No. 03-343

In The
Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100

JOHN J. GIBBONS
GITANJALI S. GUTIERREZ
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, NJ 07102
Telephone: 973-596-4700
Facsimile: 973-596-0545

Attorneys for Petitioners

April 7, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The government has submitted an extraordinary brief. Citing documents created *after* this Court granted *certiorari* and never before presented to any court, the government claims for the first time that it has applied a thorough and careful screening and review process to the Guantanamo detainees and has deemed them all to be "enemy combatants." Government's Brief 5-7 ("G. Br."). In its carefully worded description, however, the government does not even assert that these newly minted processes were applied to these petitioners. This Court, moreover, is bound to assume, as did the district court and court of appeals, that the allegations in the complaint are true and that petitioners are innocent civilians taken into custody by mistake.[1]

---

[1] Because the Court is reviewing a decision granting respondents' motion to dismiss, it "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002). Petitioners alleged that none of them "is or ever has been a combatant or belligerent against the United States, or a member or supporter of al Qaida or the Taliban . . . or has ever engaged in or supported any terrorist or hostile act against the United States." Pet. App. 25. Based on these allegations, the district court properly rejected respondents' suggestion that it take "judicial notice" that petitioners are "enemy combatants." Pet. App. 56 n.12. Similarly, the court of appeals properly concluded, "[d]espite the government's argument to the contrary," that "none of the Guantanamo detainees are within the category of 'enemy aliens,' at least as *Eisentrager* used the term." *Id.* at 11.

There is also substantial reason to believe petitioners' claim of innocence. Senior military officials have publicly conceded the possibility that many of the Guantanamo detainees were seized by mistake. *See*, *e.g.*, Dep't of Def., Secretary of Defense Donald H. Rumsfeld, *Media Availability en route to Camp X-Ray* (Jan. 27, 2002) ("Were they picked up . . . unintentionally? Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there."); G. Miller, *Many Held at Guantanamo Not Likely Terrorists,* Los Angeles Times, Dec. 22, 2002, at 1-1 ("The United States is holding dozens of prisoners at Guantanamo Bay who have no meaningful connection to Al-Queda or the Taliban . . . according to military sources with direct knowledge of the matter."); V. Mabrey, *Camp Delta: Guantanamo Bay*, 60 Minutes II, Sept. 24, 2003 ("[A] senior American military interrogator . . . told 60 Minutes II that as many as 20 percent of the Guantanamo prisoners were sent by mistake.").

What is truly astounding is that the government attempts to persuade the Court that it has employed a fair and legitimate process for determining whether petitioners are enemy combatants while simultaneously declaring that courts have no authority to examine that process and, indeed, that national security would be threatened if they did so. None of the newly announced and proposed processes that the government describes are mandatory, and there is no reason to believe that the government would abide by them any more than it has abided by the existing military regulations that require an individualized hearing where any doubt exists as to a detainee's status, which the government never mentions in its brief. As suddenly as these new processes appeared after the Court granted *certiorari*, so might they suddenly disappear if the prospect of judicial scrutiny is removed.

The government animates its apocalyptic vision of the harms resulting from judicial review with repeated mischaracterizations of what petitioners seek, stating that petitioners are asking the courts to second-guess military judgments about the conduct of the war on terrorism, that petitioners are challenging the military's authority to capture and detain enemy combatants, that petitioners assert a right to counsel during military interrogations, and that petitioners seek individualized determinations by Article III courts as to their enemy status, G. Br. 43-44, none of which petitioners have ever sought. In this context, it is important to clarify what this case is and is not about.

This case does not question the authority of the military to capture persons on the field of battle. Nor does it question the authority of the military to detain persons properly determined to be enemy combatants until the end of hostilities. The military clearly has that authority. Petitioners also do not claim that enemy combatants have a right to relief under the habeas statute. It was well established under the common law that alien enemies—and, by proper

implication, others properly determined to be enemy combatants—have no right to habeas relief.[2]

But petitioners claim that they are not enemy combatants. The sole question here is whether, long after the military captured petitioners and moved them far from the field of battle to a place under exclusive U.S. control, any court has authority to examine whether the detentions are based on a lawful process for determining that petitioners are or are not enemy combatants. Petitioners do not claim that the courts must themselves conduct that process and review the basis for each individual detention. Rather, they contend that some lawful process must apply and that the courts have authority to ensure that one does.

