for a preliminary injunction at the time they filed their suit. Instead of filing a memorandum in opposition to the motion for preliminary injunction, Defendants in the *Odah* case moved to dismiss the action. That motion was fully briefed on June 14, 2002.[4]

At the time the Court received the motion to dismiss in the *Odah* matter, it became obvious to the Court that the government was moving to dismiss both cases primarily on jurisdictional grounds. Accordingly, the Court found it

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[4] The Court's initial briefing schedule in the *Odah* case did not contemplate that Defendants would be moving to dismiss the entire action. Rather the Court's briefing schedule set forth a date for Defendants to respond to Plaintiffs' motion for preliminary injunction. *Odah v. United States*, Civ. No. 02-828 (D.D.C. May 14, 2002) (order setting forth briefing schedule). Instead of filing an opposition to the motion for a preliminary injunction, on the date that their opposition to the preliminary injunction was due, Defendants moved to dismiss the entire case (and, by inference, the motion for preliminary injunction). Plaintiffs filed a timely opposition to Defendant's motion. Defendants then filed a reply, which Plaintiffs argued was inappropriate since the Court's initial briefing schedule did not set a date for Defendants to file a reply. However, when the Court set the initial briefing schedule, it was only concerned with receiving a response to the motion for preliminary injunction. Defendants were clearly within their right to move for dismissal of the entire action, which would permit them the opportunity to file a reply to their motion to dismiss. Although Defendants filed their reply late, the Court shall grant them leave to file the reply. To the extent that Plaintiffs' opposition to Defendants' filing of a reply brief responds to new issues first raised in Defendants' reply, the Court shall consider Plaintiffs' response as a surreply to Defendants' motion to dismiss.

appropriate to make a threshold ruling on the jurisdictional question in both cases before conducting any further proceedings. Mindful of the importance of these suits, which raise concerns about the actions of the Executive Branch, the Court heard oral argument on the government's motion to dismiss in both cases on June 26, 2002.

III. FACTUAL BACKGROUND[5]

A. Rasul v. Bush

Little is known about Petitioner David Hicks except that he was allegedly living in Afghanistan at the time of his seizure by the United States Government. Am. Pet. P 22. As for Petitioner Rasul, in the summer of 2001, he allegedly took a hiatus from studying for his computer engineering degree to travel. *Id.* P 24. Allegedly, Petitioner Rasul's brother convinced him to move to Pakistan "to visit relatives and explore his culture." *Id.* Petitioner Rasul left the United Kingdom after September 11, 2001, and allegedly traveled to Pakistan solely to attempt to continue his education at less expense than it would cost to take similar courses in the United Kingdom. *Id.* Petitioner Rasul allegedly stayed with an Aunt in Lahore, Pakistan before engaging in further travel within that country. *Id.* Allegedly, forces fighting against the United States captured and kidnapped Petitioner Rasul after he left Lahore. *Id.*

As for Petitioner Iqbal, it is alleged that in July of 2001, his family arranged for him to marry a woman living in the same village in Pakistan as Petitioner Iqbal's father. *Id.* P 23. After September 11, 2001, Petitioner Iqbal left the United Kingdom and allegedly traveled to Pakistan solely for the purpose of getting married. *Id.* In early October of 2001,

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[5] For purposes of the instant motions to dismiss, the allegations of the Amended Petition/Amended Complaint are taken as true. The facts in this section are presented accordingly, and do not constitute factual findings by this Court.

shortly before the marriage, Petitioner Iqbal's father allegedly allowed Petitioner Iqbal to leave the village briefly. *Id.* After leaving the village, forces working in opposition to the United States allegedly captured Petitioner Iqbal. *Id.*

Petitioners Rasul, Iqbal, and Hicks were picked up in a region of the world where the United States is actively engaged in military hostilities authorized by a Joint Resolution of the United States Congress, passed on September 18, 2001, in wake of the September 11, 2001, terrorist attacks. The Joint Resolution authorizes the President to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (cited in Am. Pet. P 25). In the course of the military campaign authorized by the Joint Resolution, the United States attacked the Taliban, the ruling government of Afghanistan. Am. Pet. P 25. While seeking to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, "a loosely knit coalition of Afghani and other military groups opposed to the Taliban Government." *Id.* P 26.

The Northern Alliance captured Petitioner David Hicks in Afghanistan and transferred custody of him to the United States on December 17, 2001. *Id.* P 27. The precise circumstances surrounding Petitioner Rasul's and Petitioner Iqbal's capture are unknown. However, they appear to have

been transferred to United States control in early December of 2001. *Id.* P 28.

It is alleged in the Amended Petition that at no time did any of the Petitioners in United States custody voluntarily join any terrorist force. *Id.* P 30.[6] n6 Additionally, if any of the Petitioners in United States custody "ever took up arms in the Afghani struggle, it was only on the approach of the enemy, when they spontaneously took up arms to resist the invading forces, without having had time to from themselves into regular armed units, and carrying their arms openly and respecting all laws and customs of war." *Id.* Additionally, it is alleged in the Amended Petition that if Petitioners Rasul, Iqbal, and David Hicks were in Afghanistan prior to being captured, "it was in order to facilitate humanitarian assistance to the Afghani people." *Id.* P 31. Furthermore, these Petitioners allegedly "have taken no step that was not fully protected as their free exercise of their religious and personal beliefs." *Id.*

B. *Odah v. United States*

The twelve Kuwaiti nationals in the *Odah* case, who are in United States custody at the military base at Guantanamo Bay, were in Afghanistan and Pakistan, some before and some after, September 11, 2001. Am. Compl. P 14. These

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[6] While denying a role in any terrorist activity, Petitioners in their Amended Petition for Writ of Habeas Corpus conspicuously neglect to deny that they took up arms for the Taliban. In fact, in an exhibit attached to the Amended Petition, Petitioner Terry Hicks, who has brought this suit on behalf of his son, indicates that his son had joined the Taliban forces. Am. Pet., Ex. C., "Affidavit of Stephen James Kenny," Attach. 8 (Letter from Stephen Kenny, counsel for Petitioner Terry Hicks to Respondent Bush) ("It is our client's understanding that his son subsequently joined the Taliban forces and on 8 December 2001 was captured by members of the Northern Alliance."). Interestingly, this fact has been omitted from the text of the Amended Petition, but can be found only by a careful reading of an exhibit attached to the Amended Petition. *Id.*

individuals were allegedly in those countries as volunteers for charitable purposes to provide humanitarian aid to the people of those countries. *Id.* The government of Kuwait allegedly supports such volunteer service by continuing to pay the salaries of its Kuwaiti employees while they engage in this type of volunteer service abroad. *Id.*

According to the Amended Complaint, none of those held in United States custody are, or have ever been, a combatant or belligerent against the United States, or a supporter of the Taliban or any terrorist organization. *Id.* P 15. Villagers seeking bounties or other promised financial rewards allegedly seized the twelve Kuwaiti Plaintiffs against their will in Afghanistan or Pakistan. *Id.* P 16. Subsequently these twelve Plaintiffs were transferred into the custody of the United States. *Id.* At various points in time, beginning in January of 2002, these twelve Plaintiffs were transferred to Guantanamo Bay. *Id.* PP 19-21.[7]

IV. LEGAL STANDARD DISTRICT COURTS USE IN EVALUATING MOTIONS TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

In both matters before the Court, the government has moved to dismiss on jurisdictional grounds. Before a federal court can hear a case, it must ascertain that it has jurisdiction over the underlying subject matter of the action. *Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)* ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.").

