UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,	)
Plaintiffs,	)
v.	) Civil Action No. 02-CV-828 (CKK)
UNITED STATES OF AMERICA, et al.,	)
Defendants.	)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs warn that defendants seek to establish "an extraordinarily dangerous precedent." Pls.' Opp. (Opp.) at 1. Plaintiffs' concern echoes the warning of the dissenters in Johnson v. Eisentrager, 339 U.S. 763 (1950), who complained that "the Court is adopting a broad and dangerous principle." Id. at 795 (Black, J., dissenting). Just as plaintiffs complain that defendants would preclude any judicial action by the detainees even though Cuban courts clearly cannot hear their claims, the Eisentrager dissenters warned that the majority "denies courts the power to afford the least bit of protection" for aliens held by the United States military in Germany, even though "they can expect no relief from German courts." Id. at 796, 797. The striking similarity between the concerns and arguments raised by plaintiffs and those unsuccessfully advanced by the Eisentrager dissenters underscores that plaintiffs' real complaint is with the binding Eisentrager decision, not with any novel principle that defendants urge this Court to adopt. Moreover, the past half century has demonstrated that the concerns of plaintiffs and the Eisentrager dissenters are overblown. The Eisentrager decision does not mean that aliens detained by the military abroad are without rights, but

rather that the scope of those rights are to be determined by the Executive and the military, not by the courts. Far from establishing a dangerous precedent, Eisentrager reflects core constitutional separation of powers principles and avoids the truly dangerous precedent of judicial second-guessing of quintessentially military decisions.

I. JOHNSON V. EISENTRAGER IS CONTROLLING AND BARS THIS ACTION

Plaintiffs repeat many of the Rasul petitioners' arguments in attempting to limit Eisentrager to its "core holding." But whatever the core of its holding, the Supreme Court in Eisentrager clearly held that an alien detained abroad lacks the "capacity and standing to invoke the process of federal courts." 339 U.S. at 790. Although Eisentrager addressed a petition for habeas corpus – which is the most logical vehicle for challenging detention in wartime – the Court repeatedly embraced the broader principle that aliens detained abroad cannot "maintain any action in the courts of the United States," id. at 776, and lack "standing to demand access to our courts," id. at 777. See Defs.' Mot. to Dismiss Pls.' Compl. and Pls.' Mot. for a Preliminary Injunction (Defs.' Mot.) at 11 (collecting additional statements). The dissenting Justices certainly had no doubt about the breadth of the majority's ruling. See 339 U.S. at 796 (Black, J., dissenting) ("[T]he 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."). Plaintiffs' attempt to down play that language from Eisentrager fails. Whether the Court's statements are technically bound up with the holding or considered dictum is of no moment. See, e.g., Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000) ("To be sure, * * *, this language is dicta. But it is firm and considered dicta that binds this court."), cert. granted on other grounds, 122 S. Ct. 663 (2001).

Plaintiffs mistakenly suggest that Eisentrager does not preclude jurisdiction over this action because the Eisentrager Court, like the Supreme Court in Ex Parte Quirin, 317 U.S. 1 (1942), and Hirota v. MacArthur, 338 U.S. 197 (1948), went beyond its jurisdictional ruling to hold that aliens detained abroad lack constitutional or other substantive rights. In the first place, any effort to liken the Court's analysis in Eisentrager to its analysis in cases involving United States citizens or individuals detained on territory over which the United States is sovereign ignores the entire thrust of the Eisentrager decision, and the Court's specific statement that:

> Reliance on the Quirin case is clearly mistaken. Those prisoners were in custody in the District of Columbia. * * * Nor can the Court's decision in the Yamashita case aid the prisoners. * * * By reason of our sovereignty at that time over these insular possessions, Yamashita stood much as did Quirin before American courts. Yamashita's offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within territory of the United States. None of these heads of jurisdiction can be invoked by these prisoners.