The government, in contrast, takes the position that this Court's decision in *Johnson v. Eisentrager* and principles of separation of powers establish a rigid, mechanical rule under which the Executive has unlimited and unreviewable authority to detain aliens outside the technical sovereignty of the United States, based on any process it chooses to apply, or none at all; to hold the detainees indefinitely; to provide no process for reviewing the detainees' status; to treat the detainees however the Executive sees fit; and under no circumstances must the government answer to any judicial authority to justify the legality of its actions. Nothing in the Constitution, the jurisdictional statutes governing Article III courts, or this Court's decisions, however, deprives the courts of all power to consider the legality of the government's indefinite detention of petitioners. Reviewing the validity of the process by which the Executive imposes detention is a quintessential judicial activity and one that the courts have undertaken for centuries.[3]

---

[2] *See* Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 (1949); *cf. Johnson v. Eisentrager*, 359 U.S. 763, 777 n.8 (1950).

[3] *See*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing

(Continued on following page)

Whether the courts have jurisdiction to conduct such review is a straightforward yes-or-no question. Its binary character may appear to suggest that the opposing positions of the parties confront this Court with a choice between extremes. Nothing could be farther from the truth. Endorsement of the government's position—that no court has jurisdiction to review detentions imposed in a place where the government's exclusive control permits it to ship prisoners at will—would create a lawless enclave in which no inquiry can ever be conducted by a court into the most plausible complaints of the most outrageous governmental violations of basic human rights. That is truly an extreme position. Endorsement of petitioners' position that the courts have jurisdiction, on the other hand, would permit courts to grant or deny relief, preserving the rule of law while accommodating the practical exigencies and concerns that arise in the conduct and the wake of war.

I. *Eisentrager* Does Not Deny the Federal Courts Authority to Consider Petitioners' Claims

The plain language of the jurisdictional provision of the habeas corpus statute, 28 U.S.C. § 2241(a), establishes the district court's authority to hear petitioners' claims. Petitioners indisputably are "in custody under or by color of the authority of the United States," and also allege that they are "in custody in violation of the Constitution or laws or treaties of the United States."[4] Nevertheless, the government argues that the federal courts lack authority for three reasons. First, it contends that the *Eisentrager* opinion, which nowhere mentions 28 U.S.C. § 2241, nevertheless held that federal courts lack jurisdiction to consider claims of aliens outside the United States. G. Br. 14-17. Second, the government contends that, by not

---

the legality of executive detention, and it is in that context that its protections have been strongest.").

[4] 28 U.S.C. § 2241(c)(1), (3).

adopting legislation explicitly conferring jurisdiction upon the federal courts to consider habeas petitions filed by aliens outside the United States, Congress expressed its intent to preclude jurisdiction for such individuals. *Id.* at 17-19. Third, it contends that this Court in *Eisentrager* changed the traditional common law scope of habeas review and established an absolute rule that habeas jurisdiction exists to consider claims filed by aliens only if they are confined in an area over which the United States has technical sovereignty. *Id.* at 21-25. These contentions have no merit.

1. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[5] There is nothing ambiguous about the language of 28 U.S.C. § 2241. It plainly confers jurisdiction upon federal courts to consider habeas claims of individuals, such as petitioners, who are in custody of the United States or who allege they are being held in violation of the Constitution or laws or treaties of the United States. "'Where there is no ambiguity in the words, there is no room for construction.'"[6] Therefore, as a matter of plain statutory text, Section 2241 confers jurisdiction on the federal courts to consider petitioners' habeas claims. Furthermore, this Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."[7]

Consistent with these fundamental principles, the Court in *Eisentrager* nowhere stated or suggested that it lacked jurisdiction under Section 2241 to consider the petitioners' habeas claims in that case. The Court nowhere examined the text, purpose, or history of Section 2241, which one would obviously

---

[5] *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

[6] *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)).