Motions to dismiss for lack of jurisdiction over the subject matter of the action are proper under Federal Rule of Civil Procedure 12(b)(1). In the Rule 12(b)(1) context, the plaintiff bears the burden of proving jurisdiction. *McNutt v.*

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[7] It has not been confirmed that Plaintiff Mohammed Funaitel Al Dihani is currently in custody at Guantanamo Bay. Am. Compl. P 21.

General Motors Acceptance Corp., 298 U.S. 178, 182-83, 80 L. Ed. 1135, 56 S. Ct. 780 (1936). In both matters, the government challenges the actual complaint (and/or petition) itself, without relying on matters outside the pleadings. *See generally Hohri v. United States, 251 U.S. App. D.C. 145, 782 F.2d 227, 241 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64, 96 L. Ed. 2d 51, 107 S. Ct. 2246 (1987)* (explaining that materials *aliunde* pleadings can be considered on a Rule 12(b)(1) motion). One commentator has referred to this type of motion as a "facial challenge" to a complaint, because a district court is not asked to review documents outside the pleadings. 2 James Wm. Moore et al., *Moore's Federal Practice*, § 12.30[4], at 39 (3rd ed. 2002) ("A facial attack questions the sufficiency of the pleading."). As both motions to dismiss before the Court present such "facial challenges," the Court must accept all of the Amended Petition's/Amended Complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in Petitioners'/Plaintiffs' favor. *United Transp. Union v. Gateway Western R.R., 78 F.3d 1208, 1210 (7th Cir. 1996) (citing Rueth v. EPA, 13 F.3d 227, 229 (7th Cir. 1993)).*[8]

V. DISCUSSION

A. Alien Tort Statute and Administrative Procedure Act Claims

1. Rasul v. Bush

The Amended Petition for a Writ of Habeas Corpus in the *Rasul* action states that "Petitioners bring this action under *28 U.S.C. § § 2241* and 2242, and invoke this Court's

[8] Notably, there are a few attachments to the Amended Petition for Writ of Habeas Corpus which the Court cites in this Memorandum Opinion. The Court does not consider these matters to be outside the pleadings because they were attached as exhibits to the Amended Petition.

jurisdiction under *28 U.S.C. § § 1331,* 1350, 1651, 2201, and 2202, *5 U.S.C. § 702;* as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration on the Rights and Duties of Man ("ADRDM"), and Customary International Law." Am. Pet. P 2. While Petitioners seek to invoke this Court's jurisdiction under a host of separate provisions, the suit is *brought* explicitly as a petition for writs of habeas corpus pursuant to *28 U.S.C. § § 2241* and 2242.

It has long been held that challenges to an individual's custody can only be brought under the habeas provisions. *See Chatman-Bey v. Thornburgh, 274 U.S. App. D.C. 398, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc)* ("Habeas is . . . 'a fundamental safeguard against unlawful custody.'") (quoting Justice Harlan's dissent in *Fay v. Noia, 372 U.S. 391, 449, 9 L. Ed. 2d 837, 83 S. Ct. 822, 24 Ohio Op. 2d 12 (1963)); Monk v. Secretary of the Navy, 253 U.S. App. D.C. 293, 793 F.2d 364, 366 (D.C. Cir. 1986)* ("In adopting the federal habeas corpus statute, Congress determined that habeas corpus is the appropriate federal remedy for a prisoner who claims that he is 'in custody in violation of the Constitution . . . of the United States.'") (quoting *28 U.S.C. § 2241* (c)(3)). As Petitioners seek to be "released from respondents' unlawful custody," the Court can consider this case only as a petition for writs of habeas corpus and not as an action brought pursuant to the Alien Tort Statute, *28 U.S.C. § 1350,* or any of the other jurisdictional bases suggested in the Amended Petition. The exclusive means for securing the relief Petitioners seek is through a writ of habeas corpus.

2. *Odah v. United States*

Seeking to avoid having the Court consider their case as a petition for writ of habeas corpus, Plaintiffs in *Odah*

disclaim any desire to be released from confinement. Am. Compl. at 4. In fact, Plaintiffs have filed an Amended Complaint that eliminates an earlier request that this Court consider transferring the twelve Kuwaiti detainees to Kuwait. By eliminating this request, Plaintiffs endeavor to distance themselves from anything that might be construed as an effort to seek their release from United States custody. Instead, Plaintiffs in *Odah* ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." Am. Compl. P 40.

While purporting not to seek release from confinement, Plaintiffs in their Amended Complaint plainly challenge the lawfulness of their custody. The Supreme Court has held that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody." *Preiser v. Rodriguez, 411 U.S. 475, 484, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973).* As the United States Court of Appeals for the District of Columbia Circuit stated in *Chatman-Bey*, "as previously suggested, the modern habeas cases teach, broadly, that habeas is designed to test the lawfulness of the government's asserted right to *detain* an individual." *Chatman-Bey, 864 F.2d at 809* (emphasis in original); *see also Razzoli v. Federal Bureau of Prisons, 343 U.S. App. D.C. 357, 230 F.3d 371, 373 (D.C. Cir. 2000)* ("We adhere to *Chatman-Bey*: for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody.").

