No. 03-343

IN THE SUPREME COURT OF THE UNITED STATES

FAWZI AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.

Respondent.

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

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BRIEF OF THE MILITARY ATTORNEYS ASSIGNED TO THE DEFENSE IN THE OFFICE OF MILITARY COMMISSIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether United States courts lack jurisdication to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTIONAL PROVISIONS

FEDERAL STATUTORY PROVISIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICUS[1]

The military attorneys assigned to the defense in the Office of Military Commissions ("OMC") in the Office of the General Counsel of the United States Dep't of Defense, are under orders to defend named or yet-to-be-named individuals who are targets of investigations by military commissions that are to take place at Guantanamo Bay, Cuba.

Amicus submits this brief to explain why the Court should not reach an issue beyond the question presented, namely, whether the writ of habeas corpus ("habeas") is available to those who face military trials.

Each OMC lawyer assigned to the defense has a wealth of experience. Most have served as prosecutors as well as defense counsel. The listed co-counsel comprise every attorney assigned to defend individuals before commissions.[2]

Lieutenant Colonel Sharon A. Shaffer is the Deputy Chief Defense Counsel in OMC. She has tried over 200 cases in her fourteen years as a prosecutor and defense attorney. She most recently served as a Circuit Military Judge for three years and presided over 180 Courts-Martial.

Lieutenant Commander Charles Swift is military counsel for Salim Ahmed Hamdan. Mr. Hamdan, who is detained at Guantanamo, was designated by President Bush in July, 2003, as eligible for trial by commission. Before joining

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amicus* or its counsel made a monetary contribution to it. Filing and printing costs were paid by the National Security Fund at Georgetown University.

[2] The OMC Chief Defense Counsel himself does not enjoy attorney/client confidentiality and cannot function as a litigator or be involved in selecting defense strategies.

OMC, Lieutenant Commander Swift had nine years of litigation experience, six of them as a military defense attorney, and represented over 150 persons in Courts-Martial.

Lieutenant Commander Philip Sundel, before joining OMC, served as Deputy Director of the Navy-Marine Corps Appellate Government Division (where he supervised and argued over 300 appeals), as a Special Assistant U.S. Attorney, as an investigator/prosecutor with the International Criminal Tribunal for Rwanda, and as a defense counsel.

Major Mark A. Bridges, before joining OMC, had eleven years of military litigation experience. He has personally prosecuted or defended approximately 80 Courts-Martial, handled over 100 appeals, and supervised the prosecution and defense of hundreds of other Courts-Martial.

Major Michael D. Mori is military counsel for David Hicks, a petitioner in No. 03-334, *Rasul v. Bush.* President Bush designated Mr. Hicks eligible for military trial in July of 2003. Before joining OMC, Maj. Mori served as the chief prosecutor and Special Assistant U.S. Attorney for Marine Corps Base, Hawaii, and was responsible for the prosecution or defense of over 200 military criminal proceedings.

Amicus embraces the principles affirmed in *Reid v. Covert*, 354 U.S. 1, 39-40 (1957) (plurality op.) (citation omitted):

> Slight encroachments create new boundaries from which legions of power can seek new territory to capture. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * * *
>
> We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we be-

> lieve is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. Perhaps no group in the Nation has been truer than military men themselves.

SUMMARY OF ARGUMENT

Amicus does not challenge or expect to challenge the power of the United States to wage war as its civilian and military leaders see fit. It does not challenge or expect to challenge the government's temporary detention of enemy combatants while military activities are underway abroad.

What *Amicus* does challenge is the attempt by the Executive to oust Article III courts of jurisdiction over the military prosecution of individuals whom the President deems "enemy combatants." Although military commissions will likely take place at Guantanamo, this sensitive jurisdictional issue is not within the question presented in this case, and the Court should not foreclose its consideration.

Johnson v. Eisentrager, 339 U.S. 763 (1950), supports civilian jurisdiction to examine aspects of the Guantanamo commissions. The Court's limitations on habeas corpus in that case were confined to Bill-of-Rights challenges brought by enemy aliens in a declared war (as per the 1798 Alien Enemy Act). And they were limited to a battlefield commander's legal proceedings (and not those orchestrated from the Pentagon over a several-year period). Moreover, unlike *Eisentrager*, where the petitioner was "at no relevant time and in no stage of his captivity" within the territorial jurisdiction of the United States' civilian courts, 339 U.S., at 768, some of those subject to military trial today may have been within the territorial jurisdiction, either because they were present in one of the 50 States or territories (including Guantanamo itself) or because they were transported, held, or interrogated on United States Government vessels.

In addition, several legal developments since *Eisentrager* confirm this Court's jurisdiction over such individuals, most particularly: (1) the adoption of the Uniform Code of Military Justice, which expressly confers jurisdiction over individuals in leased territories; (2) the worldwide ratification of the 1949 Geneva Conventions, and (3) several domestic extensions of criminal law and habeas law.

The Government's argument that today's struggle against terrorism is tantamount to World War II obscures several fact-specific inquiries for which case-by-case review is not only important, but is essential, *e.g.*, Is the defendant a citizen of an "enemy" nation? Was the defendant or the crime in U.S. territory? Is the defendant asserting a habeas right different from that asserted in *Eisentrager*? Are the charged crimes in connection with an armed conflict? Are those crimes violations of the Law of Nations?

Such questions assume additional importance today. Unlike earlier wars, the struggle against terrorism is potentially never-ending. The Constitution cannot countenance an open-ended Presidential power, with no civilian review whatsoever, to try anyone the President deems subject to a military tribunal, whose rules and judges have been selected by the prosecuting authority itself.

Amicus urges the Court to preserve the option of case-by-case review to assess jurisdiction. *Amicus* will also explain why this approach will be far less intrusive to the Executive Branch than are the claims made by the Petitioners.

