2017

Protecting the "Worst of the Worst": The Constitutional Rights of Non-Citizen Enemies in World War II and the War on Terror

Lane Hannah Corrigan
Claremont McKenna College

Claremont McKenna College

Protecting "the Worst of the Worst": The Constitutional Rights of Non-Citizen Enemies in World War II and the War on Terror

submitted to

Professor George Thomas

by

Lane Corrigan

for

Senior Thesis

Fall 2016

December 5, 2016

Abstract

After the terrorist attacks of September 11, 2001, President Bush authorized the detention of certain non-citizens suspected of terrorism at the naval base in Guantanamo Bay, Cuba. Beginning in 2004, the Supreme Court considered whether these non-citizens were entitled to rights under the Constitution. In deciding that question, the Court compared the facts in the War on Terror cases with World War II cases that dealt with the rights of captured Nazis. Though the cases from World War II denied all protections to nonresident enemies, the Court in 2004 and 2008 determined that detentions in Guantanamo were unique. As such, the Court held that non-citizens detained at Guantanamo had certain constitutional privileges. I analyze two cases from World War II, *Johnson v. Eisentrager* and *Ex Parte Quirin*, and two cases from the War on Terror, *Rasul v. Bush* and *Boumediene v. Bush*, to illustrate the evolution in the Court's understanding of non-citizen enemies' rights. Ultimately, I find that the Court has done its part to protect detainees' basic rights, but that Congress should do more to enact legislation that embodies our nation's commitment to fairness, justice, and other constitutional values.

Acknowledgments

Thank you to my reader, Professor Thomas, who, since my first year at CMC, has pushed me to be a better thinker. In four years of lively classes and conversations, you've taught me the importance of both challenging my beliefs and standing up for my convictions.

Thank you to my friends, who make CMC my second home. I am kinder, happier, and more thoughtful because of you, and I feel lucky to be surrounded by such caring people.

Finally, thank you to my family. Mom and Dad, thanks for tirelessly reading, editing, and providing feedback on this project and many others. Most of all, thank you for instilling in Larkin and me the desire to do what is right.

"[T]he worst of the worst."

Secretary of Defense Donald Rumsfeld,
on suspected terrorists detained at Guantanamo Bay,
2002[1]

"Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger real or pretended from abroad."

James Madison,
in a letter to Thomas Jefferson,
1798[2]

[1] Seelye, Katharine Q. 2002. "Threats and Responses: The Detainees; Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says." The New York Times, October 23.

[2] Madison, James. "Letter to Thomas Jefferson, May 13, 1798." In *Writings of James Madison*, 588. Library of America.

Contents

Introduction

In 2007, Barack Obama made a promise: "As President, I will close Guantanamo."[3] Throughout his two-term presidency, Obama has reiterated his commitment to shutting down the facility. Earlier this year, he stated, "[k]eeping this facility open is contrary to our values."[4] Some slow progress has been made under Obama: fewer than 100 individuals remain detained at the facility, compared to the many hundreds originally detained in 2002. Yet Guantanamo remains open.

After the September 11, 2001 terrorist attacks against the United States, President Bush and his administration turned the U.S. naval base at Guantanamo Bay into a holding center for individuals suspected of terrorism-related charges. The military order used to justify these detentions identified broad categories of non-citizens eligible for detention and trial by military tribunal. The order also granted the executive branch exclusive control to determine who was a suspected terrorist, and to create the procedures to be used in trying the detainees before military tribunals.

Fewer than one thousand individuals were detained at Guantanamo. The mostly unchecked power that the executive used to indefinitely hold these non-citizens directly affected only a tiny sliver of the world's population. However, one of the most important questions raised by the executive's indefinite detention of suspected terrorists at Guantanamo applies to a much broader group than those held in Guantanamo. That

[3] Fetini, Alyssa. 2008. "A Brief History of Gitmo." Time, November 12.

[4] 2016. "Remarks by the President on Plan to Close the Prison at Guantanamo Bay." The White House, Office of the Press Secretary. February 23.

question is this: what rights—if any—may non-citizens detained by the U.S. government claim under the Constitution?

The executive branch made clear its answer to that question as soon as President Bush issued his November 13, 2001 military order. The order applied only to non-citizens. Those non-citizens would not be privilege to the constitutional due process protections afforded to citizens, including the right to counsel, a fair and speedy trial, and trial before a U.S. federal court. Instead, the order allowed the detainees to be tried by military tribunals, in which the military would "act as prosecutor, judge, jury, and executioner, without any appeal to civilian court."[5]

Some of the individuals detained at Guantanamo challenged the constitutionality of their nonexistent protections against the U.S. government. In the years following September 11, the Supreme Court heard a number of cases as to the constitutionality of the government's actions against suspected terrorists. In two of these cases, the Court pushed back against the executive's attempt to strip detainees of all procedural rights. The Court relied on the unique location and jurisdiction of Guantanamo Bay, and the exceptional cases of detainees held for six years without so much as being charged, to illustrate why the detainees could claim certain basic procedural protections.

In these two cases, *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court justified its unprecedented decisions by emphasizing the unique circumstances of the War on Terror and Guantanamo. Comparing the factual circumstances of the capture, detainment, and trial (or lack thereof) of the Guantanamo

[5] Cole, David. 2002. "Enemy Aliens." Stanford Law Review 54: 953-1004, 954.

detainees to Nazis detained during World War II allowed the Court to justify its decision to assign the detainees certain basic rights.

In particular, the *Rasul* and *Boumediene* Courts relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, Nazis captured by the U.S. military in China, tried by military commission in China, and transferred to a U.S.-controlled prison in Germany claimed that they deserved constitutional protections. In particular, they sought protections under Article One, Section 9, clause 2 of the Constitution, known as the Suspension Clause. The Suspension Clause states that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[6] The captured Nazis also claimed due process rights under the Fifth Amendment.

The *Eisentrager* Court rejected the Nazis' claims. As non-citizens who were almost certainly working under the direction of the German government, and who were captured, held, tried, and imprisoned abroad, the Germans had no claim on constitutional protections. Further, the practical problems inherent in granting the Nazis the right to file petitions for writs of habeas corpus—in particular, the potential damage to active U.S. military operations in Germany—led the Court to reject the Nazis' claims. The *Eisentrager* Court made a list of the factors in the Nazis' case that led it to side with the U.S. government. These factors—including the citizenship of the Germans and the location of their trial and detention—would remain a powerful precedent for the future Court in deciding how to assign constitutional rights to non-citizens.

[6] U.S. Const. art I, §9.

The Court's decision in *Eisentrager* was not perfect. In particular, the Court ignored the possibility that the Germans might be entitled to a few, basic constitutional protections without being privileged to every enumerated right in the Constitution. Putting this flaw aside, the standards set out in *Eisentrager* seemed to largely agree with a common-sense notion of how to apply the Constitution outside of U.S. borders. Because no aspect of the Nazis' case occurred within U.S. territory, and additionally, because giving the Nazis a right to habeas could harm the military's operations abroad, the Court's decision to withhold constitutional protections was largely justifiable.

But there is an important reason to hesitate in accepting the *Eisentrager* Court's conclusion that a simple list of citizenship-based and geographical facts should dictate which rights we extend to non-citizen enemies. This reason has less to do the *Eisentrager* decision itself, and more to do with a similar case that came before the Court eight years earlier. In *Ex Parte Quirin*, 317 U.S. 1 (1942), eight Nazi saboteurs were caught on U.S. soil attempting to commit acts of terrorism. A few important facts separated the Germans in *Eisentrager* from those in *Quirin*. In *Quirin*, two of the Germans claimed dual U.S. citizenship. And the Germans in *Quirin* were caught and held in the U.S. Although the FBI planned to try the Germans in civilian court, President Roosevelt issued an executive order that directed the Nazis be tried by military commission, with essentially no access to judicial review. When President Bush issued his military order in 2001, he largely used Roosevelt's 1942 order as a model.

When the Germans in *Quirin* challenged the constitutionality of their trials under Roosevelt's order, the Court agreed to hear their case. The Court's decision process in the case, though, was flawed. Because of pressure from the Roosevelt administration, the

Court issued a per curiam decision in July of 1942 that upheld the authority of the military tribunal. In August, six of the eight Germans were executed. When the Court drafted a full opinion in October of 1942, explaining the reasoning behind its per curiam decision, it became clear that a number of the Justices had doubts as to the constitutionality of Roosevelt's order and the military tribunal's authority. Under pressure from the executive branch, the Court had published an opinion that allowed what was likely the unjustified execution of six people.

In *Eisentrager*, the Court listed six facts that made it seem illogical to grant the Nazis constitutional rights. These were that each German a) was an enemy alien; b) had never been or resided in the United States; c) was captured and held in military custody outside of U.S. territory; d) was tried and convicted by a military commission sitting outside the United States; e) for offenses against laws of war committed outside the United States; f) and was at all times imprisoned outside the United States.[7] But in *Quirin*, all of the above facts were almost entirely different. Five of the six facts listed above—b) through f)—did not apply in *Quirin*. And fact a), of the Germans' citizenship, was unclear in *Quirin*: two of the Germans, at least, appeared to be U.S. citizens. Yet the *Quirin* Court ignored all of these facts that the *Eisentrager* Court would use to make its case. In *Quirin*, political pressure led the Court to disregard the facts that the *Eisentrager* Court would, just a few years later, take to be of central importance

Quirin raises doubts about the *Eisentrager* Court's holding that circumstantial facts alone should dictate how we assign rights to nonresident enemy aliens. The *Eisentrager* Court failed to note the deeper importance of constitutional rights. Its

[7] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), at 777.

decision to discuss only facts of citizenship and geographical location becomes dangerous in the face of *Quirin*. What those facts mean about claims on constitutional rights can be interpreted in different ways by different Courts, as evidenced by the gap between *Eisentrager* and *Quirin*.

Quirin teaches a valuable lesson about how to use *Eisentrager*'s precedent. The six factors laid out above in *Eisentrager* are important, certainly, in beginning to understand whether non-citizen enemies have a claim on constitutional rights. But they are not enough to reach a conclusion. Citizenship and geography are not decisive in themselves; an appeal to deeper constitutional principles is. Ultimately, the Court should not decide the rights of non-citizen enemies based on their factual circumstances alone. Sometimes an appeal to a deeper rationale for why those enemies might deserve constitutional protections, regardless of facts of citizenship and geography, is necessary.

When the Court in *Rasul* and *Boumediene* considered *Eisentrager* in making its decisions, it ultimately held that *Eisentrager* could not dictate its opinions. The circumstances of the detainees' imprisonment at Guantanamo was too different from the Nazis' imprisonment in *Eisentrager*. And, in *Boumediene*, the Court recognized the fundamental, constitutional importance of the writ for both separation-of-powers and individual liberty. In both *Rasul* and *Boumediene*, the Court understood that its decisions were unprecedented. In *Rasul*, the Court held that the naval base at Guantanamo was within the jurisdiction of U.S. courts. The detainee petitioners in that case were granted the first step in their right to habeas. Jurisdictional questions, the Court held in *Rasul*, would not bar non-citizens detained in Guantanamo from challenging the legality of their detention.

Boumediene went further than *Rasul* in granting detainees rights. Here, again, the Court decided not to adopt *Eisentrager* as precedent. Citing the exceptional circumstances surrounding the petitioners' indefinite detention, the Court held that detainees had a constitutional privilege to habeas corpus according to separation-of-powers principles. The executive alone could not decide when and where the Constitution applies. And because the detainees were held for so long without charges, counsel, trial, or access an impartial court to challenge the constitutionality of their detention, it was necessary to grant the detainees rights under the Constitution's separation-of-powers requirements. The *Boumediene* Court did what the *Eisentrager* Court did not: it relied on the intrinsic importance of the writ to justify its opinion.

