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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? And I thought you have alleged that
10 your

11 clients were not enemy aliens. If it showed they
12 were tourists, they were just picked up by mistake,
13 would you be here or would you not be here?

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

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

1 the merits whether you were an enemy alien or not.

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

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

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

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

21 QUESTION: Okay.

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

1 sufficiency application that was extended in Quirin,
2 Yamashita and Hirota versus McArthur, all of which
3 were decisions on the merits.

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

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

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

22 MR. GIBBONS: Well, Your Honor, in
23 Eisentrager, both the Court of Appeals and the
24 Supreme Court made it clear that they disapproved,
25 they were not adopting the ruling of the District

1 Court based on Ahrens v. Clark. Of course, in any
2 event, that does not go to subject matter
3 jurisdiction. That's a Rule 12(b)(2) issue of in
4 personam jurisdiction, whether a proper Respondent is
5 before the Court. In Eisentrager, the Court assumed
6 --

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

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

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

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

2 QUESTION: Let me help you.

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

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

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

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

24 MR. GIBBONS: Habeas, you mean on the
25 battlefield? Absolutely not.

1 QUESTION: We'll take it from the
2 battlefield, and a week later, 10 miles away, then
3 six months later, a thousand miles away.

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

8 QUESTION: Suppose it's Guantanamo.
9

10 MR. GIBBONS: Well, the --

11 QUESTION: A declared war and a lawful
12 combatant.

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

19 QUESTION: You are close to the merits.

20 QUESTION: You are back to the Geneva
21 Convention again, so I just have to assume your case
22 depends on the Geneva Convention.

23 MR. GIBBONS: Well, it --

24 QUESTION: It's not self-executing.

25 MR. GIBBONS: It depends on the Geneva

1 Convention and on the military regulations duly
2 adopted and binding on the military forces of the
3 United States.

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

9 MR. GIBBONS: No. It does not.

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

14 MR. GIBBONS: No. Our position is that
15 the Habeas Corpus Statute has meant what it said
16 since 1789.

17 QUESTION: I mean, you have to think down
18 the road, is there an alternative to the Geneva
19 Convention that is on the substantive claim. I was
20 also thinking, and here I want your view on it, that
21 if you have, if they get in the door, and now they
22 have a claim that they are being held without a
23 competent tribunal assessing it, you get to your
24 route as well by saying that the part about the Fifth
25 Amendment in Eisentrager is, in effect, overruled by

1 Reid v. Covert. And in fact, if you follow Harlan
2 and by following Harlan, you apply some kind of due
3 process, and the Geneva Convention comes in to inform
4 the content of that due process.

5 Now, is there an argument there or not?

6 MR. GIBBONS: There certainly is, Your
7 Honor, but since --

8 QUESTION: You're not simply being polite?
9 I want to --

10 (Laughter.)

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

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

21 MR. GIBBONS: As far as the Constitution
22 is concerned, that's what the District of Columbia
23 Circuit said. Now, as to whether or not that's right
24 --

25 QUESTION: But that's not before us.

1 MR. GIBBONS: First of all --

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

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

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

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

25 QUESTION: But that's, that's quite

1 different. I mean, all we are theoretically talking
2 about here is jurisdiction. And the idea that, you
3 know, you have Justice Kennedy's example, a lawful
4 combatant, a declared war, detained at Guantanamo
5 maybe two months after he is captured, and an
6 action's brought here in the District of Columbia for
7 habeas corpus and what does a -- what does a judge
8 say when he considers that sort of petition?

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

19 QUESTION: Well, suppose at Guantanamo,
20 you still have to summarily dismiss under the
21 hypothetical, right?

22 MR. GIBBONS: Yes, Justice Kennedy --
23 Kennedy, and the Court of Appeals did rely on some
24 mystical ultimate sovereignty of Cuba over, as we
25 Navy types call it, Gitmo, treating the Navy base

1 there as a no law zone. Now, Guantanamo Navy base,
2 as I can attest from a year of personal experience,
3 is under complete United States control and has been
4 for a century.

