

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SHAFIQ RASUL, ET AL., :

4 Petitioners :

5 v. : No. 03-334

6 GEORGE W. BUSH, PRESIDENT OF :

7 THE UNITED STATES, ET AL. :

8 and :

9 FAWZI KHALID ABDULLAH FAHAD :

10 AL ODAH, ET AL., :

11 Petitioners :

12 v. : No. 03-343

13 UNITED STATES, ET AL. :

14 - - - - -X

 Washington, D.C.

 Tuesday, April 20, 2004

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United
19 States at 10:02 a.m.

20 APPEARANCES:

21 JOHN J. GIBBONS, ESQ., Newark, N.J., on behalf of the
22 Petitioner.

23 THEODORE B. OLSON, Solicitor General, Department of
24 Justice, Washington, D.C.; on behalf of the
25 United States, supporting the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
JOHN J. GIBBONS, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
GENERAL THEODORE B. OLSON	
On behalf of the Respondents	25

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now on 03-334, Shafiq Rasul vs. George W. Bush and a companion case. Mr. Gibbons.

ORAL ARGUMENT OF JOHN J. GIBBONS
ON BEHALF OF PETITIONERS

MR. GIBBONS: Mr. Chief Justice, and may it please the Court:

What is at stake in this case is the authority of the Federal courts to uphold the rule of law. Respondents assert that their actions are absolutely immune from judicial examination whenever they elect to detain foreign nationals outside our borders. Under this theory, neither the length of the detention, the conditions of their confinement, nor the fact that they have been wrongfully detained makes the slightest difference.

Respondents would create a lawless enclave insulating the executive branch from any judicial scrutiny now or in the future.

QUESTION: Mr. Gibbons, I understand that your clients have been detained approximately two years?

MR. GIBBONS: That's correct, Your Honor.

1 QUESTION: Supposing they had only been
2 detained six months, how much would that weaken your
3 case?

4 MR. GIBBONS: It wouldn't weaken it at all
5 because as I'll get into in the argument, the case
6 depends on compliance with provisions of a binding
7 treaty, which requires a prompt determination of
8 their status.

9 QUESTION: So they would have had a habeas
10 corpus entitlement, in your view, within weeks after
11 their, after their detention?

12 MR. GIBBONS: They would have had
13 entitlement to the process specified in the Geneva
14 Convention, and if they had that process --

15 QUESTION: Did they have that right when
16 they were in Afghanistan?

17 MR. GIBBONS: They allege not, and on this
18 record, you have to assume that, as did the Court of
19 Appeals.

20 QUESTION: But now in Johnson vs.
21 Eisentrager, we said that the Geneva Convention did
22 not confer a private right of action.

23 MR. GIBBONS: Your Honor, the question of
24 the private right of action really is not presented
25 in this case. We are not asking to imply a private

1 right of action from the Geneva Convention or any
2 other treaty. What we are saying is that the cause
3 of action is created by the Habeas Corpus Statute and
4 by the Administrative Procedure Act. The treaty
5 provides a rule of decision, not a cause of action.

6 QUESTION: Well, I guess, at least the
7 question presented is just whether the Federal court
8 has jurisdiction under the Habeas Statute, Section
9 2241, is that right?

10 MR. GIBBONS: That's correct.

11 QUESTION: And you don't raise the issue
12 of any potential jurisdiction on the basis of the
13 Constitution alone. We are here debating the
14 jurisdiction under the Habeas Statute, is that right?

15 MR. GIBBONS: That's correct, Justice
16 O'Connor. As a matter of fact --

17 QUESTION: 1331. I thought --

18 MR. GIBBONS: It doesn't depend on Section
19 1331, although the Administrative Procedure Act claim
20 does depend on Section 1331.

21 QUESTION: That's what I'm asking. Is
22 that here or not? You mentioned the APA claim.

23 MR. GIBBONS: Yes.

24 QUESTION: I thought you were still
25 asserting that, are you not?

1 MR. GIBBONS: Yes. I'm asserting that.

2 QUESTION: So it isn't just habeas then,
3 it's also --

4 MR. GIBBONS: That does --

5 QUESTION: It's also 13 --

6 MR. GIBBONS: Your Honor, Justice Scalia,
7 it does depend on Section 1331.

8 QUESTION: So we have two things, the
9 Habeas Statute and 1331?

10 MR. GIBBONS: Yes.

11 QUESTION: But you still win.

12 MR. GIBBONS: Now --

13 QUESTION: If you win under the Habeas
14 Statute?

15 MR. GIBBONS: Oh, absolutely.

16 QUESTION: Yes. You don't need both.

17 MR. GIBBONS: No. We don't. Now, if you
18 look at the Court of Appeals ruling in this case, the
19 Court of Appeals assumed that these people were
20 friendly aliens, assumed that they had never been
21 members of any armed forces, and had never carried
22 out any belligerent activity against the United
23 States. Assumed that they had never had the hearing
24 required by the Geneva Convention to determine
25 whether or not in fact they were civilians who should

1 have been repatriated.

2 What the Court of Appeals held was, and
3 it's on page 1141 of the court's opinion, if the
4 Constitution does not entitle detainees to due
5 process, and it does not, they cannot invoke the
6 jurisdiction of our courts to test the
7 constitutionality or legality of restraints on their
8 liberty.

9 Thus the Court of Appeals assumed that
10 the -- that the result turned on the absence of a
11 constitutional right, and that simply misreads the
12 Habeas Corpus Statute. Section 2241(c)(1), which is
13 carried forward in virtually identical language from
14 Section 14 of the Judiciary Act of 1789, antedated
15 the Bill of Rights. All it required, all it has ever
16 required is Federal custody simpliciter, and that
17 gives habeas corpus jurisdiction.

18 QUESTION: Well, but other than producing
19 the person before the court so that the system is
20 satisfied that we know where the person is, surely
21 you have to go beyond that and assert some sort of
22 right. And you -- you say that --

23 MR. GIBBONS: Of course.

24 QUESTION: -- the Geneva Convention is
25 really not the basis for the cause of action, which I

1 agree, so where do we go after that? So he is here
2 in front of the court. Now what?

3 MR. GIBBONS: Your Honor, the Geneva
4 Convention is the supreme law of the land. That's
5 what the Constitution says about habeas.

6 QUESTION: But it may not be
7 self-executing. That's the problem, I guess. The
8 indications are it's not.

9 MR. GIBBONS: Your Honor, Your Honor --

10 QUESTION: Forgetting the Geneva
11 Convention, what happens when the person comes before
12 the court? You prevail and there is a writ of habeas
13 corpus, it comes here, and the judge says, now what
14 am I supposed to do.

15 MR. GIBBONS: What the judge is supposed
16 to do is determine first whether or not the
17 government's response that the detention is legal is
18 in fact an adequate response. Now, the government in
19 this case probably will respond, we don't have to
20 give the hearings required by the Geneva Convention.
21 But if you're going to treat a binding United States
22 treaty as the supreme law of the land, that is not an
23 adequate answer.