As evidenced by its decision not to rely on *Eisentrager*, the Court recognized the unique nature of the government's power at Guantanamo Bay, and the remarkable lack of procedural protections afforded those detainees. The Court, for its part, did nearly everything in its power to provide certain basic procedural protections to the individuals held at Guantanamo. But the protections that should be provided to non-citizens at Guantanamo go beyond what the Court decided. It should not take almost a decade of indefinite detention to trigger the Constitution's requirements.

When our government, acting through its armed forces, capture and detain nonresident enemy aliens on the battlefield, it is obligated to provide them with procedures that are adequate substitutes for procedures required under the Constitution. We may not be able to grant an individual detained on the battlefield in Iraq during the fight against the Islamic State the same process that we would a suspected criminal arrested in the United States. But as constitutional principles, and not the just the text of

the Constitution, define our obligations as a nation, we have a duty to provide adequate substitutes for the constitutional procedural protections that a citizen would have in the same situation. The U.S. military, when it captures suspected terrorists, is acting under the executive branch and in the name of protecting the American people. Our commitment to fairness, justice, and the presumption of innocence require us to provide those we capture with adequate substitutes for our own constitutional protections.

But for those who are held in Guantanamo, we must provide more than an adequate substitute. The Court is correct: Guantanamo is an exceptional case. The government has always had complete control over the situation at Guantanamo. There were never active military operations, or any other practical obstacles stopping the government from providing at least adequate substitutes for constitutional procedural protections. Yet the government provided procedures that barely gave the detainees any process at all. Many detainees went over a decade without knowing their charges. None had access to counsel, or other advocates. The tribunals set up to try the detainees allowed the military to act as prosecutor, judge, and jury, and the decisions of these tribunals were not subject to judicial review.

The executive branch has spent nearly fifteen years exercising complete control over the detainees at Guantanamo. We owe those still detained—and we owed all those who, at this point, have been transferred to other facilities but were previously detained at Guantanamo—full constitutional procedures under the Due Process clause, Suspension Clause, and other Fifth and Sixth Amendment requirements. If the detainees had been held during the course of a traditional war, and we had provided them adequate substitutes as soon as it no longer caused a direct threat to the success of military

operations, we might not owe them any constitutional protections. But after depriving hundreds of individuals of their most basic rights against governmental power, we have a duty to go above and beyond adequate substitutes. Those individuals deserve the protection of the Constitution itself.

The Court, as an institution, helps us live up to the commands of the Constitution. It checks us when our laws go too far or not far enough; it keeps the executive branch from over-exercising its authority. But the Court alone should not be protecting the rights of non-citizens. As a nation, we are guided not only by the strict text of the Constitution and Supreme Court precedent, but also by the values that underlie the Constitution. We say that we care about fairness, justice, and equal treatment under the law. Congress, not the Court, carries the greatest responsibility for enacting those principles.

Ultimately, then, it is up to Congress to pass laws that reflect our country's commitment to constitutional values. Congress can constrain the executive and make the laws that the judiciary is meant to only review. Only Congress can "ultimately write the law of this long war."[8]

[8] Wittes, Benjamin. 2008. *Law and the Long War: The Future of Justice in the Age of Terror*. New York: Penguin Press, 133.

Chapter 1: Nonresident Enemy Aliens in World War II: *Eisentrager* and *Quirin*

In the enemy combatant cases of this century, the Court used *Eisentrager* as a starting point for many of its opinions. *Eisentrager* was one of the first cases to address the question of how to assign rights to non-citizens accused of being our enemies. In 1950, the Court held in *Johnson v. Eisentrager* that enemy combatants, who were captured, tried, and convicted by a U.S. military tribunal in China, had no constitutional privilege to file a writ of habeas corpus. If *Eisentrager* applied to the enemy combatant cases, then all those captured and detained in the War on Terror would be denied any constitutional privileges. The Court of the twenty-first century, though, chose not to apply *Eisentrager* to the question of non-citizen detainees' rights at Guantanamo. The circumstances between individuals detained during World War II in Germany and individuals detained during the War on Terror in Guantanamo were too different to justify *Eisentrager*'s application.

Quirin was mentioned by the Court only a few times, at most, during its enemy combatant opinions of the past fifteen years. *Quirin* cannot claim its precedent to be nearly as central or lasting as that of *Eisentrager*. But *Quirin* is important in understanding the dangers inherent in deciding the rights of enemy aliens during wartime. The decision in *Quirin* shows that the Court's standards for denying rights to the Nazis in *Eisentrager* were contradicted just a few years prior. In *Quirin*, decided in 1942, the Court held that the executive did not act unconstitutionally by subjecting eight Nazi saboteurs—arrested and held on American soil—to a trial by military tribunal with essentially no procedural protections. However, the decision was made under extreme political pressure, by Justices involved in the Roosevelt administration. Strategic political

motivations largely moved the Court to deny the German petitioners all constitutional privileges. *Quirin* shows the challenge of fairly deciding the rights of non-citizen enemies during wartime. The case demonstrates the dangers of an executive branch left unchecked by a Court that refuses to meaningfully address the question of the rights of non-citizens accused of crimes against the U.S.

1. *Eisentrager:* Clear Rules for Assigning Rights

Eisentrager clearly lays out the Court's understanding of how to determine whether enemy aliens have any claim to constitutional protections, specifically the right to file a petition for a writ of habeas corpus. The case came to the Court after 27 German nationals were captured by the U.S. military in China and convicted of violating laws of war by a U.S. military commission.[9] According to the military, the Germans collected and furnished information about American forces to the Japanese armed forces, thereby violating the laws of war. The convicted German combatants were then repatriated to Germany and imprisoned at Landsberg Prison, in an American-occupied part of Germany. 21 of the Germans—six were acquitted by the military commission—filed a petition for a writ of habeas corpus in the District Court for the District of Columbia. The District Court dismissed the petition for lack of jurisdiction, but the Court of Appeals for the District of Columbia reversed. The Court of Appeals held that any person, including an enemy alien, "deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any

[9]*Eisentrager*, at 765.

constitutional rights or limitations would show his imprisonment illegal."[10] The Supreme Court then granted certiorari, and reversed the Court of Appeal's decision.

Before exploring the specifics of the Court's holding in *Eisentrager,* it is important to note its historical and geographical context. The German nationals, whether they were enemy combatants, as the U.S. military argued, or employees of civil agencies of the German government, as they claimed, were citizens of a nation that at the time was in an official, declared state of war against the United States. World War II lasted from September 1939 till September 1945, with Germany declaring unconditional surrender in May 1945. The war had a clear beginning and end, and defined participants: there was no doubt that the United States and Germany were enemies.

Additionally, the circumstances surrounding the capture and trial of the German nationals were relatively clear. They were captured, tried, and convicted in China, and transported to Germany to serve out their sentences. China and Germany are both sovereign nations—though the prison in Germany to which the Germans were transported was controlled by the U.S. military—far removed geographically from the United States. The definite end date of World War II, the citizenship of the combatants as belonging to a nation engaged in declared war against the U.S., and the geographical setting of the capture and imprisonment are important factors when considering the precedent set by *Eisentrager*.

In deciding that the German combatants had no right to file for a writ of habeas corpus in a U.S. court, the Court focused on three main lines of argument: first, the citizenship and residency of the petitioners and the duties of the government towards

[10] Ibid, at 767.

citizens versus non-citizens; second, the territorial application of the Constitution, specifically the writ; and third, the applicability of the Due Process Clause of the Fifth Amendment to citizens versus non-citizens. Because the petitioners were nonresident enemy aliens who were not captured or tried on U.S. territory, and because, according to the Court, the "persons" referred to in the Due Process Clause of the Fifth Amendment does not include enemy aliens outside of the U.S., according to the Court, it held that the Germans did not have a constitutional right to a writ.

a. Citizens, Enemy Aliens, and Everyone in Between

The Court majority began its opinion by drawing a distinction between numerous classes of citizens and non-citizens. First, the Court found a fundamental difference between citizens and aliens. Though the Court noted that "[m]odern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder," it observed that there are "inherent distinctions" between citizens and non-citizens.[11] In particular, the majority viewed the duties of the government toward its subjects as largely dependent on whether those subjects were citizens. According to the Court, "the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance."[12] Because the Court assumed there is an implied allegiance in citizenship that cannot be assumed for non-citizens, the government does not have the same duty to treat aliens fairly as it does its own.

[11] Ibid, at 769.
[12] Ibid, at 770.

The Court went on to distinguish among multiple types of aliens: first, aliens of friendly and enemy allegiance, and second, resident enemy aliens and non-resident enemy aliens. With each distinction, the Court saw the government as having fewer duties towards aliens. If aliens were from a country friendly to the United States, the Court contended, they enjoyed a certain "security and protection." But if non-citizens were from a nation at war with the U.S., they lost protections that otherwise might be afforded to them. The Court assumed that an alien, if from an enemy nation, was "bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy."[13]

For the Court, citizenship went hand in hand with national allegiance. The majority assumed that a citizen was loyal to her country, and that the policy of a nation would determine the political stance and actions of its subjects. And, just as the Court assumed that a citizen is faithful to her country, it assumed that a government has duties to those it controls through the fact of their citizenship. The Court tried to qualify its reliance on an alien's nationality in assigning rights: disabilities "upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage."[14] However, rights seemed to hinge almost entirely on citizenship for the Court.

In distinguishing between resident enemy aliens and nonresident enemy aliens, the Court acknowledged that citizenship alone might not entirely determine a government's duties to its subjects. For, if an enemy alien resides in the U.S. and is

[13] Ibid, at 772.
[14] Ibid, at 772.

subject to the nation's laws, he might deserve basic procedural protections from the government that he has submitted himself to. However, those protections become nonexistent in times of "declared war." The Constitution allows a resident enemy alien to be "subject to summary arrest, internment and deportation whenever a 'declared war' exists."[15] So, while residence of an enemy alien gives her a better chance of receiving constitutional protections during peacetime, a war will largely take those limited protections away. Again, the Court assumed that citizenship establishes the basis for constitutional rights.

According to the *Eisentrager* Court, a nonresident enemy alien did not possess the limited access to courts that might be afforded to a resident enemy alien. Because the nonresident enemy alien does not have "comparable claims [as compared to the resident enemy alien] upon our institutions nor could his use of them fail to be helpful to the enemy," the Court saw no reason to grant nonresident enemy aliens constitutional protections. The combination of non-citizenship and non-residence makes null any constitutionally required duties the government might otherwise have to provide access to an impartial court.

b. A Constitution within Borders

The Court's second main argument against providing the Germans the privilege of habeas centered on its understanding of the limited territorial application of the Constitution. The court repeated the facts of the case to emphasize the extraterritorial setting of the petitioners' location, capture, trial, and imprisonment. The German nationals had never been to or resided in the U.S. They were captured and held as

[15] Ibid, at 775.

prisoners of war outside of U.S. territory. They were tried and convicted by a military commission outside the U.S.[16] The Court saw no reason why prisoners who were "actual enemies, active in the hostile service of an enemy power," and at all relevant times were entirely outside of the U.S. sovereign territory, should be afforded any right to our courts.[17]

Another central aspect of the Court's territoriality argument was pragmatic in nature. To grant the German prisoners the right to file a writ of habeas, the government would also have to find a way to transport them to the U.S. to appear before a court. In fact, the Court pointed out, the physical presence of the prisoner before the court is "inherent in the very term 'habeas corpus.'"[18] But the "allocation of shipping space, guarding personnel, billeting and rations" that the government would have to provide to the German prisoners seemed unfounded to the Court.

