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# RASUL v. BUSH: A COURAGEOUS DECISION BUT A MISSED OPPORTUNITY

Sameh Mobarek<sup>†</sup>

## I. Introduction

On September 11, 2001, terrorists flew three commercial airplanes into the twin towers of the World Trade Center in New York City and the Pentagon in Washington, D.C.<sup>1</sup> A fourth plane, headed towards Washington, D.C., was destroyed by the heroic acts of its passengers before it reached its destination—likely saving many lives and avoiding further destruction to our nation’s capital.<sup>2</sup> The nation watched this tragedy unfold on its television screens as almost 3,000 people lost their lives in New York alone.<sup>3</sup> In response to the September 11th attacks, Congress passed a joint resolution authorizing President George W. Bush to pursue those persons, organizations, or nations that had planned, authorized, or aided in the attack.<sup>4</sup> Pursuant to this authority, President Bush ordered the U.S. military to commence military operations against al-Qaeda and its supporters, the Taliban regime in Afghanistan.<sup>5</sup>

During this campaign, the United States captured Taliban and al-Qaeda members in Afghanistan and labeled them “enemy or unlawful combatants.”<sup>6</sup> The significance of such a designation was to deprive those captured of the “Prisoners of War” status, and to leave the grant or denial of all the rights associated with such designation under the Geneva Convention to the discretion of the President.<sup>7</sup> The President also ordered that these prisoners be detained, either inside

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<sup>1</sup> Cable News Network, *September 11: Chronology of Terror* (Sept. 12, 2001), <http://archives.cnn.com/2001/US/09/11/chronology.attack> (last visited Jan. 17, 2005).

<sup>2</sup> *Id.*

<sup>3</sup> British Broadcasting Corporation, *A Nation’s Pain and Loss* (Sept. 13, 2002), available at <http://news.bbc.co.uk/2/hi/americas/2255068.stm> (last visited Jan. 17, 2005).

<sup>4</sup> Authorization for Use of Military Force, 50 U.S.C. § 1541 (2001).

<sup>5</sup> Steven Swanson, *Enemy Combatant and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 939 (2003).

<sup>6</sup> *Id.* at 939-40.

<sup>7</sup> See *Guantanamo Bay—Camp X-Ray*, at [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_x-ray.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_x-ray.htm) (last visited Jan. 17, 2005). The Geneva Convention was developed by a majority of states to govern the conduct of war after the tremendous suffering and bloodshed of two World Wars. K. Elisabeth Dahlstrom, *Between Empire and Community: The United States and Multilateralism 2001-2003; A Mid-Term Assessment: Humanitarian Law: The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT’L L. 662, 663 (2003). The Convention consists of four separate conventions each governing a distinct aspect of humanitarian law including “the amelioration of the sick and wounded of the armed forces in the field; the amelioration

or outside the United States, at locations designated by the Secretary of Defense.<sup>8</sup> Reportedly, 650 of these prisoners, representing as many as 33 nationalities, were transferred to the U.S. naval base at Guantanamo Bay, Cuba, where they were held without charge or trial for more than two years.<sup>9</sup> The prevailing government view was that it could hold these prisoners at Guantanamo Bay indefinitely and without access to any independent tribunal to review the facts leading to their designation as enemy or unlawful combatants.<sup>10</sup>

*Rasul v. Bush*<sup>11</sup> represents the first attempt by any of these prisoners to challenge before the Supreme Court their continued detention. Part II of this article discusses the background leading up to *Rasul*. Specifically, it discusses the remedial means available to prisoners to challenge their detention under U.S. law, as well as case law applying these means to nonresident alien prisoners.<sup>12</sup> Part III explores the Court's decision in *Rasul* where it determined that nonresident alien prisoners held at Guantanamo Bay do have the right to challenge their detention through a writ of habeas corpus.<sup>13</sup> Part IV analyzes the Court's holding, as well as the dissenting opinion, and argues that, although the Court reached the correct conclusion, it did not go far enough in determining the extent of the prisoners' rights under the Constitution.<sup>14</sup> Finally, Part V discusses the impact of the Court's ruling on changing the status of the prisoners' detention and on subsequent policies by the Executive in prosecuting the War on Terror.<sup>15</sup>

## II. Background

Under U.S. law a prisoner can challenge his or her detention by filing a writ of habeas corpus.<sup>16</sup> This writ traces its ancestry to early thirteenth century England

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of the wounded, sick, and shipwrecked members of the armed forces at sea; the treatment of prisoners of war; and the treatment of civilian persons in time of war." *Id.*

<sup>8</sup> See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833-34 (Nov. 13, 2001). The order covered any non-citizen who (1) is or was a member of al-Qaeda, (2) aided or assisted in any way in a terrorist act against the United States, its citizens, national security, foreign policy, or economy, or (3) knowingly harbored one or more persons described in (1) or (2). *Id.*

<sup>9</sup> Kim Barker, *Kabul Frees 18 Held in Cuba; Ex-Guantanamo Inmates Go Home*, CHI. TRIB., Mar. 26, 2003, at C12; see also Roy Gutman & Sami Yousafzai, *The Madman of Guantanamo*, NEWSWEEK, May 27, 2002, at 50.

<sup>10</sup> Michael Sniffen, *Details of Guantanamo Detention Emerge*, AP, Dec. 29, 2004, available at [http://www.boston.com/news/nation/washington/articles/2004/12/29/details\\_of\\_guantanamo\\_detentions\\_emerge/](http://www.boston.com/news/nation/washington/articles/2004/12/29/details_of_guantanamo_detentions_emerge/) (last visited at Nov. 10, 2005) (noting that the government's position is that it can detain foreigners who aided al Qaeda at Guantanamo Bay indefinitely even if such aid was unintentional or evidence of it was obtained by torture).

<sup>11</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See *infra* Part V.

<sup>16</sup> Swanson, *supra* note 5, at 945 (quoting Justice Story as explaining that the writ is "justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge").

where it was used to ensure that a party to a suit appeared before the court.<sup>17</sup> It was eventually adopted by the American colonies and was reflected in the Constitutional provision that prohibited Congress from passing any laws that might abridge one's right to file the writ.<sup>18</sup> Originally, the writ was limited to cases of federal prisoners held in state facilities, but the Judiciary Act of 1789 expanded its scope to apply to prisoners held in federal facilities.<sup>19</sup> Subsequently, the Habeas Corpus Act of 1867 expanded the writ's scope even further by granting federal courts the authority to hear a prisoner's appeal where his or her detention was in violation of either the Constitution or U.S. law.<sup>20</sup>

This Part discusses 28 U.S.C. § 2241 (hereinafter referred to as "§ 2241" or the "Habeas Statute") governing the grant of the writ as well as some of the historical context in which it has developed.<sup>21</sup> Although case law addressing enemy combatants' access to the writ is sparse,<sup>22</sup> this Part discusses three of the seminal cases dealing with the issuance of the writ to this class of prisoners.<sup>23</sup> As will be noted, the Court seems to draw a bright line in such an application, based on whether the detention was inside or outside the territorial sovereignty of the United States.<sup>24</sup> As such, this Part explores the history of Guantanamo Bay and the determination of U.S. sovereignty over the territory.<sup>25</sup>

#### A. The Habeas Corpus Statute – 28 U.S.C. § 2241

In 1867, Congress expanded the federal courts' authority to hear habeas corpus appeals by granting the courts the authority to hear such appeals in all cases where any person may be restrained of his or her liberty.<sup>26</sup> This language is the direct ancestor of the current 28 U.S.C. § 2241(c)(3) ("§ 2241(c)(3)").<sup>27</sup> In addition, Congress added 28 U.S.C. § 2241(a) ("§ 2241(a)"), limiting the grant of the writ by federal district and circuit judges to their respective jurisdictions.<sup>28</sup> This language reflected a congressional compromise satisfying concerns voiced

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<sup>17</sup> *Id.* at 946.

<sup>18</sup> See U.S. CONST. art. I, § 9, cl. 2 (stating that "the privilege of the writ shall not be suspended"); see also Swanson, *supra* note 5, at 946.

<sup>19</sup> Swanson, *supra* note 5, at 946.

<sup>20</sup> *Felker v. Turpin*, 518 U.S. 651, 659 (1996). Until Congress expanded the scope of the federal court's power to issue the writ of habeas corpus, the court's power was limited, by Section 14 of the Judiciary Act of 1789, to granting the writ to prisoners in custody, under or by color of the authority of the United States, or who were committed for trial before some federal court. *Id.*

<sup>21</sup> See *infra* Part II.A.

<sup>22</sup> Swanson, *supra* note 5, at 947.

<sup>23</sup> See *infra* Part II.B.

<sup>24</sup> See *infra* Part II.B.2 (discussing the *Eisentrager* opinion).

<sup>25</sup> See *infra* Part II.C.

<sup>26</sup> *Felker v. Turpin*, 518 U.S. 651, 659 (1996).

<sup>27</sup> 28 U.S.C. § 2241(c)(3) (2004) (stating that a prisoner has the right to habeas appeal if "[h]e is in custody in violation of the Constitution or laws or treaties of the United States").

<sup>28</sup> 28 U.S.C. § 2241(a) (2004) (stating that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions").

by Senator Johnson at the time of the statute's enactment.<sup>29</sup> Senator Johnson was troubled that the statute's broad grant of power to issue the writ may give federal judges the right to assert authority over jailers in remote districts, even if such districts were outside the territorial reach of the issuing court.<sup>30</sup> To address this concern, Senator Trumbull, the statute's sponsor, added the words "within their respective jurisdictions" to circumscribe the courts' authority to issue the writ.<sup>31</sup> This language survived several amendments to the statute over the years and is still reflected in § 2241(a) as language similar to that introduced by Senator Trumbull.<sup>32</sup>

## B. Jurisdictional Limitations on Habeas Appeals

Over the years, the meaning of this jurisdictional limitation was the subject of much attention by the Court.<sup>33</sup> Traditionally, as the Court found in *Ahrens v. Clark*, federal courts could not assert *in personem* jurisdiction over a habeas appeal unless both the prisoner and custodian were physically within the court's territory.<sup>34</sup> This decision was heavily criticized as impractical and not compelled by the express language of the Habeas Statute.<sup>35</sup> The Court then decided *Johnson v. Eisentrager*,<sup>36</sup> holding that federal courts did not have jurisdiction to hear the habeas appeals of enemy aliens who lacked any connection to the United States beyond their capture, trial, and subsequent incarceration.<sup>37</sup> *Eisentrager* was decided largely based on the authority of *Ahrens*, although the Court went to great lengths to discuss the limitations on the extraterritorial application of the protections of the Bill of Rights to nonresident aliens.<sup>38</sup> Finally, in *Braden v. 30th Judicial Circuit Court of Ky.*,<sup>39</sup> the Court created an exception to *Ahrens* by finding jurisdiction to issue the writ for a prisoner who was physically outside the

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<sup>29</sup> *Ahrens v. Clark*, 335 U.S. 188, 204 (1948) (Rutledge, J., dissenting).

<sup>30</sup> *Id.* Senator Johnson was responding to the original language of the bill which stated "[t]hat the several courts of the United States and the several justices and judges of such courts, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States. . . ." *Id.* at 205. This language was criticized on the grounds that "it would permit a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 496 (1973).

<sup>31</sup> *Braden*, 410 U.S. at 496.

<sup>32</sup> 28 U.S.C. § 2241(a) (2004).

<sup>33</sup> See *infra* Part II.B.1 (discussing the *Ahrens* opinion); see also *infra* Part II.B.2 (discussing the *Eisentrager* opinion); Part II.B.3 (discussing the *Braden* opinion).

<sup>34</sup> See Megan A. Ferstenfeld-Torres, *Who are We to Name? The Applicability of the "Immediate-Custodian-as-Respondent" Rule to Alien Habeas Claims under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431, 435 (2003); see also *infra* Part II.B.1 (discussing the *Ahrens* opinion).

<sup>35</sup> Ferstenfeld-Torres, *supra* note 34, at 436.

<sup>36</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>37</sup> See *infra* Part II.B.2 (discussing the *Eisentrager* opinion).

<sup>38</sup> See *infra* Part II.B.2 (discussing the *Eisentrager* opinion).

<sup>39</sup> *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

court's territory.<sup>40</sup> The Court held that *Ahrens's* reliance on the language of the Habeas Statute, which required the physical presence of both the prisoner and the custodian within a court's territory as a prerequisite to jurisdiction, was misplaced.<sup>41</sup> At least within the context of *Braden's* facts, the Court concluded that jurisdiction over the custodian alone was sufficient to find jurisdiction to grant the writ.<sup>42</sup>

1. *Ahrens v. Clark*<sup>43</sup>

In *Ahrens*, the Court considered whether a prisoner must be located within the territorial jurisdiction of a federal court to invoke that court's power to issue the writ of habeas corpus.<sup>44</sup> The petitioners were 120 German citizens who were held at Ellis Island, New York, for deportation back to Germany.<sup>45</sup> Their deportation was ordered by the Attorney General upon a determination that they were dangerous to the public and safety of the United States.<sup>46</sup> The Attorney General drew his authority from Presidential Proclamation 2655 of July 14, 1945, pursuant to the Alien Enemy Act of 1798.<sup>47</sup>

The petitioners filed a Petition for a Writ of Habeas Corpus in the District of Columbia's district court challenging the Attorney General's authority to order their removal.<sup>48</sup> The petitioners argued that the Attorney General lacked the statutory authority to effect such removal because actual hostilities with Germany had ceased.<sup>49</sup> The government moved to dismiss the petition because the petitioners were detained in New York, thus they were outside the territorial jurisdiction of a court sitting in the District of Columbia.<sup>50</sup> The district court granted the government's motion and the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") affirmed the decision.<sup>51</sup>

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<sup>40</sup> See *infra* Part II.B.3 (discussing the *Braden* opinion).

<sup>41</sup> Ferstenfeld-Torres, *supra* note 34, at 436; see also *infra* Part II.B.3 (discussing the *Braden* opinion).

<sup>42</sup> See *infra* Part II.B.3 (discussing the *Braden* opinion).

<sup>43</sup> *Ahrens v. Clark*, 335 U.S. 188 (1948).

<sup>44</sup> *Id.* at 189.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* The predecessor of § 2241 was 28 U.S.C. § 452, in effect at the time of the *Ahrens* decision, which provided:

The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district. . . .