[7] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

expect if the Court's analysis were based on that jurisdictional provision. Instead, the Court prefaced its analysis by quoting 28 U.S.C. § 2243: "The case is before us only on issues of law. The writ of *habeas corpus* must be granted 'unless it appears from the application' that the applicants *are not entitled to it*."[8] For the reasons it gave in its opinion, the Court concluded that the *Eisentrager* petitioners were "not entitled" to the writ. As petitioners explained in their opening brief, those reasons do not apply to them. Pet. Br. 26-38. In any event, the federal courts' jurisdiction under Section 241 to consider petitioners' claims does not depend on whether they are "entitled" to the relief they seek.[9]

At most, the *Eisentrager* opinion is ambiguous about jurisdiction. This Court has long held that habeas jurisdiction can be constricted only by "a clear and unambiguous statement of congressional intent."[10] Here, jurisdiction to consider petitioners' claims is required by the plain text of 28 U.S.C. § 2241; it should not be precluded on the basis of an ambiguous opinion of this Court.[11]

---

[8] 339 U.S. at 767 (quoting 28 U.S.C. § 2243) (emphasis added). The government notes that the *Eisentrager* petitioners argued in their Supreme Court brief that the Court had jurisdiction under Section § 2241(a) to consider their habeas claims and deduces that the Court "necessarily rejected" petitioners' jurisdictional argument. G. Br. 16 n.5. This deduction is specious. The Court expressly assumed that petitioners satisfied the prerequisites for the federal courts' exercise of jurisdiction under Section 2241(a). *See* 339 U.S. at 766-67.

[9] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (it is "firmly established" that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction"); Pet. Br. 14 n.13.

[10] *St. Cyr*, 533 U.S. at 298.

[11] Similarly, the plain language of 28 U.S.C. § 1331 confers jurisdiction over federal questions, such as those raised on petitioners' APA claim. Nothing in the text of Section 1331 suggests any limitation based on the citizenship of the plaintiff or the location from which suit is brought. The government argues that *Eisentrager* forecloses petitioners' claim under the APA because *Eisentrager* broadly holds that aliens outside the sovereign territory cannot bring suit in the federal courts.

(Continued on following page)

2. Congress' failure to adopt an amendment to 28 U.S.C. § 2241 explicitly conferring habeas corpus jurisdiction over claims by aliens detained outside the United States says nothing about the meaning of the habeas statute as it was enacted by the First Congress and amended in 1867. As this Court has stated, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"[12] The failure to take legislative action "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[13]

3. *Eisentrager* did not establish an absolute rule conditioning jurisdiction on technical sovereignty, and the government cites no other case to support such a rule.[14] The two times the Court used the words "sovereign" and "sovereignty" with respect to territory, it appeared to use the words interchangeably with "territorial jurisdiction,"[15] strongly suggesting that it used the terms in the everyday sense to mean "supreme authority" over territory, a description that

---

G. Br. 40. The government is plainly wrong that nonresident aliens are barred from bringing suit in U.S. courts, and courts that have examined the question have uniformly held that nonresident aliens are entitled to bring suit under the APA. *See, e.g., Estrada v. Ahrens*, 296 F.2d 690, 695 (5th Cir. 1961); *Constructores Civiles de CentroAmerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972).

[12] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

[13] *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

[14] Petitioners do not concede that the United States lacks sovereignty over Guantanamo. The U.S. Navy continues to inform the world on its website that the United States exercises "the essential elements of sovereignty over" Guantanamo and is the "supreme authority" there. The History of Guantanamo Bay: An Online Edition (1964), *available at* http://www.nsgtmo.navy.mil/history.htm; s*ee also Amicus Curiae* Brief of Retired Military Officers at 13-21.

[15] 339 U.S. at 778, 780.

plainly applies to the exclusive and absolute control that the United States exercises over Guantanamo.[16] There is no indication that *Eisentrager* or any other decision of this Court has required technical sovereignty to invoke the jurisdiction of the federal courts.[17]

Such a rule would be inconsistent with the traditional scope of habeas jurisdiction as it existed under the common law well before our Constitution was adopted. The government does not dispute that habeas jurisdiction under the common law extended to any person subject to the control of the Crown in any area over which the Crown exercised control and had the power to issue the writ.[18] There is no indication in *Eisentrager* that the Court rejected that longstanding common law rule. Any conclusion that it did so would be directly contrary to this Court's holding in

---

[16] Webster's 9th New Collegiate Dictionary 1128-29 (1988).

