

## CASE NOTE

# The Power of Habeas Corpus to Challenge Detentions at Guantanamo Bay: Revisiting the Landmark Decision of *Rasul v. Bush* While Awaiting a Ruling in *Boumediene v. Bush*

BARBARA BEATIE AND BOB SWANSON\*

“What is at stake in this case is the authority of federal courts to uphold the rule of law.”<sup>1</sup>

### I. Introduction

The devastation of September 11, 2001, ignited a chain of events that transformed America. In the aftermath of the terrorist attacks, a “War on Terror” was mounted. Military actions were waged, first in Afghanistan, and later, in Iraq. A military prison was created on the naval base at Guantanamo Bay, Cuba, to house those accused of fighting for the Taliban and al-Qaida. By the middle of 2002, over 600 people had been captured and brought by the United States to the Guantanamo Bay facility. Because these detainees were foreign nationals, the Executive branch claimed sole authority to determine what protections and rights the prisoners might have. Most of the prisoners at the facility were being held without knowledge of any charges against them and without access to legal counsel. “[T]hrough relatives acting as their next friends,” some prisoners attempted to challenge their detentions.<sup>2</sup>

Challenges to the detentions faced several obstacles. Efforts to determine the charges against the prisoners, allow access to legal counsel, and receive a hearing in an impartial setting were stymied by the military. The plaintiffs tried to invoke U.S. law from outside the U.S., but ran into juris-

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\* Barbara Beatie and Bob Swanson are both graduates of Empire College School of Law.

1. *Rasul v. Bush*, 542 U.S. 466 (2004) (Transcript of oral argument opening statements at 3).

2. *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

dictional issues. They were foreign nationals with no territorial connection to the U.S. and they were being held outside the United States.

Jurisdictional issues regarding nationality and territoriality were addressed. In June of 2004 the Supreme Court of the United States gave some definition to the guidelines for determining when and where foreign nationals with no connection to the U.S. could bring suit under the U.S. statutory scheme. The ruling in *Rasul v. Bush*<sup>3</sup> allowed such suits, at least under these facts. The government responded with legislation intended to block these actions. Summer 2008 awaits the latest ruling from the Supreme Court on the ability of prisoners at Guantanamo Bay to challenge their detentions. The continued detention of over 300 prisoners at Guantanamo Bay may be finally decided.<sup>4</sup> The reasoning behind *Rasul* forms an important basis for the much anticipated ruling to come in *Boumediene v. Bush*.<sup>5</sup>

## II. June 2004 Decision: *Rasul v. Bush*

*Rasul* was a consolidation of two lower court cases. The petitioners were two Australian citizens and twelve Kuwaiti citizens captured abroad and suspected of having alleged ties to the Taliban.<sup>6</sup> All had been held at Guantanamo Bay Naval Base since early 2002.<sup>7</sup> The petitioners maintained they had never been combatants against the United States or had ever engaged in any terrorist attacks. “They also alleged that none [had] been charged with any wrongdoing, permitted to consult with counsel, or provided with access to the courts or any other tribunal.”<sup>8</sup> The Australians challenged the custody by filing a petition for writ of habeas corpus.<sup>9</sup> The Kuwaitis did not specifically file a petition for writ of habeas corpus, but sought information on the charges against them, to have access to families and counsel, and to have access to the courts or other impartial tribunal.<sup>10</sup>

Petitioners filed their actions in the U.S. District Court for the District of Columbia. The actions were construed as petitions for habeas corpus.<sup>11</sup> The District Court dismissed the actions for lack of jurisdiction, relying on *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).<sup>12</sup> The Court of Appeals affirmed the lower court’s ruling.<sup>13</sup> The United States Supreme Court granted certiorari to hear the case.<sup>14</sup>

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3. *Rasul v. Bush*, 542 U.S. 466 (2004).

4. [http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR200701150227\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR200701150227_pf.html).

5. *Boumediene v. Bush*, No. 06-1195 (U.S. Supreme Ct., argued Dec. 5, 2007).

6. *Rasul*, 542 U.S. at 470-71.

7. *Id.* at 471.

8. *Id.* at 472.

9. *Id.* at 473.

10. *Id.* at 472.

11. *Id.* at 472.

12. *Id.* at 472.

13. *Id.* at 473.

14. *Id.* at 473.