5 QUESTION: We don't need your personal
6 experience. That's what it says in the treaty. It
7 says complete jurisdiction.

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

9 QUESTION: Complete jurisdictional control.
10

11 MR. GIBBONS: That's exactly what it says
12 -- yes.

13 QUESTION: Now, it also says Cuba retains
14 sovereignty.

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

21 QUESTION: Excuse me. Does it say that,
22 Cuba has ultimate sovereignty only if the United
23 States decides to surrender?

24 MR. GIBBONS: Yes.

25 QUESTION: Where would that text be? I

1 did not realize that was there.

2 MR. GIBBONS: Perhaps one of my colleagues
3 can find the language in the appendix.

4 QUESTION: Why don't you go ahead.

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

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

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

23 QUESTION: Mr. Gibbons, I'm quoting from
24 page 8 of the government's brief, which I assume is
25 an accurate quote of the treaty. It doesn't just say

1 that Cuba has sovereignty if we give up the lease.
2 It says the United States -- this is the treaty,
3 recognizes the continuance of the ultimate
4 sovereignty of the Republic of Cuba over the leased
5 area. Now I take that to mean that they are
6 sovereign even during the term of the lease. You may
7 say it's artificial, but there it is.

8 MR. GIBBONS: I --

9 QUESTION: It's the law of the land, as
10 you say.

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

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

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

23 QUESTION: If you said that England was
24 sovereign over Canada, and I don't think anybody
25 would say that.

1 MR. GIBBONS: But if the reference in the
2 lease meant that Cuban law somehow applied in the
3 United States Navy base at Guantanamo Bay, that would
4 be one thing. But Cuban law has never had any
5 application inside that base. A stamp with Fidel
6 Castro's picture on it wouldn't get a letter off the
7 base.

8 QUESTION: But you couldn't sublease --

9 QUESTION: Mr. Gibbons --

10 QUESTION: -- could we -- we couldn't
11 sublease Gitmo and we couldn't sell any of Gitmo to a
12 foreign country, could we? Why not? Because Cuba is
13 sovereign.

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

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

24 MR. GIBBONS: Well, Guantanamo is to some
25 extent unique. One of the amicus briefs that surveyed

1 a United States Navy base elsewhere points out that
2 this is the only base, for example, where the United
3 States has not entered into a status of forces --
4 forces agreement.

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

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

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

24 QUESTION: I can explore it with the
25 Solicitor General possibly.

1 MR. GIBBONS: Well, Your Honor, I was also
2 asked a question about whether or not aliens had any
3 constitutional rights. In Verdugo, speaking for four
4 members of the Court at least, Mr. Chief Justice, you
5 said that Eisentrager stood for the proposition that
6 --

7 QUESTION: I think I was speaking for
8 five. I think Justice Kennedy joined the opinion.

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

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

23 QUESTION: Thank you, Mr. Gibbons.
24 General Olson, we'll hear from you.

25 ORAL ARGUMENT OF SOLICITOR GENERAL THEODORE B. OLSON

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ON BEHALF OF RESPONDENTS

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

The United States is at war. Over 10,000 American troops are in Afghanistan today in response to a virtually unanimous Congressional declaration of an unusual and extraordinarily -- extraordinary threat to our national security, and an authorization to the President to use all necessary and appropriate force to deter and prevent acts of terrorism against the United States.