Not only would the government have to use its own resources in order to transport the prisoners, but the very act of transporting the Germans to the U.S. for trials would undermine the war effort. According to the Court, "[i]t would be difficult to devise more effective 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."[19] The U.S. military, at the time of *Eisentrager*'s issuance, was an occupying force in a country

[16] Ibid, at 778.
[17] Ibid, at 778.
[18] Ibid, at 778.
[19] Ibid, at 779.

it had just defeated in combat. The military had valid concerns that providing habeas review to Nazis would dangerously undermine its authority in Germany.

Eisentrager's concern for the consequences of transporting the Germans for U.S. trial might well have been justified. But the most telling part of the Court's statement had less to do with military tactics and more to do with the right to file writs of habeas corpus. For the Court, the potential strategic consequences of using civil courts to try nonresident enemy aliens were more important than any possibility that the German nationals have a right to file writs. It was more important that military officials retain authority to sentence those they deem to be enemy combatants than that a U.S. court determine if those people *are* enemy combatants.

More than any other part of the Court's opinion in *Eisentrager*, this statement makes clear the Court's understanding of habeas corpus as a right largely limited to U.S. citizens. The Court saw the provision of constitutional privileges, specifically the right to file a writ of habeas, as a favor that the U.S. government sometimes provides to resident enemy aliens. But for the Court, there was no justification for extending that right to enemy combatants located in other countries. If the Germans nationals had a constitutionally grounded right to habeas, the Court's pragmatic argument against extending the right might seem weak in comparison. An argument based on practical concerns does not carry the same weight as one based on deeply held constitutional principles. But the Court used precisely such a pragmatic argument to explain why, in part, it was acceptable to deny the Germans any right to habeas. The Court did not see itself as overriding the Germans' rights for the sake of pragmatic arguments. Rather, because the Court found that the Germans had no rights under the Constitution, the Court

merely showed why strategic military concerns work against the Germans' argument for habeas review.

c. No Substantive Right to Privileges

Finally, the Court used the language of the Fifth Amendment to find that there is no constitutionally-grounded argument supporting the petitioners' claimed right to file writs of habeas. The Court addressed the question of the Germans' substantive rights in response to the Court of Appeals's decision. The Court of Appeals based its support of the petitioners' right not on the doctrine of territorial jurisdiction, but on the substance of the Constitution itself. "Right to the writ, it reasoned, is a subsidiary procedural right that follows from the possession of substantive constitutional rights."[20] The Court rejected this argument, concluding that if the German nationals had a constitutional right to Fifth Amendment protections, they would have a right not to be tried at all for their alleged offenses.

The Court reaches this extreme conclusion by arguing that if "persons" as used in the Fifth Amendment is meant to include nonresident enemy aliens, then "accused" in the Sixth Amendment must apply as well. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[21] Because the crimes allegedly committed by the German enemies occurred in China, no such district technically existed. So, the Court made the argument that, first, application of "persons"

[20] Ibid, at 781.
[21] U.S. Const. amend. VI.

in the Due Process Clause of the Fifth Amendment requires application of "accused" in the Sixth Amendment, and second, because there is no "district" in which the accused Germans might be tried according to the Constitution, the Germans could not be tried *at all.* The Court goes so far as to say that "[i]f [the Fifth Amendment] invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers."[22]

The Court went further in arguing the implausibility of providing Fifth Amendment protections to the German combatants. Doing so, the Court held, would require not only granting nonresident enemy aliens the protections of the Sixth Amendment, but also the protection of every amendment and enumerated right in the Constitution.

> [Providing Fifth Amendment rights to nonresident enemy aliens] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.[23]

By making such analytical leaps to reach its conclusion, the Court avoided considering the substantive constitutional right that nonresident enemy aliens might have. It is by no means apparent that, as the Court claims, the provision of limited due process protections would require full application of the Sixth Amendment; that if the Sixth Amendment were applied to the nonresident enemy aliens, they would be free from *any* trial or punishment because their crimes were committed abroad; or that certain Fifth

[22] *Eisentrager*, at 783.
[23] Ibid, at 784.

Amendment guarantees for nonresident enemy aliens would inevitably make them eligible for all rights enumerated in the Constitution.

By its stark conclusion, the Court avoided any real discussion of limited substantive rights the Germans might have under the Constitution. The Court of Appeals, though, used an understanding of protection against governmental power to arrive at the decision that the Court would ultimately reverse. According to the Court of Appeals, "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition on the Constitution, has a right to the writ."[24] The Court of Appeals focused not on who the government was using its control over, but rather on the fact that the government exercised control in the first place. Such an employment of power, the Court of Appeals held, automatically triggers protections against that power.

Upon their capture, the German combatants were subjected to trial and imprisonment by the U.S. military. If basic constitutional protections applied to the Germans, they would have rights related to being held and tried by the government: due process of law, and the right to file writs of habeas corpus. The Germans likely would not, contrary to the Court's suggestion, have rights expansive enough to include free speech or the right to bear arms. But because the government was actively exercising its power over a group of individuals by trying, convicting, and imprisoning them, it makes sense that those individuals might well have had a substantive claim to certain limited protections against the government.

[24] *Eisentrager v. Forrestal*, 174 F.2d 961, 1949, at 963.

The Court of Appeals advanced another argument, ultimately ignored by the Supreme Court, in favor of granting the petitioners limited constitutional rights. That argument hinged on a robust reading of the right to due process and habeas, and the driving forces behind the creation of those rights. "The writ of habeas corpus is the established, time-honored process in our law for testing the authority of one who deprives another of his liberty, 'the best and only sufficient defense of personal freedom.'"[25] The writ was implemented as a safeguard against unjust imprisonment. The Framers did not mention a certain population that the writ was meant to protect, and included very few limitations on its use. Anyone—not just U.S. citizens—might be wrongly held under the authority of the U.S. government. As such, the Court of Appeals reasoned, true respect for personal liberty would require the Court to allow nonresident enemy aliens the right to file writs of habeas.

The Supreme Court in *Eisentrager*, however, determined that such substantive arguments could be ignored. Because the German combatants were enemy aliens, had never been or resided in the U.S., were captured and held outside U.S. territory, tried and convicted by a military commission sitting outside the U.S. for crimes committed outside of the U.S., and were at all times imprisoned outside of the U.S., they had no justifiable claim on any of the constitutional protections that U.S. citizens might have against the government. Seemingly, then, the Court in *Eisentrager* came up with a set of simple and clear guidelines to distinguish between who did and did not have a claim on constitutional privileges.

[25] Ibid, at 964.

2. *Quirin* and Political Pressure

Up until the enemy combatant cases, the standards in *Eisentrager* served as a guide for the Court in assigning privileges to nonresident enemy aliens. A case decided eight years before *Eisentrager,* though, shows that the standards set out in *Eisentrager* are not as neatly logical as they might seem. The facts in *Quirin* weaken the *Eisentrager* Court's argument that it was the Germans' citizenship and location that made them ineligible for the Constitution's protections. The story behind *Quirin* also emphasizes the importance of a separation between the executive and the judiciary, and of the Court's ability to make decisions independent of the executive's influence.

In *Quirin,* the Court had held that the executive could constitutionally subject enemy aliens to military tribunals, without any procedural protections. Even though the Germans in *Quirin* had been caught and detained on U.S. soil, and even though two had U.S. citizenship—three standards the Court in *Eisentrager* would apply in withholding constitutional protections—the Court found that the president had the power to subject the Germans to trial by military tribunal, and in doing so did not violate constitutional constraints on executive power, or the constitutional requirements of the Suspension Clause, Fifth, or Sixth Amendments. Six of the eight Nazis were executed after their conviction by military tribunal. Analysis of *Quirin* reveals the inconsistency in the Court's reasoning for withholding constitutional privileges from nonresident enemy aliens between 1942 and 1950, between *Quirin* in 1942 and *Eisentrager* in 1950.

a. Deciding On Trial by Military Tribunal

In 1942, eight Nazi saboteurs landed on American soil—four on Long Island, New York and four on Ponte Vedra Beach, Florida—with the intention of carrying out a

variety of attacks on American railroad systems, aluminum plants, and other important structural entities.[26] Days after arrival in the U.S., though, one of the Germans, George Dasch, alerted the Federal Bureau of Investigation about his and his fellow saboteurs' presence and plans of attack. With Dasch's help, the FBI captured three of the Germans in New York City. Herbert Haupt, one of the yet uncaptured Nazis, and a U.S. citizen, "made the mistake of stopping by the FBI office in Chicago to inform the bureau that he had returned from Mexico. The FBI found his visit suspicious and put a tail on him," and soon after, Haupt and the remaining saboteurs were tracked down and captured by the FBI.[27] The press, though, depicted the FBI as single-handedly apprehending the Germans. No one, besides the FBI agents and a few reporters following the story, knew that Dasch's confession, or Haupt's mistake, had helped the FBI catch the saboteurs.[28]

The FBI agents who interrogated the Germans had originally planned to try them in civil court; they had not considered trial by military tribunal.[29] Dasch made an agreement with the FBI: if he pled guilty, he would get a Presidential pardon. Additionally, Dasch understood that the public would not know about his involvement with the saboteurs, and that "everything would be kept quiet."[30] But, the day after making that agreement, Dasch saw his picture on the front page of his prison guard's newspaper. Dasch withdrew his plea, and instead, wanted to go to civilian court and make a full explanation of his role in turning in the other Germans.

---

[26] Fisher, Louis. 2005. *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism*. Lawrence, Kansas: University of Kansas Press, 91.
[27] Ibid, 93.
[28] Ibid, 93.
[29] Ibid, 94.
[30] Ibid, 95.

But because the FBI had been given sole credit for catching the Germans, the administration would not allow Dasch to make a public statement explaining his involvement. "FBI Director J. Edgar Hoover, after being praised for discovering the saboteurs, did not want it known that one of them had turned himself in and fingered the others. Neither did President Roosevelt and other top officials."[31] Further, in civilian court, the maximum penalty for sabotage was a sentence of 30 years, and the government was not confident in its ability to convict the Germans on that charge. The administration had to maintain its false image, Dasch could not make public his role in thwarting the Germans' plot, and the Germans would have to receive a severe penalty.

And, so, on the advice of Attorney General Frances Biddle and Secretary of War Henry L. Stimson, President Roosevelt decided that the Germans would be tried by military tribunal. On July 2, 1942, Roosevelt created a military tribunal by issuing Proclamation 2561.[32] The first paragraph of the proclamation stated that the "safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the law of war."[33] According to Louis Fisher, this reference to "law of war"—and not "Articles of War"—was crucial. While the Articles of War carry statutory procedures for courts-martial, the "law of war" comprises a loose group of principles and customs. By establishing the tribunal as operating under the "law of war," the tribunal

[31] Ibid, 95.
[32] Ibid, 98.
[33] 7 Fed. Reg. 5101 (1942).

"could pick and choose among the principles and procedures it found compatible with the overall theme of Roosevelt's proclamation."[34]

The proclamation continued by stating that President Roosevelt acted "by virtue of the authority vested in me by the Constitution and the statutes of the United States." So, as Fisher points out, Roosevelt "was not claiming inherent or exclusive constitutional authority." It would be more difficult to accuse Roosevelt of acting unconstitutionally if he did not use the Constitution as his sole source of authority. The proclamation also included an extensive description of all those who might be tried by military tribunal:

> [A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.[35]

Such a detailed description would ensure that the Germans could justifiably be tried before a tribunal.

Lastly, the proclamation essentially denied judicial review to those that it made subject to military tribunal. It stated that "such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions."[36] This restriction could be lifted with the approval of either the Attorney General or Secretary of War, but for all intents and purposes, enemy aliens tried before military tribunals would have no way to contest the tribunals' rulings.

---

[34] Fisher, 99.
[35] 7 Fed. Reg. 5101.
[36] Ibid.