24 Now, this question of, is the treaty
25 self-executing or not self-executing, I suggest is a

1 straw man. Since 1813, if a treaty provides a rule
2 of decision and something else provides a cause of
3 action, the treaty nevertheless provides the rule of
4 decision. That was several --

5 QUESTION: But Johnson said quite
6 specifically that the Geneva Convention was not
7 available to the Petitioners in that case because it
8 did not confer any right of action.

9 MR. GIBBONS: Well, Your Honor, I think
10 the latter part of your sentence is probably an
11 overreading of Johnson. In Johnson, which I suggest
12 is clearly distinguishable from this case, there were
13 three critical facts. One was that they were
14 admitted enemy aliens. Our Petitioners` plead that
15 they are not.

16 The other was that they had a hearing
17 before a military tribunal which comported with
18 Federal legislation and with the extant rules of
19 international law, and our Petitioners have had no
20 such hearing.

21 QUESTION: Well --

22 QUESTION: But I take it you are --

23 QUESTION: -- if you, if you, if your
24 clients here had been given the review that has been
25 described to us in the government's brief, by

1 military authorities to determine whether these
2 people are indeed being held as enemy combatants,
3 would you be here if you knew that that review had
4 been provided?

5 MR. GIBBONS: We would not be. What we
6 are seeking is the review provided --

7 QUESTION: Well, I don't see how that --

8 QUESTION: Wouldn't that depend on what
9 the review showed? You have alleged that your
10 clients were not enemy aliens. If it showed they
11 were tourists, they were just picked up by mistake,
12 would you be here or would you not be here?

13 MR. GIBBONS: If they were detained after
14 a hearing determined that they were civilian
15 detainees who under Article IV of the Geneva
16 Convention should be repatriated, we would be here.

17 QUESTION: I don't see how those merits
18 question go to the issue of jurisdiction of the
19 Court. It may well be that if those factors you
20 mentioned were changed, you'd be entitled to judgment
21 here, even though the plaintiffs in Eisentrager were
22 not entitled to judgment, but we are not talking
23 about the merits right now. We are talking about
24 jurisdiction. Certainly jurisdiction doesn't turn on
25 the merits whether you were an enemy alien or not.

1 MR. GIBBONS: Well, I suggest that a fair
2 reading of Eisentrager is that that did turn on the
3 merits.

4 QUESTION: No, but I thought your -- may
5 I, may I ask you this, because I'm having the trouble
6 Justice Scalia is having. I thought your principal
7 argument on the basis of Eisentrager was that it
8 cannot stand for the proposition that there is no
9 jurisdiction because in fact, in Eisentrager, there
10 was enough mention of matters on the merits so that
11 it was clear that's what was driving the ultimate
12 resolution in Eisentrager.

13 And it cannot stand for the proposition
14 that a court cannot even inquire, and the only issue
15 we have got is whether under the Habeas Statute the
16 court can even inquire. Do I misunderstand your
17 position?

18 MR. GIBBONS: No, you do not, Justice
19 Souter.

20 QUESTION: Okay.

21 MR. GIBBONS: It's our position that
22 Eisentrager was a decision on the merits as a matter
23 of fact. The Court says that they -- Petitioners
24 were extended the same preliminary hearing as the
25 sufficiency application that was extended in Quirin,

1 Yamashita and Hirota versus McArthur, all of which
2 were decisions on the merits.

3 QUESTION: But in several different
4 places, Mr. Gibbons, in Eisentrager, the Court says
5 that we are talking about the Habeas Statute, and we
6 are saying these Petitioners are not entitled to
7 habeas.

8 MR. GIBBONS: Well, they are not as a
9 matter -- let me be clear about that. The result on
10 the merits in Eisentrager is perfectly correct. What
11 the Court did in Eisentrager was apply the scope of
12 review on habeas corpus, which was standard at that
13 time. If the military tribunal had lawful
14 jurisdiction, that ended the habeas inquiry.

15 QUESTION: Well, there is another problem.
16 At that time, that case was decided when Ahrens
17 against Clark was the statement of the law, so there
18 is no statutory basis for jurisdiction there, and the
19 issue is whether the Constitution by itself provided
20 jurisdiction. And of course, all that's changed now.

21 MR. GIBBONS: Well, Your Honor, in
22 Eisentrager, both the Court of Appeals and the
23 Supreme Court made it clear that they disapproved,
24 they were not adopting the ruling of the District
25 Court based on Ahrens v. Clark. Of course, in any

1 event, that does not go to subject matter
2 jurisdiction. That's a Rule 12(b)(2) issue of in
3 personam jurisdiction, whether a proper Respondent is
4 before the Court. In Eisentrager, the Court assumed
5 --

6 QUESTION: Well, you raised the question
7 of whether the territorial jurisdiction provision
8 covered it. There was no territorial jurisdiction if
9 they were outside the district under the ruling in
10 Ahrens against Clark, which means they had to rely on
11 the Constitution to support jurisdiction, which in
12 turn means that once they have overruled Ahrens
13 against Clark, which they did, there is now a
14 statutory basis for jurisdiction that did not then
15 exist.

16 MR. GIBBONS: Your Honor, respectfully, I
17 don't think you can fairly read Justice Jackson's
18 opinion as adopting the Ahrens v. Clark position.

19 QUESTION: No. But Ahrens v. Clark was
20 the law at the time of that decision, and it was
21 subsequently overruled. So that -- that case was
22 decided when the legal climate was different than it
23 has been since Ahrens against Clark was overruled.

24 MR. GIBBONS: Well -- in any event --

25 QUESTION: Let me help you.

1 MR. GIBBONS: In any event, there is no
2 question that the Ahrens v. Clark rule does not apply
3 today. These Respondents are the proper Respondents.

4 QUESTION: Of course, it's a question of
5 how much it doesn't apply, whether it doesn't apply
6 only when there is at least clear statutory
7 jurisdiction in one, in one Federal court so it's
8 almost a venue call. It isn't clear that it's been
9 overruled when there is no statutory jurisdiction in
10 any Federal court. That's certainly an open question.

11 MR. GIBBONS: Well, Your Honor, as to the
12 absence of jurisdiction, 2241(c)(1) could not be
13 plainer. It's been plain for 215 years. If there is
14 Federal detention and there is a proper Respondent
15 before the Court as there is, there is habeas corpus
16 jurisdiction. I don't see any, even ambiguity in
17 that statute.

18 QUESTION: What do you do if you have a
19 lawful combatant in a declared war, and the
20 combatant, an enemy of the United States is captured
21 and detained, habeas?

22 MR. GIBBONS: Habeas, you mean on the
23 battlefield? Absolutely not.

24 QUESTION: We'll take it from the
25 battlefield, and a week later, 10 miles away, then

1 six months later, a thousand miles away.