The issue before the Court in this case was “whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”<sup>15</sup>

### III. The Great Writ of Habeas Corpus

The ability to challenge one’s detention is a crucial right in the balance between the people and the government. When King John of England signed the Magna Carta eight hundred years ago, he “pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”<sup>16</sup> This concept became known as habeas corpus. It is enshrined “in the Constitution, which forbids suspension of ‘[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.’”<sup>17</sup>

The writ of habeas corpus has also been enacted into the U.S. statutory scheme. Its origins can be traced back to the earliest days of the country, starting with “the first grant of federal-court jurisdiction: Section 14 of the Judiciary Act of 1789.”<sup>18</sup> This initially “authorized federal courts to issue the writ of habeas corpus to prisoners ‘in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same.’”<sup>19</sup> After the Civil War, habeas protection was expanded to “any person . . . restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”<sup>20</sup> Since then, habeas protections under the law have expanded significantly.<sup>21</sup> Still, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention . . . .”<sup>22</sup> In fact, “it is in that context [of Executive detention] that its protections have been strongest.”<sup>23</sup> This has been true “in wartime as well as in times of peace.”<sup>24</sup> It is fundamental that one has the ability to challenge a detention because, without that, one could be imprisoned indefinitely.

The Supreme Court in *Rasul v. Bush* undertook a three-part analysis to consider the habeas issue. It framed the issue as “whether the habeas statute confers a right to *judicial review of the legality of executive detention of*

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15. *Id.* at 470.

16. *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting)).

17. *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting U.S. CONST. art. I, § 9, cl. 2).

18. *Rasul*, 542 U.S. at 473.

19. *Id.* at 473.

20. *Id.* at 473.

21. *Id.* at 474.

22. *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

23. *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

24. *Rasul*, 542 U.S. at 474.

aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’ ”<sup>25</sup> First, the Court looked at whether the Constitution barred such a right of judicial review. Next, the Court pondered whether the statutory scheme would support such a review. This was important as petitioners “invoked the Court’s jurisdiction under” federal statutes.<sup>26</sup> Finally, the Court considered the extra-territorial application of the statutes with respect to Guantanamo Bay. All three aspects informed the Court’s decision.

#### IV. Test to Determine the Constitutional Right to Habeas Corpus for Alien Prisoners

The government argued that *Johnson v. Eisentrager* was controlling on the jurisdictional question and that U.S. courts did not have jurisdiction. The District Court in *Rasul* relied on *Eisentrager* in dismissing the claim, holding that “aliens detained outside the sovereign territory of the United States” could not bring “a petition for a writ of habeas corpus.”<sup>27</sup> The Court of Appeals in *Rasul* affirmed the District Court’s dismissal per *Eisentrager*, saying “ ‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’ ”<sup>28</sup>

In *Eisentrager*, German nationals were captured, tried, and convicted in China by a Military Commission. After, the prisoners were incarcerated in Germany at an American military base. The prisoners then filed a writ of habeas corpus. The District Court dismissed the petition on statutory grounds. This was reversed by the Court of Appeals on constitutional grounds. The Supreme Court reversed again, finding that the constitutional grounds put forward did not apply to the prisoners and holding that the alien enemies did not have a constitutional right to “immunity from military trial and punishment . . . .”<sup>29</sup> The District Court’s dismissal was affirmed.

The Supreme Court in *Rasul* looked at the reasoning behind the *Eisentrager* holding. The *Rasul* Court found that *Eisentrager* set out a six-factor test<sup>30</sup> in determining whether an alien prisoner had a constitutional right to the writ of habeas corpus. If all six of the factors were answered “yes,”

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25. *Id.* at 475 (emphasis added).

26. *Id.* at 472.

27. *Rasul v. Bush*, 542 U.S. 466, 472-73 (2004) (quoting *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (DC 2002)).

28. *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Al Odah v. U.S.*, 321 F.3d 1134, 1144 (D.C. Cir. 2003)) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

29. *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950).

30. *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950). (In summary, those six critical factors are whether the prisoners: (1) were enemy aliens; (2) had never been or resided in the United States; (3) had been captured outside of [U.S.] territory and there held in military custody as a prisoner of war; (4) were tried and convicted by a Military Commission sitting outside the United States; (5) were tried and convicted for offenses against laws of war committed outside the United States and; (6) at all times were imprisoned outside the United States.)

then the prisoner had no right to the writ. Applying that test to the *Rasul* petitioners this Court distinguished *Eisentrager*, noting that the current “[p]etitioners . . . differ from the *Eisentrager* detainees in important respects.”<sup>31</sup>

They 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.<sup>32</sup>

In finding the *Rasul* “petitioners differently situated from the *Eisentrager* detainees,” the Court implied that there was no constitutional bar to the judicial review of this suit.<sup>33</sup> Further, the *Rasul* Court stated that *Eisentrager* only addressed the alien prisoners’ constitutional rights to the writ of habeas corpus, not any statutory rights. “*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.”<sup>34</sup> However, the *Rasul* court passed on the question of whether the petitioners before it had a constitutional right to habeas corpus.