ARGUMENT

I. THE COURT SHOULD NOT ADOPT A BLANKET APPROACH THAT PRECLUDES CASE-BY-CASE REVIEW FOR THOSE FACING COMMISSIONS.

Amicus does not dispute the President's power to detain enemy combatants in a time of war. However, the case for

civilian jurisdiction is at its apogee once the President decides to cross the threshold from detention and seeks to mete out justice in a calculated and deliberate fashion. This is a widely recognized principle of constitutional law, and nothing in *Eisentrager* is at odds with it. *Amicus* believes that the Court's resolution of the question presented, which is limited to "detention," need not, and should not, resolve whether civilian courts have jurisdiction over military commissions at Guantanamo. *Amicus* seeks nothing more than a recognition from this Court that the case for jurisdiction for those facing tribunals stands on a different, and stronger, footing than would a case brought by a detainee who has not been designated for military prosecution.

A. Those who face military commissions have the strongest case for civilian jurisdiction.

The colonists who wrote our Declaration of Independence penned, among their charges against King George, that "[h]e has affected to render the Military independent of and superior to the Civil Power"; "depriv[ed] us, in many Cases, of the benefits of trial by jury"; "made Judges dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended Offences." THE DECLARATION OF INDEPENDENCE, para. 11, 20, 21 (U.S. 1776).

Those charges describe the United States' legal position in this case. The President here asserts the power to create a legal black hole, where a simulacrum of Article III justice is dispensed but justice in fact depends on the mercy of the Executive. Under this monarchical regime, those who fall into the black hole may not contest the jurisdiction, competency, or even the constitutionality of the military tribunals, despite the guarantee of habeas corpus, *see* U.S. Const., Art. I, § 9, cl. 2, and the right to such determinations by a "competent tribunal" under the 1949 Geneva Convention. The President's assertion of such absolute supremacy contravenes the bedrock principle that it is "the province and

duty of the judicial department to say what the law is," and the similarly "'settled and invariable principle * * * that every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 177 (1803) (quoting Blackstone).[3] This Court has never given the President the ability to proclaim himself the superior or sole expositor of the Constitution in matters of justice.

Amicus does not dispute, in any way, the President's power to wage war. And, in the theatre of war, the President does not need congressional permission to decide how and when, within the laws of war, to take custody of enemy combatants upon their capture or surrender for the purpose of detention until the war ends and repatriation is possible. That is implicit in the Commander-in-Chief function itself.[4]

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[3] While this Court has accepted limits to judicial supremacy in foreign affairs, it has not done so in the context of military *trials* when Congress has not explicitly authorized a departure from civilian law. Here, Congress has said nothing in support of rescinding habeas corpus rights, and has said much against it in the statute's plain text. See *infra* pp.12-13. Congress' post-*Eisentrager* silence can hardly be deemed assent to the Government's over-reading of the case today--particularly given the very circumscribed basis for the *Eisentrager* holding. *See infra* pp. 12-21. *See also Reid*, 354 U.S., at 14 (plurality op.) (the concept that "constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates * * * would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended").

[4] *See* U.S. Const. art. II, § 2, cl. 1; Brief of Resp't United States in Opposition in *Hamdi v. Rumsfeld*, No. 03-6696, *cert. granted*, Jan. 9, 2004, at 14 (stating that the "detention of enemy combatants 'is neither punishment nor an act of vengeance,' but rather 'a simple war measure'" and that "the President's war powers include the authority to capture and detain enemy combatants at least for the duration of a conflict") (citations omitted); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture

(continued)

The moment the President ventures beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment, however, he has moved outside the perimeter of his role as Commander in Chief and entered a zone that involves judging and punishing. In that zone, the fact that the President entered wearing his military garb cannot obscure the fact that he is now pursuing a different goal—assessing guilt and meting out retrospective justice rather than waging war.

Concerns that the Executive has usurped the function of the Judiciary are at their height when the Executive seeks to deny access to a right as fundamental as habeas corpus. This right is part of our Constitution's "bulwark" against "tyranny," THE FEDERALIST No. 84, at 512 (Hamilton) (Rossiter ed., 1961); 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *134 (1765-69), and essential to the adversarial system. *See Castro v. United States*, No. 02-6683, slip op., at 3 (Dec. 15, 2003) (Scalia, J., concurring in part and concurring in the judgment).

B. This Court has required civilian courts to exercise jurisdiction over military commissions.

In the case of American civilians, this Court has extended jurisdiction to contest the constitutionality of, including Bill of Rights challenges to, military tribunals. *See Ex Parte Milligan*, 71 U.S. 2 (1866).

In the case of American servicemen, this Court has long held that, on habeas, the lawful power of tribunals can be challenged. *See In re Grimley,* 137 U.S. 147, 150 (1890) ("It

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is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated, or otherwise released.") (footnotes omitted).

cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and * * * may discharge him from the sentence."). Habeas is permissible to examine whether the tribunal: (1) is legally constituted; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged. *Hiatt v. Brown,* 339 U.S. 103, 111 (1950).

In the case of enemy belligerents, *Ex Parte Quirin*, 317 U.S. 1, 25 (1942), held that "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." The Court declined to hold that enemy aliens lack the ability to file habeas petitions, even though Attorney General Biddle opened his argument with that claim. *See id.* at 11 (reprinting argument). Moreover, the Court did not hold that the basis for jurisdiction was that the saboteurs decided to directly threaten the United States by landing on its shores instead of remaining abroad. To do so would have meant *rewarding* with special rights those who had infiltrated American soil. As enemy belligerents, they were not entitled to Fifth and Sixth Amendment rights. *Id.* at 45. Rather, *Quirin* offered the saboteurs the same habeas rights that were extended in *Grimley*. *See id.* at 48 (concluding that the President's "Order convening the Commission was a lawful order and that the Commission was lawfully constituted" and that "Charge I * * * alleged an offense which the President is authorized to order tried by military commission").