On the same day that he issued the proclamation, Roosevelt issued another important order related to the trial of the Germans. In a military order, he appointed the "members of the tribunal, the prosecutors, and the defense counsel."[37] The order also gave the tribunal the freedom to "as the occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."[38] The tribunal would have the power to admit evidence that "would, in the opinion of the President of the Commission, have probative value to a reasonable man."[39] Thus, the tribunal would have the power to create its own rules of procedure, and to consider any evidence it deemed to have "probative value."

Finally, the order provided that only a two-thirds vote was needed to convict the defendants, or to sentence them to death. It also directed the trial record and sentence be submitted directly to Roosevelt.[40] There would be no other review of the tribunal's decisions.

The decision to use a military tribunal and the manner in which that tribunal was constructed were questionable. President Roosevelt, and other executive officials, decided to use a tribunal in order to maintain the FBI's powerful image, and in order to impose a severe sentence on the saboteurs. Using a civilian court would have shed light on the help that Dasch provided the FBI, and could have resulted in a lesser sentence for

[37] Ibid, 99.
[38] 7 Fed. Reg. 5103 (1942).
[39] Ibid.
[40] Fisher, 100.

the Germans. Political strategy and expediency dictated the President's decision to issue orders creating the tribunal and establishing its procedures.

b. Tribunal Proceedings

The regulations surrounding the proceedings of the tribunal, and the proceedings themselves, reinforce the conclusion that political strategy was the underlying motivation for the entire tribunal process. The tribunal decided that all of its sessions would be private; citing national security concerns, the tribunal's rules stated that "sessions shall not be open to the public."[41] However, in a private statement, executive officials made it clear that the motivation to keep private Dasch's involvement in the capture--thereby maintaining the powerful image of the FBI--was truly behind the privacy of the tribunal. "We do not propose to tell our enemies the answers to the questions which are puzzling them," the private statement noted.[42]

Two of the attorneys appointed by Roosevelt to defend the Germans decided to challenge the constitutionality of the tribunal. Before the trial began, on July 6, Colonels Kenneth C. Royall and Cassius M. Dowell wrote to President Roosevelt, expressing their concern about the unconstitutionality of the president's proclamation and order that created the tribunal. Roosevelt did not respond, and the trial commenced. However, about two weeks into the trial, Royall appealed directly to numerous justices on the Supreme Court. After failing to persuade Justice Black or to reach Justice Frankfurter, he found an

[41] "Rule Established by the Military Commission Appointed by Order of the President of July 2, 1942," Papers of Frank Ross McCoy, Box 79, Library of Congress, 1.
[42] Untitled, undated three-page statement, McCoy Papers, 3.

open ear in Justice Owen Roberts. Roberts spoke to Chief Justice Stone; soon after, it was decided that oral arguments would be held by the Court on July 29.[43]

Multiple irregularities surrounded the arrival of *Ex Parte Quirin* before the Court. First, the case did not rise through the lower courts. Though Royall filed a petition for a writ of habeas in the district court, it was turned down on July 28. The district court cited Roosevelt's proclamation as grounds for denying judicial review to the defendants.[44] Second, the Justices were generally unfamiliar with the questions before the Court, "including the Articles of War and the law of war."[45] Third, some Justices had personal interests tied to the case. Chief Justice Stone's son was a member of the government's defense team. Frankfurter was one of President Roosevelt's close confidants, and before the case came to court, Frankfurter had "staked out a position that favored the government."[46] And Justice Byrnes had worked as a "de facto member of the Roosevelt administration" for months before *Quirin* came before the Court.[47] Despite such potential conflicts of interest, all justices except Murphy, who removed himself given his status as an officer in the military, heard the case.

The Germans' defense lawyers argued that Roosevelt's proclamation and military order violated the Constitution. Given that the U.S. courts were open and functioning at the time of the Germans' detainment and arrest, the attorneys argued that Roosevelt unconstitutionally subjected the detained enemy aliens to trial by military tribunal. Their argument included more specific contentions, including that the law of war is analogous

[43] Fisher, 107.
[44] Ibid, 107.
[45] Ibid, 107.
[46] Ibid, 108.
[47] Ibid, 108.

to common law and there can be no common law crime against the U.S. government, and that Roosevelt's proclamation was an ex post facto law as applied to the Germans, having been issued after their capture.

The government contended that the Germans had "no capacity to sue in this Court or in any other court" because they were enemy aliens.[48] Civil liberties, including the right to the writ of habeas corpus, were never intended for "armed invaders" against the United States.[49] They argued that Fifth Amendment protections are not granted to U.S. soldiers charged with crimes, and so it made no sense that enemy combatants might have access to civilian courts and juries. The government's attorneys also relied on British precedents to argue that writs of habeas corpus were only meant to be used "to protect the subjects of the nation," and not subjects of an enemy nation.[50]

Further, the government argued that shifts in the landscape of war since 1864 allowed a president unprecedented unilateral power. According to the attorneys, "[w]ars today are fought on the total front on the battlefields of joined armies, on the battlefields of production, and on the battlefields of transportation and morale, by bombing, the sinking of ships, sabotage, spying, and propaganda."[51] Because the way in which World War II was fought differed so greatly from previous wars, the president, they argued, should have the power to "meet force with force."[52]

---

[48] "Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia," reprinted in 39 Landmark Briefs and Arguments of the Supreme Court of the United States 296 (1975), 393.
[49] Ibid, 409.
[50] Fisher, 110.
[51] Landmark Briefs, 411.
[52] Ibid, 413.

Notably, when the government's attorneys claimed that Dasch and Haupt—who had American citizenship—gave up any claim to that citizenship because of their activities against the U.S., Royall and Dowell made no counter-argument. George Dasch was naturalized as a U.S. citizen in 1933.[53] In 1930, at the age of 11, Herbert Haupt became a U.S. citizen.[54] But Dasch and Haupt's defense attorneys apparently agreed that invading the U.S., and attempting to commit hostile acts against the country, invalidated any claims to proceedings in civilian courts, and other constitutional protections due to U.S citizens. Citizenship was one of the main categories on which *Eisentrager* Court based its decision to deny protections to the German petitioners. Yet just eight years earlier, *Quirin* denied two Americans the privileges of their citizenship.

c. The Court's Per Curiam Decision and Opinion

On July 31, 1942, the Court released a per curiam decision upholding the tribunal's jurisdiction. A longer opinion would be released in October, but, with the Court's approval, the tribunal could finish its proceedings and deliver sentences to the eight Germans. The tribunal concluded its process, and sentenced all eight men to death. Roosevelt commuted the sentences of Dasch and Burger to life imprisonment, since they had aided the FBI.[55] But the other six defendants were executed in the electric chair on August 8, 1942.

---

[53] Abella, Alex, and Scott Gordon. 2003. Shadow Enemies: Hitler's Secret Terrorist Plot Against the United States. The Lyons Press, p. 24.

[54] "Notable Trials in the Northern District of Illinois: United States v. Haupt, et al. - The treason trial of Hans Max Haupt." Northern District of Illinois Historical Association. http://www.ilndhistory.uscourts.gov/hauptTrial.html.

[55] Fisher, 114.

At that point, the Court had yet to draft a full opinion. There was little room for disagreement in its final opinion: after issuing a per curiam decision that allowed the execution of six people, it could not acceptably express much doubt as to the grounds supporting that decision. It was later learned that there was, in fact, substantial disagreement about what to include in the final opinion. Though the Court's per curiam decision was unanimous, there had never been agreement among the Justices as to the constitutionality of the tribunal. In a private letter, Justice Stone told Frankfurter he found it "very difficult to support the Government's construction of the articles of [war]."[56] Stone acknowledged that it was "almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated."[57]

Other justices had similar doubts as to the strength of the rationale supporting the Court's per curiam opinion. Justice Black "told Stone that he was troubled by the argument that 'every violation of every rule of the Laws of War' would subject every person living in the United States to the jurisdiction of military tribunals."[58] And Justice Frankfurter, in a memo, said that "there can be no doubt that the President did not follow" certain articles of war.[59]

Yet none of these doubts could be reflected in the Court's opinion, given the fact that such admissions of uncertainty could lead to the conclusion that six people were wrongly executed. So, the Court produced *Quirin,* which reaffirmed Roosevelt's

[56]1942. Letter from Stone to Frankfurter. Frankfurter Papers. September 10.
[57] Ibid.
[58] Fisher, 116.
[59] "Memorandum of Mr. Justice Frankfurter, In re Saboteur Cases." Papers of William O. Douglas, Box 77, Library of Congress.

constitutional authority to create a military commission to try the Germans. The Court affirmed numerous arguments made by the government in defending Roosevelt's authority to create and direct the commission. Essentially, the Court's line of argument was this: the President is granted authority, under Article II of the Constitution, to "wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war . . . and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."[60] Through the Articles of War, Congress has provided for the trial of unlawful enemy combatants by military tribunal. So, in creating the military commission, Roosevelt was exercising his constitutionally-granted power to carry out laws passed by Congress.

The Court added that neither the Germans' possible U.S. citizenship, nor the protections of the Fifth and Sixth Amendments, could be used to challenge the constitutionality of the military commission. Even if some of the enemy combatants were indeed U.S. citizens, their citizenship did not "relieve" them from the "consequences of belligerency."[61] It was more important that the saboteurs had decided to undertake hostile actions against the U.S. than that they might be entitled to constitutional privileges of citizenship. This argument should give great pause to anyone familiar with the Court's decision in *Eisentrager*. In that case, the Court spent a good part of its opinion distinguishing the rights afforded to citizens compared to non-citizens. The *Quirin* Court's dismissal of the Germans' possible U.S. citizenship in a single sentence brings into question how much importance the Court truly placed on citizenship. At the least,

[60] *Quirin*, at 26.
[61] Ibid.

Quirin's nonchalant treatment of U.S. citizenship reveals that a seemingly essential argument in favor of individual rights—that citizens, even those accused of committing terrible crimes, are entitled to constitutional protections—has before been brushed aside by the Court in favor of political expediency.

Additionally, according to the Court, the protections of the Fifth and Sixth Amendments could not apply to the Germans. The Founders, it said, had never meant for such privileges to be granted to enemy combatants. The Fifth and Sixth Amendment do not "enlarge the right to jury trial" that is established in Article II, and since that right does not apply to unlawful enemy combatants, neither do the Fifth or Sixth Amendment.[62] Thus, the Court held the creation of the military tribunal, and the trial of the Germans before it, to be lawful and constitutional.

Within the context of determining nonresident enemy aliens' right to certain constitutional protections, *Quirin* is important for two reasons. First, though the Court decided *Quirin* just eight years before *Eisentrager,* the standards it used to determine a valid claim on constitutional protections vary significantly. *Eisentrager*'s focus on the Germans' rights due to their citizenship and location becomes easier to question upon examination of the Court's decision process in *Quirin*. In considering the divergence between *Quirin* and *Eisentrager,* it becomes less clear that close factual analysis necessarily dictates the outcome of a non-resident enemy alien case. Other forces—whether those be political pressure or another influence entirely—can dictate the Court's opinions. As such, it is important for the Court to consider the strong normative reasons for providing constitutional protections.

[62] Ibid.

Second, and perhaps more importantly, the process leading up to the decision in *Quirin,* and the underlying political context that led to the creation of Roosevelt's military tribunal, tell an important story of how basic understandings of justice and fairness can be compromised during times of war. There were objectively strong arguments for providing the Germans basic constitutional rights. The Germans were caught and held in the U.S.; two were likely U.S. citizens; and the authority of the military would not have been compromised by providing the eight Germans access to judicial review. Yet the Court did not address these arguments.

