No. 03-334

IN THE
Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

JOSEPH MARGULIES
Counsel of Record
MARGULIES & RICHMAN, PLC
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900

MICHAEL RATNER
BARBARA J. OLSHANSKY
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway
New York, NY 10012
(212) 614-6430

MACARTHUR JUSTICE CENTER
UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
(773) 702-9560

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

Attorneys for Petitioners

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INTRODUCTION

The Respondents argue that *any* judicial involvement in this matter will threaten national security. We are told that the danger facing the country can be met only if the Respondents enjoy the power to seize any foreign national from anywhere in the world, and to detain him at Guantánamo Bay for as long as the Executive sees fit, with no legal process and no inquiry into the lawfulness of his detention by any court or tribunal in the country. Anything short of this power creates an intolerable risk to national security.

A claim by the Executive Branch that national security demands unrestrained power is hardly novel. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), for instance, the Executive Branch argued that martial law in Hawaii "was not subject to any judicial control whatever," and issued orders that "prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney." *Id.* at 309; *see also United States v. United States Dist. Court for the Eastern Dist. of Michigan*, 407 U.S. 297, 318-19 (1972). The Court has long resisted such claims, and when it has not, the nation has come to regret it.[1]

But Respondents insist the times have changed and that the power they claim is necessary to meet the reality of today's conflict. As they have made clear, this is not a traditional war with a plainly marked beginning and end, fought by distinctively uniformed armies on readily identifiable battlefields. It is, instead, a 'war on terrorism'. According to the Respondents, this conflict will be fought indefinitely, anywhere in the world.[2] By its very nature, this

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[1] *See* Brief *Amicus Curiae* of Fred Korematsu at 24-28.

[2] "The war on terrorism is a global campaign against a global adversary... It will not end until terrorist networks have been rooted out, wherever they exist." *Prepared Testimony of U.S. Secretary of*

conflict may result in the detention of people whose garb and circumstances do not differ from those of any disengaged civilian.[3] And as Government officials have admitted, the difficulty in distinguishing friend from foe has likely led to the detention of innocent people at Guantánamo.[4]

These differences are vital. Past conflicts have always been governed by familiar principles that contained an inherent check on the arbitrary use of executive power. The very notion of a "theatre of operations," in other words, presupposes its opposite: a time and place where the battle does not rage and civil law prevails.[5] The very notion of an enemy soldier permits the inference that the prisoner in slate gray uniform is a member of the enemy who may be held, with no further process required to determine whether his detention is lawful.[6]

Defense Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan, Washington, D.C., July 31, 2002.

[3] For example, Respondents claim "[t]he Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas." Secretary of Defense Donald H. Rumsfeld, Dep't of Defense, News Briefing, Feb. 8, 2002.

[4] *See, e.g.*, Katharine Q. Seelye, *A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp*, N.Y. Times (March 16, 2002) (Deputy Commander at Guantánamo acknowledges "some [of the detainees] were 'victims of circumstance,' and probably innocent.").

[5] *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then ... martial rule" may prevail. But "[a]s necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power.").

[6] This explains why the WWII German and Italian prisoners of war fall into an obviously different category than the Guantánamo detainees. Their status as prisoners of war, and the circumstances of their capture, dispensed with the need for a further process to determine the lawfulness of their detention. They instead enjoyed all the rights guaranteed under

But according to the Respondents, none of these principles – and therefore none of the checks on arbitrary power that inhere within them – apply to this conflict. They claim all the authority that comes from invoking the war power, with none of the limitations. They claim the right to hold people indefinitely without legal process, and describe this as a traditional incident of war-time operations. But at the same time, they invoke everything that is *untraditional* about this conflict to free them from the historic limitations on the power to detain, including the Geneva Conventions and the military's own regulations. And they do this despite the acknowledged risk that the unconventional nature of this conflict is precisely what creates the likelihood that they have imprisoned people who have a right to be at large.[7]

Times have indeed changed. But the changes do not counsel in favor of allowing executive power to go unchecked. The very conditions that make this conflict unique are the same conditions that make it essential for the Executive Branch to provide some process by which people can demonstrate that their detention is unlawful. They are the same conditions that make it essential for the Court to reject the Respondents' claim of an unlimited, and unreviewable, power to detain.

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the extant legal framework implementing the 1929 Geneva Convention, and were not held outside that legal system.