Eisentrager, 339 U.S. 779-780 (emphasis added). More fundamentally, the fact that Eisentrager supported its holding that federal courts lack jurisdiction over the claims of aliens detained abroad by pointing out also that those aliens had no rights to enforce on the merits, hardly strengthens plaintiffs' argument that this Court has jurisdiction. Finally, contrary to plaintiffs' claims, the Supreme Court in Eisentrager did not definitively reject the asserted rights of the petitioners under the Geneva Convention on the merits, but instead observed that the extent of those rights was a matter for the executive branch and the military, not for the courts. See id. at 789 n.14.

Plaintiffs are likewise mistaken in suggesting that the principles of Eisentrager do not apply to detainees held at Guantanamo. The Supreme Court made clear in Eisentrager that aliens held outside territory over which the United States is sovereign cannot challenge their detention, and has elsewhere made clear that the "determination of sovereignty over an area is for the legislative and

executive departments," and not a question on which a court may second-guess the political branches. Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948); accord United States v. Spelar, 338 U.S. 217, 221-222 (1949); Jones v. United States, 137 U.S. 202, 212 (1890). The Lease Agreement between Cuba and the United States makes clear that Cuba retains sovereignty over the base, and as a result, the authoritative decisions unanimously find that Guantanamo does not constitute United States sovereign territory. See Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (Guantanamo is a leased base "under the sovereignty of [a] foreign nation[]"); Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1050 (C.D. Cal. 2002) ("sovereignty over Guantanamo Bay remains with Cuba"), appeal filed (No. 02-55367); Bird v. United States, 923 F. Supp. 338, 343 (D. Conn. 1996) ("sovereignty over the Guantanamo Bay does not rest with the United States").[1]

Plaintiffs note (at 11) that Eisentrager "used the term[s] 'territorial jurisdiction' and 'sovereignty' interchangeably," but it is clear that the Court's reference was to the territorial jurisdiction of a United States court. See Eisentrager, 337 U.S. at 777-778 (noting that "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") (emphasis added). As plaintiffs have implicitly acknowledged by filing suit in this Court, Guantanamo, unlike the Canal Zone which had its own United States District Court, does not lie within the territorial jurisdiction of any United States court.

---

[1] Plaintiffs' continuing reliance on the vacated decisions in Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d. Cir. 1992), vacated as moot, 509 U.S. 918 (1993), and Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1029 (E.D.N.Y. 1993), vacatur by stipulated order noted in Cuban Am. Bar Ass'n, 43 F.3d at 1424 n.8, only underscores the complete absence of any precedent supporting their position. In any event, even if these decisions retained any precedential force, they would remain inapposite. See Rasul Mot. to Dismiss at 17 n.9.

Moreover, whatever the exact scope of the constitutional rights enjoyed by aliens in "'occupation zones after war,'" Opp. at 11 (quoting Harbury, 233 F.3d at 603), it is abundantly clear that such rights do not include the right to invoke judicial review of an alien's detention by the United States military because Eisentrager itself concerned aliens detained in an occupation zone in Germany after World War II.

Finally, plaintiffs attempt to distinguish Eisentrager based on the contrasting status of the detainees and the contrasting nature of the relief sought. But despite plaintiffs' continuing effort to make a virtue out of the fact that, unlike the Eisentrager detainees, they have not waited for hostilities to cease before mounting their legal challenge, the fact that the detainees have not been designated for trial by military commission does not strengthen their jurisdictional claim. To the contrary, that fact highlights an additional jurisdictional obstacle under the political question doctrine. The dissenters in Eisentrager, the only Justices who, because they would have made a threshold decision in favor of jurisdiction, had occasion to consider the political question issue, concluded that the cessation of hostilities was critical to justiciability. Justice Black took it as an "undisputable axiom" that "[a]ctive fighting forces must be free to fight while hostilities are in progress." 339 U.S. at 796 (Black, J., dissenting). "It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefront." Id. Despite these concerns, the dissenters thought that judicial review was appropriate in Eisentrager because "[w]hen a foreign enemy surrenders, the situation changes markedly." Id. (emphasis added). In sum, the prematurity of plaintiffs' action does not distinguish Eisentrager, but rather creates an additional jurisdictional obstacle.

