No. _____

In The

United States Supreme Court

SHAFIQ RASUL, ET AL.,
Petitioners,

v.

GEORGE W. BUSH, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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

Counsel for Petitioners

BARBARA J. OLSHANSKY
STEVEN MACPHERSON WATT
SHAYANA KADIDAL
MICHAEL RATNER
JEFFREY E. FOGEL
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430

QUESTIONS PRESENTED

Petitioners are citizens of Great Britain and Australia. Seized abroad in apparent connection with the United States' "War on Terrorism," they have been incarcerated in Guantánamo Bay, Cuba, without charges or proof of wrongdoing, and with no opportunity to establish their innocence, for over 18 months. The Government claims it may hold Petitioners under these conditions indefinitely, and that no court has jurisdiction to review the cause for their detention. The courts below agreed.

In this context, the case presents the following questions:

I.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that enemy aliens who had been convicted by a lawful military commission of violating the laws of war in China, and who had never been under the exclusive control of the United States, could not obtain further review of their convictions in federal court. Did the courts below err in extending *Johnson* to deny Petitioners a judicial forum in which to question the factual basis for their detention or its legality under the Constitution and international law?

II.

Did the courts below err in holding categorically that the Constitution gives "no constitutional rights, under the due process clause or otherwise," to foreign nationals who are subjected to injurious action by the Government of the United States unless they have set foot within territory over which the United States has "ultimate sovereignty" (as distinguished from exclusive jurisdiction and control?).

III.

Does the Due Process clause of the Fifth Amendment permit the United States to detain foreign nationals indefinitely, in

solitary confinement, without charges and without recourse to any legal process, so long as they are held outside the "ultimate sovereignty" of the United States, even when they are held in territory over which the United States has exclusive jurisdiction and control?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The following persons imprisoned at Guantánamo Bay Naval Base appeared below as petitioners: Mamdouh Habib; Shafiq Rasul; Asif Iqbal; and David Hicks. The following individuals, who are family members of the detainees listed above, also appeared below as next friend petitioners: Maha Habib, the wife of Mamdouh Habib; Skina Bibi, the mother of Shafiq Rasul; Mohammed Iqbal, the father of Asif Iqbal; and Terry Hicks, the father of David Hicks.

The following persons appeared below as respondents: George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense; Brigadier General Michael Lehnert, Commander of Joint Task Force-160; Brigadier General Rick Baccus, Commander of Joint Task Force-160; Colonel Terry Carrico, Commander of Camp X-Ray, Guantánamo Bay, Cuba; and Lieutenant Colonel William Cline, Commander of Camp Delta, Guantánamo Bay, Cuba.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Shafiq Rasul, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), and is reprinted in Appendix A to this petition. The orders denying the petitions for reconsideration and rehearing *en banc* are unreported, and are reprinted in Appendix B. The opinion of the United States District Court for the District of Columbia is reported as *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the D.C. Circuit Court of Appeals was entered on March 11, 2003. Timely petitions for reconsideration and rehearing *en banc* were denied on June 2, 2003. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution (67a), as well as 28 U.S.C. § 2241 (68a); Geneva Convention III, Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Article 5, 6 U.S.T. 3316, 75 U.N.T.S 135 (69a-70a); and U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, Chapter 1-6, Tribunals, Applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, (October 1,

1997) (71a-74a).[1]

STATEMENT OF THE CASE

A. Statement of Facts

Seized in apparent connection with the "War on Terrorism," Petitioners are in United States custody in Guantánamo Bay, Cuba. They have never been charged, and have no recourse to any legal process. Apart from censored letters from their families, they have been held *incommunicado* for approximately 18 months. The United States has presented no evidence to justify the detentions under either military or civilian law, and claims it is under no obligation to do so. It also claims it may hold Petitioners under these conditions indefinitely, and the Court of Appeals agreed.

i. The Petitioners

Shafiq Rasul and Asif Iqbal are British citizens; Mamdouh Habib and David Hicks are Australian. R. Pet. ¶1; H.Pet. ¶1.[2] After September 11, 2001, Petitioner Rasul traveled from his home in Britain to visit relatives in Pakistan. While overseas, he wanted to explore his culture and continue his computer studies. He was seized in Pakistan after visiting with his aunt. R. Pet. ¶24. Petitioner Iqbal also traveled to Pakistan from his home in Britain after

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[1] Petitioners withdraw any reliance on the Alien Tort Claims Act, 28 U.S.C. §1350.

[2] "R. Pet." refers to the First Amended Petition for Writ of Habeas Corpus, filed in the D.C. District Court on March 18, 2002, on behalf of Petitioners Rasul, Iqbal and Hicks and their respective next friends. *Rasul et al. v. Bush, et al.*, No. 02cv00299 (D.D.C.). "H. Pet." refers to the Petition for Writ of Habeas Corpus and Request for Adequate Process, filed on June 10, 2002, on behalf of Petitioner Mamdouh Habib and his next friend. *Habib et al. v. Bush, et al.*, No. 02cv01130 (D.D.C.). As described in the text, *infra*, the lower court accepted Petitioners' allegations as true and dismissed the cases for lack of jurisdiction. (38a)

September 11, intending to marry a woman from his father's small village. He was seized in Pakistan shortly before the marriage. *Id.* at ¶23. Both men were ultimately detained by the Northern Alliance or other forces and turned over to the United States in December 2001. In January 2002, they were transported to Guantánamo Bay, where they have been held ever since. *Id.* at ¶¶11,15, 28.

Petitioner Habib traveled to Pakistan from his home in Australia in August 2001, to look for work and a school for his teenage children. On October 5, 2001, he was seized by Pakistani authorities, who turned him over to Egyptian authorities. Early in 2002, Egypt transferred Mr. Habib to U.S. custody, and on May 4, 2002, he was transported to Guantánamo Bay. H. Pet. ¶¶16-19. Petitioner Hicks was living in Afghanistan at the time of his seizure by the Northern Alliance, which transferred him to United States custody in December 2001. Hicks' father believes his son may have joined the army of the then-incumbent government of Afghanistan, the Taliban. R. Pet. ¶¶22, 27; R. Pet. Ex. C, Att. 8. Petitioner Hicks has been held at Guantánamo Bay since January 2002. *Id.* at ¶¶7-8.

