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A Most Certain Tragedy, but Reason Enough to Side-Step the Constitution and Values of the United States?

David R. Chludzinski*

I. Introduction

Twenty-five years ago, in the midst of a bloody Cold War that pitted communism against democracy, two East German citizens hijacked a Polish airliner at gunpoint and diverted it to the sector of West Berlin, then occupied and operated by the United States.¹ These East Germans were eventually captured by the U.S. and held as detainees in a military area also occupied and operated by the U.S.² Although these East Germans violated the law by hijacking an airliner at gunpoint,³ the United States Court for Berlin held, in *United States v. Tiede*,⁴ that the U.S. Constitution gave these detainees the right to speak with counsel and the right to a trial by jury.⁵

Twenty-five years after the court's decision in *Tiede*, foreign nationals once again hijacked an airline. But this time, instead of diverting the plane into a section of West Berlin, the hijackers diverted the plane into sections of The World Trade Center in New York City on September 11, 2001 (hereinafter "9/11"). Like the U.S. reaction to the East German hijacking in the late 1970's, the U.S. military again sought

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1. See *United States v. Tiede*, Crim. Case No.78-001A, 86 F.R.D. 227 (U.S. Ct. for Berlin Mar. 14, 1979), reprinted in 19 I.L.M. 179, 188 (1980); HERBERT J. STERN, JUDGMENT IN BERLIN, 8 (Universe Books) (1984). Judge Stern gave his perspective on the background outcome of *United States v. Tiede*, in particular, his decision to afford United States constitutional rights to aliens of the United States. *Id.*

2. See STERN, *supra* note 1, at 27-28.

3. *Id.* at 18.

4. *Tiede*, 19 I.L.M. at 204.

5. *Id.* at 179.

to prosecute those having political and social connections with the 9/11 hijacking by detaining suspects and placing them in a U.S. occupied and operated military base in Guantanamo Bay, Cuba. However, unlike the East German detainees, these new Guantanamo Bay detainees are being denied the right to counsel, trial by jury, and even the right to be heard in U.S. Federal Court.

Without question, the 9/11 terrorist attacks created a sense of caution and fear in many people throughout the world.⁶ These tragic events made many Americans fear that, at any moment, terror from afar could strike at home; a fear unmatched since the Japanese attacked Pearl Harbor.⁷ But while both the government and citizens of the U.S. are trying to cope with the aftermath of 9/11, so too are many non-resident aliens, who fear being plucked from parts of the Middle East and elsewhere to be brought to the U.S. military base in Guantanamo Bay as suspects of terror.⁸

A majority of these aliens brought to Guantanamo Bay have not been charged with an offense, told why they are being held, or given the opportunity to speak with counsel, family, or friends.⁹ In March of 2003,

6. Andrew Miga, *Attack on America; Violent Attacks Unite Congress—Vow To Stand Behind Bush for Justice*, BOSTON HERALD, Sept. 13, 2001, at 22, available at 2001 WL 3810955. Discussing how the terrorist attacks of September 11 initially united many American leaders against terrorists, especially politicians from both parties, who sought retribution for the actions of the “terrorists.” *Id.*

7. *Commentary: Of Being Muslim and Arab-American Singled Out; Easy Targets for Retaliation Because of Their Appearances*, CHI. TRIB., Sept. 17, 2001, at 17, available at 2001 WL 4115711. This article briefly describes the attacks of September 11, 2001, and makes a comparison to the Attacks on Pearl Harbor over fifty years ago. *Id.* The article further elaborates on the possible issue of resentment towards people of Arab descent following September 11, and the need to restrain from retaliating against Arab-Americans. *Id.*

8. John Mintz, *Lawyer: Most Cuba Detainees Not Terrorists; Young Men Moved by Arabic TV, ‘Religious Fervor’ Into Trip To Afghanistan, He Says*, WASH. POST, June 2, 2002, at A11, available at 2002 WL 21748744. One of the lawyers representing many of the detainees in Guantanamo Bay, Cuba says that “[m]ost detainees at the U.S. prison in Guantanamo Bay, Cuba, have no affiliation with Al Qaeda or the Taliban and are largely young Arab men who rushed to Afghanistan with visions of assisting the needy.” *Id.* Another attorney who represents some of the detainees, Najeeb Al-Nauimi said, “Inflamed by televised images of deprivation, the men now detained left jobs and families to go to Afghanistan . . . [o]nce in Afghanistan, the great majority never touched a gun or got anywhere near Osama Bin Laden’s training camps.” *Id.*

9. *Foreign Detainees Matter Too*, WASH. POST, Aug. 16, 2002, at A24, available at 2002 WL 24828225. This article comments on the U.S. District Judge, Colleen Kollar-Kotelly’s dismissal of a lawsuit by twelve detainees being held in Guantanamo Bay, Cuba. *Id.* The judge ruled that the United States Constitution does not apply to these detainees because they are non-citizens being held outside of the United States. *Id.* Therefore, the judge wrote that “no U.S. court has jurisdiction to consider the detainees’ claims that they are being illegally held without charge and without access to counsel and to their families.” *Id.*

the Circuit Court of Appeals for the District of Columbia permitted the United States' actions by holding that courts are not open to aliens who are being held in military custody outside of a United States' territory.¹⁰ In essence, the court determined that the protections of the U.S. Constitution do not apply to these people, who are being held by the United States military in an area occupied and operated by the United States.¹¹

In November of 2003, the U.S. Supreme Court granted certiorari in *Al Odah v. United States*¹² to determine whether United States federal courts have jurisdiction to hear challenges to the open-ended detentions of foreign nationals detained in Guantanamo Bay.¹³ If the Supreme Court decides that the detainees can be heard in a federal court, the case will be remanded to the district court and decided on its merits.¹⁴ However, the Supreme Court has deferred addressing the issue of whether these detentions are unconstitutional.¹⁵

Although Guantanamo Bay detainees will not know whether they can challenge their detentions until the Supreme Court decides *Al Odah v. United States*, they may seek comfort in a recent decision by the Court of Appeals for the Ninth Circuit. The Ninth Circuit held that the U.S. cannot indefinitely detain captured foreigners in Guantanamo Bay without allowing them to challenge their detentions in U.S. federal

10. *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) *petition for cert. filed*, 72 USLW 3171 (Sept. 02, 2003) (NO. 03-334). This case involves twelve Kuwaiti nationals who were allegedly providing humanitarian aid in Pakistan and Afghanistan when they were seized by local bounty hunters, turned over to United States' forces, and transferred to Guantanamo Bay, Cuba. *Id.* at 1136. None of the attorneys for the plaintiffs in this case has had the opportunity to speak with their clients. *Id.*

11. Steve Vogel, *Afghan Prisoners Going to Gray Area; Military Unsure What Follows Transfer To U.S. Base in Cuba*, WASH. POST, Jan. 9, 2002, at A1, available at 2002 WL 2519780. This article briefly describes how Guantanamo Bay, Cuba became controlled and occupied by the United States. *Id.* After the Spanish-American War, "Cuba gave control of the base to the United States . . . [t]he base was later leased in perpetuity to the United States, an agreement that can only be revoked if both countries agree. *Id.*