Likewise, plaintiffs cannot evade Eisentrager by backing away from their request to be

transferred out of United States custody. By requesting such a transfer, plaintiffs' complaint requests the classic remedy of the writ of habeas corpus and is squarely barred by Eisentrager. Plaintiffs appear to have belatedly recognized this bar, as their latest filing repeatedly offers to sever this aspect of their requested relief. See infra. But plaintiffs cannot generate jurisdiction by limiting their request for relief. When the Supreme Court in Eisentrager barred aliens held abroad from contesting the fundamental fact of their confinement, it by no means opened up the courts to subsidiary questions concerning their confinement, or violations of the Administrative Procedure Act (APA), Alien Tort Act (ATA), or other provisions. Instead, the Court ruled broadly that aliens held abroad lack "the privilege of litigation" in United States courts. 339 U.S. at 777.

II. EVEN IF EISENTRAGER DID NOT CONTROL, PLAINTIFFS' ACTION WOULD STILL BE BARRED AS A THRESHOLD MATTER

1. Even without Eisentrager, plaintiffs' action would still be precluded. See Defs.' Mot. at 14-21. Because of the nature of plaintiffs' challenge – i.e., to the legality of the detained plaintiffs' detention – habeas corpus (which plaintiffs scrupulously avoid in a flawed attempt to avoid Eisentrager) is the proper vehicle for plaintiffs' challenge, to the extent that a habeas action would be available at all in the circumstances here. Plaintiffs' action for declaratory and injunctive relief – outside of habeas – therefore must be dismissed. See id. at 14-16.

In response, plaintiffs claim that "[t]hey have not challenged either the fact or the duration of their confinement." Opp. at 4 & n.4; see id. at 19, 22. But plaintiffs' own pleadings belie that claim. For example, although plaintiffs now insist in their opposition (at 22) that they "are not asking this Court to determine the validity of the Kuwaiti Detainees' detention," in their complaint (¶43) plaintiffs specifically requested a "[a] declaration that the prolonged, indefinite, and restrictive detention of the Kuwaiti Detainees * * * is arbitrary and unlawful," and plaintiffs explicitly

challenged (¶¶39, 40) not only the fact but also the "duration" of their detention. Likewise, when they were not concerned about the propriety of bringing this action outside of habeas – and, instead, were trying to join this case with the habeas action in Rasul – plaintiffs specifically acknowledged that "[p]laintiffs in the present action and plaintiffs in Rasul allege that they are being detained in violation of their rights under the Constitution and international law." Pls.' Mot. for Consolid. at 2 (emphasis added). That kind of challenge is confined to habeas corpus.

None of the simple "conditions" cases cited by plaintiffs are to the contrary. In Gerstein v. Pugh, 420 U.S. 103, 107 n.6 (1975) (emphasis added), the Court was careful to point out that the plaintiffs "asked only that the state authorities be ordered to give them a probable cause determination." So too, in Wilwording v. Swenson, 404 U.S. 249, 249 (1971) (per curiam) (emphasis added), the plaintiffs "challenged only their living conditions and disciplinary measures while confined"; in Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam), the plaintiff challenged only a prison "disciplinary measure"; and, in Brown v. Plaut, 131 F.3d 163, 167 (D.C. Cir. 1997) (emphasis added), the plaintiff "challenge[d] only his placement in administrative segregation." In other words, quite unlike the plaintiffs in the present case, the plaintiffs in Gerstein, Wilwording, Haines, and Brown did not argue that the fact or duration of their confinement was unlawful – a challenge that, as Brown reaffirms, lies "at the 'heart' of habeas corpus." 131 F.3d at 167 (quoting Preiser v. Rodriquez, 411 U.S. 475, 498 (1973)); see Defs.' Mot. at 14-15.[2]