[7] The risk that the military may capture "civilian non-combatants" does not distinguish this conflict from others in recent memory. On the contrary, as Petitioners observed in their brief, the risk first arose during the Vietnam War. Pet. Br. 47-48. The military responded by drafting regulations that provided for Article 5 hearings to identify such civilians. *Id.* These hearings were used extensively during the first Persian Gulf War, and are presently being used in Iraq. *See infra.* The difference in the current hostilities, therefore, is not in the nature of the conflict, but in the nature of the Executive's response.

I. THE RESPONDENTS' IMPROPER RELIANCE ON EXTRA-RECORD MATERIAL UNDERSCORES THE NEED FOR JUDICIAL REVIEW

The Respondents' brief is striking in several respects, the most prominent of which is its heavy reliance on factual assertions that have no basis in the record. The brief opens with a lengthy Statement drawn almost entirely from material recently prepared by the Department of Defense, including the transcript of a February 13, 2004, speech by Secretary Rumsfeld to the Greater Miami Chamber of Commerce, a Pentagon press briefing that reiterates the Secretary's remarks, and an undated DOD "fact sheet" about the detentions. Resp. Br. 4-7. None of this material is in the record.

The Statement describes – for the first time in this litigation – an elaborate "process" that the Department of Defense now claims has always been part of its treatment of the prisoners at Guantánamo Bay. *Id.* In addition, it describes a recent proposal to establish "administrative review boards." If created, these boards will consider annually whether individual detainees should be released. *Id.* at 6 n.4.

It is noteworthy that most of the Respondents' Statement is not properly before the Court.[8] But still more significant is that none of this information bears any relevance to the question presented. As the Respondents acknowledge, "the sole question presented in this case" is

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[8] Supreme Court Rule 24(g) (Statement should include "the facts material to the consideration of the questions presented, with appropriate references to the joint appendix ... or to the record."); Robert L. Stern, et al., Supreme Court Practice 650 (8th ed. 2002) ("decisions must be based on the evidence submitted to ... the [trial] court and nothing else. In the normal situation, attempts to rely on nonrecord facts in appellate courts are 'unprofessional conduct'.").

whether the federal courts have jurisdiction over the Petitioners' challenge to the legality of their detention at Guantánamo Bay Naval Station. Resp. Br. 13. Jurisdiction, however, does not depend on any "screening process" that may have taken place in Afghanistan, and certainly cannot be influenced by any "administrative review" that has not yet come into existence, nor do the Respondents suggest otherwise.

As Petitioners demonstrated in their brief, a lawful process in a coordinate system of justice may affect the *scope* of subsequent habeas review, but it does not displace federal jurisdiction. Petitioners' Brief on the Merits 35-37 & n.40. Respondents argue that the decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is alone sufficient to resolve this case. Central to this argument is the claim that the lengthy military trial enjoyed by the prisoners in *Johnson* had no bearing on the result in that case. Resp. Br. 36-38. In light of this argument, the Respondents can hardly suggest that an unexamined "screening process," announced more than two years after the litigation began and described in extra-record speeches and press briefings, is somehow relevant to the jurisdictional question before the Court.

Since the great bulk of the information contained in the Statement is irrelevant to the issue before the Court, the Respondents must have included it for some other reason. The explanation emerges from the timing of critical events in this and related litigation. The telling events are as follows:

- November 10, 2003: Court grants *certiorari*. App. 4a[9]
- November 30, 2003: Executive announces its intention to release approximately 140 detainees within the next two months, more than double the

[9] In an Appendix to this Reply Brief, Petitioners document in greater detail the chronology recounted in the text.

number that had been released since the prison opened. *Id.* at 4a.

- January 14, 2004: Petitioners and supporting *amici* in *Rasul* and *Al Odah* file their briefs in this Court, attacking indefinite detention without process. *Id.* at 5a.

- February 13, 2004: In Miami speech, Secretary Rumsfeld describes, for the first time, the "screening process" that supposedly took place in Afghanistan and announces, for the first time, the "administrative review board" that may be created in the future. *Id.* at 5a.

- February 13, 2004: DOD representative holds a press conference at the Pentagon, reiterating the "process" supposedly extended to Guantánamo detainees, repeating plans for an "administrative review" panel, and insisting the detainees are not held "in some legal black hole." *Id.* at 6a.

- March 2, 2004: DOD prepares draft memorandum outlining the procedures to be followed by the "Administrative Review Board," including the assistance of a commissioned officer. According to DOD, "[t]he process provided in this Memorandum is established solely as a matter of discretion and does not confer any right or obligation enforceable by law." Memorandum published the following day. *Id.* at 6a.