In both *Quirin* and *Eisentrager,* the Court reached decisions that denied constitutional protections to nonresident enemy aliens. However, fundamental differences separate both the facts of the cases, and the logic used by the Court in its opinions. The largest differences can be seen in first, the importance of citizenship; second, the territorial application of the Constitution and the territorial circumstances in each case; and third, the pragmatic considerations of granting the right to file writs of habeas corpus.

In *Eisentrager,* there was never a possibility that the accused Germans might also be U.S. citizens. The *Eisentrager* court strongly emphasized the distinction between the constitutional protections that a government owes citizens versus non-citizens. Further, the Court stressed the distinction between the limited protections that might be afforded to enemy aliens who submitted themselves to U.S. laws, and nonexistent protections owed to enemy aliens who had never set foot in the country. In *Eisentrager,* none of the petitioners had any claim to U.S. citizenship, and none had ever been to the U.S.

In *Quirin,* though, two of the eight accused saboteurs were U.S. citizens. In its final opinion, the Court did not even feel it necessary to address whether U.S. citizenship

should fundamentally change the duties of the government toward those accused of crimes. Instead, it concluded that being a U.S. citizen does not change the fact that the Germans planned sabotage against the U.S. Those plans, according to the Court, were grave enough to merit trial by military commission without access to civilian courts.

The geographical circumstances of each case also differ enough that arguments for the territorial application of the Constitution can legitimately only be made in *Eisentrager*. In that case, the German nationals were captured and tried in China, imprisoned in Germany, and had never been to the U.S. As noted previously, the U.S. military did control the prison in Germany where the accused were imprisoned, and it exercised total control over the Germans throughout their capture, trial, and imprisonment. There is still an argument, then, that the U.S. government exercised enough authority over the Germans that they deserved certain constitutional protections. But it is not difficult to see why the *Eisentrager* Court decided that the Constitution could not be applied to the German nationals. In a basic, common-sense way, it makes sense to claim that the total geographical separation of the Germans from the U.S. denied them the Constitution's protections.

But the facts in *Quirin* make it more difficult to argue why a limited territorial application of the Constitution would not extend certain basic protections to the accused in that case. The Germans came to the U.S., were arrested on American soil, and were held, tried, and ultimately convicted in the U.S. Dasch and Haupt had spent years living in the U.S. Every step of the capture and trial of the German saboteurs occurred in the territorial United States.

Eisentrager is not a complete decision. The Court never really addressed the claim that non-citizens might have limited substantive protections under the Constitution. However, the decision in *Quirin* raises more concerns than *Eisentrager.* The motivations that led the government to create a military commission, the tribunal's proceedings, and the pressure on the Court to validate Roosevelt's actions make it difficult to conclude that the Court's holding was legitimate.

More than *Eisentrager, Quirin* shows the challenges of defining the rights of enemy aliens during wartime. The political context of the case made it problematic for the Court to issue an impartial opinion. Any claims the Germans had to basic civil liberties were ignored. Roosevelt himself later realized realized the impropriety of the military commission and treatment of the accused Germans. In 1944, when two more German spies were caught in the U.S., Roosevelt issued another military order—but this time, he did not appoint the members of the tribunal, or the attorneys for the prosecution or defense, and ordered that he would not review the trial record. Instead, the commanding generals would have the power to appoint the members of the tribunal, and the trial record would be reviewed within the Judge Advocate General's office.[63] Aware of the lack of safeguards in the 1942 tribunal process, Roosevelt ensured that the nonresident enemy aliens in 1944 were entitled to certain basic procedural protections.

[63] Ibid, 128.

Chapter 2: Nonresident Enemy Aliens in the War on Terror: *Rasul* and *Boumediene*

Eisentrager remains a commonly-cited precedent on the question of constitutional protections for nonresident enemy aliens. The central discussion of many of the Court's more recent enemy combatant cases—those brought by Guantanamo detainees and their families in the years following September 11—has been whether *Eisentrager* should be applied to the cases at hand. In two of its landmark enemy combatant cases the Court has held that *Eisentrager* did not dictate its decisions. The facts surrounding the capture, trial, and imprisonment of 21 Germans in 1950, the Court said, were distinguishable from those of the detention of hundreds of suspected terrorists in Guantanamo in the twenty-first century. In *Rasul v. Bush*, 542 U.S. 466 (2004) the Court held that federal courts did in fact have jurisdiction over Guantanamo Bay, Cuba, because the U.S. government exercised total control over the military base there. And in *Boumediene v. Bush*, 553 U.S. 723 (2008) the Court once more rejected *Eisentrager*'s application in deciding whether nonresident enemy aliens could file writs of habeas corpus in U.S. federal courts.

Before exploring the Court's holdings in *Rasul* and *Boumediene* in detail, it is necessary to understand how and why hundreds of non-citizens were detained in Guantanamo. Following the hijacking of four planes by Al Qaeda operatives and the ensuing attacks against the World Trade Center and the Pentagon, President Bush issued a number of executive and military orders addressing the apprehension and detention of suspected terrorists. On November 13, 2001, Bush issued a military order establishing military commissions to try non-citizens suspected of terrorism.

Bush's military order was similar to Roosevelt's 1942 executive order. Like Roosevelt's order, the tribunal created by Bush was empowered to convict and sentence the accused based only on the vote of two-thirds of its members. It could also admit evidence so long as it was of "probative value to a reasonable person," the same standard established in Roosevelt's order.[64] And, like Roosevelt's, Bush's order denied defendants judicial review. Finally, Bush directed that the final trial record be submitted directly to him for review. Roosevelt did the same in 1942, although in his 1944 order assigned the record review to the Judge Advocate General.

While Roosevelt's 1942 order applied to eight individuals, Bush's order "'defines a class of defendants' for future and past crimes."[65] In so doing, it made a population of approximately 18 million subject to the executive branch's unchecked powers of detainment.[66]

1. The Order

In his military order, Bush justifies the executive's power to detain by linking it to the necessity of protecting the U.S. and its citizens. The order states that:

> The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.[67]

The order goes on to outline the broad standards to be used to detain non-citizens. By claiming that far-reaching standards were necessary in order to protect the country itself,

[64] 66 Fed. Reg. 57835-36, sec. 4 (2001).
[65] Fisher, 168.
[66] Fisher, 169.
[67] 66 Fed. Reg. 57835-36, sec. 2 (2001).

and stating that "an extraordinary emergency exists for national defense purposes," the Bush administration anticipated the need to justify the detentions to come.[68]

The second section of the order outlined the characteristics and actions that would make non-citizens candidates for detention. Only non-citizens were subject to the order, and they could be detained if

> (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.

The subjectivity incorporated in these standards is striking. To begin with, a determination of whether an individual falls within one of the aforementioned categories is based on whether there is "reason to believe" she might fall into any of the numerous groups listed. The degree of evidence necessary to find such "reason" is not defined. Determining whether such a "reason" existed was left to the discretion of a few members of the executive branch.

Ambiguity pervades much of the order. Other phrases within the portion of Section 2 cited above are just as vague as "reason to believe." For instance, there is no immediately obvious construction of what might constitute "aid[ing] or abett[ing]," "knowingly harbored," or "international terrorism" itself. "Aiding or abetting," for example, "could involve innocently contributing money to a group that seemed to be a legitimate charitable or humanitarian organization, but one that the U.S. government later

[68] 66 Fed. Reg, sec. 2.

claims is a front that provides assistance to al Qaeda or other terrorist bodies."[69] And, given the "reasonable belief" standard, such vague phrases were subject to interpretation by the Bush administration. As noted by Fisher, "[t]he portion of non-U.S. citizens at risk depends on presidential 'determinations.'" Both the ambiguity, and number, of the categories of people who could be detained under the order allowed the executive branch to extend its unchecked power to over 18 million non-citizens.

The fourth section of the order, though, displays no such ambiguity. It outlines the military tribunal procedures for trying those individuals detained under the order. The order makes available only one form of trial for those detained: "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."[70]

The regulations guiding the operation of the military commissions were to be determined by the Secretary of Defense, an executive official who is appointed by the President. The order gave the Secretary of Defense the authority to create "orders and regulations" that would determine the "rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys."[71]

While guidelines regulating the military commissions were left largely to the discretion of the Secretary of Defense, the order included some required provisions for

[69] Fisher, 170.
[70] 66 Fed. Reg, sec. 4.
[71] 66 Fed. Reg., sec. 4.

the functioning of the commissions. One of these allowed "admission of such evidence as would, in the opinion of the presiding officer of the military commission . . . have probative value to a reasonable person."[72] This provision echoed Roosevelt's 1942 order, as did the standard for convictions and sentences in a trial by a military commission. Under Bush's order, a defendant could be convicted "only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present," and could be sentenced "only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present."[73] And, finally, the order directed that the final trial record be submitted directly to Bush for final review.

Overall, the Bush order is quite similar to the Roosevelt order of 1942. Bush, though, did not take heed of the changes that Roosevelt ultimately made to the military commission process in 1944. Roosevelt knew that he made mistakes in the authority that he gave himself in the original order. The poorly argued *Quirin* per curiam decision, and ultimate opinion that allowed the execution of six people, were to be avoided in the future. In 1944, "an entirely different military proceeding" took place in trying accused Nazi saboteurs.[74] But Bush did not take into account what the Roosevelt administration learned after issuing its first order in 1942.

And, so, in an atmosphere of heightened public fear, Bush released the November 13, 2001 order that potentially allowed the executive to detain and try millions of non-citizens. Under the authority of the order, the Bush administration actually did apprehend

[72] 66 Fed. Reg., sec. 4.
[73] 66 Fed Reg., sec. 4.
[74] Fisher, 168.

and detain hundreds of individuals, sending them to Guantanamo for indefinite imprisonment. As of September 11, 2002, 598 enemy combatants were held in Guantanamo. By 2005, that number had grown to more than 750.[75] Though the exact number of detainees that were held in Guantanamo remains unclear, it is estimated that "[n]early 800 detainees have passed through Guantanamo at one point or another."[76] A number of these detainees contested the grounds of their detainment and the fact that their imprisonment was not subject to judicial review.

In two cases, the Court sided with the detainees. Though the Court never broadly endorsed the rights of the detained non-citizens, it ruled against the unchecked power of the executive over the non-citizens. Unlike the Court in *Quirin* or *Eisentrager*, the Court in *Rasul* and *Boumediene* found that the U.S. judiciary does have jurisdiction over the prison where the government indefinitely detains non-citizens, and that the executive branch alone is not authorized to decide whether or not enemy aliens have a right to judicial review.