2 MR. GIBBONS: In the zone of active
3 military operations or in an occupied area under
4 martial law, habeas corpus jurisdiction has never
5 extended.

6 QUESTION: Suppose it's Guantanamo.

7 MR. GIBBONS: Well, the --

8 QUESTION: A declared war and a lawful
9 combatant.

10 MR. GIBBONS: A declared war and someone
11 who has been determined to be a combatant in
12 accordance with Article V of the Geneva Convention,
13 an application for a writ of habeas corpus in those
14 circumstances would, under Rule 12(b)(6), be
15 summarily dismissed.

16 QUESTION: You are close to the merits.

17 QUESTION: You are back to the Geneva
18 Convention again, so I just have to assume your case
19 depends on the Geneva Convention.

20 MR. GIBBONS: Well, it --

21 QUESTION: It's not self-executing.

22 MR. GIBBONS: It depends on the Geneva
23 Convention and on the military regulations duly
24 adopted and binding on the military forces of the
25 United States.

1 QUESTION: But isn't that the merits case
2 that you are talking about? I mean, your
3 jurisdictional argument doesn't depend, as I
4 understand it, on military regulations or the Geneva
5 Convention. It depends on this statute.

6 MR. GIBBONS: No. It does not.

7 QUESTION: If you get into court, your
8 clients may raise Geneva Convention and all sorts of
9 things, but that's not what your case here depends
10 on.

11 MR. GIBBONS: No. Our position is that
12 the Habeas Corpus Statute has meant what it said
13 since 1789.

14 QUESTION: I mean, you have to think down
15 the road, is there an alternative to the Geneva
16 Convention that is on the substantive claim. I was
17 also thinking, and here I want your view on it, that
18 if you have, if they get in the door, and now they
19 have a claim that they are being held without a
20 competent tribunal assessing it, you get to your
21 route as well by saying that the part about the Fifth
22 Amendment in Eisentrager is, in effect, overruled by
23 Reid v. Covert. And in fact, if you follow Harlan
24 and by following Harlan, you apply some kind of due
25 process, and the Geneva Convention comes in to inform

1 the content of that due process.

2 Now, is there an argument there or not?

3 MR. GIBBONS: There certainly is, Your
4 Honor, but since --

5 QUESTION: You're not simply being polite?
6 I want to --

7 (Laughter.)

8 MR. GIBBONS: I have more to say about it.

9 QUESTION: But you do have the impediment,
10 Mr. Gibbons, that the D.C. Circuit said it decided
11 the merits as well as jurisdiction, so I think
12 Justice O'Connor and Justice Kennedy were asking you
13 before, well, if you prevail on jurisdiction under
14 that opinion, don't you go out the door immediately
15 because the D.C. Circuit said, at least as far as the
16 Constitution is concerned, nonresident aliens have no
17 due process rights.

18 MR. GIBBONS: As far as the Constitution
19 is concerned, that's what the District of Columbia
20 Circuit said. Now, as to whether or not that's right
21 --

22 QUESTION: But that's not the point.

23 MR. GIBBONS: First of all --

24 QUESTION: Whether -- as I take it we ask
25 you to address only the bare jurisdictional question.

1 MR. GIBBONS: The bare jurisdictional
2 question depends on Federal custody simpliciter, and
3 then the Court goes on to decide, is there any legal
4 basis for the government's response to the writ.

5 QUESTION: Can I ask this, Mr. Gibbons.
6 If the jurisdictional question rests on Habeas
7 Statute simpliciter, without reference to the Geneva
8 Convention or any of the other merits points that
9 you've been raising, how then do you answer Justice
10 Kennedy's question if the merits are out and it
11 doesn't matter whether you are a combatant or
12 noncombatant, is there jurisdiction when somebody is
13 captured on the field of battle and held immediately
14 on the field of battle, why wouldn't there be
15 jurisdiction there? The only answers you give are
16 merits answers, not jurisdictional answers.

17 MR. GIBBONS: Your Honor, what I'm
18 suggesting is that whether you call it jurisdiction
19 or whether you call it the merits, in the battlefield
20 situation, it's going to go out under Rule 12, in any
21 event.

22 QUESTION: But that's, that's quite
23 different. I mean, all we are theoretically talking
24 about here is jurisdiction. And the idea that, you
25 know, you have Justice Kennedy's example, a lawful

1 combatant, a declared war, detained at Guantanamo
2 maybe two months after he is captured, and an
3 action's brought here in the District of Columbia for
4 habeas corpus and what does a -- what does a judge
5 say when he considers that sort of petition?

6 MR. GIBBONS: When he sees that petition,
7 he should dismiss it summarily, whether he dismisses
8 it under 12(b)(1) or 12(b)(6), it won't take him any
9 more time. Habeas corpus, as the historians' brief,
10 and others among the amici point out, has never run
11 to the battlefield, as a matter of habeas corpus
12 common law. And it is, after all, a common law writ.
13 It has never run to any place except where the
14 sovereign issuing the writ has some undisputed
15 control.

16 QUESTION: Well, suppose at Guantanamo,
17 you still have to summarily dismiss under the
18 hypothetical, right?

19 MR. GIBBONS: Yes, Justice Kennedy --
20 Kennedy, and the Court of Appeals did rely on some
21 mystical ultimate sovereignty of Cuba over, as we
22 Navy types call it, Gitmo, treating the Navy base
23 there as a no law zone. Now, Guantanamo Navy base,
24 as I can attest from a year of personal experience,
25 is under complete United States control and has been

1 for a century.

2 QUESTION: We don't need your personal
3 experience. That's what it says in the treaty. It
4 says complete jurisdiction.

5 MR. GIBBONS: That's exactly what it says.

6 QUESTION: Complete jurisdiction.

7 MR. GIBBONS: That's exactly what it says
8 -- yes.

9 QUESTION: Now, it also says Cuba retains
10 sovereignty.

11 MR. GIBBONS: It does not say that. It
12 says that if the United States decides to surrender
13 the perpetual lease, Cuba has ultimate sovereignty,
14 whatever that means. Now, for lawyers and judges
15 dealing with the word sovereignty, it doesn't
16 self-define.

17 QUESTION: Excuse me. Does it say that,
18 Cuba has ultimate sovereignty only if the United
19 States decides to surrender?

20 MR. GIBBONS: Yes.

21 QUESTION: Where would that text be? I
22 did not realize that was there.

23 MR. GIBBONS: Perhaps one of my colleagues
24 can find the language in the appendix.

25 QUESTION: Why don't you go ahead.

1 MR. GIBBONS: But, for example, if one of
2 the detainees here assaulted another detainee in
3 Guantanamo, there is no question they would be
4 prosecuted under American law because no other law
5 applies there. Cuban law doesn't apply there.

6 Now, if the test is sovereignty, that term
7 must be given some rational meaning by judges.
8 Respondents concede that habeas corpus would extend
9 to citizens detained in Guantanamo. That would be no
10 interference with Cuban sovereignty, and extending
11 habeas corpus to noncitizens there is no more an
12 interference with Cuban sovereignty.