- March 3, 2004: Respondents file their brief in this Court, describing at length the process given and planned for detainees. *Id.* at 6a.

The pattern indicated by this chronology – when events in the litigation are followed closely by external events that, if acted upon, will ameliorate the detainees'

plight – suggests that the ameliorating events appear only under the pressure of litigation, and that the real purpose of the Respondents' actions, and the reason the Respondents devote the majority of their Statement to describing them in such detail, is to dissuade the Court from reviewing the Executive's actions.[10] And though Respondents recount this process at length, they fail to note that it confers "no right or obligation enforceable by law." *See supra* at 6.

But what the Executive Branch extends by grace, it may withdraw by fiat. Because "the defendant is free to return to [its] old ways," the Court has always viewed the timing of such unilateral action with suspicion. *United States. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also City of Erie v. Pap's A.M.* 529 U.S. 277, 288 (2000) (noting "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review").[11] Far from demonstrating that this Court should stay its hand, therefore, the Respondents' conduct since the grant of *certiorari* demonstrates the vital importance of judicial review – and the prospect of judicial review – to make the Executive Branch aware of its obligation to conform national-security policies to the rule of law.

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[10] The phenomenon is not limited to this case. In *Hamdi v. Rumsfeld*, No. 03-6696, the Department of Defense did not allow Hamdi to meet with counsel until the day before Hamdi's counsel filed their merits brief in this Court; in *Padilla v. Rumsfeld*, No. 03-0127, the Department of Defense finally allowed Padilla to meet with counsel the day the Executive Branch filed its reply brief in support of *certiorari*. App. 4a, 5a.

[11] *See also Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43 (1944) ("Respondent has consistently urged the validity of the [its] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.").

II. THE RESPONDENTS MISREAD *JOHNSON v. EISENTRAGER*

The Respondents rest virtually their entire argument on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But their position is manufactured from scattered passages, taken out of context and pressed into service by the artful use of ellipses.[12] The argument rests on three propositions: first, that *Johnson* is actually a jurisdictional holding, despite the exhaustive merits review undertaken by the Court; second, that *Johnson* applies to all aliens, and not merely enemy aliens convicted by a lawful tribunal, as suggested throughout the opinion; and third, that *Johnson* makes federal habeas jurisdiction contingent on the detainee's presence within the "ultimate sovereignty" of the United States. To prevail, the Respondents must convince the Court of all three propositions. None withstands scrutiny.

A. *Johnson* Restrained The Exercise of Habeas To Avoid Conflict With A Coordinate Adjudicative System Where The Prisoners Had An Opportunity To Challenge Their Detention

In their opening brief, Petitioners demonstrated that the Court in *Johnson*, as it has done on a number of occasions, restrained the exercise of habeas to avoid interfering with a lawfully created coeval system of justice. Pet. Br. 31-40. But the process that took place in *Johnson* – a lengthy military trial before a lawful tribunal – did not displace federal habeas jurisdiction, just as it did not displace jurisdiction in *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality), *Stone v. Powell*, 428 U.S. 465 (1976), and *Ex parte Royall*, 117 U.S. 241 (1886). *See* Pet. Br. 36-37. Consistent with this understanding, the Court in *Johnson* did not consider itself powerless to inquire into the lawfulness of

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[12] The Petitioners discuss *Johnson* at length in their brief, Pet. Br. 30-46, and focus their reply on the Respondents' use of the decision.

the prisoners' detention. On the contrary, the Court exercised subject matter jurisdiction and carefully considered the prisoners' claims.

First, the Court provided the prisoners "the same preliminary hearing" that it provided to the prisoners in *Ex parte Quirin*, 317 U.S. 1 (1942), *In re Yamashita*, 327 U.S. 1 (1948), and *Hirota v. MacArthur*, 338 U.S. 197 (1949). *Johnson*, 339 U.S. at 784. Second, the Court considered and rejected the prisoners' challenge to the jurisdiction of the military commissions. *Id.* at 785-88.[13] And third, the Court considered and rejected the prisoners' claims under both the Constitution and the 1929 Geneva Convention. *Id.* at 788-90.[14]

Despite this, the Respondents insist *Johnson* is nothing other than a case about subject matter jurisdiction. Resp. Br. 14-17. They make this argument by ignoring what the Court *did*. The Respondents make no mention of the multi-faceted review given to the prisoners' claims in

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[13] At the time *Johnson* was decided, this inquiry into the jurisdiction of the underlying tribunal marked the limit of the Court's *merits* review in federal habeas. *See, e.g., Hiatt v. Brown*, 339 U.S. 103, 110 (1950); Pet. Br. 39.

