

2005

With Liberty and Justice for All?: The War on Terror and the Controversial Separation of Powers between the Military's Authority to Detain "Enemy Combatants" Vis-à-vis the Judiciary's Duty to Review the Legality of All Executive Detentions

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Recommended Citation

Michael J. Crossey Jr., *With Liberty and Justice for All?: The War on Terror and the Controversial Separation of Powers between the Military's Authority to Detain "Enemy Combatants" Vis-à-vis the Judiciary's Duty to Review the Legality of All Executive Detentions*, 43 Duq. L. Rev. 241 (2005).
Available at: <https://dsc.duq.edu/dlr/vol43/iss2/5>

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With Liberty and Justice For All?: The War on Terror and the Controversial Separation of Powers Between the Military's Authority to Detain "Enemy Combatants" Vis-à-vis the Judiciary's Duty to Review the Legality of All Executive Detentions

I. INTRODUCTION

At first blush, it seems axiomatic that the U.S. military may properly seize and detain those individuals engaged in hostilities with the United States and its armed forces. However, as with many other legal issues facing our country in the wake of September 11, 2001 and the War on Terror, our military's, and our President's, authority to detain alleged "enemy combatants" without affording them the traditional Procedural Due Process safeguards guaranteed by our Constitution has created a sharp conflict that has resulted in three recent Supreme Court pronouncements: *Rasul v. Bush*,¹ *Hamdi v. Rumsfeld*,² and *Rumsfeld v. Padilla*.³

This comment presents an overview of one of these important and controversial cases, *Rasul v. Bush*, in which the Supreme Court addressed the availability of habeas corpus to foreign nationals detained abroad in connection with the United States campaign against terror. In addition, this comment introduces generally the writ of habeas corpus as the appropriate vehicle, if any, for military detainees to challenge their detentions. Finally, this comment presents and synthesizes some of the seminal historical jurisprudence on the issue of military detentions of enemy combatants.

It was noted that "[t]he war on terrorism has challenged the traditional rhetoric and contemporary reality concerning the Bill of Rights."⁴ Due to the immediacy of this challenge, the issue is now within the Supreme Court's province as the Court attempts to provide guidance on the exact nature and scope of our traditional

1. 124 S. Ct. 2686 (2004).

2. 124 S. Ct. 2633 (2004).

3. 124 S. Ct. 2711 (2004).

4. Christopher E. Smith, *The Bill of Rights after September 11th: Principles or Pragmatism*, 42 DUQ LAW REV 260 (2004).

constitutional protections as applied to both citizens and aliens, and in cases arising both domestically and abroad.

II. HABEAS CORPUS RELIEF VIS-À-VIS THE RIGHTS OF ENEMY COMBATANTS

After the unthinkable attacks of September 11, 2001, the United States was quick to respond and retaliate. Throughout our military campaign many suspected "enemy combatants" and terrorists were captured and detained.⁵ In a number of instances, as discussed below, those detained as enemy combatants were denied access to counsel and to the courts, and received no review, judicial or otherwise, of their detentions. Notably, it is claimed that some of the alleged enemy combatants were never even informed of any charges being asserted against them.

As stated in the introduction to this comment, complex constitutional issues have arisen over what Due Process rights, if any, should be afforded to those accused of being "enemy combatants" -- a term that is itself somewhat amorphous.⁶ Should these prisoners be notified of the charges, if any, against them? Should they receive a hearing? Counsel? Most importantly, can these enemy combatants even petition our courts in the first instance via the writ of habeas corpus to challenge their detentions or the manner in which such detentions are affected?

Perhaps the issue ought to be restated as follows: whether, in military affairs, the detention of alleged enemy combatants is a matter entrusted to the sole and absolute discretion of the President and Congress, such that these detentions are outside of the ambit of judicial review and our customary Due Process safeguards, or whether the "Great Writ," Habeas Corpus, can be used to challenge the basis for military detentions and provide a mechanism to ensure that at least a minimal level of process is provided to all individuals, citizens and aliens alike, who are in military custody under color of authority of the United States.