13 If there isn't -- if there isn't
14 sovereignty over that base where no law applies,
15 legislative, judicial or otherwise, the term has no
16 meaning. Sovereignty for legal purposes must at
17 least mean that some political organization has a
18 monopoly on sanction in that defined geographic area.

19 QUESTION: Mr. Gibbons, I'm quoting from
20 page 8 of the government's brief, which I assume is
21 an accurate quote of the treaty. It doesn't just say
22 that Cuba has sovereignty if we give up the lease.
23 It says the United States -- this is the treaty,
24 recognizes the continuance of the ultimate
25 sovereignty of the Republic of Cuba over the leased

1 area. Now I take that to mean that they are
2 sovereign even during the term of the lease. You may
3 say it's artificial, but there it is.

4 MR. GIBBONS: I --

5 QUESTION: It's the law of the land, as
6 you say.

7 MR. GIBBONS: I misspoke, Justice Scalia,
8 by omitting the reference to continuing. But it
9 doesn't make any difference. That continuing
10 sovereignty -- Queen Elizabeth is the nominal
11 sovereign of Canada. That doesn't determine whether
12 or not Canadian courts can grant a writ of habeas
13 corpus. She's also the nominal sovereign of
14 Australia.

15 QUESTION: I don't think sovereignty is
16 being used in the same sense. I mean, it would be a
17 good point if you --

18 MR. GIBBONS: Well, that's the point.

19 QUESTION: If you said that England was
20 sovereign over Canada, and I don't think anybody
21 would say that.

22 MR. GIBBONS: But if the reference in the
23 lease meant that Cuban law somehow applied in the
24 United States Navy base at Guantanamo Bay, that would
25 be one thing. But Cuban law has never had any

1 application inside that base. A stamp with Fidel
2 Castro's picture on it wouldn't get a letter off the
3 base.

4 QUESTION: But you couldn't sublease --

5 QUESTION: Mr. Gibbons --

6 QUESTION: -- could we -- we couldn't
7 sublease Gitmo and we couldn't sell any of Gitmo to a
8 foreign country, could we? Why not? Because Cuba is
9 sovereign.

10 MR. GIBBONS: Well, there are all sorts of
11 treaties in which the United States, or perhaps
12 leases in other respects, in which the United States
13 knew its own authority, but that doesn't mean that
14 the United States has surrendered its sovereignty.

15 QUESTION: Is it like a Federal enclave
16 within a State? I was trying to think of anything
17 that might be -- resemble this relationship of the
18 United States to a territory inside another
19 territory?

20 MR. GIBBONS: Well, Guantanamo is to some
21 extent unique. One of the amicus briefs that served
22 a United States Navy base elsewhere points out that
23 this is the only base, for example, where the United
24 States has not entered into a status of forces --
25 forces agreement.

1 It's not at all clear that we have
2 exclusive jurisdiction, civil jurisdiction in any of
3 our other enclaves in foreign countries. But we have
4 exclusive jurisdiction and control over civil law in
5 Guantanamo, and have had for a century. So it's --
6 so it's so totally artificial to say that because of
7 this provision in the lease, the executive branch can
8 create a no law zone where it is not accountable to
9 any judiciary, anywhere.

10 Now, in some other places where the United
11 States has a base, there may be other civil authority
12 that can demand an accounting. But what the
13 executive branch is saying here is we don't have to
14 account to anyone, anywhere.

15 Justice Breyer, you asked me a question
16 before, and someone else, that's not unusual,
17 interrupted before I answered you. And to tell you
18 the truth, I don't remember your question at this
19 point.

20 QUESTION: I can explore it with the
21 Solicitor General possibly.

22 MR. GIBBONS: Well, Your Honor, I was also
23 asked a question about whether or not aliens had any
24 constitutional rights. In Verdugo, speaking for four
25 members of the Court at least, Mr. Chief Justice, you

1 said that Eisentrager stood for the proposition that
2 --

3 QUESTION: I think I was speaking for
4 five. I think Justice Kennedy joined the opinion.

5 MR. GIBBONS: Well, he did. But he wrote
6 separately, I think, and at least cast some doubt on
7 whether or not he agreed with your position that
8 there is no Fifth Amendment right for an alien
9 outside the United States.

10 Now, of course, that reading of
11 Eisentrager assumes that it was a decision on the
12 merits and not a jurisdictional decision. But be
13 that as it may, our position, and again, it's not
14 necessary for reversal in this case, and perhaps
15 should not even be addressed because you could avoid
16 a constitutional decision by making a statutory
17 decision, but our position is that that statement in
18 Verdugo is overbroad.

19 QUESTION: Thank you, Mr. Gibbons.
20 General Olson, we'll hear from you.

21 ORAL ARGUMENT OF SOLICITOR GENERAL THEODORE B. OLSON
22 ON BEHALF OF RESPONDENTS

23 GENERAL OLSON: Mr. Chief Justice, and may
24 it please the Court:

25 The United States is at war. Over 10,000

1 American troops are in Afghanistan today in response
2 to a virtually unanimous Congressional declaration of
3 an unusual and extraordinarily -- extraordinary
4 threat to our national security, and an authorization
5 to the President to use all necessary and appropriate
6 force to deter and prevent acts of terrorism against
7 the United States.

8 It's in that context that Petitioners ask
9 this Court to assert jurisdiction that is not
10 authorized by Congress, does not arise from the
11 Constitution, has never been exercised by this Court
12 --

13 QUESTION: Mr. Olson, supposing the war
14 had ended, could you continue to detain these people
15 on Guantanamo? Would there then be jurisdiction?

16 GENERAL OLSON: We believe that there
17 would not be jurisdiction, just --

18 QUESTION: So the existence of the war is
19 really irrelevant to the legal issue?

20 GENERAL OLSON: It is not irrelevant,
21 because it is in this context that that question is
22 raised, and I would -- the question, the case of
23 Johnson vs. Eisentrager, which we have discussed
24 here, even the dissent in that case said that it
25 would be fantastic to assume that habeas corpus

1 jurisdiction would exist in the time of war. So that
2 that case is not --

3 QUESTION: No, but your position does not
4 depend on the existence of a war?

5 GENERAL OLSON: It doesn't depend upon
6 that, Justice Stevens, but it's even more forceful.
7 And more compelling. Because all of the Justices in
8 the Eisentrager case would have held that there was
9 no jurisdiction under these circumstances.