In the present case, Plaintiffs' fourth request for relief squarely challenges the validity of Plaintiffs' detention. Plaintiffs seek to have "access to the courts or some other impartial tribunal." Am. Compl. P 40. Elaborating on this request, Plaintiffs have told the Court that they seek access to an impartial tribunal in order to "expeditiously establish their

innocence and be able to return to Kuwait and their families." Pls.' Mem. of P. & A. in Supp. of Mot. for a Prelim. Inj. ("Pls.' Mem.") at 2. Without question, this prayer for relief is nothing more than a frontal assault on their confinement. While Plaintiffs in this case state that they do not seek immediate release, neither did the plaintiffs in *Chatman-Bey* or *Monk*. Nevertheless, the District of Columbia Circuit in both of those cases found that the federal habeas statute was the only lawful way for the petitioners to challenge their confinement. *Chatman-Bey, 864 F.2d at 809; Monk, 793 F.2d at 366.* In the *Odah* case, Plaintiffs seek to be presented immediately before a court to exonerate themselves "expeditiously." This type of claim is within the exclusive province of the writ of habeas corpus.[9]

The other provisions of Plaintiffs' request for relief, namely that they be permitted to "meet with their families," "be informed of the charges, if any, against them," and "designate and consult with counsel of their choice," Am. Compl. P 40, are directly related to their request to be brought before a court which would determine the extent of their entitlement to rights. Plaintiffs cannot escape having the Court convert their action into writs for habeas corpus by adding these three additional requests for relief.

Plaintiffs argue that they merely seek to challenge the *conditions* of their confinement relying principally on *Gerstein v. Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975).* Pls.' Opp'n to Defs.' Mot. to Dismiss Pls.' Compl. and Mot. for a Prelim. Inj. ("Pls.' Opp'n") at 19-20. The Supreme Court in *Gerstein* found that, pursuant to *42 U.S.C. § 1983,* a declaratory judgment action against state officials was a permissible means to address whether a person arrested and held for trial under a prosecutor's

[9] Plaintiffs cite to the habeas statutes as a basis for the Court's jurisdiction over their claims. Am. Compl. P 1. Even though Plaintiffs have disavowed that their action is one sounding in habeas, the *Amended* Complaint continues to rely on the habeas statutes to provide this Court with jurisdiction.

information was constitutionally entitled to a probable cause hearing before a judge. *Gerstein, 420 U.S. at 107 n.5.* Thus, the Supreme Court concluded that such an action did not need to be filed as a habeas petition. *Id.* n.6 ("Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination.").

There are clear differences between the claims presented in *Odah* and those addressed by the Court in *Gerstein.* As the Third Circuit has noted, "In *Gerstein v. Pugh*, the constitutional validity of a method of pretrial procedure, *rather than its application to any particular case, was the focus of the challenge." Tedford v. Hepting, 990 F.2d 745, 749 (3d Cir. 1993)* (emphasis added). The *Gerstein* Court recognized that the pretrial custody of the named plaintiffs had long since expired. *Gerstein, 420 U.S. at 110 n.11.* Accordingly, the claims the *Gerstein* Court addressed were focused on the constitutional adequacy of a pretrial procedure as it existed in the abstract. Plaintiffs in *Odah*, on the other hand, each seek a hearing on the merits of their individualized detentions.

In addition, Plaintiffs have not brought a declaratory judgment action seeking to invalidate some procedure that would not impact the duration of their confinement. The issue in *Odah* is Plaintiffs' desire to have a hearing before a neutral tribunal. For such a claim, a petition for writ of a habeas corpus is the exclusive avenue for relief.[10] Thus, as it

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[10] Plaintiffs' citation to *Brown v. Plaut* is similarly unavailing. Pls.' Opp'n at 20 (citing *Brown v. Plaut, 327 U.S. App. D.C. 313, 131 F.3d 163 (D.C. Cir. 1997)).* The *Brown* case involved a prisoner's challenge to a decision to place him in administrative segregation. The Court of Appeals held that such action did not have to be brought as a petition for writ of habeas corpus. *131 F.3d at 167.* In that case, the appellate panel observed that the Supreme Court "has never deviated from *Preiser*'s clear line between challenges to the fact or length of custody and challenges to the conditions of confinement." *131 F.3d at 168.* Plaintiffs' broad request to be produced before a tribunal is obviously a challenge "to the fact . . . of custody." *Id.* Accordingly, *Brown* does not apply to this case.

does in *Rasul*, the Court shall review the jurisdictional basis of the *Odah* case as if it were styled as a petition for writ of habeas corpus.[11]

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[11] Alternatively, the Court notes that in order for the government to be sued under the Alien Tort Statute, the government must waive its sovereign immunity. *FDIC v. Meyer, 510 U.S. 471, 475, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)* ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Plaintiffs argue that Section 702 of the Administrative Procedure Act provides such a waiver. Pls.' Opp'n at 24 (citing *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 207 (D.C. Cir. 1985)* (Scalia, J.) (stating that while the Alien Tort Statute does not provide a waiver of sovereign immunity, "with respect to claims against federal [officials] for *nonmonetary* relief . . . the waiver of the Administrative Procedure Act . . . is arguably available") (emphasis in original)).

Assuming that Section 702 of the Administrative Procedure Act provides a waiver, the Court finds that the actions of the government in this case would be exempt by *5 U.S.C. § 701*(b)(1)(G) (providing an exemption for, "military authority exercised in the field in time of war or in occupied territory"). Cases that have analyzed Section 701(b)(1)(G) have had occasion to address it only in the context of "judicial interference with the relationship between soldiers and their military superiors." *Doe v. Sullivan, 291 U.S. App. D.C. 111, 938 F.2d 1370, 1380 (D.C. Cir. 1991).* Despite the absence of pertinent case law, the language of Section 701(b)(1)(G) supports the view that this Court is unable to review the claim Plaintiffs make under the Administrative Procedure Act. There is no dispute that Plaintiffs were captured in areas where the United States was (and is) engaged in military hostilities pursuant to the Joint Resolution of Congress. Am. Compl. P 16 ("the Kuwaiti Detainees were seized against their will in Afghanistan or Pakistan"). This situation plainly falls within Section 701(b)(1)(G).

The Court was unable to find any material in the legislative history that addressed Section 701(b)(1)(G) of the Administrative Procedure Act, *see, e.g.*, S. Rep. No. 89-1350, at 32-33 (1966); H.R. Rep. No. 89-901, at 16 (1965), and the parties have not provided any legislative history, that would change the Court's view of this provision. Furthermore, granting Plaintiffs relief under the Administrative Procedure Act would produce a bizarre anomaly: United States soldiers would be unable to use the courts of the United States to sue about events arising on the battlefield, while aliens, with no connection to the United States, could sue their United States military captors while hostilities continued. Such an outcome defies common sense.