[17] In fact, the courts have often exercised jurisdiction over constitutional claims asserted by aliens in territories, such as the Panama Canal Zone, over which the United States clearly lacked technical sovereignty. *See* Pet. Br. 35-36 n.61. The government claims that the Canal Zone was different because Congress had established federal courts there. G. Br. 33. The court system was established in the Canal Zone, however, due to the foreseen civilian populace in that territory. Guantanamo, on the other hand, was intended to be a naval base. The difference between the bases is a result of their respective uses as described in the land agreements and not a result of any alleged difference in the degree of sovereignty. *See* R. Powers, Jr., *Caribbean Leased Bases Jurisdiction*, XV JAG J., 161, 163 (Oct.-Nov. 1961).

[18] *See*, *e.g.*, *Rex v. Cowle*, 97 Eng. Rep. 587 (K.B. 1759); *Rex v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669); *see generally Note on the Power of the English Courts to Issue the Writ of Habeas Corpus*, 8 Jurid. Rev. 157 (1896) ("One of the most remarkable features of *habeas corpus* law in England is that the writ may be issued, not only to places within the ordinary jurisdiction of the English Courts, but also to places outwith that jurisdiction altogether."); W. Duker, A Constitutional History of Habeas Corpus 115 (1980); *Amicus Curiae* Brief of Legal Historians at 16-19; Amicus Curiae Brief of Commonwealth Lawyers Association at 2-6. Where other laws and legal systems were in place, the English courts refrained from exercising jurisdiction. *See* 8 Jurid. Rev. at 158.

St. Cyr that habeas jurisdiction remains available at least as it existed at the time the Constitution was adopted.[19]

Other than asserting that *Eisentrager* makes it so, the government offers no reasoned justification for an absolute rule against U.S. court jurisdiction over claims brought by detainees held in an area under exclusive U.S. control but outside technical U.S. sovereignty. The government asserts that technical sovereignty is the only "manageable and defensible" line to draw. G. Br. 44. Federal courts, however, have shown that they are able to distinguish between cases arising out of territory under the exclusive control of the United States and on which only U.S. law applies, and cases in which the assertion of jurisdiction by U.S. courts could clash with the laws and authority of other nations.[20] Furthermore, as Congress has indicated, the courts are capable of distinguishing "occupied territory" and "the field of battle," where military actions are beyond judicial review, and territory like Guantanamo, which is far removed from the battlefield, and where judicial review will not interfere with military judgment.[21] In any event, the government offers no explanation why a jurisdictional line should be drawn at technical sovereignty for aliens detained by the United States when the U.S. courts are open every day to hear diversity and federal question claims brought by aliens living in areas far from the control of the United States.[22] It would be

[19] *See St. Cyr*, 533 U.S. at 301.

[20] *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987) (federal courts may properly decline to assert jurisdiction over "cases touching the laws and interests of other sovereign states").

[21] 5 U.S.C. § 701(b)(1)(H).

[22] The government is clearly wrong to read *Eisentrager* as extending the "privilege of litigation" to "aliens, whether friendly or enemy," *only if* they are present in the country. Although nonresident *enemy* aliens may not have access to our courts, there is no doubt that non-enemy aliens have such access, even when they are not present in the

(Continued on following page)

anomalous, to say the least, if aliens detained by the United States are accorded no access to U.S. courts while other nonresident aliens are routinely granted the right to sue in the United States to complain of ordinary commercial harms.

The government relies on the presumption against construing federal law to apply extraterritorially, but that presumption has no application here. As this Court has recognized, the presumption against construing U.S. laws to apply abroad was established to prevent "unintended clashes" with the laws of foreign powers.[23] There is no possibility of such a clash at Guantanamo because only U.S. law applies there. Furthermore, the presumption against extraterritorial application of U.S. laws does not apply to the construction of jurisdictional provisions, such as 28 U.S.C. § 1331 and § 2241. "Unlike ordinary domestic statutes, jurisdictional statutes inherently present the question of how far Congress wishes U.S. law to extend. There is therefore no reason to presume that Congress did, or did not, mean to act extraterritorially."[24]

In enacting the habeas statute in 1789, Congress intended to adopt the common law scope of habeas review, which extended extraterritorially to claims by persons