## V. Requirements for Statutory Habeas Relief

The *Rasul* court then considered the petitioners’ statutory relief. When *Eisentrager* was decided, *Ahrens v. Clark*<sup>35</sup> was the rule in considering statutory entitlement to habeas relief. Under *Ahrens*, the language of the habeas statute, “within their respective jurisdictions” was held “to require the petitioners’ presence within the district court’s territorial jurisdiction . . . .”<sup>36</sup> This means the presence of the petitioners before the court would be necessary. Since no U.S. court has jurisdiction over Guantanamo Bay Naval Base, the detainees would have nowhere to petition and would have no way to challenge their imprisonment.

More than twenty years after *Eisentrager*, the Court decided *Braden v. 30th Judicial Circuit Court of Kentucky*.<sup>37</sup> In *Braden*, the “Court held, contrary to *Ahrens*, that the prisoner’s presence within the territorial jurisdiction of the district court [was] not ‘an invariable prerequisite’” to obtaining statutory habeas relief.<sup>38</sup> It was held that the writ acts upon the person holding the prisoner, not upon the prisoner. As long as “the custodian can be reached by service of process,” the District Court has jurisdiction to

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31. *Rasul*, 542 U.S. at 476.

32. *Id.* at 476.

33. *Id.* at 476.

34. *Id.* at 476.

35. *Ahrens v. Clark*, 335 U.S. 188 (1948).

36. *Rasul v. Bush*, 542 U.S. 466, 477 (2004) (quoting *Ahrens v. Clark*, 335 U.S. 188, 192 (1948)).

37. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

38. *Rasul*, 542 U.S. at 478.

act.<sup>39</sup> This decision overruled *Ahrens*. The justification relied on in *Eisen-trager* to dismiss habeas petitions on statutory grounds from petitioners outside territorial jurisdiction was gone. The District Court clearly had jurisdiction over the custodians of the Guantanamo Bay detainees. “No party questions the District Court’s jurisdiction over petitioners’ custodians.”<sup>40</sup> The result for the *Rasul* petitioners is that “*Eisen-trager* plainly does not preclude the exercise of [28 U.S.C.] § 2241 jurisdiction over petitioners’ claims.”<sup>41</sup>

## VI. The Application of U.S. Law in Guantanamo Bay, Cuba

As an alternative, the government contended that Cuba was beyond the territorial jurisdiction of any U.S. court. *Braden* might allow detainees held in one District Court’s jurisdiction to file a habeas petition in another District Court’s jurisdiction. Cuba, however, was completely outside U.S. borders. Generally, when it comes to the operation of U.S. law outside U.S. borders, “congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested.”<sup>42</sup> As a result, the government was saying, the habeas statutes did not apply outside the U.S. borders, and Cuba was outside the U.S. borders. Further, under the 1903 Lease Agreement, “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” including the Guantanamo Bay naval base.<sup>43</sup> Thus, not only was Cuba outside U.S. borders, but the United States did not even have ultimate sovereignty over the Guantanamo Bay naval base.

The *Rasul* Court dismissed the government arguments. First, the Court found that Cuba was within the territorial jurisdiction of the United States. “[E]xtraterritoriality . . . has no application to the operation of the habeas statute with respect to persons detained within ‘the territorial jurisdiction’ of the United States.”<sup>44</sup> Next, the Court looked at the actual written terms of the U.S. agreements with Cuba.<sup>45</sup> Ultimate sovereignty was not the key to jurisdiction. Instead, the important thing was who exercised control and who held the power to end control. Here, “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

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39. *Rasul v. Bush*, 542 U.S. 466, 478-79 (2004) (quoting *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-95 (1973)).

40. *Rasul*, 542 U.S. at 483.

41. *Id.* at 479.

42. *Id.* at 480.

43. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (quoting the 1903 Lease Agreement).

