Nos. 03-334 and 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH, ET AL.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that, under *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), United States courts lack jurisdiction to consider challenges to the legality of the detention of aliens captured abroad in connection with ongoing hostilities and held outside the sovereign territory of the United States at the Guantanamo Bay Naval Base, Cuba.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-29a)[1] is reported at 321 F.3d 1134. The opinion of the district court (Pet. App. 32a-64a) is reported at 215 F. Supp. 2d 55.

[1] All citations to the Petition Appendix refer to the appendix accompanying the petition in No. 03-334.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2003. Rehearing was denied on June 2, 2003 (Pet. App. 30a-31a). The petition for a writ of certiorari in No. 03-334 was docketed on September 3, 2003, and the petition for a writ of certiorari in No. 03-343 was docketed on September 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, murdering approximately 3000 persons. In response, the President, in his capacity as Commander in Chief, took steps to protect the homeland and prevent additional threats. Congress backed the President's use of force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime. In the course of that campaign—which remains ongoing—the United States and its allies have captured or taken control of thousands of individuals. As in virtually every other major armed conflict in the

Nation's history, the military has determined that many of those captured in connection with the hostilities in Afghanistan should be detained during the ongoing conflict as enemy combatants. Such detention serves the vital objectives of preventing combatants from continuing to aid our enemies and gathering intelligence to further the overall war effort. The military's authority to capture and detain such combatants is both well-established and time-honored. See, *e.g.*, *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313-314 (1946); *Ex parte Quirin*, 317 U.S. 1, 30-31 & n.8 (1942); L. Oppenheim, *International Law* 368-69 (H. Lauterpacht ed., 7th ed. 1952); W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920).

The United States military has transferred some of these combatants from Afghanistan to the United States Naval Base at Guantanamo Bay, Cuba. The Guantanamo Naval Base is in the sovereign territory of the Republic of Cuba. The United States occupies the base under a 1903 Lease Agreement with Cuba, which was extended by a 1934 Treaty.[2] The Lease Agreement specifically provides that Cuba retains sovereignty over the leased lands:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area], on the other hand the Republic of Cuba consents that during the period of the occupation by the United

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[2] See Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (Lease Agreement); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866 (extending lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations").

> States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas * * * .

Lease Agreement art. III, T.S. No. 418 (6 Bevans at 1113). A supplemental agreement between the two nations further provides that the United States may not permit anyone "to establish or maintain a commercial, industrial or other enterprise" on Guantanamo. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. III, T.S. No. 426. That provision is compatible with Cuba's explicit retention of "ultimate sovereignty" over Guantanamo under the Lease Agreement quoted above.

The President has announced that "[t]he United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949." Office of the White House Press Secretary, Fact Sheet, *Status of Detainees at Guantanamo* 1 (Feb. 7, 2002) <www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. In the past year and a half, more than 60 Guantanamo detainees who the military has determined should no longer be detained for intelligence-gathering or other purposes have been released or repatriated to the custody of other nations.

2. On February 19, 2002, individuals claiming to be the parents of three British and Australian nationals detained at Guantanamo filed a petition for habeas corpus as the "next friends" of those detainees. *Rasul* v. *Bush*. The detainees at issue in *Rasul* (No. 03-334) are aliens who were captured in connection with the

military campaign in Afghanistan. The habeas petition challenged, *inter alia*, the legality of those aliens' detention and named as respondents the President, Secretary of Defense, and two military commanders at Guantanamo. Pet. App. 4a. The government moved to dismiss the petition, *inter alia*, for lack of jurisdiction on the ground that, under *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), United States courts lack jurisdiction over claims filed by or on behalf of aliens, like the Guantanamo detainees, who are detained outside of the sovereign territory of the United States.

On May 1, 2002, a second action, *Al Odah* v. *United States*, was filed on behalf of another group of Guantanamo detainees against the President, Secretary of Defense, Chairman of the Joint Chiefs of Staff, two military commanders at Guantanamo, and the United States. The plaintiffs in *Al Odah* (No. 03-343) claim to be the relatives of twelve Kuwaiti nationals who were captured abroad in connection with the hostilities in Afghanistan and are being detained by the United States military at Guantanamo. Although invoking the district court's jurisdiction under, *inter alia*, the federal habeas statute, the *Al Odah* plaintiffs declined to style their action as a petition for a writ of habeas corpus and instead purported to challenge the legality of the captured aliens' detention under the Alien Tort Statute (ATS), 28 U.S.C. 1350, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and directly under the Fifth Amendment to the Constitution. They sought, *inter alia*, an order declaring that the aliens' detention is arbitrary and unlawful, and an order providing them an opportunity to consult with counsel. Pet. App. 3a-4a.

The *Al Odah* plaintiffs moved to consolidate their case with *Rasul* for the purpose of resolving the jurisdiction issue and moved for a preliminary injunction to

enjoin defendants from continuing to detain the 11 Kuwaiti plaintiffs now under custody of the United States without granting them certain relief. Pet. App. 37a. In response, the government moved to dismiss *Al Odah* because, *inter alia*, the court lacked jurisdiction under *Eisentrager*.