28 U.S.C. § 452 (1940).

<sup>49</sup> *Ahrens*, 335 U.S. at 189.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

The Supreme Court first noted that the jurisdictional limitation on federal courts' power to issue the writ was a matter of first impression.<sup>52</sup> The Court also stated that as a matter of legal principle the federal district courts' jurisdiction was territorial unless Congress expressly created an exception to extend such jurisdiction.<sup>53</sup> As such, the Court reasoned that the presence of a jailer within a district court's jurisdiction was not, by itself, sufficient to establish that court's jurisdiction over that jailer's prisoner.<sup>54</sup> Furthermore, the Court pointed out that the Habeas Statute contemplated procedures which may require the appearance of a petitioner before the court.<sup>55</sup> In the case of a prisoner, this requirement may involve significant travel and administrative expenses, as well as a risk of escape if the prisoner is being transported from remote locations, perhaps thousands of miles from the court's location.<sup>56</sup> The Court also discussed the legislative history associated with the Habeas Statute and found that Congress was primarily concerned with circumscribing the federal courts' territorial jurisdiction to issue the writ.<sup>57</sup> Thus, the Court concluded that Congress could not have contemplated such a requirement if it intended to extend the courts' jurisdiction to issue the writ beyond its territorial limits.<sup>58</sup> Therefore, the Court held that the district court sitting in the District of Columbia did not have jurisdiction to hear a habeas appeal from a petitioner located in New York.<sup>59</sup>

Justice Rutledge, with whom Justices Black and Murphy joined, dissented.<sup>60</sup> Justice Rutledge noted that the Court's holding essentially elevated the place of physical custody to the level of exclusive jurisdictional criteria when one applies the Habeas Statute.<sup>61</sup> He found that such a restriction greatly contracted the writ's historical scope and was contrary to the Court's own precedent.<sup>62</sup> He further found that the Court had already determined that jurisdiction over the jailer,

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<sup>52</sup> *Id.* at 190.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 190-91.

<sup>56</sup> *Id.* at 191.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 193. However, the Court expressly noted that its holding did not "determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 196.

<sup>62</sup> *Id.* at 195. To highlight his concerns, Justice Rutledge asked:

For if the absence of the body from the jurisdiction is alone conclusive against the existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present and can be served with process only in another? And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it, whether purporting to act officially or otherwise?

*Id.*

and not the prisoner, was controlling in ascertaining a particular court's jurisdiction to issue the writ.<sup>63</sup> In addition, Justice Rutledge noted that the legislative history of the Habeas Statute, while suggesting clear congressional intent to limit the scope of federal courts to issue the writ, did not indicate that Congress intended to limit a court's personal jurisdiction to its territorial limits.<sup>64</sup> Thus, he found no support for the Court's conclusion that the absence of a prisoner from the territorial jurisdiction of a court was fatal to that court's ability to issue the writ even when the court had such jurisdiction over the jailer.<sup>65</sup>

## 2. *Johnson v. Eisentrager*<sup>66</sup>

In *Eisentrager*, the Court was asked to determine whether federal courts had jurisdiction to hear habeas appeals filed by enemy aliens detained by the U.S. military outside the sovereign territory of the United States.<sup>67</sup> The petitioners in this case were twenty-one German nationals captured in China by the U.S. military after the Japanese surrendered at the end of the Second World War.<sup>68</sup> They were charged with violating the laws of war by engaging in, permitting, or ordering continued military activity against the United States after the surrender of Germany and before the surrender of Japan.<sup>69</sup> They were tried and convicted by a military commission instituted in China by the Commanding General of the United States Forces, China Theater, pursuant to the authority granted by the Joint Chiefs of Staff of the United States.<sup>70</sup> After their convictions, their sentences were reviewed and approved by a military reviewing authority and the petitioners were then transported to a prison under the control of the U.S. Army in Landsberg, Germany to serve out their sentences.<sup>71</sup>

The prisoners petitioned the district court in the District of Columbia for a writ of habeas corpus challenging their detention.<sup>72</sup> The prisoners alleged that they were civilian contractors working for the German government when they were captured.<sup>73</sup> As such, they claimed that their trial, conviction, and imprisonment by the U.S. military violated, *inter alia*, Articles I and III of the U.S. Constitution as well as the Fifth Amendment.<sup>74</sup> Relying on *Ahrens*, the district court dis-

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<sup>63</sup> *Id.* at 196-97; see also *Ex parte Endo* 323 U.S. 283, 306 (1944) noting that: [t]here are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner (internal citations omitted).

<sup>64</sup> *Ahrens*, 335 U.S. at 205.

<sup>65</sup> *Id.* at 206.

<sup>66</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>67</sup> *Id.* at 765.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 766.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 765.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 767.

missed the petitions for lack of jurisdiction, causing the prisoners to appeal to the D.C. Circuit.<sup>75</sup>

In considering the appeal, the D.C. Circuit distilled the case down to three main issues: (1) whether the prisoners were entitled to the writ as a matter of substantive law; (2) if so, whether the Habeas Statute divested them of that right; and (3) if they were entitled to that right, which court had jurisdiction to hear the habeas petition.<sup>76</sup>

To answer these questions, the court resorted to the fundamental principles underlying the Constitution.<sup>77</sup> First, the court reasoned that the Fifth Amendment's protections extended to any person and not just to American citizens.<sup>78</sup> By implication, the court reasoned that the protections of the Fifth Amendment's due process clause extended to enemy aliens deprived of life, liberty, or property by official action under the color of U.S. law.<sup>79</sup> In other words, since the Fifth Amendment acted as a limitation on the conduct of the federal government, the only jurisdictional nexus required to extend Fifth Amendment protections was an action by the federal government, irrespective of the status or location of the persons upon whom this action operated.<sup>80</sup> Furthermore, since the writ of habeas corpus was the best defense of personal freedom, the use of the writ to challenge violations of the Fifth Amendment was indispensable.<sup>81</sup>

Second, the court reasoned that Congress' power to suspend the writ was limited to times of rebellion or invasion when public safety may require it.<sup>82</sup> If the Habeas Statute was interpreted to condition the application of the writ on court jurisdiction, such a limitation, if interpreted within the rubric of *Ahrens*, could operate to deny an American citizen's access to a habeas appeal simply because he or she may be held by the U.S. government outside the jurisdiction of any federal court.<sup>83</sup> Since Congress was not empowered by the Constitution to effect

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<sup>75</sup> *Id.*

<sup>76</sup> *Eisenrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949), *rev'd sub nom. Johnson v. Eisenrager*, 339 U.S. 763 (1950).

<sup>77</sup> *Forrestal*, 174 F.2d at 963.

<sup>78</sup> *Id.* Although the D.C. Circuit did not expressly indicate which provision of the Fifth Amendment was implicated by the case, it is reasonable to assume that the court impliedly relied on the Fifth Amendment's due process clause to support its holding. See U.S. CONST. amend. V (stating that no "person shall . . . be deprived of life, liberty, or property, without due process of law").

<sup>79</sup> *Forrestal*, 174 F.2d at 964 (noting that the "constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory").

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*

<sup>82</sup> See U.S. CONST. art. I, § 9, cl. 2 (stating that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); see also *Forrestal*, 174 F.2d at 965.

<sup>83</sup> *Forrestal*, 174 F.2d at 964. The D.C. Circuit seems to be echoing Justice Rutledge's concern in his dissent in *Ahrens*, namely that a geographical limitation on the application of the writ could operate to deny it to those entitled to its protection under the Constitution. See *Ahrens v. Clark*, 335 U.S. 188, 195 (1984).

such a deprivation, the court reasoned that the Habeas Statute must be interpreted to allow such access or impliedly be rendered unconstitutional.<sup>84</sup>

Accordingly, the D.C. Circuit concluded that when a person was outside the territorial jurisdiction of any district court and deprived of his or her liberty by official action of the U.S. government, that person's habeas petition would lie in the district court which had territorial jurisdiction over the officials with directive power over the immediate jailer.<sup>85</sup>

The Supreme Court disagreed with the D.C. Circuit's decision and reversed. Justice Jackson, in his opinion for the majority, noted that the Court had been at pains to point out that extending constitutional protections to aliens depended on the aliens' presence within the territorial jurisdiction of the United States.<sup>86</sup> Even when such jurisdiction was found, those protections could be further circumscribed by the status of the alien.<sup>87</sup> For example, if the alien was a citizen of a country with which the United States was at war, the alien could be constitutionally subject to summary arrest, internment, and deportation.<sup>88</sup> In such a case, courts would entertain challenges to the detention of that person by the U.S. government only to the extent necessary to ascertain the existence of a state of war or to determine whether he or she was an enemy alien.<sup>89</sup> Once these jurisdictional elements were established, courts would not inquire further into internment issues.<sup>90</sup> Deprivation of other constitutional protections afforded to aliens within the territorial jurisdiction of the United States would thus be a temporary incident of war and not an incident of alienage.<sup>91</sup>

However, in the case of an enemy alien located outside U.S. territorial jurisdiction that remained in the service of the enemy, Justice Jackson reasoned that even this limited review was unavailable.<sup>92</sup> He noted that it was a well-established common law tradition that a nonresident enemy alien could not maintain an action in the courts of a country with which his country of residence maintained a state of war.<sup>93</sup> This principle was borne out of the practical considera-

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<sup>84</sup> *Forrestal*, 174 F.2d at 964. The D.C. Circuit reasoned that the other solution would be to interpret the statute as requiring a distinction in its application between American citizens and aliens. *Id.* The court impliedly rejected this approach finding that the writ of habeas corpus was deeply rooted in a common law tradition that used the writ to test the authority of one who deprives another of his liberty. *See Id.*

<sup>85</sup> *Id.* at 967.

<sup>86</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 775.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 772.

<sup>92</sup> *Id.* at 776; *see also Ex parte Quirin*, 317 U.S. 1, 45-46 (1942); *In re Yamashita*, 327 U.S. 1, 25-26 (1946). The prisoners argued that they should be, at least, granted review based on the Court's decisions in *Quirin* and *Yamashita* where the habeas petitions of nonresident enemy aliens were reviewed but denied on the merit. *Eisentrager*, 339 U.S. at 779. Justice Jackson distinguished both *Quirin* and *Yamashita* by noting that, in both cases, the petitioners were within the territorial jurisdiction of American courts. *Id.* at 780.

<sup>93</sup> *Eisentrager*, 339 U.S. at 776.

tions that such access could hamper the war efforts and give aid to the enemy.<sup>94</sup> As such, Justice Jackson found the fact that the prisoners in this case were (1) nonresident enemy aliens (2) captured and held as prisoners-of-war outside the United States, (3) tried for crimes committed outside the United States, and (4) remained at all times afterwards outside of the United States, to be determinative.<sup>95</sup>

Furthermore, Justice Jackson found the D.C. Circuit's broad application of the Fifth Amendment to the *Eisentrager* prisoners to be untenable.<sup>96</sup> He reasoned that if the Fifth Amendment's use of "any person" could be construed to extend Fifth Amendment protections to nonresident enemy aliens, such interpretation would extend more protections to enemy aliens than available to American soldiers in time of war.<sup>97</sup> Moreover, if the term "any person" in the Fifth Amendment was interpreted so expansively, then the Sixth Amendment's use of "accused" would logically extend the Sixth Amendment to enemy aliens as well.<sup>98</sup> For that matter, because the civil-rights amendments were similarly unlimited by territory or person, courts would have to extend to enemy aliens the First Amendment's protection of freedom of speech, religion, press, and assembly; the Second Amendment's right to bear arms; the Fourth Amendment's protection against unreasonable searches and seizures; and the Fifth and Sixth Amendment's right to jury trials.<sup>99</sup> In short, Justice Jackson flatly rejected such expansion and found that the Fifth Amendment did not confer any rights onto the *Eisentrager* prisoners.<sup>100</sup>

Accordingly, Justice Jackson concluded that the prisoners did not have the right to a habeas appeal.<sup>101</sup> He concluded that the prisoners did not have a constitutional right to access federal courts; thus, there was no need to determine where such access could be had.<sup>102</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 777.

<sup>96</sup> *Id.* at 782.

<sup>97</sup> U.S. CONST. amend. V (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*") (emphasis added); see also *Eisentrager*, 339 U.S. at 783.

<sup>98</sup> *Eisentrager*, 339 U.S. at 782.

<sup>99</sup> *Id.* at 784.

<sup>100</sup> Justice Jackson's opinion for the majority of the Court seems to have considered the extent of an alien's rights under the Constitution as dependant first upon the alien's presence in the United States as a threshold matter and second on the duration of this presence. He stated:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

*Id.* at 770.

<sup>101</sup> *Id.* at 790-91.

<sup>102</sup> *Id.* at 791.

Justice Black, with whom Justices Douglas and Burton joined, dissented primarily for three reasons.<sup>103</sup> First, he noted that the gravamen of the Court's majority opinion was based on the conclusion that the prisoners were nonresident enemy aliens, in the service of an enemy, and in violation of the laws of war.<sup>104</sup> However, he argued that the prisoners alleged enough facts to raise doubt as to the conclusion that they violated the laws of war.<sup>105</sup> Irrespective, he noted that the only question presented to the Court was limited to jurisdiction and not to the validity or sufficiency of the pleadings with respect to the relevant facts, which the district court never reached or considered.<sup>106</sup>

Second, Justice Black reasoned that the question whether enemy combatants could contest trial and conviction for war crimes by habeas appeal was addressed twice by the Court in *Ex parte Quirin*<sup>107</sup> and *Yamashita v. United States*.<sup>108</sup> He noted that, in *Quirin*, the Court held that the designation of "enemy combatant" did not foreclose consideration by the courts of a prisoner's claim that his or her detention was in violation of the Constitution or U.S. law.<sup>109</sup> It was only after the Court upheld jurisdiction to consider the prisoner's habeas appeal that the Court denied the appeal on the merits.<sup>110</sup> Similarly, in *Yamashita*, the Court determined that a Japanese general tried and convicted for war crimes after hostilities with Japan at the end of the Second World War had the right to challenge the authority of the military tribunals determining such conviction.<sup>111</sup> Thus, Justice Black concluded that the status of the *Eisenstrager* prisoners as enemy combatants was not, by itself, sufficient to deny them access to courts through habeas appeals.<sup>112</sup>

Third, Justice Black noted that the Court's majority opinion did not deny that if the prisoners were held within the United States, there would be no question as to the courts' jurisdiction to hear challenges to the prisoners detention through habeas appeal.<sup>113</sup> He also noted that, although the prisoners in both *Quirin* and *Yamashita* were held as prisoners in the United States or territories under the control and authority of the United States, the Court's decisions in both cases did

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<sup>103</sup> *Id.* (Black, J. dissenting).

<sup>104</sup> *Id.* at 792-93.

<sup>105</sup> *Id.* at 793.

<sup>106</sup> *Id.* at 792.

<sup>107</sup> *Id.* (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

<sup>108</sup> *Id.* (citing *In re Yamashita*, 327 U.S. 1 (1946)).

<sup>109</sup> *Id.* (citing *Quirin*, 317 U.S. at 25).

<sup>110</sup> *Id.* (citing *Quirin*, 317 U.S. at 48).

<sup>111</sup> *Id.* 794 (citing *Yamashita*, 327 U.S. at 9). In *Yamashita*, the Supreme Court affirmed its ruling in *Quirin* and held that the fact that Congress sanctioned trials of enemy combatants by military commissions indicated that Congress recognized the accused's right to a defense, and, thus, the Executive branch could not deny the courts' power to review the authority of these commissions. *Yamashita*, 327 U.S. at 9. At the same time, the Court also noted that the commission's rulings on evidence and on the mode of conduct of the proceedings against an enemy combatant were reviewable by the appropriate military reviewing authority and not the courts. *Id.* at 23.

<sup>112</sup> *Eisenstrager*, 339 U.S. at 795.