12. Linda Greenhouse, *Justices To Hear Detainees; Top Court Takes Guantanamo Prisoners' Case*, INT'L. HERALD TRIB., Nov. 12, 2003, at 1, available at 2003 WL 64831785. This article states that the Supreme Court will resolve whether or not federal courts can hear this case, but will not yet determine whether the detentions are constitutional. *Id.*

13. Charles Lane, *Justices To Rule on Detainees' Rights; Court Access for 660 Prisoners At Issue*, WASH. POST, Nov. 11, 2003, at A1, available at 2003 WL 67885366. This article gives possible reasons why the Supreme Court granted certiorari in *Al Odah v. United States*. *Id.* The article further suggests that the United States reputation is at stake as a "beacon of liberty." *Id.* The article also questions whether Guantanamo Bay can be truly considered a Cuban territory. *Id.*

14. See Greenhouse, *supra* note 12, at 1.

15. *Id.*

courts, or provide them with legal counsel in order to do so.¹⁶ This decision may devastate those who support the Circuit Court of Appeals for the District of Columbia's decision, and add a new wrinkle of reasoning that might persuade the Supreme Court to reverse the Circuit Court of Appeals decision in *Al Odah* and provide the detainees with constitutional protections.

This comment will analyze why the situations in *Tiede* and the situation in Guantanamo Bay came to quite different conclusions. It will also question why the Circuit Court of Appeals for the District of Columbia's approach of following the Supreme Court case of *Johnson v. Eisentrager* is flawed. Parts II and III will explore the historical backgrounds of the *Al Odah* and *Tiede* cases in order to better understand their similarities. Part IV will discuss the *Eisentrager* decision and demonstrate how *Al Odah* can be distinguished from *Eisentrager*. Part V will examine the status of the U.S. in both West Berlin during the late 1970's, as well as present-day Guantanamo Bay, focusing specifically on issues of sovereignty and territoriality. Part V will also explore the similarities between *Tiede* and *Al Odah*, showing that Judge Stern's¹⁷ reasoning should be viewed favorably by the Supreme Court in *Al Odah*. Part VI will explore the principle of mutuality of obligation, and discuss whether a duty to allow constitutional protections is owed to the detainees. Finally, Part VII will conclude this comment and suggest an outcome for the *Al Odah* case.

II. Historical Background of *United States v. Tiede*

A. *The Occupation of Germany*

To better understand the jurisdictional issue in *Tiede*, a brief history of the West Berlin occupation is needed. This history can be broken down into two parts, the occupation of Germany and the United States' judicial authority under the occupation.¹⁸

16. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003); Henry Weinstein, *The Nation; Court Backs Rights for Detainees; The Foreigners Held At the U.S. Naval Base in Cuba Can Legally Challenge Their Confinement, Appellate Judges Rule*, L.A. TIMES, Dec. 19, 2003, at A42, available at 2003 WL 68905685. This article states that the decision made by the Court of Appeals for the Ninth Circuit to allow detainees access to United States courts, although the effect of its decision has been stayed until the Supreme Court rules later this summer, demonstrates that the judicial system will not allow the Executive Branches power to go unchecked. *Id.*

17. Judge Stern was appointed by the United States Ambassador to the Federal Republic of Germany to be the judge for the United States Court for Berlin in the case of *United States v. Tiede*. 19 I.L.M. at 179. Judge Stern was, at the time of his appointment, a judge for the federal district of New Jersey. *Id.*

18. *Tiede*, 19 I.L.M. at 181-88. Judge Stern explained the way that the occupying

1. The occupation of Berlin

As World War II (hereinafter “WWII”) neared its end in June of 1945, the Allied powers “assumed supreme authority over the country, including all the powers possessed by the German Government . . . or authority.”¹⁹ It is important to note that the Allies expressly denied any intent to “effect the annexation of Germany.”²⁰ Although the U.S. occupied only part of Germany following WWII, by deciding not to annex the country, the U.S. did not intend to act as a sovereign over Germany.²¹ This is because one of the most important objectives of the Allied Powers was the reunification of Germany.²² To an extent, the reunification of Germany was partially realized in May of 1955, when the Bonn Conventions²³ were signed and the occupation in the Federal Republic of Germany was terminated.²⁴ Regardless of the Bonn Conventions, the Allied powers continued to occupy Berlin.²⁵

By 1945, the Berlin area was already occupied by the United States, the British, the French, and the Soviet Union for over ten years.²⁶ Berlin had been split into sectors, each occupied by one of the Allied powers.²⁷ Eventually, the relationship between the Soviet Union and the Allied powers deteriorated.²⁸ By 1949, there existed a virtual split between the sectors of Berlin in the East, controlled by the Soviet Union, and those sectors in the West, controlled by the other three Allied powers.²⁹

powers broke up Germany in order to occupy certain territories at the close of World War II (“WWII”). *Id.* at 181-87. He also explained how the courts set-up by the United States were to be used in West Berlin. *Id.* at 188.

19. *Id.* at 181.

20. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, Signed at Berlin, June 5, 1945, *reprinted in* DOCUMENTS ON GERMANY, 1944-1971, Committee on Foreign Relations, United States Senate, 92d Cong., 1st Sess. 8, 12-13 (1971).

21. *Tiede*, 19 I.L.M. at 182.

22. *See* Protocol of the Proceedings of the Berlin (Potsdam) Conference, August 1, 1945, *reprinted in* DOCUMENTS ON GERMANY, 1944-1971, Committee on Foreign Relations, United States Senate, 92d Cong., 1st Sess. 8, 32,34 (1971).

23. *Tiede*, 19 I.L.M. at 182. These were a series of agreements signed by the three Allied Powers and the Federal Republic of Germany in 1952 that helped to formally end the war between the countries and set up protocols for continued post-war success.

24. Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251; Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411; Protocol to Correct Certain Textual Errors in the Convention on Relations, June 27, 1952, 6 U.S.T. 5381.