The four Petitioners are not, nor have they ever been, enemy aliens or unlawful combatants. Prior to their detention, the Taliban had caused no American casualties, and Petitioners neither caused nor attempted to cause harm to American personnel. Likewise, the four Petitioners have never been members of or received training from Al Qaida or any other terrorist organization. They had no involvement, direct or indirect, in the terrorist attacks of September 11, 2001, or in any other terrorist act. They maintain today, as they have throughout this litigation, that they are innocent of any wrongdoing. The United States has never presented evidence to the contrary. R. Pet. ¶¶22-31; H. Pet. ¶¶15, 23.

All four Petitioners promptly identified themselves to the United States by their correct names and nationalities. They were allowed to write a letter to their respective families, which the International Committee of the Red Cross (ICRC) delivered. When their families learned that Petitioners were in custody, they contacted attorneys. The attorneys and family members for all four Petitioners have repeatedly implored the United States to provide information regarding their welfare, and to let them speak with Petitioners. These entreaties have gone unanswered. Apart from sporadic, censored mail from their families, Petitioners have had no contact with the outside world. R. Pet. ¶¶7-17, 48-49; H. Pet. ¶¶5, 10, 45. They do not even know they are the subject of this litigation.

Within the prison, Government agents have repeatedly interrogated all four Petitioners. Petitioners have not been charged, they have not appeared before any military or civilian tribunal, and they have not been provided counsel. Not only have Petitioners *not* been informed of their rights under domestic or international law, the Government contends they should *not* be so informed. The Government also claims that Petitioners are not entitled to the protections of the Geneva Conventions. R. Pet. ¶47; H. Pet. ¶44.[3] At the

[3] In the lower courts, the Government insisted that the Petitioners were not being held pursuant to the President's order concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed. Reg. 57,831. Instead, they were held pursuant to the "President's authority as Commander in Chief and under the laws and usages of war." *Rasul v. Bush*, Gov't. Motion to Dismiss at 8. On July 3, 2003, the President designated six detainees as subject to the order. According to the Government, this means these detainees *may*, but need not, be brought before a military commission. Department of Defense News Transcript, *Background Briefing on Military Commissions*, July 3, 2003, available at http://www.dod.mil/transcripts/2003/tr20030703-0323.html. Though the Government has not identified the detainees that have been designated, media reports indicate that Petitioner David Hicks is among them. *See e.g.*, *Anger as Britons Named for U.S. Terror Trials*, WASH. POST, July 4,

same time, Government officials have acknowledged that at least some of the detainees on Guantánamo were victims of circumstance and are probably innocent. H. Pet. ¶46; Katharine Q. Seelye, *A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002)(quoting Deputy Commander at Guantánamo).

ii. The Prison

A veil of secrecy surrounds the prison and its inmates. The Government has never publicly acknowledged that Petitioners are being held in Guantánamo, although the British and Australian Governments have confirmed that each of the Petitioners is incarcerated on the base. Indeed, the Government has never disclosed information regarding any particular detainee, including the circumstances of his seizure, what the Government believes he may have done to justify his continued detention, or his current welfare.

The Government has, however, "allowed tightly controlled media visits." Charles Savage, *For Detainees At Guantánamo, Daily Benefits – and Uncertainty*, MIAMI HERALD, Aug. 24, 2003. According to recent reports, Camp Delta consists of four units. The majority of the inmates are held in three camps described by the Government as maximum-security facilities. Inmates are in solitary confinement, restricted to their 6'8" by 8' cells twenty-four hours per day, except for 30 minutes' exercise three times per week, followed by a five minute shower. *Id.* The inmates are shackled while outside their cells, and exercise on a "caged 25-foot by 30-foot concrete slab." *Id.* "Lights are kept on 24 hours a day, and guards pace the rows constantly. Inside each cell, detainees have a hole-in-the-ground toilet, a sink with running water low enough to make washing feet

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2003. If the United States begins proceedings against Mr. Hicks, it is possible his case would no longer raise the same issues as the remaining Petitioners (who have not been designated). At this point, however, Mr. Hicks remains subject to indefinite detention without legal process.

for prayers easy, and an elevated shelf-bunk with a mattress." *Id.*

The prison currently holds approximately 660 inmates from 42 countries. *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS, Aug. 26, 2003. Though some inmates have been released in the past 18 months, others have replaced them, and for the past year, the prison has maintained approximately the same number of inmates. *See e.g., Tales of Despair From Guantánamo*, N.Y. TIMES, June 17, 2003. Further, the Government recently confirmed that the prison is expanding. A fifth unit, adding 24,000 square feet, will be finished mid-2004. According to the prison commander, the new construction signals the Government's commitment to rely on the prison "as long as the global war on terrorism is ongoing...." Charles Savage, *Growth at Base Shows Firm Stand on Military Detention*, MIAMI HERALD, Aug. 24, 2003 (quoting prison commander Maj. Gen. Geoffrey Miller). The expansion increases capacity by ten percent and will "enlarge[] [the] ability to do interrogations." When this new phase is completed, the prison will have capacity for 1,100 inmates. *Id.*

The Government acknowledges that indefinite detention is taking its toll on the inmates. Since the prison opened, there have been 32 attempted suicides. *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS Aug. 26, 2003. Most attempts, including three in the past ten days, have occurred this year, which prison officials attribute "to the effects of the indefinite detentions on prisoner morale." *Guantánamo Suicide Attempts Rise to 31*, ASSOC. PRESS Aug. 21, 2003. As of last year, 57 prisoners were being treated for mental illnesses, and many were taking antidepressants or anti-psychotic medication. Katherine Q. Seelye, *Guantánamo Bay Faces Sentence of Life as Permanent U.S. Prison*, N.Y. TIMES, Sept. 16, 2002 (quoting prison hospital director Capt. Albert Shimkus).

iii. Guantánamo Bay

Since 1903, the naval base at Guantánamo Bay has been under the exclusive jurisdiction and control of the United States. The Government occupies Guantánamo Bay pursuant to a lease that grants the United States "complete jurisdiction and control," while Cuba retains "ultimate sovereignty." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, 23 Feb. 1903, art. III, T.S. No. 418. (14a) These terms are not defined in the lease. The lease term is indefinite. *Id.*

Guantánamo is a self-sufficient and fully American enclave, larger than Manhattan, with thousands of military and civilian residents who enjoy the trappings of a small American city. The base operates its own schools, power system, water supply, and internal transportation system. Congress has repeatedly extended federal statutes to the base. Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 STAN. L. REV. 1197, 1198 (1996).