Similarly, in *In re Yamashita*, 327 U.S. 1, 9 (1946) (citations omitted), the Court permitted a convicted enemy belligerent, a Japanese Army General, to file a habeas petition:

> [W]e held in *Ex parte Quirin*, as we hold now, that Congress * * * has not foreclosed their right to contend that the Constitution or laws of the United

> States withhold authority to proceed with the trial. It has not withdrawn, and the Executive * * * could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.[5]

Amicus believes that its clients may stand in the same procedural position as General Yamashita, in that they may be labeled "enemy aliens" who contend that the "Constitution or laws" "withhold authority to proceed" with their trials. This Court's consideration of the petitioners' claims in *Quirin* and *Yamashita* stemmed not from any right gained by sneaking into America or from the fact that Yamashita was in territory that was subsequently regained by the U.S. Rather, jurisdiction stemmed from the fundamental principle recognized in cases from *Grimley* to *Milligan* and *Yamashita* to *Quirin*: We are a nation bound by law and claim no power to punish except that permitted by law.

C. *Johnson v. Eisentrager* does not preclude all jurisdiction over military commissions today.

1. *Eisentrager* permits filing habeas actions that challenge the lawfulness of proceedings.

In *Eisentrager*, the Court was presented with the claims of extraterritorial enemy aliens considered non-belligerents by the D.C. Circuit and as to whom the Circuit had extended

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[5] *See also id.* at 30 (Murphy, J., dissenting) ("This Court fortunately has taken the first and most important step toward insuring the supremacy of law * * * * Jurisdiction properly has been asserted to inquire 'into the cause of restraint of liberty' of such a person. 28 U.S.C. 452. Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.").

the right to trial by jury. 174 F.2d 961 (1949). While Q*uirin* and *Yamashita* recognized that belligerents had the same right to challenge the lawfulness of a tribunal as American servicemembers, *Eisentrager* declined to extend the Bill of Rights to extraterritorial enemy aliens. As Part III explained, if the Fifth Amendment denied the military tribunal personal jurisdiction over the petitioners, then the Sixth Amendment would deny it to district courts, leaving the petitioners completely unpunished. 339 U.S., at 782-83.

Yet *Eisentrager* did not end at Part III. Rather, in Part IV the Court reached the merits of the commission's legality. In so doing, it quoted *Yamashita*'s key language, that "'We consider here only the lawful power of the commission to try the petitioner for the offense charged.'" *Id.* at 787.

This distinction between "lawful power" and Bill-of-Rights challenges undergirds the Court's heavy focus in Part II on the fact that Yamashita's case was brought from American territory, *Id.* at 780. In Parts II and III, the Court concerned itself with individual rights, in particular the Fifth and Sixth Amendments. But the Court in Part IV at no point invoked this discussion to justify rejection of the structural and jurisdictional challenges to the tribunals themselves. To the contrary, it quoted the foundational language from *Yamashita* where the Court held that it must consider such claims on habeas.

Eisentrager's approach in Part IV mirrored the system of military justice at the time, where despite the uncertainty about what Fifth and Sixth Amendment rights existed, habeas review was always present to examine whether the tribunals had "lawful power," meaning whether they were properly constituted and had personal and subject-matter jurisdiction. *See Grimley, supra; Hiatt, supra; Reaves v. Ains-*

worth, 219 U.S. 296, 304 (1911). Ever since *Milligan*'s warning,[6] those latter inquiries have been the foundational questions that every Court has reached. This reading of *Eisentrager* also accords with the way the Court treated other claims by enemy aliens at the time.[7]

It is, of course, possible to read *Eisentrager* to stand for more than this, but doing so would be in considerable tension with the Court's unbroken treatment of challenges to the jurisdiction and composition of tribunals. Such a reading would also be in tension with *Eisentrager*'s recognition that those claiming citizenship were entitled to habeas review to "assure fair hearing of [their] claims to citizenship," *id.* at 769. If person *A* is entitled to habeas to decide whether she is a citizen (because being a citizen is so jurisdictionally important), then, so too, should person *B* get a habeas hearing to decide whether she is an enemy belligerent (since that status is of equivalent jurisdictional importance).

Such a reading of *Eisentrager* also squares with the unusual choice by Eisentrager's counsel to assert only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein * * * in custody for an

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[6] *See Milligan*, 71 U.S., at 124-25 (criticizing the view that a military commander can "punish all persons, as he thinks right and proper, without fixed or certain rules" because "if true, republican government is a failure, and there is an end of liberty regulated by law" and "destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power.'").

[7] For example, in *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court exercised jurisdiction over a claim made by an alien enemy "war bride" whom the Attorney General detained at Ellis Island without a hearing. Despite the fact that the detainee was born in Germany and labeled a security threat by the Attorney General, and despite the fact that she had not been admitted into the United States, this Court found jurisdiction to examine, on the merits, her claim that the President lacked the constitutional power to summarily exclude her. *Id.* at 542-44.

act done or omitted under any alleged * * * order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations." 28 U.S.C. 2241 (c)(4). *See also* Br. for Resp't, *Johnson v. Eisentrager*, at 2 (reprinting statute involved and only reprinting (a) and (c)(4)); *Id.* at 24-26 (making argument based solely on (c)(4)). Lothar Eisentrager thus stood in a different position from Tomoyuki Yamashita, for Yamashita asserted a (c)(3) claim, that his trial violated the Constitution and laws.

As such, Eisentrager could not benefit from, and this Court did not confront the possible tension with, *Yamashita*'s foundational claim reprinted at pp. 8-9, *supra*. *Yamashita* built on the bedrock of *Ex Parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867), where this Court observed that the habeas corpus statute "is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or law. It is impossible to widen this jurisdiction." Mr. Eisentrager's decision to assert only jurisdiction predicated on "the law of nations" led this Court to analogize his claim to the private-law disputes the New York courts rejected during the war of 1812. *See Eisentrager*, 339 U.S., 776-777.