<sup>113</sup> *Id.*

not rely on any territorial nexus.<sup>114</sup> Thus, he concluded that the majority's opinion in *Eisentrager* fashioned a dangerous rule that could allow the Executive to deprive all federal courts of their power to protect against illegal incarcerations simply by deciding where federal prisoners would be tried and imprisoned.<sup>115</sup>

### 3. *Braden v. 30th Judicial Circuit Court of Kentucky*<sup>116</sup>

In *Braden*, the Supreme Court revisited its interpretation in *Ahrens* of the jurisdictional limitations on federal courts' authority to hear habeas appeals. In this case, Braden was serving a sentence in an Alabama prison.<sup>117</sup> Prior to his arrest and conviction in Alabama, he was indicted for storehouse breaking and safe-breaking in a Kentucky court on facts unrelated to his crimes in Alabama.<sup>118</sup> However, since the Kentucky indictment was likely to prejudice his opportunity for parole from his Alabama prison, Braden demanded that his trial in Kentucky proceed.<sup>119</sup> When Kentucky refused, he filed a habeas appeal with the federal district court sitting in the Western District of Kentucky alleging that Kentucky's refusal violated his constitutional right for a speedy trial.<sup>120</sup> The district court granted the petition and held that Kentucky must arrange for Braden's return to the state to stand trial on the charges against him.<sup>121</sup> On appeal, the U.S. Court of Appeals for the Fifth Circuit reluctantly reversed, recognizing that its decision may result in Braden being denied a forum in which to assert his constitutional claim.<sup>122</sup>

The Supreme Court noted that developments since *Ahrens* raised serious questions as to the continued vitality of that decision.<sup>123</sup> The Court further noted that *Ahrens* was predicated on the view that the expenses and risks associated with the production of prisoners from remote locations before the issuing court were of paramount concern to Congress when it imposed a jurisdictional limit on the power of federal courts to issue the writ.<sup>124</sup> However, the Court found that Congress had since amended the Habeas Statute in such a way as to indicate that these concerns were no longer valid.<sup>125</sup> For example, Congress allowed collateral attacks on federal sentences to be brought in the sentencing court rather than

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

<sup>117</sup> *Id.* at 485.

<sup>118</sup> *Id.* at 486.

<sup>119</sup> *Id.* at 487.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* Pursuant to the Rules of the U.S. Court of Appeals for the Fifth Circuit in effect at the time and where Braden was incarcerated, he could only file a habeas appeal in the district court sitting in the state that filed the challenged indictment. *Id.* at 488. In other words, Braden could not file his appeal in a federal district court in Alabama because he was challenging an indictment issued by Kentucky.

<sup>123</sup> *Id.* at 497.

<sup>124</sup> *Id.* at 496.

<sup>125</sup> *Id.* at 497.

the district in which the prisoner was incarcerated.<sup>126</sup> Congress also allowed a prisoner convicted in state court in a state with two or more federal districts to challenge his conviction on federal habeas grounds in either the district court of his confinement or his conviction, if different.<sup>127</sup> The Court also noted that in *Burns v. Wilson*,<sup>128</sup> it implicitly held that an American citizen held outside the territory of any district court could not be denied habeas relief.<sup>129</sup> Thus, the Court concluded that *Ahrens* should not be viewed as instituting a rigid jurisdictional rule requiring a choice of an inconvenient forum, even in a class of cases the Court did not consider when it decided *Ahrens*.<sup>130</sup>

Instead, the Court held that the writ of habeas corpus did not act on the prisoner who sought relief.<sup>131</sup> Rather, the writ acted upon the custodian responsible for the challenged detention.<sup>132</sup> The Court further reasoned that § 2241(a), when read literally, required nothing more than the issuing court having jurisdiction over the custodian.<sup>133</sup> In other words, so long as the custodian can be reached by process, a federal court could properly issue the writ "within its jurisdiction" under § 2241(a).<sup>134</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 498 (citing *Burns v. Wilson*, 346 U.S. 137 (1953), *reh'g denied*, 346 U.S. 844, 851-52 (1953)). In *Burns*, the Supreme Court considered denial of habeas appeal to American citizens convicted by a military court-martial on the Island of Guam for murder and rape. *Burns*, 346 U.S. at 138. In considering the prisoners' appeal, the Court stated that the

statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases.

*Id.* at 139. In his opinion denying rehearing, Justice Frankfurter noted that while the Court's opinion in the case spoke only of jurisdiction as the proper scope of review, the Court had reviewed decisions by military commissions for procedural errors in the past. *Id.* at 846. Thus, he concluded that the scope of review of military commissions actually extended beyond geographic jurisdiction and into the constitutional underpinnings necessary for legitimacy of the commission's decision. *Id.*

<sup>129</sup> *Id.* at 498.

<sup>130</sup> *Id.* at 499-500. The Court noted that, in *Ahrens*, there was no indication why the district court sitting in the District of Columbia was more convenient than the district court sitting in the Eastern District of New York or why the government should be required to incur the expense of transporting 120 detainees from New York to the District of Columbia for the hearings. *Id.* at 500. Without reasonable justification, the rule remained that the proper venue in such a case was the Eastern District of New York as decided by the Court at the time. *Id.*

<sup>131</sup> *Braden*, 410 U.S. at 494.

<sup>132</sup> *Id.* at 495-96 (citing *In re Jackson*, 114 U.S. 564 (1885)), quoted with approval in *Ex parte Endo*, 323 U.S. 283, 306 (1944):

The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.

<sup>133</sup> *Braden*, 410 U.S. at 495; see also *Endo*, 323 U.S. at 306 (noting that the writ of habeas corpus may be issued by a court that could reach a respondent who was custodian of the prisoner petitioning for such relief).

<sup>134</sup> *Braden*, 410 U.S. at 495

Consequently, the Court held that because Alabama, as custodian, could be considered Kentucky's agent, and because Kentucky was within the territorial jurisdiction of the district court sitting in Kentucky, the federal court in Kentucky had jurisdiction to hear Braden's habeas appeal.<sup>135</sup>

### C. Extent of Constitutional Protections Afforded to Aliens

One of the key issues involved in aliens' access to habeas appeal is the extra-territorial scope of the rights guaranteed by the Constitution. It is of little consequence that an alien prisoner can petition the courts for a writ of habeas corpus if that prisoner has no rights, save the right to the appeal itself, that the court could enforce. Because the writ allows a prisoner to challenge his or her detention as a violation of the Constitution or U.S. laws, it would be illogical to argue that a right to the writ existed when the Constitution and U.S. law did not confer to such prisoner any right in the first place. This is precisely the point that Justice Jackson made in his majority opinion in *Eisenstrager* with respect to alien enemies outside the territorial jurisdiction of the United States.

The Supreme Court's pronouncements on the extraterritoriality of constitutional protections are instructive, though not definitive.<sup>136</sup> However, it is well settled that the Constitution is the basis for federal government authority.<sup>137</sup> Thus, the government cannot act beyond its Constitutional authority and the limitations imposed upon it.<sup>138</sup> In other words, the question at issue in determining constitutional extraterritoriality is the interpretation of the individual provisions and the determination of their application in particular situations.<sup>139</sup>

In *Reid v. Covert*,<sup>140</sup> the Supreme Court considered whether American citizens tried and convicted by a military court-martial overseas had the right to a trial by jury as mandated by the Fifth<sup>141</sup> and Sixth Amendments.<sup>142</sup> The Court first

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<sup>135</sup> *Id.* at 498-99.

<sup>136</sup> See Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 44 (2004) (noting that the Supreme Court's previous pronouncements on the extraterritorial application of constitutional rights may not be conclusive in the case of prisoners held within the context of military action).

<sup>137</sup> See *Reid v. Covert*, 354 U.S. 1, 6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The Government may act only as the Constitution authorizes.").

<sup>138</sup> *Reid*, 354 U.S. at 74 (Harlan, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."); see also Neuman, *supra* note 136, at 45. Justice Harlan argued that constitutional protections should not be considered to automatically protect Americans overseas. *Reid*, 354 U.S. at 74. Rather, factors of practicality and reasonableness must be considered when ascertaining which constitutional rights afforded by the Constitution could be extended to protect Americans in anomalous situations overseas. *Id.*

<sup>139</sup> Neuman, *supra* note 136, at 45.

<sup>140</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>141</sup> U.S. CONST. amend. V.

<sup>142</sup> U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

noted that the language of the Constitution must be given its plain meaning, unless the language was unclear and ambiguous.<sup>143</sup> The Court also noted that the Constitution required criminal trials to be by jury and to be held within the state in which the crime had been committed or, when the crime was not committed within a state, in a place directed by Congress.<sup>144</sup> The Court reasoned that jury trials and indictment procedures were enshrined in the Constitution to protect their abridgement for expediency or convenience.<sup>145</sup> The Court rejected the notion that a treaty with a foreign country could give the Executive branch the authority to ignore the mandates of the Constitution with respect to conduct within the treaty's scope.<sup>146</sup> While the Constitution gave Congress the power to authorize the trial of members of the military without all the constitutional safeguards given an accused, this power did not extend to civilians.<sup>147</sup> Thus, the Court concluded that the Constitution in its entirety does apply to American citizens held outside U.S. territorial jurisdiction.<sup>148</sup>

But the Court was more circumspect when extending constitutional protections to aliens subject to actions by the United States overseas. In *United States v. Verdugo-Urquidez*, the Supreme Court considered whether the Fourth Amendment protection against unreasonable searches and seizures extended to an alien overseas.<sup>149</sup> The defendant-alien involved was a Mexican citizen and resident believed to be the leader of an organization that smuggled narcotics into the United States.<sup>150</sup> Agents of the Drug Enforcement Agency ("DEA") obtained a warrant for his arrest and, with the help of Mexican authorities, apprehended him in Mexico, and moved him to the United States where he was formally arrested.<sup>151</sup> Subsequently, DEA agents, in association with Mexican police, searched the defendant's residence in Mexico without any judicial authorization.<sup>152</sup> The defendant motioned the court to suppress the evidence discovered in his residence as a violation of the Fourth Amendment and, as such, excluded by operation of the fruit-of-the-poisonous tree doctrine.<sup>153</sup> The district court granted

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of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

<sup>143</sup> *Covert*, 354 U.S. at 8 n.7; see also *United States v. Sprague*, 282 U.S. 716, 731-32 (1931):

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. . . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.

<sup>144</sup> *Reid*, 354 U.S. at 7 (citing U.S. CONST. art. III, § 2 cl. 3).

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.* at 16-18.

<sup>147</sup> *Id.* at 19-21.

<sup>148</sup> *Id.* at 21.

<sup>149</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>150</sup> *Id.* at 262.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 263.

the motion, and the U.S. Court of Appeals for the Ninth Circuit affirmed that decision.<sup>154</sup>

In a sharply divided 5-4 decision, the Supreme Court noted that the Fourth Amendment, like the First, Second, Ninth, and Tenth Amendments, used the term “the people” as the object of its protections as opposed to “persons” or “accused” in the Fifth and Sixth Amendments.<sup>155</sup> The Court reasoned that such terms referred to a class of persons who were part of a national community or have otherwise developed a sufficient connection with the country considered to be part of that community.<sup>156</sup> The Court also found that such a conclusion was supported by the history of the Fourth Amendment’s drafting, which suggested that the framers intended it to be limited to domestic matters within the United States.<sup>157</sup> Thus, the Court concluded that Fourth Amendment protections did not extend to nonresident aliens overseas.<sup>158</sup>

However, the Court’s decision in *Verdugo-Urquidez* was more sweeping than its holding may initially convey. In concluding that Fourth Amendment protections did not extend to aliens, the Court analogized the operation of the Fourth Amendment to that of the Fifth Amendment in *Eisentrager*.<sup>159</sup> The Court reasoned that *Eisentrager* stood for the proposition that Fifth Amendment protections do not extend to aliens outside the sovereign territory of the United States.<sup>160</sup> The Court also narrowly interpreted its holding in *Reid* and found that it applied only to American citizens stationed abroad.<sup>161</sup>

Justice Kennedy, who supplied the crucial fifth vote for the majority in *Verdugo-Urquidez*, argued for a different approach.<sup>162</sup> He advocated the approach adopted by Justice Harlan’s concurring opinion in *Reid*, and disagreed that there was an express, textual limitation on the scope of the constitutional protections in the Bill of Rights.<sup>163</sup> Instead, he reasoned that the extraterritorial extension of the Bill of Rights should be determined based on a contextual analysis of the due process clause of the Fifth Amendment.<sup>164</sup> Only where the adoption of a particular right in the Bill of Rights proved to be impracticable and anomalous should it be held inapplicable to government action overseas.<sup>165</sup> Because Justice Kennedy considered the application of the Fourth Amendment’s

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 265 (citing U.S. CONST. amend. IV, stating that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 266.

<sup>158</sup> *Id.* at 273-75.

<sup>159</sup> *Id.* at 269.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 270.

<sup>162</sup> *Id.* at 277 (Kennedy, J., concurring).

<sup>163</sup> *Id.*; see also discussion in *supra* note 138.

<sup>164</sup> *Verdugo-Urquidez*, 494 U.S. at 278; see also Neuman, *supra* note 136, at 46.

<sup>165</sup> *Verdugo-Urquidez*, 494 U.S. at 278; see also Neuman, *supra* note 136, at 46.

protections against unreasonable searches and seizures in *Verdugo-Urquidez* to be impracticable and anomalous, he agreed with the majority's conclusion.<sup>166</sup>

#### D. The Status of the Naval Base at Guantanamo Bay, Cuba

##### 1. History

In 1898, a battalion of U.S. Marines were stationed in Guantanamo Bay, Cuba, as part of the war with Spain.<sup>167</sup> On March 2, 1901, Congress enacted a law authorizing the President to buy or lease land from the government of the Republic of Cuba ("Cuba") to establish a naval station in that country.<sup>168</sup> In implementing this mandate, the President entered into two lease agreements and a treaty over 33 years.<sup>169</sup>

The first agreement, signed on February 16, 1903, involved both the lease of specifically identified areas to be used for the base and the granting of rights to the adjacent water and waterways.<sup>170</sup> The base was expressly limited to coaling or naval stations only, and for no other purpose.<sup>171</sup> The agreement also acknowledged the continued ultimate sovereignty of Cuba over the leased land, but stipulated that the United States had complete jurisdiction and control over the area during the term of the lease.<sup>172</sup>

The second agreement was signed on July 2, 1903.<sup>173</sup> This agreement provided that the United States would pay Cuba the sum of 2,000 gold coins every year as payment for the leased land and water rights.<sup>174</sup> It also provided that any fugitives from Cuban law taking refuge in the base would be delivered by the United States to Cuban authorities upon demand; likewise, any fugitives from U.S. law taking refuge in Cuba would be delivered by Cuba to U.S. authorities upon demand.<sup>175</sup>

The foregoing agreements were further modified by a treaty signed between the United States and Cuba on May 29, 1934.<sup>176</sup> This treaty provided that the

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<sup>166</sup> *Verdugo-Urquidez*, 494 U.S. at 278.

<sup>167</sup> *Bird v. United States*, 923 F. Supp. 338, 340 n.2 (D. Conn. 1996).

<sup>168</sup> M.E. MURPHY, *THE HISTORY OF GUANTANAMO BAY*, Chapter III (U.S. Naval Base, District Publications and Printing Office Tenth Naval Dist. 1953). Specifically, the law stated:

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling and Naval stations at certain specified points to be agreed upon by the President of the United States.