[14] The Respondents invoke *Johnson* to reject habeas jurisdiction to consider Geneva Convention claims and, apparently, all treaty-based claims. Resp. Br. at 38, 47. But contrary to the Respondents' assertion, the Court in *Johnson* did not leave the prisoners' claims under the Convention to "diplomatic intervention." On the contrary, the Court considered and rejected the prisoners' claims that the military had failed to comply with the procedural requirements of the Convention. 339 U.S. at 789-90. *Johnson* interpreted the 1929 Convention, and not the 1949 Convention presently in force. *Id.* at n.14. Today, any doubt about the status of captured detainees must be resolved by a "competent tribunal." Art. 5. By parallel reasoning, just as the Court had jurisdiction in *Johnson* to review compliance with the procedural requirements of the 1929 Convention, it has jurisdiction today to review, at a minimum, compliance with the procedural requirements of the 1949 Convention. The difference is that in *Johnson*, the Executive Branch complied with these requirements, and today it has not.

Johnson, nor do they acknowledge that the prisoners enjoyed "the same preliminary hearing" in the federal courts as did the prisoners in *Quirin*, *Yamashita*, and *Hirota*.[15] But ignoring what took place does not change it, nor does it alter the fact that the Court in *Johnson* exercised the power that comes only from jurisdiction.[16]

B. *Johnson* Involved Enemy Aliens Convicted By A Lawful Tribunal And Has No Application To Aliens Detained With No Process To Determine Whether They Engaged In Combat Or Conduct Inimical To The United States

The Respondents argue that *Johnson* is about all aliens by ignoring the fact that the entire opinion is about *enemy* aliens. To make this argument, the Respondents are forced to engage in exceedingly creative drafting. For instance, they begin their discussion of *Johnson* with a quote from the opinion, suggesting the Court "framed the basic question before it as 'one of jurisdiction of civil courts.'" Resp. Br. 15 (*quoting Johnson*, 339 U.S. at 765).

It would have been more helpful, however, to quote the entire sentence:

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[15] The only exception is in the Respondents' discussion of the Fifth Amendment. They rely on *Johnson* for the proposition that the Fifth Amendment does not apply at Guantánamo. Resp. Br. 19-20. As Petitioners demonstrated in their brief, this is in error. Pet. Br. 19 n.20. But in any case, the Respondents do not attempt to reconcile how, if the Court had no jurisdiction in *Johnson*, it could also resolve the prisoners' constitutional claims.

[16] As Petitioners acknowledged in their brief, *Johnson* is ambiguous because the Court sometimes uses the term "jurisdiction" to imply a limitation on the power of a federal court. Pet. Br. 40. The better reading of the case, however, looks to what the Court did, rather than what it sometimes said. In any event, the jurisdictional language favored by the Respondent was tied to the fact that the prisoners in *Johnson* were *enemy aliens* – a qualification ignored by the Respondents in their brief, as discussed *infra*.

> The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with *enemy aliens overseas.*

339 U.S. at 765 (emphasis added).

The Respondents then quote *Johnson* for the proposition that "'nothing ... in our statutes' supports the exercise of jurisdiction over a habeas petition filed on behalf of an alien held abroad." Resp. Br. 15 (*quoting Johnson*, 339 U.S. at 768). Later in their brief, they return to this language, and say the Court in *Johnson* "held that 'nothing ... in our statutes' confers jurisdiction over a claim filed on behalf of an alien who 'at no relevant time' has been within the sovereign territory of the United States." *Id.* at 25. In fact, however, the relevant text reads as follows:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an *alien enemy* who, at no relevant time and in no stage of his captivity, has been within *its territorial jurisdiction.* Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

339 U.S. at 768 (emphasis added). Thus, the Respondents misrepresent this passage in three respects. First, they omit the reference to "alien enemy." Second, they substitute "sovereign territory" for the language actually used by the Court: "territorial jurisdiction." And third, they imply that the quoted language concerns the sovereign territory "of the United States" when in fact the text refers to the "territorial jurisdiction" of a court.