3. On July 30, 2002, after holding a consolidated hearing in both cases on the jurisdictional issue, the district court granted the government's motions to dismiss in *Rasul* and *Al Odah*. Pet. App. 32a-64a. The district court held that "*Eisentrager*, and its progeny, are controlling and bars the Court's consideration of the merits of these two cases." *Id.* at 48a (citation omitted). The court explained that, "[i]f an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution." *Id.* at 55a. Because the detainees in these cases are aliens held abroad, the court held that, under *Eisentrager*, it lacked jurisdiction over their claims. *Id.* at 62a.

The district court rejected the petitioners' argument that *Eisentrager* applies only to the detention of "enemy" aliens. The court explained (Pet. App. 51a) that *Eisentrager* "did not hinge on the fact that the petitioners were enemy aliens," but instead "broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus." *Id.* at 54a. In addition, the court rejected petitioners' argument to circumvent *Eisentrager* by arguing that the United States exercises "de facto" control over Guantanamo. As the court explained, *Eisentrager* "never qualified its definition of sovereignty" based on a "*de facto* theory of sovereignty." *Id.* at 56a. Accordingly, because "[i]t is undis-

puted, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States," the court concluded that *Eisentrager* bars the court's jurisdiction. *Id.* at 55a, 63a.

4. a. The court of appeals affirmed. Pet. App. 1a-29a. The court concluded that "the detainees [in these cases] are in all relevant respects in the same position as the prisoners in *Eisentrager*" and thus held that, under *Eisentrager*, "the [United States] courts are not open to them." *Id.* at 18a.

The court of appeals rejected petitioners' attempt to distinguish *Eisentrager* "on the ground that the prisoners there were 'enemy aliens.'" Pet. App. 7a. As the court explained, although "the Supreme Court referred to the *Eisentrager* prisoners as 'enemy aliens," *id.* at 8a-9a, "*Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions," *id.* at 13a. In particular, the court observed, *Eisentrager* stated that, "in 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." *Ibid.* (quoting 339 U.S. at 771). That aspect of *Eisentrager*, the court of appeals explained, was reaffirmed by this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). Pet. App. 11a-12a.

Moreover, the court of appeals continued, *Eisentrager* stated that "the 'privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection.'" Pet. App. 13a. (quoting 339 U.S. at 777-778) (emphasis added by court of appeals). In declining to subject the overriding jurisdictional question in this case to "factual determinations at the threshold" on matters such as an alien's "enemy"

status, the court further reasoned that "the Court in *Eisentrager* did not decide to avoid all the [separation-of-powers] problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place." *Ibid.* Accordingly, the court of appeals concluded that *Eisentrager* applies "regardless of whether [the Guantanamo detainees] are enemy aliens." *Id.* at 11a.[3]

The court of appeals likewise rejected petitioners' argument that *Eisentrager* is distinguishable on the ground that the United States exercises de facto control or territorial jurisdiction over Guantanamo Bay. Pet. App. 14a-17a. The court "disagree[d] with the detainees that the *Eisentrager* opinion interchanged 'territorial jurisdiction' with 'sovereignty,' without attaching any particular significance to either term." *Id.* at 16a. Furthermore, the court explained, the United States' Lease Agreement with Cuba explicitly "shows that Cuba—not the United States—has sovereignty over Guantanamo." *Id.* at 15a. For that reason alone, the court continued, Guantanamo Bay is unlike "the geographic area of the States" and "insular possessions" over which the United States *does* exercise sovereignty. *Id.* at 16a.

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[3] The court of appeals rejected the government's argument that "the Guantanamo detainees are within the category of 'enemy aliens,' at least as *Eisentrager* used the term." Pet. App. 10a. But at the same time, the court emphasized that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*." *Ibid.* As the court explained, the Guantanamo detainees "too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." *Ibid.*

The court of appeals also concluded that petitioners could not avoid *Eisentrager* by asserting non-habeas claims under the ATS or APA. As the court observed, "[t]he holding in *Eisentrager*—that 'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign, (339 U.S. at 777-778)—dooms these additional causes of action, even if they deal only with conditions of confinement and do not sound in habeas." Pet. App. 17a-18a. Moreover, the court continued, "[n]othing in *Eisentrager* turned on the particular jurisdictional language of any statute; everything turned on the circumstances of those seeking relief, on the authority under which they were held, and on the consequences of opening the courts to them." *Id.* at 18a. "With respect to the detainees [at Guantanamo]," the court held, "those circumstances, that authority, and those consequences differ in no material respect from *Eisentrager*." *Ibid.*

b. Judge Randolph concurred separately to address additional "grounds for rejecting the detainees' non-habeas claims" under the ATS and the APA. Pet. App. 19a-29a. As he stated, however, it was "unnecessary" for the court to decide those additional grounds for rejecting petitioners' claims "because *Eisentrager* disposes of the cases." *Id.* at 26a. Judges Garland and Williams did not take issue with the reasoning of Judge Randolph's concurrence, but declined to join the concurrence because they "believe[d] the issues addressed need not be reached." *Id.* at 19a n.*.