5. *Rasul*, 124 S. Ct. at 2690 (noting that just at Guantanamo Bay Naval Base the U.S. is holding approximately 640 foreign prisoners).

6. See Molly McDonough, *Split Decision Divides Detainees' Fates: Supreme Court Likely Will Have to Make Final Decision*, ABA JOURNAL REPORT (2005), available at <http://www.abanet.org/journal/ereport/f4gitmo.html> (on file with author).

A. *Habeas Corpus*

It is quotidian in American society to discuss the nature and extent of the Constitutional Rights we have always been afforded. We know, for example, the Sixth Amendment guarantees us a right to counsel.⁷ Additionally, we know we have a constitutional protection against self-incrimination or coerced confessions.⁸ We are aware that, without probable cause, our authorities have no power to search and/ or seize our persons or effects.⁹ Our American culture is infused with a constitutionally enforced more against cruel and unusual punishment.¹⁰ Finally, and most importantly, we are all cognizant that *nobody* is to be deprived of life, liberty, or property without due process of the law.¹¹

These basic rights form the foundation of American society. Indeed, we fought a revolution to obtain them. As such, a safeguard was, and still is, necessary to prevent the depletion of these rights. Throughout our history it has always been the case that if these constitutional protections are not followed and a party alleges that he or she is unlawfully imprisoned, “the writ of habeas corpus is his appropriate legal remedy.”¹²

Habeas corpus is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”¹³ Statutorily, habeas corpus is governed by 28 U.S.C.S. §2241, which provides: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . [as long as] *a prisoner . . . is in custody under . . . the authority of the United States . . .* “or the prisoner is “in custody in violation of the Constitution or laws or treaties of the United States”¹⁴

Interestingly, neither the definition of habeas corpus nor its governing statute distinguish between citizens and non-citizens, or between those detained for violation of a criminal law and those under some other form of Executive detention, such as a military

7. U.S. CONST. amend. VI.

8. U.S. CONST. amend. V.

9. U.S. CONST. amend. IV.

10. U.S. CONST. amend. VIII.

11. U.S. CONST. amend. V.

12. *Ex Parte Milligan*, 71 U.S. 2, 113 (1866) (quoting *Holmes v. Jennison et al.*, 39 U.S. 540 (1840)).

13. BLACK’S LAW DICTIONARY 715 (7th ed. 1999).

14. 28 U.S.C. §2241(a), (c) (2004) (emphasis added).

detention. It follows, if one was to look solely to the plain meanings of this definition and governing statute, the writ of habeas corpus appears to be available to *anyone* to challenge his or her confinement.¹⁵ This, however, is counter-intuitive in at least one respect -- as initially stated, it seems self evident that the military can detain enemy fighters in the course of combat without the usual concomitant burden of having to grant to the detainee an immediate hearing upon petition to determine the legality of the detention.

On the other hand, the question which necessarily arises is whether the risk of erroneous, arbitrary, or illegal detentions and overreaching by our government is any less prevalent in times of war and national peril. One could argue that it is during times of hostilities, when our American system of democracy is being challenged, that the Great Writ's availability is most important in order to ensure that the principles upon which the Constitution was created and for which our soldiers fight -- most significantly, individual liberty -- are jealously guarded both domestically and abroad.

B. Historical Availability of the Great Writ to Military Detainees

Three early seminal Supreme Court cases addressed the availability of the habeas corpus relief to those in military custody who seek judicial review of their detentions. While one early, fact-specific, case allowed a U.S. citizen in military custody to employ the writ to challenge his detention, the later two adopted a narrower application of the writ -- i.e., the court felt that habeas relief was unavailable to enemy aliens and unlawful combatants, regardless of whether these combatants were aliens or American citizens.