B. The Ability of Courts to Entertain Petitions for Writs of Habeas Corpus Made By Aliens Held Outside the Sovereign Territory of the United States

The Court, therefore, considers both cases as petitions for writs of habeas corpus on behalf of aliens detained by the United States at the military base at Guantanamo Bay, Cuba. In viewing both cases from this perspective, the Court concludes that the Supreme Court's ruling in *Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950),* and its progeny, are controlling and bars the Court's consideration of the merits of these two cases. The Court shall briefly provide an overview of the *Eisentrager* decision, discuss the distinction in *Eisentrager* between the rights of citizens and aliens, analyze whether *Eisentrager* applies only to enemy aliens, and lastly, discuss the meaning of the concept of "sovereign territory" as presented in *Eisentrager.*

1. *Johnson v. Eisentrager*

The *Eisentrager* case involved a petition for writs of habeas corpus filed by twenty-one German nationals in the United States District Court for the District of Columbia. *Eisentrager, 339 U.S. at 765.* The prisoners in *Eisentrager* had been captured in China for engaging in espionage against the United States following the surrender of Germany, but before the surrender of Japan, at the end of World War II. *Id. at 766.* Since the United States was at

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Accordingly, even if the Court did not treat the *Odah* case as a petition for writs of habeas corpus, Count III, brought pursuant to the Administrative Procedure Act, fails because the actions complained of by Plaintiffs are exempt pursuant to *5 U.S.C. § 701*(b)(1)(G). Additionally, as Plaintiffs have not set forth another basis for the government's waiver of its sovereign immunity outside the Administrative Procedure Act, Count II brought pursuant to the Alien Tort Statute would be subject to dismissal.

peace with Germany, the actions of the *Eisentrager* petitioners violated the laws of war. *Id.* Following a trial and conviction by a United States military commission sitting in China, with the express permission of the Chinese government, the prisoners were repatriated to Germany to serve their sentences at Landsberg Prison. *Id.* Their immediate custodian at Landsberg Prison was a United States Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. *Id.*

The district court dismissed the petition for want of jurisdiction. *Id. at 767.* An appellate panel reversed the decision of the district court and remanded the case for further proceedings. *See Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961 (D.C. Cir. 1949).* In an opinion by Judge E. Barrett Prettyman, the Court of Appeals for the District of Columbia Circuit held that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *174 F.2d at 963.*

A divided panel of the Supreme Court reversed the decision of the District of Columbia Circuit and affirmed the judgment of the district court. *Eisentrager, 339 U.S. at 791.* In finding that *no* court had jurisdiction to entertain the claims of the German nationals, the Supreme Court, in an opinion by Justice Robert Jackson, found that a court was unable to extend the writ of habeas corpus to aliens held outside the sovereign territory of the United States. *Id. at 778.*

2. The Critical Distinction Between Citizens and Aliens

Justice Jackson began his opinion by noting the legal differences between citizens and aliens, and between friendly aliens and enemy aliens. *Id. at 769.* Noting that citizenship

provides its own basis for jurisdiction, Justice Jackson observed that "citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar." *Id.* Such protections, Justice Jackson noted, also apply to an individual seeking a fair hearing on his or her claim to citizenship. *Id. 769-70* (citing *Chin Yow v. United States, 208 U.S. 8, 52 L. Ed. 369, 28 S. Ct. 201 (1908)).*

In the case of the alien, Justice Jackson wrote that "the alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.* at 770. For example, presence within the country provides an alien with certain rights that expand and become more secure as he or she declares an intent to become a citizen, culminating in the full panoply of rights afforded to the citizen upon the alien's naturalization. *Id.* In extending constitutional protections beyond the citizenry, Justice Jackson noted that the Supreme 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." *Id.* at 771. Justice Jackson's sentiment is borne out by the case law. Courts of the United States have exercised jurisdiction in cases involving individuals seeking to prove their citizenship, *Chin Yow, 208 U.S. at 13 (1908)* (habeas action permitted for one seeking admission to the country to assure a hearing on his claims to citizenship), or in situations where aliens held in a port of the United States sought entry into the country, *Nishimura Ekiu v. United States, 142 U.S. 651, 660, 35 L. Ed. 1146, 12 S. Ct. 336 (1892)* ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."). In the cases at bar it is undisputed that the individuals held at Guantanamo Bay do not seek to become citizens. Nor have Petitioners or Plaintiffs suggested that they have ever been to

the United States or have any desire to enter the country. Petitioners and Plaintiffs do not fall into any of the categories of cases where the courts have entertained the claims of individuals seeking access to the country.

3. Does the *Eisentrager* Opinion Apply Only to "Enemy" Aliens?

Justice Jackson continued his analysis in *Eisentrager* by noting that enemy aliens captured incident to war do not have even a qualified access to the courts of the United States as compared to an alien who has lawful residence within the United States. *Eisentrager, 339 U.S. at 776* ("The nonresident enemy alien, especially one who has remained in the service of the enemy, does not have . . . this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."); *id.* (quoting *Clarke v. Morey, 10 Johns. 69, 72 (N.Y. Sup. Ct. 1813)* ("A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.")). Petitioners in *Rasul* and Plaintiffs in *Odah* argue that the determination by the military commission in China that the petitioners in *Eisentrager* were enemy aliens is fatal to the government's reliance on *Eisentrager*. Pet'rs Mem. in Opp'n to Resp'ts Mot. to Dismiss ("Pet'rs Opp'n") at 12; Pls.' Opp'n at 6-7. Insisting that no determination has been made about the aliens presently held by the government at Guantanamo Bay, Plaintiffs and Petitioners argue that the holding in *Eisentrager* is inapplicable to the instant cases.

To the contrary, the Supreme Court's conclusion in *Eisentrager*, that the district court was without jurisdiction to consider the petition for writs of habeas corpus on behalf of the twenty-one German nationals, did not hinge on the fact that the petitioners were enemy aliens, but on the fact that

they were aliens outside territory over which the United States was sovereign. The Supreme Court held:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the 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 sences of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

Id. at 777-78. In fact, the Supreme Court has consistently taken the position that *Eisentrager* does not apply only to those aliens deemed to be "enemies" by a competent tribunal. *See Zadvydas v. Davis, 533 U.S. 678, 693, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001)* (Breyer, J.); *United States v. Verdugo-Urquidez, 494 U.S. 259, 270, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990)* (Rehnquist, C.J.). These later Supreme Court cases reinforce the conclusion that there is no meaningful distinction between the cases at bar and the *Eisentrager* decision on the mere basis that the petitioners in *Eisentrager* had been found by a military commission to be "enemy" aliens.[12]