2. *Rasul:* Rejecting *Eisentrager*'s Jurisdictional Holdings

In *Rasul v. Bush,* two Australian citizens and 12 Kuwaiti citizens who were captured in Afghanistan and taken to Guantanamo for indefinite detention then filed actions against the U.S. government in the U.S. District Court for the District of Columbia.[77] The Australians, Mamdouh Habib and David Hicks, filed petitions for writs of habeas corpus to contest the grounds of their detention. The Kuwaitis filed a complaint

[75] Pious, Richard M. 2006. The War on Terrorism and the Rule of Law. Los Angeles, California: Roxbury Publishing Company, 166.
[76] Wittes, 79.
[77] *Rasul,* at 472.

against the government, requesting to be informed of the charges against them, to have access to their counsel and families, and to have access to the courts or another impartial tribunal.[78]

The U.S. District Court treated all three actions as petitions for writs of habeas corpus, and dismissed them. The court determined that the petitioners were outside of U.S. "sovereign territory," and relying on *Eisentrager*, held that for the Court's want of jurisdiction the detainees could not file petitions for writs of habeas.[79] The Court of Appeals affirmed the dismissal. The Supreme Court reversed. It observed that the U.S., though not sovereign over Guantanamo, exercised total control over the base. As a result, the petitioners were within U.S. jurisdiction, and had a statutory right to file for writs of habeas. The main question in *Rasul* was "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[80] The Court's answer, in short, was yes.

a. Distinguishing *Eisentrager* and *Rasul*

Before answering the statutory question, though, the Court's opinion goes into the comparisons between *Eisentrager* and *Rasul.* Because the District Court and Court of Appeals both relied on *Eisentrager* to deny the petitioners' claim to a right of habeas, the Court determined to show why, in fact, *Eisentrager* could not be applied to the facts at

[78] Ibid, at 472.
[79] Ibid, at 472-473.
[80] Ibid, at 475.

hand. Justice Stevens, writing for the Court, said that the petitioners in *Rasul* differed from those in *Eisentrager* in "important respects."[81] The Australians and Kuwaitis

> are not nationals of countries at war with the United States, and they deny that they have 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 wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[82]

In *Eisentrager,* the combination of the petitioners' nationality, and the locations of their crimes, capture, trial, and imprisonment, led to the Court's determination that they had no claim on the right to habeas. Unlike the Nazis, those held in Guantanamo were not members of a single enemy nation. The War on Terror was never waged against one sovereign nation in particular. As David Cole observes, the War on Terror "is more akin to the metaphorical (and indefinite) "war on drugs" or "war on crime" than to a conventional war. As yet, it finds no nation on the other side. We [fought] an international criminal organization, Al Qaeda, and those who [aided] it, including . . . the Taliban. But we have declared war on no nation."[83] In *Eisentrager,* the Court could be sure that the accused were citizens of a nation that had engaged in active hostilities against the U.S. But the War on Terror, an amorphous conflict with an inarticulable end date, does not present an easily definable enemy.

What's more, the petitioners in *Rasul* never got their day before a military tribunal (let alone in a court). Flawed as the construction of the tribunals under Bush's military order was, the tribunals at least served the basic purpose of meting out a punishment for

[81] Ibid, at 476.
[82] Ibid, at 476.
[83] Cole, 958.

the crimes allegedly committed by the detainees. But the Australians and Kuwaitis in *Rasul* were held indefinitely in Guantanamo for over two years, without charges or trial of any kind.

Finally, the Court points out the difference between the locations of the trial and imprisonment in *Eisentrager*--China and Germany, respectively--and the location of the petitioners' detainment in *Rasul.* Though Cuba is a sovereign nation, Guantanamo Bay can be considered within U.S. jurisdiction. "By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."[84] For the Court, then, because of the different geographical locations, *Eisentrager* cannot be automatically applied to *Rasul.*

The other main difference between *Eisentrager* and *Rasul* arises from the constitutional focus of *Eisentrager.* There the parties, and the Court, addressed all issues in constitutional terms. Ultimately, "the Court in Eisentrager made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' constitutional entitlement to habeas corpus."[85] But, according to the *Rasul* Court, "[t]he [Eisentrager] Court had far less to say on the question of the petitioners' statutory entitlement to habeas review."[86] The petitioners in *Rasul* claimed not only a constitutional right to file writs of habeas, but also a statutory entitlement under the federal habeas corpus statute, 28 U.S.C. §2241. As such, *Eisentrager* alone was not enough to dismiss the detainees' claim on that statutory right.

---

[84] *Rasul*, at 480.
[85] Ibid, at 476.
[86] Ibid, at 476.

b. Finding a Statutory Right

The *Rasul* Court distanced itself from *Eisentrager* by highlighting the latter's focus on the constitutional, instead of statutory, question of habeas. Because *Eisentrager*, on its face, otherwise seemed like an apt precedent for *Rasul*, the Court noted that *Eisentrager* hardly addressed the statutory question on which the *Rasul* Court ultimately based its opinion.

According to Justice Stevens, "reference to historical context" can explain why *Eisentrager* dealt only in constitutional terms.[87] In 1948, just a few months after the *Eisentrager* petitioners filed their original petition in the District Court for the District of Columbia, the Supreme Court issued its opinion in *Ahrens v. Clark*, 335 U. S. 188. *Ahrens*, similar to *Eisentrager*, addressed whether 120 Germans who were detained at Ellis Island at the time could file writs of habeas corpus. The Court in *Ahrens*, affirming the district court and court of appeals, denied the petitioners' request, holding that U.S. courts lacked jurisdiction to hear the Germans' claims. The Court based its holding on its reading of the federal habeas corpus statute. Because the Court saw "the phrase 'within their respective jurisdictions' as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims."[88] The Court in *Ahrens* did not address the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights."[89]

[87] Ibid, at 476.
[88] Ibid, at *477.*
[89] *Ahrens v. Clark*, 335 U. S. 188, 1948, at 192.

So, when *Eisentrager* first came before the U.S. District Court for the District of Columbia, that court dismissed the petitioners' claims based on the precedent created by *Ahrens.* Like the Supreme Court in *Ahrens,* the district court in *Eisentrager* held that U.S. courts did not have statutory jurisdiction to address the Germans' petitioners for habeas corpus. And, when the Court of Appeals reversed the District Court's decision, it did so on constitutional, not statutory grounds. According to Stevens, "[the Court of Appeals] implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*."[90] Because the Court of Appeals accepted the *Ahrens* Court's interpretation of the habeas statute, it instead relied on constitutional "fundamentals" to authorize the Germans' right to habeas protections.

When *Eisentrager* came before the Supreme Court, then, the Court addressed only the constitutional grounds of the petitioners' claims. Neither the District Court nor the Court of Appeals questioned the *Ahrens* Court's interpretation of the habeas corpus statute, so the Supreme Court did not address it. The Supreme Court agreed with the Court of Appeals that "nothing in our statutes" conferred jurisdiction for federal courts to hear the Germans' claims.

According to Stevens, the Court had issued decisions after *Eisentrager* that rendered unnecessary petitioners' sole reliance on the Constitution to validate their habeas claims. In particular, *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U. S. 484, 495 (1973) fills "the statutory gap" presented by *Eisentrager.*[91] In *Braden,* the Court held that it was the location of the person who holds the prisoner, and not the location of the

[90] *Rasul,* at 477.
[91] Ibid, at 478.

prisoner himself, that determines federal court jurisdiction under the habeas statute. The Court's opinion stated that "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."[92] *Braden,* then, rejected and overturned *Eisentrager*'s "inflexible jurisdictional rule."

The Court in *Rasul* deconstructed *Eisentrager'*s avoidance of the statutory question, and *Braden*'s reinterpretation of the federal habeas statute's jurisdictional requirements, to make its own case. For the *Rasul* Court, "the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians."[93] All that the federal habeas statute requires, under *Braden,* is that the custodians are within U.S. federal courts' jurisdiction. As a result, the Court determined that the detainees may have their habeas claims heard in federal court.

Though it dealt with a narrow jurisdictional question, the Court's opinion in *Rasul* was significant. The case centered on enemy combatants held in a U.S. controlled prison, like the petitioners in *Eisentrager,* at a time of heightened public fear, as was the case during World War II. In deciding to sidestep *Eisentrager*, the Court made it clear that the case presented in *Rasul* was new enough, and unique enough, to warrant different treatment than *Eisentrager.* What's more, the Court's decision, in holding that U.S. courts have jurisdiction to hear the petitioners' claims, was the first step in providing

[92] *Ahrens,* at 494-495
[93] *Rasul,* at 483.

basic rights to those detained in Guantanamo. The Court did not allow the executive unchecked control over the detainees' fates, despite the executive's claims that such control was necessary to ensure national security.

3. *Boumediene:* A Constitutional Privilege of Habeas Corpus

In 2008, the Court issued an opinion that granted limited rights to Guantanamo detainees. *Boumediene,* a case that found the Military Commissions Act's suspension of the writ of habeas corpus unconstitutional, was the first to find a constitutionally-based right to habeas corpus Guantanamo detainees. The Court ultimately relied on separation of powers principles, and on the unprecedented violation of individual liberties at Guantanamo, to make its argument. The Suspension Clause of the Constitution, the Court ruled, must be applied to Guantanamo Bay.

The central question in *Boumediene* was whether the protections of the Suspension Clause reached detainees held in Guantanamo. The petitioners in the case were "aliens designated as enemy combatants and detained" at Guantanamo. [94] All petitioners were foreign nationals, but none were from a nation that was at war with the U.S. in 2008. All were apprehended abroad, though not in the same location: some were captured on the battlefield in Afghanistan, but others were apprehended "in places as far away from there as Bosnia and Gambia."[95] All petitioners appeared before Combatant Status Review Tribunals (CSRTs)—tribunals established by the Department of Defense to determine detainees' enemy combatant status—and all were determined to be enemy combatants.[96] All petitioners denied they were enemy combatants or had any role in the

[94] *Boumediene,* at 732.
[95] Ibid, at 734.
[96] Ibid, at 734.

September 11, 2001 attacks carried out by Al Qaeda. After the petitioners were classified as enemy combatants, they sought writs of habeas corpus in the U.S. District Court for the District of Columbia to challenge the legality of their detention.[97]

Boumediene came before the Court after years of pull-and-push between the legislative and executive branches on one hand, and the judiciary on the other. The petitioners' case began in 2002, when the District Court for the District of Columbia dismissed their petition for lack of jurisdiction. After the Court's opinion in *Rasul,* however, which held that federal courts do have the jurisdiction to hear habeas claims from Guantanamo detainees, the petitioners' cases were consolidated into two cases and heard in two different District Court proceedings. These proceedings, though, resulted in two opposite holdings: District Court Judge Richard J. Leon sided with the government, and dismissed the petitioners' petition, holding they had "no rights that could be vindicated" through a habeas action.[98] In the other proceeding, District Court Judge Joyce Hens Green held that the detainees had "rights under the Due Process Clause of the Fifth Amendment."[99]

While appeals were pending for these District Court decisions, though, Congress in 2005 passed the Detainee Treatment Act (DTA). One of the changes enacted by the DTA was to strip jurisdiction from all federal courts to hear habeas corpus actions on behalf of any alien held in Guantanamo. Under the DTA, the petitioners' cases would have to be dismissed entirely: the DTA's amendment to the habeas statute directly contravenes the Court's ruling in *Rasul.*

---

[97] Ibid, at 734.
[98] Ibid, at 734.
[99] Ibid, at 734.

The DTA was not the end of the back-and-forth between the Court and Congress. In 2006, the Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) that the DTA's provision against any federal court hearing detainees' habeas corpus actions did not apply to cases pending when the DTA was enacted.[100] In response to *Hamdan,* Congress in turn passed the Military Commissions Act (MCA). The MCA amended the federal habeas corpus statute once more. Under this revision, 23 U.S.C. A. §2241(e) (Supp. 2007) provided that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf or an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Subsection b of the amendment extends the same jurisdictional prohibition to "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an enemy combatant. Additionally, the revised statute specified a start date for its provisions: "[t]he amendment made by [MCA §7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception."[101]

The petitioners filed an appeal, and additional briefs in support of their case after the Court issued *Hamdan,* but the Court of Appeals dismissed the petitioners' cases under the authority of the MCA.[102] The Court of Appeals concluded that MCA §7 stripped "from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications; that petitioners are not entitled to the privilege of the writ or the protections

[100] Ibid, at 735.
[101] 120 Stat. 2636.
[102] *Boumediene,* at 735-736.

of the Suspension Clause; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA."[103]

In *Boumediene,* the Court, reviewing the Court of Appeals's decision, held that the petitioners did have a constitutional privilege of habeas corpus. And, thus, the MCA was an unconstitutional suspension of the writ, as it did not provide an adequate alternative to the writ. The Court's decision wound through a number of related historical precedents, from 17th century common law cases on the writ to the Insular Cases of the 20th century.[104] Ultimately, the Court relied on what it saw as the most salient features of *Eisentrager* to draw distinctions between the facts of *Eisentrager* and the facts at hand. These features, and the Court's concern over the implications for separation of powers principles and the Suspension Clause in not granting detainees a right to habeas, led the Court to find that the petitioners had a constitutional privilege of habeas corpus.