10 QUESTION: What if one of the Plaintiffs
11 were an American citizen here, being held in
12 Guantanamo.

13 GENERAL OLSON: We have not --

14 QUESTION: Jurisdiction under Habeas
15 Statute?

16 GENERAL OLSON: We would acknowledge
17 jurisdiction. The Court has never --

18 QUESTION: Excuse me.

19 GENERAL OLSON: We would acknowledge that
20 there would be jurisdiction --

21 QUESTION: Why?

22 GENERAL OLSON: -- under the Habeas Corpus
23 Statute for the reasons that are explained in
24 Eisentrager itself, that citizenship is a foundation
25 for a relationship between the nation and the

1 individual and a foundation for --

2 QUESTION: Is that sufficient to give us
3 jurisdiction over Guantanamo, which is another
4 sovereign?

5 GENERAL OLSON: With respect to the
6 individual. We would, we would still argue --

7 QUESTION: What if the American citizen
8 was in the middle of the battlefield in Iraq?

9 GENERAL OLSON: We would still argue that
10 the jurisdiction under the Habeas Statute would not
11 extend under these circumstances to a wartime
12 situation, Justice Stevens, but that the -- what the
13 Eisentrager Court said, that there is enhanced
14 respect with respect to the power of the Court under
15 the habeas corpus jurisdiction with respect to
16 questions involving citizenship.

17 But what was unquestionable with respect
18 to that case is that an alien who had never had any
19 relationship to the United States and who was being
20 held as a result of a combat situation or a war
21 situation in a foreign jurisdiction, there was no
22 jurisdiction under the Habeas Statute.

23 QUESTION: Well, it's clear that there was
24 no relief. What do you say to Mr. Gibbons' position
25 that because in fact they did discuss the merits,

1 that case cannot really be taken as authority for
2 the -- leaving Ahrens and Braden aside, that the case
3 cannot be taken as authority for the proposition that
4 there is no jurisdiction in the sense of allowing the
5 person through the door to make whatever claim the
6 person wants to make. What is your response to that?

7 GENERAL OLSON: Our response to that is
8 throughout the decision in Eisentrager, the Court
9 referred to the question of jurisdiction.

10 QUESTION: Oh, it did.

11 GENERAL OLSON: It starts --

12 QUESTION: I'm really not asking a
13 question about, frankly, about the Court's
14 terminology. I'm asking about the holding in the
15 case.

16 GENERAL OLSON: The holding --

17 QUESTION: The mere argument is you can't
18 say it held anything more than that there was no
19 relief at the end of the road.

20 GENERAL OLSON: It held that there was no
21 relief at the end of the road, because the ultimate
22 question, to use the words of the Court, the ultimate
23 question is jurisdiction. The Court over and over
24 again said that we are deciding how far the Habeas
25 Statute reaches.

1 QUESTION: General Olson, would you look
2 at page 777 of the Johnson v. Eisentrager opinion,
3 and it says -- this is a hard opinion to fathom, but
4 it does say we are here confronted with, and there is
5 a whole list of things. And one of them is, is an
6 enemy alien, and another is, was tried and convicted
7 by a military commission sitting outside the United
8 States.

9 Why would the Court think it necessary to
10 say this is what we confronted in this case which
11 makes it worlds different from our case, where there
12 has been no trial and conviction, where these people
13 are saying, and we must accept for the moment that
14 it's true, that they are innocents. That they are
15 not combatants of any kind.

16 GENERAL OLSON: Well, those were
17 unquestionably facts that related to the case, that
18 related to the facts that came to the Court, but in
19 the very next paragraph, the Court goes on to say
20 that we have pointed out that the privilege of
21 litigation has been extended to aliens whether
22 friendly or enemy, that specifically addresses one of
23 the points you mentioned, only because permitting
24 their presence in the country implied protection.

25 And the Court went on to say, no such

1 basis can be invoked here for these prisoners at no
2 relevant time were within any territory over which
3 the United States is sovereign, and the scenes of
4 their offense, their capture, their trial and their
5 punishment were all beyond the territorial
6 jurisdiction of the United States.

7 And earlier in that --

8 QUESTION: Their trial and their
9 punishment. This is a completed episode. This is a
10 very difficult decision to understand. I would say
11 it's at least ambiguous.

12 GENERAL OLSON: It seems to me -- it seems
13 to me that those statements all have to be read in
14 the context -- context of the Court saying the
15 ultimate question is jurisdiction.

16 QUESTION: But it was so unnecessary to
17 say, to give that list that appears on page 777.

18 GENERAL OLSON: Well, I suspect that there
19 are many decisions of this Court where, when the
20 Court is dealing with the facts of a specific case,
21 especially in the context of a Court of Appeals
22 decision, if the Court were to turn to the briefs
23 that were written before to present the issue in this
24 Court, the only -- the question presented, submitted
25 in this case, in this Court, in Eisentrager was the

1 jurisdiction under the Habeas Statute. But the case
2 arose in the context where the Court of --

3 QUESTION: Was it really -- was it really
4 under the Habeas Statute or under the Constitution?

5 GENERAL OLSON: It was --

6 QUESTION: Because if the, if the views of
7 the dissenters in Ahrens against Clark were the law
8 at that time as they perhaps are now, then there
9 would have been statutory jurisdiction, which was not
10 present at that time.

11 GENERAL OLSON: But the Court was
12 specifically focusing on the jurisdictional incidents
13 attached to the condition of the individual --

14 QUESTION: But the Eisentrager Court never
15 once mentioned the statute, the Habeas Statute in its
16 opinion. What it seemed to do was to reach the
17 merits and say at the end of the day, these people
18 have no rights. They have had a trial under the
19 military tribunal and they have no rights that could
20 be granted at the end of the day, and no mention of
21 the Habeas Statute.

22 GENERAL OLSON: The Court specifically did
23 say, but did not mention the statute, Justice
24 O'Connor, but the statute is mentioned throughout the
25 briefs, in the government's brief when it says what

1 -- the statute at issue, the Habeas Corpus Statute
2 and within its territory, the language of Part A.
3 The statute that exists today is the same statute
4 that the Eisentrager Court was considering.

5 QUESTION: Well, the briefs may have
6 mentioned it, but wasn't the problem that Eisentrager
7 had to confront, the problem created by Ahrens,
8 construing respective jurisdiction, and therefore,
9 the only way there could be habeas jurisdiction in
10 Eisentrager was if due process demanded it.

11 And the Court went on to say, well, there
12 are various reasons why there is no ultimate due
13 process entitlement, and therefore, due process does
14 not demand entertainment of jurisdiction.

15 After Braden, that argument is gone. Why,
16 therefore, is Eisentrager not undercut to the point
17 where it's no further authority on the jurisdictional
18 point?

19 GENERAL OLSON: Well, it seems to me again
20 the entire opinion has to be taken in context. The
21 Court did specifically say that there is no statutory
22 authority. It didn't say, it didn't identify by
23 number a provision of the code, but it specifically
24 said no statutory authority.

25 QUESTION: The reason it said that was

1 because Ahrens was then the law.

2 QUESTION: Yeah.

3 QUESTION: And that was very clear in the
4 Court of Appeals opinion. They rested their decision
5 solely on the Constitution.

6 GENERAL OLSON: Well, Justice Stevens, I
7 submit that in the context of the case, in the
8 context of the way the dissent understood it, as well
9 as the majority understood it --

10 QUESTION: Yes, but the fact case was --
11 the case was decided when the majority view in Ahrens
12 was the law, and that is no longer the law.

