

No. 07-1090

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SUPREME COURT, U.S.

**In The  
Supreme Court of the United States**

REPUBLIC OF IRAQ,

*Petitioner,*

v.

JORDAN BEATY, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit**

**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether, in light of 28 U.S.C. § 1605A, the Republic of Iraq's sovereign immunity, abrogated under 28 U.S.C. § 1605(a)(7), was restored under § 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23.

**PARTIES TO THE PROCEEDINGS**

Petitioner is the Republic of Iraq, which was defendant and appellant below.

Respondents are Jordan Beaty; A.M.B., a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon. Respondents were the plaintiffs and appellees below.

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## OPINIONS BELOW

The order of the D.C. Circuit granting summary affirmance is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari at page App. 1a. The opinion of the District Court is reported *sub nom. Beaty v. Republic of Iraq*, 480 F.Supp.2d 60 (D.D.C. 2007) and is reproduced in the Appendix to the Petition for Writ of Certiorari at page App. 5a.

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## APPLICABLE STATUTES

The text of the relevant statutes is set forth in the appendix to this reply.

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## STATEMENT OF THE CASE

The Respondents, Jordan Beaty; A.M.B., a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon, are the children of Kenneth Beaty and William Barloon, both of whom were Plaintiffs in *Daliberti v. Republic of Iraq*, 146 F.Supp. 19 (D.D.C. 2001).

Following the conclusion of hostilities between the United States and Petitioner Republic of Iraq ("Iraq") in 1991, Kenneth Beaty ("Beaty") and William Barloon ("Barloon") each resided in Kuwait on a temporary basis. Mr. Beaty worked as an oil rig

drilling supervisor. Mr. Barloon supervised aircraft maintenance and overhaul.

On April 25, 1993, Mr. Beaty was traveling en route to an oil rig located within sight of the Kuwait-Iraqi border. Mr. Beaty stopped at an Iraqi border checkpoint. He displayed his credentials to the Iraqi border guards. Mr. Beaty explained that he wished to travel to the oil rig using appropriate roads within the borders of Kuwait. The border guards responded by arresting Mr. Beaty. The Iraqi guards then blindfolded Mr. Beaty and transported him at gunpoint, first to Basra, Iraq, and later to Baghdad.

Once in Baghdad, Mr. Beaty was initially confined in a car park, converted into a prison, in a cell that lacked water or a toilet. He had only a steel cot for a bed. He was later transferred to Abu Ghraib prison in Baghdad, where he was confined for 205 days. He lived in a cell infested with vermin and shared a toilet with more than 200 other prisoners. During his captivity, Mr. Beaty was denied adequate food, water and medical attention. Iraq held Mr. Beaty as a hostage for ransom. Ultimately, he was released when the ransom of \$5,000,000 was paid to the Iraqi government.

On or about March 13, 1995, William Barloon was traveling near the Kuwait-Iraqi border when he encountered an Iraqi border guard. The border guard, an agent of Defendant Republic of Iraq, checked Mr. Barloon's identification, which demonstrated that he

was a citizen of the United States. The border guard took William Barloon into custody.

Mr. Barloon was transported at gunpoint to Basra, Iraq, and later to Baghdad. He was held captive at Abu Ghraib prison. During his 126 days in captivity, Mr. Barloon was tortured, beaten, subjected to mock executions and deprived of adequate food, water, medical care and access to toilet facilities. Mr. Barloon lost a significant amount of weight and became hopeless and despondent.

Respondents endured severe mental anguish, depression, humiliation, anxiety, and pain and suffering as a direct result of their fathers' captivity. Throughout their ordeal, Respondents were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment. Respondents knew that their fathers were being held captive by Petitioner without any legal justification. Through various media sources, Respondents were able to see where their fathers were being held. Through these and other sources, Respondents contemporaneously learned and understood that their fathers were deprived of adequate food, water and medical care, had lost substantial weight and were emotionally distraught.