The tactical choice by Mr. Eisentrager's counsel to place all his eggs in one jurisdictional basket cannot bind later individuals who seek to pursue other avenues for jurisdiction, particularly claims that a person "is in custody under or by color of the authority of the United States or is committed for trial before some court thereof," 28 U.S.C. 2241(c)(1); *or* "is in custody in violation of the Constitution or laws or *treaties* of the United States," (c)(3) (emphasis added); *or* "[i]t is necessary to bring him into court to testify or for trial," (c)(5). In each, the plain text of the habeas statute clearly permits the filing of habeas actions by those who face commissions. While some of the *dicta* in *Eisentrager*

appear to reach more than (c)(4), the Court in that case had absolutely no occasion to revisit, question, or even consider the other possibilities for jurisdiction that were at issue in *Yamashita* and earlier cases.[8] The claims today will go to the heart of constitutional law, and cannot be analogized to 190-year-old private-law disputes in New York state courts.

2. *Eisentrager*'s analysis depended on the declaration of war.

A declaration of war is a commitment of all national resources to a particular cause.[9] While lesser forms of authorization unquestionably suffice for the President to

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[8] The Court has stated with respect to Courts-Martial that doubts should be resolved in favor of civilian jurisdiction. *See United States ex rel Toth v. Quarles*, 350 U.S. 11, 14 (1950) ("There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."); *see also Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868) ("the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States, and this tendency, except in one recent instance, has been constant and uniform"); *Price v. Johnson*, 334 U.S. 266, 283 (1948) ("the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."), *overruled on other grounds in McCleskey v. Zant*, 499 U.S. 467 (1991).

[9] [T]he state of war between the United States and the Government of Germany * * * is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States and the *resources of the government* to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress of the United States.

J. Res., Dec. 11, 1941, Pub. L. 77-331, 55 Stat. 796, 796 (emphasis added).

conduct military operations, blanket restrictions on liberty are altogether different. This is why *Eisentrager* was so influenced by the 1798 Alien Enemy Act, now codified at 50 U.S.C. 21, which authorized the detention and removal of alien enemies and precluded nearly all subsequent judicial review. The Court found that only a formal declaration of war would trigger the Act. *Id.* at 775 (stating that the Act is applicable "whenever a 'declared war' exists"). In other contexts, the Court has interpreted it in precisely this way.[10]

Nothing even close to the authorization of World War II is present today. The recent Congressional Resolution permits only the use of "force"; applies only to those involved in some way in the September 11 attacks; and then extends only to the "prevent[ion of] * * * future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224, 224 (2001). Congress carefully avoided using the word "war."[11] Without that crucial language, the President today lacks what the Court

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[10] *E.g., Ludecke v. Watkins*, 335 U.S. 160, 166 n.11 (1948) (rejecting the view that the legislative history of the Alien Act shows that "declared war" meant "state of actual hostilities"); *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952) ("The statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany."); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1402 (1992) (describing the Alien Act and stating that "a formal declaration of war" is "valuable" because it "forces Congress to acknowledge publicly, and to accept, that one cost of waging war is that individual liberty in the United States might have to suffer").

[11] Rep. Conyers, for example, stated that "[b]y not declaring war, the resolution preserves our precious civil liberties" and that "[t]his is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend 'alien enemies.'" 147 CONG. REC. H5638, H5680 (daily ed. Sept. 14, 2001); *see also id.* at H5653 (statement of Rep. Barr) (arguing that "[w]e need a declaration of war" from Congress to "[g]ive the President the tools, the absolute flexibility he needs").

had before it in *Eisentrager*, the clear statement by *both* political branches as to the curtailment of rights of aliens.

At bottom, the President's argument is one of severe constitutional informality. The President asserts, despite clear-statement principles, not only that (1) vague statutes can be stretched to provide authority for commissions, but also that (2) Congress need not declare war to strip civilian review altogether.[12] Even if the first proposition might be thought to follow from *Quirin*, the second does not, and creates an unconstitutional delegation of power. *See Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting).[13]

Again, *Amicus* in no way challenges the President's prerogative to launch military operations without a formal declaration. But the broad latitude the President has by dint of that power does not extend to the rather different function of pursuing justice. The Court has never approved a wholesale deprivation of the ability to challenge in civilian courts the very jurisdiction of a commission when war has not been declared. To insist on that declaration, or an

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[12] *Yamashita* itself insisted on the formality of war at several times in discussing the lawfulness of commissions. *E.g.*, 327 U.S., at 11-12 (stating that "the authority sanctioned by Congress to administer the system of military justice recognized by the law of war * * * is without qualification * * * so long as a state of war exists--from its *declaration* until peace is proclaimed") (emphasis added); *Id.* at 12 ("No writer on international law appears to have regarded the power of military tribunals * * * as terminating before the formal state of war has ended.").

[13] Such an interpretation would leave the President free to define a "time of war," grant him the discretion to set up tribunals at will, bestow upon him the power to prosecute whomever he selects, vest him with the authority to label something an offense and to try an offender for it, give him the power to try those cases before military judges serving as part of the executive branch, and empower him to dispense with habeas review.

emergency that truly precludes congressional suspension of the writ, does not shackle the President's war powers; it simply reaffirms the principle that justice is to be pursued according to duly enacted law. Here, the only relevant law is the Alien Act, and that Act requires a declared war.[14]

There is an additional reason why the *Eisentrager* Court so strictly confined its analysis. Unlike today, where military commissions have not begun, that Court faced a situation in which hundreds of thousands of cases already had been tried in American commissions by the time of Lothar Eisentrager's petition.[15] The Court confronted severely entrenched interests—with over 400,000 cases possibly reopened—an entrenchment that makes the interest in cases like *Herrera v. Collins*, 506 U.S. 390, 401-03 (1993) look trivial by comparison.[16] Yet today none of these problems exists

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[14] The Government's claim that declarations of war are no longer in vogue internationally is therefore beside the point. The relevant issue is the suspension of rights, not the ability to fight wars. (And we note the peculiarity of the Government, which has taken positions against relying on customary international law, *e.g.*, Petition for Certiorari in *Sosa v. Alvarez-Machain*, No. 03-339, *cert. granted* Dec. 1, 2003, at 24, now relying on contemporary international law when the Constitution and statutes say otherwise.) It is the law of the United States that decides this matter.