5. Petitioners sought rehearing en banc. The court of appeals denied rehearing with no member of the court indicating dissent from the denial of rehearing. Pet. App. 30a-31a.

ARGUMENT

More than 50 years ago, in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that aliens captured and detained abroad lack "capacity and standing to invoke the process of federal courts." *Id.* at 790. Both the court of appeals and the district court below correctly concluded that this Court's decision in *Eisentrager* forecloses petitioners' efforts to invoke the jurisdiction of United States courts to challenge the legality of the military's detention of aliens held abroad at Guantanamo. The court of appeals' unanimous decision does not conflict with any other decision of this Court or of any other court of appeals. The petitions for certiorari accordingly should be denied.

1. In *Johnson* v. *Eisentrager*, *supra*, this Court declined to exercise jurisdiction over a habeas petition filed by German nationals who had been seized by the United States armed forces in China after the German surrender in World War II, tried by military commission, and subsequently imprisoned in a United States military prison in Landsberg, Germany. See 339 U.S. at 765-767. The Court held that the prisoners lacked "access to our courts" (*id.* at 777) to challenge their detention because they were aliens seized and held outside the sovereign territory of the United States.

The *Eisentrager* Court emphasized that aliens are accorded rights under the Constitution and the laws of the United States only as a consequence of their *presence* within the United States. As the Court put it, "in 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." 339 U.S. at 771. The *Eisentrager* Court held that the "privilege

of litigation" was unavailable because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-778. The Court further held that the prisoners could not invoke the writ of habeas to vindicate the Fifth Amendment, because, as aliens abroad, they had no Fifth Amendment rights. See *id.* at 781-783.

The *Eisentrager* Court underscored the fundamental nature of its jurisdictional ruling. The Court specifically framed the jurisdictional question before it as "one of jurisdiction of civil courts." 339 U.S. at 765. Moreover, in resolving that issue, it referred in broad terms to: the Judiciary's "power to act" vis-a-vis military authorities with respect to aliens held abroad, *id.* at 771; the standing of such individuals "to maintain any action in the courts of the United States," *id.* at 776; the "standing [of such individuals] to demand access to our courts," *id.* at 777; and the "capacity and standing to invoke the process of federal courts," *id.* at 790. Similarly, the Court spoke of "the privilege of litigation" in United States courts, and discussed its concerns about the use of "litigation [as a] weapon" by aliens held by military authorities overseas. *Id.* at 777-779.

The *Eisentrager* Court also stressed that judicial review of the claims of aliens seized overseas by the military in a time of war would interfere with the President's authority as Commander in Chief, which "has been deemed, throughout our history, as essential to war-time security." 339 U.S. at 774. As the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very

enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* at 779. "Nor is it unlikely," the Court continued, "that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Ibid.*

The court of appeals correctly applied *Eisentrager* to the claims filed on behalf of the detainees in these cases and held that it lacked jurisdiction. Pet. App. 8a-16a. Indeed, the central underpinnings of this Court's holding in *Eisentrager* are equally present here. As every court to consider the issue has concluded (see pp. 24-26, *infra*), the Guan-tanamo detainees are in all material respects indistinguishable from the prisoners in *Eisentrager*. First, the Guantanamo detainees, just like the prisoners in *Eisentrager*, are aliens with no connection to the United States. Second, the Guantanamo detainees, just like the prisoners in *Eisentrager*, were taken into the custody of the United States military overseas and are being held outside the sovereign territory of the United States. Accordingly, as the court of appeals unanimously held, *Eisentrager* is controlling here.

2. The court of appeals and the district court below carefully considered and correctly rejected petitioners' various attempts to circumvent the clear import of *Eisentrager*. Pet. App. 7a-17a (court of appeals); *id.* at 49a-63a (district court).

a. Petitioners argue (03-334 Pet. 10, 18-19; 03-343 Pet. 18-19) that *Eisentrager* is inapplicable on the ground that the detainees in this case are not "enemy" aliens. As the court of appeals explained, that is incorrect. Pet. App. 6a-13a; see *id.* at 51a-55a. Although the

Eisentrager Court referred to the prisoners as "enemy aliens," its holding was not dependent on the aliens' status as enemies, but rather on the aliens' lack of presence inside the sovereign territory of the United States. *Id.* at 11a. The *Eisentrager* Court emphasized that "the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." 339 U.S. at 777-778 (emphasis added). The dissenters in *Eisentrager* likewise appreciated that the Court's decision "inescapably" applied to "any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." *Id.* at 796 (Black, J., dissenting).

Moreover, this Court has repeatedly cited *Eisentrager* as a seminal decision defining the application of the Constitution to *all* aliens abroad, not simply *enemy* aliens. See, *e.g.*, *DeMore* v. *Kim*, 123 S. Ct. 1708, 1730 (2003); *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). As the court of appeals noted (Pet. App. 11a), in *Verdugo-Urquidez*, the Court—citing *Eisentrager*—explained that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. So too, in *Zadvydas*, the Court—again pointing to *Eisentrager*—stated that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693. More recently, in *Demore*, which was decided a month after the court of appeals' decision in these cases, the Court again cited *Eisentrager* for the proposition that aliens present in the United States enjoy

rights not available to aliens outside the Nation's borders. 123 S. Ct. at 1730.