The government's main argument against extending Suspension Clause protections to the petitioners was that as non-citizens determined to be enemy combatants who are detained outside of the territorial U.S., the petitioners had no constitutional rights.[105] The petitioners contended that they had a valid claim on constitutional protections, and that the revisions to the federal habeas statute under the MCA were an unconstitutional suspension of the writ.[106] The Court, in deciding whether the petitioners have constitutional rights in light of their alleged status as enemy combatants and their location, relied in large part on *Eisentrager.*

---

[103] Ibid, at 735-736.
[104] Ibid, at 740-745 and 756-757.
[105] Ibid, at 739.
[106] Ibid, at 739.

To make its argument, the government attempted to claim that the Constitution's application did not extend to Guantanamo based on its interpretation of *Eisentrager*'s adoption of a "formalistic, sovereignty-based test for determining the reach for the Suspension Clause."[107] It reached this conclusion by citing a sentence from the 1950 opinion: the Germans "at no time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of the United States."[108]

However, the Court rejected the government's contention that de jure sovereignty—sovereignty under law, as opposed to sovereignty based on who, in fact, controls territory—is the touchstone of habeas corpus protections. The Court based this rejection on two propositions: first, that *Eisentrager,* in fact, was not based on Germany's de jure sovereignty over Landsberg Prison. In repudiating the government's interpretation of *Eisentrager*, the Court used its own construction of the case to hold that, in fact, de jure sovereignty was not the deciding factor in determining the Constitution's application. Instead, *Eisentrager* tells us that three sets of factors—the detainees' status, sites of imprisonment, and practical obstacles in granting the right to the writ—should inform the Court's opinion.

Second, the Court contended that the government's proposed sovereignty-based test went against our country's deeply held understandings of governmental balance. Basing the Suspension Clause's reach on de jure sovereignty alone brought up grave separation-of-powers concerns. Declaring that de jure sovereignty alone should limit the

[107] Ibid, at 762.
[108] *Eisentrager*, at 778.

reach of the Suspension Clause allowed the executive to overstep its authority, and undermined the protection of individual liberty that the Framers meant to effectuate by establishing the writ of habeas corpus.

a. Seeing *Boumediene* Through *Eisentrager*

Germany's de jure sovereignty over Landsberg Prison did not lead the *Eisentrager* Court to withhold the right of the writ from the German petitioners. The *Boumediene* Court pointed out that the U.S. lacked both de jure sovereignty and plenary control over Landsberg Prison in 1950.[109] Whenever the *Eisentrager* Court mentioned sovereignty, then, it was not clear whether it referred to the narrow, legal status of de jure sovereignty, or to "connote the degree of control the military asserted over the facility."[110] Additionally, the Court mentioned "territorial sovereignty" only twice in its opinion; the *Boumediene* Court pointed out that practical obstacles inherent in resolving the petitioners' right to the writ played a far larger part in the *Eisentrager* Court's decision than did any notion of sovereignty.[111]

After rejecting de jure sovereignty's central important, the Court pointed to the factors in *Eisentrager* that it did take to be instructive in deciding *Boumediene*. The Court outlined three main aspects of *Eisentrager* that it held to be most relevant to the case at hand. These were the petitioners' citizenship and status and how that status was determined; where the apprehension and detention of the prisoners took place; and the practical obstacles presented by resolving the detainees' privilege to the writ.[112] The

[109] *Boumediene,* at 763.
[110] Ibid, at 763.
[111] Ibid, at 763.
[112] Ibid, at 766.

Court compared these three sets of facts in *Eisentrager* and *Boumediene.* Because there were substantial differences between the circumstances of the two cases, the Court decided that, contrary to the government's contention, *Eisentrager* did not require that its outcome be repeated in the case at hand.

The detainees' status as enemy combatants in *Boumediene*, the Court noted, has from the beginning been a "matter of dispute."[113] While the prisoners in both *Eisentrager* and *Boumediene* were not American citizens, the Germans in *Eisentrager* never contested their designation as enemy aliens. The petitioners in *Boumediene*, though, denied they were enemy combatants.

Not only was the status of the detainees unclear in *Boumediene*, but the method for determining that status was not as comprehensive as that used in *Eisentrager*. The petitioners in *Eisentrager* had the opportunity to go through "a rigorous adversarial process to test the legality of their detention" through their trial by military commission.[114] They "were charged by a bill of particulars that made detailed factual allegations against them."[115] The Germans were allowed to have counsel represent them in the tribunals, could introduce evidence on their own behalf, and could cross-examine witnesses.[116] In contrast, the petitioners in *Boumediene* had far fewer procedural protections in their CRST hearings. The detainees were allowed to have a "representative" in their hearings, but that representative was not allowed to act as counsel or as an advocate. The detainees could introduce "reasonable available"

[113] Ibid, at 766.
[114] Ibid, at 767.
[115] Ibid, at 767.
[116] Ibid, at 767.

evidence, but their "confinement and lack of counsel" seriously limited their ability to meaningfully rebut the government's arguments.[117]

In regard to the second relevant factor, the Court again found important differences between *Eisentrager* and *Boumediene*. Both Landsberg Prison, where the Germans in 1950 were imprisoned, and the U.S. Naval Station at Guantanamo Bay, where the petitioners in *Boumediene* were detained, are located outside of U.S. sovereign territory. But there the similarities end. In 1950, the U.S.'s control over Landsberg Prison was "neither absolute nor indefinite." The Allies as a whole, and not the U.S. alone, had authority over the prison. Further, the Allies never intended to exercise control over Germany in the long term, or replace German legal procedures with those of the U.S. Because the U.S. did not intend to indefinitely govern the area, there was no need to "extend full constitutional protections" there, under the precedent created by the Insular Cases.[118]

But under Cuba's lease of Guantanamo Bay to the U.S., Guantanamo is, "in every practical sense," under the total and indefinite control of the U.S. government.[119] Cuba retains ultimate sovereignty under the agreement, but it "effectively has no rights as a sovereign" until the lease is modified or abandoned.[120] The U.S. is answerable to no other sovereign for its actions on Guantanamo (versus the U.S.'s obligation to the Allies at Landsberg), and it will maintain exclusive jurisdiction and control for the indefinite future.

---

[117] Ibid, at 767.
[118] Ibid, at 768.
[119] Ibid, at 769.
[120] Ibid, at 753.

Finally, the Court noted that the difference in the practical obstacles present in affirming the prisoners' right to habeas in *Eisentrager* and *Boumediene* is of critical importance. Practicality, as already noted in Chapter 1, played a large role in the Court's decision. It would have required significant resources at the U.S. government's expense to transport the prisoners to the U.S. for habeas actions. And, further, the U.S. military claimed it could not afford any damage to its missions that might result from a perceived loss of authority. At the time *Eisentrager* was decided, "[i]n addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy."[121] Whether or not these pragmatic arguments should have overruled the right that the Germans might have had to file writs of habeas, the Court found them persuasive; they were central to the Court's ultimate decision.

In *Boumediene*, though, the Court stated that "[t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."[122] Any valid concerns that the government might have had in 1950 about "judicial interference with the military's efforts to contain 'enemy elements, guerrilla fighters, and 'werewolves'" were not to be found in 2008 at Guantanamo Bay.[123] Guantanamo consists of 45 square miles. The vast majority of its inhabitants are detainees and military personnel. The Court refused to accept that the strategic consequences of allowing habeas review for the petitioners in Guantanamo might lead to any of the outcomes feared in Germany in 1950.

[121] Ibid, at 769.
[122] Ibid, at 769.
[123] Ibid, at 770.

The Court's analysis of *Eisentrager,* then, led it to reject the government's argument against extending the Suspension Clause under *Eisentrager*'s authority. But what led the Court to ultimately rule in the detainees' favor was not an analysis of past case law, but an argument based on fundamental separation of powers principles. Because the writ functions as a mechanism for ensuring a balance between the branches, and for protecting individual liberty against executive authority, the Court held it to be of deep importance. Precisely because the Court could find no exact historical parallel, it decided to grant the detainees a right to the constitutional privilege of habeas corpus.

b. The Writ as Safeguarding a Separation of Powers

The Framers' understanding of the purpose of the writ informs the Court's most central argument for extending the protections of the Suspension Clause to the petitioners at Guantanamo Bay. According to the Court, the Framers "viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."[124] The writ was one of the few protections originally written into the Constitution before the addition of a Bill of Rights. What's more, the Framers' decision to allow suspension of the writ only in limited circumstances—"rebellion or invasion"—shows the importance they placed on the writ as a protector of individual liberty.[125]

The writ, though, is not designed solely to protect individual liberty. It is also fundamental in maintaining our government's separation-of-powers scheme. In fact, it is difficult to separate the writ's role as protector of liberty and protector of governmental

[124] Ibid, at 739.
[125] Ibid, at 743.

balance: "The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."[126] The separation of powers between the branches has always been meant to promote individual liberty, so by allowing the judiciary to exercise a check on the executive's authority, the writ both maintains the separation of powers scheme and safeguards liberty.

Notably, the Framers considered the writ most important not during times of political calm, but during periods when the executive was prone to overstep its authority. The Framers were familiar with cyclical abuse of monarchical power in sixteenth- and seventeenth-century England. They saw the writ as a partial antidote to that abuse. The Framers knew "that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power."[127] The fact that the imprisonment of detainees in Guantanamo is politically charged is not a reason to prohibit the use of the writ. Rather, the Court believes, the highly political nature of the detainees' imprisonment is a strong justification for employing the writ. The executive's issuance of its sweeping military order likely represents a "pendular swing away from individual liberty." As such, the judiciary has a constitutional right to review the executive's decisions. That is precisely the function of the writ of habeas corpus.

In attempting to determine the writ's reach based purely on de jure sovereignty, the government tried to unilaterally limit where and when the Constitution applied. The

[126] Ibid, at 742.
[127] Ibid, at 742.

government argued that "by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint."[128] The Court found this contention unacceptable. The executive branch cannot decide to "switch the Constitution on or off at its will." Such a concentration of unchecked power represented a fundamental violation of the separation-of-powers doctrine.

The executive's attempt to exercise control over the Constitution's territorial application is concerning in any context, but particularly so in that of the Suspension Clause. The writ of habeas itself is meant to protect against executive overreaching. In attempting to neutralize the power of the writ, the government overextended the same executive power that the writ is supposed to check. The Court firmly rejected the possibility that Congress and the President can "contract away" the Constitution's reach. The separation-of-powers concerns raised by the government's de jure sovereignty test led the Court to reject the assertion that de jure sovereignty is the touchstone of habeas corpus jurisdiction.

c. Exceptionalism in *Boumediene*

The Court found no precise historical parallel to aid in its decision in *Boumediene.* *Eisentrager* gave the Court no concrete answer. Comparing the facts in *Eisentrager* and *Boumediene* showed that a simple replication of the decision in *Eisentrager* would be unjustified. Ultimately, the historical centrality of the writ of habeas in protecting

[128] Ibid, at 765.

individual liberty and enforcing the separation-of-powers scheme led the Court to decide in favor of the petitioners.

The Court's decision in *Boumediene* is unprecedented. The lack of historical parallel, and the extreme circumstances in the case, led the Court to grant constitutional privileges to nonresident enemy aliens. In his dissent, Justice Scalia noted that the decision in *Boumediene* was the first of its kind: "for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."[129] While Scalia disagreed with the Court's determination that the MCA was unconstitutional, Scalia and the Court's majority agreed about the unique nature of the case. The Court stated that "[t]he gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional."[130]

If the detainees had not been held without charges or trial for six years, the Court likely would not have issued the same decision. If the government's attempt to unilaterally determine the reach of the writ was not part of the case, the Court also might have come to a different conclusion. It was precisely because the circumstances were both unique and extreme that the Court decided in favor of the petitioners.