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

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

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

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

GENERAL OLSON: It is not irrelevant, because it is in this context that that question is

1 raised, and I would -- the question, the case of
2 Johnson vs. Eisentrager, which we have discussed
3 here, even the dissent in that case said that it
4 would be fantastic to assume that habeas corpus
5 jurisdiction would exist in the time of war. So that
6 that case is not --

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

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

14 QUESTION: What if one of the Plaintiffs
15 were an American citizen here, but being held in
16
17 Guantanamo.

18 GENERAL OLSON: We have not --

19 QUESTION: Jurisdiction under Habeas
20 Statute?

21 GENERAL OLSON: We would acknowledge
22 jurisdiction. The Court has never --

23 QUESTION: Excuse me.

24 GENERAL OLSON: We would acknowledge that
25 there would be jurisdiction --

1 QUESTION: Why?

2 GENERAL OLSON: -- under the Habeas Corpus
3 Statute for the reasons that are explained in
4 Eisentrager itself, that citizenship is a foundation
5 for a relationship between the nation and the
6 individual and a foundation for --

7 QUESTION: Is that sufficient to give us
8 jurisdiction over Guantanamo, which is another
9 sovereign?

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

12 QUESTION: What if the American citizen
13 was in the middle of the battlefield in Iraq?

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

22 But what was unquestionable with respect
23 to that case is that an alien who had never had any
24 relationship to the United States and who was being
25 held as a result of a combat situation or a war

1 situation in a foreign jurisdiction, there was no
2 jurisdiction under the Habeas Statute.

3 QUESTION: Well, it's clear that there was
4 no relief. What do you say to Mr. Gibbons' position
5 that because in fact they did discuss the merits,
6 that case cannot really be taken as authority for
7 the -- leaving Ahrens and Braden aside, that the case
8 cannot be taken as authority for the proposition that
9 there is no jurisdiction in the sense of allowing the
10 person through the door to make whatever claim the
11 person wants to make. What is your response to that?

12 GENERAL OLSON: Our response to that is
13 throughout the decision in Eisentrager, the Court
14 referred to the question of jurisdiction.

15 QUESTION: Oh, it did.

16 GENERAL OLSON: It starts --

17 QUESTION: I'm really not asking a
18 question about, frankly, about the Court's
19 terminology. I'm asking about the holding in the
20 case.

21 GENERAL OLSON: The holding --

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

25 GENERAL OLSON: It held that there was no

1 relief at the end of the road, because the ultimate
2 question, to use the words of the Court, the ultimate
3 question is jurisdiction. The Court over and over
4 again said that we are deciding how far the Habeas
5 Statute reaches.

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

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

21 GENERAL OLSON: Well, those were
22 unquestionably facts that related to the case, that
23 related to the facts that came to the Court, but in
24 the very next paragraph, the Court goes on to say
25 that we have pointed out that the privilege of

1 litigation has been extended to aliens whether
2 friendly or enemy, that specifically addresses one of
3 the points you mentioned, only because permitting
4 their presence in the country implied protection.

5 And the Court went on to say, no such
6 basis can be invoked here for these prisoners at no
7 relevant time were within any territory over which
8 the United States is sovereign, and the scenes of
9 their offense, their capture, their trial and their
10 punishment were all beyond the territorial
11 jurisdiction of the United States.

12 And earlier in that --

13 QUESTION: Their trial and their
14 punishment. This is a completed episode. This is a
15 very difficult decision to understand. I would say
16 it's at least ambiguous.

17 GENERAL OLSON: It seems to me -- it seems
18 to me that those statements all have to be read in
19 the context -- context of the Court saying the
20 ultimate question is jurisdiction.

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

23 GENERAL OLSON: Well, I suspect that there
24 are many decisions of this Court where, when the
25 Court is dealing with the facts of a specific case,

1 especially in the context of a Court of Appeals
2 decision, if the Court were to turn to the briefs
3 that were written before to present the issue in this
4 Court, the only -- the question presented, submitted
5 in this case, in this Court, in Eisentrager was the
6 jurisdiction under the Habeas Statute. But the case
7 arose in the context where the Court of --

8 QUESTION: Was it really -- was it really
9 under the Habeas Statute or under the Constitution?

10 GENERAL OLSON: It was --

11 QUESTION: Because if the, if the views of
12 the dissenters in Ahrens against Clark were the law
13 at that time as they perhaps are now, then there
14 would have been statutory jurisdiction, which was not
15 present at that time.