---

country. In addition to the right of nonresident aliens to bring suit under 28 U.S.C. § 1331, discussed above, *see supra* note 11, under 28 U.S.C. § 1332 and Article III, Sec. 2, diversity jurisdiction is expressly provided for suits by "citizens or subjects of a foreign state," and diversity jurisdiction has long been understood to allow nonresident aliens to bring suit in U.S. courts. *See Breedlove v. Nicolet*, 32 U.S. 413, 431-32 (1833) (Marshall, C.J.); *see also* 28 U.S.C.A. § 1332 notes 1291-1360. In 1988, Congress confirmed that permanent *resident* aliens do not qualify as aliens for diversity purposes, *see* 28 U.S.C. § 1332(a), thus further demonstrating Congress's intent that *nonresident* aliens are entitled to sue under § 1332.

[23] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

[24] *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) (Kozinski, J.).

held outside the borders but subject to the control of the Crown.[25] Any other rule would not only be contrary to the plain language and history of the statute, it would also make no sense. It would give the Executive unchecked power to evade judicial examination of decisions—even decisions made in the United States—simply by choosing to hold their prisoners outside U.S. sovereign territory. Guantanamo offers the Executive the perfect refuge to try to accomplish that purpose—it is a unique area under exclusive U.S. control and therefore beyond the reach of any foreign court, while also, assertedly, beyond the reach of the U.S. courts. The Executive's purpose was clear;[26] the result should not be allowed.

II. Judicial Review of Petitioners' Claims Would Not Interfere with Separation of Powers

The government bluntly declares that judicial review would be "very damaging to the military's ability to win the war," that any court involvement would "directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters," and that judicial review would "no doubt be highly comforting to enemies of the United States." G. Br. 42, 43. The Executive has made similar claims throughout our nation's history, and they have consistently been rejected.[27]

---

[25] *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (in construing "the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law").

[26] *See* Col. Daniel F. McCallum, *Why GTMO?*, at 6-8, *available at* http://www.ndu.edu/nwc/writing/AY03/5603/5603G.pdf.

[27] This Court has thus held that principles of separation of powers do not give the executive unlimited and unreviewable authority to punish desertion by soldiers on the field of battle, *Trop v. Dulles*, 356 U.S. 86 (1958); to maintain steel production during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); to punish acts of sabotage by alien enemies, *Ex parte Quirin*, 317 U.S. 1 (1942); to seize enemy property, *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); to annex territory seized by military conquest, *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850); to impose internments on resident aliens and U.S. citizens, *Korematsu v. United States*, 323 U.S. 214 (1944); to exercise

(Continued on following page)

Although the Executive is entitled to considerable discretion in exercising military authority, this Court has long understood that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[28]

The government invokes national security concerns on the false premise that petitioners are asking the courts to second-guess military judgments. Petitioners seek judicial review limited to what is necessary to ensure that the Executive employs a legitimate process to distinguish enemy combatants from innocent civilians. The government cannot plausibly argue that national security is threatened by such a process because the military's own regulations require it, and the military has provided that process to detainees in every conflict since World War II.[29] In signing and ratifying Geneva Convention III, which mandates that detainees be provided access to an impartial tribunal where there is any doubt as to their status, Congress and the President likewise concluded that national security is not threatened by providing an impartial process to persons captured in wartime. Ensuring that the government adheres to procedures ratified by Congress and adopted in executive regulations cannot plausibly be said to interfere with the President's war powers or threaten national security.

---

court martial authority over former servicemen, *Toth v. Quarles*, 350 U.S. 11 (1955); to impose punishment on military dependants abroad, *Reid v. Covert*, 354 U.S 1 (1957); and to declare martial law and try civilians, *Ex parte Milligan,* 71 U.S. 2 (1866). *See* Pet. Br. 42-47.

[28] *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

[29] *See* Pet. App. 80; *Amicus Curiae* Brief of Experts on the Law of War at 9-11, filed in *Hamdi v. Rumsfeld*, No. 03-0696. The government has denied the Guantanamo detainees POW status because they were dressed as civilians, while proclaiming that no impartial tribunals are necessary because "there is no doubt about their status." *Response of the Government of the United States of America to Inter-American Commission for Human Rights*, Jan. 5, 2004. But many people dressed as civilians are in fact innocent civilians, making impartial tribunals all the more necessary.