25. *Tiede*, 19 I.L.M. at 183.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; Agreement on the Terms for Continuance of the Allied (Western) Kommandatura as the Agency for Allied Control of Berlin, June 7, 1949, *reprinted in*

2. The United States' judicial authority during the occupation

From the very beginning of the allied occupation of Germany, and regardless that the U.S. military would provide governance within the United States' Sector of Berlin, German law was applied to the courts.³⁰ However, the U.S. military continued to retain broad powers over the German court system throughout the early 1940's.³¹ By 1949, just as the three Allied powers were diminishing their governance over Germany, the United States occupation of the court system was doing the same.³² In fact, the jurisdiction of the occupation courts was reserved for those few offenses described in the Occupation Statute of 1949.³³ These powers were finally discontinued with the signing of the Bonn Conventions in 1955.³⁴

However, before the Bonn Conventions concluded the functions of the United States courts of the Allied High Commission for Germany, the United States Court for Berlin was established.³⁵ Although this Court was established in 1955, until the *Tiede* case, it had only existed on paper.³⁶ In addition, although the court adopted Rules of Criminal Procedure that were consistent with the Federal Rules of Criminal Procedure and Evidence, the court did not provide jury trials.³⁷

B. *Hijacking to Freedom?*

In August 1978, three East Germans, Hans Detlef Alexander Tiede ("Tiede"), Ingrid Ruske ("Ruske"), and Ruske's daughter, Sabine, after several attempts to escape Communist East Berlin, finally arrived in the United States' Sector of West Berlin.³⁸ They arrived via a Polish

DOCUMENTS ON GERMANY, 1944-1971, Committee on Foreign Relations, United States Senate, 92d Cong., 1st Sess. 8, 159 (1971). Although the new agreement adopted by the three Allied powers provided Greater Berlin with full legislative, executive, and judicial powers, it continued to reserve certain powers to the Allied Forces, including the right to assume complete authority where "essential to security or to preserve democratic government, or in the pursuance of the international obligations of their Governments." *Id.* In addition, from the signing of the Bonn Conventions in 1955, up through the early 1970's, the local Berlin government, and not the Allied powers, continued to possess complete authority over Berlin, except in the case of the above-mentioned exceptions. *Id.*

30. Proc. No. 2, United States Area of Control, United States Military Government for Germany, Sept. 19, 1945, 12 Fed. Reg. 6997 (1947).

31. *Tiede*, 19 I.L.M. at 186.

32. *Id.*

33. *Id.*

34. *Id.* at 187.

35. *Id.*

36. *Id.*

37. *Id.* at 188.

38. See STERN, *supra* note 1, at 3.

airliner, diverted from its planned destination of East Germany.³⁹

This diversion was not accidental.⁴⁰ Tiede and Ruske, determined to find freedom, hijacked LOT No. 165⁴¹ at gunpoint and forced the pilot to land in West Berlin.⁴² When the plane arrived at Tempelhof Airport, then controlled by the United States, military personnel welcomed them to free Berlin.⁴³ Although Tiede, Ruske, and Sabine had arrived safely in West Berlin, they would soon learn that their freedom was in much more jeopardy than they had thought.⁴⁴

What Tiede and Ruske found was that, although West Berlin was occupied and controlled by the United States, the constitutional protections Americans were usually provided were not so easily granted to non-resident aliens, even if they were being held captive by United States' forces.

After LOT 165 landed, Tiede, Ruske, and Sabine were arrested by the United States military.⁴⁵ Both Tiede and Ruske were questioned, taken into custody, held without bail, and not provided the opportunity to speak with legal counsel. However, throughout that time, they were not charged with a crime.⁴⁶ This treatment continued for months,⁴⁷ when finally, after more than three months of being held without justification, a formal arrest was finally made on Tiede and he was given an attorney.⁴⁸

After Judge Stern was sworn in as the judge for the United States Court for Berlin, the issue to be decided was whether or not the United States' Constitution applied to the East German detainees, thus allowing Tiede a jury trial.⁴⁹ With strong opposition by the prosecution, Judge Stern, after discussing the United States' role in West Berlin, held that the United States Constitution would apply to these proceedings.⁵⁰

39. *Id.*

40. *Tiede*, 19 I.L.M. at 179.

41. LOT No. 165 refers to the type of plane that was hijacked by Tiede and Ruske.

42. *See STERN*, *supra* note 1, at 4.

43. *Id.*

44. *Id.* at 27. This account may sound rather dramatic, but throughout the Cold War Era, many people who were trapped in Communist controlled areas would do almost anything to leap over the Berlin Wall and land in a free world. *Id.* at 24. Stern described some of the daring escapes that occurred within weeks of the East Berlin border being sealed off by the Russian forces with the construction of the Berlin Wall. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 27-28. Judge Stern discussed how the United States held the three captives incommunicado, trying to avoid providing them with counsel, and avoiding charging the three with any crimes because the United States was unsure of what the proper procedure should be under the occupation authority. *Id.*

48. *Id.* at 48.

49. *United States v. Tiede*, 19 I.L.M. 179, 188 (1980).

50. *Id.* at 204.

Therefore, the East German detainees would be given the right to a jury trial.⁵¹

III. Background of *Al Odah v. United States*

In response to the attacks of 9/11, American troops rounded up people located in various parts of the Middle East whom the troops suspected of misconduct, and detained them at the U.S. Naval Base in Guantanamo Bay, Cuba.⁵² On account of these detainments, some of the captives have filed suit in United States federal courts.⁵³ Most notably, twelve of the detainees, who are Kuwaiti nationals, claim a denial of their Fifth Amendment right of due process and want the U.S. to either charge them with a crime or allow them to go free.⁵⁴ In addition, these detainees allege to have been merely assisting in charitable efforts in the region when they were taken captive.⁵⁵

The district court in *Al Odah* dismissed the complaint for lack of jurisdiction, and the Circuit Court of Appeals for the District of Columbia affirmed the district court's decision.⁵⁶ This decision was argued before the Supreme Court in March of 2004, and a final decision is expected in the summer of 2004.⁵⁷ Although both the district and appellate courts' opinions discussed case law, interpreted the lease of Guantanamo Bay, and determined that the Constitution does not apply to the Guantanamo Bay detainees, as will be shown, and in light of *Tiede*

51. *Id.* at 188-203. Judge Stern spoke at length about the unique situation presented in terms of the occupation of Germany and the role of The United States Court for Berlin. *Id.* at 188. In addition, Stern explained that the West Berlin of 1979 is much different than it was when it was first occupied by the Allied powers. *Id.* at 193. He notes that, "West Berlin is a thriving metropolis, a center of commerce, tourism and the arts, with a civilian administration adhering to the principles of democratic self-government, and with a minimum of control exerted by the Western occupying powers." *Id.* Stern goes on to say that the main reason that the Western powers remain is to protect the freedom of West Berlin, and continue the goal of a "reunified, democratic Germany." *Id.* at 194. By concluding that the constitutional right to a jury applies to the defendant aliens in this case, Stern noted that the language in both the Fifth and Sixth Amendments to the Constitution contains universal language that may include all people, not just American citizens. *Id.* at 203; *see also* STERN, *supra* note 11, at 120-132.

52. *See* Mintz, *supra* note 8, at A11.

53. *Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003).

54. *Id.*

55. *Id.*

56. *Id.* at 1137, 1145. In making its decision, the court looked at a few different criteria. First, the court looked at *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950), in which the Supreme Court rejected the defense's proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses." *Al Odah*, 321 F.3d at 1140. In addition, the *Al Odah* court found that the lease of Guantanamo Bay between the United States and Cuba continues to make Cuba the overall sovereign. *Id.* at 1142.