In any event, the Guantanamo detainees qualify as "enemy aliens" for purposes of *Eisentrager* because they were seized in the course of active and ongoing hostilities against United States and coalition forces. Cf. *United States* v. *Terry*, 36 C.M.R. 756, 761 (A.B.R. 1965) ("The term 'enemy' applies to any forces engaged in combat against our own forces."), aff'd, 36 C.M.R. 348 (C.M.A. 1966). Nothing in *Eisentrager* suggests that an "enemy alien" is limited to a national of a country that has formally declared war on the United States. Although *Eisentrager* noted that under international law all nationals of a belligerent nation become "enemies" of the other upon a declaration of war, see 339 U.S. at 769-773 & n.2, the Court stressed that it did not need to rely on that "fiction" because the detainees were "actual enemies, active in the hostile service of an enemy power." *Id.* at 778. The same is true of the Guantanamo detainees here.

The "enemy" status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches. See, *e.g.*, *The Three Friends*, 166 U.S. 1, 63 (1897); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862). The President, in his capacity as Commander in Chief, has conclusively determined that the Guantanamo detainees—both al Qaeda and Taliban—are not entitled to prisoner-of-war status under the Geneva Convention. See Office of the White House Press Secretary, Fact Sheet, *Status of Detainees at Guantanamo*, *supra*; *United States* v. *Lindh*, 212 F. Supp. 2d 541, 554-555 (E.D. Va. 2002). Any effort to look beyond such an executive determination at the jurisdictional threshold would conflict with the rationale of *Eisen-*

trager. As the *Eisentrager* Court emphasized, exercising jurisdiction over the claims of aliens held abroad during wartime would directly, and perhaps gravely, interfere with the Executive's conduct of the war and divert the attention of the military from ongoing hostilities abroad to courtrooms at home. See 339 U.S. at 778-779. So too, allowing detainees to invoke the courts to litigate their "enemy" status to determine whether jurisdiction exists under *Eisentrager* would invite the same dangers that the Court wisely avoided in *Eisentrager*. As the court below aptly observed, "the Court in *Eisentrager* did not decide to avoid all the [separation-of-powers] problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place." Pet. App. 13a.

b. Nor, as the courts below correctly held, is there any basis for distinguishing *Eisentrager* on the ground that Guantanamo is under the "de facto control" of the United States. See Pet. App. 14a-17a; *id.* at 55a-63a. *Eisentrager* itself makes clear that its jurisdictional rule is based on sovereignty, and not on malleable concepts like de facto control. In particular, in explaining why "the privilege of litigation" did not extend to the aliens in *Eisentrager*, the Court stated that the "prisoners at no relevant time were within any *territory over which the United States is sovereign*." 339 U.S. at 777-778 (emphasis added).

Like the prisoners in *Eisentrager*, the Guantanamo detainees are being held outside the sovereign territory of the United States. The United States uses and occupies the Guantanamo Naval Base under a lease with the Republic of Cuba. Although Cuba "consents" to permit the United States to "exercise complete jurisdiction and control" of the base, the Lease Agree-

ment between Cuba and the United States provides that Cuba retains "ultimate sovereignty" over the naval base. Lease Agreement, art. III, T.S. No. 418 (6 Bevans at 1113), quoted pp. 3-4, *supra*.[4] As this Court has explained, the "determination of sovereignty over an area is for the legislative and executive departments," and not a question on which a court may second-guess the political branches. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380 (1948).[5]

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[4] The Lease Agreement was executed in both English and Spanish, and both authoritative texts confirm Cuba's ongoing sovereignty over Guantanamo Bay. The Spanish phrase in Article III for "ultimate sovereignty" is "soberania definitiva." The word "definitiva" belies any assertion that "ultimate" as used in Article III means only "eventual." Instead, it is defined in *Diccionario Salamanca* 472 (1996) as "que no admite cambios," or, in English, "not subject to change." Similarly, "ultimate" itself is more naturally defined in this context as "basic, fundamental, original, primitive." *Webster's Third New International Dictionary* 2479 (1993). As this Court explained in *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833), "[i]f the English and the Spanish parts [of a treaty] can, without violence, be made to agree, that construction which establishes this conformity ought to prevail." Thus, the terms "definitiva" and "ultimate" are equally understood to affirm Cuba's sovereignty over the leased territory.

[5] The Executive Branch opinions cited by petitioners (03-334 Pet. 20) do not in any way undermine that conclusion. Indeed, those opinions—which address issues far afield from the question presented here—specifically recognize that the United States' lease agreement with Cuba reserves to Cuba the "ultimate sovereignty" over Guantanamo, 35 Op. Att'y Gen. 536, 537 (1929) (quoting Lease Agreement) (addressing whether Guantanamo is a "possession" of the United States within the meaning of the tariff law), and that, under that agreement, Guantanamo thus lies "*outside* the territorial United States," 6 Op. Office of Legal Counsel 236, 238 (1982) (emphasis added) (addressing whether the installation of slot machines at Guantanamo is barred by the Anti-Slot Machine Act).