44. *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

45. *Rasul*, 542 U.S. at 480.

chooses.”<sup>46</sup> The government itself allowed “that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base.”<sup>47</sup> In pointing out “that the statute draws no distinction between Americans and aliens held in federal custody,” the Court took this to mean that Congress did not intend to have the habeas statutes apply differently depending on citizenship.<sup>48</sup> In conclusion, “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”<sup>49</sup>

## VII. Justice Kennedy’s Concurrence: Use the *Eisentrager* Framework

Justice Kennedy concurred with the majority’s ruling, but followed a different path. He believed the majority’s conclusion that *Braden* overruled *Ahrens* was inadequately supported. Instead, “the correct course [was] to follow the framework of *Eisentrager*.”<sup>50</sup> The six-factor test was necessary “to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented.”<sup>51</sup> A natural consequence, then, “of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.”<sup>52</sup>

Following an *Eisentrager* analysis, Justice Kennedy was able to distinguish the petitioners in *Rasul* from those in *Eisentrager*. He found that “Guantanamo Bay is in every practical respect a United States territory . . . far removed from any hostilities.”<sup>53</sup> Also, the United States has long exercised unchallenged and indefinite control over Guantanamo Bay.<sup>54</sup> This “has produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it.”<sup>55</sup> Additionally “the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status.”<sup>56</sup> The *Eisentrager* detainees already had recourse to legal proceedings. The petitioners in *Rasul*, therefore, did not satisfy at least two of the six *Eisentrager* factors. Based on that, it would appear that Justice Kennedy would have found a constitutional right to habeas corpus for the detainees.

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46. *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (quoting 1903 Lease Agreement, Art. III; 1934 Treaty, art. III).

47. *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (quoting Tr. of Oral Arg. 27).

48. *Id.* at 481.

49. *Id.* at 481.

50. *Id.* at 486 (Kennedy, J., concurring).

51. *Id.* at 487 (Kennedy, J., concurring).

52. *Id.* at 487 (Kennedy, J., concurring).

53. *Id.* at 487 (Kennedy, J., concurring).

54. *Id.* at 487 (Kennedy, J., concurring).

55. *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

56. *Rasul*, 542 U.S. at 487-88 (Kennedy, J., concurring).

### VIII. The Dissent: The U.S. Courts Have No Jurisdiction Over Foreign Nationals Held at Guantanamo Bay, Cuba

Written by Justice Scalia, the dissent disagreed with the majority on nearly every point. The majority's ruling "contradicts a half-century old precedent on which the military undoubtedly relied."<sup>57</sup> The dissent read *Eisentrager* to say that "[t]he Court of Appeals concluded that there was statutory jurisdiction."<sup>58</sup> However, the dissent recognized that the *Eisentrager* Court of Appeals reached "that conclusion by applying the canon of constitutional avoidance."<sup>59</sup> That Court of Appeals construed the habeas statutes so they would not "constitut[e] a suspension of the writ in violation of the constitutional provision."<sup>60</sup> That included construing "custody . . . as including those who have directive custody, as well as those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements," and allowing jurisdictional issues with respect to the prisoners and the immediate jailers to be ignored.<sup>61</sup>

The *Eisentrager* Supreme Court rejected this constitutionally based interpretation of the habeas statutes. Since the *Eisentrager* Court of Appeals' statutory jurisdiction conclusion was supported solely on these constitutional grounds, the dissent's reliance on the fact that the Court of Appeals found statutory jurisdiction might be viewed as invalid. Thus, the dissent's contention that the Supreme Court in *Johnson v. Eisentrager* ruled on constitutional and statutory grounds is true, but overstated. The *Eisentrager* court itself recognized that it was "confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to . . . a writ of habeas corpus" when it developed its six factor test.<sup>62</sup> Its statutory analysis was limited to saying the Court "consistently adhered to and recognized the general rule," referencing *Ahrens v. Clark* as authority for that.<sup>63</sup>

The dissent contended that *Braden* did not overrule *Ahrens*. "*Braden* did not overrule *Ahrens*; it distinguished *Ahrens*."<sup>64</sup> The dissent correctly says that "*Ahrens* explicitly reserved '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.'"<sup>65</sup> But the dissent goes on to

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57. *Id.* at 488 (Scalia, J., dissenting).

58. *Id.* at 491 (Scalia, J., dissenting).

59. *Id.* at 491 (Scalia, J., dissenting).

60. *Rasul v. Bush*, 542 U.S. 466, 491 (2004) (Scalia, J., dissenting) (quoting *Eisentrager v. Forrester*, 174 F.2d 961, 967 (1949)).

61. *Rasul v. Bush*, 542 U.S. 466, 491 (2004) (Scalia, J., dissenting) (quoting *Eisentrager v. Forrester*, 174 F.2d 961, 967 (1949)).

62. *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950) (emphasis and underlining added).

63. *Id.* at 777.

64. *Rasul*, 542 U.S. 466, 494 (2004) (Scalia, J., dissenting).