16 GENERAL OLSON: But the Court was
17 specifically focusing on the jurisdictional incidents
18 attached to the condition of the individual --

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

1 the Habeas Statute.

2 GENERAL OLSON: The Court specifically did
3 say, but did not mention the statute, Justice
4 O'Connor, but the statute is mentioned throughout the
5 briefs, in the government's brief when it says what
6 -- the statute at issue, the Habeas Corpus Statute
7 and within its territory, the language of Part A.
8 The statute that exists today is the same statute
9 that the Eisentrager Court was considering.

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

16 And the Court went on to say, well, there
17 are various reasons why there is no ultimate due
18 process entitlement, and therefore, due process does
19 not demand entertainment of jurisdiction.

20 After Braden, that argument is gone. Why,
21 therefore, is Eisentrager not undercut to the point
22 where it's no further authority on the jurisdictional
23 point?

24 GENERAL OLSON: Well, it seems to me again
25 the entire opinion has to be taken in context. The

1 Court did specifically say that there is no statutory
2 authority. It didn't say, it didn't identify by
3 number a provision of the code, but it specifically
4 said no statutory authority.

5 QUESTION: The reason it said that was
6 because Ahrens was then the law.

7 QUESTION: Yeah.

8 QUESTION: And that was very clear in the
9 Court of Appeals opinion. They rested their decision
10 solely on the Constitution.

11 GENERAL OLSON: Well, Justice Stevens, I
12 submit that in the context of the case, in the
13 context of the way the dissent understood it, as well
14 as the majority understood it --

15 QUESTION: Yes, but the fact case was --
16 the case was decided when the majority view in Ahrens
17 was the law, and that is no longer the law.

18 GENERAL OLSON: Well, we would submit that
19 Ahrens, the over -- partial overruling, I think, has
20 been pointed out before. Ahrens has no effect on the
21 vitality of the Eisentrager case. The Court made
22 clear that it was deciding -- and everyone -- the
23 reason I mentioned the briefs is the context in which
24 the case was presented to the Court, and argued to
25 the Court and the decision that was made by the

1 majority in the Court, focusing on the identity of
2 the Petitioner, whether alien or friendly.

3 Justice Black in his dissenting opinion
4 says this decision would apply to whether someone was
5 hostile or not, and the entire context of the case,
6 Justice Stevens, it seems to me, and does not --

7 QUESTION: The context of the case was it
8 was decided at a time when Ahrens against Clark was
9 the law. And if the dissenting opinion in Ahrens
10 against Clark had been the law, it would have been
11 decided differently.

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

22 QUESTION: And that's a complete response
23 to an argument resting entirely on the Constitution.

24 QUESTION: Did it cite Ahrens?

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

1 QUESTION: I don't recall.

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

4 QUESTION: Kind of extraordinary if it was
5 relying entirely on that --

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

14 QUESTION: Well, didn't the Johnson
15 opinion also say, we don't have to concern ourselves
16 here with the proper custodian. We kind of finesse
17 that point?

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

1 from the common law.

2 QUESTION: That gets me back to your
3 statement that if this had been a citizen held in
4 Guantanamo, that habeas would be available. But the
5 statute doesn't talk about citizens. It says
6 prisoners held under the authority of the United
7 States. Now, if the citizen can say that he is a
8 prisoner held under the authority of the United
9 States in Guantanamo, why couldn't a noncitizen under
10 the statute say the same thing?

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

21 QUESTION: Well, but the only way we can
22 do it --

23 QUESTION: I don't, I don't mean to
24 misconstrue it or to misstate it, I had thought you
25 said at the outset that if this had been a citizen of

1 the United States held in Guantanamo, there would be
2 habeas corpus.