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[12] The government has encouraged this Court to take "judicial notice" that these individuals are "enemy combatants." Tr. 9-10. In reviewing this case, the Court has taken the allegations in the Amended Petition and Amended Complaint as true as required by Rule 12(b)(1). Petitioners and Plaintiffs allege that the individuals held at Guantanamo Bay were initially taken into custody and detained in Afghanistan and Pakistan where military hostilities were in progress. Am. Pet. PP 22-24; Am. Compl. P 16. David Hicks, who had joined the Taliban, *see supra* note 6, arguably may be appropriately considered an "enemy combatant." The paucity, ambiguity, and contradictory information provided by the Amended Petition and the Amended Complaint about Petitioners Rasul

In *Zadvydas*, the Court cited *Eisentrager* for the proposition that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas, 533 U.S. at 693* (discussing also that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). In *Verdugo-Urquidez*, the Court quoted a passage from *Eisentrager* for the proposition that the Supreme Court has emphatically rejected "extraterritorial application of the Fifth Amendment." *Verdugo-Urquidez, 494 U.S. at 269.* The Court of Appeals for the District of Columbia Circuit has taken a similarly broad view of *Eisentrager. Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 605 (D.C. Cir. 2000), rev'd on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002)* (observing that the Supreme Court's citation to *Eisentrager* in *Verdugo-Urquidez* was binding, and expressing its view that extraterritorial application of the Fifth Amendment was not available for aliens).

If there exists any doubt as to the sweeping nature of the holding in *Eisentrager*, the dissent in that opinion clearly crystallizes the extent of the decision. Justice Douglas, writing for himself and two other Justices, stated:

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and Iqbal and the twelve Kuwaiti Plaintiffs held at the military base at Guantanamo Bay prevents the Court from likewise concluding that these individuals were engaged in hostilities against the United States, or were instead participating in the benign activities suggested in the pleadings. While another court with apparently the same factual record has labeled, without explanation, the individuals held at Guantanamo Bay "enemy combatants," *Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1048 (C.D. Cal. 2002),* this Court on the record before it, declines to take that step because taking judicial notice of a fact requires that the fact be "not subject to reasonable dispute." Fed. R. Evid. 201.

> If the [majority's] opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle. . . . The Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.

Eisentrager, 339 U.S. at 795-96 (Douglas, J., dissenting). Thus, even Justice Douglas noted that according to the majority's opinion in *Eisentrager*, the Great Writ had no extraterritorial application to aliens.

Accordingly, the Court finds that *Eisentrager* is applicable to the aliens in these cases, who are held at Guantanamo Bay, even in the absence of a determination by a military commission that they are "enemies."[13] While it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, *id. at 766,* the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.

In sum, the *Eisentrager* decision establishes a two-dimensional paradigm for determining the rights of an individual under the habeas laws. If an individual is a citizen

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[13] The United States confronts an untraditional war that presents unique challenges in identifying a nebulous enemy. In earlier times when the United States was at war, discerning "the enemy" was far easier than today. "In war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy.'" *Eisentrager 339 U.S. at 772* (quoting *The Rapid, 8 Cranch 155, 161 (1814)).* The two cases at bar contain nationals from three friendly countries at peace with the United States, demonstrating the difficulty in determining who is the "enemy."

or falls within a narrow class of individuals who are akin to citizens, i.e. those persons seeking to prove their citizenship and those aliens detained at the nation's ports, courts have focused on situs and have not been as concerned with the status of the individual. However, if the individual is an alien without any connection to the United States, courts have generally focused on the location of the alien seeking to invoke the jurisdiction of the courts of the United States. If an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution. Given that *Eisentrager* applies to the aliens presently detained at the military base at Guantanamo Bay, the only question remaining for the Court's resolution is whether Guantanamo Bay, Cuba is part of the sovereign territory of the United States.

4. Is Guantanamo Bay Part of the Sovereign Territory of the United States?

The Court in *Eisentrager* discusses the territory of the United States in terms of sovereignty. *Id.* at 778 ("for these prisoners at no relevant time were within any territory over which the United States is sovereign"). It is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States.[14] Thus, the only

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[14] The United States occupies Guantanamo Bay under a lease entered into with the Cuban government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418. The lease provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and

question remaining for resolution is whether this fact alone is an absolute bar to these suits, or whether aliens on a United States military base situated in a foreign country are considered to be within the territorial jurisdiction of the United States, under a *de facto* theory of sovereignty.

Petitioners and Plaintiffs assert that the United States has *de facto* sovereignty over the military base at Guantanamo Bay, and that this provides the Court with the basis needed to assert jurisdiction. Pet'rs Opp'n at 21; Pls.' Opp'n at 11. In other words, Petitioners and Plaintiffs argue that even if the United States does not have *de jure* sovereignty over the military facility at Guantanamo Bay, it maintains *de facto* sovereignty due to the unique nature of the control and jurisdiction the United States exercises over this military base. According to Petitioners and Plaintiffs, if the United States has *de facto* sovereignty over the military facility at Guantanamo Bay, then *Eisentrager* is inapplicable to their cases and the Court is able to assume jurisdiction over their claims. However, the cases relied on by Petitioners and Plaintiffs to support their thesis are belied not only by *Eisentrager*, which never qualified its definition of sovereignty in such a manner, but also by the very case law relied on by Petitioners and Plaintiffs.

At oral argument, when asked for a case that supported the view that *de facto* sovereignty would suffice to provide the Court with jurisdiction, both Petitioners and Plaintiffs directed the Court to *Ralpho v. Bell, 186 U.S. App. D.C. 368, 569 F.2d 607 (D.C. Cir. 1977).* Tr. at 33, 62-63. The *Ralpho* case involves a claim brought under the Micronesian Claims Act of 1971, which was enacted by the United States

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> control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Id. As is clear from this agreement, the United States does not have sovereignty over the military base at Guantanamo Bay.

Congress to establish a fund to compensate Micronesians for losses incurred during the hostilities of World War II. *Ralpho, 569 F.2d at 611.* The plaintiff in that case, a citizen of Micronesia, argued that the Micronesian Claims Commission, established by the Act to adjudicate settlement claims, violated his due process rights by relying on secret evidence in deciding his claim. *Id.* at 615. While the United States did not have sovereignty over Micronesia, the District of Columbia Circuit found that the plaintiff was entitled to the protections of the due process clause. *Id.* at 618-19.