[15] *See* Br. of United States, *Johnson v. Eisentrager*, [hereinafter "U.S. *Eisentrager* Br."] at 54-55 ("The extraordinary nature of the burden that would fall on the local District Court under the decision below is suggested by the fact that nearly 400,000 cases were tried by American Military Government Courts *alone* in the American occupation zone of Germany *alone* between September 1944 and August 1948"); Cert. Pet'n of United States Gov't, *Johnson v. Eisentrager*, at 14 ("several hundred thousand cases have been tried in Germany, Japan, and Italy by military government courts and other American-manned tribunals since United States troops first occupied those enemy countries in World War II").

[16] *Eisentrager*'s holding also squared with the statute for habeas corpus in the District of Columbia, 16-801. Section 16-801 "expressly limits the local district court's jurisdiction to issue such writs to cases of restraint 'within the District.'" U.S. *Eisentrager* Br., *supra*, at 9. The Government there

(continued)

because the Government has proceeded cautiously. A prospective decision by this Court to confer limited case-by-case review to decisions by commissions would have none of the overtones of the *fait accompli* that reached this Court in 1950. Moreover, if later events necessitate change, Congress can modify the habeas statute accordingly.

3. *Eisentrager*'s holding was confined to field tribunals, not manipulation of locale.

Eisentrager placed particular emphasis on the fact that the petitioners had been "captured outside of our territory and there held in military custody as a prisoner of war." 339 U.S., at 777. Strong justification exists for this holding, as the President's hands should not be tied on the battlefield, particularly when the territory is under the control of many nations. And so, for example, an international tribunal for former President Saddam Hussein in Iraq would not be a matter that the American courts could review.

But when justice is administered off the battlefield, and particularly in those places where no other nation offers legal remedies, the situation shifts.[17] In those areas, the fear

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argued that the D.C. courts had denied jurisdiction in similar cases, including one from a military tribunal at Nuremberg, Germany. *Id.* at 22-23. But on Sept. 1, 1948, after Mr. Eisentrager filed his April 26, 1948 habeas petition, the District Court for the District of Columbia was made an integral part of the federal judicial system. *See* 62 Stat. 992 (1948).

[17] Unlike *Eisentrager*, where the Government claimed "enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and * * * * like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," U.S. *Eisentrager* Br. *supra*, at 67, there appears to be no inclination whatsoever to let Cuban law apply to those facing military tribunals. Deference to local practices (as in Puerto Rico or the Philippines, *see Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904)) is not compatible with American policy.

of interfering with battlefield operations is at its nadir. The likelihood that the decisions are being made on the spur of the moment in the midst of crisis drops precipitously, while the likelihood that the key decisions are being made in the continental United States increases. *See* U.S. *Eisentrager* Br., *supra*, at 23 (distinguishing cases where courts found habeas jurisdiction over extraterritorial prisons in Lorton and Occoquan, Virginia by stating that "these institutions were controlled and staffed by District officials").[18]

In this sense, the Government's reading of *Eisentrager* is both under- and over-inclusive. Its reading would extend habeas rights to those, such as the Nazi saboteurs, who lack any connection to this country beyond a surreptitious entrance, but deny habeas to those who have done far less (and perhaps no) damage to American interests. The Constitution cannot be contorted into this senseless position without doing grave damage to the rule of law.

There is no direct precedent on this issue because, so far as *Amicus* is aware, the American Government has never before consciously created a trial process, courtroom, and other accoutrements of judicial process outside the battlefield and housed them all in an area calculated to divest civilian jurisdiction.[19] The most direct precedent comes

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[18] The establishment of the military commissions (such as its staffing, the selection of procedural rules, and the defining of war crimes), the choice over where to hold and try those subject to them, and the decision to name (at present) six individuals as potential subjects have all been made by Respondents while they were within this Court's jurisdiction.

[19] Seven years after *Eisentrager*, a plurality of this Court observed: "We have examined all of the cases of military trial of civilians by the British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research. Without exception, these cases appear to have involved trials during wartime in the area of battle – 'in the field' – or in occupied enemy territory." *Reid,* 354 U.S., at 34 n.60. The Court's pro-

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from 1660s England, where Lord Clarendon shipped prisoners to military "garrisons" to evade habeas corpus.[20] Clarendon's actions, which became part of his impeachment trial, were rebuked by Parliament's 1679 Habeas Corpus Act, and form a crucial event in the development of the writ. In particular, the 1679 Act forbade a prisoner from being sent "into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be *within or without* the dominions of his Majesty." 31 Car. 2, c. 2, § 12 (emphasis added). Even before the Act, English courts "had already been accustomed to send out their writ of habeas corpus into all places of peculiar and privileged jurisdiction, where this ordinary process does not run, and even to the island of Jersey, *beyond the strict limits of the kingdom of England*." 2 Hallam, The Constitutional History of England 178 (1846) (emphasis added); *see also id.* at 65.

Eisentrager also emphasized that "the scenes of their offenses * * * were all beyond the territorial jurisdiction of the United States." 339 U.S., at 778. Yet today, jurisdiction has been extended to acts of terrorism worldwide, including those against the U.S.S. Cole and those of Sept. 11, 2001.[21]

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nouncements about the validity of military tribunals have been confined in this way. *See, e.g.,id.* at 33-34 (discussing Japan and Germany); *id.* at 34-35; *Id.* at 26 n.44 ("In time of war the Common Law recognized an exception that permitted armies to try soldiers 'in the field.'").

[20] In 1667, Clarendon "was accused of sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning of any other of his majesty's subjects in like manner.'" 9 Holdsworth, History of British Law 116 (1926).

[21] Courts have extended jurisdiction to individuals who have never set foot on American soil, *e.g.*, *United States v. Winter*, 509 F.2d 975, 982 (5th Cir. 1975) (finding jurisdiction over all conspirators even when some of them had never been in the United States).

See 18 U.S.C. 2331-38 (providing criminal and civil remedies against acts of "international terrorism" and stating that "the district courts of the United States shall have exclusive jurisdiction over an action brought under this chapter."). In *Eisentrager*, the offenses only existed within the laws of war. But today, the "scenes" of "offenses" may well be *within* "the territorial jurisdiction of the United States."