Because of their fathers' captivity, Respondents were totally dependent upon their mothers for financial and emotional support. However, Respondents' mothers were not in a position to provide such support because they too suffered extreme emotional

distress as a result of their husbands' ordeal. Mrs. Beaty and Mrs. Barloon devoted themselves to the various efforts to secure their husbands' release. Such efforts often took them away from their children, both physically and emotionally, for extended periods.

Respondents' severe mental anguish did not end, even after their fathers' return. Although their fathers were physically present, they were emotionally absent, unable to provide the love and support their children desperately needed. As Judge Oberdorfer recognized in *Daliberti*:

Following their release, [Mr. Beaty and Mr. Barloon] exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each [of them] has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships. . . . [T]hese men will experience these effects for the rest of their lives.

In 2003, Respondents filed an action against Iraq, under the state-sponsored terrorism exception to sovereign immunity codified in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(7), in the U.S. District Court for the District of Columbia for intentional infliction of emotional distress under state common law, violations of customary international law as incorporated into federal common law, and loss of solatium under federal common law. The District Court took jurisdiction.

Iraq filed a motion to dismiss the case asserting lack of jurisdiction under § 1605(a)(7), failure to state a cause of action under federal and state common law, and presentation of a nonjusticiable political question. Respondents also moved for summary judgment as to liability on all causes of actions alleged in the Third Amended Complaint.

On March 20, 2007, the District Court entered a comprehensive Memorandum Opinion granting in part and denying in part Iraq's motion to dismiss, and granting in part and denying in part Plaintiffs' motion for partial summary judgment. The District Court held that Respondents stated a cause of action under state common law; jurisdiction existed under § 1605(a)(7); and the suit was not barred by the political question doctrine, the act of state doctrine or the doctrine of foreign affairs preemption. It granted Iraq's Motion to Dismiss as to Respondent's claims under federal common law.

Iraq appealed the District Court's denial of its claim of sovereign immunity as a collateral order and moved the District Court to certify its decision for interlocutory appeal under 28 U.S.C. §1292(b). The District Court granted Iraq's motion to certify its order for interlocutory appeal on April 19, 2007.

Iraq then filed a petition for initial hearing *en banc* of the District Court's decision regarding its sovereign immunity, urging the D.C. Circuit to reconsider its decision in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C.

Cir. 2004). On June 7, 2007, Respondents moved for summary affirmance on the basis of *Acree*.

On November 6, 2007, the D.C. Circuit denied the petition for initial hearing *en banc*.<sup>1</sup> On November 21, 2007, the D.C. Circuit summarily denied Iraq's appeal and stated:

The District Court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23. *See Acree v. Republic of Iraq*, 370 F.3d 41, 51 (D.C. Cir. 2004).

Subsequently, Iraq filed the instant Petition.

On December 19, 2007, in Iraq's interlocutory appeal, *In re: Republic of Iraq*, No. 07-8004 (D.C. Cir. 2007), the D.C. Circuit ordered on its own motion that the case be held in abeyance pending resolution of *Simon v. Republic of Iraq*, No. 06-7175 (D.C. Cir. 2006).

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<sup>1</sup> Iraq asserts in its Petition that Judges Kavanaugh and Brown's statement that they would agree to initial hearing *en banc* signifies that they question the propriety of the D.C. Circuit's decision in *Acree*. Iraq's assertion is misguided. Judge Brown concurred in the summary denial of Iraq's jurisdictional appeal on the basis of *Acree* less than three weeks later. Appendix to Petition for Writ of Certiorari at App. 1a.