These examples can be readily multiplied. The Respondents quote *Johnson* for the proposition that "aliens

held abroad" – and not simply enemy aliens convicted by a military tribunal – have no right "'to sue in some court of the United States for a writ of *habeas corpus*.'" Resp. Br. 16 (*quoting Johnson*, 339 U.S. at 777). They repeat this snippet later in their brief. *Id.* at 26, 27. The relevant text, however, is otherwise:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against the laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

339 U.S. at 777.

Elsewhere, the Respondents quote *Johnson* to argue that "judicial review of claims filed on behalf of aliens captured by the military" – and not enemy aliens convicted by a lawful tribunal – "would directly interfere with the President's authority as Commander in Chief, which 'has been deemed, throughout our history, as essential to war-time security'." Resp. Br. 16-17 (*quoting Johnson*, 339 U.S. at 774). The text containing these words, however, indicates that "[e]xecutive power *over enemy aliens*" has always been

considered "essential to war-time security." 339 U.S. at 774 (emphasis added).

There is a reason why *Johnson* concerns itself with the rights of enemy aliens who had been convicted by a lawful tribunal – as opposed to all aliens, whatever their circumstances – and it is the same reason why Respondents labor throughout their brief to manipulate the text of the opinion in its favor: Respondents' argument, like the opinion below, has no limiting principle. According to the Respondents, any foreign national in the world may be seized from the streets of his home, brought against his will to Guantánamo Bay, and held by the United States for as long as Respondents see fit, with no legal process afforded, and no means to question the factual basis for his detention.[17] Nothing in *Johnson* authorizes this result.[18]

C. *Johnson* Does Not Obscure The Difference Between Guantánamo Bay And Wartime China and Germany

The Respondents argue that *Johnson* conditions jurisdiction on the Petitioners' presence within the "ultimate sovereignty" of the United States. As noted, Respondents' argument suffers from the same creative use of language as their argument about aliens, substituting the words "sovereign territory of the United States" for text that refers

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[17] *See Gherebi v. Bush*, 352 F.3d 1278, 1299-1300 (9th Cir. 2003).

[18] The Respondents' argument also cannot be squared with this Court's long-arm jurisprudence. Foreign nationals with no voluntary connection to the United States may, and have, brought suits in the courts of this country to vindicate their due process rights. *See Asahi Metal Indus. Co v. Superior Court*, 480 U.S. 102, 113 (1987) (holding that a foreign entity which had not voluntarily established the minimum contacts with the United States required by the due process doctrine of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), could not constitutionally be served with process by an American state court).

to the "territorial jurisdiction" of a court.[19] In addition, the Respondents continue to offer no persuasive reason *why* a prisoner's presence within the "ultimate sovereignty" should be the exclusive touchstone of habeas jurisdiction. Instead, they argue that finding subject matter jurisdiction over petitions filed by prisoners at Guantánamo produces a rule that cannot be cabined, and will inevitably compromise the war on terrorism. Resp. Br. 44-46. The argument cannot withstand scrutiny.

First, the Respondents' argument ignores the territorial reach of the common law writ, enshrined by the Suspension Clause. Historically, habeas jurisdiction in an English court did not turn on the formal status of the territory in which the prisoner was detained, but on whether English officials had consolidated sufficient control over the territory to ensure obedience to the writ's command, and on whether there was an alternate local court capable of issuing the writ.[20] At common law, no conquered or settled territory that was subject to exclusive English jurisdiction and control was allowed to remain beyond the rule of law.[21] And of

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[19] As noted in Petitioners' Brief, which discusses Guantánamo at length, the Executive Branch has long agreed that Guantánamo is within United States "territory" and "territorial jurisdiction." *See* Pet. Br. 43-44.

[20] *See* Brief *Amicus Curiae* of Legal Historians at 3-5; Brief *Amicus Curiae* of Commonwealth Lawyers Association at 10-26.

[21] The exclusive jurisdiction and control standard for defining the territorial reach of the writ mirrors current international practice. *See Aksoy v. Turkey*, 23 Eur. H.R. 553 (1996); *Chalal v. United Kingdom*, 23 Eur. H.R. 413 (1997). In addition, the United Nations Human Rights Committee has recently stated that state obligations under the International Covenant on Civil and Political Rights (ICCPR) extend over persons "within the power or effective control" of a State, including non-citizens, and including those within its power or effective control "outside its territory." *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Human Rights Comm., 80th Sess., Gen. Cmt. on Art. 2, at ¶10, CCPR/C/74/CRP.4/Rev.5 (2004). As petitioners noted in their opening brief, the United States ratified the ICCPR in 1992. Pet. Br. 25 n.28.

course, Guantánamo is concededly subject to the exclusive jurisdiction and control of the United States.