B. Basis for Federal Jurisdiction In the Court Below

Through their next friends, Petitioners Rasul, Iqbal and Hicks filed a First Amended Petition for Writ of Habeas Corpus on March 18, 2002. The Petitioners alleged that prolonged and potentially indefinite detention in Guantánamo violated the Due Process clause of the Fifth Amendment, as well as other provisions of domestic and international law. R. Pet. ¶¶51-64. They requested, *inter alia*, an evidentiary hearing to the extent Respondents contested the facts; a declaratory judgment that the current detention is unlawful; an order permitting them to confer privately with counsel; and release from unlawful custody.

On March 18, 2002, the Government moved to dismiss the First Amended Petition on various grounds, including lack of jurisdiction. On May 1, 2002, while the Government's motion was pending, twelve Kuwaiti

prisoners on the base, through their next friends, filed *Al Odah v. United States*, No. 02cv00828 (D.D.C.), as a related case. The Government moved to dismiss that suit as well, and the cases were consolidated for the consideration of the motions to dismiss. On June 10, 2002, Petitioner Habib, through his next friend, filed a Petition for Writ of Habeas Corpus in *Habib v. Bush*, No. 02cv01130 (D.D.C.), raising the same violations and seeking the same relief as Petitioners in *Rasul*, except that Habib requested release from unlawful custody "unless respondents commence a legally sufficient process adequate to establish the legality of his continued detention." H. Pet. ¶15.

On July 30, 2002, the district court dismissed *Rasul* and *Al Odah* for lack of subject matter jurisdiction. (34a) On August 8, 2002, the court dismissed *Habib*. (65a) All parties filed timely appeals to the D.C. Circuit, which consolidated *Habib* and *Rasul* and heard argument in all cases on December 2, 2002.

The D.C. Circuit affirmed the dismissals on March 11, 2003, holding that Petitioners have no enforceable rights, "under the due process clause or otherwise." (12a) The "consequence" of this conclusion, the Court held, is that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. §2241, to the Guantánamo detainees...". *Id.* The court then denied the timely requests for reconsideration and rehearing *en banc* on June 2, 2003. (30a-31a)

Because the lower courts held that there is no jurisdiction to entertain a writ of habeas corpus, there has been no occasion in this litigation to discuss what process Petitioners would enjoy under either the Due Process clause or international law.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT IMPROPERLY EXTENDED *JOHNSON v. EISENTRAGER* TO ALLIED NATIONALS IMPRISONED WITHOUT LEGAL PROCESS IN AN AREA SUBJECT TO EXCLUSIVE UNITED STATES JURISDICTION AND CONTROL

The United States has created a prison on Guantánamo Bay that operates entirely outside the law. Within the walls of this prison, foreign nationals may be held indefinitely, without charges or evidence of wrongdoing, without access to family, friends or legal counsel, and with no opportunity to establish their innocence. The Government claims that no court in the country has jurisdiction to review the cause for their detention, and the lower courts agreed.

So framed, this case presents questions of surpassing importance: whether the United States Government is constrained by the Constitution and international law in its treatment of foreign nationals imprisoned outside the "ultimate sovereignty" of the United States, and if so, whether foreign nationals may enforce those constraints in a federal court.

The Court of Appeals held that the Government is free to act without legal restriction because these prisoners enjoy no enforceable rights, "under the due process clause or otherwise," so long as they have not set foot within the "ultimate sovereignty" of the United States. Though the United States has held Petitioners without legal process for approximately 18 months, far from any theater of military operations and in an area over which the United States exercises exclusive jurisdiction and control, the lower court held they have no rights that may be vindicated in federal court.

In reaching its conclusion, the lower court dramatically extended *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Johnson*, the Court held that German war criminals convicted and sentenced by a lawful military commission for violating the laws of war in China could not seek habeas relief in the federal courts. But this case differs from *Johnson* in three fundamental respects.

First, the petitioners in *Johnson* were convicted war criminals. A lawful military commission had convicted them of violating the laws of war by assisting the Japanese after Germany's surrender, and they did not complain that the commission's procedures had denied them due process. The Petitioners in the present case, by contrast, are imprisoned completely without legal process. It is one thing to hold that war criminals – tried, convicted, and sentenced by a lawful commission – whose procedural protections are not the subject of complaint cannot seek further review in a civilian court. It is quite another to extend that holding to people who have never been charged or afforded any process.

Second, the prisoners in *Johnson* were enemy aliens – that is, they were the citizens of a nation at war with the United States. The Court emphasized repeatedly in *Johnson* that enemy aliens suffer restrictions that are not visited upon aliens of friendly allegiance. The Petitioners in the present case are citizens of our closest allies, Great Britain and Australia.

And third, Guantánamo Bay is not wartime China. It is a fully American enclave under the exclusive jurisdiction and continuous control of the United States Government. Unlike China, the quality and character of the control exercised by the United States in Guantánamo Bay is no less comprehensive than that exercised in the insular territories, and is entirely sufficient to justify federal jurisdiction.