3 GENERAL OLSON: We are not -- we are
4 saying that we would not be contesting it, Justice
5 Kennedy, and the Court will be dealing with other
6 issues involving citizens.

7 QUESTION: You don't have to contest the
8 jurisdictional objection. If there is no
9 jurisdiction, there is no jurisdiction, whether you
10 contest it or not.

11 GENERAL OLSON: Well, I guess the only way
12 I can answer this, Justice Stevens, is to say that
13 what the Court seemed to say, not only in the
14 majority opinion, but in the dissenting opinion, that
15 more rights would be given to citizens --

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

23 GENERAL OLSON: I don't --

24 QUESTION: With respect to the citizen?
25 Doesn't make any difference if they have got lots of

1 rights if there is no jurisdiction to get into a
2 court to enforce them.

3 GENERAL OLSON: I think that the answer is
4 that that does not necessarily follow. The Court has
5 not reached that decision yet, and that's something
6 that is not before the Court.

7 QUESTION: Certainly the argument is
8 available that in that situation, the Constitution
9 requires jurisdiction. The Constitution requires
10 that an American citizen who has the protection of
11 the Constitution have some manner of vindicating his
12 rights under the Constitution. That would be the
13 argument.

14 GENERAL OLSON: I agree with that, justice
15 Scalia, and this Court has said again and again that
16 --

17 QUESTION: And that was part of his
18 argument in Eisentrager.

19 GENERAL OLSON: And it was -- and in that
20 case, the Court specifically said the Fifth Amendment
21 did not extend to the Petitioners in that case. The
22 Court has said that again in the Verdugo case in
23 terms of the Fourth Amendment.

24 QUESTION: Is that your answer to Justice
25 Kennedy, that there would be jurisdiction because due

1 process would require it for citizens, but there
2 would not be statutory jurisdiction in the case of
3 the citizen at Guantanamo?

4 GENERAL OLSON: I think it would be an
5 interpretation. And what this Court is doing is
6 interpreting the statute because the Habeas Corpus
7 Statute defines the extent of rights --

8 QUESTION: Well, but what is the
9 position -- I mean, I want to know what the position
10 of the United States is for the same reason Justice
11 Kennedy does.

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

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

22 GENERAL OLSON: Excuse me, Justice --

23 QUESTION: You are going outside of the
24 statutory language to resolve both the hypothetical
25 case and the case in front of us. This is a

1 prisoner, and he is detained under the authority of
2 the United States.

3 GENERAL OLSON: And this Court construed
4 those provisions in the Eisentrager case and
5 determined that the statute did not reach aliens that
6 did have no contact with the United States and were
7 held in a foreign jurisdiction outside the
8 sovereignty of the United States.

9 QUESTION: It did not construe the
10 statute. It assumed the statute was inapplicable and
11 concluded that the Constitution was not a substitute
12 for the statute.

13 GENERAL OLSON: Well, Justice Stevens, I
14 respectfully disagree. I think the Court was
15 construing the statute not to be applicable, then it
16 went on because the Court of Appeals had addressed
17 the constitutional question.

18 QUESTION: Not a word, not a word in the
19 opinion that supports it.

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

1 the --

2 QUESTION: Well, it's obvious that there
3 is language in Eisentrager that supports you, obvious
4 to me, but you have just heard that judges don't
5 always distinguish between 12(b)(1) and 12(b)(6), not
6 even in this Court, at least we don't always get it
7 right. And there is also language, as you have
8 heard, that's against you. I think there is some in
9 there.

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

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

20 Problem two is that we have several
21 hundred years of British history where the cases
22 interpreting habeas corpus said to the contrary
23 anyway. And then we have the possibility of really
24 helping you with what you're really worried about,
25 which is undue court interference by shaping the

1 substantive right to deal with all those problems of
2 the military that led you to begin your talk by
3 reminding us of those problems.

4 So if it's that choice, why not say, sure,
5 you get your foot in the door, prisoners in
6 Guantanamo, and we'll use the substantive rights to
7 work out something that's protective but practical.