Moreover, this Court has already recognized that leased United States military installations abroad lie outside the sovereign territory of the United States. In *United States* v. *Spelar*, 338 U.S. 217, 219 (1949), the Court held that a United States military base leased in Newfoundland was "subject to the sovereignty of another nation," not "to the sovereignty of the United States," and therefore fell within the "foreign country" exception to the Federal Tort Claims Act. The base in *Spelar* was governed by "the same executive agreement and leases" as the United States military base in Bermuda. *Id.* at 218. In *Vermilya-Brown*, this Court recognized that the United States' rights over the base in Guantanamo are "substantially the same" as its rights over the base in Bermuda. 335 U.S. at 383.[6] The Guantanamo Naval Base, therefore, clearly lies outside the sovereign territory of the United States—and, indeed, as noted above, that much is "undisputed" by petitioners. Pet. App. 55a.[7]

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[6] Other lower courts that have considered the status of Guantanamo have likewise concluded that it lies outside the United States' sovereign territory. See also *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1425 (11th Cir.) (rejecting argument that control and jurisdiction of Guantanamo "is equivalent to sovereignty"), cert. denied, 515 U.S. 1142 (1995); *Bird v. United States*, 923 F. Supp. 338, 343 (D. Conn. 1996) ("sovereignty over the Guantanamo Bay does not rest with the United States").

[7] Petitioners cite *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990) (per curiam), for the proposition that crimes committed at Guantanamo may be prosecuted in the United States courts. But petitioners overlook that the *Lee* court exercised jurisdiction over the indictment in that case pursuant to provisions that extend the criminal law extraterritorially to "crimes committed outside the jursdiction of a state or district court." 906 F.2d at 117 n.1. That certain laws may apply *extra*territorially to Guantanamo only

In addition, if, as petitioners contend, de facto control is sufficient to establish sovereignty for purposes of *Eisentrager*, then the prisoners in *Eisentrager* themselves would have been entitled to judicial review of their habeas claims. The Landsberg prison in Germany was undeniably under the control of the United States when Eisentrager was held there. See 339 U.S. at 766, 768 n.1 (prisoners were under custody of "American Army officer" who was the "Commandant of Landsberg prison" and noting similar cases of "aliens confined by *American* military authorities abroad" (emphasis added). As Justice Black stated in his dissent in *Eisentrager*, "[w]e control that part of Germany we occupy." *Id.* at 797. The United States similarly controls Guantanamo, but, as the majority held in *Eisentrager*, in the absence of sovereignty, such control does not entitle the aliens held at Guantanamo to the privilege of litigating in United States courts.

c. Petitioners attempt (03-334 Pet. 14; 03-343 Pet. 16-17) to distinguish *Eisentrager* on the ground that the detainees in that case had been convicted by a military commission. But, as the district court observed, "[w]hile it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus." Pet. App. 54a (citation omitted). Moreover, under petitioners' reading of *Eisentrager*, aliens captured and held abroad would have access to the United States courts in the earliest stages of their

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reinforces the conclusion that the base lies outside the sovereign territory of the United States. See Pet. App. 14a-15a.

detention, but not after hostilities had ended and the detainees had been convicted of military charges years later. Nothing in *Eisentrager* supports that counter-intuitive result. Accordingly, the fact that the President has not determined how each of the Guantanamo detainees should ultimately be treated, including whether they should be charged pursuant to his military order or returned to their countries of origin, provides no reason to avoid *Eisentrager*.

Indeed, the timing of this litigation if anything only exacerbates the concerns that this Court stressed in *Eisentrager* about judicial interference with military affairs committed to the political branches. Whereas the habeas action in *Eisentrager* did not reach the Supreme Court until years after the hostilities of World War II had ceased, this litigation challenges the President's military detentions while American soldiers and their allies are still engaged in armed conflict overseas against an unprincipled, unconventional, and savage foe. See Associated Press, *Suspected Taliban Fighters Kill American in Gun Battle*, Wash. Post, Oct. 1, 2003, at A12 ("Suspected Taliban fighters killed an American soldier and wounded two others in a gun battle Monday that underscored the stiffening resistance of insurgents nearly two years after a U.S.-led coalition ousted the Taliban from power."). The potential for interference with the core war powers of the President in this litigation is therefore even more acute in this case than it was in *Eisentrager*. Indeed, even the dissenters in *Eisentrager*, the only Justices who thought that there was jurisdiction in that case and therefore had the need to consider the political question issue, acknowledged that courts should not interfere

"while hostilities are in progress." 339 U.S. at 796 (Black, J., dissenting).[8]

3. Contrary to petitioners' contentions (03-334 Pet. 24-28; 03-343 Pet. 24-25, 27-28), the court of appeals' unanimous decision in these cases does not conflict with any decision of this Court or of any other court of appeals.