57. *See, supra* notes 9, 10.

and the spirit and breadth of the Constitution, the Supreme Court should strongly consider reversing the lower court's decision.⁵⁸

IV. The Supreme Court Should Decline To Follow the Reasoning of *Eisentrager*⁵⁹ Because *Al Odah* Can Be Easily Distinguished

One case that was cited numerous times in the *Al Odah* decision was *Johnson v. Eisentrager*. *Eisentrager* has been viewed as settling the issue that was in dispute in *Al Odah*.⁶⁰ However, for many reasons, this 1950 case is very different than the *Al Odah* case, and should not be followed.

The detainees in *Eisentrager* were in the service of the German armed forces during WWII.⁶¹ After Germany surrendered in May of 1945, all forces under German control were to surrender and discontinue their war effort.⁶² However, these twenty-one German nationals continued to provide military aid to Japan and because of this aggression against the U.S., when captured, they were charged, tried, and convicted by U.S. military tribunals in China.⁶³

These German detainees filed habeas corpus petitions and the U.S. Supreme Court found, for multiple reasons, that U.S. federal courts did not have jurisdiction to grant these petitions on behalf of the detainees.⁶⁴ One of these reasons, which can be and are distinguishable in the *Al Odah* case is the fact that the detainees in *Eisentrager* had been given military trials and had been convicted before they brought forth petitions for habeas corpus.⁶⁵ Therefore, unlike *Al Odah*, the detainees in *Eisentrager* had been previously charged and convicted of criminal activity. Also, the *Eisentrager* detainees were caught in the process of engaging in hostile operations against the U.S.⁶⁶ Finally, it was clear in *Eisentrager* that the U.S. had neither territorial jurisdiction nor

58. See Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 519 n.67 (2003). Here Paust opines that the *Al Odah* decision was wrongly decided. *Id.* Paust looks at the *Tiede* decision as well as the habeas statute and determines that it "does not require sovereignty, but only U.S. jurisdiction." *Id.*

59. *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950). This case dealing with the rights of enemy alien's captured in non-American controlled or occupied areas has been used for the last fifty years as precedent for denying U.S. constitutional rights.

60. *High Court to Hear Case of Detainees Held at Base; Guantanamo Decision Could Shed Light on Future of Bush's Anti-Terror Policies*, SEATTLE TIMES, Nov. 11, 2003, at A1, available at 2003 WL 3656363.

61. *Eisentrager*, 339 U.S. at 765.

62. *Id.*

63. *Id.* at 766.

64. *Id.* at 790-91.

65. *Id.* at 766.

66. *Id.*

sovereignty over the locations the detainees were captured, prosecuted, and confined in.⁶⁷

A. *The Court's Decision in Eisentrager Should Not Be Extended to Al Odah Because of the Factual Differences Between the Detainees*

In *Al Odah*, the Circuit Court of Appeals for the District of Columbia used the decision in *Johnson v. Eisentrager* as a guide to deny constitutional protections to the detainees.⁶⁸ That court's use of *Eisentrager* should be questioned and not control the Supreme Court in *Al Odah* because of the vast factual differences between the two cases. Specifically, the *Eisentrager* decision should not control the Court in *Al Odah* because there are three main differences between the detainees' alien status in the two cases.⁶⁹

1. The detainees in *Eisentrager* were already tried and convicted for war crimes

The detainees in *Eisentrager* were already tried and convicted for war crimes by military commissions prior to filing for writs of habeas corpus.⁷⁰ Therefore, these detainees had already been provided with due process in the form of a military trial.⁷¹ Although the Court in *Eisentrager* decided not to extend constitutional protections to the detainees, the aliens were clearly given due process, by way of a trial, and they were subsequently charged with crimes of war.⁷²

By contrast, although the detainees in *Al Odah* have not been convicted of any crime, they have been imprisoned for nearly two years, have not been given legal process, and have not been given a reason for their detention.⁷³ The detainees in *Al Odah*, under the Fifth Amendment to the U.S. Constitution, should either be charged for a crime that they committed, or released.

2. The alien status of the detainees

The second difference between the two groups of detainees relates to their alien status. The detainees in *Eisentrager* were convicted war criminals who had been assisting Japan as it was in the midst of a

67. *Id.* at 778.

68. *Al Odah v. United States*, 321 F.3d 1134, 1142-43 (D.C. Cir. 2003).

69. *See id.*; *Eisentrager*, 339 U.S. at 765-67. These portions of the two opinions lay out the facts in the cases and the factual differences are extremely obvious.

70. *Eisentrager*, 339 U.S. at 766.

71. *Id.*

72. *Id.*

73. *Al Odah*, 321 F.3d at 1136.

declared war with the United States.⁷⁴ These detainees were non-resident aliens whose actions most certainly made them enemies of the United States. On the other hand, the detainees being held in Guantanamo Bay are citizens of Kuwait, a country that is in no way at war or engaged in hostilities with the United States.⁷⁵ In fact, the detainees are citizens of a United States ally.⁷⁶

In addition, the detainees in *Al Odah* have alleged that while they were providing humanitarian aid in Afghanistan, they were seized by villagers seeking bounties and handed over to United States forces.⁷⁷ The *Al Odah* detainees should not be classified as alien enemies when looking at how the Supreme Court classified alien enemies in the *Eisentrager* decision, therefore, the detainees in *Al Odah* should not be subjected to the constitutional restrictions that were laid out by the Court in *Eisentrager*.⁷⁸ These two distinctions should make *Eisentrager* inapplicable to the situation in *Al Odah*.

3. There Exists Ambiguity As to Which Type of Control is Needed in Order for the United States to Provide Constitutional Protections to Non-Resident Aliens

The unique circumstances surrounding the involvement of the U.S. in Guantanamo Bay are very different from those occurring in wartime China and Germany during the 1950's.⁷⁹ The Lease of 1903 states that the United States is to have "complete jurisdiction and control" over Guantanamo Bay.⁸⁰ The U.S. has controlled and supervised this area for over one hundred years.⁸¹ In contrast, China, where the *Eisentrager*

74. *Eisentrager*, 339 U.S. at 766.

75. *Al Odah*, 321 F.3d at 1136; Brief for Petition for Writ of Certiorari at 2-3, *Al Odah v. United States*, 321 F.3d 1134 (2003) (No. 03-343), available at 2003 WL 22428940.

76. See Lane, *supra* note 13, at A1.

77. *Al Odah*, 321 F.3d at 1136; Brief for Petition for Writ of Certiorari at 2-3, *Al Odah v. United States*, 321 F.3d 1134 (2003) (No. 03-343), available at 2003 WL 22428940.

78. *Eisentrager*, 339 U.S. at 771-77. In detail, the Court described the difference between aliens who are nationals of countries who are at war with the United States and those aliens who are not. *Id.* In addition, the Court stressed that those aliens who "remained in the service of the enemy" would be given even less access to United States' courts. *Id.* at 776.

79. *Id.* at 766. This case involved German nationals who petitioned the court for writs of habeas corpus after being tried and convicted by a military commission in China, a country over which the United States is most definitely not sovereign. *Id.*

80. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 [hereinafter 1903 Lease].

