

July 8, 2004

## COURT PERMITS CHALLENGE TO DETENTION OF TALIBAN FIGHTERS AT GUANTANAMO

*(Rasul v. Bush)*

The U.S. Supreme Court this week ruled that the federal courts have jurisdiction to hear challenges to the U.S. military's decision to detain captured Taliban and al Qaeda fighters at the Naval Base in Guantanamo Bay, Cuba, even though the detainees are not U.S. citizens. While permitting such challenges to proceed, the Court did not rule on whether the detainees possess any rights under the U.S. Constitution, or whether their detention was in any way improper.

The decision was a setback for the Washington Legal Foundation (WLF), which had filed a brief in the case, *Rasul v. Bush*, in support of the U.S. government. WLF had argued that federal courts are not open to overseas aliens who challenge their detention by the U.S. government.

The detained fighters have filed petitions for writs of habeas corpus, alleging that their detention without trial violates their rights under the Fifth Amendment's Due Process Clause as well as their rights under international law. Their cases will now return to the U.S. District Court for the District of Columbia, the court in which they originally filed their petitions. WLF has pledged to continue its involvement in the case, to support the military's right to keep captured Taliban and al Qaeda fighters in detention while hostilities continue.

"The overseas conduct of U.S. military forces in their dealings with aliens simply should not be subject to second-guessing by the federal courts," said WLF Chief Counsel Richard Samp after reviewing the Court's decision. "While we are disappointed that the Court allowed the petitions to proceed, we are confident that the lower courts ultimately will defer to the military's determination that these detentions are proper. Allowing courts to become a major part of the fact-finding 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 12 Kuwaitis, two Australians, and two British citizens being held at Guantanamo Bay after their capture in Afghanistan. In July 2002, a federal district court dismissed the petitions, finding that the federal courts lack

jurisdiction to hear these cases. The petitioners appealed to the U.S. Court of Appeals for the D.C. Circuit, which affirmed the dismissal in an opinion issued in 2003. The Supreme Court last fall agreed to review the case; this week's decision reinstated the petitions and allows the detainees to start their case from scratch. WLF also filed a brief when the case was in the appeals court.

WLF had argued 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. The petitioners deny that they were Taliban or al Qaeda fighters but instead insist that they were captured in Afghanistan while on humanitarian missions. WLF argued that *Eisentrager* applies here regardless that the petitioners deny their guilt; and that the key principle underlying *Eisentrager* is that the federal courts are not open to the claims of nonresident aliens being held overseas by the U.S. military, regardless whether the petitioners admit that they are enemy soldiers.

By a 6-3 majority, the Court held that evolutionary changes in habeas corpus law had undermined *Eisentrager's* authority. The Court did *not* indicate that granting jurisdiction to the habeas corpus claims of nonresident aliens is constitutionally required; rather, it based its ruling on its reading of the federal habeas corpus statute. Accordingly, should it so desire, Congress is free to overrule the Court's decision by amending the habeas corpus statute.

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. WLF filed its brief on behalf of itself, the Allied Educational Foundation, and the Jewish Institute for National Security Affairs.

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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](http://www.wlf.org).