a. Petitioners argue (03-334 Pet. 25 & n.17) that courts, relying on the so-called "Insular Cases," have extended certain "fundamental constitutional rights to non-resident aliens in the Canal Zone, the Trust Territories, and the American Sector in post-war Berlin." By analogy, petitioners argue (03-334 Pet. 26) that these same rights should inhere to aliens held at Guantanamo Bay where the United States maintains "exclu-

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[8] The extraordinary circumstances in which this litigation arises and the particular relief that petitioners seek implicate core political questions that the Constitution leaves to the President as Commander in Chief. Petitioners ask the courts to opine on the legality of the President's ongoing military operations and to release individuals who were captured during hostilities and who the military has determined should be detained. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch. That is particularly true where, as here, the President is acting with the full backing of Congress. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring); see also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668- 669 (1981). Accordingly, although the courts below did not need to reach the issue because they properly concluded that *Eisentrager* itself requires dismissal, the political question doctrine provides an additional, and independently sufficient, basis for dismissing these actions.

sive jurisdiction and control." That analogy is fundamentally flawed. To begin with, Guantanamo is not a territory, or even an unincorporated territory like Guam or Puerto Rico. Rather, it is a military base on foreign soil; as explained above, under the United States' lease agreement with Cuba, Cuba retains sovereignty over Guantanamo. For that reason alone, the decision below in no way conflicts with any of the Insular Cases or their progeny.

More fundamentally, the application of *Eisentrager* turns on the existence, or not, of United States sovereignty over an area, and not on United States' jurisdiction or control over an area. The Insular Cases are not inconsistent with that rule. To the contrary, as this Court explained in *Verdugo-Urquidez*, they simply specify "that not every constitutional provision applies to governmental activity *even where the United States has sovereign power*." 494 U.S. at 268 (emphasis added). The Insular Cases therefore do not help the detainees in this case, who are being held in a land over which the United States *lacks* sovereignty.[9]

b. Petitioners argue (03-334 Pet. 26-27) that the decision below conflicts with *Ralpho* v. *Bell*, 569 F.2d 607 (D.C. Cir. 1977), which held that due process principles may apply in the Trust Territory of Micronesia. See *id.* at 619 & n.71. The court below, however, correctly distinguished *Ralpho*. Pet. App. 16a-17a. That

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[9] Petitioners likewise suggest (03-334 Pet. 16) that the decision below conflicts with *Reid* v. *Covert*, 354 U.S. 1 (1957). As this Court itself underscored in *Verdugo-Urquidez*, however, *Reid* only "decided that United States citizens stationed abroad could invoke the protections of the Fifth and Sixth Amendments." 494 U.S. at 270. Thus, as was true for the alien defendant in *Verdugo-Urquidez*, the *aliens* on whose behalf these actions were brought "can derive no comfort from the *Reid* holding." *Ibid.*

case did not involve the detention of aliens abroad, but instead concerned a court's jurisdiction to review a claim to a hearing under the Micronesian Claims Act. See 569 F.2d at 611-612. Moreover, the court's decision in *Ralpho* that Micronesian residents enjoyed due process rights was based on its conclusion that the Trust Territory was equivalent to other American territories, which are accorded due process rights.[10] See *id.* at 619; see also *Gale* v. *Andrus*, 643 F.2d 826, 832-833 (D.C. Cir. 1980). The military base at Guantanamo is not, and is not remotely like, an American territory. For those reasons, the court correctly distinguished *Ralpho*, but even if there were any tension between the District of Columbia Circuit's decision in

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[10] Guantanamo is a special-purpose enclave within a foreign country, which the United States occupies pursuant to a lease with Cuba, which in turn retains sovereignty over Guantanamo. By contrast, no other sovereign existed at the time of the appointment of the United States as administrator of the Micronesia Trust Territory. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665 (preamble). Likewise, the United States' operation of the Guantanamo base does not share any of the civilian governmental attributes of its special role with respect to the Trust Territory in Micronesia, and responsibility to "nurture the Trust Territory toward self-government." *Andrus*, 643 F.2d at 830; see 48 U.S.C. 1681(a). Furthermore, unlike Guantanamo, Congress has exercised Article IV powers with respect to Micronesia. See, *e.g.*, Proclamation 5564, 51 Fed. Reg. 40,399 (1986) (establishing the Northern Mariana Islands as United States territory and through Free Association compacts with the remaining portions of the former Trust Territories); Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (covenant to establish a Commonwealth of the Northern Mariana Islands in political union with the United States); Act of Nov. 8, 1977, Pub. L. No. 95-157, 91 Stat. 1265 (establishing a United States District Court in the Northern Mariana Islands).