The first Supreme Court case, *Ex parte Milligan*,¹⁶ decided shortly after the Civil War, discussed the jurisdiction of U.S. courts to consider a habeas petition brought by a citizen accused of being an enemy combatant.¹⁷ In restating the facts, Justice Davis made the following précis:

15. See 39 C.J.S. *Habeas Corpus* §4 ("the legislature may not deprive any person of the constitutional right to habeas corpus").

16. 71 U.S. 2 (1866).

17. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* §5-1 (7th ed. 2004 supp.).

Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission organized under the direction of the military commander¹⁸

Under these specific facts, the *Milligan* court permitted the alleged enemy combatant to request judicial review of his conviction via the writ of habeas corpus.¹⁹ Finding that “it is the birthright of every American citizen when charged with a crime, to be tried and punished according to the law” and that the “provisions of [the Constitution] on the administration of criminal justice are too plain and direct, to leave room for misconstruction,” the Supreme Court found that a military commission has no jurisdiction to try citizens when the U.S. courts are open.²⁰

While *Milligan’s* holding at first may appear to grant to the federal courts broad authority to review military detentions pursuant to a petition for habeas, in actuality, the holding was interpreted much more narrowly. Specifically, the Court appears to have limited its holding to petitions for a writ of habeas corpus brought by a citizen who is arrested by a military commission in non-hostile territory and who contests ever taking up arms against the U.S. military.

The next case addressing the availability of habeas relief in a military detention, *Ex parte Quirin*,²¹ is illustrative of the narrow nature of *Milligan*. In *Quirin*, an opinion issued during World War II, the Court denied leave to file petitions for habeas corpus when several suspected saboteurs’ (including one U.S. citizen) sought review of their detentions.²² In accord with *Milligan*, the court in *Quirin* posited that, while U.S. citizens are not subject to the jurisdiction of a military tribunal so long as our Federal Courts are operating, this rule is inapplicable to combatants, whether the combatant is an American citizen or an alien.²³ The

18. *Milligan*, 71 U.S. at 118.

19. *Id.*

20. *Id.* at 119, 121.

21. 317 U.S. 1 (1942). The *Quirin* opinion commonly has come to be known as the “Nazi Saboteurs” case. ROTUNDA, *supra*, note 17 at §5-1.

22. *Quirin*, 317 U.S. at 48.

23. ROTUNDA, *supra*, note 17 at §5-1.

Court recognized one of the main contemporary arguments for militarily detaining enemy combatants:

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.²⁴

Furthermore, *Quirin* made the following distinction between lawful combatants who must be afforded P.O.W. status in accordance with the laws of war and unlawful combatants:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.²⁵

Because it was stipulated that all petitioners had received sabotage training and came to the United States secretly and without uniform to destroy American war facilities,²⁶ the court found military jurisdiction proper.²⁷

In projecting this opinion, and the distinction between unlawful and lawful combatants, into contemporary times, it would seem to go without saying that the terrorists at war with the U.S., via their unconventional and immoral panic and terror tactics, would qualify as "unlawful combatants" under *Quirin's* definition. Therefore, under the doctrine of *stare decisis*, if it applied, the *Quirin* opinion would seem to dictate that the alleged enemy com-

24. *Quirin*, 317 U.S. at 29.

25. *Id.* at 31 (citations omitted).

26. *Id.* at 20-21.

27. *Id.* at 48.

batants captured during our campaign against terror were properly being held by U.S. forces and that there is no obligation to allow them access to federal courts to challenge their detentions.