## REASONS FOR DENYING THE WRIT

### I. THE D.C. CIRCUIT'S DECISION FOLLOWS ESTABLISHED PRECEDENT AND DOES NOT INVOLVE AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

The instant Petition is premised wholly on the argument that the D.C. Circuit in *Acree* incorrectly decided the issue of statutory interpretation of § 1503 of the Emergency Wartime Supplemental Appropriations Act (“EWSAA”) of 2003, Pub. L. No. 108-11, 117 Stat. 559. Specifically, Iraq challenges the Court’s holding that § 1503 did not grant the President the authority to waive the jurisdiction of the federal courts over Iraq under the state sponsor of terrorism exception contained in 28 U.S.C § 1605(a)(7). Accordingly, there is no issue of exceptional national importance, because Congress and the President have recognized the propriety of the *Acree* decision by establishing in federal law that § 1503 of the EWSAA of 2003 **did not** grant the President the authority to remove the jurisdiction of any court of the United States. *See* Pub. L. No. 110-181, 122 Stat. 342 (2008).

On January 28, 2008, the National Defense Authorization Act for 2008 (“NDAA II”), H.R. 4986, 110th Cong. (2008), was signed by the President. *Id.* NDAA II was drafted in response to the President’s veto of Congress’s initial NDAA for 2008 (“NDAA I”), H.R. 1585, 110th Cong. (2007), which had been passed by an overwhelming majority of Congress in December 2007. The President vetoed NDAA I over provisions in § 1083 directed at enhancing the ability

of victims of state sponsored terrorism to recover against defendant states in actions under 28 U.S.C. § 1605, particularly as it applied to Iraq. *Memorandum of Disapproval*, 3 Weekly Comp. Pers. Doc. 1641 (Dec. 28, 2007).

Section 1083, initially titled “Justice for Marines and other Victims of State Sponsored Terrorism,” was added to NDAA I by Senate Amendment 2251, on September 26, 2007. This amendment was sponsored by Senator Frank Lautenberg and cosponsored by twenty Senators, including Senators Specter, Clinton, Dole, Lieberman and Nelson. *See* Library of Congress: Report on Senate Amendment 2251, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SP02251>. Section 1083 was targeted specifically at addressing decisions of the D.C. Circuit and tactics being employed by defendant states that Congress considered to impermissibly weaken the ability of plaintiffs to recover under 28 U.S.C. § 1605(a)(7). 154 Cong. Rec. S54-56 (daily ed. Jan. 22, 2008) (statement of Sen. Lautenberg). These tactics and decisions were addressed and disapproved through the revision of § 1605 and the establishment of a new section, 28 U.S.C. § 1605A. This new section, while substantially similar to § 1605, contained among other enhancements the ability to place liens on a defendant state’s assets and the removal of such state’s ability to take interlocutory appeals. *Id.*

Section 1083, as passed by the Senate and House in H.R. 1585 also contains § 1083(c)(4) that was targeted directly at the argument Iraq is employing

in the instant Petition and in other cases involving § 1605(a)(7), that the *Acree* majority had incorrectly interpreted Congress's intent in reviewing § 1503 of the EWSAA of 2003. Section 1083 provides unequivocally that Congress did not intend § 1503 to authorize the President to remove the jurisdiction of any court of the United States, exactly as the D.C. Circuit held in *Acree*. Section 1083(c)(4) of H.R. 1585 states:

**(4) PRESERVING THE JURISDICTION OF THE COURTS. –**

Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

Immediately upon reconvening Congress in January 2008, a bipartisan group began negotiating a compromise with the executive branch over § 1083 to facilitate a new NDAA. 154 Cong. Rec. S53-54 (daily ed. Jan. 22, 2008) (statement of Sen. Levin). Congress was under considerable pressure to immediately pass NDAA II in order to provide funding for the ongoing actions in Iraq and Afghanistan. *Id.* Against the will of numerous members of Congress, the negotiations resulted in a revision of § 1083 that did not in any way modify NDAA I § 1605A, except to add a new

section, § 1605A(d).<sup>2</sup> See 154 Cong. Rec. H257-59 (daily ed. Jan. 16, 2008). As contained in H.R. 4986, § 1605A(d) grants the President the authority to waive provisions of § 1605A as they would affect Iraq, subject to certain required presidential determinations.