81. See *id.* Article III of the lease reads, "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents

detainees were tried, and Germany, where they were imprisoned, were both independent countries, in no way under U.S. control. In addition, because both China and Germany were independent countries, the United States had no territorial reach over either of them.

The Court in *Eisentrager* repeatedly noted both the importance of territorial jurisdiction, as well as sovereignty, when describing whether the U.S. judiciary would have the power to act in a proceeding.⁸² This fact compels one to question what the Supreme Court thought was enough control to grant constitutional protections to non-resident aliens. If sovereignty is what was expected, the Supreme Court in *Eisentrager* should have spoken with more clarity.

The confusion between territorial control and sovereignty is magnified by the fact that many believe *Eisentrager* stands for the premise that aliens outside the territorial reach of the U.S. have no constitutional rights.⁸³ If this statement is true, and territorial reach is the important question, it appears that *Eisentrager* would not apply to the *Al Odah* case because it is obvious that Guantanamo Bay is within the territorial reach of the United States.⁸⁴

Although the court in *Al Odah* tries to resolve the Supreme Court's use of the terms "sovereignty" and "territorial jurisdiction," by reasoning that they were used in different contexts to describe different things, the fact remains that the United States' current position in Guantanamo Bay is far different from its position in 1950's China and Germany.⁸⁵ Further

that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof." *Id.*; Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 STAN. L. REV. 1197, 1198 (1996). Neuman describes Guantanamo Bay as "a self-sufficient and fully American enclave, larger than Manhattan, with thousands of military and civilian residents who enjoy the trappings of a small American city." See Neuman, *supra* note 65, at 1198. Neuman also notes that the military base "operates its own schools, power system, water supply . . . and [c]ongress has repeatedly extended federal statutes to the base." See *id.*

82. *Eisentrager*, 339 U.S. at 771, 778.

83. Linda Greenhouse, *Prisoners Ruling Coming*, *DESERET MORNING NEWS*, Nov. 11, 2003, at A1, available at 2003 WL 67514091. This article states some of the key issues that need to be resolved by the Supreme Court when it decides *Al Odah v. United States*. *Id.*

84. See Weinstein, *supra* note 16, at A42.

85. *Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003). Circuit Judge Randolph reasoned that the Supreme Court attached separate significance to the terms sovereignty and territorial jurisdiction. *Id.* at 1143. However, at least one scholar has argued that the habeas corpus statute only requires United States jurisdiction, not sovereignty. See Paust *supra* note 50, at 529 n.67. Even if sovereignty is the correct test to determine constitutional rights abroad, the United States exercise of complete control and jurisdiction over Guantanamo Bay is sovereign in nature and should be enough to

proof that Guantanamo Bay is considered to be an American territory comes from the official website of Guantanamo Bay.⁸⁶ The Circuit Court of Appeals for the District of Columbia should not have extended *Eisentrager* based on the Courts' ambiguity as to what was needed, sovereignty or territorial control.

B. A Broader and More Logical Reading of the Lease of 1903 Reveals That Constitutional Protections Should Be Granted to the Detainees in Al Odah

1. Lease construction and interpretation

As stated earlier, one of the difficulties the lower courts had in extending constitutional protections to the *Al Odah* detainees was based on the fact that the language of the lease of 1903 states that Cuba has "ultimate sovereignty" over the territory known as Guantanamo Bay.⁸⁷ The lower courts read the language of the one hundred year old lease between Cuba and the U.S. narrowly, and used their reading as a major basis to deny constitutional protections to the detainees.⁸⁸ By reading the lease narrowly, the courts construed the rule established by the Supreme Court in *Johnson v. Eisentrager* to deny constitutional rights to the detainees.⁸⁹

However, a broader and more logical reading of the Lease may cast doubt on the ruling in *Al Odah*. For instance, the language of the lease between Cuba and the United States appears to contradict itself multiple times.⁹⁰ At first the lease purports to grant "ultimate sovereignty" to Cuba, but later, it specifies that "the United States shall exercise complete jurisdiction and control" over Guantanamo Bay.⁹¹ By granting

allow constitutional protections. *See id.*

86. Brief for Petition for Writ of Certiorari at 5, *Al Odah v. United States*, 321 F.3d 1134 (2003) (No. 03-343), available at 2003 WL 22428940. This petition quotes the official website where the United States Navy describes Guantanamo Bay as, "a Naval reservation, which, for all practical purposes, is American territory. Under the [lease] agreements, the United States has for approximately [one hundred] years exercised the essential elements of sovereignty over this territory, without actually owning it." *See also The History of Guantanamo Bay: An Online Edition* (1964), available at <http://www.nsgtmo.navy.mil/history.htm>.

87. *Al Odah*, 321 F.3d at 1142.

88. *Id.* at 1142-44

89. *Johnson v. Eisentrager*, 339 U.S. 763, 771, 778 (1950). Although the Court appears to place a great deal of emphasis on the fact that the defendant aliens were never in any territory over which the United States was sovereign, other sections of the opinion appear to focus on the importance of the alien's presence within the territorial jurisdiction of the United States. *Id.* at 771.

90. *See* 1903 Lease, *supra* note 80.

91. *See id.*

“ultimate sovereignty” to one country, it would logically follow that the U.S. must retain some extent of sovereignty over Guantanamo Bay.⁹² If the parties to the lease did not intend for the U.S. to have partial sovereignty over Guantanamo Bay, then it would have been superfluous to use the word “ultimate” when determining the said amount of sovereignty.

2. Course of performance of the 1903 lease.

In addition to determining whether the U.S. retains partial sovereignty over Guantanamo Bay, because a divorce of “ultimate sovereignty” from “complete jurisdiction and control” exists, we must also consider the amount of control that the U.S. has exerted over Guantanamo Bay for the past one hundred years.⁹³ Thus, even if a narrow reading of the lease is proper, the course of performance for the 1903 lease by the U.S. over the last one hundred years makes it difficult to ignore the “complete jurisdiction and control” language in the actual lease with Cuba.⁹⁴ In fact, one scholar notes the grasp of American power over Guantanamo Bay has similarities to an American City.⁹⁵ Although the lower courts focused on the word “sovereignty,” the fact that the United States exercises sole power over Guantanamo Bay, as well as the implied grant of “partial” sovereignty over the area, should allow Guantanamo Bay to be treated as part of the United States for jurisdictional purposes.⁹⁶

V. The Court in *Al Odah* Should Follow Judge Stern’s Opinion in *Tiede*

Rather than following *Eisentrager*, the U.S. Supreme Court should follow the United States Court for Berlin’s decision in *United States v. Tiede* in its approach to *Al Odah*.⁹⁷ The Court should do so because the *Tiede* and *Al Odah* cases are very similar. In both cases, the detainees were foreign nationals of countries friendly to the United States, they were held by the U.S. military, and, for a period of their imprisonment, the detainees were neither charged for their alleged crimes nor permitted

92. See Paust, *supra* note 58, at 519 n.67.

93. See 1903 Lease, *supra* note 80.

94. See Neuman, *supra* note 81, at 1198.

95. See *id.*

96. See Vogel, *supra* note 11, at A1. This article quotes one of the briefs filed for petitioners in *Al Odah v. United States*, telling the Court that the amount of control by the United States in Guantanamo Bay is so great that it acts as if it were a part of the United States. *Id.*

97. *United States v. Tiede*, 19 I.L.M. 179 (1980).

to speak with counsel.⁹⁸ However, the most important reason that the Court should follow *Tiede* is the fact that the U.S. has greater control over Guantanamo Bay now, than it had over West Berlin in 1979.

