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JURISDICTION FOR DETAINEES HELD AT GUANTANAMO BAY

KHALED A. F. AL ODAH, ET AL., APPELLANTS v. UNITED STATES OF AMERICA, ET AL., APPELLEES

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

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

321 F.3d 1134; 2003 U.S. App. LEXIS 4250

December 2, 2002, Argued
March 11, 2003, Decided

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SUBSEQUENT HISTORY: Rehearing, en banc, denied by *Al Odah v. United States, 2003 U.S. App. LEXIS 11166 (D.C. Cir., June 2, 2003)*
Rehearing, en banc, granted by *Al Odah v. United States, 2003 U.S. App. LEXIS 11167 (D.C. Cir., June 2, 2003)*
Rehearing denied by *Al Odah v. United States, 2003 U.S. App. LEXIS 11168 (D.C. Cir., June 2, 2003)*
US Supreme Court certiorari granted by, in part *Rasul v. Bush, 2003 U.S. LEXIS 8203 (U.S., Nov. 10, 2003)*
US Supreme Court certiorari granted by, in part *Al Odah v. United States, 2003 U.S. LEXIS 8204 (U.S., Nov. 10, 2003)*

PRIOR HISTORY: [**1] Appeals from the United States District Court for the District of Columbia. (02cv00299), (02cv00828), (02cv01130). *Rasul v. Bush, 215 F. Supp. 2d 55, 2002 U.S. Dist. LEXIS 14031 (D.D.C., 2002)*

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Through their "next friends," plaintiff detainees 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 their confinement. Two of the actions sought a writ of habeas corpus, all three invoked the Fifth Amendment. The U.S. District Court for the District of Columbia held that it lacked jurisdiction. The detainees appealed.

OVERVIEW: The detainees were nationals of Kuwait, Australia, or the United Kingdom who were taken into custody in Afghanistan and Pakistan. The court held that the next friends in these cases had 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 were inaccessible. The court held that none of the Guantanamo detainees were within the category of enemy aliens. They could have become alien enemies by taking up arms against the United States, but on the pleadings, each of the detainees had denied engaging in hostilities against America. The court held that they were precluded from seeking habeas relief in the courts of the United States because the Constitution did not entitle them as aliens outside of the territory of the United States to due process. The leases for Guantanamo Bay Naval Base demonstrated that Cuba, not the United States, had sovereignty over the base.

OUTCOME: The judgment of the district court dismissing the complaint in one action and the petitions for writs of habeas corpus in the other two actions for lack of jurisdiction was affirmed.

COUNSEL: Thomas B. Wilner 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.

JUDGES: Before: RANDOLPH [**2] 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.

OPINIONBY: RANDOLPH

OPINION:

[*1135] 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.

[*1136] 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).* [**3]

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 [**4] 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 [**5] 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 [*1137] 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* [**6] 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, [**7] 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 [**8] 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 [*1138] 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" [**9] 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 [**10] 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* [**11] 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 [*1139] 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).* [**12]

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 [**13] 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 [**14] 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 [*1140] time-honored meaning of the term. "Every individual of the one nation must acknowledge every individual [**15] 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 [**16] 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.

* * * *

[T]he 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_ [**18] 263_wilhelm_hoettl.html.) The passage of the opinion just quoted may be read to mean that the constitutional rights [*1141] 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*.

* * * *

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 [**21] 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 as [*1142] 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.

* * * *

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 [**24] 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 [*1143] 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 [**25] 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*. * * * *

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 [*1144] sovereignty over the geographic area of the States and, as the *Eisentrager* Court recognized, over insular possessions, *id. at 780.* [**28] 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.* [**29] *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 [**30] 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 [**31] 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* [*1145] *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 [**32] 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.*