65. *Rasul v. Bush*, 542 U.S. 466, 490 (2004) (Scalia, J., dissenting) (quoting *Ahrens v. Clark*, 335 U.S. 188, 192 n.4 (1948)).

assert that this was “resolved in *Eisentrager* insofar as noncitizens are concerned.”<sup>66</sup> This would appear to ignore the *Eisentrager* Court’s statement that the six-factor test was developed to test a prisoner’s constitutional right to the writ. It also seems to ignore the *Eisentrager* Court’s referencing of *Ahrens* for the general rule.

The dissent also disagreed with the majority in interpreting the agreements with Cuba. The dissent emphasized “the continuance of the ultimate sovereignty of the Republic of Cuba” as authority for no territorial jurisdiction by the courts.<sup>67</sup> On the other hand, the majority favored “the United States exercises ‘complete jurisdiction and control’ ” over Guantanamo Bay to find territorial jurisdiction.<sup>68</sup>

### IX. *Rasul*: A Right to Challenge Detentions

In *Rasul v. Bush*, then, the Court undertook an analysis to determine whether alien detainees at Guantanamo Bay Naval Base, arguably outside U.S. territorial jurisdiction, had a right to a writ of habeas corpus. The government argued that *Johnson v. Eisentrager* held the federal courts did not have jurisdiction and that the alien detainees therefore did not have a right to habeas. This Court said that *Eisentrager* only decided how to determine whether alien detainees had a constitutional right to the writ. *Eisentrager* did not decide statutory habeas rights, nor did it decide whether federal courts had jurisdiction in such cases. Authority for the prisoners’ statutory habeas rights came from *Braden*, which held that that the custodian, not the detainees, must be within the territorial jurisdiction of the District Court.<sup>69</sup>

The government argued an additional ground in *Rasul* for dismissing the case for lack of federal court jurisdiction. It contended that statutory legislation did not have force outside the U.S., unless Congress clearly indicated that it should. Since Cuba was outside the U.S., the expected result would be that statutory habeas legislation should have no force at Guantanamo Bay Naval Base. The Court said that ultimate U.S. sovereignty over an area was not necessary for territorial jurisdiction. The U.S. only needed to exercise “complete jurisdiction and control” over the territory.<sup>70</sup>

For the *Rasul* petitioners, there was no ruling on their constitutional right to pursue a habeas petition. The Court decided the case on other grounds. The Court ruled that the District Court only needed to have, and

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66. *Rasul*, 542 U.S. at 491 (Scalia, J., dissenting).

67. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (quoting the 1903 Lease Agreement).

68. *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (quoting 1903 Lease Agreement, Art. III; 1934 Treaty, art. III).

69. At the time of *Eisentrager*, *Ahrens* was the law regarding federal court jurisdiction in statutory habeas cases. *Ahrens* held that the detainee must be within the territorial jurisdiction of the District Court. *Braden*, however, later overruled *Ahrens*.

70. *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (quoting 1903 Lease Agreement, Art. III; 1934 Treaty, art. III).

did have in this case, territorial jurisdiction over the custodian. Territorial jurisdiction over the detainees was not necessary. The Court also ruled that Guantanamo Bay Naval Base was within the territorial jurisdiction of the federal courts. The habeas statute, then, was not being applied extraterritorially, as the government claimed, but within the territorial jurisdiction of the United States. Therefore, citizens and aliens alike were entitled to bring suit in federal court under § 2241.

### **X. The Aftermath of *Rasul***

The reaction of Congress to the ruling in *Rasul* was to attempt to put the Guantanamo detainees outside the jurisdiction of the courts. The Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) severely restricted the ability of Guantanamo detainees to access the courts. This legislation purported to take away jurisdiction from federal courts, judges, and justices to hear or consider habeas petitions from any “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.”<sup>71</sup>

The only court given jurisdiction was the United States Court of Appeals for the District of Columbia Circuit. Its jurisdiction is limited to considering whether the procedures set forth in section 1005(e) of the DTA had been followed. A reading of the legislation indicates that the military is the only entity with jurisdiction to determine whether, and when, a detainee may be released. If the DTA and MCA have been validly applied, any statutory basis for habeas relief for the Guantanamo detainees would be removed.

The Supreme Court may provide an answer to this question in *Boumediene v. Bush*.<sup>72</sup> *Rasul* held that prisoners at Guantanamo Bay, Cuba did have a right under U.S. law to challenge their detentions through habeas corpus actions. The forthcoming ruling in *Boumediene* may finally give them their day in court.

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71. 28 U.S.C. § 2241(e)(1) (2006).

72. *Boumediene v. Bush*, No. 06-1195 (U.S. Supreme Ct., argued Dec. 5, 2007).