A. The United States Has More Control Over Guantanamo Bay Now Than it Had Over West Berlin in 1979

Although the American Sector of West Berlin was within the jurisdiction of the U.S., the fact remained that Germany retained sovereignty over the entirety of West Berlin.⁹⁹ Regardless of the lack of sovereignty over West Berlin, Judge Stern still afforded the detained aliens with the protections of the United States Constitution.¹⁰⁰ Although the U.S. was using its occupying power to convene the court in Berlin, Judge Stern appeared to agree with the defense's proposition that "the defendants' rights could not be snuffed out merely by shuffling them out of the German system of justice into an 'occupation court,' convened in time of peace, to try an ordinary criminal case."¹⁰¹

Similarly, the U.S. occupies Guantanamo Bay, having complete jurisdiction and control over the area.¹⁰² Also, as stated above, the United States' authority in the area is widely recognized and acknowledged.¹⁰³ The self-sufficiency that the U.S. has within the area provides additional evidence that it controls the area.¹⁰⁴ The mere fact that Cuba retains ultimate sovereignty under the Lease agreement, just as Germany retained sovereignty over West Berlin, should not be determinative for denying constitutional protections to the detained aliens.

In addition, the Court of Appeals for the Ninth Circuit has recently shed some light on the question of United States' sovereignty over

98. *Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003); *see also* STERN, *supra* note 11, at 28.

99. *Tiede*, 19 I.L.M. at 193. In particular, Judge Stern said that West Berlin in 1979 was minimally controlled by the United States. *Id.* Stern also explained that the occupation authority, which the United States had over West Berlin, did not "displace the sovereignty of the occupied state." *Id.* at 188. The explicit philosophy of the United States was to "afford to the people of Berlin the fullest possible rights of self-government through their own institutions." *Id.*

100. *Id.* at 204.

101. *See* STERN, *supra* note 1, at 107. The defense noted that, "Berlin is not an enemy territory . . . [and] [t]here is a functioning Berlin government, with a fully-developed political and justice system which deals with the daily problems of a large metropolis." *Id.*

102. *See* 1903 Lease, *supra* note 80.

103. Brief for Petition for Writ of Certiorari at 5, *Al Odah v. United States*, 321 F.3d 1134 (2003) (No. 03-343), available at 2003 WL 22428940.

104. *See* Neuman, *supra* note 81, at 1197, 1198.

Guantanamo Bay.¹⁰⁵ In the opinion, Judge Reinhardt¹⁰⁶, after looking at the Lease between the U.S. and Cuba, quoted Black's Law Dictionary's definition of sovereignty.¹⁰⁷ This source defined sovereignty as "the supreme, absolute and uncontrollable power by which any independent state is governed."¹⁰⁸ When Judge Reinhardt looked at the actual presence and control of the U.S. in Guantanamo Bay, he stated that "it would appear that there is no stronger example of the United States' exercise of supreme power than at Guantanamo."¹⁰⁹

Reinhardt also noted the exclusive control the United States has had over Guantanamo Bay for the past one hundred years and opined that the "ultimate sovereignty" language used in the 1903 lease was likely meant to provide Cuba with a reversionary interest in Guantanamo Bay if the U.S. gave up their position in Guantanamo Bay.¹¹⁰ This, of course, has not occurred. Therefore, the Supreme Court in *Al Odah* should follow Judge Reinhardt's reasoning and view the U.S. as sovereign over Guantanamo Bay.

B. Even if the Court is Unwilling to View Guantanamo Bay As Sovereign U.S. Territory, an Alternative May Exist to Allow Constitutional Protections to the Detainees in Al Odah

If sovereignty is found to be the controlling factor for affording constitutional protections, and if the Court finds that the U.S. does not retain sovereignty over Guantanamo Bay, it should still follow Judge Stern's decision in *Tiede*. In *Tiede*, although the prosecution attempted to show that only American citizens were entitled to constitutional protections when outside of the U.S., Judge Stern sharply disagreed,¹¹¹

105. See Weinstein, *supra* note 16, at A42.

106. Judge Reinhardt is a judge on the Court of Appeals for the Ninth Circuit, and it is he who wrote the opinion in *Gherebi v. Bush*, which held that the detainees have the right to bring habeas corpus petitions in front of U.S. federal courts.

107. See, Weinstein, *supra* note 16, at A42

108. *Id.*

109. *Id.*

110. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003). In this recent decision by the Court of Appeals for the Ninth Circuit, the court held that the Guantanamo Bay detainees are permitted to challenge their detentions in United States federal courts. *Id.* at 1305. Judge Reinhardt focused on the language of the 1903 Lease with Cuba, the definition of "sovereignty," and the jurisdiction and control, which the United States exerts and has exerted over Guantanamo Bay. *Id.* at 1297. Reinhardt concluded that by using a plain meaning interpretation of the words used in the 1903 Lease, and by looking at the conduct of both the United States and Cuba since the lease was entered into, the United States appears to exercise sovereignty over Guantanamo Bay at the present time. *Id.* at 1296. In fact, Reinhardt says that the United States will continue to exercise sovereignty until the United States decides to leave Guantanamo Bay. *Id.* at 1293.

111. *United States v. Tiede*, 19 I.L.M. 179, 203 (1980).

stating that certain fundamental constitutional rights, as they are written, should apply to all people, not just United States' citizens.¹¹²

Stern examined certain amendments to the Constitution and stated that, with no ambiguity, the Fifth Amendment says "no person shall be deprived of life or liberty without due process of the law," and "the Sixth Amendment protects all who are 'accused,' without justification."¹¹³ Because these amendments were written so as to exclude no one, Stern found that friendly aliens were meant to enjoy the same rights as citizens.¹¹⁴ It is important that Stern referred to the Fifth Amendment specifically because it is the due process rights the detainees in *Al Odah* feel are being violated by not being given access to the courts in order to file writs of habeas corpus.¹¹⁵

Although Stern's statements discussing the universal application of constitutional rights to friendly aliens appears to contradict portions of the *Eisentrager* decision, a closer reading of *Eisentrager* shows that no true disagreement exists.¹¹⁶ The Court in *Eisentrager* repeatedly made reference to only "non-resident alien enemies" when it decided not to extend coverage of the Constitution, namely the Fifth Amendment, to the detainees.¹¹⁷ The Court in *Eisentrager* never spoke of the constitutional protections that should be afforded to non-resident, friendly aliens. Therefore the Court in *Al Odah* should not be made to follow the *Eisentrager* decision because the *Al Odah* detainees should not be considered "alien enemies."¹¹⁸

The detainees in *Al Odah* cannot be considered alien enemies because they are nationals of a country that is allied with the United States.¹¹⁹ In addition, the detainees were captured and brought to Guantanamo Bay while allegedly involved in peace missions, and not while involved in unlawful, hostile action, the kind of action the *Eisentrager* Court viewed as important in determining the status of non-resident aliens.¹²⁰

112. *Id.* at 197.