Crimes of terrorism are similar to Lamdin Milligan's offense of trying to overthrow the government, as to which this Court said there was "[n]o reason of necessity" for a military trial "because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them." 71 U.S., at 122. Conversely, crimes of terrorism are dissimilar to Lothar Eisentrager's offenses, for there the Court emphasized that he would go unpunished if a commission could not bring charges. *Eisentrager*, 339 U.S., at 782-83.

The Government's argument in this case has no logical stopping point. If there is no right to civilian review, the government is free to conduct sham trials and condemn to death those who do nothing more than pray to Allah.[22] The President's claim is for the absence of any legal restraint whatsoever on the government, commensurate with absolute duties and subjugation for those at Guantanamo.

The relief sought by Mr. Eisentrager, to be set free, itself was a claim with little logical stopping point.[23] But at

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[22] Were *Eisentrager*'s conception of "sovereignty" converted into the wholesale deprivation of liberty that the Government asserts, it would directly conflict with U.S. Const. Amend. XIII, which reaches not simply "the United States," but also "any place subject to their jurisdiction."

[23] *See* Pet'n for Writ, reprinted in *Johnson v. Eisentrager* App., at 7 (last line of petition asking "that the petitioner and the other prisoners be discharged from the offenses and confinement aforesaid"); Br. in Opp. by Eisentrager, *Johnson v. Eisentrager*, at 6 ("If the legal position taken by the respondent is correct, then the prisoners should be released as soon as

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present there may be far more limited claims, apart from detention, that individuals who face military trial may assert. The fact that Lothar Eisentrager yoked his broad claim for relief (freedom) to a weak jurisdictional theory ((c)(4)), cannot bind those who advance different arguments today.

II. POST-*EISENTRAGER* DEVELOPMENTS CONFER JURISDICTION FROM MILITARY COMMISSIONS.

In the aftermath of World War II, remarkable changes throughout the globe altered the legal landscape. The United States has signed any number of treaties that modify previous statutes. The Government has extended its law extraterritorially. The UCMJ has been globalized. And habeas looks quite different than it did in 1950. Yet the Government relies on the antiquated environment of *Eisentrager*, instead of addressing the world as it exists today.

The Geneva Conventions. *Eisentrager* adopted a nineteenth-century conception of warfare in which the entire nation was at war. *See* 339 U.S., at 772 ("in war `every individual of the one nation must acknowledge every individual of the other nation as his own enemy.'" (quoting *The Rapid*, 8 Cranch 155, 161 (1814)).[24] Under this conception, there are no civilians with "distinct and individual legal

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possible"); Pet'n for Cert. by United States Gov't, *Johnson v. Eisentrager*, at 5 ("In affording enemy aliens access to our courts to test their *detentions* by American officials any place in the world, the decision below is obviously of far-reaching importance") (emphasis added).

[24] Francis Lieber, Laws of War: General Orders No. 100, Sec. I, Art. 20 (1863) ("Public war* * * is a law and requisite of civilized existence that men live in * * * states or nations, whose constituents bear, enjoy, suffer, advance, and retrograde together, in peace and war"). *See also The Rapid*, 8 Cranch, at 160-61 ("In the state of war, nation is known to nation only by their armed exterior * * * * The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet it is only in combat.")

personalities * * * * No one can pretend that he or she just happened to be caught living as an accidental German or Frenchman when the two countries go to war. The nation at war suffers and prospers as an organic entity."[25] This view led the New York courts cited in *Eisentrager* to conclude that wartime non-resident enemy aliens lack access to American courts in private-law disputes. *See Bell v. Chapman*, 10 Johns. 183 (N.Y. 1813); *Jackson v. Decker*, 11 Johns. 418 (N.Y. 1814); *Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813).

But these comparisons will often fail today. Some of those who face military commissions are nationals of countries at peace with the United States. Others are alleged to be part of the stateless al Qaeda network. To transmute the concept of "enemy alien" outside of its state-centered focus is to extend the concept far beyond its nineteenth-century moorings. Membership in a nation with which we are at war sets a logical stopping point to the enemy-alien doctrine; to expand it more broadly means that the government is free to label virtually any person on the globe an enemy alien and deprive recourse to the civil courts.

The nineteenth-century version contained built-in remedies--enemy nations could sign peace treaties or take other actions to protect their citizens who faced military commissions. That fact explains why the War of 1812 cases, upon which *Eisentrager* relied, held that "the disability of the plaintiff is but temporary in its nature, (for a state of perpetual war is not to be presumed)," and that there was no "bar to a new action on the return of peace." *Chapman*, 10 Johns., at 184. But when the concept is stretched to encompass all aliens who are affiliated with any stateless "enemy," those protections and temporal limits evaporate.

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[25] Fletcher, *Black Hole in Guantanamo Bay*, J. Intl. Crim. Just., Jan. 2004. Some analysis that follows is derived from this Article.

Indeed, the Government's argument winds up trying to extend nineteenth-century notions of warfare to a twenty-first century that repudiated those notions in the latter part of the twentieth one. After the 1949 Geneva Conventions, ratified after *Eisentrager*, the new emphasis on civilians as protected persons precludes thinking that the nation goes to war as an organic unit. And this underscores, again, the need for case-by-case adjudication. Some facing tribunals may claim that they are not "enemies," others that they are from allied nations, and still others that they are civilians entitled to all of the relevant protections of this century.

This is not a claim for the "self-execution" of the Geneva Convention. The President has himself made international law binding as to the rules for military commissions.[26] And

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[26] Nearly one year after the *Eisentrager* decision, in May, 1951, the President promulgated the Manual for Courts-Martial, which provides: "Subject to *any* applicable rule of international law or any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." Part I, ¶2(b)(2) (emphasis added).