Extending *Johnson* to Petitioners here has three immediate and significant consequences. First, it has brought the D.C. Circuit into conflict with this Court. The decision below is not only inconsistent with *Johnson*, but with this Court's due process jurisprudence. The Court has held that due process is violated when an American state court exerts *in personam* jurisdiction over nonresident foreign nationals who have not voluntarily established certain minimum contacts with this country. Such a holding would be not merely wrong but inconceivable if, as the D.C. Circuit held below, the very *absence* of such minimum contacts deprived nonresident foreign nationals of any right to invoke due process protection in the first place. Second, the decision below has brought the D.C. Circuit into conflict with the many other courts of appeals that have extended fundamental constitutional rights to foreign nationals in territory that is outside the "ultimate sovereignty" of the United States but within its exclusive jurisdiction and control.

But the third consequence of the lower court opinion is perhaps the most important. The lower court has sanctioned the creation of a prison wholly outside of the law. Though the United States relies on *Johnson*, it has pointedly refused to heed the Court's admonition that the prisoners were entitled to the protections of the Geneva Convention. *Johnson*, 339 U.S. at 789, n. 14. Indeed, to the contrary, the Government here claims that Petitioners do not enjoy *any* substantive protections as a matter of right, but only as a matter of convenience, and only to the extent permitted by the United States. The Government claims it will apply "the principles" of the Third Geneva Convention "to the extent appropriate and consistent with military necessity." Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantánamo, Feb. 7, 2002, at 1 (www.whitehouse.gov/news /releases/2002/02/20020207-13.html). Despite its statement committing to adherence to the principles of international humanitarian law, however, the Government has therefore

decided that the Third Geneva Convention does not apply either to Al Qaida or Taliban detainees, thereby denying them even the possibility of receiving the process and protections due prisoners of war. It made the decision without holding the independent and impartial tribunals mandated by the Third Geneva Convention, U.S. military regulations which implement Article 5 of that Convention, and international and human rights law generally. Petitioners are thus held in a law-free zone, possessing only those substantive rights under military or civilian law that the Government deigns to extend. Two centuries ago, this Court recognized "the government of the United States as ... a government of law and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803). *Johnson* certainly does not authorize the Executive Branch to imprison Petitioners indefinitely at its sole discretion without any legal process or justification for its actions. The Government's disdain for the principles of justice and the rule of law is unprecedented in our history.

The United States now holds nearly 700 inmates at Guantánamo Bay. Most live in solitary confinement, restricted to 6' by 8'cells for more than 23 hours a day.[4] According to the Pentagon, there have been 32 attempted suicides since the prison opened in January 2002, with most taking place this year.[5] With no legal process, no opportunity to establish their innocence, no human contact with the outside world except censored letters transmitted through the

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[4] Amnesty International, *USA: The Threat of A Bad Example*, AI Index AMR 51/114/2003, Aug. 2003 at 17, available at http://web.amnesty.org/library/Index/ENGAMR51114203.

[5] *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS, Aug. 26, 2003; *see also Guantánamo Suicide Attempts Rise to 31*, ASSOC. PRESS, Aug. 21, 2003 (quoting Pentagon)("Most attempts occurred this year, which officials and critics alike have attributed to the effects of the indefinite detentions on prisoner morale.").

ICRC, and no apparent end to their incarceration, the prisoners "drift[] through life rather than live[], the prey of aimless days and sterile memories." ALBERT CAMUS, THE PLAGUE 66 (Modern Library ed.) (1948). Indeed, the Petitioners in this case are not even aware of the litigation.

Yet because they have been deemed outside the jurisdiction of an American court, Petitioners' circumstances may not only continue indefinitely, they may deteriorate: the United States may beat prisoners, as it has apparently done at other facilities,[6] or it may transfer them to other countries where beatings are commonplace.[7] Or it may simply forget them, in the vain hope the world will as well.

A. The Decision Below Misreads *Johnson*

The lower court held that foreign nationals outside United States sovereignty have no constitutional rights that may be vindicated in federal court, regardless of their circumstances. (12a) Pressing this crabbed view of the Constitution into service for the jurisdictional question, the lower court also held that because the prisoners have no enforceable rights, they may not bring their claim to federal court. (13a) This holding, however, cannot be squared with *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Reid v. Covert*, 354 U.S. 1, 67 (1957)(Harlan, J., concurring), or *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

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[6] Two prisoners in U.S. custody at Bagram Air Force Base died of "blunt force injuries" in December, 2002. Military coroners ruled both deaths to be homicides, and a spokesman for the U.S. forces said the men had been "beaten." *See, e.g., U.S. Military Investigating Death of Afghan in Custody,* N.Y. TIMES, Mar. 15, 2003 (quoting military spokesman).

[7] *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002 (quoting a Government official directly involved in "rendering" detainees to other countries: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.").

As noted, the Petitioners in this case differ from the prisoners in *Johnson* in three respects: they have been held approximately 18 months without legal process; they are citizens of our allies; and they are held at Guantánamo Bay, an area subject to the exclusive jurisdiction and control of the United States.

i. *Johnson* Does Not Countenance Indefinite Detention Without Even The Most Rudimentary Process

Unlike Petitioners, the prisoners seeking habeas relief in *Johnson* were convicted war criminals. In their trial before the military commission, the prisoners in *Johnson* enjoyed the rights to notice of the charges against them, to prompt appointment of counsel of choice, to prepare a defense, to call and confront witnesses, to compulsory process, to discover and introduce evidence, to make an opening statement and closing argument, and to appeal their conviction to a military panel. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)(Case No. 306)(Index to Pleadings Filed in Supreme Court, Respondents' Exhibit F at 37-40 (Regulations Governing the Trial of War Criminals).

The commission found 21 of the 27 defendants guilty of war crimes "by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan." 339 U.S. at 765. After their military appeal, the convicted prisoners sought post-conviction relief in the civilian courts, citing unspecified violations of the Fifth Amendment and other provisions of the Constitution and the 1929 Geneva Convention. *Id.* at 767.[8] Given the procedural protections

[8] While *Johnson* involved the 1929 *Convention Relating to the Treatment of Prisoners of War* (July 27, 1929, 47 Stat. 2021) the present case involves the 1949 Convention (*Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135), which guarantees prisoners certain due process rights, including fair trial rights

that these inmates enjoyed, it is not surprising that they *did not* raise a challenge under the Due Process clause. *Id.* at 785; *see also Johnson v. Eisentrager*, 339 U.S. 763(1950) (Case No. 306) (Index to Pleadings Filed in Supreme Court, Petition for Writ of Habeas Corpus at 8).