Petitioners and Plaintiffs have seized upon this case as an example of a court granting an alien due process rights in a geographic area where the United States was not sovereign. Petitioners and Plaintiffs contend that if the plaintiff in *Ralpho* was able to secure constitutional rights in an area where the United States was not sovereign, constitutional rights are arguably available to aliens located in places where the United States is the *de facto* sovereign. The problem for Petitioners and Plaintiffs is that *Ralpho* does not stand for the proposition that a court can grant constitutional rights over a geographical area where *de facto* sovereignty is present. Rather, *Ralpho* stands for a limited extension of the uncontested proposition that aliens residing in the sovereign territories of the United States are entitled to certain basic constitutional rights.

As the Court of Appeals explained in *Ralpho*, "that the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories." *Id.* After this observation, the *Ralpho* Court quoted the remarks of the United States Representative to the United Nations Security Council Meeting that considered whether to award trusteeship to the United States: "My government feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign

territory." *Id.* n.72 (internal citation omitted). Additionally, when the United States was appointed by the United Nations to administer Micronesia as a trust territory, no other nation had sovereignty over Micronesia, and the United States had "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of [the trust] agreement." Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, art. 3; *id.*, preamble (noting that "Japan, as a result of the Second World War, has ceased to exercise any authority in these islands").

As clearly set forth in the case, the *Ralpho* Court treated Micronesia as the equivalent of a United States territory, such as Puerto Rico or Guam. In fact, *Ralpho* relies solely on the cases establishing constitutional rights for persons living in the territories of the United States as support for the view that the plaintiff located in Micronesia was deserving of certain due process rights. *Ralpho, 569 F.2d at 619 n.70* (citing, *inter alia, Balzac v. Porto Rico, 258 U.S. 298, 313, 66 L. Ed. 627, 42 S. Ct. 343 (1922)).* The *Balzac* case, which predates *Eisentrager*, stands for the proposition that the limits of due process apply to the sovereign territories of the United States. *Balzac, 258 U.S. at 313; id at 312* ("The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or [Puerto] Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.")[15]

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[15] In *Harbury*, the Court of Appeals referred to *Balzac* as a situation where foreign nationals were under "de facto U.S. political control." *Harbury, 233 F.3d at 603.* This phrase does not imply that in situations where "*de facto* sovereignty" might arguably be present, constitutional rights are available to aliens. In making this statement, the Court of

Thus, the Court in *Ralpho* analogized the situation before it to those cases granting constitutional rights to the peoples of United States territories, even though the trust agreement with the United Nations did not provide for sovereignty over Micronesia. *Ralpho, 569 F.2d at 619 n.71.* The cases involving the territories of the United States, relied on by the *Ralpho* Court, are fundamentally different from the two cases presently before the Court. The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base. Accordingly, the Court is hard-pressed to adopt Petitioners' and Plaintiffs' view that the holding in *Ralpho* favors their claims.

In fact, another district court considering whether a *de facto* sovereignty test should be used to analyze claims occurring at the military base at Guantanamo Bay flatly rejected the idea. *Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996).* In *Bird*, a plaintiff alleged a misdiagnosis of a

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Appeals cited to two cases involving Puerto Rico, *Examining Bd. of Eng'rs., Architects & Surveyors v. Otero, 426 U.S. 572, 599 n.30, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976)* and *Balzac, 258 U.S. at 312-13,* and another case involving a special court of the United States that was held in Berlin, *United States v. Tiede, 86 F.R.D. 227, 242-44 (U.S. Ct. Berlin 1979).* In the two cases involving Puerto Rico, it is undisputed that the United States had sovereignty over the territory. In the case involving the special court convened in Berlin, the court was a United States court convened in an occupation zone controlled by the United States. *Tiede, 86 F.R.D. at 244-45* ("The sole but novel question before the Court is whether friendly aliens, charged with civil offenses in a United States court in Berlin, under the unique circumstances of the continuing United States occupation of Berlin, have a right to a jury trial."). Accordingly, the fact that the panel in *Harbury* used the phrase "de facto U.S. political control" to describe a category of cases where constitutional rights were provided to non-citizens does not aid Petitioners and Plaintiffs. The cases relied upon by the Court of Appeals in *Harbury* for this statement do not support the view that where the United States has *de facto* sovereignty, courts of the United States have jurisdiction to entertain the claims of aliens.

brain tumor at the United States Medical Facility at Guantanamo Bay. *Id. at 339.* Seeking to sue under the Federal Tort Claims Act ("FTCA"), the plaintiff sought to distinguish prior case law which held that injuries occurring on leased military bases were exempt from the FTCA under the "foreign country" exemption. In order to circumvent this case law, the plaintiff in *Bird* argued that the unique territorial status of the military base at Guantanamo Bay brought injuries occurring on its soil within the FTCA. *Id. at 340.* Rejecting the plaintiff's argument that the United States had *de facto* sovereignty over the military base at Guantanamo Bay, the court wrote, "because the 1903 Lease of Lands Agreement clearly establishes Cuba as the *de jure* sovereign over Guantanamo Bay, this Court need not speculate whether the United States is the *de facto* sovereign over the area." *Id. at 343.* While *Bird* dealt with the foreign country exemption to the FTCA, it expressly disavowed a *de facto* sovereignty test, when it was clear that Cuba was the *de jure* sovereign over Guantanamo Bay.

The *Bird* case is not the only court to reject a *de facto* sovereignty test for claims involving aliens located at the military base at Guantanamo Bay. *Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995), cert. denied, 515 U.S. 1142 (1995).* The *Cuban American Bar Association* case involved Cuban and Haitian migrants held in "safe haven" at Guantanamo Bay after they left their respective countries and were intercepted in international waters by the United States Coast Guard. *Id. at 1417, 1419.* The Eleventh Circuit specifically addressed the question of whether migrants "outside the physical borders of the United States have any cognizable statutory or constitutional rights." *Id. at 1421.* In *Cuban American Bar Association*, the Eleventh Circuit held:

> The district court here erred in concluding that Guantanamo Bay was a "United States territory." We disagree that "control and

> jurisdiction" [as set forth in the lease between the United States and Cuba] is equivalent to sovereignty. . . . We again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functionally equivalent" to being land borders or ports of entry of the United States or otherwise within the United States.

Id. at 1425 (internal citations omitted). Thus, *Cuban American Bar Association* stands for the proposition that the military base at Guantanamo Bay is not within the territorial jurisdiction of the United States simply because the United States exercises jurisdiction and control over that facility.

Plaintiffs seek to distinguish *Cuban American Bar Association* by citing a Second Circuit opinion that has been vacated as moot by the Supreme Court. Pls.' Opp'n at 12-13 (citing *Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot sub nom. Sale v. Haitian Centers Council, Inc., 509 U.S. 918, 125 L. Ed. 2d 716, 113 S. Ct. 3028 (1993)* [hereinafter "*HCC*"]). Ordinarily the Court would give short shrift to a case that has been vacated by the Supreme Court and not issued by the District of Columbia Circuit. However, since Plaintiffs in their papers, emphasize the importance of the reasoning in this vacated decision, the Court considers it necessary to briefly address the case.