---

[2] In addition, in Gerstein, Wilwording, Haines, and Brown, another statutory cause of action was available to the plaintiffs other than habeas to challenge the conditions of their confinement, namely 42 U.S.C. 1983. As explained below, here there is no other statutory cause of action (even assuming habeas corpus would be available, notwithstanding Eisentrager) available to plaintiffs to challenge their confinement, and certainly no cause of action available to plaintiffs under the APA or ATA. Indeed, the APA makes express that a plaintiff may not resort to the general provisions of the APA to maintain a legal action that should be brought (if at all) in

The conclusion that plaintiffs were required to proceed (if at all) in habeas is bolstered by their extraordinary prayer for a transfer out of United States custody. Compl. ¶44. Although plaintiffs now seek to disavow that request – while, at the same time, implausibly suggesting that it was "not a request for their release from confinement," Opp. at 22 n.17 (emphasis added); see id. at 7 n.10, 19 n.15[3] – plaintiffs' demand for a "writ" releasing them from United States custody itself speaks volumes about the nature of the challenge that they themselves framed in this case. In any event, as Monk v. Secretary of the Navy, 793 F.2d 364, 366 (D.C. Cir. 1986), teaches, there is no requirement that a plaintiff seek "immediate release" for an action to be confined to habeas. The plaintiff in Monk, like the detained plaintiffs here, sought "a declaratory judgment" that he was unlawfully confined (on the ground that his conviction was invalid). Ibid. Thus, even though Monk did not seek his "immediate release," he – just like the detained plaintiffs here – argued "that he is 'in custody in violation of the Constitution,'" and, accordingly, the court held, Monk's exclusive remedy lay in habeas corpus. Ibid. (quoting 28 U.S.C. 2441(c)).

Nor can plaintiffs avoid the conclusion that they were required to proceed in habeas by pointing to their request for preliminary relief. The fact that plaintiffs have requested certain relief short of their release from detention does not alter the acknowledged thrust of their challenge – "that

---

habeas. See 5 U.S.C. 703. Likewise, the APA makes clear that it does not confer any right of action where, as here in the case of the habeas statute (as Eisentrager underscores), another statute that arguably "grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702(2); see 5 U.S.C. 701(a)(1).

[3] The suggestion that plaintiffs' request does not seek their release from confinement presumably is grounded on the notion that, once this Court issued the requested "writ," plaintiffs would remain confined in Kuwait, under the authority of the Government of Kuwait. But, as plaintiffs effectively acknowledge (see Opp. at 19 n.15), there would be nothing that this Court could do to prevent the Government of Kuwait from releasing the detained plaintiffs upon the requested "transfer[]," or at any point thereafter. Compl. ¶44.

they are being detained in violation of their rights under the Constitution and international law." Pls.' Mot. for Consolid. at 2 (emphasis added). Indeed, plaintiffs' own motion for a preliminary injunction underscores the point. It is explicitly framed in terms of "enjoin[ing] defendants from continuing to detain the 11 Kuwaitee plaintiffs * * * without" complying with plaintiffs' preliminary demands. Pls.' Mot. for a Preliminary Injunction at 1 (emphasis added); see Defs.' Mem. at 16. In any event, as the D.C. Circuit has held, when the nature of a challenge properly lies in habeas, the complainant "may not avoid the requirement that he proceed by habeas corpus by adding a request for relief that may not be made in a petition for habeas corpus." Monk, 793 F.2d at 366.[4]

2. Even if plaintiffs could proceed outside of habeas with such an obvious challenge to confinement, their claims under the ATA and APA are precluded in several different ways by the express provisions of those statutes. See Defs.' Mot. at 16-19.