Amicus expects to make two other claims, neither of which depends on "self-execution," and it respectfully requests that this Court leave the door open for their case-by-case review. *First*, the only way to understand what the "laws of war" mean is by referring to the Geneva Conventions. *See* Const., Art. VI, cl. 2 (defining "supreme law of the land as including "treaties"). *Quirin* defined the term "unlawful combatant" by looking to the definition of combatancy in the 1907 Annex to the Hague Convention. 317 U.S., at 34-38. *Yamashita* directly relied on the words "commanded by a person responsible for his subordinates" in the 1907 Annex to explain why the General's actions constituted a war crime, 327 U.S., at 15-16. It then interpreted Article 60 of the 1929 Geneva Convention to not require a Court-Martial. *Id.* at 23-24. At no point was there any discussion of self-execution because in this unique area, where common-law law-of-war principles are constantly incorporated, there is absolutely nothing unusual about looking to international law. Indeed, the Geneva Conventions rip asunder the nineteenth-century conception of warfare, whereby every citizen of a state at war with another is enti-

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the 1949 Conventions directly reverse a key part of the *Eisentrager* reasoning, for the Court feared that "we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action * * * can purchase no equivalent for benefit of our citizen soldiers," 339 U.S., at 779. But since that time, most every nation on earth has adopted the Conventions, and one of their guarantees is a "competent tribunal" to determine whether someone is a prisoner of war in cases of doubt. The propriety and need for review is particularly acute when an individual has been neutralized as a combat threat. See Geoffrey Best, War and Law Since 1945, at 348-49 (1994). At this moment in time, the world order, and treatment of citizen soldiers, looks startlingly different than it did in the immediate aftermath of World War II.

Congress Has Divested the President From the Ability to Define Crimes of War. *Quirin* recognized that a court must in-

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tled to no rights. Rather, the Conventions mandate the use of procedural justice despite the needs of modern war, and reveal an international consensus that not all rights can be eliminated, particularly when doubt exists as to whether someone is a prisoner of war.

Second, the Geneva Conventions, which were ratified after the UCMJ, condition the way in which that Code (and its limited recognition of military commissions) operates. Under the last-in-time rule, when a treaty is subsequent to congressional action, the treaty controls. *See Reid*, 354 U.S., at 18 n.34 (plurality op.) ("By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation* * * * (I)f the two are inconsistent, the one last in date will control the other." (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)); *Cook v. United States*, 288 U.S. 102 (1933). In *Cook*, this Court found that a treaty negotiated with Great Britain in 1924 regarding the twelve-mile territorial limit on seas trumped a statute from 1922 (and even though Congress reenacted the statute in 1930). *Cook* also held that statutes enacted after treaties cannot trump those treaties without a clear statement. *Id* at 120. *See also Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

quire "whether it is within the constitutional powers of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged," 317 U.S., at 29. The first part of such an inquiry is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.*

With respect to what constitutes a violation of the law of war, "Congress ha[s] the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts." *Id.* at 30. In *Quirin*, Congress chose not to define such offenses, and this led the Court to approve the common-law path of the tribunal. *Id.*

In the War Crimes Act of 1996, however, Congress chose to define those very offenses. *See* 18 U.S.C. 2441; H.R. Rep. No. 104-698. Congress later amended 2441 by passing the Expanded War Crimes Act of 1997.[27] As a result of these Acts, a "war crime" means "any conduct" that, *inter alia*, is a "grave breach" of the 1949 Geneva Conventions, any "violation of common Article 3" of the same convention, as well as violations of certain other treaties.

Thus, Congress has "crystallize[ed] in permanent form

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[27] The 1997 amendment intentionally broadened the statute to encompass all acts recognized by both the United States and international law as war crimes. *See* H.R. Rep. No. 105-204 at 3; 143 Cong. Rec. H5865-68, 66 (July 28, 1997) (statement of Rep. Jones). Its expanded form "include[s] violations of any convention signed by the United States." *Id.* at H5866 (statement of Rep. Lofgren). The amendment "rectif[ied] the existing discrepancies between our Nation's intolerance for war crimes and our inability to prosecute all war criminals." *Id.* at H5866-67 (statement of Rep. Jones). The expansiveness of the coverage prompted concern that jurisdiction would broaden automatically when the United States joined another law of war convention. *Id* at H5867 (statement of Rep. Conyers).

and in minute detail every offense against the law of war."[28] It is likely that a future court will be required to address the precise question asked in *Quirin* (that the specific charges are not cognizable before military tribunals). At no point in the crystallization of these offenses did Congress try to divest the courts of habeas jurisdiction to hear such claims.

Other Sovereign Territory. This Court emphasized that the *Eisentrager* plaintiffs "at no relevant time were within any territory over which the United States is sovereign, and * * * their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S., at 778. Once the facts are revealed through trial by commission, some today may be shown to have been in sovereign American territory. Because so little is known about their capture and subsequent handling, it is only possible to give an illustration at present: The likelihood that some facing tribunals were housed, transported, and interrogated aboard American vessels or aircraft.

Vessels belonging to the United States are deemed an extension of the sovereignty of the United States. *United States v. Rodgers*, 150 U.S. 249, 260-65 (1893); *United States v. Flores*, 289 U.S. 137, 155-56 (1933). This is particularly true for military warships. *United States v. Collins*, 7 M.J. 188 (C.M.A. 1979); *cf. Kinnell v. Warner*, 356 F. Supp. 779 (D. Hawaii 1973).[29] Those facing tribunals were likely transported to Guantanamo via military vessels and aircraft, and perhaps held or interrogated on them for lengthy periods. If so, the detainees would be within American sovereignty during a relevant period of their captivity, irrespective of the status

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[28] The General Counsel of the Department of Defense promulgated a list of offenses for commissions. Instruction No. 2, 68 Fed. Reg. 39381 (2003). That list differs substantially from Congress' enumeration in § 2441.

[29] Consistent with this principle of sovereignty, Congress has recognized jurisdiction over vessels and aircraft. 18 U.S.C. 7 (2003).

of Guantanamo itself as sovereign American territory. *See Gherebi v. Bush*, 2003 WL 22971053 (9th Cir.Dec. 18, 2003).