However, it must be noted that this opinion was very fact specific. Notably, it was *undisputed* that all petitioners in *Quirin* had come secretly onto American soil with destructive intentions. As will be discussed with the Supreme Court's recent opinion, the issue becomes more complicated when those captured deny that they were ever engaged in hostilities with U.S. forces and assert that there is no foundation upon which to charge them as an enemy combatant. Furthermore, while the petitioners in *Quirin* were denied access to our civil courts, they were nevertheless afforded a trial by military commission.²⁸ Today, indeed, one of the arguments for affording alleged terrorists access to our courts is that the military's prisoners are sometimes afforded no hearing or review whatsoever.²⁹

Finally, the third historical decision in addressing the detention of enemy combatants was *Johnson v. Eisentrager*.³⁰ In *Eisentrager*, another WWII case,³¹ the Supreme Court seemed to further foreclose the possibility of enemy soldiers petitioning United States courts. Justice Jackson, speaking for the court, framed the issue broadly. Specifically, he opined that the question was "one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas."³²

In a 6-3 opinion,³³ the Supreme Court held that the U.S. civil courts have no jurisdiction over non-citizen enemy fighters captured and held in foreign territory.³⁴ Justice Jackson argued that "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security."³⁵ The Court, however, was careful to distin-

28. *Id.* at 23.

29. *See Rasul*, 124 S. Ct. at 2700 (Kennedy J., concurring).

30. 339 U.S. 763 (1950).

31. ROTUNDA, *supra*, note 17 at §5-1.

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

33. The majority opinion was authored by Justice Jackson and Justices Vinson, Reed, Frankfurter, Clark, and Minton joined. Justice Black, with whom Justices Douglas and Burton concurred, authored a dissenting opinion. *Id.* at 765, 791.

34. ROTUNDA, *supra*, note 17 at §5-1.

35. *Eisentrager*, 339 U.S. at 774. In support, Justice Jackson noted that a fundamental tenet of habeas corpus is that the prisoner should be brought before the tribunal reviewing his or her petition. *Id.* at 778 (citing 28 U.S.C. §2243). In exposing the ostensibly obvious problem, he explained:

guish cases involving citizens and, while it reserved judgment as to the propriety of militarily detaining citizens captured as enemy combatants,³⁶ Justice Jackson took pains to address the fact that "[c]itizenship is a high privilege."³⁷ Nevertheless, as to the alien petitioners in the case at bar, who were arrested for fighting in violation of the laws of war after the surrender of their country, and confined in a prison in Germany that was controlled by the U.S. forces, the court found that they had no right, constitutional or otherwise, to petition for habeas relief.³⁸

Eisentrager, especially when coupled with *Quirin*, seems to bar the use of habeas corpus petitions by military detainees. In summary, *Quirin* held that admitted enemy combatants, captured in the U.S., were properly subjected to military jurisdiction and thus had no right to petition our federal courts for relief.³⁹ *Eisentrager* further expounded that military jurisdiction would lie over foreign nationals captured and held abroad in U.S. controlled territory. Finally, notwithstanding Justice Jackson's discourse on citizens' heightened protections, *Quirin* unequivocally stated that citizens acting as enemy combatants are properly subject to the jurisdiction of a military tribunal.

It is important in analyzing these cases to recall that in both *Quirin* and *Eisentrager*, the detainees at least received some minimal process as they were charged and tried by military commission -- again, a step our military apparently has not taken with some of its current detentions. Nevertheless, these cases seem to clearly establish a precedent for denying our federal courts juris-

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend the legality of sentence.... Such trials would hamper the war effort and bring aid and comfort to the enemy....It would be difficult to devise a more fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Id. at 778-79.

36. *Eisentrager*, 339 U.S. at 769. Specifically, the court noted that citizens were "untouched" by this opinion. *Id.*

37. *Id.* at 770 (quoting *United States v. Manzi*, 276 U.S. 463, 467 (1928)).

38. *Eisentrager*, 339 U.S. at 784.

39. See *Quirin*, 317 U.S. at 48; see also *Eisentrager*, 339 U.S. at 776-77 (stating that "alien enemies resident in the country of the enemy could not maintain an action in its courts during periods of hostilities" (citing *Bell v. Chapman*, 10 Johns. (N.Y.) 183; *Jackson v. Decker*, 11 Johns. (N.Y.) 418; *Clarke v. Morey*, 10 Johns. (N.Y.) 70, 74-75; *Caperton v. Bowyer*, 14 Wall. 216, 236; *Masterson v. Howard*, 18 Wall. 99, 105; *Ex parte Colonna*, 314 U.S. 510)).

diction to review habeas petitions of those captured during hostilities with our country. This precedent, however, for better or worse, has proved malleable.