113. *Id.* at 203.

114. *Id.*

115. *Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003).

116. *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950). This portion of the decision discusses reasons why alien enemies were not meant to be included within the constitutional protections of the Fifth and Sixth Amendments. *Id.*

117. *Id.* at 784.

118. Joan Fitzpatrick, *Sovereignty, Territoriality, and The Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 328 (2002). Fitzpatrick discusses, among other things, the definition of alien enemies, as set forth by Congress, and explains why that definition may be too exclusive to encompass certain groups of aliens, namely those aliens that are involved in terrorist groups such as Al Qaeda. *Id.*

119. *Al Odah*, 321 F.3d at 1136.

120. *Id.*; *Eisentrager*, 339 U.S. at 783.

Furthermore, because the *Eisentrager* Court found importance in the classification of non-resident aliens in determining whether constitutional protections would be provided, we should look at the definition of an alien enemy.¹²¹ As it is codified in 50 U.S.C. § 21, alien enemies are defined as, “natives, citizens, denizens, or subjects of [a] hostile nation or government” with which the United States is engaged in a declared war.¹²²

The detainees in *Al Odah* do not fall within this definition of alien enemies for many reasons. First, even though the U.S. is currently involved in a war on terror, this type of war is different than traditional notions of war.¹²³ Therefore, the classification of the parties involved must be different.¹²⁴ The detainees in *Al Odah* are nationals of Kuwait, a country that is not in a declared war with the United States.¹²⁵ In addition, even if the government would argue that the detainees were members of Al Qaeda, a group of people whom the U.S. are actively involved in hostilities with, it is very unlikely that members of a fundamental terrorist group, like Al Qaeda, can be said to be citizens of a nation or government.¹²⁶

It is unlikely that the detainees in *Al Odah* could be classified as alien enemies under the definition codified by Congress. Therefore, the Supreme Court should not follow the *Eisentrager* decision, even if the Court concludes that Guantanamo Bay cannot be considered sovereign territory of the United States.¹²⁷ Instead, the Court should follow the reasoning of Judge Stern, who acknowledged that certain amendments to the Constitution were meant to include both United States’ citizens as well as friendly aliens.¹²⁸

121. 50 U.S.C. § 21 (2003).

122. *See id.*; *see also* Fitzpatrick, *supra* note 118, at 328 n.80.

123. *See* Fitzpatrick, *supra* note 118, at 328. The current war on terror is more of an ideological war being waged by fundamentalist groups, and not actual countries, whose armies would be considered citizens or “subjects of [a] hostile nation or government.” *Id.* at n. 80.

124. *See* 50 U.S.C. § 21; *see also* Fitzpatrick, *supra* note 118, at 328.

125. *Al Odah*, 321 F.3d at 1136.

126. *See* 50 U.S.C. § 21; *see also* Fitzpatrick, *supra* note 118, at 328 n.80.

127. *See* David Cole, *The New McCarthyism: Repeating History in The War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 15 (2003). Among other constitutional issues, Cole explains that the Enemy Alien Act continues to be good law in the United States, and it “requires no individualized finding of culpability, dangerousness, or even suspicion” by the United States when it is used. *Id.* However, Cole reiterates Fitzpatrick, acknowledging that a “formally declared war” is a condition that must be met in order for the Act to be used. *Id.*

128. *United States v. Tiede*, 19 I.L.M. 179, 203 (1980).

VI. The Mutuality of Obligation Principle Should be Considered by the Court When Deciding *Al Odah*

When deciding *Al Odah*, the Supreme Court should also consider the notions of fairness and mutuality that Judge Stern focused on when deciding *Tiede*.¹²⁹ These values have been reiterated by both Supreme Court Justices and legal scholars as logical and fair means of protecting those aliens who are subject to certain U.S. laws or obligations.¹³⁰

In *Tiede*, the detainees were imprisoned by United States' authorities, on a U.S. Air Force Base, without being formally arrested or charged.¹³¹ They were interviewed by German police on behalf of the U.S., guarded by the U.S. military, and were not permitted to speak with counsel for over three months.¹³² Although the U.S. was immersed in every aspect of the *Tiede* detainment, the government did not wish to extend protections of the U.S. Constitution to the alien detainees.¹³³ However, in his bench opinion, Judge Stern disagreed with the prosecution's argument. Stern spoke of American traditions of fairness and justice stating that, "it is a first principle of American life, not only life at home but life abroad, that everything its public officials do is governed by, measured against, and authorized by the United States Constitution."¹³⁴

Judge Stern was proposing that an obligation to provide constitutional rights is owed to those who are under the control of United States' authorities, regardless of whether they are inside or outside of a U.S. territory. Additionally, Stern said that without providing reciprocal, constitutional rights, there is nothing, and "people could be dragged off the streets [and] incarcerated."¹³⁵ This idea has been expanded upon by

129. *Tiede*, 19 I.L.M. at 191-92; see also STERN, *supra* note 1, at 123-24, 142.

130. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279-97 (1990) (Brennan, J., dissenting); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION; IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW, 60-100 (Princeton University Press)(1996). Neuman's book focuses on the constitutional rights that currently exist for aliens, both within the United States as well as those abroad. *Id.* at 52-117. Neuman examines the framework of the United States' Constitution, as well as precedent Supreme Court cases, in an attempt to solve current problems and tricky constitutional issues concerning non-resident aliens. *Id.* at 97-117. Neuman also focuses one chapter on the principle of mutuality of obligation, noting that uncertainties exist in applying constitutional rights to aliens in extraterritorial situations; however, Neuman believes that those issues should be decided in favor of extending constitutional protections in those cases where the United States imposes certain obligations on non-resident aliens. *Id.*

131. See STERN, *supra* note 1, at 141-42.

132. *Id.*

133. *Tiede*, 19 I.L.M. at 179.

134. *Id.* at 192; See also STERN, *supra* note 1, at 124.