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

15 Indeed, as we point out in our brief,
16 eight months after the Eisentrager decision, a bill
17 was introduced that would have changed that statute,
18 H.R. 2812, which would specifically have changed the
19 statute to deal with the Eisentrager situation, so
20 there is a check.

21 QUESTION: It could have been just a
22 clarifying, General Olson. As you well know, the
23 fact that a bill was introduced and not passed
24 carries very little weight on what law that exists
25 means.

1 GENERAL OLSON: Well, I understand that,
2 but the bill was -- came eight months after
3 Eisentrager.

4 QUESTION: You're not using it to say what
5 the law was. You're using it to show that there was
6 available, and is available, a perfectly good check
7 upon the executive branch. If the people think that
8 this is unfair, if Congress thinks it's unfair, with
9 a stroke of the pen, they can change the Habeas
10 Statute.

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

18 You mentioned several hundred years of
19 British history was your second point. All of those
20 cases, or virtually all of those same cases that have
21 been brought up in the briefs, and the amicus briefs
22 today, were in the briefs that were before the
23 Eisentrager --

24 QUESTION: I grant you this. My question
25 has to assume that Eisentrager is ambiguous and not

1 clearly determinative. But then on that assumption,
2 I'm still honestly most worried about the fact that
3 there would be a large category of unchecked and
4 uncheckable actions dealing with the detention of
5 individuals that are being held in a place where
6 America has power to do everything.

7 Now, that's what's worrying me because of
8 Article III, and the other thing on the opposite
9 side, as I said, is it's possible to tailor the
10 substance to take care of the problems that are
11 worrying you. Those are my two basic points.

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

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

1 it?

2 GENERAL OLSON: Congress could do all that

3 --

4 QUESTION: If it wanted to change the
5 Habeas Statute, it could make all sorts of refined
6 modifications.

7 GENERAL OLSON: Yes, it could --

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

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

22 QUESTION: The battlefield, I might, since
23 -- all I mean by working out the substantive rights
24 is what Justice Harlan meant and what Justice Kennedy
25 meant in adopting Justice Harlan's view in Verdugo.

1 And that really derives from the insular cases, and I
2 don't think it's something that requires witnesses
3 and reticulated whatever they are, tax cuts.

4 (Laughter.)

5 GENERAL OLSON: Well, to the extent that
6 the Court would say, the executive, you must give a
7 military process because the Petitioners in this
8 case, first of all, demanded in their petition and
9 they would have a right to raise these issues to the
10 extent they have not backed off in this case, but
11 they demanded in their petition, their release,
12 unmonitored communications with counsel, cessation of
13 interrogations, evidentiary hearings.

14 QUESTION: Wasn't it --

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

18 GENERAL OLSON: Well, there is no question
19 that that is exactly right. And to the extent that
20 what the Petitioners are seeking is to oversee the
21 circumstances -- this is the language in their brief,
22 to oversee the circumstances of detention. That is
23 going to vary from case to case.

24 QUESTION: General Olson, I have looked at
25 the reply brief, which is the last chance to say what

1 they mean. And they say we are not asking for any of
2 those things, and certainly not asking to have a
3 lawyer there while these people are being
4 interrogated.

5 They are saying, look, we are claiming
6 that our people are innocents. And for purposes of
7 this proceeding, we must assume that. And all we
8 want is some process to determine whether they are
9 indeed innocent, and it doesn't have to be a court
10 process.

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

19 QUESTION: But to go back to the
20 jurisdiction, so I understand really what your
21 argument is. Would this be entirely different, as
22 far as their jurisdiction is concerned, if we were
23 talking about -- if the people were prisoners on
24 Ellis Island or in Puerto Rico?