III. A NEW PARADIGM: THE FEDERAL COURTS' NEWLY VESTED JURISDICTION TO REVIEW MILITARY DETENTIONS OF NON-CITIZEN "ENEMY COMBATANTS" CAPTURED ABROAD

As noted, one of the three recent Supreme Court cases addressing the detention of enemy combatants is *Rasul v. Bush*.⁴⁰ In *Rasul*, the petitioners, 2 Australian citizens and 12 Kuwaiti citizens who were captured in Afghanistan in the midst of the U.S.'s military campaign against the Taliban, challenged the legality of their detention in the United States District Court for the District of Columbia, asserting that they were not enemy combatants and that they were never charged or given access to counsel or to a hearing in any tribunal.⁴¹

Justice Stevens initially phrased the issue as "whether the United States courts lack jurisdiction to consider [habeas corpus] challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."⁴² In the controversial opinion, the majority of the court, with a 6-to-3 vote,⁴³ reversed both the District Court and the Court of Appeals and held that the U.S. federal courts do in fact have jurisdiction to hear such habeas petitions.⁴⁴

In so holding, the court was quick to distinguish *Eisentrager*:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have

40. 124 S.Ct. 2686 (2004).

41. *Rasul*, 124 S. Ct. at 2690-91. Allegedly, none of the detainees were even captured by the United States. The "Kuwaiti detainees allege that [they] were taken captive 'by local villagers seeking promised bounties or other financial rewards' while they were providing humanitarian aid in Afghanistan and Pakistan." *Id.* at 2691 n.4. One Australian was allegedly captured by the Northern Alliance -- "a coalition of Afghan groups opposed to the Taliban" -- and subsequently released into United States custody. *Id.* Finally, the second Australian alleged that he was arrested by Pakistani authorities who turned him over to American forces. *Id.*

42. *Id.* at 2690.

43. *Id.* at 2689. Justice Stevens, with whom Justices O'Connor, Souter, Ginsberg, and Breyer joined, authored the majority opinion. Justice Kennedy filed a concurring opinion. Justice Scalia, joined by Justices Rehnquist and Thomas, authored the dissent. *Id.*

44. *Id.* at 2692.

engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of any wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.⁴⁵

Furthermore, Justice Stevens argued that *Eisentrager* only addressed the constitutional availability of habeas corpus to enemy detainees: "The [*Eisentrager*] Court," Justice Stevens noted, "had far less to say on the question of petitioners' statutory entitlement to habeas review."⁴⁶

Therefore, ostensibly, *Rasul* did not hold that the detainees had any constitutional right to habeas review. Rather, the Court broadly held that because the Great Writ acts on the individual(s) holding the prisoner, and not on the prisoner himself, a district court can consider any habeas petition "as long as 'the custodian can be reached by service of process.'"⁴⁷ This, the majority found, was sufficient to confer jurisdiction over the petitioners' habeas petitions. To this, the Court expounded that the habeas statute does not discriminate on the basis of citizenship and applies equally to extra-territorial detainees.⁴⁸ Therefore, the Supreme Court remanded the case with instructions that the district court consider the merits of petitioners' claims and to address the "legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."⁴⁹

IV. ANALYSIS

Several oddities in the *Rasul* opinion seem patently obvious. While reserving judgment on the propriety of *Rasul's* holding, and taking into account that any thorough analysis regarding that would necessarily be a treatise unto itself, it is, nevertheless, necessary to examine the peculiarities of the opinion.

First, it is interesting that Justice Stevens quoted Justice Jackson, the author of the majority opinion for *Eisentrager* and on the panel for the *Quirin* opinion, both of which dismissed habeas peti-

45. *Id.* at 2693.