*Id.* An appendix to the constitution of the Republic of Cuba promulgated on May 2, 1902, contained identical language. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at Appendix D.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

two lease agreements would continue in full force and effect so long as (1) the United States did not abandon its naval station on the leased land or (2) the governments of the United States and Cuba agree to terminate the agreements.<sup>177</sup>

## 2. *The Legal Status of the Naval Base at Guantanamo Bay*

The Supreme Court never directly addressed the status of the naval base at Guantanamo Bay before it faced the issue in *Rasul v. Bush*.<sup>178</sup> However, in *Vermilya-Brown Co. v. Connell*,<sup>179</sup> the Supreme Court considered the collateral issue of whether military bases overseas constitute U.S. possessions, and thus subject to the jurisdiction of federal courts with respect to tort claims arising from base operations. The base at issue in the case involved a ninety-nine-year lease of land in Bermuda that was recognized as the sovereign territory of the United Kingdom.<sup>180</sup> The Court noted that, while recognizing that the determination of sovereignty over an area was a political matter that should be left to the Executive and Legislative branches, it had authority to determine the status of prior action by the government.<sup>181</sup> The Court acknowledged that nothing in the case caused it to differ from the Executive branch's determination that the lease in question did not confer sovereignty to the United States over the leased land.<sup>182</sup> However, the Court reasoned that Article IV, section 3, of the Constitution authorized Congress to make all rules and regulations governing U.S. territory and property.<sup>183</sup> The Court also noted that the lease agreement with the United Kingdom provided the United States with all the rights, power, and authority to affect its control over the leased territory, thereby concluding that such authority did not depend on sovereignty over the territory.<sup>184</sup>

The Court then noted that the scope of the Fair Labor Standards Act, which was at issue in the case, extended to any U.S. state, as well as the District of Columbia, and to any U.S. territory or possession.<sup>185</sup> The Court also noted that the term "possession" included Puerto Rico, Guam, the Guano Islands, Samoa, and the Virgin Islands.<sup>186</sup> Thus, the Court reasoned that it was logical to expect

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<sup>177</sup> *Id.*

<sup>178</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>179</sup> *Vermilya-Brown v. Connell*, 335 U.S. 377 (1948).

<sup>180</sup> *Id.* at 378-79; see also Seth J. Hawkins, *Up Guantanamo Without a Paddle: Waves of Afghan Detainees Drown in America's Great Habeas Loophole*, 47 ST. LOUIS L.J. 1243, 1255 (2003) (noting that the terms of the lease involved in *Vermilya-Brown* resembled leases for military bases in the Philippines, Panama, and Guantanamo).

<sup>181</sup> *Vermilya-Brown*, 335 U.S. at 380.

<sup>182</sup> *Id.*; see also Hawkins, *supra* note 180, at 1255 (noting that the Court in *Vermilya-Brown* rejected that notion that the terms "all rights, power, and authority" in a lease agreement gave the United States sovereignty over the leased land).

<sup>183</sup> *Vermilya-Brown*, 335 U.S. at 381 (citing U.S. CONST. art. IV, § 3, cl. 2.).

<sup>184</sup> *Id.* at 383. The Court also noted that such provision was similar to provisions in other lease agreements signed by the United States for military bases overseas, including the lease agreement with Cuba for Guantanamo Bay. *Id.* at 383-84.

<sup>185</sup> *Id.* at 379.

<sup>186</sup> *Id.* at 388.

that the term "possession" also included areas vital to our national interest where the United States had sole power, such as the naval base in Bermuda.<sup>187</sup> Accordingly, the Court held that the scope of the Fair Labor Standards Act extended to the base.<sup>188</sup>

In *Cuban American Bar Association v. Christopher*,<sup>189</sup> the U.S. Court of Appeals for the Eleventh Circuit directly considered the status of the naval base at Guantanamo Bay when it was asked to determine the rights of Cuban and Haitian refugees held at the base.<sup>190</sup> The Eleventh Circuit found, just as the Supreme Court did in *Vermilya-Brown*, that complete jurisdiction and control over Guantanamo Bay was not the functional equivalent to sovereignty.<sup>191</sup> However, unlike the Court's conclusion in *Vermilya-Brown*, the Eleventh Circuit refused to recognize the naval base at Guantanamo Bay as a possession of the United States or any like territory to which the Bill of Rights extended. Thus, the court concluded that if the Cuban and Haitian migrants had any rights while being held in Guantanamo Bay, it would depend on the extraterritorial application of statutory or constitutional provisions.<sup>192</sup> Finding no provisions with such application, the court held that the migrants could not claim constitutional or other statutory protections to challenge their detention.<sup>193</sup>

Similarly, the United States District Court for the District of Connecticut followed the reasoning of the Eleventh Circuit in *Christopher* when it decided *Bird v. United States*.<sup>194</sup> In *Bird*, the plaintiff sued a military doctor at Guantanamo Bay for medical malpractice for failing to properly and timely diagnose her medical condition, a brain tumor.<sup>195</sup> The plaintiff based her suit on the Federal Tort Claims Act ("FTCA").<sup>196</sup> The court first noted that, while the FTCA granted a limited waiver to the government's sovereign immunity for complaints involving negligence by government employees, it expressly exempted claims arising in foreign countries from taking advantage of this limited waiver.<sup>197</sup> The court then

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<sup>187</sup> *Id.* at 390.

<sup>188</sup> *Id.*

<sup>189</sup> *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995).

<sup>190</sup> *Id.* at 1424-25; *see also* Hawkins, *supra* note 180, at 1257.

<sup>191</sup> *Christopher*, 43 F.3d at 1425 (referring to the extent of control the United States had over Guantanamo Bay as agreed in the lease agreements with Cuba); *see also* MURPHY, *supra* note 168 (discussing the lease agreements and treaty between the United States and Cuba giving the United States the right to establish the naval base at Guantanamo).

<sup>192</sup> *Christopher*, 43 F.3d at 1425; *see also* Hawkins, *supra* note 180, at 1257.

<sup>193</sup> *Christopher*, 43 F.3d at 1428-29 (noting that "unadmitted and excludable aliens 'cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the Executive's exercise of its parole discretion'" (internal citations omitted)).

<sup>194</sup> *Bird v. United States*, 923 F. Supp. 338 (D. Conn. 1996).

<sup>195</sup> *Id.* at 339; *see also* Hawkins, *supra* note 180, at 1258.

<sup>196</sup> *Bird*, 923 F. Supp. at 339-40; *see also* Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2000): [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

<sup>197</sup> Federal Tort Claims Act, Exceptions, 28 U.S.C. § 2680(k) (2000) ("The provisions of this chapter and section . . . shall not apply to . . . (k) Any claim arising in a foreign country.").

found that because the lease agreements giving the United States jurisdiction and control over Guantanamo Bay unequivocally left sovereignty of the land to Cuba, Guantanamo Bay must be considered a foreign country for the purposes of applying FTCA.<sup>198</sup> Thus, the court concluded that it did not have jurisdiction to hear the plaintiff's claim.<sup>199</sup>

### III. Discussion

In *Rasul v. Bush*, the Supreme Court held that the Petitioners were entitled to access U.S. courts to challenge their detention at the naval base at Guantanamo Bay.<sup>200</sup> The District Court and the U.S. Court of Appeals for the District of Columbia Circuit, relying on *Eisentrager*, found that the Petitioners were barred from accessing U.S. courts.<sup>201</sup> However, after the Petitioners successfully petitioned for certiorari, the Court reversed in a 6-3 decision.<sup>202</sup> Justice Kennedy filed a concurring opinion, while Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.<sup>203</sup>

#### A. Facts

*Rasul* consolidated *Rasul v. Bush*<sup>204</sup> (“*Rasul I*”) and *Odah v. United States*.<sup>205</sup> In *Rasul I*, petitioners in the case included Shafiq Rasul and Asif Iqbal, citizens of the United Kingdom, and David Hicks, a citizen of Australia (together the “*Rasul* Petitioners”).<sup>206</sup> Petitioner Rasul alleged that he took a hiatus from his studies in the United Kingdom to visit his home country of Pakistan to see relatives and explore its culture.<sup>207</sup> He then decided to stay in Pakistan after September 11, 2001 to continue his education for less than it would have cost him to take similar courses in the United Kingdom.<sup>208</sup> He further alleged that while traveling in the country, forces fighting against the United States kidnapped him.<sup>209</sup> Similarly, petitioner Iqbal alleged that he traveled to Pakistan after September 11, 2001 to get married.<sup>210</sup> Shortly before his wedding, forces fighting

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<sup>198</sup> *Bird*, 923 F. Supp. at 342-43 (noting that the U.S. Supreme Court defined the term “foreign country” in *United States v. Spelar*, 338 U.S. 217, 218 (1949) as a “territory subject to the sovereignty of another nation”).

<sup>199</sup> *Id.* at 343.

<sup>200</sup> *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

<sup>201</sup> See *infra* Part III.B (discussing the lower courts’ opinions).

<sup>202</sup> See *infra* Part III.C.1 (discussing the Supreme Court’s majority opinion).

<sup>203</sup> See *infra* Part III.C.2 (discussing Justice Kennedy’s concurring opinion); see also Part III.C.3 (discussing Justice Scalia’s dissent).

<sup>204</sup> *Rasul v. Bush*, No. 02-299, mem. (D.D.C. July, 2002), <http://www.dcd.uscourts.gov/02-299.pdf>.

<sup>205</sup> *Odah v. United States*, No. 02-828, mem. (D.D.C., Aug. 13, 2004), <http://www.dcd.uscourts.gov/02-828.pdf>.

<sup>206</sup> *Rasul v. Bush*, 215 F. Supp. 2d 55, 57 (D.D.C. 2002).

<sup>207</sup> *Id.* at 59.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

against the United States kidnapped him while he was traveling outside his home village.<sup>211</sup> With respect to petitioner Hicks, there was little known about the reasons for his presence in Afghanistan except that he was living in the country at the time of his capture.<sup>212</sup>

The *Rasul* Petitioners were all captured in Afghanistan after the United States commenced military operations against the Taliban in that country.<sup>213</sup> The circumstances of *Rasul* and Iqbal's capture were unknown, except that they were captured by an undetermined third party and transferred into U.S. custody in early December, 2001.<sup>214</sup> Hicks was captured in Afghanistan by the Northern Alliance, a group funded and supported by the United States in the fight against the Taliban, and was transferred to U.S. custody in mid-December, 2001.<sup>215</sup>

The *Rasul* Petitioners filed an action in the District of Columbia District Court to challenge their detention, to allow them unmonitored access to counsel, and to enjoin the United States from interrogating them any further.<sup>216</sup> They claimed that they did not voluntarily join a terrorist force nor do anything that would be considered outside of their protected religious and personal rights.<sup>217</sup> They further claimed that if they took up arms against the United States, they did so only as a spontaneous reaction to resist an approaching invading force and without sufficient time to organize themselves into regular armed units subject to the internationally recognized rules of war.<sup>218</sup>

In *Odah*, the petitioners included twelve Kuwaiti citizens captured in Afghanistan and Pakistan, and transferred to U.S. custody (hereinafter referred to as the "*Odah* Petitioners" and, together with the *Rasul* Petitioners, hereinafter referred to as the "Petitioners").<sup>219</sup> They alleged that they were in those countries on volunteer charitable missions supported by the Kuwaiti government.<sup>220</sup> They further alleged that the Kuwaiti government encouraged such charitable work by continuing to pay its employees while engaged in this type of volunteer service abroad.<sup>221</sup> They filed an action in the District of Columbia District Court seeking an injunction prohibiting the United States from denying them access to their families, and to force the United States to inform them of the charges against them and grant them access to U.S. courts or some other independent tribunal to hear their grievances.<sup>222</sup> They alleged that they had never been combatants or belligerent against the United States, nor were they ever supporters of the Taliban

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 60.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 57.

<sup>217</sup> *Id.* at 60.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 61.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 58.

or any terrorist organization.<sup>223</sup> They further claimed that they were captured in Afghanistan or Pakistan by villagers seeking bounty or other financial rewards.<sup>224</sup>

In the consolidated complaint, the Petitioners raised three theories to support their challenges.<sup>225</sup> First, they contended that their continued detention violated their due process rights under the Fifth Amendment.<sup>226</sup> Second, they claimed that the actions of the United States violated the Alien Tort Claims Act.<sup>227</sup> Third, they alleged that the actions of the United States were arbitrary, unlawful, and unconstitutional behavior in violation of the Administrative Procedure Act.<sup>228</sup> In response, the United States filed a motion to dismiss the entire complaint on the basis that the District of Columbia District Court lacked jurisdiction to hear it.<sup>229</sup>

## B. Lower Courts' Decisions

### 1. District Court

Initially, the District of Columbia District Court noted that in considering the Government's motion to dismiss, the court must accept the Petitioners' allegations in their pleadings as true, but that the Petitioners carried the burden to prove that the court had jurisdiction.<sup>230</sup> The court also noted that the Petitioners claimed that the court had jurisdiction under, among other laws, the Habeas Statute.<sup>231</sup>

In addition, the court noted that the writ of habeas corpus had long been held as the only means an individual could use to challenge his or her custody as a violation of the Constitution or U.S. law.<sup>232</sup> Consequently, because the Petitioners sought relief from their detention, the court found that the claims under the Alien Tort Claims Act and the Administrative Procedure Act were actually habeas appeals.<sup>233</sup> Furthermore, the court found that, although the *Odah* Petitioners did not directly join the *Rasul* Petitioners in seeking relief from their detention, the *Odah* Petitioners were indirectly challenging their detention.<sup>234</sup> To support this finding, the court noted that the *Odah* Petitioners expressly stated that their purpose for seeking a hearing in an independent forum was to challenge

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<sup>223</sup> *Id.* at 61.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 58.

<sup>226</sup> *Id.*

<sup>227</sup> See 28 U.S.C. § 1350 (2005); see also *Rasul*, 215 F. Supp. 2d at 58.

<sup>228</sup> See 5 U.S.C. §§ 555, 702, and 706 (2005); see also *Rasul*, 215 F. Supp. 2d at 58.