Ralpho and its decision below, any such intra-circuit conflict would not merit this Court's review.[11]

c. Petitioners claim (03-334 Pet. 28; 03-343 Pet. 24) that *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), supports the notion that the United States' effective control over Guantanamo Bay is sufficient for them to invoke habeas relief in the United States courts. As the court of appeals explained, however, the Second Circuit's decision in *McNary* "has no precedential value because the Supreme Court vacated it." Pet. App. 15a. Furthermore, as the court of appeals also explained, the currency of the Second Circuit's vacated decision in *McNary* is further diminished by the fact that the decision is "at odds with the Supreme Court's reasoning not only in *Vermilya-Brown*, but also in *Spelar*," which reaffirm that "control is surely not the test" for deter-

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[11] Petitioners' reliance (03-334 Pet. 25-26; 03-343 Pet. 25) on the Panama Canal Zone cases is similarly misplaced. The Fifth Circuit's holdings extending some constitutional rights to the Panama Canal Zone are based on that court's determination that the Canal Zone was an unincorporated territory and on its application of the Insular Cases. See *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566, 568, 570 (5th Cir. 1974); *Government of the Canal Zone* v. *Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979). Congress also possessed Article IV powers with respect to the Canal Zone. See *Husband R.*, 453 F.2d at 1058-1059. Moreover, the Fifth Circuit's exercise of jurisdiction in those cases reflected the fact that the United States had established a United States federal district court for the Canal Zone, with appellate review in the Fifth Circuit. See Panama Canal Act, ch. 390, § 8, 37 Stat. 560, 565 (repealed 1979). Obviously there is no analogous district court with jurisdiction over Guantanamo. The Canal Zone cases are therefore also inapplicable.

mining when constitutional provisions may apply extraterritorially. *Id.* at 15a-16a.[12]

d. Contrary to petitioners' contention (03-334 Pet. 24; 03-343 Pet. 28), the court of appeals' decision also does not conflict with *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987). *Asahi* concerns the circumstances under which a foreign defendant—seeking to avoid jurisdiction—may be sued in a state court. See *id.* at 109-110. This litigation, however, involves the different question whether an alien held abroad may "demand access to our courts." *Eisentrager*, 339 U.S. at 777.[13]

4. Far from conflicting with any other decisions, the court of appeals' decision in this case is consistent with the decisions of the other courts that have considered habeas petitions filed on behalf of Guantanamo detainees. In *Coalition of Clergy* v. *Bush*, 189 F. Supp. 2d 1036 (C.D. Cal.), aff'd in part and vacated in part, 310 F.3d 1153 (9th Cir. 2002), cert. denied, 123 S. Ct. 2073 (2003), a coalition of clergy, lawyers, and professors filed a habeas petition on behalf of all the Guantanamo

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[12] Petitioners' reliance (03-334 Pet. 28-29; 03-343 Pet. 25) on *United States* v. *Tiede*, 86 F.R.D. 227 (U.S. Ct. of Berlin 1979), is also misplaced. The *Tiede* court was an occupation court established by the United States Ambassador to Germany, not an Article III court. See U.S. High Commissioner Law No. 46, as amended. Its erroneous holding that aliens *abroad* enjoy full constitutional protections is plainly inconsistent with later controlling precedent. See, *e.g.*, *Zadvydas*, 533 U.S. at 693.

[13] Petitioners' reliance (03-343 Pet. 18-19) on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), is also misplaced. That case concerned an alien who was detained at Ellis Island in New York. *Id.* at 207. The Court therefore had no occasion to consider whether aliens held abroad are entitled to the privilege of litigating in United States courts.

detainees, including the detainees in these cases. The district court held that the coalition lacked next-friend standing to maintain the action because it had no prior relationship whatsoever with the detainees. 189 F. Supp. 2d at 1040-1044. The court further held, however, that, even if the coalition had possessed next-friend standing, United States courts would lack jurisdiction to entertain the habeas petition under this Court's decision in *Eisentrager*. *Id.* at 1046-1050. Indeed, as the district court explained, the Guantanamo detainees are similar "[i]n all key respects" to the prisoners in *Eisentrager*. *Id.* at 1048.

On appeal, the Ninth Circuit affirmed the district court's decision that the coalition lacked next-friend standing to file a habeas petition on behalf of the Guantanamo detainees. 310 F.3d 1153, 1157. In addition, the Ninth Circuit noted that "[t]here is no question that the holding in [*Eisentrager*] represents a formidable obstacle to the rights of the detainees at [Guantanamo] to the writ of habeas corpus," and that *Eisentrager* "well matches the extraordinary circumstances" of the Guantanamo detentions. *Id.* at 1164 n.4. However, the Ninth Circuit vacated that portion of the district court's decision addressing *Eisentrager* on the ground that it was not necessary for the court to reach that issue in light of the fatal absence of next-friend standing. The plaintiffs in *Coalition of Clergy* petitioned for certiorari, challenging both the court of appeals' holding that next-friend standing was lacking and the district court's alternative holding that jurisdiction was lacking under *Eisentrager*. See 02-1155 Pet. i. This Court denied certiorari. 123 S. Ct. 2073 (2003).