46. *Rasul*, 124 S. Ct. at 2694.

47. *Id.* at 2695.

48. *Id.* at 2696.

49. *Id.* at 2699.

tions brought by military detainees for want of jurisdiction, as authority in reaching his conclusion that habeas review should be available to those detained in Guantanamo Bay.⁵⁰

In addition, the majority relied on both *Ex parte Milligan* and *Ex parte Quirin*, discussed *supra*, in reaching the conclusion that the writ has historically been available to challenge military detentions.⁵¹ First, as previously mentioned, *Milligan* was very fact specific in that it dealt with an American citizen, not a combatant, captured in non-hostile territory in the U.S.⁵²

As Professor Rotunda of George Mason University School of Law correctly explains, *Milligan* was interpreted narrowly and, to boot, the narrow interpretation was by none other than *Quirin*.⁵³ Specifically, Professor Rotunda stated that "*Quirin* held that rules protecting civilians from courts martial while civil courts can function and are open, do *not* insulate combatants from military jurisdiction"⁵⁴ The apparent implication of this is that if combatants are subject to military jurisdiction, they are not entitled to the general protection of judicial oversight by the use of the writ of habeas corpus to challenge their militarily sanctioned detentions.

Nevertheless, Justice Stevens specifically cited *Quirin* for support on the following statement:

Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The court has, for example, entertained the habeas petitions . . . of admitted enemy aliens convicted of war crimes during a declared war and held in the United States.⁵⁵

The Court's construction of *Quirin* as such appears to misconstrue that opinion's disposition. Indeed, such a statement seems antithetical to *Quirin*'s holding. As previously noted, *Quirin* held

50. *Id.* at 2692. Justice Stevens quoted Justice Jackson's statement that "[e]xecutive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, disposed, outlawed, or exiled save by the judgment of his peers or by the law of the land." *Id.* (quoting *Shaughnessy v. U.S. ex rel. Mezei*, 73 S. Ct. 625 (1953) (Jackson J. dissenting)).

51. *Rasul*, 124 S. Ct. at 2693.

52. *Milligan*, 71 U.S. at 107.

53. ROTUNDA, *supra*, note 17 at §5-1.

54. *Id.*

55. *Rasul*, 124 S. Ct. at 2692-93.

that it was proper for the military, not the federal courts, to exercise jurisdiction over admitted combatants.

It is, therefore, confusing to see the Court postulate that *Quirin* provides precedent for federal courts' review of habeas petitions. Justice Stone, who authored *Quirin*, could not have been much clearer: "The Court holds: The *motions for leave to file petitions for writs of habeas corpus are denied.*"⁵⁶ The Supreme Court did not say, as some commentators suggest, that pursuant to the writ, the district court could make a limited factual inquiry of the basis for the detentions. On the contrary, the Supreme Court would not allow the writ of habeas corpus to be filed.

To take this analysis one step further, the question as to why the majority in *Rasul* saw fit to cite *Quirin* becomes even more perplexing when juxtaposed with Justice Steven's extended discourse on the importance of the fact that the prisoners in *Rasul* were held in Guantanamo Bay, a place in which the U.S. exercised "complete jurisdiction and control."⁵⁷ Indeed, the fact that the prisoners were held at Guantanamo Bay, as opposed to being held in territory which was merely controlled by the military (such as a United States occupied prison in Germany as in *Eisentrager*), was one of the factors leading the Court to conclude that *Eisentrager* was distinguishable and, hence, not controlling.⁵⁸

However, assuming, *arguendo*, this distinction is valid -- i.e., even if the Court could properly find that prisoners in a United States occupied prison in Germany had no right to the writ but prisoners in Guantanamo Bay (which has a greater similarity to territory over which the U.S. is a sovereign due to its Lease Agreement executed with Cuba⁵⁹) may petition for habeas --- *Quirin* seems to vitiate the distinction's import. Once again, in *Quirin*, the Supreme Court denied leave to file writs of habeas corpus to military detainees held *in the United States*.⁶⁰ Considering the fact that enemy combatants captured and held in America have been restricted from employing the Great Writ, it appears illogical to rule that alleged enemy combatants captured abroad and held in a U.S. naval base in Cuba can have unrestricted access to our courts in order to have their detentions reviewed.