Making the scope of the writ turn on exclusive jurisdiction and control, rather than "ultimate sovereignty", is also consistent with jurisprudence regarding the reach of federal law. In *Vermilya-Brown v. Connell*, 335 U.S. 377 (1948), the Court held that the Fair Labor Standards Act applied to a leased military base in Bermuda, which the Court likened to the leased base in Guantánamo, even though the United States was not sovereign on the Bermuda base. The Court held that the Act applied to Bermuda, "even if aliens may be involved, where the incidents regulated occur *on areas under the control, though not within the territorial jurisdiction or sovereignty*," of the United States. 335 U.S. at 381 (*emphasis added*).[22]

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[22] The Court reinforced this conclusion the following year. In *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), the Court held that the Eight Hour Law did not apply to work performed for an American company in Iraq and Iran because the United States had neither sovereignty nor "some measure of legislative control" within those locations. *Id.* at 285; *see also id.* ("There is nothing . . . indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iraq or Iran. We were on that territory by their leave, but without the transfer of any property rights to us.").

Vermilya-Brown also resolves the Respondents' suggestion that judicial involvement in this matter impinges on the Executive Branch's prerogative to determine the nation's sovereignty. Resp. Br. 23. In *Vermilya-Brown*, the Executive argued that the Court could not extend the Fair Labor Standards Act to Bermuda because sovereignty was a political question. As the Court noted, however, the issue was not whether the military base in Bermuda was within the nation's sovereignty, but whether presence within the sovereignty was essential to bring a claimant within the protection of the Act. 335 U.S. at 380. The Court accepted the Executive Branch's determination that the base was within the sovereignty of the British Empire, but held that the Act applied because the United States exercised "sole power" at the base. *Id.* at 390.

Second, Respondents' argument confuses the distinction between jurisdiction and the substantive right to habeas relief. As Petitioners demonstrated in their opening brief, jurisdiction turns on the language of the habeas statute, constant in all material respects for the past 225 years. So long as federal courts have existed, Congress has invested them with subject matter jurisdiction to inquire into the legality of the detention of persons "in custody, under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1); Pet. Br. at 9-16. Nothing in the statute has ever made jurisdiction turn on either the prisoner's alienage, or his presence within the "ultimate sovereignty" of the United States.

At the same time, however, the Court has long recognized that the *substantive* reach of the federal law may be more limited in "a zone of active military operations [or areas] under martial law," which the United States occupies temporarily as an incident of military operations. *Johnson v. Eisentrager*, 339 U.S. at 780; *see also Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946) (recognizing distinction between events in territorial Hawaii and "occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function"); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 127

As Petitioners established in their opening brief, while these differences do not displace the jurisdiction of the federal court, they may affect the scope of federal review. Pet. Br. at 30-40. For that reason, a habeas application filed by a prisoner at a forward outpost in Iraq, at least in the current circumstances, may be entitled to nothing more than a summary dismissal with prejudice. But the federal courts would have jurisdiction to entertain the claim, and if

circumstances in Iraq change, so could the scope of federal review.[23]

III. NATIONAL SECURITY DOES NOT REQUIRE THAT PETITIONERS BE HELD IN A LAWLESS VOID

The Respondents warn ominously that Article III jurisdiction in this case will trigger a cascading series of events and place the nation in peril. Resp. Br. 41-46 . According to the Respondents, habeas review means lawyers, which leads to contact with the detainees; contact means the end of interrogations, which will end all intelligence gathering; this in turn destroys the nation's ability to protect itself. *Any* judicial involvement, therefore, "would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters." Resp. Br. 42; *id.* at 43-44. This sweeping contention, however, is simply not credible.

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[23] Finally, even if jurisdiction were made to turn on some undefined quantum of "sovereignty," the Petitioners would still prevail, since the Respondents ignore the extent to which the United States is "sovereign" at Guantánamo. Guantánamo is apparently the only military base in the world where the United States exercises complete jurisdiction and control *in perpetuity*. *See* Brief *Amicus Curiae* of Retired Military Officials at 13-22. This unique status has led numerous scholars, as well as former military officials and the State Department's Solicitor, to conclude the United States exercises at least partial sovereignty over the base. *Id.* at 17-19. In addition, as Petitioners noted in their opening brief, the United States has long exercised prescriptive and adjudicative federal jurisdiction over the base. Moreover, the Court has already resolved that Guantánamo is covered by federal statutes regulating conduct in "territories and possessions" and that the rule against "extraterritorial application" of federal law has no provenance in a case arising from Guantánamo Bay. *Vermilya-Brown*, 335 U.S. at 381; Pet. Br. 43-45. Finally, the Executive has agreed in other litigation that the habeas statute extends to Guantánamo Bay for a United States citizen. *See* Tr. of Oral Argument at 18-19, *Padilla v. Rumsfeld*, 2003 U.S. App. LEXIS 25616 (Nos. 03-2235, 03-2438) (2d Cir. Dec. 18, 2003); Pet. Br. 16 n.16; *id.* at 42.