13 GENERAL OLSON: Well, we would submit that
14 Ahrens, the over -- partial overruling, I think, has
15 been pointed out before. Ahrens has no effect on the
16 vitality of the Eisentrager case. The Court made
17 clear that it was deciding -- and everyone -- the
18 reason I mentioned the briefs is the context in which
19 the case was presented to the Court, and argued to
20 the Court and the decision that was made by the
21 majority in the Court, focusing on the identity of
22 the Petitioner, whether alien or friendly.

23 Justice Black in his dissenting opinion
24 says this decision would apply to whether someone was
25 hostile or not, and the entire context of the case,

1 Justice Stevens, it seems to me, and does not --

2 QUESTION: The context of the case was it
3 was decided at a time when Ahrens against Clark was
4 the law. And if the dissenting opinion in Ahrens
5 against Clark had been the law, it would have been
6 decided differently.

7 GENERAL OLSON: Well, it seems to me that
8 a fair reading of the case goes much further than
9 that, because the Court was not focusing on that. It
10 didn't specify that it was making its decision on
11 that basis. It did specify over and over again, and
12 the dissent referred to this as well, that it was
13 focusing on the fact that the individuals bringing
14 the petition had no sufficient contacts with the
15 United States. That's in part why the Court
16 distinguished --

17 QUESTION: And that's a complete response
18 to an argument resting entirely on the Constitution.
19 Did it cite Ahrens?

20 GENERAL OLSON: It did not, as I'm --

21 QUESTION: I don't recall.

22 GENERAL OLSON: I don't recall that it
23 did. The District Court --

24 QUESTION: Kind of extraordinary if it was
25 relying entirely on that --

1 GENERAL OLSON: The District Court relied
2 upon that decision. The Court of Appeals went much
3 further with respect to -- in fact, the Court, and
4 this Court, Justice Jackson's opinion for the Court
5 in this case specifically points out that the Court
6 of Appeals went back to something it called
7 fundamentals, because it couldn't find any authority
8 in either the statute or the Constitution.

9 QUESTION: Well, didn't the Johnson
10 opinion also say, we don't have to concern ourselves
11 here with the proper custodian. We kind of finesse
12 that point?

13 GENERAL OLSON: I believe that's a correct
14 characterization. What -- the other portion of the
15 decision that it seems to me important to recognize
16 is that this is a decision that was widely perceived,
17 and has been consistently perceived, as a definition
18 of the scope of the Habeas Statute. Going back to
19 the early 1800s, this Court decided that the extent
20 of habeas jurisdiction arose from the statute, not
21 from the common law.

22 QUESTION: That gets me back to your
23 statement that if this had been a citizen held in
24 Guantanamo, that habeas would be available. But the
25 statute doesn't talk about citizens. It says

1 prisoners held under the authority of the United
2 States. Now, if the citizen can say that he is a
3 prisoner held under the authority of the United
4 States in Guantanamo, why couldn't a noncitizen under
5 the statute say the same thing?

6 GENERAL OLSON: I think, Justice Kennedy,
7 the answer to that is, in the first place, we are
8 not, we are not saying that there necessarily would
9 be jurisdiction there, but we are saying that the
10 Court -- that the Court would go further with respect
11 to that because, and this is also in Eisentrager and
12 a number of other Court's -- of this Court's
13 decisions, that the Court will find more protection
14 for citizens as a result of the relationship going
15 back --

16 QUESTION: Well, but the only way we can
17 do it --

18 QUESTION: I don't, I don't mean to
19 misconstrue it or to misstate it, I had thought you
20 said at the outset that if this had been a citizen of
21 the United States held in Guantanamo, there would be
22 habeas corpus.

23 GENERAL OLSON: We are not -- we are
24 saying that we would not be contesting it, Justice
25 Kennedy, and the Court will be dealing with other

1 issues involving citizens.

2 QUESTION: You don't have to contest the
3 jurisdictional objection. If there is no
4 jurisdiction, there is no jurisdiction, whether you
5 contest it or not.

6 GENERAL OLSON: Well, I guess the only way
7 I can answer this, Justice Stevens, is to say that
8 what the Court seemed to say, not only in the
9 majority opinion, but in the dissenting opinion, that
10 more rights would be given to citizens --

11 QUESTION: No, but there are no rights
12 that can be recognized unless there is jurisdiction
13 in the first place. And if the Court is going to
14 make good on what you have just said it said, it has
15 got to do so presupposing jurisdiction. So if you
16 are going to rely upon those statements, don't you
17 necessarily have to concede jurisdiction?

18 GENERAL OLSON: I don't --

19 QUESTION: With respect to the citizen?
20 Doesn't make any difference if they have got lots of
21 rights if there is no jurisdiction to get into a
22 court to enforce them.

23 GENERAL OLSON: I think that the answer is
24 that that does not necessarily follow. The Court has
25 not reached that decision yet, and that's something

1 that is not before the Court.

2 QUESTION: Certainly the argument is
3 available that in that situation, the Constitution
4 requires jurisdiction. The Constitution requires
5 that an American citizen who has the protection of
6 the Constitution have some manner of vindicating his
7 rights under the Constitution. That would be the
8 argument.

9 GENERAL OLSON: I agree with that, justice
10 Scalia, and this Court has said again and again that
11 --

12 QUESTION: And that was part of his
13 argument in Eisentrager.

14 GENERAL OLSON: And it was -- and in that
15 case, the Court specifically said the Fifth Amendment
16 did not extend to the Petitioners in that case. The
17 Court has said that again in the Verdugo case in
18 terms of the Fourth Amendment.

19 QUESTION: Is that your answer to Justice
20 Kennedy, that there would be jurisdiction because due
21 process would require it for citizens, but there
22 would not be statutory jurisdiction in the case of
23 the citizen at Guantanamo?

24 GENERAL OLSON: I think it would be an
25 interpretation. And what this Court is doing is

1 interpreting the statute because the Habeas Corpus
2 Statute defines the extent of rights --

3 QUESTION: Well, but what is the
4 position -- I mean, I want to know what the position
5 of the United States is for the same reason Justice
6 Kennedy does.

7 GENERAL OLSON: Our answer to that
8 question, Justice Souter, is that citizens of the
9 United States, because of their constitutional
10 circumstances, may have greater rights with respect
11 to the scope and reach of the Habeas Statute as the
12 Court has or would interpret it. That case has never
13 come before this Court, and it's important to
14 emphasize that --

15 QUESTION: You go outside of the statutory
16 language for your case that's in front of us.

17 GENERAL OLSON: Excuse me, Justice --

18 QUESTION: You are going outside of the
19 statutory language to resolve both the hypothetical
20 case and the case in front of us. This is a
21 prisoner, and he is detained under the authority of
22 the United States.