<sup>229</sup> *Rasul*, 215 F. Supp. 2d at 61.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 62.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 62-63.

their detention.<sup>235</sup> Thus, the court concluded that the Petitioners' entire consolidated complaint must be viewed as a habeas petition.<sup>236</sup>

With this conclusion, the court reasoned that *Eisentrager* was directly applicable to the Petitioners.<sup>237</sup> The court noted that *Eisentrager* distinguished between citizens and aliens when determining the extent of protections allowed under the Constitution.<sup>238</sup> The court also noted that *Eisentrager* further distinguished between aliens inside and outside U.S. territorial sovereignty.<sup>239</sup> The court found that aliens within U.S. territorial sovereignty were afforded qualified rights under the Constitution.<sup>240</sup> On the other hand, aliens outside U.S. territorial sovereignty were afforded a limited review only in cases where they applied for and were denied U.S. citizenship.<sup>241</sup> Moreover, the court declined to accept the Petitioners' reasoning that *Eisentrager* turned on the determination that the prisoners in that case were enemy aliens.<sup>242</sup> Instead, the court reasoned that *Eisentrager* turned on the presence of the prisoners outside U.S. territorial sovereignty, finding such prisoners without any rights under the Constitution.<sup>243</sup> The court found that the designation of "enemy" versus "friendly alien" was immaterial under such circumstances.<sup>244</sup> As such, the court concluded that the status of the naval base at Guantanamo Bay, Cuba, was the controlling issue in determining whether the court had jurisdiction to hear the Petitioners' complaint.<sup>245</sup>

In determining the status of the naval base, the court noted three facts. First, the court found that the Petitioners did not deny that the base was outside U.S. sovereign territory, though the court also noted that this alone was not determinative of the base's status.<sup>246</sup> Second, the court reasoned that only *de jure* sovereignty over a territory was a sufficient basis to extend constitutional protections to Guantanamo Bay.<sup>247</sup> Thus, even if the court accepted the Petitioners' argument that the extensive control the United States exercised over Guantanamo Bay was equivalent to *de facto* sovereignty, it was not enough.<sup>248</sup> The court noted that the *Christopher* and *Bird* courts had already determined as much.<sup>249</sup> Third, the court found that the lease agreement between the United States and Cuba for

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<sup>235</sup> *Id.* at 63.

<sup>236</sup> *Id.* at 62.

<sup>237</sup> *Id.* at 65.

<sup>238</sup> *Id.* at 65-66 (discussing *Johnson v. Eisentrager*, 339 U.S. 763 (1956)).

<sup>239</sup> *Id.* (citing *Eisentrager*, 339 U.S. at 770).

<sup>240</sup> *Id.* at 66 (citing *Chin Yow v. United States*, 208 U.S. 8, 13 (1908)).

<sup>241</sup> *Id.* at 67 (citing *Zadvydas v. Davis*, 553 U.S. 678, 693 (2001)).

<sup>242</sup> *Id.* (citing *Eisentrager*, 339 U.S. at 777-78).

<sup>243</sup> *Id.* (citing *Zadvydas*, 553 U.S. at 693).

<sup>244</sup> *Id.* at 67.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 69.

<sup>247</sup> *Id.* at 71.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 71-72 (citing *Bird v. United States*, 923 F. Supp. 338, 343 (1996) and *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995)).

Guantanamo Bay expressly reserved *de jure* sovereignty over the territory to Cuba.<sup>250</sup> Thus, the court concluded that the United States did not exercise sufficient sovereignty over Guantanamo Bay to put the Petitioners outside the ambit of *Eisentrager*.<sup>251</sup> Therefore, the court held that the Petitioners were barred by *Eisentrager* from accessing U.S. courts and could not rely on the provisions of the Habeas Statute to challenge their detention.<sup>252</sup>

## 2. U.S. Court of Appeals for the D.C. Circuit

The D.C. Circuit agreed with the District Court's conclusion.<sup>253</sup> The court also agreed that *Eisentrager* applied to bar the Petitioners' habeas appeal on jurisdictional grounds.<sup>254</sup> Like the District Court, the court reasoned that the enemy alien designation of the *Eisentrager* petitioners was immaterial to the *Eisentrager* holding.<sup>255</sup> The court also reasoned that *Eisentrager* deprived the Petitioners of any rights under the Constitution upon which to base their habeas appeal.<sup>256</sup> The court found that such a conclusion was supported by the Supreme Court's express rejection in *Eisentrager* of the extraterritorial application of the Fifth Amendment to aliens irrespective of their location outside of U.S. territorial sovereignty as well as the affirmation of that rejection in *Verdugo-Urquidez*.<sup>257</sup>

The D.C. Circuit also rejected the Petitioners' contention that *Eisentrager* required *either* sovereignty or territorial jurisdiction to trigger Fifth Amendment protections.<sup>258</sup> The court noted that *Eisentrager*'s use of "territorial jurisdiction" did not imply that something less than sovereignty was required to extend Fifth Amendment protections.<sup>259</sup> Instead, the court reasoned that *Eisentrager*'s reference to territorial jurisdiction was intended to describe the extent of federal court jurisdiction and not as a trigger of constitutional protections.<sup>260</sup> The court concluded that nothing short of U.S. sovereignty over Guantanamo Bay was sufficient to trigger Fifth Amendment protections.<sup>261</sup> Because the lease agreement made clear that Cuba retained sovereignty over Guantanamo Bay, the court found that the Petitioners did not have any defendable constitutional rights upon which to base their habeas appeal.<sup>262</sup>

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<sup>250</sup> *Id.* at 71 (citing Bird, 923 F. Supp. at 343).

<sup>251</sup> *Id.* at 72-73.

<sup>252</sup> *Id.*

<sup>253</sup> Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. 2003).

<sup>254</sup> *Id.* at 1140.

<sup>255</sup> *Id.* at 1141 (citing Johnson v. Eisentrager, 339 U.S. 763, 765-66 (1950)).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990)).

<sup>258</sup> *Id.* at 1142.

<sup>259</sup> *Id.* at 1143.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1144.

<sup>262</sup> *Id.* at 1145.

C. U.S. Supreme Court Decision

In a 6-3 opinion written by Justice John Paul Stevens, the Supreme Court reversed the decision of the D.C. Circuit.<sup>263</sup> The majority implicitly held that territorial jurisdiction over the place of custody was sufficient to trigger Fifth Amendment protections and as such the Petitioners could challenge their detention through a writ of habeas corpus.<sup>264</sup> Justice Anthony Kennedy concurred with the majority's conclusion, but argued that the background and circumstances of detention should control whether Fifth Amendment protections should be extended.<sup>265</sup> In a scathing dissent, Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, argued that nothing less than sovereignty over the place of custody was required for application of the Fifth Amendment.<sup>266</sup> Because it was indisputable that the United States did not have sovereignty over Guantanamo Bay, Justice Scalia argued that the Petitioners were without any rights under the Constitution or U.S. law, and therefore could not invoke the writ of habeas corpus.<sup>267</sup>

1. *The Majority Opinion*

The majority held that the Petitioners had the right to a habeas appeal to challenge their detention by the United States in Guantanamo Bay.<sup>268</sup> To reach this conclusion, the Court first reasoned that the writ of habeas corpus was intended to be a last resort for a prisoner to challenge his detention by the Executive.<sup>269</sup> The Court also acknowledged that, in the case of aliens detained outside U.S. territorial sovereignty, its decision in *Eisentrager* was implicated.<sup>270</sup> However, the Court distinguished *Eisentrager*, noting that its holding relied on constitutional rather than statutory grounds.<sup>271</sup> The Court found that the appellate court's opinion in *Eisentrager* granted the *Eisentrager* prisoners access to federal court because they had a constitutional right to due process under the Fifth Amendment.<sup>272</sup> This, the Court reasoned, was what *Eisentrager* reversed.<sup>273</sup> As such, the *Eisentrager* decision did not determine, for example, whether the *Eisentrager*

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<sup>263</sup> Rasul v. Bush, 542 U.S. 466, 485 (2004).

<sup>264</sup> *Id.* at 476.

<sup>265</sup> See generally *id.* at 488.

<sup>266</sup> *Id.* at 488 (Scalia, J., dissenting).

<sup>267</sup> *Id.* at 504 (Scalia, J., dissenting).

<sup>268</sup> *Id.* at 483.

<sup>269</sup> *Id.* at 474-75. The Court framed the issue in the case as "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty." *Id.* (internal quotations omitted).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 474-79 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)) (noting that the Court reversed the D.C. Circuit's opinion in *Eisentrager*, which was based on constitutional grounds).

<sup>272</sup> *Id.* at 474; see also *supra* Part II.B.2 (discussing the D.C. Circuit's decision in *Eisentrager*).

<sup>273</sup> *Rasul*, 542 U.S. at 474.

prisoners were barred by the Habeas Statute from filing a habeas appeal.<sup>274</sup> Thus, because the only issue raised in *Rasul* was statutory in nature, *Eisenrager* had no application to bar the Petitioners' habeas appeal.<sup>275</sup>

Furthermore, the Court explained that six keys facts in *Eisenrager* were essential to its holding.<sup>276</sup> Specifically, the *Eisenrager* prisoners were (1) enemy aliens, (2) not residing in nor been to the United States, (3) captured and held by military authorities outside the United States, (4) tried and convicted by a military commission sitting outside the United States, (5) for war crimes committed outside the United States, and (6) at all times imprisoned outside the United States.<sup>277</sup> The Court reasoned that the Petitioners were distinguishable from the *Eisenrager* prisoners in that the Petitioners were not nationals of a country with which the United States was at war and denied that they engaged in any acts of aggression against the United States.<sup>278</sup> In addition, unlike the *Eisenrager* prisoners, the Petitioners were denied access to any tribunal and were not even charged with any wrongdoing for more than two years at a detention center over which the United States exercised exclusive jurisdiction and control.<sup>279</sup> Thus, the Court concluded that the Petitioners' circumstances were sufficiently distinguishable to make *Eisenrager* inapplicable as a bar to the Petitioners' habeas appeal.<sup>280</sup>

Of particular significance, the Court reasoned that *Eisenrager* could not apply when the detention at issue took place at a location within U.S. territorial jurisdiction.<sup>281</sup> The Court reasoned that, while there was no dispute that the naval base at Guantanamo Bay was outside U.S. sovereign territory, sovereignty was not key to the operation of the Habeas Statute.<sup>282</sup> Rather, the extent and nature of control exercised over a territory could also be sufficient to extend the reach of the Statute.<sup>283</sup> Because the United States exercised complete jurisdiction and control over Guantanamo Bay, the Court concluded that such control was sufficient to justify the Statute's application to prisoners held at the naval base.<sup>284</sup> To strengthen this conclusion, the Court noted that there was no dispute that federal courts had jurisdiction over claims by American citizens held at the base.<sup>285</sup> As

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> See *id.* (citing *Eisenrager*, 339 U.S. at 777); see also *supra* Part II.B.2 (discussing the majority opinion in *Eisenrager*).

<sup>278</sup> *Rasul*, 542 U.S. at 474.

<sup>279</sup> *Id.*

<sup>280</sup> See generally *id.* at 474-75.

<sup>281</sup> See generally *id.*

<sup>282</sup> *Id.* at 480.

<sup>283</sup> *Id.* (noting that historically, early English cases "confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown") (internal quotation marks omitted).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

such, since the Habeas Statute did not make any distinction based on alienage in its application, the Court reasoned that Congress did not intend to create a limitation on the extent of the Statute's reach based on a prisoner's citizenship.<sup>286</sup>

Having addressed the application of *Eisentrager*, the Court next determined that the language of the Habeas Statute itself did not bar the Petitioners' appeal.<sup>287</sup> While the Statute conferred authority to issue the writ to federal courts only within their respective territorial jurisdiction, it did not bar courts from issuing the writ so long as the custodian was within the issuing court's territorial reach, even if the prisoner was not.<sup>288</sup> The Court reasoned that *Ahrens*, which required that the prisoner be present within the territorial jurisdiction of the issuing court, was effectively overruled by *Braden*, where the Court held that such a requirement was not a prerequisite to the court's exercise of jurisdiction.<sup>289</sup> Consequently, the Court concluded that the fact that the Petitioners were detained in a location over which no federal court had jurisdiction was of no importance if a federal court had jurisdiction over their custodian, namely the U.S. military.<sup>290</sup> In other words, the Habeas Statute's jurisdictional requirement would be satisfied if the Petitioners filed their habeas appeal in a federal court that could reach the U.S. military with process.<sup>291</sup>

## 2. Justice Kennedy's Concurring Opinion

Justice Kennedy agreed with the majority's conclusion but differed on the reasoning behind it.<sup>292</sup> He reasoned that *Eisentrager*'s holding should be viewed as denying judicial interference in matters reserved by the Constitution to the Executive and the Legislative branches.<sup>293</sup> In other words, the Separation of Powers Clause prevented courts from considering the *Eisentrager* prisoners' habeas petition because, absent some connection to the United States, there was no nexus to invoke such authority.<sup>294</sup> Justice Kennedy interpreted this approach as recognizing a realm of political authority over military affairs where judicial authority should not interfere.<sup>295</sup> He further reasoned that such an approach required an inquiry into the circumstances of the detention to determine whether courts could entertain a habeas petition and thus grant relief.<sup>296</sup> Because the *Eisentrager* prisoners were proven enemy aliens and were detained outside the United States, and

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 483.

<sup>288</sup> *Id.* (citing *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973)).

<sup>289</sup> *Id.*; see also *supra* Part II.B.1 (discussing the *Ahrens* decision); Part II.B.3 (discussing the *Braden* decision). In a bizarre twist, the Court reasoned without further explanation that *Braden* also overruled "the statutory predicate to *Eisentrager*." *Rasul*, 542 U.S. at 476.

<sup>290</sup> *Rasul*, 542 U.S. at 483.

<sup>291</sup> See generally *id.*

<sup>292</sup> *Id.* at 484 (Kennedy, J., concurring).

<sup>293</sup> *Id.*

<sup>294</sup> See generally *id.*

<sup>295</sup> *Id.* at 486.

<sup>296</sup> *Id.*

because the existence of jurisdiction would have undermined the authority of the military commanders on the field of battle in a time of war, Justice Kennedy reasoned that the matter in *Eisentrager* was appropriately left to the Executive, and thus no jurisdiction to hear the prisoners' claims was found.<sup>297</sup> However, as a corollary to this approach, he also reasoned that where the facts and circumstances of detention were different, a different conclusion could be reached.<sup>298</sup>

Applying this approach to the Petitioners, Justice Kennedy determined that the facts of *Rasul* were sufficiently distinguishable from *Eisentrager*, rendering *Eisentrager* inapplicable as a bar to the Petitioners' habeas appeal for two reasons.<sup>299</sup> First, he agreed with the majority's reasoning that the extent of the United States' jurisdiction and control over Guantanamo Bay justified the reach of the Habeas Statute over it.<sup>300</sup> Second, he found that the indefinite nature of the Petitioners' detention coupled with the total denial of access to any tribunal in which to challenge such detention called for judicial review.<sup>301</sup> He reasoned that such confinement could result in detaining both friends and foe alike without any recourse, and could not be justified by any military exigency, particularly when custody was outside any zones of active combat.<sup>302</sup>

Thus, Justice Kennedy concluded that because of the particular facts of *Rasul*, jurisdiction over the Petitioners' habeas petition should be found.<sup>303</sup> He reasoned that this approach was preferable to the majority's approach which, by basing such authority on jurisdiction over the custodian, would have granted automatic statutory jurisdiction over claims of persons held outside the United States.<sup>304</sup>

### 3. *Dissenting Opinion*

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.<sup>305</sup> In a scornful opinion, he disagreed with the Court's reasoning and found that the Habeas Statute should not be extended to aliens held by the military outside U.S. sovereign territory and outside the territorial jurisdiction of any court.<sup>306</sup>

Justice Scalia first noted that, while the *Eisentrager* opinion was largely devoted to the determination that the *Eisentrager* prisoners did not have a constitutional right to a habeas appeal, it implied that there was also no statutory source

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<sup>297</sup> See generally *id.*

<sup>298</sup> *Id.* at 486.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* Justice Kennedy found the unchallenged and indefinite nature of United States' control over Guantanamo to be key to this conclusion. *Id.* He reasoned that such control "produced a place that belongs to the United States, extending the "implied protection" of the United States to it." *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 488.