Rather than arguing that national security would be threatened by the relief petitioners actually seek, the government argues that national security is threatened by various forms of relief that petitioners do not seek and have never sought. The government argues that national security would be threatened by providing detainees access to lawyers during intelligence interrogations, *see* G. Br. 42-43, but petitioners have never asserted a right to have counsel present during intelligence interrogations.[30] The government further argues that national security would be threatened by giving all detainees individualized review by Article III courts of the legitimacy of their capture, *id.* at 55, but petitioners have expressly disclaimed any right to challenge their initial capture. Pet. Br. 4; J.A. 14-35. Indeed, petitioners have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States. Instead, petitioners maintain that the courts must stand watch to ensure that the Executive imposes detentions only based upon a lawful process. Review of the legality of that process "would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case."[31]

The government's invocation of the political question doctrine, G. Br. 35, 37 n.19, suffers from similar flaws. To

---

[30] The government now concedes that detainees subject to criminal processes have a right to counsel. *See* Military Order No. 1, 68 Fed. Reg. 39,374 (July 1, 2003). It appeared that such a point had arrived in February of 2002 when Secretary of Defense Rumsfeld declared that the interrogation of the detainees for intelligence purposes had ended and that the detainees were being interrogated for purposes of criminal prosecution. J.A. 31 ¶ 35; Pet. App. 97. The government has now apparently retreated from that declaration.

[31] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680 n.11 (1986). Furthermore, petitioners have indicated from the outset that a court reviewing their claims should establish reasonable procedures to protect national security. J.A. 34 ¶ 4.

establish that petitioners' claims are nonjusticiable under the political question doctrine, the government must demonstrate that a provision of the Constitution establishes "a textually demonstrable constitutional commitment" to give the President unreviewable authority to impose indefinite detentions on aliens seized and detained abroad, or alternatively, the government must establish that courts lack competence to determine the legality of petitioners' detention.[32] The government attempts neither. Instead, the government attacks straw men by arguing that the political question doctrine precludes courts from reviewing questions that petitioners have never sought to litigate, such as the "legality of the President's ongoing military operation," G. Br. 37 n.19, and whether petitioners are actual enemies of the United States, *id.* at 35. Petitioners have repeatedly made clear that they only seek judicial review to ensure that the Executive employs a lawful process for imposing detention on them, and nothing in the political question doctrine precludes courts from making that quintessentially judicial determination.

In contrast to the limited judicial review petitioners seek, the government advances the stark proposition that United States courts *never* have authority to review the detention of aliens so long as the Executive chooses to imprison them outside the technical sovereignty of the United States. *See* G. Br. 41-44. The government's position does not depend on the existence of an armed conflict or whether the detainees are enemy combatants, as it insists that no aliens detained outside the country have a right to judicial review at any time. *Id.* at 12. The government thus takes the position that, no matter what the Executive does to aliens abroad, and no matter how long it does so, there

[32] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

are no circumstances under which it must answer to the judiciary or justify the legality of its actions. *Id.* at 41-44.[33]

The government's position that the military has unreviewable authority over aliens abroad greatly exceeds the reasoned conclusion of Congress, which, in enacting the APA, gave careful consideration to what exercises of military judgment should be shielded from judicial review and which should not. Rather than adopting a blanket exemption from judicial review for all actions by the military abroad, Congress enacted narrow exemptions for the decisions of "military commissions," for military actions "exercised in the field in time of war," and for military actions undertaken in "occupied territory," none of which are applicable here.[34] Because the narrow exemptions for military action adopted in the APA were duly enacted by Congress and signed by the President, they are entitled to the greatest degree of judicial deference.[35] In contrast, the government's assertions of unlimited authority over aliens seized abroad, which has no backing by congressional enactment, is entitled to no such respect. This Court has repeatedly rejected similar attempts to aggrandize Executive power, recognizing instead "Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."[36]

---

[33] The government's assertion of Executive power goes so far as to suggest that even Congress lacks power to legislate with regard to executive detentions of aliens abroad. G. Br. 45.

[34] 5 U.S.C. § 701(b)(1)(F), (H).