23 GENERAL OLSON: And this Court construed
24 those provisions in the Eisentrager case and
25 determined that the statute did not reach aliens that

1 did have no contact with the United States and were
2 held in a foreign jurisdiction outside the
3 sovereignty of the United States.

4 QUESTION: It did not construe the
5 statute. It assumed the statute was inapplicable and
6 concluded that the Constitution was not a substitute
7 for the statute.

8 GENERAL OLSON: Well, Justice Stevens, I
9 respectfully disagree. I think the Court was
10 construing the statute not to be applicable, then it
11 went on because the Court of Appeals had addressed
12 the constitutional question.

13 QUESTION: Not a word, not a word in the
14 opinion that supports it.

15 GENERAL OLSON: Well, I respectfully
16 disagree. The Court does say, we don't find any
17 authority in the statute. We don't find any
18 authority in the Constitution. We will not go to
19 so-called fundamentals to find it someplace else.
20 That is consistent with what this Court decided in
21 the --

22 QUESTION: Well, it's obvious that there
23 is language in Eisentrager that supports you, obvious
24 to me, but you have just heard that judges don't
25 always distinguish between 12(b)(1) and 12(b)(6), not

1 even in this Court, at least we don't always get it
2 right. And there is also language, as you have
3 heard, that's against you. I think there is some in
4 there.

5 So what I'm thinking now, assuming that
6 it's very hard to interpret Eisentrager, is that if
7 we go with you, it has a virtue of clarity. There is
8 a clear rule. Not a citizen, outside the United
9 States, you don't get your foot in the door. But
10 against you is that same fact.

11 It seems rather contrary to an idea of a
12 Constitution with three branches that the executive
13 would be free to do whatever they want, whatever they
14 want without a check. That's problem one.

15 Problem two is that we have several
16 hundred years of British history where the cases
17 interpreting habeas corpus said to the contrary
18 anyway. And then we have the possibility of really
19 helping you with what you're really worried about,
20 which is undue court interference by shaping the
21 substantive right to deal with all those problems of
22 the military that led you to begin your talk by
23 reminding us of those problems.

24 So if it's that choice, why not say, sure,
25 you get your foot in the door, prisoners in

1 Guantanamo, and we'll use the substantive rights to
2 work out something that's protective but practical.

3 GENERAL OLSON: Well, Justice Breyer,
4 there are several answers to that. You started with
5 the proposition that there was no check and that the
6 executive is asserting no check. This is the
7 interpretation of the scope of a Habeas Statute.
8 Congress had -- has had 54 years with full awareness
9 of the decision to change it.

10 Indeed, as we point out in our brief,
11 eight months after the Eisentrager decision, a bill
12 was introduced that would have changed that statute,
13 H.R. 2812, which would specifically have changed the
14 statute to deal with the Eisentrager situation, so
15 there is a check.

16 QUESTION: It could have been just a
17 clarifying, General Olson. As you well know, the
18 fact that a bill was introduced and not passed
19 carries very little weight on what law that exists
20 means.

21 GENERAL OLSON: Well, I understand that,
22 but the bill was -- came eight months after
23 Eisentrager.

24 QUESTION: You're not using it to say what
25 the law was. You're using it to show that there was

1 available, and is available, a perfectly good check
2 upon the executive branch. If the people think that
3 this is unfair, if Congress thinks it's unfair, with
4 a stroke of the pen, they can change the Habeas
5 Statute.

6 GENERAL OLSON: That's precisely correct.
7 And they had a bill before them eight months after
8 the Eisentrager decision which had -- that Congress
9 proceeded on it. Congress has also dealt with the
10 Habeas Statute in a variety of other ways. It has
11 seen fit in no way to change the decision required by
12 this Court with respect to the statute.

13 You mentioned several hundred years of
14 British history was your second point. All of those
15 cases, or virtually all of those same cases that have
16 been brought up in the briefs, and the amicus briefs
17 today, were in the briefs that were before the
18 Eisentrager --

19 QUESTION: I grant you this. My question
20 has to assume that Eisentrager is ambiguous and not
21 clearly determinative. But then on that assumption,
22 I'm still honestly most worried about the fact that
23 there would be a large category of unchecked and
24 uncheckable actions dealing with the detention of
25 individuals that are being held in a place where

1 America has power to do everything.

2 Now, that's what's worrying me because of
3 Article III, and the other thing on the opposite
4 side, as I said, is it's possible to tailor the
5 substance to take care of the problems that are
6 worrying you. Those are my two basic points.

7 GENERAL OLSON: Well, let me get back to
8 it again. Those earlier cases were decided and
9 rejected in Eisen -- in the Eisentrager case.
10 Whether there is a check on the executive, there is a
11 Congressional check through the power of legislation,
12 through the power of oversight, through the power of
13 appropriations. There is --

14 QUESTION: Can we hold hearings to
15 determine the problems that are bothering you? I
16 mean, we have to take your word for what the problems
17 are. We can't call witnesses and see what the real
18 problems are, can we, in creating this new
19 substantive rule that we are going to let the courts
20 create. Congress could do all that, though, couldn't
21 it?

22 GENERAL OLSON: Congress could do all that
23 --

24 QUESTION: If it wanted to change the
25 Habeas Statute, it could make all sorts of refined

1 modifications.

2 GENERAL OLSON: Yes, it could --

3 QUESTION: About issues that we know
4 nothing whatever about, because we have only lawyers
5 before us. We have no witnesses. We have no
6 cross-examination, we have no investigative staff.
7 And we should be the ones, Justice Breyer suggests,
8 to draw up this reticulated system to preserve our
9 military from intervention by the courts.

10 GENERAL OLSON: Well, we would agree with
11 that and we would emphasize the point that stepping
12 across that line would be impossible to go back from
13 with respect to prisoners in the battlefield. In
14 fact, the reply brief refers to the front lines in
15 Iraq, in a battle station in Iraq. We are talking
16 here about battlefield decisions and --

17 QUESTION: The battlefield, I might, since
18 -- all I mean by working out the substantive rights
19 is what Justice Harlan meant and what Justice Kennedy
20 meant in adopting Justice Harlan's view in Verdugo.
21 And that really derives from the insular cases, and I
22 don't think it's something that requires witnesses
23 and reticulated whatever they are, tax cuts.

24 (Laughter.)

25 GENERAL OLSON: Well, to the extent that

1 the Court would say, the executive, you must give a
2 military process because the Petitioners in this
3 case, first of all, demanded in their petition and
4 they would have a right to raise these issues to the
5 extent they have not backed off in this case, but
6 they demanded in their petition, their release,
7 unmonitored communications with counsel, cessation of
8 interrogations, evidentiary hearings.

9 QUESTION: Wasn't it --

10 QUESTION: Our, our doctrine would have to
11 be applied in the first instance by 800 different
12 district judges, I take it.

13 GENERAL OLSON: Well, there is no question
14 that that is exactly right. And to the extent that
15 what the Petitioners are seeking is to oversee the
16 circumstances -- this is the language in their brief,
17 to oversee the circumstances of detention. That is
18 going to vary from case to case.