The Court had previously upheld the use of military commissions. *In re Yamashita*, 327 U.S. 1, 7-8 (1946). In addition, the Court had held in *Yamashita* that it would not look behind the commission's verdict to consider the petitioners' guilt, a position the Court reaffirmed in *Johnson*. 339 U.S. at 786-88. As a matter of law, therefore, the petitioners in *Johnson* reached the Court as war criminals who had actively engaged in the service of a hostile state, and who had received the benefit of a lawful trial, the procedures of which complied in all respects with the procedural protections afforded by the 1929 Convention. *Id.* at 778.[9]

The Court granted *certiorari* in *Johnson* to decide "whether the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of an American military

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for prisoners accused of war crimes and a right to an independent determination as to status by a competent tribunal for all captives, which were not included in the predecessor Convention.

[9] The procedural history is significant: in their first application for relief, the *Johnson* petitioners admitted they were enemy aliens "in the service of German armed forces in China." *Johnson*, 339 U.S. at 765. They later amended their petition, however, to allege "that their employment [in China] was by civilian agencies of the German Government." *Id.* The Court found this distinction "immaterial" because "[t]hese prisoners have been convicted of violating laws of war" by assisting Japan after Germany's surrender. *Id.* Had there been no trial, the petitioners would have received the benefit of their well-pleaded allegations. There was "no fiction about their enmity," therefore, *only because they had been tried and convicted. Id.*

commission imposed after trial and conviction for violations of the laws of war." *Johnson v. Eisentrager*, Case No. 306, Brief for Petitioner at 2. The Court interpreted the Fifth Amendment claim as amounting "to a right not to be tried at all." 339 U.S. at 782. The question for the Court, therefore, was whether war criminals had a Fifth Amendment right to be free from the requirement of a lawful military trial. Answering this question in the negative, the Court held "that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy in the hostile service of a government at war with the United States." *Id.* at 785. In short, *Johnson* deals with the constitutional rights of war criminals who had received a lawful trial.

Seven years after *Johnson*, the Court decided *Reid v. Covert*, 354 U.S. 1 (1957). In his oft-quoted concurrence, which provided the most narrow ground for decision by the Court, Justice Harlan emphasized what was apparently lost on the lower court here: the application of the Constitution overseas cannot be reduced to categorical pronouncements, and depends entirely on the process 'due' in a particular case:

> The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. ... [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.

Reid, 354 U.S. at 74-75 (Harlan, J., concurring)(emphasis in original). More than thirty years later, the Court quoted this language with approval in a case involving a non-resident

alien. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990); *id.* at 277-78 (Kennedy, J., concurring).[10]

Viewing *Johnson* through the lens of Justice Harlan's concurrence, it is apparent the Court sensibly concluded in *Johnson* that war criminals tried, convicted, and sentenced by a lawful commission, whose procedural protections were not the subject of complaint, were not 'due' any additional process in a civilian court; certainly they could not claim a Fifth Amendment right to be free from military trial.

But the present case stands on entirely different footing. The Petitioners have been held for approximately 18 months without legal process. Because there have been no proceedings, they do not complain about an overseas trial by a presumptively competent tribunal, and they do not seek

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[10] In *Verdugo*, the Court held that the warrant clause of the Fourth Amendment does not apply to the search of a foreign national in Mexico, by Mexican agents. *Dicta* in the case cited *Johnson* for the "emphatic" rejection of the "extraterritorial application of the Fifth Amendment." 494 U.S. at 269 (1990). But this language cannot be read in isolation. Immediately prior to the discussion of *Johnson*, the *Verdugo* Court cited the *Insular Cases*. These cases held that fundamental constitutional rights, including Fifth Amendment rights, apply to citizens and aliens alike in "territories ultimately governed by Congress." *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922)(it is the locality that is determinative of the application of the Constitution..., and not the status of the people who live in it."). The *Verdugo* Court then approvingly quoted the passage from Justice Harlan's *Reid* concurrence insisting that the extra-territorial reach of the Constitution depended on what process was due in a particular case. Although *Reid* had involved the application of the Fifth Amendment to a U.S. citizen overseas, the Court in *Verdugo* did not hesitate to endorse Justice Harlan's guiding principle in the context of a case involving a foreign national. It is thus incorrect to read *Verdugo* as establishing a categorical rule that the Fifth Amendment cannot apply to an alien overseas, without regard to his or her circumstances. Indeed, Justice Kennedy's concurring opinion in *Verdugo* made explicit that the Court had not yet resolved the Constitution's extra-territorial reach "when the Government acts, in reference to an alien, within its sphere of foreign operations." 494 U.S. at 277.

post-conviction relief. Instead, they challenge the fact that they have been cast into a legal limbo, held by the United States without charges, without recourse to any legal process, and with no opportunity to establish their innocence. They seek the core protection of the Great Writ, and nothing in *Johnson* sanctions the holding that a court is powerless to give it to them.[11]

ii. *Johnson* Does Not Confuse All Foreign Nationals With Enemy Aliens

Petitioners' case is distinguishable from *Johnson* in a second respect as well. The prisoners in *Johnson* were "enemy aliens" – a term used to describe them nearly twenty times in the *Johnson* opinion. They were citizens of a nation at war with the United States; and so, even if they had not enjoyed a lawful trial, their status alone subjected them to significant restraints on their liberty.

As the Court explained, while aliens ordinarily enjoy substantial constitutional protection, "[i]t is war that exposes the relative vulnerability of the alien's status." *Johnson*, 339 U.S. at 771. The Court was emphatic that aliens' "vulnerability" was caused by "war," and not, as the lower court here held, by their location outside the United States. Once the United States has declared war, enemy aliens suffer dramatic restrictions on their right to seek relief in the courts, at least when compared to "aliens of friendly allegiance." *Id.* It is their formal status *as* an enemy that works to their detriment.