[35] *See Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

[36] *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989); *see also Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

III. The Substantive Scope of the Fifth Amendment Has No Bearing on the Jurisdiction of the Courts to Hear Petitioners' Claims

The government argues that there is no jurisdiction to review petitioners' claims because, purportedly, the protections of the Fifth Amendment have no application to aliens detained abroad. *See* G. Br. 19-20, 26. That argument is a non-sequitur: although the substantive scope of the Fifth Amendment may affect the *merits* of petitioners' claims of unlawful detention, it says nothing about the *jurisdiction* of the courts to consider petitioners' claims. Moreover, the Fifth Amendment's due process clause is but one of many substantive bases for petitioners' claim that their detention is unlawful, as petitioners also allege that their detention violates military regulations, the Military Order, and treaties of the United States. Even if the government is correct that there is no merit to petitioners' due process claim, that conclusion would not affect the merit of petitioners' other claims, nor would it affect the jurisdiction of the courts to consider those claims.[37]

Beyond that, the authority of the judiciary to review the legality of executive detentions does not derive from the Fifth Amendment and, indeed, predates the adoption of the Bill of Rights. Under the habeas provision in the First Judiciary Act, the courts were authorized to examine

[37] In support of its argument that the Fifth Amendment does not protect aliens detained abroad, the government relies on this Court's citations to *Eisentrager* in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990), and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *See* G. Br. 19-20. Those citations demonstrate, however, that this Court has not regarded *Eisentrager* as a jurisdictional decision (in which case the discussion of the extraterritorial application of the Fifth Amendment would be dictum) but rather has looked to *Eisentrager* as a decision on the merits. In any event, this Court has recognized that aliens abroad are entitled to be treated in accordance with Fifth Amendment standards of fair play and substantial justice before being subjected to the processes of U.S. courts. *See Asahi Metal Indus. Co. v. Superior Ct. of California*, 480 U.S. 102, 113 (1987).

executive detentions and to grant relief if the Executive could show no lawful process or basis for the detention.[38] The adoption of the Bill of Rights was never intended to diminish this fundamental protection of human liberty.

IV. The Proposition that the Executive Can Evade Judicial Review By Detaining Individuals Outside the Nation's Borders Is Anathema to International Law

Although the government argues that international law has no bearing on the jurisdictional issue presented by this case, international law is relevant to jurisdiction in two distinct ways. First, 28 U.S.C. § 2241(c)(3) provides jurisdiction over claims that a prisoner "is in custody in violation of the Constitution or laws or *treaties* of the United States," and petitioners allege that they are being detained by the United States in violation of two treaties ratified by Congress, Geneva Convention III and the International Covenant on Civil and Political Rights. Section 2241 on its face establishes the district court's jurisdiction to hear petitioners' claim of a violation of international treaties to which the United States is a party.[39] The government argues at length that petitioners' treaty-based claims are meritless, G. Br. 38-39, but such arguments have no relevance to the jurisdictional question before this Court, as even the government concedes that the "availability of habeas jurisdiction does not turn on a threshold inquiry into the merits of a detainee's claims under international or domestic law." *Id.* at 48.[40]

---

[38] *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970-75 (1998).

[39] Likewise, 28 U.S.C. § 1331 establishes district court jurisdiction of all civil actions arising under the "treaties of the United States."

[40] Moreover, the government is wrong on the merits of petitioners' treaty-based claims. With respect to Geneva Convention III ("GC III"), the International Committee of the Red Cross, charged with monitoring

(Continued on following page)

Second, international law is relevant to the jurisdictional question because, pursuant to the principle recognized by this Court in *Murray v. Schooner Charming Betsy*, the statutes at issue in this case, like other congressional enactments, "ought never to be construed to violate the law of nations if any other possible construction remains."[41] To construe 28 U.S.C. §§ 1331 and 2241 as the government urges—to foreclose judicial review to persons under indefinite detention by the United States in territory under exclusive U.S. control but outside the nation's borders—would be inconsistent with a uniform body of international law. Every civilized nation and international tribunal that has considered the question has rejected the proposition that a state's obligation to provide judicial review to those it detains ends at its borders, and instead have looked to whether the territory and individuals are subject to the state's authority and control.[42] The principle announced by this Court in *Charming Betsy* establishes