The adoption of the Uniform Code of Military Justice. The UCMJ took effect on May 31, 1951, nearly one year after the June 5, 1950 *Eisentrager* decision. *See* 10 U.S.C. 801-940 (1952 ed. Supp. V). The Code is the result of painstaking study and reflects an effort to reform the system from top to bottom. *Burns v. Wilson,* 346 U.S. 137, 141 (1953) (plurality op.). With this complete revision of the Articles of War came the expansion of Article 2, in 10 U.S.C. 802(12), which identifies additional persons who are subject to the Code:

> Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Paragraph 12 thus represents a clear break from *Yamashita*, where this Court stated that "neither Article 25 nor Article 38 is applicable" because "Article 2 of the Articles of War enumerates 'the persons * * * subject to these articles.'" 327 U.S., at 19; *see also id.* at 20 (stating that Article 2 does not cover Yamashita). Unlike the old Article 2, which only covered "members of our own Army and of the personnel accompanying the Army," *id.* the new ¶12 extends jurisdiction to "persons within" leased areas without limitation.[30]

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[30] As proposed and ultimately adopted, ¶12 was criticized for being much more expansive than its predecessor, 34 U.S.C. 1201. In his Senate testimony, Maj. Gen. Thomas Green, the Army Judge Advocate General, argued "Article 2 (12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any

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The Government now finds itself in the very situation that some feared when the UCMJ was drafted. Under ¶12, all of the detainees currently being held at Guantanamo are subject to the Code, for the Naval Base is leased by the United States and under the control of Secretary Rumsfeld. Therefore, any detainee taken to a military tribunal would necessarily be entitled to the protections provided for in the UCMJ, including potential review by civilian courts.

While the UCMJ applies to persons at Guantanamo, the practical consequences will be limited because much of it does not govern detentions.[31] The UCMJ will provide, however, some procedural guarantees to those prosecuted before commissions. *See* 10 U.S.C. 810 (speedy trial); 10 U.S.C. 837 (unlawfully influencing tribunal); and 10 U.S.C. 855 (cruel and unusual punishment).

Habeas Rights for American Citizens Overseas. At the time of *Eisentrager*, American courts were skeptical of habeas claims filed by citizens overseas. In *Eisentrager*, the Government went so far as to say that "*Neely v. Henkel*, 180 U.S. 109 (1901), held the constitutional provision as to habeas corpus inapplicable to an American held in American-occupied Cuba after the War of 1898. The circumstances of that case are *entirely comparable* to those presented by the current occupations of enemy territory, and citizens now detained overseas are equally without the constitutional

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person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications." Statement of Major General Thomas H. Green, U.S. Senate, Cmte. on Armed Services, May 9, 1949, at 266. Despite this criticism, ¶12 was adopted without the limitations in § 1201.

[31] With limited exceptions, provisions of the UCMJ generally apply to courts-martial, other procedures which the detainees will never be involved in, or administrative matters that are irrelevant to the detainees.

right to invoke the writ." U.S. *Eisentrager* Br., *supra*, at 15 (emphasis added). But this legal conception has been eliminated by *Reid v. Covert, supra*, and *Burns v. Wilson*, *supra* (permitting the district court in Washington, D.C., to hear a habeas petition filed by United States citizens confined in Japan after being found guilty of rape and murder in Guam). And if the Government's comparison in *Eisentrager* is correct, then those cases have undermined whatever remains of *Eisentrager* today.[32]

Next Friend. The Government has represented that petitions can be filed by those who are inaccessible:

> In accordance with the writ's common law history (*see Whitmore v. Arkansas*, 495 U.S. 149, 162-163 (1990), the habeas statute expressly contemplates that a detainee may be inaccessible, and thus authorizes a proper next-friend to bring an action on a detainee's behalf * * * * Thus, appointment of a next friend serves as a mechanism by which an otherwise unavailable detainee – including an 'inaccessible' (*ibid*.) detainee – may effectively gain access to the courts* * * * That is a traditional function of the next-friend doctrine in habeas actions * * * *

Br. of United States in Opp. in No. 03-6696, *Hamdi v. Rumsfeld*, at 35. *Amicus* expects those prosecuted in tribunals to bring such petitions, as the Government has suggested.[33] In

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[32] *Eisentrager,* 339 U.S., at 778, also built from *Ahrens v. Clark*, 335 U.S. 188 (1948). The case cannot be divorced from the general limitation of the time that habeas was confined to petitioners and custodians who were in the district. *See* U.S. *Eisentrager* Br., *supra*, at 51. These limitations have since eroded, *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498 (1973).

[33] Next-friend standing has been used when the detained party has been in Korea, and the American doctrine developed out of an English statute

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Eisentrager, the Court had no occasion to address the issue because the only "next friend" mentioned in the Petition was a person outside the jurisdiction, namely, Lothar Eisentrager himself. Pet'n for Writ, *Johnson v. Eisentrager*, App. 2.

III. HABEAS ACTIONS THAT CONTEST ASPECTS OF MILITARY COMMISSIONS DO NOT THREATEN PRESIDENTIAL DEFENSE RESPONSIBILITIES.

The United States justifies much of its position by focusing on the President's military responsibilities and this Court's limited role in that arena. *Amicus* agrees with many of these claims and does not question the President's ability to detain enemy combatants until the cessation of hostilities when the Executive Branch deems it appropriate. However, when the President sets up a parallel system of justice off the battlefield to try crimes, that action does not fall within the President's defense function.

Permitting those targeted by military commissions to file habeas petitions would not threaten the President's responsibility to protect the nation because the President would always retain the detention power. It is only the far broader step, sought by Petitioners, to permit Article III courts to become forums for *en masse* Bill-of-Rights challenges to detentions that may conceivably do so. This Court can reject that broad step, but still permit the filing of habeas petitions that challenge the jurisdiction and lawfulness of a military commission, without restricting the President's defense responsibilities at all.

Respectfully submitted,

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that "authorized complaints to be filed by '*any* one on * * * behalf' of detained persons." *Whitmore*, 495 U.S., at 162 (citations omitted).

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