More recent readers share the view that *Johnson* concerned the rights of enemy aliens, rather than aliens generally. *See, e.g., United States v. Verdugo-Urquidez*, 494

[11] "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

U.S. 259, 291 (1990) (Brennan, Marshall, JJ., dissenting on other grounds) (*Johnson* "rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers."); *Zadvydas v. Davis*, 533 U.S. 678, 704 (2001) (Scalia, J., dissenting on other grounds)(*Johnson* dealt "with the military's detention of enemy aliens outside the territorial jurisdiction."); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1306 n.174 (2002)(*Johnson* should be limited to "enemies in a declared war."). And the present Petitioners are, of course, citizens of nations allied with the United States who neither fought with nor owed allegiance to a nation at war with the United States.

iii. *Johnson* Does Not Contemplate That Territory Within The Exclusive Jurisdiction And Control Of The U.S. Government Can Be Put Beyond The Reach Of Due Process And Judicial Competence

In addition, the prisoners in *Johnson* were tried in China and later repatriated to Germany. The Court in *Johnson* repeatedly noted their lack of connection to this country's "territorial jurisdiction." *See, e.g., Johnson*, 339 U.S. at 768 ("We are cited to no instance where a court...has issued [the writ] on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction."); *id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *id.* at 781 (criticizing lower court for dispensing with "all requirement of territorial jurisdiction.").

The Court also observed that the petitioners had not come within United States sovereignty. *Id.* at 778. But at no

time did the Court establish this as essential to the result.[12] Seizing on this passage, the D.C. Circuit here held that Guantánamo Bay, at least for these purposes, is not different from wartime China because the lease governing the base grants Cuba "ultimate sovereignty" over the territory. (14a) To suggest that Guantánamo Bay is no more a part of the United States than wartime China simply defies reality.

The Executive Branch has long considered Guantánamo Bay to be "practically...a part of the Government of the United States." 25 Op. Att'y Gen. 157 (1904). Solicitor General Olsen once described the base as part of our "territorial jurisdiction" and "under exclusive United States jurisdiction." 6 Op. O.L.C. 236, 242; (1982) (opinion of Asst. Attorney General Olsen). This is confirmed both in theory and in practice.

Larger than Manhattan and nearly half the size of the District of Colombia, the base is entirely self-sufficient. It generates its own power, has its own schools, provides its own internal transportation, and supplies its own water. *See* Neuman, *Anomalous Zones*, 48 STAN L. REV. at 1198. Nearly 7,000 people, including soldiers and civilians, American and alien, live on the base under U.S. authority. *Id.* Crimes committed on the base are prosecuted in Virginia, where defendants, including foreign nationals, enjoy the full panoply of constitutional rights. *See* 18 U.S.C. § 7(3); *United States v. Lee*, 906 F.2d 117, 117 (4th Cir. 1990) (Jamaican national). The Government controls all

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[12] The *Johnson* dissenters certainly did not believe the holding depended on whether the petitioners had set foot within the sovereignty of the United States. The dissent never uses the word 'sovereignty' and criticizes the majority for making "territorial jurisdiction" the *sine qua non* of jurisdiction. 339 U.S. at 796 (Black, J., dissenting) ("a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction...").

entry to the base, and no one may enter or leave without approval from the United States.

The United States exercises this control under an unusual lease that gives Cuba "ultimate sovereignty" over the base, while the United States has always exercised "complete jurisdiction and control." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, art. III, T.S. No. 418, 6 Bevans 1113. This language is not defined in the lease. The lease runs indefinitely, and cannot be terminated without the consent of the United States, which has repeatedly declared its intention to remain indefinitely. Neuman, *Anomalous Zones*, 48 STAN L. REV. at 1198.

We alone exercise power at Guantánamo Bay and refuse to recognize the authority of any international tribunal or foreign court. In 2002, the Inter-American Commission on Human Rights of the Organization of American States, of which the United States is a member, ruled that the Guantánamo prisoners may not be held "entirely at the unfettered discretion of the United States government" and that the United States must convene competent tribunals to determine the legal status of the prisoners under its control. Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am.C.H.R. (Mar. 12, 2002), reprinted in 41 I.L.M. 532, 533 (2002). The United States maintains that the decisions of the Commission are not binding upon it and has not complied with the request. It also refuses to recognize the authority of the Cuban government within Guantánamo Bay.[13]

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[13] The United States has also rejected the view of the United Nations High Commissioner for Human Rights, the United Nations Working Group on Arbitrary Detention, the European Parliament, and the Parliamentary Assembly of the Council of Europe, all of whom disagree with the Government's position on Guantánamo. *See* Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida

Thus, as Professor Neuman has aptly observed, the United States in Guantánamo exercises "the powers of sovereignty while nominal sovereignty lay elsewhere." Neuman, *Anomalous Zones*, 48 STAN L. REV. at 1228. On the base, the United States enjoys "the basic attributes of full territorial sovereignty," *Duro v. Reina*, 495 U.S. 676, 685 (1990), including unfettered authority, indefinite control, and "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Id.* To that end, Congress has repeatedly exercised its prerogative to extend federal statutes to Guantánamo. *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 389 (1948).[14]

The extent of our jurisdiction and control in Guantánamo Bay stands in stark contrast to the situation in wartime China. In *Johnson*, the United States could not convene a

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Prisoners at U.S. Base in Guantánamo Bay, Cuba, 16 Jan. 2002 (App. I); Report on the Working Group on Arbitrary Detention, U.N. GAOR, Hum. Rts. Comm., 59th Sess., U.N. Doc. E/CN.4/2003/8 at 19-21, Dec. 16, 2002 (App. J); European Parliament Resolution on the European Union's Rights, Priorities and Recommendations for the 59th Session of the U.N. Commission on Human Rights in Geneva (Mar. 17 – Apr. 25, 2003) available at http://europa.eu.int/abc/doc/off/bull/en/200301/p10200 1.htm; Parliamentary Assembly Resolution No. 1340 (2003)(Adopted June 26, 2003) available at http://assembly.coe.int/Documents/AdoptedT ext/ta03/ERES1340.htm.