19 QUESTION: General Olson, I have looked at
20 the reply brief, which is the last chance to say what
21 they mean. And they say we are not asking for any of
22 those things, and certainly not asking to have a
23 lawyer there while these people are being
24 interrogated.

25 They are saying, look, we are claiming

1 that our people are innocents. And for purposes of
2 this proceeding, we must assume that. And all we
3 want is some process to determine whether they are
4 indeed innocent, and it doesn't have to be a court
5 process.

6 GENERAL OLSON: But Justice Ginsburg, the
7 relief that I was articulating is what they asked for
8 in the first instance. If they have jurisdiction in
9 this Court, the next Petitioner doesn't have to say
10 well, I only want a process. And if they only
11 want -- now they are saying they only want an
12 executive branch process to review. As we
13 explained --

14 QUESTION: If you go back to the
15 jurisdiction, so I understand really what your
16 argument is. Would this be entirely different, as
17 far as their jurisdiction is concerned, if we were
18 talking about -- if the people were prisoners on
19 Ellis Island or in Puerto Rico?

20 GENERAL OLSON: Yes, we would. Because we
21 are talking about territorial sovereign jurisdiction
22 of the United States. What -- what exists in
23 Guantanamo is no different than existed in Lansberg
24 Prison and --

25 QUESTION: Why is that, why is that

1 crucial? I mean, it's not crucial, I take it, under
2 the respective jurisdiction clause of 2241. Is it
3 crucial under the Due Process Clause?

4 GENERAL OLSON: It is, it is the line that
5 this Court drew and repeatedly articulated --

6 QUESTION: But why is it a good line? I
7 mean, what is -- what is the justification?

8 GENERAL OLSON: Because it is a line that
9 is, is -- has the virtue of what Justice Breyer was
10 talking about, of having relative certainty. It is a
11 line that's defined by State to State relationships.

12 QUESTION: Why does it have complete
13 jurisdiction? No one else has jurisdiction.
14 Complete jurisdiction of satisfactory lines.

15 GENERAL OLSON: Well, the complete
16 jurisdiction is a phrase in that lease, the lease
17 specifically says that ultimate sovereignty is
18 Cuba's. It specifically says that the United States
19 --

20 QUESTION: How many years have we been
21 operating in Guantanamo with Cuban law never
22 applying?

23 GENERAL OLSON: With respect -- the lease
24 restricts the ability of the United States to use
25 that property for only Naval or coaling purposes. It

1 specifically says it may not be used for any other
2 purpose.

3 QUESTION: General Olson, there is a whole
4 other issue in this case which you have not addressed
5 and I don't think your brief much addressed it.
6 There is also a claim of jurisdiction under Section
7 1331 in the Administrative Procedure Act. Will you
8 say at least a few words about what your response to
9 that is? I don't even see the APA cited in your
10 brief.

11 GENERAL OLSON: What is cited in the
12 brief, and we explain that the President is not an
13 agency under the APA, that the United States military
14 with respect to operations and military operations
15 are specifically exempted by the APA.

16 QUESTION: That goes to the merits.

17 GENERAL OLSON: And that the fundamental
18 nature of what the Petitioners are seeking here is
19 the review of the nature and status of their
20 detention, which sounds in -- and is examined by this
21 Court repeatedly under the doctrine of habeas corpus.
22 And that there is no foundation. In fact, I submit
23 that the way the briefs have been written, the
24 Petitioners don't even feel strongly about the APA
25 position.

1 What they are talking about, and why most
2 of their briefs explain, they are focusing on
3 fundamental habeas corpus as it existed throughout
4 the centuries. What is important to emphasize here
5 with respect to all of these questions, with respect
6 to, well, how much control would there be, how much
7 control would there be in Guantanamo versus a place
8 in Afghanistan or another place --

9 QUESTION: I think Guantanamo, everyone
10 agrees, is an animal, there is no other like it. The
11 closest would be the Canal Zone, I suppose.

12 GENERAL OLSON: The Canal Zone was treated
13 differently by Congress. Congress created, applied,
14 under its responsibility with respect to territorial
15 and insular or unincorporated territory, applied laws
16 there, put a court there. So it's very different
17 than the Canal Zone.

18 QUESTION: Why isn't this like, as I asked
19 Mr. Gibbons, a Federal enclave within a State?

20 GENERAL OLSON: Because it is -- because
21 it is a -- in the first place, the question of
22 sovereignty is a political decision. It would be
23 remarkable for the judiciary to start deciding where
24 the United States is sovereign and where the United
25 States has control --

1 QUESTION: The word is physical control,
2 power.

3 GENERAL OLSON: We have that, Justice
4 Ginsburg, in every place where we would put military
5 detainees, in a field of combat where there are
6 prisons in Afghanistan where we have complete control
7 with respect to the circumstances.

8 QUESTION: But those -- Afghanistan is not
9 a place where American law is, and for a century, has
10 customarily been applied to all aspects of life. We
11 even protect the Cuban iguana. We bring -- in
12 bringing people from Afghanistan or wherever they
13 were brought to Guantanamo, we are doing in
14 functional terms exactly what we would do if we
15 brought them to the District of Columbia, in a
16 functional sense, leaving aside the metaphysics of
17 ultimate sovereignty.

18 If the metaphysics of ultimate sovereignty
19 do not preclude us from doing what we have been doing
20 for the last 100 years, why is it a bar to the
21 exercise of judicial jurisdiction under the Habeas
22 Statute?

23 GENERAL OLSON: The Court actually heard a
24 case, *Neely vs. Henkel*, in 1901, which specifically
25 addressed that, and held that the United States did

1 not have sovereignty for the enforcement of its laws
2 in Guantanamo. And at that point --

3 QUESTION: We've been doing a pretty good
4 job of it since then, am I right?

5 GENERAL OLSON: With respect to a certain
6 area, a military base in Germany, a military base in
7 Afghanistan, the United States must have and does
8 exercise relatively complete control. Every argument
9 that's being made here today could be made by the two
10 million persons that were in custody at the end of
11 World War II, and judges would have to decide the
12 circumstances of their detention, whether there had
13 been adequate military process, what control existed
14 over the territory in which they were being kept.
15 What this is --

16 QUESTION: Are you saying that there is no
17 statutory regime that applies to Guantanamo which is
18 different from the statutory or legal regime that
19 applied to occupied territories after World War II or
20 indeed that applies to territory under the control of
21 the American military in Afghanistan or Iraq?

22 GENERAL OLSON: There is a great deal of
23 differences in connection with every area over which
24 the United States has some degree of control. The
25 degree of control that it has here is limited to

1 specific purposes in -- with respect to the
2 sovereignty of Cuba.

3 QUESTION: Thank you, General Olson. The
4 case is submitted.

5 (Whereupon, at 11:02 a.m., the case in the
6 above-entitled matter was submitted.)

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