Plaintiffs all but acknowledge that the Federal Tort Claims Act (FTCA) does not waive the sovereign immunity of the United States with respect to the sort of challenge made in this case – i.e., to military operations in wartime with respect to aliens captured in the theater of battle and detained outside the sovereign United States. See Defs.' Mot. at 17-18. Nonetheless, plaintiffs argue that Congress did waive sovereign immunity for essentially the same challenge under the ATA and the APA and so courts remain free to second-guess and enjoin the conduct of military operations in foreign lands in a time of active hostilities. That argument not only does not pass a common-sense test, it fails under the express terms of the pertinent provisions of the ATA and APA.

---

[4] Plaintiffs do not even attempt to rebut the argument that habeas jurisdiction would be lacking in this case because none of the custodians are within this district. See Opp. at 23 n.19; Defs.' Mem. at 16 n.9, 20-21. As a result, although it is not necessary for the Court to reach the issue because of the other grounds for dismissing this action (e.g., Eisentrager), if the Court does reach this issue, it should dismiss the action for lack of habeas jurisdiction.

As explained in defendants' motion to dismiss (at 16-17), the D.C. Circuit has squarely held that "[t]he ATCA itself does not provide a waiver of sovereign immunity." Industria Panificadora, S.A. v. United States, 957 F.2d 886, 887 (D.C. Cir.) (per curiam), cert. denied, 506 U.S. 908 (1992). In Sanchez-Espinoza v. Reagan, 770 F. 2d 202, 207 (D.C. Cir. 1985), the court suggested in dictum that the limited waiver of sovereign immunity in the APA "arguably" might extend to the ATA. But there is no need to resolve that dispute here because for several reasons – each of which is sufficient to dispose of plaintiffs' ATA and APA claims – the APA plainly does not provide a basis for entertaining the claims at issue in this case.

First, the APA expressly exempts from its limited waiver of immunity suits challenging "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. 701(b)(1)(G); see also 5 U.S.C. 701(b)(1)(F). As the D.C. Circuit has recognized, Section 701(b)(1)(G) insulates from judicial review "dispute[s] over military strategy," and applies not only to the exercise of military authority "in combat zones," but also to the exercise of such authority "in the aftermath of * * * battle." Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1980). Plaintiffs' challenge to the detention of aliens who were captured in connection with fighting in Afghanistan that is ongoing, and who are being detained by the military as enemy combatants for intelligence-gathering and other military purposes, falls directly within the APA's "military authority" exception. Indeed, one of the purposes of that exception is to avoid "judicial interference" (ibid.) with military operations, a concern that is hardly abstract. Plaintiffs themselves suggest (at 13) that this Court should attempt to bring before it military authorities from the Guantanamo Bay Naval Base, and thus divert the attention and efforts of such authorities from the vital military operation sanctioned by the President in his capacity as Commander in Chief and expressly backed by the Congress by statute.

See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

Second, the APA similarly does not apply to challenges to executive action that "is committed to agency discretion by law." 5 U.S.C. 701(a)(2). And, as the Supreme Court has explained, Section 701(a)(2) covers matters that have been "traditionally left to agency discretion." Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (emphasis added). As history – including the events at issue in Eisentrager – teach, military operations during time of war have traditionally been left to the discretion of the military, not to mention the President as Commander in Chief. See Hirota v. MacArthur, 338 U.S. 197, 215 (1948) (Douglas, J., concurring). As the D.C. Circuit has recognized, the APA does not cover any action of the President, much less action stemming from the exercise of his Commander in Chief power. Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991); cf. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111-112 (1948) (Jackson, J.). There is no basis for concluding that Congress intended to provide for judicial intervention in military operations, especially such as those at issue here, which are inextricably tied to the exercise of the Commander-and-Chief power. Heckler v. Chaney, 470 U.S. 821 (1985), is not to the contrary. That case – in which the Court held judicial review was precluded under Section 701(a)(2) – dealt with a question of statutory authority and interpretation, not a question of the exercise of core Article II authority. In short, even more so than the agency action in Heckler, the military operations at issue here are unreviewable under the APA.