<sup>304</sup> *Id.* at 486-87.

<sup>305</sup> *Id.* at 490 (Scalia, J., dissenting).

<sup>306</sup> *Id.*

for such a right.<sup>307</sup> He also noted that the appellate court in *Eisentrager* found jurisdiction to hear the prisoners' habeas appeals because it had, for one, determined that the prisoners had a constitutional right to such an appeal, and secondly, because it was trying to avoid declaring the Habeas Statute unconstitutional for denying such a right.<sup>308</sup> In other words, the prisoners' constitutional right was the source of the appellate court's finding of jurisdiction.<sup>309</sup> Justice Scalia reasoned that once the *Eisentrager* Court rejected this source, it was reasonable to presume that the *Eisentrager* Court did not find any other source for jurisdiction.<sup>310</sup> Otherwise, the Court would have agreed with the appellate court's conclusion, but disagreed with the reasoning behind it.<sup>311</sup> Thus, Justice Scalia concluded that *Eisentrager's* rule was that the Habeas Statute did not confer court jurisdiction to hear habeas appeals by aliens held outside U.S. sovereign territory.<sup>312</sup>

Furthermore, Justice Scalia argued that *Braden* did not overrule *Ahrens*, but, instead, it merely distinguished it.<sup>313</sup> He found that *Braden* stood for the proposition that, where a prisoner was held in multiple jurisdictions within the United States, he or she may seek a writ of habeas corpus in the jurisdiction of his legal confinement.<sup>314</sup> This was the case even if such location was not the location of his physical confinement.<sup>315</sup> However, outside of this limited circumstance, *Ahrens's* jurisdictional rule limited a federal court's authority to hear habeas appeals from prisoners detained within the court's territorial reach.<sup>316</sup> As such, since the Petitioners were not held in multiple jurisdictions in the United States, their petition did not justify application of *Braden's* limited exception to the *Ahrens* rule.<sup>317</sup> Thus, Justice Scalia concluded that *Ahrens* required the Petitioners' presence within the territorial reach of a federal court before that court could have jurisdiction to hear their habeas appeal.<sup>318</sup>

Justice Scalia also disagreed with the Court's finding that complete jurisdiction and control over Guantanamo Bay was sufficient to extend the reach of the

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<sup>307</sup> *Id.* at 492 (Scalia, J., dissenting).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *See generally id.*

<sup>312</sup> *Id.* at 493-94 (Scalia, J., dissenting).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* Justice Scalia further distinguished *Braden* on the basis that it focused solely on the choice of forum in which the *Braden* prisoner could file his habeas appeal. *Id.* at 495-96. He reasoned that *Braden* was concerned with the expense and inconvenience of transporting prisoners, witnesses, or records long distances to the issuing court. *Id.* This, he reasoned, was at odds with the *Rasul* decision since this decision required domestic hearings for prisoners held abroad and dealing with events that transpired abroad. *Id.* Justice Scalia further reasoned that the *Rasul* holding, in essence, allowed the Petitioners to forum-shop, which the Habeas Statute was expressly promulgated to prevent. *Id.* at 497-99.

<sup>316</sup> *Id.* at 494 (Scalia, J., dissenting).

<sup>317</sup> *Id.* at 494-96 (Scalia, J., dissenting).

<sup>318</sup> *Id.*

Habeas Statute to the naval base there.<sup>319</sup> He reasoned that such jurisdiction and control could also be achieved by lawful force of arms, which would imply that the Habeas Statute could logically extend to parts of Iraq and Afghanistan under U.S. control.<sup>320</sup> In fact, the statute could also extend to the prison in Landsberg, Germany, where the *Eisenstrager* prisoners were held.<sup>321</sup> Therefore, Justice Scalia found that such logic was untenable and could result in an unreasonable expansion of the scope of the Habeas Statute.<sup>322</sup>

In summary, Justice Scalia concluded that the extension of the Habeas Statute was unjustified by logic or case law.<sup>323</sup> Particularly, he found such an extension during wartime to be judicial adventurism of the worst kind.<sup>324</sup> He reasoned that the Executive was justified in relying on the Court's prior precedent to expect that detaining the Petitioners in Guantanamo Bay would shield military affairs from the cumbersome machinery of domestic courts.<sup>325</sup> Instead, the Court's decision would effectively allow the Petitioners to choose any one of ninety-four federal courts to file their habeas petition.<sup>326</sup>

#### IV. Analysis

The Supreme Court correctly concluded that the Petitioners had the right to the writ of habeas corpus to challenge their detention.<sup>327</sup> However, in reaching this conclusion, the Court misconstrued its own precedent in *Eisenstrager* and the extent to which *Braden* applied to the Petitioner's appeal.<sup>328</sup> The key to the Court's holding in *Rasul* was its implicit finding that the Habeas Statute did not require U.S. sovereignty over the place of detention in order to grant a prisoner the right of a writ to challenge such detention.<sup>329</sup>

Furthermore, the *Rasul* holding leaves untouched the question of the Petitioners' rights under the Constitution.<sup>330</sup> The Court avoided the issue by refusing to recognize that its *Eisenstrager* holding was largely based on its finding that a connection with the United States is a *sine qua non* for the extraterritorial appli-

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<sup>319</sup> *Id.* at 500-01 (Scalia, J., dissenting).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* Justice Scalia also found no support for extending the reach of the Habeas Statute in case law. *Id.* at 502-504. He found that the cases noted by the Court in support of its holding were clearly distinguishable on the basis that the prisoner was held in a territory over which the United States had clear authority by treaty or was himself an American citizen. *Id.*

<sup>323</sup> *Id.* at 493-95 (Scalia, J., dissenting).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 504-06 (Scalia, J., dissenting).

<sup>326</sup> *Id.* at 506 (Scalia, J., dissenting).

<sup>327</sup> See *infra* Part IV.A (discussing the *Rasul* holding within the context of the dissenting opinion's rationale).

<sup>328</sup> *The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L. REV. 396, 396 (2004) ("The majority misread its precedents in concluding that the habeas statute conferred jurisdiction independent of what the Constitution requires."); see *infra* Part IV.A.

<sup>329</sup> See *infra* Part IV.A.

<sup>330</sup> See *infra* Part IV.B.

cation of the Fifth Amendment's due process clause.<sup>331</sup> By so refusing, the Court only delayed addressing the issue and guaranteed that the Petitioners would remain incarcerated for years to come or until the President, at his own discretion, decides to free them.<sup>332</sup>

## A. The Jurisdictional Approach Adopted by the *Rasul* Court

### 1. Analysis of Historical Precedent

The first step in understanding the Supreme Court's decision in *Rasul* is to analyze the full implications of the Supreme Court's decisions in *Ahrens*, *Braden*, and *Eisentrager*.<sup>333</sup> In *Ahrens*, the Court was asked to interpret the extent of federal courts' jurisdiction to hear habeas appeals by aliens.<sup>334</sup> The issue in *Ahrens* involved a procedural question as to the proper forum for the detained aliens to file their habeas appeal.<sup>335</sup> At no point did the *Ahrens* Court question the aliens' right to file such an appeal.<sup>336</sup> Moreover, at no point did the *Ahrens* Court conclude, for example, that the *Ahrens* prisoners could not file their petition in the district court sitting in New York.<sup>337</sup> Although Justice Rutledge's dissent in the case focused on the fact that the Court's decision created a jurisdictional threshold that could defeat a habeas petition on purely procedural grounds, there was nothing in the Court's opinion to indicate that such procedural grounds are sufficient to completely deny a petitioner's right to the writ.<sup>338</sup> In other words, because the petitioners could have filed their petition in the district court sitting in New York, there were no substantive constitutional implications to override the procedural defect that the Court found.<sup>339</sup>

Next, the Supreme Court considered *Eisentrager* and the application of the Habeas Statute to alien prisoners that were at no time within U.S. territorial juris-

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<sup>331</sup> *The Supreme Court, 2003 Term Leading Cases*, *supra* note 328, at 396 (“[t]he Supreme Court recognized the perils of allowing courts to hamper wartime security, and set forth specific limits on the jurisdiction of federal courts over claims brought by nonresident or resident aliens. These limits followed the common law tradition of excluding alien combatants and prisoners of war from access to the writ of habeas corpus.”); *see also infra* Part IV.B.

<sup>332</sup> *See infra* Part IV.B.

<sup>333</sup> *See generally* *Rasul v. Bush*, 542 U.S. 466, 476-79 (2004); *see also supra* Part III.C.1 (discussing the *Rasul* majority opinion).

<sup>334</sup> *See supra* Part II.B.1 (discussing the *Ahrens* decision).

<sup>335</sup> *See* Rachel E. Rosenbloom, *Is The Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the “Immediate Custodian” Rule in Immigration-Related Habeas Actions*, 27 N.Y.U. REV. L. & SOC. CHANGE 543, 552 (2001).

<sup>336</sup> *See generally* *Ahrens v. Clark*, 335 U.S. 188 (1948).

<sup>337</sup> *See* *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 500 (1973) (“On the facts of *Ahrens* itself . . . petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district.”); *see also supra* Part II.B.1 (discussing the *Ahrens* decision); *see also supra* Part II.B.3 (discussing the *Braden* decision).

<sup>338</sup> *Braden*, 410 U.S. at 499-500 (noting that in view of the developments since *Ahrens*, *Ahrens* could not be viewed as imposing an inflexible jurisdictional rule, forcing the choice of an inconvenient forum even in a case that could not have been foreseen when *Ahrens* was decided).

<sup>339</sup> *Id.* at 500.

diction.<sup>340</sup> The Court reversed the D.C. Circuit's opinion that found jurisdiction based on constitutional grounds.<sup>341</sup> In so doing, the Court reasoned that the right to due process was conditioned on the alien's presence within a U.S. territorial jurisdiction.<sup>342</sup> The underlying rationale behind this decision was two-fold. First, the Court impliedly concluded that the petitioners lacked Fifth Amendment rights, or any other constitutional rights, upon which a habeas appeal could be based because they had no connection with the United States, outside the facts of their incarceration.<sup>343</sup> Second, because the petitioners lacked a sufficient constitutional basis to invoke the power of the judiciary in any district, there was no need to consider the operation of the jurisdictional limitations of the Habeas Statute to determine the appropriate forum in which the petitioners could file their habeas appeal.<sup>344</sup>

The Supreme Court reached the clash between the procedural and substantive requirements of the writ of habeas corpus in *Braden*.<sup>345</sup> In *Braden*, the jurisdictional limitation on habeas appeals enunciated by the Court in *Ahrens* would have effectively barred the petitioner from exercising his constitutional right to a speedy trial.<sup>346</sup> In other words, the Court faced the same choices that the D.C. Circuit in *Eisentrager* faced: declare the Habeas Statute unconstitutional as applied to the *Braden* petitioners or construe the statute as vesting jurisdiction in the district court in Kentucky.<sup>347</sup> The Court chose the second approach and found that the language of the Habeas Statute required nothing more than the issuing court having jurisdiction over the custodian responsible for the challenged detention.<sup>348</sup> In essence, the Court impliedly indicated that it would bypass the procedural rule from *Ahrens* only if it was an impediment to a petitioner's exercise of his or her constitutionally-guaranteed substantive right.<sup>349</sup>

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<sup>340</sup> Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 254 (2003) (discussing the importance of the location of the German enemy aliens).

<sup>341</sup> See *supra* Part II.B.2 (discussing the D.C. Circuit's opinion in *Eisentrager*).

<sup>342</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights . . ."); see also *supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

<sup>343</sup> See *Eisentrager*, 339 U.S. at 776.

<sup>344</sup> *Id.* at 790-91 ("Since in the present application we find no basis for invoking federal judicial power in any district, we need not debate as to where, if the case were otherwise, the petition should be filed.").

<sup>345</sup> See *supra* Part II.B.3 (discussing the *Braden* decision).

<sup>346</sup> *Id.*

<sup>347</sup> See *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

<sup>348</sup> See *id.* at 494-95; see also Christopher M. Schumann, *Bring It On: The Supreme Court Opens the Floodgates with Rasul v. Bush*, 55 A.F. L. REV. 349, 358 (2004) ("[t]he Rasul Court found that the *Braden* decision held that application of the writ does not necessarily depend upon the location of the party invoking it, but rather upon the location of the government actor who has orchestrated the detention.").

<sup>349</sup> See *Rasul v. Bush*, 542 U.S. 466, 493-95 (2004) (Scalia, J., dissenting); see also *supra* Part III.C.3 (discussing Justice Scalia's dissenting opinion in *Rasul*).

## 2. Application of Historical Precedent

The *Rasul* Court's interpretation of *Braden* as overruling *Ahrens*'s jurisdictional rule may be an overstatement of *Braden*'s impact.<sup>350</sup> As Justice Scalia argued in his dissent, *Braden* distinguished *Ahrens* by conferring authority on federal courts to hear a habeas appeal based on jurisdiction over the custodian when reliance on territorial jurisdiction alone would have deprived the *Braden* petitioner of his constitutionally-guaranteed right to a speedy trial.<sup>351</sup> In other words, the determination that the petitioner in *Braden* had a constitutionally-guaranteed right to enforce in federal court was the predicate to the Court's determination that the Habeas Statute could not deprive him of that right on procedural grounds.<sup>352</sup> To interpret *Braden* in any other way would be tantamount to giving federal courts worldwide jurisdiction over any claims by federal prisoners or detainees.<sup>353</sup> There was nothing in *Braden* to indicate that the Court intended such expansive result.<sup>354</sup>

In addition, as Justice Scalia argued, the Court's conclusion that *Braden* overruled the statutory predicate to *Eisentrager* may be inaccurate.<sup>355</sup> The *Eisentrager* Court never reached the statutory question addressed by *Braden* and did not determine the impact of the jurisdictional limitations in § 2241(a) to the petitioners in the case.<sup>356</sup> The *Eisentrager* Court concluded that because the petitioners did not have cognizable constitutional or statutory rights, the question of the choice of forum in which to enforce these rights was irrelevant.<sup>357</sup> In other words, the Court impliedly concluded that the petitioners could not file a habeas appeal under § 2241(c)(3) because their detention was not in violation of the

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<sup>350</sup> See *Rasul*, 542 U.S. at 478-79 (majority opinion) (arguing that *Braden* impliedly overruled *Ahrens*'s jurisdictional rule in all circumstances).

<sup>351</sup> See *id.* at 492-94 (Scalia, J., dissenting) (noting that the *Braden* Court was careful to distinguish the exception it was creating in *Braden* from the general rule of *Ahrens*); see also Schumann, *supra* note 348, at 363 (noting that the key of *Braden* was the fact that the Court recognized that it would serve no useful purpose to apply the *Ahrens* general rule to the *Braden* petitioner who was being incarcerated in Alabama when it was Kentucky directing his detention, which was the basis of his habeas appeal).