---

compliance with the Geneva Conventions, has publicly rebuked the United States for failing to convene the individual "competent tribunals" required by Article V of GC III. *See* ICRC Operational Update, *Guantanamo Bay: the work continues*, July 18, 2003; *see also* A. Higgens, *Agency Decries Cuba Detainees' Detention*, Associated Press, Oct. 10, 2003. The government's claim that the Geneva Conventions are not self-executing, G. Br. 39, is beside the point since 28 U.S.C. § 2241 and 5 U.S.C. § 702 each provide petitioners a cause of action by which their GC III claims can be heard. *See Amicus Curiae* Brief of Experts on the Law of War at 16-20, filed in *Hamdi v. Rumsfeld*, No. 03-0696. Moreover, the requirement in GC III of an impartial hearing has been held to be self-executing. *Id.* at 21-27. The government's claims regarding the International Covenant on Civil and Political Rights are similarly specious. *See Amicus Curiae* Brief of Human Rights Institute of International Bar Association at 14-21.

[41] 6 U.S. (2 Cranch) 64, 118 (1804).

[42] *See* Pet. Br. 40-41; *see also Amicus Curiae* Brief of Human Rights Institute of the International Bar Association at 18-21; *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* Office of the United Nations High Commissioner for Human Rights, 78th Sess. ¶ 10, CCPR/C/74/CRP.4/Rev.5 (March 2004) (states are responsible for ensuring human rights protections for all persons under their "effective control," even if they are not within the state's territorial boundaries).

that, if there is any doubt regarding the jurisdiction of the courts to hear petitioners' claim, the jurisdictional statutes should not be construed to make the United States a pariah among the international community.

The government mistakenly reads the *Charming Betsy* rule to reflect a different concern—that, pursuant to separation of powers principles, courts should avoid interfering with the Executive's foreign affairs powers. *See* G. Br. 39-40.[43] The *Charming Betsy* rule is not intended to give free reign to the Executive whenever international affairs are implicated; rather, it is a freestanding principle of statutory construction, applied to prevent U.S. law from conflicting with international legal norms.[44] The longstanding principle embodied in the *Charming Betsy* rule reflects the Founders' recognition that "the judgment of other nations is important . . . particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can followed."[45]

---

[43] The government relies on this Court's decision in *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21-22 (1963), but that case does not suggest that courts should defer to the executive's foreign affairs power in spite of international law. The Court in fact held that statutes should be construed consistently with *both* foreign affairs policy and "well-established rule[s] of international law." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (discussing *McCulloch*).

[44] *See*, *e.g.*, *Weinberger*, 456 U.S. at 32 (*Charming Betsy* provides a "maxim of statutory construction" to construe acts of congress consistently with international law); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (Scalia, J., dissenting) (describing the rule in *Charming Betsy* as a "canon of statutory construction . . . relevant to determining the substantive reach of a statute" in light of " 'the law of nations,' or customary international law"); *see also* Restatement (Third) of Foreign Relations Law of the United States § 115 cmt. a (1987).

[45] The Federalist No. 63 (Alexander Hamilton).

CONCLUSION

What is at issue in this case is not the policy of this or any particular presidential administration, but rather the authority of the federal courts to review the actions of the Executive Branch now and in the future. The Executive argues that it has absolute immunity from judicial examination whenever it elects to hold foreign nationals outside U.S. sovereign territory. It claims Guantanamo as a judicial-free zone for the people it captures in the war on terrorism. And because that war takes place in every corner of the globe, the Executive's claim would allow it to capture any foreign national anywhere in the world at any time and to detain him or her at Guantanamo without process or possibility of judicial review, forever. That position has no precedent in our history; it contravenes the fundamental ideals upon which this nation was founded and which it has come to symbolize around the world. Regardless how the courts may eventually decide these cases on the merits, confirming that the courts have the authority to examine the Executive's actions, at least in an area such as Guantanamo that is subject to exclusive U.S. jurisdiction and control, will confirm that in America it is still true that no government official is above the law, and that even in times of stress and danger the rule of law will continue to apply.

Respectfully submitted,

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100

JOHN J. GIBBONS
GITANJALI S. GUTIERREZ

GIBBONS, DEL DEO,
DOLAN, GRIFFINGER &
VECCHIONE, P.C.
One Riverfront Plaza
Newark, NJ 07102
Telephone: 973-596-4700
Facsimile: 973-596-0545

Attorneys for Petitioners

April 7, 2004