

Litigation Update

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COURT UPHOLDS DETENTION OF TALIBAN FIGHTERS AT GUANTANAMO BAY

(Al Odah v. United States)

The U.S. Court of Appeals for the District of Columbia Circuit this week rejected a challenge to the U.S. military's decision to detain captured Taliban and al Qaeda fighters at the Naval Base in Guantanamo Bay, Cuba. The decision in *Al Odah v. United States* was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case urging that the detentions be upheld. WLF filed its brief on behalf of itself, the Allied Educational Foundation, and the Jewish Institute for National Security Affairs.

The detained fighters filed petitions for writs of habeas corpus, alleging that their detention without trial violated their rights under the Fifth Amendment's Due Process Clause as well as their rights under international law. The appeals court agreed with WLF that the federal courts lack jurisdiction to hear habeas corpus claims raised by nonresident aliens who are not being held on U.S. territory. The court noted that while Guantanamo Bay is under the control of U.S. military forces, it has always been understood by all parties that the naval base is part of Cuba.

"The overseas conduct of U.S. military forces in their dealings with aliens are simply not subject to second-guessing by the federal courts," said WLF Chief Counsel Richard Samp after reviewing the court's decision. "Those who believe they are being unjustly detained are free to raise their claims through appropriate Executive Branch and diplomatic channels; but allowing courts to become a part of the process, thereby allowing our enemies to use our courts to challenge military decisions, is one of the surest ways to hamper our military effectiveness," Samp said.

The habeas corpus petitions were filed by close relatives of 12 Kuwaitis, two Australians, and two British citizens being held at Guantanamo Bay after their capture in Afghanistan. The three separate petitions were consolidated into a single case. In July, the federal district court dismissed the petitions, finding that the federal courts lack jurisdiction to hear these cases. The petitioners appealed to the D.C. Circuit, whose decision yesterday affirmed the district court.

The appeals court agreed with WLF that dismissal was required by *Johnson v. Eisentrager*, a 1950 case in which the Supreme Court refused to allow federal courts to exercise jurisdiction

over habeas corpus petitions filed by German soldiers convicted of war crimes and being held in a military prison controlled by American forces in Germany. In an effort to distinguish *Eisentrager*, the petitioners in this case denied that they were Taliban or al Qaeda fighters; they insisted that they were captured in Afghanistan while on humanitarian missions. The appeals court held that *Eisentrager* applies here regardless that the petitioners deny their guilt; it held that the key principle underlying *Eisentrager* is that the federal courts are not open to the claims of overseas aliens being held overseas by the U.S. military, regardless whether the defendants admit that they are enemy soldiers.

WLF's brief also urged the court to reject the petitioners' claim that evolving principles of international law have rendered *Eisentrager* obsolete. WLF labeled as "particularly pernicious" the efforts of activists lawyers to enforce international law in federal courts. WLF argued that federal courts are supposed to apply federal/American law, not international law. WLF said that Congress is free to make international law part of our federal law by passing laws to that effect, but insisted that Congress has never done so. WLF argued that while the Senate has ratified several human rights treaties in recent years, the petitioners are not permitted to sue to enforce those rights because Congress at the time of ratification made absolutely clear that the treaties did not give rise to any rights enforceable in court. Although the majority opinion in the appeals court relied exclusively on *Eisentrager* and did not address WLF's additional arguments, a concurring opinion by Judge Randolph adopted many of those arguments. In particular, Judge Randolph agreed with WLF that the Alien Tort Act (a 1789 law that was moribund for nearly two centuries) does not make "customary international law" part of the laws of the United States. In so finding, Judge Randolph explicitly rejected efforts by several other federal appeals courts to breathe new life into the Alien Tort Act.

The Washington Legal Foundation is a law and public policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its website, www.wlf.org.