The Government's position that the prisoners occupy a law-free zone recently prompted the English Court of Appeal to conclude that the prisoners were in a "legal black hole." *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598. The Court noted its "deep concern that, in apparent contravention of fundamental principles of law, [the prisoners] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of [their] detention before any court or tribunal." *Id.* at ¶66.

[14] Of course, nothing in the present litigation implies habeas jurisdiction over Bagram Air Force Base in Afghanistan or other bases in the theater of military operations.

military commission to try the petitioners unless it first secured permission from the Chinese Government. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Case No. 306) (Index to Pleadings Filed in Supreme Court, Respondents' Exhibit 4 at 49, Message of 6 July 1946 to Wedemeyer from Joint Chiefs of Staff).[15] Unlike in Guantánamo Bay, the United States exercised only temporary and shared control over prisoners held in wartime China, and solely as a consequence of the exigencies of wartime operations.[16]

Yet despite the fact that Petitioners are citizens of countries allied with the United States, and have been imprisoned without legal process in an area subject to the exclusive jurisdiction and control of the United States, the D.C. Circuit held that, like the prisoners in *Johnson*, they do not enjoy "the privilege of litigation" in the federal courts. (17a) The court held that the process enjoyed by the prisoners in *Johnson* was inconsequential to the result, and that there is no meaningful difference between a war criminal convicted by a lawful tribunal and a person held with no charges and no opportunity to establish his innocence. (9a) The court further held that *Johnson* involved the rights of all aliens outside the sovereignty of the United States, rather than enemy aliens, as suggested throughout the opinion. (12a-13a) And finally, the court held that Guantánamo Bay is no different than wartime China because the lease grants Cuba "ultimate sovereignty" over the base.

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[15] The message from the Joint Chiefs read as follows: "Authority granted, *provided the Chinese Government acquiesces,* to appoint United States Military Commission in China for the trial of violation of the laws and customs of war...").

[16] The same is true of Landsberg prison, where the *Johnson* petitioners were detained. The United States shared jurisdiction and control over detentions in occupied Germany with other powers (the United Kingdom and France). *See* Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, reprinted in Senate Comm. on For. Rel's., 92nd Cong., Documents on Germany, 1944-70 (Comm. Print 1970), at 150-51.

(14a) These conclusions cannot be squared with either the letter or spirit of *Johnson*.

iv. *Johnson* Does Not Authorize Disregard Of The Due Process Rule Of *Asahi Metal*

But the decision of the D.C. Circuit below disregards more than this Court's reasoning in *Johnson*, *Reid*, and *Verdugo*. If the Court of Appeals is correct that "a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'" (12a), then the holding in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987), has been rendered incomprehensible. In *Asahi*, the Court held that a foreign entity which had not voluntarily established the minimum contacts with the United States required by the due process doctrine of *International Shoe Company v. Washington*, 326 U.S. 310 (1945), could not constitutionally be served with process by an American state court. Yet according to the holding of the court below in the present case, the same lack of "property or presence in this country" that *gave* Asahi Metal a meritorious due process claim would have *deprived* it *ab initio* of constitutional protection "under the due process clause or otherwise." *See Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993)(relying on *Asahi Metal* to support constitutional protections for non-resident aliens held in Guantánamo Bay).

B. The Decision Below Conflicts with Decisions of Other Courts of Appeal

The D.C. Circuit's decision below is not only at odds with the decisions of this Court, but with the decisions of other courts of appeals. Guided by the *Insular Cases*, the courts of appeals have often extended fundamental constitutional rights to foreign nationals residing outside United States sovereignty but within its exclusive jurisdiction and control.

In the *Insular Cases*, the Court held that fundamental constitutional rights, including the Fifth Amendment, apply in the "unincorporated" territories.[17] Relying on this principle, the lower courts have extended fundamental constitutional rights to non-resident aliens in the Canal Zone, the Trust Territories, and the American Sector in post-war Berlin. At least one circuit has applied the Fifth Amendment to Guantánamo Bay.

For years, the Executive Branch has likened Guantánamo Bay to the Canal Zone. The treaties with Panama and Cuba were completed within weeks of each other. Panama granted the United States "in perpetuity" a zone across the Ithmus for the "construction, maintenance, operation, sanitation and protection" of a ship canal. The United States was granted "all the rights, power and authority within the zone...." Isthmian Canal Convention, Nov. 18, 1903, Arts. II-III, 33 Stat. 2234, 2234-35, TS No. 431. According to William Howard Taft, then Secretary of War, the Panama Agreement reserved "titular sovereignty" in the Panamanian government, meaning that when the United States chose to relinquish its treaty rights, title and possession would revert to Panama. States, Territories and Governments, 4 Whiteman DIGEST ON INTERNATIONAL LAW, at 267.

Thus, "[i]n one, no less than in the other, we acquired a

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[17] The term refers to the series of cases from *DeLima v. Bidwell*, 182 U.S. 1 (1901) to Insular cases *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The cases have been severely criticized, *see, e.g., Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion), but never overruled. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). In *Dorr v. United States*, 195 U.S. 138 (1904), the Court recognized that the application of the constitution within the unincorporated territories cannot be undertaken mechanically, since "[t]he limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States...." *Id.* at 142; *see also Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (White, J. concurring).

place subject to the use, occupation and control of the United States for a particular purpose...." 35 Op. Atty. Gen. 536 (1929) (internal citations omitted). Commentators have drawn the same parallel. *See e.g.,* Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 HARV. L. REV. 781, 792 (1955) (U.S. status in Guantánamo is "in substance identical with that in the Canal Zone"); Neuman, *Anomalous Zones*, 48 STAN. L. REV. at 1228 n. 186 (1996) (citing *id.*).