<sup>352</sup> See *Rasul*, 542 U.S. at 496 (noting that *Braden*'s analysis was based on forum inconvenience, something that did not play a part in the *Eisentrager* decision); see also *supra* Part III.C.3 (discussing Justice Scalia's dissent in *Rasul*); see also Rosenbloom, *supra* note 335, at 553-54 (noting that while state and federal convictions were no longer governed by *Ahrens* as a result of the *Braden* decision, other types of cases, including cases of military confinement, extradition, immigration, interstate detainers, and challenges to the legality of prison term, were subject to *Ahrens*'s territorial limitation).

<sup>353</sup> See *Rasul*, 542 U.S. at 499-500; see also *supra* Part III.C.3 (discussing Justice Scalia's dissenting opinion in *Rasul*).

<sup>354</sup> See generally *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

<sup>355</sup> See *Rasul*, 542 U.S. at 492-94 (Scalia, J., dissenting) (noting that even if *Braden* overruled parts of *Ahrens*, the fact that *Braden* did not touch any of the statutory issues considered by *Eisentrager* makes it hard to accept the proposition that *Braden* overruled any part of *Eisentrager*).

<sup>356</sup> See *Braden*, 410 U.S. at 488 (stating that the *Braden* petitioner was entitled to raise his constitutional challenge for a speedy trial and that the issue before the Court was the choice of forum in which to review such challenge).

<sup>357</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 790-91 (1950) ("Since in the present application we find no basis for invoking federal judicial power in any district, we need not debate as to where, if the case were otherwise, the petition should be filed.").

Constitution or any laws of the United States.<sup>358</sup> Thus, it is difficult to see how *Braden's* conclusion, based upon the interpretation of the procedural limitations in § 2241(a), could have had any impact on *Eisentrager's* holding—which was based on the substantive limitations in § 2241(c)(3).<sup>359</sup>

However, contrary to Justice Scalia's conclusion, the Court's holding in *Rasul* did not overturn *Eisentrager*.<sup>360</sup> *Eisentrager* was premised on two key facts.<sup>361</sup> First, the prisoners in the case were found guilty of war crimes against the United States by a military tribunal.<sup>362</sup> However, even enemy aliens had a limited right of review of their enemy designation so long as they had sufficient connection with U.S. territorial jurisdiction.<sup>363</sup> Second, and more importantly, although the Court reached this conclusion based solely on factual allegations in the pleadings and not on any factual findings by the trial court, the Court found that the prisoners did not have any connection with the United States.<sup>364</sup> This fact alone was the basis for the Court's conclusion that the prisoners did not merit even the limited review afforded to enemy aliens who possess sufficient connections to the United States.<sup>365</sup> Without any cognizable rights under the Constitution or

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<sup>358</sup> *Id.* at 790.

<sup>359</sup> *Id.* The Court noted that both the district and appellate courts in *Eisentrager* decided the case based on case law where the petitioner's right to habeas appeal was unquestioned and the only issue left to resolve was where to make such appeal. *Id.* However, the *Eisentrager* Court found that petitioners in that case did not have a constitutional claim to support their right to a habeas appeal and, therefore, the issue of which forum to make this appeal was irrelevant. *Id.* at 790-91.

<sup>360</sup> See *Rasul v. Bush*, 542 U.S. 466, 492-495 (2004) (Scalia, J., dissenting), (discussing Justice Scalia's dissenting opinion in *Rasul*). Justice Scalia argued that because *Braden* did not deal with the issues involved in *Eisentrager*, *Braden* did not overturn *Eisentrager*. *Rasul*, 542 U.S. at 493-95. Thus, by finding jurisdiction to hear the *Rasul* Petitioners' habeas appeal, the Court must logically reverse *Eisentrager* whose holding would be directly contrary to the holding of *Rasul*. *Id.*

<sup>361</sup> *Eisentrager*, 339 U.S. at 777. While the *Eisentrager* Court listed six key facts that it found relevant to its analysis, these facts can be summarized to the petitioners' status as friendly or enemy alien and the level of connection they had with the United States. *Id.*

To support [the assumption that the petitioners are entitled, as a matter of constitutional right, to sue in federal court] we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

*Id.*

<sup>362</sup> *Id.* at 776.

<sup>363</sup> *Id.* at 775.

The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.

*Id.*; see also *supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

<sup>364</sup> *Eisentrager*, 339 U.S. at 778 ("[A]t no relevant time were [the *Eisentrager* petitioners] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

<sup>365</sup> *Id.*

U.S. law, the *Eisentrager* prisoners did not have sufficient grounds to invoke the protections of the Habeas Statute under § 2241(c)(3).<sup>366</sup>

As such, the Court's finding in *Rasul* that Guantanamo Bay was effectively within U.S. territorial jurisdiction, and, by implication that the *Rasul* prisoners had sufficient connections to the United States, put them outside the ambit of *Eisentrager*.<sup>367</sup> The *Rasul* Court determined that the United States exercised complete jurisdiction and control over the land and could retain such jurisdiction and control for as long as it desired.<sup>368</sup> In addition, the Court expressly refused to consider applying the Habeas Statute to prisoners in Guantanamo Bay as an extraterritorial application of the statute, considering such application to be within U.S. territorial jurisdiction.<sup>369</sup>

It is wholly unclear what criteria the Court found to be controlling in its designation of Guantanamo Bay as within U.S. territorial jurisdiction.<sup>370</sup> It is also unclear how the Court's decision in *Rasul* comports with its decision in *Vermilya-Brown* where the Court concluded that complete jurisdiction and control were not sufficient to find that the United States exercised sovereignty over a territory.<sup>371</sup> What is clear is that the Court decided that territorial jurisdiction, not sovereignty, is sufficient to trigger the Habeas Statute.<sup>372</sup>

This approach has merit in light of the nature of control the United States exercises over Guantanamo Bay.<sup>373</sup> The lease between the United States and Cuba gave the United States extensive control over Guantanamo Bay, although it reserved ultimate sovereignty for Cuba.<sup>374</sup> Unlike the Bermuda lease the Court considered in *Vermilya-Brown*, the Guantanamo Bay lease does not impose a durational requirement upon its validity.<sup>375</sup> In fact, it vests complete discretion

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<sup>366</sup> *Id.* at 790-91; see also *supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

<sup>367</sup> *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004). Although the Court noted that the Petitioners' claims "unquestionably describe" acts in violation of the Constitution and the laws of the United States, the Court did not really explain how the Petitioners could have any rights to enforce them unless the location of the Petitioners' detention was such that the protections of both the Constitution and the laws of the United States extended there. *Id.* at 483-84.

<sup>368</sup> *Id.* at 480-81; see also *supra* Part III.C.1 (discussing the majority's opinion in *Rasul*).

<sup>369</sup> *Rasul*, 542 U.S. at 480-81.

<sup>370</sup> See *id.*; see also *The Supreme Court, 2003 Term Leading Cases*, *supra* note 328, at 402 (noting that both the majority and concurring opinions in *Rasul* downplayed the canon that some physical connection between the prisoner and the United States was required to trigger the prisoner's constitutional right to access U.S. courts).

<sup>371</sup> See *supra* Part II.D.2 (discussing the legal status of Guantanamo Bay).

<sup>372</sup> *Rasul*, 542 U.S. at 480-81; see also *supra* Part III.C.1 (discussing the majority's opinion in *Rasul*). While the Court did not expressly state that the level of control the United States exercises over Guantanamo Bay was sufficient to extend operations of the Habeas Statute to the territory, it clearly establishes that the doctrine of extraterritoriality "has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." *Rasul*, 542 U.S. at 480. At the same time, the Court acknowledged that Cuba retained sovereignty over Guantanamo Bay. *Id.* at 469-73. Read together, one can reasonably conclude that territorial jurisdiction was a concept less than full sovereignty and sufficient by itself for the operation of the Habeas Statute.

<sup>373</sup> See generally *Rasul*, 542 U.S. at 480-81.

<sup>374</sup> See *id.* at 469-72; see also *supra* Part II.D.1 (discussing the history of Guantanamo Bay).

<sup>375</sup> *Rasul*, 542 U.S. at 480-81; see also *supra* Part II.D.2 (discussing the legal status of Guantanamo Bay).

in the United States to determine if and when control of the land should revert back to Cuba.<sup>376</sup> Furthermore, unlike the base in Bermuda, the base at Guantanamo Bay effectively operates outside the constraints of Cuban law.<sup>377</sup> The base is separated by 50,000 mines planted in Cuban territory around the base to prevent anyone from entering the base without the express authorization of the United States.<sup>378</sup> In fact, the United States, not Cuba, controls all entry and exit points to the base.<sup>379</sup> Moreover, unlike any other U.S. overseas military base, there is no Status-of-Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel at Guantanamo Bay.<sup>380</sup> Indeed, in recent years, the United States exercised criminal jurisdiction over both citizens and aliens on the land to the exclusion of Cuban law.<sup>381</sup> Criminal defendants were brought to the United States for trial and were given the full panoply of constitutional protections.<sup>382</sup> In sum, while Cuba retained ultimate jurisdiction over the land on paper, in reality, Cuban sovereignty over Guantanamo Bay was nothing more than a legal fiction unsupported by any measure of recognized sovereignty.<sup>383</sup>

## B. The Constitutional Approach

The Court's jurisdictional approach provides the prisoners at Guantanamo Bay with a venue in which they could challenge their designation as enemy aliens.<sup>384</sup> While this solution addresses the immediate issue of the Prisoners' access to federal courts, it leaves untouched the core issue regarding the extent of the Prisoners' rights under the Constitution.<sup>385</sup> In addition, this solution ignores the deliberate and methodical manner by which the Executive went about depriving prisoners in the War on Terror from the fundamental protections which lie at the core of our legal system and tradition.

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<sup>376</sup> *Rasul*, 542 U.S. at 480-81; see also *supra* Part II.D.1 (discussing the history of Guantanamo Bay).

<sup>377</sup> See *supra* Part II.D.1 (noting that the lease agreement between the United States and Cuba, while recognizing Cuban sovereignty over the territory, gave the United States complete jurisdiction and control over the territory and its affairs).

<sup>378</sup> See Eddie Dominguez, *Mines Removed at Guantanamo Base*, AP, para. 1-2 (Jan. 17, 1998), <http://www.cubanet.org/CNews/y98/jan98/17e6.htm>.

<sup>379</sup> *Id.* at para. 4 (noting that the naval base at Guantanamo Bay is surrounded by 4,000 Cuban soldiers and protected from within by only 400 Marines).

<sup>380</sup> Neuman, *supra* note 136, at 39.

<sup>381</sup> *Id.* at 43.

<sup>382</sup> *Id.* at 43-44.

<sup>383</sup> See generally *supra* Part II.D.1. This approach has support in recent case law. The Ninth Circuit in *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *reversed and remanded*, 542 U.S. 952 (2004), *vacated and remanded to the Ninth Circuit for further consideration*, followed the same logic. The Ninth Circuit concluded that even if Guantanamo Bay was not considered within U.S. sovereign territory, it must be considered within U.S. territorial jurisdiction by virtue of the level of control the United States exercised over it. *Gherebi*, 352 F.3d at 1299. The court then relied on *Braden* to find that the jurisdictional limitation in § 2241(a) allowed federal court authority to be found based on jurisdiction over the custodian. *Id.* at 1301.

<sup>384</sup> *Gherebi*, 352 F.3d at 1301.

<sup>385</sup> *The Supreme Court, 2003 Term Leading Cases*, *supra* note 328, at 400 ("Justice Stevens did not take a position on whether his statutory holding was also constitutionally compelled . . .").

Some of our nation's core values were expressed by our founding fathers in the Declaration of Independence.<sup>386</sup> Our founding fathers recognized that there are certain rights that transcend national borders or ethnicity, including the right to life, liberty, and the pursuit of happiness.<sup>387</sup> Thus, it would seem logical that these ideals would also be reflected in the Constitution. It is the Constitution that limits actions of the federal government that could potentially infringe upon these inherent rights. Indeed, the Bill of Rights contains an enumeration of the limitations the drafters of the Constitution imposed on the federal government. Among these limitations are the mandates of the Fifth Amendment.

Unlike any other right included in the Bill of Rights, the Fifth Amendment extends its mandate to "any person."<sup>388</sup> It requires that no person will be tried on a capital or "infamous" crime without being indicted by a grand jury, except in cases arising in the military during times of war or public danger.<sup>389</sup> It also protects any person from being tried for the same crime twice and from being compelled to provide self-incriminating evidence at a criminal trial.<sup>390</sup> It further provides that no person shall be deprived of life, liberty, or property without due process of law.<sup>391</sup> Lastly, it protects private property from public use without just compensation.<sup>392</sup>

Because the Constitution operates as a limit on federal government authority, it would seem reasonable to conclude that the instructions of the Fifth Amendment prohibit the government from undertaking any action that would deny those enumerated rights to any person. Indeed, this conclusion formed the basis of Justice Black's dissenting opinion and the D.C. Circuit's opinion in *Eisen-trager*.<sup>393</sup> Both Justice Black and the D.C. Circuit relied on the fact that the protections of the Fifth Amendment required only one thing: action by the federal government.<sup>394</sup> Fifth Amendment protections are triggered by such action to protect any person affected. As such, the D.C. Circuit reasoned that because the prisoners in *Eisen-trager* were captured, tried, convicted, and incarcerated by the

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<sup>386</sup> See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776), available at [http://www.archives.gov/national-archives-experience/charters/declaration\\_transcript.html](http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html) (last visited Nov. 13, 2005).

<sup>387</sup> *Id.* at para. 2. The Declaration of Independence states, in relevant part:

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

*Id.* (emphasis added).

<sup>388</sup> See generally U.S. CONST. amend. V.

<sup>389</sup> U.S. CONST. amend. V.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> See *supra* Part II.B.2 (ii) (discussing the D.C. Circuit's opinion in *Eisen-trager*); see also *supra* Part II.B.2 (iv) (discussing Justice Black's dissenting opinion).

<sup>394</sup> See *supra* Part II.B.2 (ii) (discussing the D.C. Circuit's opinion in *Eisen-trager*); see also *supra* Part II.B.2 (iv) (discussing Justice Black's dissenting opinion).

military, the requisite nexus to trigger the protections of the Fifth Amendment was present. Thus, the court concluded that the prisoners could invoke the Habeas Statute to challenge their detention as a violation of due process.

Of course, this view was expressly rejected by the Court where Justice Jackson's majority opinion made clear that the Fifth Amendment did not have such a broad scope. Justice Jackson reasoned that if the Fifth Amendment was given such a broad scope, the other protections of the Bill of Rights would also extend to the *Eisentrager* prisoners and all enemy aliens in any theater of war. In particular, Justice Jackson expressly referenced the First Amendment's right to freedom of speech, press, and assembly; the Second Amendment's right to bear arms; the Fourth Amendment's right to be free from unreasonable searches and seizure; the Fifth Amendment's right to indictment by a grand jury; and the Sixth Amendment's right to trial by jury.<sup>395</sup>

However, both the Court's later decision in *Verdugo-Urquidez* and the express language of the Constitution bring into question the continued vitality of Justice Jackson's approach. In *Verdugo-Urquidez*, the Court determined that the Fourth Amendment did not apply to aliens subject to official action outside the territorial jurisdictions of the United States. To reach this conclusion, the Court noted that the First, Second, and Fourth Amendments restricted their protections to "the people." The Court reasoned that such a term implied a national connection with the United States that a nonresident alien, subject to official action outside of the United States, does not have. In other words, the Court interpreted the term "the people" to limit the application of the First, Second, and Fourth Amendments to persons with sufficient connection to the United States.