First, the argument "knocks at an open door" by attacking a claim Petitioners do not advance. *Monroe v. Pape*, 365 U.S. 167, 235 (1961) (Frankfurter, J., dissenting on other grounds). Petitioners do not suggest, and have never suggested, that the only means by which the Executive Branch can establish the lawfulness of the detentions is *de novo* review in federal district court. On the contrary, as Petitioners argued at length in their opening brief, *de novo* review is required only because the military officials have "manifestly refused to consider" Petitioners' claims. *Burns v. Wilson*, 346 U.S. at 142; Pet. Br. 35-37 & nn.39-40. The military may create a process to determine whether the Petitioners are lawfully detained, so long as the proceedings are not "manifestly unfair ... such as to prevent a fair investigation, or show manifest abuse of the discretion committed to the executive officers ..., or that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." *Kwack Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (internal quotation marks omitted). In that respect, the military faces the prospect of plenary review only because it insists on holding the Petitioners in a lawless void.[24]

Second, the Respondents' position cannot be squared with the military's regulations. As discussed in the Petitioners' brief, these regulations were drafted by the military and apply without limitation to *all* prisoners in military custody, including foreign nationals seized on or near the field of battle during on-going hostilities.[25] They

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[24] As noted, such proceedings would not displace federal jurisdiction; they could, however, affect the *scope* of habeas review. Pet. Br. 35-37. These are matters to be taken up on remand.

[25] *See Enemy Prisoners of War, Detained Personnel, Civilian Internees, and Other Detainees*, U.S. Army Reg. 190-8 (applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps) (Oct. 1, 1997), at J.A. 71a-74a.

guarantee that when doubt arises as to any detainee's status, individuals will not be denied POW or civilian internee status without notice and an opportunity to be heard before an impartial tribunal of three commissioned officers. Pet. Br. 48-49.[26] The military conducted nearly 1200 such hearings during the first Persian Gulf War and continues to conduct these hearings in Iraq. *Id.* at 49. The Executive Branch has never suggested that these hearings interfere with intelligence gathering or fetter field commanders. And in a silence that speaks volumes, the Respondents do not mention these regulations in their brief.

Third, the Respondents' argument is belied by their own position. As they describe in their brief, the Department of Defense has vowed to create – sometime in the vague and uncertain future – a review process that gives those imprisoned at Guantánamo an annual opportunity to establish their claim to freedom. Resp. Br. at 7 n.4. The Court can assume the military would not create a process that imperils national security. It follows that creating a process to determine whether a detainee is being held unlawfully will not realistically interfere with the current war efforts. As discussed above, the belated, extra-record account of this contemplated review, which may include the assistance of a commissioned officer, is hardly a sufficient basis to establish its legitimacy at this stage of the litigation. But unless the Defense Department has no intention of honoring its commitment, the very existence of the proposed review is conclusive proof that individualized hearings in Guantánamo, even with the assistance of counsel, are not a threat to national security.

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[26] At the hearings, prisoners enjoy the right to testify on their own behalf, call witnesses, present evidence, and question witnesses called by the tribunal. They may also remain silent. Pet. Br. at 48-49.

CONCLUSION

The Court should reverse the judgment below and remand to the Court of Appeals for further proceedings.

Respectfully submitted,

MACARTHUR JUSTICE CENTER
UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
(773) 702-9560

JOSEPH MARGULIES
COUNSEL OF RECORD
MARGULIES & RICHMAN, PLC
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900

MICHAEL RATNER
BARBARA J. OLSHANSKY
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, NY 10012
(212) 614-6430

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

APPENDIX

Chronology

Date	Prison Population at Guantánamo	Litigation Developments
1/15/2002	50 detainees held.[1]	
1/28/2002	158 detainees held.[2]	
2/8/2002	186 detainees held.[3]	
2/19/2002		*Rasul* Petitioners file habeas petition in D.C. District Court.
2/28/2002	300 detainees held.[4]	
5/1/2002		*Al Odah* Plaintiffs file civil action in D.C. District Court.
5/20/2002		District court orders military to permit Federal Public Defender unmonitored access to Hamdi.
5/23/2002		Respondents move in district court to stay counsel access order in *Hamdi*.
5/29/2002		District court orders counsel access meeting with Hamdi to go forward within 72 hours of order.