[129] Ibid, at 826-827.
[130] Ibid, at 772.

Chapter 3: Constitutional Values

The Court's understanding of its role in assigning rights to non-citizen enemy aliens has progressed. In 1942, the Court displayed complete deference to the executive branch in *Quirin*. Even though there existed strong—even definitive—reasons for the Court to challenge the authority of the executive and intercede to protect the Germans' rights, it failed to do so. The Court in *Eisentrager*, at least, did not engage in the same kind of total executive deference as it did in *Quirin*. *Eisentrager*, like *Quirin*, denied all basic constitutional protections to non-resident enemy aliens. The aliens were all far removed from the jurisdiction of the U.S., though; *Eisentrager* at least had a decently strong rationale for denying constitutional rights to captured nonresident enemy aliens in comparison to *Quirin*.

With the enemy combatant cases of the 2000s, the Court shifted its view of its own part in assigning non-citizen enemies' rights, at least within the unique circumstances presented by Guantanamo. The Court in *Rasul* knocked down any jurisdictional barrier to the Guantanamo detainees' right to habeas. The Court decided against the U.S. government in this case: the executive branch made the argument that *Eisentrager* dictated against providing any constitutional right to the detainees. The Court, though, held that the detainees had a right to habeas under the federal habeas corpus statue, and that the custodian—the U.S. government—was within the jurisdiction of U.S. federal courts. The detainees, therefore, could file petitions for writs in U.S. federal court.

In *Boumediene*, the Court once more rejected the government's argument. Here, the government claimed that Guantanamo was part of Cuba, a sovereign nation, and as a

result the naval base could not lie within U.S. federal court jurisdiction. But the Court rejected this interpretation. Instead, it relied on the fundamental importance of both the writ and separation-of-powers principles, and the unique deprivation of rights at Guantanamo, to find in favor of the detainees' constitutional right to habeas.

The Court has made a move in its view of the Constitution as, in some cases, extending its protections to non-citizens accused of terrorism against the U.S. In *Boumediene*, though, the Court did not have to a make a general statement about which rights we should provide to non-citizen suspected terrorists. The exceptional circumstances in *Boumedien*e—which, the Court is correct, certainly were unique—let the Court decide firmly in favor of the Guantanamo detainees' constitutional privilege to habeas without making a blanket statement about the rights we should, as a standard, provide to non-citizen enemies.

Those standard rights, in fact, remain largely undefined. The legislature is the governmental body that is in the business of enacting legislation that aligns with the constitutional values of the country. But the legislation that has thus far been passed by Congress in relation to Guantanamo detainees does not fully reflect our constitutional principles. The Detainee Treatment Act of 2005 (DTA), while prohibiting cruel, inhuman, or degrading treatment or punishment—essentially banning "enhanced interrogation methods," or torture—does little else to protect the procedural rights of detainees. The DTA, in fact, clarifies that the only judicial review available to detainees is in the D.C. Circuit Court of Appeals. This provision, while standing "as an acknowledgment in law that detentions in the war on terrorism are something different from either war or criminal justice and that they require legal arrangements that will

hybridize the two," does not do enough to provide adequate procedural protections to detainees.[131] Further, this act applies only to those in Guantanamo, not to non-citizen terrorists in general.

The Military Commissions Act of 2006 (MCA), the "most ambitious congressional effort to write the rules of the war on terrorism," did little to reflect our constitutional values.[132] In fact, the MCA's suspension of the writ was the main subject of *Boumediene*; the Court ultimately held this section of the MCA to be unconstitutional. The rest of the bill explicitly authorized the military commission and spelled out their necessary procedures. Some of these procedures, at least, represented a portion of those that are necessary to provide constitutional substitutes. Defendants being tried before commissions were to be informed of the charges against them "as soon as practicable;" statements obtained through torture were to be excluded; and a few more requirements were added to the admission of evidence, though the "probative value to a reasonable person" standard remained.[133] But the MCA also attempted to strip federal courts of habeas jurisdiction, and its procedures for military commissions—while more explicit—were not meant to serve as substitutes for constitutional protections.

Perhaps most importantly, the legislation passed by Congress thus far fails to justify or clarify the procedures for detentions themselves. Congress "has never ground the detentions in law—meaning that the entire edifice [of Congress's Guantanamo-related legislation], controversial and rickety at this stage, stands on a bed of sand. By cutting off all of the habeas actions, or attempting to, Congress insisted that this absurd structure be

[131] Wittes, 140.
[132] Ibid, 140.
[133] Military Commissions Act of 2006.

immune from the judicial scrutiny most readily available."[134] Not only do the DTA and MCA provide too few safeguards to detainees in their trial processes, but the detentions themselves have no justification in law, let alone in foundational constitutional principles.

The fact that both *Rasul* and *Boumediene* dealt in questions of habeas shows the lack of procedural safeguards in place for detainees, particularly in determining the "terrorist" status of a detainee in the first place. Typically, in criminal law, filing petitions for writs of habeas is a last resort. It is a "stopgap against injustice," used only as a last defense against wrongful conviction.[135] But in the cases of Guantanamo detainees, the arguments for habeas serve as their only way to challenge the legality of their detentions. "If the military were operating a strong, stable, and fair detention regime, habeas review would become much less significant—whether the federal courts retained habeas jurisdiction or not. If it were entirely clear as a matter of law that the government were entitled to hold a given detainee, that detainee would have no successful habeas action to file."[136]

As representatives of the country who should be guided by ideals of fairness, justice, and presumption of innocence, Congress has an obligation to pass legislation that guarantees procedures that are adequate substitutes for constitutional protections. These procedures do not have to mirror exactly what the Constitution requires: a military commission that is truly impartial, requires unanimous votes for sentencing, has standards for evidence that do not put the defendant at a disadvantage, and provides counsel for detainees would likely still meet standards of fairness and presumption of

[134] Wittes, 142.
[135] Ibid, 152.
[136] Ibid, 152.

innocence. But in setting out the standards of procedure owed to non-citizens who are suspected terrorists, our laws must be guided not by fear and complete deference to the executive branch, but by the constitutional principles that undergird our commitment to the Constitution itself.

These standards for procedure should apply, as much as possible, to all situations in which the military captures and detains non-citizens. As long as the success of the military operations is not directly harmed by providing procedural safeguards to detainees in their detentions, status determinations, trials, and sentences, we have an obligation to increase their protections to the point of constitutional adequacy. In active military operations, and in detentions after those operations, we must provide procedures that fulfill the requirements of fairness, justice, and presumption of innocence. These protections would include an individual's right to be made aware of the charges against him; the right to remain silent and not be forced into making incriminating statements; the right to counsel, and to an impartial interpreter if necessary; the right to a fair and relatively speedy trial; and the right to be sentenced only upon the agreement of all members of a military commission. This list, of course, is not exhaustive; legal experts and certain members of the military, especially those familiar with both military justice procedures and legal procedures required under the Constitution, are best situated to form a comprehensive list that satisfies the values embodied in our Constitution.

These are standards that should be required in the capture and detention of any non-citizen suspected terrorist. But the protections that we owe to those still held in Guantanamo, or those who were held in Guantanamo indefinitely before being eventually transferred to other facilities, must be higher. In Guantanamo, the government

unnecessarily deprived hundreds of individuals of basic rights. Detainees were held for years without even being made aware of the charges against them. Though Bush's order authorized trial by military commission, many detainees were held for years without ever appearing before those commissions. Torture was used against some in Guantanamo. Few detainees ever had access to counsel; in the CSRTs that determined whether or not detainees were enemy combatants, the detainees had a right to a "personal representative," but that individual was not meant to act as the detainee's advocate. The very fact of Bush's military order that allowed broad swaths of non-citizens to be subject to detention, without judicial review, goes against fundamental requirements of fairness and individual liberty against excessive governmental power.

In attempting to redress the wrongs our government committed by denying basic rights to Guantanamo detainees, we should go beyond adequate substitutes for the Constitution. In these limited cases, in which the government knowingly and continuously deprived individuals of basic procedural rights in a facility entirely removed from any hostilities of war, we should grant detainees the protections of the Constitution itself. The government failed to live up to the mandates of fairness and justice when it first captured and held the detainees at Guantanamo. Now, giving those detainees the full procedural protections of the Constitution—including access to habeas actions in a U.S. federal court—is how we might make up their years-long lack of rights. These detainees were not necessarily entitled to the privileges of the Constitution itself when they were first captured. But because the detainees in Guantanamo were not given fair procedural protections, their claim on the Constitution now is stronger than at the time of their

capture. The U.S. government actively deprived detainees of basic rights for years. Those detainees deserve the force of the Constitution itself.

That we must treat enemies of the U.S.—even those accused of terrorism against our country—in a way that aligns with our values is no novel concept. In 1942, one of the defense attorneys in *Quirin* tried to urge the military tribunal not to take steps that would contradict our nation's values. Kenneth Royall articulated the necessity of providing certain rights even to our greatest enemies. The United States would win World War II, he predicted, but we should not "want to win it by throwing away everything we are fighting for, because we will have a mighty empty victory if we destroy the genuineness and the truth of democratic government and fair administration of law."[137]

President Obama has made statements that echo Royall's plea. In pledging to shut down Guantanamo, Obama has confirmed that indefinite detentions, trials without procedure, and prohibition of judicial review go against the principles we hold dear. Our nation has an obligation to provide procedural rights to detainees that are adequate substitutes for constitutional privileges, and that align with our notions of justice and fairness. The U.S. fights terrorism in the name of democracy, fairness, and protection of human rights. But adherence to those values means nothing if we allow our government to violate the most fundamental requirements of fairness and justice.

[137] Fisher, 114.

Works Cited

Abella, Alex, and Scott Gordon. 2003. *Shadow Enemies: Hitler's Secret Terrorist Plot Against the United States.* The Lyons Press.

Cole, David. 2002. "Enemy Aliens." *Stanford Law Review* 54: 953-1004.

Fetini, Alyssa. 2008. "A Brief History of Gitmo." *Time*, November 12.

Fisher, Louis. 2005. *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism.* Lawrence, Kansas: University of Kansas Press.

1942. Letter from Stone to Frankfurter. *Frankfurter Papers.* September 10.

Madison, James. 1999. "Letter to Thomas Jefferson, May 13, 1798." *Writings of James Madison,* 588. Library of America.

"Memorandum of Mr. Justice Frankfurter, In re Saboteur Cases." Papers of William O. Douglas, Box 77, Library of Congress.

"Notable Trials in the Northern District of Illinois: United States v. Haupt, et al. - The treason trial of Hans Max Haupt." *Northern District of Illinois Historical Association.* http://www.ilndhistory.uscourts.gov/hauptTrial.html.

"Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia." reprinted in 39 Landmark Briefs and Arguments of the Supreme Court of the United States 296 (1975).

Pious, Richard M. 2006. *The War on Terrorism and the Rule of Law.* Los Angeles, California: Roxbury Publishing Company.

2016. "Remarks by the President on Plan to Close the Prison at Guantanamo Bay." The White House, Office of the Press Secretary. February 23.

"Rule Established by the Military Commission Appointed by Order of the President of July 2, 1942." Papers of Frank Ross McCoy, Box 79, Library of Congress.

Seelye, Katharine Q. 2002. "Threats and Responses: The Detainees; Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says." *The New York Times,* October 23.

2001. "Senate Judiciary Committee Hearing on Anti-Terrorism Policy, 106th Cong." December 6.

Untitled, undated three-page statement, McCoy Papers.

Wittes, Benjamin. 2008. *Law and the Long War: The Future of Justice in the Age of Terror*. New York: Penguin Press.