In *Gherebi* v. *Bush*, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003), appeal pending, No. 03-55785 (9th Cir.

argued Aug. 11, 2003), another habeas petition was filed on behalf of a Guantanamo detainee, this time by an individual claiming to be the brother of a Guantanamo detainee. The district court—the same court that decided *Coalition of Clergy*—held that next-friend standing was present, but that *Eisentrager* "compels dismissal" of the petition for habeas relief. *Id.* at 1066-1067, 1068-1071.[14]

5. Petitioners object (03-334 Pet. 9, 28-29; 03-343 Pet. 9-11) to the court of appeals' decision on the ground that it leaves the detainees without any access to United States courts. In many respects, petitioners' objections echo those of the dissenters in *Eisentrager*, who clearly appreciated "[t]he broad reach of [the Court's] opinion." 339 U.S. at 792 (Black, J., dissenting). In any event, *Eisentrager* does not establish that aliens detained by the military abroad are without any rights or process, but rather that the scope of those rights or procedures are to be determined by the Executive and the military, and not the courts. As the Court stated in *Eisentrager*, "[w]e are not holding that these prisoners have no right which the military authorities are bound to respect," but rather that the "responsibility for observance and enforcement of th[e] rights [asserted on behalf of the prisoners] is upon political and military authorities" in seeking to fulfill the United States' international commitments. *Id.* at

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[14] In *Gherebi*, the United States has also argued that the district court lacked jurisdiction to entertain the petition under the terms of the habeas statute because no custodian responsible for the custody of the Guantanamo detainees is present within the Central District of California. See 28 U.S.C. 2241(a); *Schlanger* v. *Seamans*, 401 U.S. 487, 491 (1971) (Under Section 2241, "absence of [the] custodian is fatal to * * * jurisdiction").

789 n.14.[15] Thus, far from establishing the sort of dangerous precedent characterized by petitioners, *Eisentrager* reflects core separation-of-powers principles, avoids the truly dangerous precedent of judicial second-guessing of quintessentially military decisions, and ensures that "enemy litigiousness" does not jeopardize the war effort or "bring aid and comfort to the enemy." *Id.* at 779.

In a similar vein, petitioners argue (03-343 Pet. 25-26) that, under *Eisentrager*, the Guantanamo detainees lack of access to United States *courts* would violate the United States' international obligations. That is incorrect. But more to the point, as this Court recognized in *Eisentrager*, our Constitution reserves that judgment to the political branches, which, unlike the courts, may be held politically accountable for that judgment. See 339 U.S. at 789 n.14. In addition, the federal habeas statute has allowed treaty-based international law claims since at least 1867, and the prisoners in *Eisentrager* themselves raised claims under the Geneva Convention. But in *Eisentrager*, this Court held that the United States courts lacked jurisdiction over such habeas claims. Nor is there any reason to conclude that the same courts that are closed under *Eisentrager* to claims based on an alleged violation of

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[15] That political and diplomatic dynamic is fully available and, indeed, already active in the case of the Guantanamo detainees, just as it has been available for aliens detained by the military in connection with prior armed conflicts. See, *e.g.*, Office of the White House Press Secretary, Fact Sheet, *Statement on British Detainees* 1 (July 18, 2003) (discussing meeting between the President and the Prime Minister Blair concerning U.K. nationals detained at Guantanamo) <www.whitehouse.gov/news/releases/2003/07/20030717-9.html>. In addition, in the past year and a half, more than 60 detainees have been released from Guantanamo.

the United States Constitution nonetheless remain open to claims based on alleged violations of international law.

In particular, petitioners' reliance (03-343 Pet. 26-27) on the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, is misplaced. The ICCPR—a multilateral agreement addressing basic civil and political rights—could not possibly be read to override *Eisentrager*. As Judge Randolph explained in his concurring opinion below, the ICCPR is a non-self-executing treaty that does not create any judicially enforceable rights in this country at all. Pet. App. 22a; see also, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, No. 02-9008, 2003 WL 22038598, at *18 n.35 (2d Cir. Sept. 2, 2003). Furthermore, by its terms, the ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory. Article 2, paragraph 1 of the ICCPR states that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within* its territory *and* subject to its jurisdiction the rights recognized in the present Covenant" (emphasis added). That territorial limitation is reinforced by the canon of construction that treaties "normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

6. There is no reason to hold these petitions pending the disposition of the petition for certiorari in *Sosa* v. *Alvarez- Machain*, No. 03-339 (filed Sept. 2, 2003). As discussed in the United States' brief in support of the petition in No. 03-339, the threshold question presented in *Sosa* is whether the Alien Tort Statute (ATS), 28 U.S.C. 1350, creates a private cause of action for aliens for torts committed in violation of the law of nations or treaties of the United States or, instead, is simply a

jurisdiction-granting provision. In his concurrence in this case, Judge Randolph expounded on the position taken by Judge Bork in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (concurring opinion), cert. denied, 470 U.S. 1003 (1985), that the ATS "does not create a cause of action." Pet. App. 20a; see *id.* at 20a-26a. But, as Judge Randolph further observed, it was "unnecessary" for the panel to reach or resolve that ATS issue here because, *inter alia*, "*Eisentrager* disposes of the[se] cases." *Id.* at 26; see *id.* at 19a n.*; see also U.S. Br. at 14-15, *Sosa* v. *Alvarez-Machain*, *supra* (No. 03-339) (discussing *Al Odah*). Accordingly, although Judge Randolph's concurrence sheds added light on the District of Columbia Circuit's interpretation on the ATS, the court of appeals' judgment below does not implicate the important ATS issue presented by *Sosa*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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