Of overwhelming significance to the instant action, H.R. 4986 as passed by both houses of Congress and as signed into law by the President includes unmodified § 1605A(c)(4). Section 1605A(c)(4) as contained in Public Law 110-181 states:

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<sup>2</sup> Along with other members of Congress, Senate Majority Leader Harry Reid expressed his dissatisfaction with the § 1083 compromise during discussions on the revised NDAA. During the January 22 meeting of the Senate, Senator Reid stated:

I also want to reiterate that it is my belief that the Government of Iraq should take responsibility for what has taken place there in years past, including the brutal torture of American POWs. *Congress has gone on record repeatedly – most recently, in overwhelmingly passing section 1083 of the conference report to H.R. 1585 last year in both the House and Senate and sending it to the President – to support the efforts of these Americans who have suffered so much for their country to hold the torturers accountable. This administration has been fighting for years to oppose efforts to win compensation for these soldiers, which is, frankly, a disgrace.* 154 Cong. Rec. S57 (daily ed. Jan. 22, 2008) (emphasis added).

**(4) PRESERVING THE JURISDICTION OF THE COURTS. –**

Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

Section 1605A(c)(4) along with § 1605A(d) (the provision granting the President the authority to waive provisions of § 1605A as they apply to Iraq) were codified as notes to 28 U.S.C. § 1605A and are now in force as binding provisions of federal law.

The Congress and the Executive could not have set forth a clearer statement that the D.C. Circuit's ruling in *Acree* as to the statutory interpretation of § 1503 of the EWSAA was correct. As such, it is self evident that neither the Executive nor Congress considers the propriety of the *Acree* decision to be a question of exceptional national importance. For this Court to hold otherwise would directly contradict an express provision of federal law and multiple direct expressions of the will of Congress as to this matter. Accordingly, this Court must acknowledge that the D.C. Circuit's decision in *Acree* is consonant with its established precedent and refuse to accept Iraq's Petition for Writ of Certiorari.

**II. REMAND FOR RECONSIDERATION IN LIGHT OF SECTION 1083 OF THE NDAA IS UNNECESSARY, THE D.C. CIRCUIT IS CURRENTLY REVIEWING THESE ISSUES IN *SIMON V. REPUBLIC OF IRAQ*, NO. 06-7175.**

On February 4, 2008, in *Simon v. Republic of Iraq*, No. 06-7175 (D.D.C. 2006), the D.C. Circuit issued an order directing the parties to submit briefs to the Court, addressing the effects upon the case of § 1083 of NDAA II and of the President's waiver, pursuant to § 1083(d) thereof, of "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof," contained in Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Jan. 28, 2008). App. 2-3. As of March 14, 2008, both the Appellant and the Appellee Iraq have filed briefs to the D.C. Circuit as ordered by the Court.

On December 19, 2007, the D.C. Circuit issued an order on its own motion placing this case in abeyance pending resolution of *Simon*. App. 1. The Courts decision in *Simon* will decide the exact issues upon which Iraq seeks to have the case remanded for reconsideration. This case as currently held in abeyance in the D.C. Circuit is on interlocutory appeal of the Circuit Court's decision on Iraq's Motion to Dismiss. Accordingly, it is undeniable that Iraq is currently being afforded a full opportunity to have the D.C. Circuit reconsider its decision as to the jurisdiction of the federal courts over Iraq in light of § 1083(d) and Presidential Determination No. 2008-9.

In consideration of the order in *Simon* and Iraq's pending interlocutory appeal in the instant case, a remand of the D.C. Circuit's decision would serve no conceivable purpose and would waste judicial time and resources.

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**CONCLUSION**

For the reasons stated herein, the Respondents respectfully request that this Court deny Iraq's Petition for Writ of Certiorari, and affirm the District Court and the Circuit Court in all respects.

Respectfully submitted,

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