25 GENERAL OLSON: Yes, we would. Because we

1 are talking about territorial sovereign jurisdiction
2 of the United States. What -- what exists in
3 Guantanamo is no different than existed in Lansberg
4 Prison and --

5 QUESTION: Why is that, why is that
6 crucial? I mean, it's not crucial, I take it, under
7 the respective jurisdiction clause of 2241. Is it
8 crucial under the Due Process Clause?

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

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

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

17 QUESTION: Why does it have complete
18 jurisdiction? No one else has jurisdiction.
19 Complete jurisdiction of satisfactory lines.

20 GENERAL OLSON: Well, the complete
21 jurisdiction is a phrase in that lease, the lease
22 specifically says that ultimate sovereignty is
23 Cuba's. It specifically says that the United States
24 --

25 QUESTION: How many years have we been

1 operating in Guantanamo with Cuban law never
2 applying?

3 GENERAL OLSON: With respect -- the lease
4 restricts the ability of the United States to use
5 that property for only Naval or coaling purposes. It
6 specifically says it may not be used for any other
7 purpose.

8 QUESTION: General Olson, there is a whole
9 other issue in this case which you have not addressed
10 and I don't think your brief much addressed it.
11 There is also a claim of jurisdiction under Section
12 1331 in the Administrative Procedure Act. Will you
13 say at least a few words about what your response to
14 that is? I don't even see the APA cited in your
15 brief.

16 GENERAL OLSON: What is cited in the
17 brief, and we explain that the President is not an
18 agency under the APA, that the United States military
19 with respect to operations and military operations
20 are specifically exempted by the APA.

21 QUESTION: That goes to the merits.

22 GENERAL OLSON: And that the fundamental
23 nature of what the Petitioners are seeking here is
24 the review of the nature and status of their
25 detention, which sounds in -- and is examined by this

1 Court repeatedly under the doctrine of habeas corpus.
2 And that there is no foundation. In fact, I submit
3 that the way the briefs have been written, the
4 Petitioners don't even feel strongly about the APA
5 position.

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

14 QUESTION: No, I think Guantanamo, everyone
15
16 agrees, is an animal, there is no other like it. The
17 closest would be the Canal Zone, I suppose.

18 GENERAL OLSON: The Canal Zone was treated
19 differently by Congress. Congress created, applied,
20 under its responsibility with respect to territorial
21 and insular or unincorporated territory, applied laws
22 there, put a court there. So it's very different
23 than the Canal Zone.

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

1 GENERAL OLSON: Because it is -- because
2 it is a -- in the first place, the question of
3 sovereignty is a political decision. It would be
4 remarkable for the judiciary to start deciding where
5 the United States is sovereign and where the United
6 States has control --

7 QUESTION: The word is physical control,
8 power.

9 GENERAL OLSON: We have that, Justice
10 Ginsburg, in every place where we would put military
11 detainees, in a field of combat where there are
12 prisons in Afghanistan where we have complete control
13 with respect to the circumstances.

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

24 If the metaphysics of ultimate sovereignty
25 do not preclude us from doing what we have been doing

1 for the last 100 years, why is it a bar to the
2 exercise of judicial jurisdiction under the Habeas
3 Statute?

4 GENERAL OLSON: The Court actually heard a
5 case, Neely vs. Henkel, in 1901, which specifically
6 addressed that, and held that the United States did
7 not have sovereignty for the enforcement of its laws
8 in Guantanamo. And at that point --

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

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

22 QUESTION: Are you saying that there is no
23 statutory regime that applies to Guantanamo which is
24 different from the statutory or legal regime that
25 applied to occupied territories after World War II or

1 indeed that applies to territory under the control of
2 the American military in Afghanistan or Iraq?

3 GENERAL OLSON: There is a great deal of
4 differences in connection with every area over which
5 the United States has some degree of control. The
6 degree of control that it has here is limited to
7 specific purposes in -- with respect to the
8 sovereignty of Cuba.

9 QUESTION: Thank you, General Olson. The
10 case is submitted.

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

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