Third, the action in this case is barred under Section 701(a)(1) of the APA, which provides that the APA does not apply to the extent that another statute "preclude[s] judicial review." 5 U.S.C. 701(a)(1). As explained above, and as Eisentrager illustrates, the habeas statute precludes review with respect to the types of challenges made in this case.

Fourth, the exceptions contained in 5 U.S.C. 702 also preclude review in this case. See Defs.' Mot. at 18-19. In particular, the D.C. Circuit's decision in Sanchez-Espinoza makes clear that Section 702(1) precludes the sort of action here. As then-Judge Scalia explained for the Court:

> The APA specifically provides that its judicial review provision does not affect "the power or duty of the court to dismiss any action or deny relief on any . . . appropriate legal or equitable ground." 5 U.S.C. § 702. At least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of discretion to provide such discretionary relief [i.e., a request for declaratory or injunctive relief].

770 F.2d at 207 (emphasis added). Sanchez-Espinoza involved a challenge to the actions of federal officials with respect to hostilities in Nicaragua, which the court of appeals declined to resolve on the basis of the political question doctrine. Id. at 206. The sorts of military operations and activities at issue in this case – the capture and detention of aliens overseas in connection with active hostilities involving the United States – implicate just as "sensitive a foreign affairs matter" as, if not a more sensitive matter than, the activities at issue in Sanchez-Espinoza. So too here, Section 702 precludes the plaintiffs' extraordinary request, under the rubric of the APA, for a court to enjoin the President, Secretary of Defense, and other military officials from undertaking such activities.[5]

Likewise, there is no basis for plaintiffs' last-ditch suggestion (at 29 (emphasis added)) that, simply because plaintiffs have sued United States officials for alleged violations of international law,

[5] Sanchez-Espinoza – in which the D.C. Circuit specifically declined to invoke the political question doctrine – refutes plaintiffs' suggestion (at 27) that Section 702(1) simply codifies that doctrine. So does the Administrative Conference Committee Report referred to by plaintiffs, which stated in pertinent part that "it is fanciful to suppose that [the APA's] abolition of sovereign immunity will allow courts to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." The Administrative Conference's citation to Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967), is noteworthy, but not for the reason given by plaintiffs. In affirming the dismissal of the action in Luftig, the court of appeals relied directly on the Supreme Court's decision in Eisentrager. Id. at 666.

"plaintiffs' [ATA] claims are cognizable regardless of the applicability of the APA's waiver of sovereign immunity." As discussed, the D.C. Circuit has squarely held that "[t]he ATCA itself does not provide a waiver of sovereign immunity," Industria Panificadora, S.A., 957 F.2d at 887 (emphasis added), and the APA clearly does not supply such a waiver here. Plaintiffs cannot circumvent that absolute sovereign-immunity bar and the multiple barriers to suit under the APA by invoking Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). See Opp. at 29. Indeed, the various bars to suit in the APA apply even where sovereign immunity does not. Larson, which concerned the application of sovereign immunity and not those other, independent bars to suit, therefore does not help plaintiffs.

In any event, as the Supreme Court observed in Larson, and has reiterated since, "Larson * * * made clear that, at least insofar as injunctive relief is sought, an error of law by [officers] acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 113 (1984) (citing Larson, 337 U.S. at 690, 695) (emphasis added). That is surely the case here, where all the declaratory and injunctive relief sought by plaintiffs would "effectively," if not directly, be relief against the sovereign – which, tellingly, plaintiffs themselves have named as the lead defendant in this case. In addition, for Larson to apply at all, a plaintiff must show that a federal officer has acted in excess of his statutory authority or proper mandate. See Larson, 337 U.S. at 689-691. Plaintiffs here have not cited in their complaint, or even in their legal memorandum, any statutory provision exceeded by the President, Secretary or Defense, or any of the other federal officials named as defendants in carrying out the military operations at issue. To the extent that plaintiffs purport to rely on alleged violations of customary international law, see Opp. at 29-30, they have not advanced

their baseless argument under Larson, and instead seek to circumvent the obvious bars to their APA and ATA claims by inappropriately attempting to collapse the threshold immunity issue with their arguments on the merits, which are entirely premature at this stage before any determination has been made that jurisdiction even exists.[6]