56. *Quirin*, 63 S. Ct. at 21 (emphasis added).

57. *Rasul*, 124 S. Ct at 2690-91.

58. *Id.* at 2693.

59. *Id.* at 2691 n.2 (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418).

60. *Quirin*, 63 S. Ct. at 7-8.

Finally, there is one other point to address regarding *Rasul*. The majority opinion framed the issue as “whether the habeas statute confers a right to judicial review of the legality of Executive detentions of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction.”⁶¹ The majority found that the petitioners had a right to petition for habeas relief, with the issue broadly framed as such, and with a narrow interpretation of *Eisentrager* to the following “critical” facts -- a prisoner arrested that

(a) is an enemy alien; (b) has never been . . . in the United States; (c) was captured outside of our territory and there held in military custody . . . ; (d) was tried and convicted by a military commission... and is at all times imprisoned outside the United States.⁶²

However, it can be argued that *Eisentrager* was much broader than *Rasul*'s narrow interpretation implies. Indeed, the broad nature of *Eisentrager* becomes particularly apparent upon review of how Justice Jackson phrased the issue in that case. “The ultimate question,” Jackson explained, “is one of jurisdiction of civil courts of the United States vis-à-vis military authority in dealing with enemy aliens overseas.”⁶³ Therefore, the *Eisentrager*'s disposition, a denial of leave to file habeas petitions, seems to suggest that the civil courts did not have the authority to deal with enemy aliens. Thus, *Eisentrager*, especially when coupled with *Quirin*, should have controlled the outcome in *Rasul*. To this, even Justice Kennedy, in his concurrence, recognized that any decision on this issue should have been done in the framework established by *Eisentrager*.⁶⁴

Notwithstanding the foregoing, and despite the opinion's deviation from precedent that was palpably on point, there is strong merit to the majority's disposition in *Rasul*. First and foremost, it appears to have been stipulated in both *Eisentrager* and *Quirin* that the petitioners were admitted enemy aliens. This being the case, there is less need for them to employ the writ to challenge the factual predicates to their detentions.

61. *Rasul*, 124 S. Ct at 2693.

62. *Id.*

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

64. *Rasul*, 124 S. Ct. at 2699 (Kennedy J., concurring).

Additionally, in both *Eisentrager* and *Quirin*, the petitioners were afforded a trial by military tribunal. In *Rasul*, it is alleged that that none of the prisoners were "charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal."⁶⁵

As Justice Kennedy noted, the prisoners in *Eisentrager*, "[h]aving already been subject to procedures establishing their status, . . . could not justify 'a limited opening of our courts' to show that they were 'of friendly personal disposition' and not enemy aliens."⁶⁶ Where, however, the military detainees profess that they never even took up arms against the United States, as was the case in *Rasul*, a more compelling case is made for judicial review. Justice Kennedy explicated that "[i]ndefinite detentions without trial or other proceedings presents altogether different considerations," which both weaken the considerations of military necessity warrant and judicial oversight.⁶⁷

It follows from this analysis that one possible solution is for the military to follow standard procedures, created by the Congress and the President, for affording to detainees trials by military tribunals.⁶⁸ And while not a panacea, this would appear to bring today's detentions in line with historical practice and satisfy, at least to some degree, the often overactive American conscience.

Separate and distinct from these two problems -- i.e., prisoners contesting that they ever took up arms against the United States and the absence of military hearings -- is the issue of who even qualifies as an "enemy combatant" in the first instance, such that they may be militarily detained. One district court recently ruled that "the term 'enemy combatant' is unconstitutionally vague and overbroad."⁶⁹ The judge found that, as the term is currently employed,

enemy combatants could include 'a little old lady in Switzerland who writes checks' to a charity she thinks is aiding Afghanistan orphans but is really a front for al-Qaida. Or it could be a person who teaches English to the son of an al-

65. *Id.* at 2691.