The Court determines that *HCC* is distinguishable on its facts. In *HCC*, migrants were housed at the military base on Guantanamo Bay and determinations were made by Immigration and Naturalization Service ("INS") officers regarding their status. *Id. at 1332-33.* Those migrants that an INS officer deemed to have a credible fear of political persecution were "screened in" and were to be brought to the United States to pursue asylum claims. Those who did not fit within this class were repatriated to Haiti. *Id.*

The crucial distinction in their rights as aliens is that the aliens in *HCC* had been given some form of process by the government of the United States. Once the United States made determinations that the migrants had a credible fear of political persecution and could claim asylum in the United States, these migrants became vested with a liberty interest that the government was unable to simply deny without due process of law. The situation in *HCC* is fundamentally different from the cases presently before the Court. The individuals held at Guantanamo Bay have no desire to enter the United States and no final decision as to their status has been made. At this stage of their detention, those held at Guantanamo Bay more closely approximate the migrants in *Cuban American Bar Association* than the migrants "screened in" for admission to the United States in *HCC*.[16]

VI. CONCLUSION

The Court concludes that the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States. Given that under *Eisentrager*, writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, this Court does not have jurisdiction to entertain the claims made by Petitioners in *Rasul* or Plaintiffs in *Odah*. Of course, just as the *Eisentrager* Court did not hold "that these prisoners have no right which the military authorities are bound to respect," *Eisentrager, 339 U.S. at 789 n.14,* this opinion, too, should not be read as stating that these aliens do not have some form of rights under international law. Rather, the Court's decision

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[16] While there is dicta in the *HCC* opinion which indicates a broader holding with regard to the constitutional rights of individuals detained at the military base on Guantanamo Bay, such dicta in *HCC* is not persuasive and not binding. *HCC, 969 F.2d at 1343.* The Supreme Court in *Eisentrager, Verdugo-Urquidez*, and *Zadvydas*, and the District of Columbia Circuit in *Harbury*, have all held that there is no extraterritorial application of the Fifth Amendment to aliens.

solely involves whether it has jurisdiction to consider the constitutional claims that are presented to the Court for resolution.

Petitioners and Plaintiffs argue that as long as the United States has *de facto* sovereignty over Guantanamo Bay, Fifth Amendment protections should apply. For this proposition, Petitioners and Plaintiffs rely on *Ralpho*, case that involves land so similar to United States territory that the District of Columbia Circuit extended constitutional protections to its inhabitants. Clearly, Guantanamo Bay does not fall into that category. The Court, therefore, rejects the holding in *Ralpho* as a basis for this Court to exercise jurisdiction over the claims made by Petitioners and Plaintiffs. Accordingly, both cases shall be dismissed for want of jurisdiction.

COLLEEN KOLLAR-KOTELLY
United States District Judge

ORDER
(July 30, 2002)

For the reasons stated in the accompanying Memorandum Opinion, it is this 30 day of July, 2002, hereby

ORDERED that Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus [# 26] filed in *Rasul v. Bush*, Civil Action No. 02-299, is GRANTED; it is further

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Complaint and Plaintiffs' Motion for a Preliminary Injunction [# 15] filed in *Odah v. United States*, Civil Action No. 02-828, is GRANTED; it is further

ORDERED that *Rasul v. Bush*, 02cv299, and *Odah v. United States*, 02cv828, are DISMISSED WITH PREJUDICE.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
COLUMBIA

MAMDOUH HABIB, MAHA
HABIB, as Next Friend of
Mamdough Habib, *et al.*,
Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,
Respondents.

Civil No. 02-1130 (CKK)

ORDER TO SHOW CAUSE
(July 30, 2002)

For the reasons set forth in its Memorandum Opinion issued July 30, 2002, in Rasul v. Bush, Civil Action No. 02-299, and Odah v. United States, Civil Action No. 02-828, dismissing those actions, the Court determines that "it appears from the application that the applicant or person detained is not entitled [to the writ]." 28 U.S.C. §2243. Accordingly, it is this 30th day or July, 2002, hereby

ORDERED that Petitioners shall have until August 7, 2002, to submit a notice to the Court as to why the Petition for Writ of Habeas Corpus should not be dismissed with prejudice; it is further

ORDERED that if the Court does not receive a response from Petitioners by August 7, 2002, it will dismiss the Petition for Writ of Habeas Corpus with prejudice.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX E

United States Constitution

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

United States Code

28 U.S.C. §2241, which provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> 1. He is in custody under or by color of the authority of the United States....; or
>
> * * *
>
> 3. He is in custody in violation of the Constitution or laws or treaties of the United States....

APPENDIX G

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949

RESERVATIONS MADE AT THE TIME OF SIGNATURE OF THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS OF AUGUST 12, 1949

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Geneva Convention relative to the Treatment of Prisoners of War was open for signature from August 12, 1949 until February 12, 1950, and during that period was signed on behalf of the United States of America and sixty other States;

WHEREAS the text of the said Convention, in the English and French languages, as certified by the Swiss Federal Council, is word for word as follows:

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

PART I

GENERAL PROVISIONS

***

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

APPENDIX H

Army Regulation 190-8
OPNAVINST 3461.6
AFJI 31-304
MCO 3461.1

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

UNCLASSIFIED

***

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in

hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a

right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

(f) The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

(g) Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to

determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

APPENDIX I

STATEMENT OF HIGH COMMISSIONER FOR HUMAN RIGHTS ON DETENTION OF TALIBAN AND AL QAIDA PRISONERS AT US BASE IN GUANTANAMO BAY, CUBA
16.01.02

The following statement was issued today by United Nations High Commissioner for Human Rights Mary Robinson:

According to recent reports, 30 Taliban and At Qaida prisoners from Afghanistan arrived at the United States Naval Base in Guantanamo Bay, Cuba, on 14 January, 2002, to join a first group of 20 prisoners transferred from Afghanistan starting on 11 January. The reports include allegations about the manner in which the prisoners were transported and the conditions in which they are being detained.

Detailed information on these specific allegations is not yet available. I am aware that there are a number of legal issues and these are under active consideration by the US authorities. I am also aware that the International Committee of the Red Cross will have access to the prisoners and that there will be consular access.

It is appropriate to recall that there are international legal obligations that should be respected. In particular, I would like to recall that:

- All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.