In both areas, the United States leased the territory for an indefinite period and secured exclusive jurisdiction and control while reserving the underlying sovereignty to the foreign state. Based on this jurisdiction and control, the Fifth Circuit held that the Canal Zone was an "unincorporated territory" whose residents, alien and citizen alike, enjoyed the protection of fundamental constitutional rights. *See, e.g., United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057-61 (5th Cir. 1971) ("Canal Zone is an unincorporated territory of the United States" and government action against alien must be measured against requirements of the due process clause); *Canal Zone v. Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979) (fundamental aspects of Confrontation Clause apply); *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (fundamental constitutional rights apply to citizens and aliens alike "since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive."); *cf. National Bd. of YMCA v. United States*, 395 U.S. 85, 89-90 (1969) (applying Takings Clause).

Likewise, the D.C. Circuit itself previously extended constitutional protections to the Trust Territory of the Pacific Islands, where the United States exercised complete jurisdiction and control, but was not sovereign. *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir.), *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977). In *Ralpho*, the D.C. Circuit held that

because the residents of the Territory were subject to American authority and oversight as much as in any unincorporated territory, fundamental constitutional rights apply. *Id.* at 618-19. Relying on the *Insular Cases* and *Canal Zone v. Scott*, *supra*, the Court reaffirmed that Ralpho's non-resident alien status did not deprive him of constitutional protection since "it is the locality that is determinative of the application of the Constitution..., and not the status of the people who live in it." *Ralpho* at 618-19; *see also Juda v. United States*, 6 Cl. Ct. 441 (1984) (Takings Clause applies to Marshall Islands and protects both alien and citizen).[18]

Similarly, constitutional rights extended to non-resident aliens within the American Sector in Berlin. In *United States v. Tiede*, 86 F.R.D. 227, 239 (U.S. Ct. for Berlin 1979), Judge Stern held that Polish citizens charged with diverting an aircraft from East to West Berlin were entitled to U.S. constitutional rights at their trial in West Berlin. *Id.* at 249-53. Like Guantánamo today, West Berlin was within the

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[18] The lower court did not discuss the Canal Zone cases. Its attempt to distinguish *Ralpho*, however, was decidedly unpersuasive. The court conceded that the United States was not sovereign over the Trust Territory, but held that because Congress had treated the islands as though they were "a territory of the United States" the *Insular Cases* entitled aliens on the islands to the benefit of the Due Process clause. (16a-17a) Yet the court did not undertake the same type of functional analysis of Guantánamo Bay, contenting itself with the observation that "Cuba – not the United States – has sovereignty" over the base. (15a) The court below also relied on the "reasoning" of *United States v. Spelar*, 338 U.S. 217 (1949), where the Court held that the Federal Tort Claims Act does not apply to a military base in Newfoundland because the base is in a foreign country. The lower court found this significant, as though Guantánamo's presence within Cuba had been relevant to the result. (15a-16a) The court apparently overlooked the fact that the Federal Tort Claims Act also does not apply to the Trust Territory. *Callas v. United States*, 253 F.2d 838, 839-40 (2d Cir. 1958), *cert. denied,* 357 U.S. 936 (1958).

United States' jurisdiction, but not its sovereignty.[19] It was also within effective American control; no other state could in practice block the exercise of our jurisdiction.

And of course, as the lower court recognized, the Second Circuit has previously extended constitutional protections to Guantánamo Bay. *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993). In *McNary*, the Second Circuit concluded that the due process clause protects foreign nationals held by the United States in Guantánamo Bay because the Government exercises exclusive jurisdiction and control, even though the United States is not sovereign. *Id.* at 1343. Though the case was later vacated as moot, the Second Circuit continues to rely on its analysis of Guantánamo as having a "unique" status. *United States v. Gatlin*, 216 F.3d 207, 214 n.8 (2d Cir. 2000).

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In sum, the lower court has permitted the Government to detain allied nationals indefinitely, and to deprive them of any forum in which to contest the legality of their detention, because they have not set foot within the "ultimate sovereignty" of the United States. The United States has made the deliberate decision to bring the Petitioners to Guantánamo Bay, an area where it exercises undisputed dominion. Yet the Government maintains it may act without respect for the Constitution and without an obligation to account to the judiciary for the lawlessness of its actions, merely because "ultimate sovereignty" over Guantánamo Bay resides with Cuba.

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[19] United States jurisdiction there was "concurrent with that of the Berlin courts, except to the extent that the American Sector Commandant withdraws jurisdiction from the German courts in a given case," which he did in the *Tiede* case. 86 F.R.D. at 238; *see also id.* at 228 n.2.

The Government will likely respond that the United States is at war, as though that were sufficient reason for the Court to stay its hand. But "[e]mergency does not create power. Emergency does not increase granted power or diminish the restrictions imposed upon power granted...." *Home Building and Loan Ass'n v Blaisdell*, 290 U.S. 398, 425 (1934). "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

The circumstances of the present emergency confirm the wisdom in these warnings. As the Government has 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 Government, this "war" will be fought indefinitely, anywhere in the world.[20] By its very nature, this conflict has resulted in the detention of people whose garb and circumstances do not differ from those of any disengaged civilian.[21]

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[20] "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. It will not end until the state sponsors of terror are made to understand that aiding, abetting and harboring terrorists has deadly consequences for those that try it." *Prepared Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan*, Washington, D.C., July 31, 2002, available at http://www.defenselink.mil/speeches/2002/s20020731-secdef3.html

[21] "The 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." Department of Defense News Briefing, *Statement of Secretary of Defense Donald H. Rumsfeld*, Feb. 8, 2002, available at http://www.dod.mil/news/Feb2002/t02082002_t0208sd.html.

As Government officials have admitted, the difficulty in distinguishing friend from foe has likely led to the detention of innocent people at Guantánamo.[22] The conditions that make this "war" unique are the same conditions that make it essential for the Government to provide some process by which innocent people can secure their release. They are the same conditions that make it essential for the Court to reject the Government's insistence that the law ends when war begins. *Cf. Liversidge v. Anderson*, (1942) A.C. 206, 244 ("In this country, amid the clash of arms, the laws are not silent.")

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the D.C. Circuit Court of Appeals. On review, the judgment of that court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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

Attorneys for Petitioners

BARBARA J. OLSHANSKY
STEVEN MACPHERSON WATT
SHAYANA KADIDAL
MICHAEL RATNER
JEFFREY E. FOGEL
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430

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