Date	Prison Population at Guantánamo	Litigation Developments
5/30/2002		Respondents file notice of appeal in Fourth Circuit of Hamdi counsel access order.
6/9/2002		President issues order designating Padilla as an enemy combatant. Padilla transferred to naval brig.
6/10/2002		Habib files habeas petition in D.C. District Court.
6/10/2002	Appx. 400 detainees held.[5]	
6/12/2002		Padilla files habeas petition in Southern District of New York District Court.
6/21/2002	564 detainees held.[6] 180 detainees added this month.	
7/12/2002		Court of Appeals for the Fourth Circuit reverses counsel access order in *Hamdi* and remands.
7/22/02		Respondents refuse to make initial disclosures in *Hamdi.*
7/23/2002		Respondents move to terminate appointment of counsel in *Hamdi.*

Date	Prison Population at Guantánamo	Litigation Developments
10/26/2002	4 detainees released.[7]	
10/28/2002	34 detainees added.[8] Appx. 625 detainees held.[9]	
12/26/2002		Respondents refuse counsel access to Padilla.
1/10/2003	Appx. 625 detainees held.[10]	
3/11/2003		D.C. Court of Appeals affirms dismissal in *Rasul & Al Odah.*
5/14/2003	5 detainees released.[11]	
7/3/2003		President designates 6 detainees under his Military Order of November 13, 2001,[12] including *Rasul* Petitioner David Hicks.[13]
7/18/2003	27 detainees released.[14] 10 detainees added.[15] Appx. 660 detainees held.[16]	
9/2/2003		Rasul and Al Odah file petition for certiorari in United States Supreme Court.

Date	Prison Population at Guantánamo	Litigation Developments
10/1/2003		Hamdi files petition for certiorari in United States Supreme Court.
11/10/2003		**United States Supreme Court grants petition for certiorari in *Rasul* and *Al Odah*.**
11/21/2003	20 detainees released.[17]	
11/23/2003	20 detainees added.[18] Appx. 660 detainees held.[19]	
11/25/2003		United States and Australia agree on military commission procedures for any charged Australian detainee.[20]
11/30/2003		Official speaking on condition of anonymity states that military expects to release additional 100 to 140 detainees by the end of January 2004.[21]
12/2/2003		Defense Department announces Hamdi will be allowed access to counsel.[22]
12/3/2003		Government files opposition to Hamdi's petition for certiorari.

Date	Prison Population at Guantánamo	Litigation Developments
12/3/2003		Department of Defense assigns counsel to *Rasul* Petitioner David Hicks.[23]
1/9/2004		**United States Supreme Court grants petition for certiorari in *Hamdi*.**
1/14/2004		Rasul and Al Odah file merit briefs in support of petition.
1/16/2004		Government files petition for certiorari in *Padilla*.
1/26/2004	3 detainees released.[24]	
2/4/2004		Padilla files opposition to petition for certiorari.
2/11/2004		Defense Department announces that Padilla will be allowed access to counsel.[25]
2/11/2004		Government files reply brief *Padilla* in support of petition for certiorari.
2/13/2004		Defense Secretary Donald Rumsfeld and Deputy Assistant Secretary of Defense Paul Butler announce plans for annual administrative review panel for Guantánamo detainees.[26]

Date	Prison Population at Guantanamo	Litigation Developments
2/13/2004		Paul Butler, Deputy Assistant Secretary of Defense, announces that screening process "takes place" in Afghanistan.[27]
2/16/2004	87 detainees released to date and "a few" transferred for detention in home country.[28]	
2/20/2004		**United States Supreme Court grants petition for certiorari in *Padilla***
2/24/2004		Department of Defense charges 2 detainees.[29]
2/25/2004	1 detainee released.[30]	
3/1/2004	7 detainees released.[31]	
3/3/2004		Department of Defense releases memo outlining draft administrative review process in Guantánamo.[32]
3/3/2004		Respondents file reply brief in *Rasul/Al Odah*.
3/9/2004	5 detainees transferred, including *Rasul* Petitioners Shafiq Rasul and Asif Iqbal.[33]	

Date	Prison Population at Guantanamo	Litigation Developments
3/15/2004	26 detainees released[34] Appx. 610 detainees held.[35]	
4/2/2004	15 detainees released. A total of 119 detainees release to date.[36] Appx. 595 detainees held.[37]	

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