3. In addition, as defendants explained in their motion to dismiss (at 20), plaintiffs' Fifth Amendment claim also fails at the outset. The Fifth Amendment does not – any more so than the APA or ATA – permit a plaintiff to bring an action such as this, seeking injunctive or declaratory relief challenging the fact or duration of their detention outside of habeas corpus. In any event, the Fifth Amendment does not apply extraterritorially, see, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); Eisentrager, supra; Harbury, 233 F.3d at 602-604, and, therefore, does not apply to the extraterritorial activities at issue in this case.

4. Finally, even if the APA, ATA, or the Fifth Amendment itself somehow (contrary to the well-established precedents addressed above) could provide this Court jurisdiction, in the context of the issues raised in this case, the political question doctrine would foreclose the exercise of jurisdiction. Even the dissenters in Eisentrager, who contrary to the majority would have exercised jurisdiction, recognized that the situation would have been different if the hostilities had been still ongoing. Moreover, as Justice Douglas recognized in a related context, even after the fighting in World War II had ceased, "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as

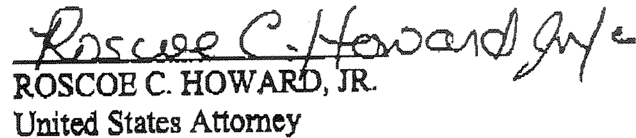
[6] Plaintiffs' passing notation (at 30 n.30) that they also have named defendants in their "individual" capacities also does not remove the sovereign-immunity bar to this action. This Court plainly could not enter the sort of injunctive and declaratory relief sought by plaintiffs against defendants in their individual capacities, and plaintiffs have not alleged any conduct that could even plausibly support an individual claim in this case.

spokesman for the nation in foreign affairs, had the final say." Hirota v. MacArthur, 338 U.S. 197, 215 (1948) (Douglas, J., concurring) (emphasis added).

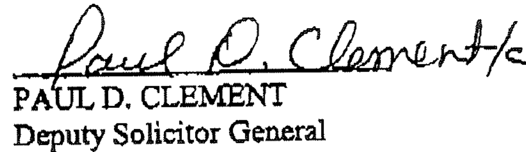
CONCLUSION

For the foregoing reasons, and those stated in defendants' motion to dismiss, plaintiffs' complaint and motion for a preliminary injunction should be dismissed.

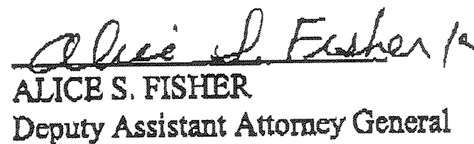
Respectfully submitted,



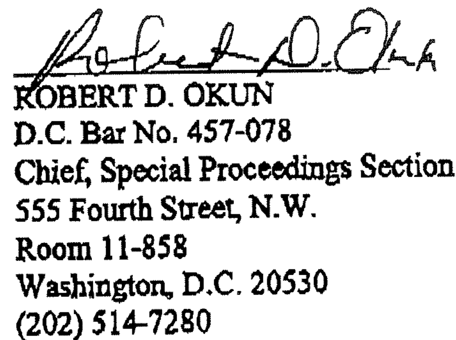
ROSCOE C. HOWARD, JR.
United States Attorney



PAUL D. CLEMENT
Deputy Solicitor General



ALICE S. FISHER
Deputy Assistant Attorney General



ROBERT D. OKUN
D.C. Bar No. 457-078
Chief, Special Proceedings Section
555 Fourth Street, N.W.
Room 11-858
Washington, D.C. 20530
(202) 514-7280

Attorneys for Defendants
UNITED STATES OF AMERICA, et al.