- The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention.

- All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention.

- Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention.

APPENDIX J

III. LEGAL OPINION REGARDING THE DEPRIVATION OF LIBERTY OF PERSONS DETAINED IN GUANTANAMO BAY

61. The Working Group has received many communications alleging the arbitrary character of detention measures applied in the United States as part of its investigations into the terrorist acts of 11 September 2001. These communications from the United States may be divided into two categories, the first covering persons detained in prisons on United States territory, and the second persons detained at the Naval Base of Guantanamo Bay adapted as a detention centre.

62. The Chairman-Rapporteur of the Working Group sent a letter dated 22 January 2002 to the Permanent Representative of the United States of America to the United Nations Office at Geneva, asking his Government for an invitation to visit the country in order to examine in situ the legal aspects of the question. The Working Group would take into consideration the provisions of articles 4 and 15, paragraph 2, of the International Covenant on Civil and Political Rights in order to be as rigorous and objective as possible.

63. As this letter remained unanswered, the Chairman-Rapporteur sent a second letter on 25 October 2002, requesting the following information concerning the detainees in Guantanamo Bay:

(a) How many persons are currently being detained in Guantanamo Bay?

(b) When did the first detainees arrive?

(c) Were the detainees informed of any charges and, if so, by what authority were they charged and under what legal proceedings?

(d) Is legal counsel available to the detainees and, if so, are they freely chosen or imposed automatically?

(e) Are detainees allowed to meet with their legal counsel and, if so, are the interviews confidential?

(f) Are detainees brought to a representative of the prosecution and, if so, within what period of time?

(g) Do detainees ultimately appear before a court and, if so, within what period of time?

64. As this second letter also remained unanswered, the Working Group gave its views in the light of the following elements of appreciation:

Category I (persons detained on United States territory). After considering the two cases before it, the Working Group, with regard to this category, arrived at the following position of principle in its Opinion No. 21/2002 (E/CN.4/2003/8/Add. 1): "The Working Group considers that Mr. X and Mr. Y have been detained for more than 14 months, apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention." This situation is such as to confer an arbitrary character on their detention, with regard to articles 9 and 14 of the International Covenant on Civil and Political Rights, which guarantee, respectively, the right to a review of the lawfulness of detention by a competent judicial authority and the right to a fair trial.

Category II (persons detained at Guantanamo Bay). Before giving an opinion as to whether the detention of persons in this category was arbitrary or not, the Working Group determined the relevant legal framework, namely, the third Geneva Convention (relative to the treatment of prisoners of war), and the International Covenant on Civil and Political Rights, to both of which the United States are a party.

With respect to the third Geneva Convention. The Working Group began by noting the interpretation given by the American authorities, whereby these belligerents belonged to the sui generis category known as "enemy combatants" and that as such "they are not covered by the Geneva Convention and are not entitled to prisoner-of-war (POW) status under treaty" (statement made by the United States Press Secretary on 2 February 2002).

Besides the fact that this interpretation is open to debate, the Working Group recalls that the authority which is competent to determine prisoner-of-war status is not the executive power but the judicial power, in conformity with the provisions of article 5, paragraph 2, of the third Geneva Convention, which states that: "Should any doubt arise as to whether persons [...] belong to any other categories [of prisoners of war] enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" of the detaining power.

The United States court, however, dealing with the case (District Court for the District of Columbia) declared itself incompetent ratione loci, on the grounds that, since the territory of Guantanamo Bay was governed by an agreement concluded in 1903 between the United States and Cuba, the detention centre could not be considered as being on American soil.

The Working Group believes that it is worth recalling in this respect that, by letter of 14 September 1995, the United States authorities, agreeing to a request by the Working Group, had invited the Group to visit Haitian migrants and asylum-seekers detained at the Guantanamo Naval Base. The visit had finally had to be postponed indefinitely, following a decision, in 1996, by a United States court (District Court of the Eastern District of New York), which, after declaring itself competent, had ordered the release of the detainees. The Working Group suggested that this precedent should be taken into consideration in the debate taking place regarding the applicability of the above-mentioned article 5, paragraph 2, of the third Geneva Convention.

The Working Group concludes from the above that, so long as a "competent tribunal" in the meaning of the above-mentioned paragraph 2 has not issued a ruling on the contested issue, detainees enjoy "the protection of the ... Convention", as provided in paragraph 2, whence it may be argued that they enjoy firstly the protection afforded by its article 13 ("Prisoners of war must at all times be humanely treated"), and secondly the right to have the lawfulness of their detention reviewed and the right to a fair trial provided under articles 105 and 106 of that Convention (notification of charges, assistance of counsel, interpretation, etc.), so that the absence of such rights may render the detention of the prisoners arbitrary.

With respect to the International Covenant on Civil and Political Rights: Since the United States are party to the Covenant, in the case where the benefit of prisoner-of-war status should not be recognized by a competent tribunal, the situation of detainees would be governed by the relevant provisions of the Covenant and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial.

The need to combat terrorism undoubtedly requires imposing special restrictions on certain rights, including those concerning detention and fair trial. Such restrictions are in fact provided under article 4 of the Covenant ("In time of public emergency which threatens the life of the nation"), provided that, as the Human Rights Committee recalls in its General Comment No. 29, the notification procedure stipulated in paragraph 3 has been respected, whereby "Any State party [...] availing itself of the right of degrogation shall immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuates." This has not so far been the case with the United States.

The Working Group therefore considers that, while it is not competent to comment on whether the status of prisoner of war applies to the persons currently detained in Guantanamo Bay, it does remain within its mandate in considering whether the absense of minimum guarantees provided under articles 9 and 14 of the Covenant may confer on the detention an arbitrary character, all the more so if the Government concerned has failed to provide the information called for in article 4, paragraph 3, of the Covenant.

In other words, so long as a "competent tribunal" has not declared whether the status of prisoner of war may be considered applicable or not, the persons detained in Guantanamo Bay provisionally enjoy the guarantees stipulated in articles 105 and 106 of the third Geneva Convention.

On the other hand, should such a court issue a ruling on the matter:

- Either it rules in favour of a prisoner-of-war status and the persons concerned are definitely entitled to the guarantees provided by the third Geneva Convention:

- Or it invalidates the prisoner-of-war status, in which case the above-mentioned guarantees of the Covenant)under articles 9 and 14) take over from those of articles 105 and 106 of the third Geneva Convention, which no longer apply.

In conclusion, the Working Group recalls that, in its decision of 12 March 2002, the Inter-American Court of Human Rights requested that the United States take urgent measures to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.