Furthermore, while the language of the Sixth Amendment confers the right to a jury in a criminal prosecution, it also calls for jurists to be selected from the state or a district previously defined by law wherein the crime was committed. The clear implication of these selection criteria is that the drafters of the Sixth Amendment did not intend its protections to extend outside the United States. Thus, contrary to Justice Jackson's conclusion, the First, Second, Fourth, and Sixth Amendments have no application to aliens without a national connection to the United States.

Moreover, unlike the First, Second, and Fourth Amendments, the plain language of the Fifth Amendment indicates that its protections will extend to any person. In this regard, it is obvious that the Fifth Amendment does not distinguish between citizens and aliens or between resident and nonresident aliens when imposing its limitations on government action. Furthermore, this interpretation comports with the intent expressed in the Declaration of Independence which recognizes that the right to life, liberty, and happiness are inalienable rights guaranteed to "all persons" without regard to citizenship. No other right has been expressed in such an expansive way in the Declaration of Independence. Thus, despite Justice Jackson's finding, the only reasonable conclusion is that the Fifth Amendment requires only government action to trigger its protections, and

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<sup>395</sup> Johnson v. Eisentrager, 339 U.S. 763, 784 (1950); see also *supra* Part II.B.2 (discussing Justice Jackson's majority opinion).

is intended to apply to aliens and citizens alike as impliedly stated in the Constitution.

Justice Jackson's innate fear that such application would hinder the government's efforts in times of war is not without merit.<sup>396</sup> Indeed, one cannot reasonably consider the text of the Constitution and the Declaration of Independence without regard to the practical realities facing our nation. Nor can one reasonably argue that the myriad of constitutional protections afforded to American citizens should be extended to our declared enemies. However, the judicial process exists as an independent check on the actions of the other branches of government to ensure that the principles upon which this nation was founded do not give way to expediency. There must be a framework through which the courts could fulfill this independent role by balancing the government's interest in the public good with the liberty interest of individuals protected by the Fifth Amendment.

Although the scope of substantive due process afforded to aliens outside U.S. territorial jurisdiction must be developed over time, the Court has already determined that the test set forth in *Mathews v. Eldridge*<sup>397</sup> is sufficient to balance these competing interests.<sup>398</sup> In *Mathews*, the Court determined that procedural due process of the Fifth and Fourteenth Amendments imposed constraints on the government when depriving an individual of a protected right.<sup>399</sup> The Court further found that the government must provide the individual with some form of a hearing before depriving him or her of such a right.<sup>400</sup> In determining the scope of this protection, the Court reasoned that three factors must be balanced: (1) the individual interest at stake,<sup>401</sup> (2) the fairness and adequacy of existing procedures and the probable value of additional procedural safeguards,<sup>402</sup> and (3) the public interest at stake.<sup>403</sup> For example, in a theater of war, the fairness and adequacy of procedures would likely be evaluated from the prospective of military exigency, and the public interest at stake would likely be at its maximum. Indeed, Justice Black's dissenting opinion in *Eisentrager* called for exactly such an approach.

Perhaps a better approach would be to adopt Justice Kennedy's reasoning in his concurring opinion in *Verdugo-Urquidez*. Justice Kennedy concluded that

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<sup>396</sup> See *infra* Part II.B.2 (discussing Justice Jackson's majority opinion in *Eisentrager*).

<sup>397</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>398</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). The Court relied on *Mathews* to conclude that a U.S. citizen was entitled to the protections of due process despite the government's compelling interest in securing the nation.

<sup>399</sup> *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.").

<sup>400</sup> *Id.* ("The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

<sup>401</sup> *Id.* at 341 (noting that the length of deprivation is also a factor in the private interest at stake).

<sup>402</sup> *Id.* at 343.

<sup>403</sup> *Id.* at 347-48 (stating that the financial costs alone are not determinative of the public interest, but they are a factor to consider).

there was no express textual limitation on the scope of the Bill of the Rights, and elected, instead, to rely on a contextual analysis of the Fifth Amendment's due process clause to determine the extraterritorial scope of constitutional rights. Implicit in Justice Kennedy's conclusion is that the due process clause is applicable outside the territorial jurisdiction of the United States. The only question to be resolved, then, is the scope of constitutional protections when procedural violations are alleged in cases involving overseas government action. Such approach would focus judicial attention not on whether the due process clause is applicable in a particular situation, which is assumed to apply in all situations, but rather on the much more substantive question of what exactly does due process mean within the circumstances of individual cases. The powerful simplicity of this approach, in comparison to the *Mathews* balancing test, is even more amplified in cases originating in Guantanamo Bay, which the Court has already concluded to be within U.S. territorial jurisdiction.

In conclusion, the *Rasul* Court should have expressly overruled part of its reasoning in *Eisentrager* and found that aliens, even enemy aliens, affected by federal government action are protected by the Fifth Amendment. At the same time, the Court could have preserved the ultimate conclusion in *Eisentrager* by finding that, although the prisoners had cognizable rights under the Constitution which would support their challenge under § 2241(c)(3), no due process violation existed. This result would be supported by the fact that (1) there were adequate procedural safeguards in the case, given a properly constituted military tribunal to consider the charges, (2) there were sufficient mechanisms to review the tribunal's conviction of the prisoners, and (3) there were no claimed violations of the Geneva Convention. Admittedly, these findings directly implicate the merits of the prisoners' claims in *Eisentrager*. However, the fact that the *Eisentrager* Court based its conclusion on the merits of the case necessitates such an approach.

By taking this approach, however, the *Rasul* Court would have determined once and for all that the Constitution stands above all three branches of government, and that its power and effectiveness is not beholden to the ingenuity of the Executive in devising schemes to circumvent it. Furthermore, the Court would have provided clear guidance to the lower courts to determine the extent of the prisoners' rights in the case.

## V. Impact

By adopting the jurisdictional approach to resolving the prisoners' rights to a habeas appeal, the Court addressed only the initial question of the prisoners' right to access federal courts. However, without clarifying exactly what rights the prisoners have, the lower courts are left without any guidance as to whether there is actually any violation of the Constitution or U.S. law if prisoners are detained indefinitely and without trial at Guantanamo Bay.<sup>404</sup> This will unavoidably cre-

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<sup>404</sup> See generally Nat Hentoff, *More Lawlessness at Guantanamo Bay*, DUNKIN DAILY DEMOCRAT (Nov. 30, 2004), <http://www.ddnews.com/story/1081711.html> ("Guantanamo remains a legal black hole.").

ate confusion in the lower courts and result in conflicting opinions on a threshold matter that the Court could have easily resolved in *Rasul*.

For example, in *In re Guantanamo Detainees*, Judge Green found that “[t]here would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment.”<sup>405</sup> Yet, Judge Leon in the same court concluded that *Rasul* did not confer on the Guantanamo detainees any substantive rights and was, instead, limited to whether these detainees had a right to judicial review of the legality of their detention under the Habeas Statute.<sup>406</sup> Judge Leon then found that the detainees had no substantive rights,<sup>407</sup> effectively limiting their rights under *Rasul* to simply filing papers with courts to raise claims that are bound to be dismissed for failure to state a claim upon which relief can be granted.

In *Hamdan v. Rumsfeld*,<sup>408</sup> which is currently under consideration by the Court, the Court once again has an opportunity to address the substantive issues that it avoided in *Rasul*. In *Hamdan*, the petitioner was denied the limited right for review of his status as an enemy combatant that *Eisentrager* held he is entitled to. He was detained in Guantanamo Bay without a hearing by any competent tribunal or the opportunity to effectively contest his designation as an enemy combatant.<sup>409</sup> In his continuing trial for war crimes by a military commission, the petitioner was denied the rights and protections of the Geneva Convention (III) Relative to the Treatment of Prisoners of War on the Executive’s unreviewed finding that the Convention does not apply to the petitioner or other similarly situated detainees. In essence, the Executive asserted the sole and exclusive authority to determine whether the detainees are subject to international treaties, what criminal process they will face,<sup>410</sup> what rights they will have,<sup>411</sup> who will judge them,<sup>412</sup> how they will be judged,<sup>413</sup> upon what crimes they will be sentenced,<sup>414</sup> and how the sentence will be carried out.<sup>415</sup> Nothing in the Constitution gives the Executive such complete and unfettered authority over the life,

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<sup>405</sup> *In re Guantanamo Detainees*, 355 F. Supp. 2d 443, 465 (D.D.C. 2005).

<sup>406</sup> *Khalid v. Bush*, 355 F. Supp. 2d 311, 322 (D.D.C. 2005).

<sup>407</sup> *Id.*

<sup>408</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33 (2005), cert. granted by 126 S. Ct. 622 (2005).

<sup>409</sup> *Id.* at 35.

<sup>410</sup> See Dep’t of Defense, Military Commission Order No. 1 (Revised), § 11 (Aug. 31, 2005), available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf> (last visited Jan. 23, 2006) [hereinafter MCO No. 1]. The President formed a military commission for the sole purpose of trying the *Hamdan* petitioner and other similarly situated detainees.

<sup>411</sup> *Id.* § 6D. For example, the Military Commission adopts neither the Federal Rules of Evidence nor the Military Rules of Evidence, which have been painstakingly developed through decades of experience and public comment. Instead, the Commission’s only rule governing, for example, admissibility of evidence is the arbitrary “probative value to a reasonable person” standard. *Id.* The Commission also has no prohibition on admissibility of evidence obtained by torture or unlawful coercion.

<sup>412</sup> *Id.* § 6H(4). The Executive can appoint and remove members of the Military Commission’s panel as well as members of the panel that was designed to review the final judgment of the Military Commission. *Id.*

<sup>413</sup> *Id.* § 3.

<sup>414</sup> *Id.*

liberty, or property of a human being, alien or citizen, within the territorial jurisdiction of the United States.<sup>416</sup>

The Supreme Court also missed an opportunity to define the Guantanamo detainees' rights under the Constitution before Congress essentially suspended the detainee's right for the writ of habeas corpus in December 2005.<sup>417</sup> Unless the Court determines the issue in *Hamdan*, the detainees are likely to remain deprived of their freedom without an understanding of exactly what crimes they committed or an opportunity to hear and rebut the evidence against them in a competent and independent forum. Sadly, the process now afforded to the detainees is defined in terms over which the United States has consistently criticized other countries.<sup>418</sup>

## VI. Conclusion

If the events surrounding the Abu Ghraib prison in Iraq reveal anything, it is that the Executive is incapable of creating sufficient internal checks and balances to ensure that the rule of law, which is deeply rooted in our nation's consciousness, is followed.<sup>419</sup> There is no dispute that the War on Terror has been thrust upon us because of the senseless death of thousands of our fellow Americans. There is also no dispute that we are justified in taking all reasonable measures to protect ourselves following this act of barbarism. However, the moral righteousness of our cause is measured not only by the purity of our objectives but also by the means we use to achieve them. While expediency and convenience can be helpful in addressing our short-term objectives of catching those who would

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<sup>415</sup> *Id.* §§ 6H(2)-(4). The President has sole and exclusive authority to accept, reject, or modify the findings of the commission. *Id.*

<sup>416</sup> See generally *Ex Parte Quirin*, 317 U.S. 1 (1949). Even in *Quirin* where the Supreme Court affirmed the President's authority to have such unfettered authority over the lives of enemy combatants within the territorial jurisdiction of the United States, this authority was limited by the *Quirin* prisoners undisputed status as enemy combatants. *Id.* at 7. In *Hamdan*, the petitioner's status as an enemy combatant was disputed, and the dispute was never resolved by a competent tribunal.

<sup>417</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005). Section 1005(e)(1) of that Act amends the habeas statute to provide that "no court, Justice, or judge shall have jurisdiction to hear or consider" any action filed by or on behalf of an alien held in Military custody at Guantanamo Bay for a writ of habeas corpus or any other form of relief, except pursuant to Exclusive statutory review procedures established by the Act. *Id.* at § 1005(e)(1), 119 Stat. 2741. The Act further states that this provision "shall take effect on the date of the enactment of this Act." *Id.* at § 1005(h)(1), 119 Stat. 2743.

<sup>418</sup> See U.S. State Dep't, Egypt: Country Reports on Human Rights Practices 2000, available at <http://www.state.gov/drl/rls/hrrpt/2000/nea/784.htm> (last visited Jan. 23, 2006). The State Department criticized Egypt's use of military courts to try defendants accused of terrorism. *Id.* The report stated that Egypt's military courts have "deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge." *Id.* It went on to criticize the military courts' lack of independence, noting that they "do not ensure civilian defendants due process before an independent tribunal" since military judges are appointed by the Minister of Defense and subject to military discipline. *Id.*

<sup>419</sup> See T.A. Badge, *Soldier Gets 10 years for Iraq prison abuse*, DET. NEWS, Jan. 16, 2005, at 1A; see also Pasiley Dodds, *FBI letter on Guantanamo Says Army Told of Abuses*, VENTURA COUNTY STAR (Cal.), Dec. 7, 2004, at 10; (noting that the FBI may have warned the Pentagon about physical abuse and "aggressive" interrogation methods of the detainees at Guantanamo Bay more than a year before the prison abuse scandal in Iraq broke); see also Paisley Dodds, *Special Forces Accused of Pressuring Others*, VENTURA COUNTY STAR (Cal.), Dec. 8, 2004, at 12.

wage war against us, it cannot and must not be the controlling factor in our decision-making process. Instead, fortitude and perseverance must be at the core of our efforts to root out those who would seek to harm us and those who have already inflicted unimaginable pain upon us.

The *Rasul* Court's decision made clear that the Judiciary will not abdicate its duty as an independent check on the actions of the Executive and the Legislature in their prosecution of the War on Terror. It also made clear that, while we will remain resolute in defending our nation and our way of life, we will not do so at the expense of who we are. We are a nation of laws that represent the values and morals that make us Americans, and our democratically-elected government is the political and legal embodiment of these laws. Our government's actions, whether in the national or international arenas, are a reflection of these laws and, as such, the limits that we place upon these actions are a reflection of our nation's ideals. It is foolhardy to believe that the Executive derives its power from these laws and, at the same time, insist that the Executive can act completely unconstrained simply because such action would occur outside of our physical borders.<sup>420</sup> As former British Prime Minister William Pitt said in a speech before the House of Common on November 18, 1783: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."<sup>421</sup>

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<sup>420</sup> See generally *supra* Part II.B.2 (discussing the *Eisentrager* opinion); see also *supra* Part III.C (discussing the majority, concurring, and dissenting opinion in *Rasul*). There is no dispute that indefinite detention and total denial of access to an independent tribunal would be unlawful if it occurred within the United States. See generally *Johnson v. Eisentrager*, 339 U.S. 763, 795-96 (1950). While there is no serious argument that nonresident aliens should be afforded the protection of the entire Bill of Rights, it is illogical to believe that they do not have any protections at all against actions by the Executive. *Id.* at 796-97.

<sup>421</sup> JOHN BARTLETT, FAMILIAR QUOTATIONS 412 (Emily Morison Beck ed., Little, Brown, & Company 1980) (1855).