135. *Tiede*, 19 I.L.M. at 191; See also STERN, *supra* note 1, at 123-24.

others, and has stood for the principle of mutuality of obligation.¹³⁶

In *United States v. Verdugo-Urquidez*, Justice Brennan wrote a dissenting opinion that closely mirrored those ideas set forth by Judge Stern in *Tiede*.¹³⁷ Justice Brennan stated that when the U.S. government investigates and attempts to hold non-resident aliens accountable under U.S. law, the government has treated them as members of the U.S. community, and is therefore obliged to respect certain fundamental rights.¹³⁸ Justice Brennan also noted that by disregarding the fundamental constitutional rights of non-resident aliens when the U.S. is responsible for capturing and holding them, the nation's status as "protector of liberties" becomes lost and it begs other countries to treat United States' citizens in the same manner when they are captured or held.¹³⁹

Although Justice Brennan's opinion was the minority view, he is not the only one who agrees with the notion of mutuality and fairness that Judge Stern set forth in *Tiede*. In his book, *Strangers To The Constitution*¹⁴⁰, Gerald Neuman examined the geographical scope of the Constitution and how it might be applied extraterritorially. Neuman discussed the approach coined "mutuality of obligation," saying that the "acquisition of sovereignty over a territory [is] sufficient to extend the [Constitution] there."¹⁴¹ If the Supreme Court agrees with the Court of Appeals for the Ninth Circuit's view that the definition of sovereignty encompasses the type of control that the U.S. possesses in Guantanamo Bay, then Stern's and Brennan's idea of mutuality of obligation, as reiterated by Neuman, appears to be a strong argument for granting constitutional protections to the detainees in *Al Odah*.

Additionally, Neuman states even more broadly that the mutuality approach would entitle aliens, even those outside of a United States' territory, to constitutional protections when "the United States asserts an alien's obligation to comply with American law as a justification for interfering with the alien's freedom or property."¹⁴² This example, which follows along the same lines as Judge Stern's remarks in *Tiede* and

136. *Tiede*, 19 I.L.M. at 191.

137. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990). This case denied Fourth Amendment protection to a non-resident alien from illegal searches by United States' officials done in defendant's residence in Mexico. *Id.* at 259. Justice Brennan wrote a dissenting opinion in the case, stressing the importance of providing constitutional rights to aliens when their rights are being imposed upon by the United States. *Id.* at 284. (Brennan, J., dissenting).

138. *Id.*

139. *Id.* at 285.

140. See NEUMAN, *supra* note 130, at 60-100.

141. *Id.* at 72-73.

142. *Id.* at 99.

Justice Brennan's dissent in *Verdugo-Urquidez*, fits very closely with the current situation in *Al Odah* and should be given deference by the Supreme Court.

Although Neuman states that the mutuality of obligation approach may not provide for all domestic constitutional rights to residents of adversary nations during armed hostilities, as stated earlier, the detainees in *Al Odah* are not residents of an adversary nation, and therefore this cautionary warning does not apply.¹⁴³ In a quite literal sense, the detainees in *Al Odah* were taken captive, handed over to United States' authorities, and transferred to a land controlled by the U.S.¹⁴⁴ Then, the detainees were questioned, held captive, and not permitted to speak with legal counsel or their families for a period of over two years.¹⁴⁵ Although the U.S. has initiated all of these actions, the government is attempting to deny the due process rights of the detainees, by arguing that writs of habeas corpus cannot be filed in United States' federal courts.

The Supreme Court should consider the mutuality of obligation approach when deciding *Al Odah* because the government, by holding and questioning the detainees, owes a duty to provide reciprocal rights. The Supreme Court should also consider this approach because the United States, which constantly stresses its values of fairness and equality, should not appear to be hypocritical when dealing with non-resident friendly aliens.¹⁴⁶

VII. Conclusion

For many reasons, it would be both improper and against United States' policy for the Supreme Court to follow the *Eisentrager* decision when it decides *Al Odah*. Instead, the Court should follow the *Tiede* decision and provide the detainees with Fifth Amendment protections, and allow them to file writs of habeas corpus to challenge their detentions in United States' federal court.

The Court should not follow the *Eisentrager* decision because the circumstances surrounding the detentions of the detained German soldiers are distinguishable from the detentions of the Kuwaiti nationals in *Al Odah*. At the present time, no military tribunal has been commenced against the detainees in *Al Odah*, and they have not been charged with any crime, whereas both of these circumstances had

143. *Id.* at 100.

144. *Al Odah v. United States*, 321 F.3d at 1134, 1136 (D.C. Cir. 2003).

145. *Id.*

146. *See Cole, supra* note 127, at 29.

occurred when the *Eisentrager* detainees filed writs of habeas corpus.¹⁴⁷ Also, even though it was obvious that the detainees in *Eisentrager* were German soldiers and that they were providing aid to Japan, a country that was in the midst of a declared war with the United States, the same cannot be said for the Kuwaiti nationals in *Al Odah*, who are not citizens of any nation with which the United States is fighting a declared war.¹⁴⁸

The Court should also decline to follow *Eisentrager* because the United States has "complete jurisdiction and control" over Guantanamo Bay, a type of control that the United States did not have over China or Germany, the locations where the *Eisentrager* detainees were tried and imprisoned.¹⁴⁹ Finally, at least one court, the Court of Appeals for the Ninth Circuit, has opined that the control the United States exerts over Guantanamo Bay is one of the strongest examples of United States' sovereignty.¹⁵⁰

Because the decision in *Eisentrager* turned heavily on both the fact that the detainees were non-resident alien enemies who had already been given a military trial, as well as the fact that the detainees were never contained in lands the United States had control or sovereignty over, the Supreme Court should not apply *Eisentrager* when it decides *Al Odah*.¹⁵¹

Instead, on account of both the factual similarities between the two cases, as well as the United States' own principles of fairness and mutuality that are stated in *Tiede*, the Court should follow *Tiede* when deciding *Al Odah*. The detainees in *Al Odah* are nationals of a United States ally and are not citizens of a nation involved in a declared war with the United States. Therefore, they should not be considered alien enemies, but instead should be classified as friendly aliens, just as the detainees in *Tiede*.

Also, because the United States controls Guantanamo Bay to a greater extent than the United States controlled West Berlin in 1979, granting certain constitutional protections to the friendly aliens in *Al Odah* would appear to comport with *Tiede*. In addition, the Supreme Court should consider concepts of fairness and mutuality because, as has been shown, a nation that prides itself in these virtues should not allow its government to unilaterally detain friendly aliens without providing them with reciprocal rights.

The Supreme Court faces a monumental task when it decides *Al Odah*. This decision must be made with an eye towards fundamental fairness, and it should be decided on the specific facts of the case.

147. *Al Odah*, 321 F.3d at 1136; *Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950).

148. *Eisentrager*, 339 U.S. at 765-66.

149. See 1903 Lease, *supra* note 80; *Eisentrager*, 339 U.S. at 766.

150. See Neuman, *supra* note 81, at 1198; see also Weinstein, *supra* note 16, at A42.

151. *Eisentrager*, 339 U.S. at 778, 784.

Because the United States is a nation which many others look towards for guidance, the last thing the Supreme Court should do is allow the United States government to detain massive amounts of non-resident aliens in a place the government says is outside the reach of the United States, thus allowing those detainments to continue unchallenged. The Supreme Court should allow the detainees in *Al Odah* to challenge their detention in United States federal court and thus show the world that the United States is a nation that practices what it preaches.¹⁵²

152. See *supra* note 60, at A1; see also Cole, *supra* note 127, at 29. Cole acknowledges that fighting a war for freedom does not really make sense when the United States is in turn limiting the freedom of others. *Id.*