66. *Id.* at 2700 (Kennedy J., concurring) (quoting *Eisentrager*, 339 U.S. at 778).

67. *Id.* at 2700-01.

68. See McDonough, *supra*, note 6 (Noting that currently, there is a process in place for the military to review and evaluate detentions known as the Combatant Status Review Tribunal, but this process is claimed by some to be deficient because the prisoners are prohibited both from consulting with counsel and from reviewing the military's evidence).

69. *Id.*

Qaida member, or a journalist who knows where Osama Bin Laden is but refuses to divulge the information to protect a source.⁷⁰

In the end, it is difficult to draw an exact line of demarcation between the military's and the President's power to subject suspected enemy combatants to its sole jurisdiction and the judiciary's power to oversee these Executive detentions. This controversy is, at root, a separation of powers dispute between the President's and Congress' monopoly in the foreign affairs and military arenas, and the Supreme Court's ubiquitous role in ensuring strict adherence to our founding document.

Even in the face of *Rasul's* unambiguous holding -- that jurisdiction to consider habeas petitions lies whenever the custodian of the prisoner can be reached by service of process -- district courts are still without certainty. It has been noted that district courts "are struggling to interpret and elaborate on the U.S. Supreme Court's ruling in *Rasul v. Bush* . . . that foreigners can appeal their detentions by the U.S. military in U.S. courts."⁷¹

It was once noted by Judge Posner of the Seventh Circuit that "[j]udges too often tell defendants what the defendants [such as President Bush and the U.S. military in the instant case] cannot do without indicating what they can do, thus engendering legal uncertainty that foments further litigation." That truism may be fittingly applied to this Supreme Court opinion.⁷²

As of the date of this article, two federal district courts in the District of Columbia have issued opinions with opposing views regarding the alleged enemy combatants' rights to a substantive review of their cases.⁷³ In *In re Guantanamo Detainee Cases*, No. 02-CV-0299 (1/31/2005), Judge Joyce Hens Green held that "the Fifth Amendment protects and applies to detainees . . ." and "foreign terror suspects held at Guantanamo Bay . . . should be allowed to challenge their detention."⁷⁴

However, in *Khalid v. Bush*, No. 04-1142 (1/19/2005), Judge Richard J. Leon, determined that *Rasul* stood only for the proposition that U.S. courts could consider the legality of the Executive's potentially indefinite detention of individuals and that it did not

70. *Id.*

71. *Id.*

72. *Bartlett v. Heibl*, 128 F.3d 497, 501 (1997).

73. *Id.*

74. *McConough*, *supra*, note 6.

establish a rule that purported terrorists possessed “substantive rights on the merits of their claims.”⁷⁵ In accordance with his conclusion, Judge Leon held that “the Pentagon’s system for reviewing detentions is adequate and that the detainees had no writ to seek habeas corpus relief.”⁷⁶

As evidenced by these opinions, there is still no clear answer on the proper constitutional, statutory, or natural rights, if any, that must be afforded to those accused of being enemy combatants and terrorists. To that end, it is expected that the issue will find its way back to the Supreme Court’s docket.⁷⁷

Hopefully, upon reconsideration, the Supreme Court will once and for all clearly define the category of persons that fall within the classification of “enemy combatants” and the proper due process to which these persons are entitled, taking appropriate notice of the Court’s historical jurisprudence, the country’s current mores, and the hardship that could be imposed on our military if our commanders were distracted from active military affairs in order to respond to habeas complaints. All this must be delicately balanced with the injustice that could result from the indefinite detention of even one potentially innocent foreigner. For now, suffice to say, the issue is anything but resolved.

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75. *Id.*

76. *Id.*

77. *Id.*