

Accordingly, had such a consequential holding been made in *Eisentrager*, it would have been met with prolific commentary from the legal community, from other Justices. It would have been an event, but that event did not occur—because it had no such meaning, of course, as evidenced by the lack of contemporary discussion. No decision subsequent to *Eisentrager* has reversed its holding that alien enemy combatants have no right to habeas protections guaranteed to American citizens by the U.S. Constitution.

Therefore, its holding remains governing law. Moreover, the issue now, if it ever could have been considered ambiguous, has been definitively resolved by the same judge who earlier granted Salim Ahmed Hamdan's habeas petition. Judge James Robertson, of the U.S. District Court for the District of Columbia, issued an opinion on December 13 in which he relied, in large part, on *Eisentrager* to justify his ruling that enemy alien combatants have no constitutional right to habeas corpus.

Judge Robertson, appointed to the bench by President Clinton, dismissed Hamdan's petition for habeas relief on the grounds that the MCA effectively denied his court's jurisdiction to hear the case; recognizing that Congress had removed Hamdan's statutory right to petition the D.C. Circuit Court for habeas relief.

Judge Robertson also held:

Hamdan's connection to the United States lacked the geographical and volitional predicates necessary to claim a Constitutional right to habeas corpus.

Well, then, the *Rasul* case came along. Proponents of this amendment argue that they seek only to restore the right to habeas corpus as found by the Supreme Court in the 2004 case of *Rasul v. Bush*. *Rasul* took great pains to emphasize that its extension of habeas to Guantanamo Bay was based not on the Constitution, which clearly is a historic right we talked about on habeas, but it was based on some statute passed by Congress.

Some Justices may have wanted to make *Rasul* a constitutional holding, but there clearly was no majority for such a position. Supreme Court cases such as *Eisentrager* are still the governing law on the constitutional reach of habeas and the Congress's ability to limit its statutory application.

These precedents hold that aliens who are either held abroad or held here but who have no substantial connection to this country are not entitled to invoke the U.S. Constitution.

*Rasul* was an unprecedented decision which effectively and truthfully seemed to fly in the face of all previous Supreme Court and English case law. Several Justices in this case engaged in what I would submit to my colleagues is activism.

The Court extended the reach of the Federal habeas statute to Guantanamo Bay detainees. To my knowledge, this decision was the first time in recorded history that any court of any nation at

war held that those whom its military had determined to be enemies had a right of access to its domestic courts and could sue the Commander in Chief to challenge their detention.

The Court based its analysis on the phrase, "within their respective jurisdictions," as used in the Federal habeas statute and various decisions construing that particular provision.

Moreover, the Court expressly distinguished between the statutory and suspension clause holdings of *Eisentrager* and limited its analysis to only the statutory grant of habeas. The Court determined that the measure of the Guantanamo lease agreement between the United States and Cuba allows for the jurisdiction of habeas claims since the United States exercises plenary and exclusive jurisdiction over the land on which the naval base is situated, although it does not have "ultimate authority."

Furthermore, the majority, I think and others think, mischaracterized the congressional statute as meaning that the writ of habeas corpus could be issued if "the custodian can be reached by service of process" and not the detainee.

As Justice Scalia accurately pointed out in his dissent, the majority:

springs a trap on the executive, subjecting Guantanamo Bay to the oversight of the Federal courts even though it has never before been thought to be within their jurisdictions and thus making it a foolish place to have housed alien wartime detainees."

Furthermore, the decision opens a veritable Pandora's Box since it "permits an alien captured in a foreign theater of active combat to bring a section 2241 petition against the Secretary of Defense."

This case was a clear-cut example of, I believe, Supreme Court overreach. They seemed determined to do something about this. They wanted to do something about it. Apparently, they did not like it. So in straining to grant U.S. courts jurisdiction over terrorists held outside the United States, the Supreme Court determined, for the first time in history, that a simple lease agreement brought Guantanamo Bay within the jurisdiction of the court.

Read broadly, the majority opinion could be used to bring U.S. military bases and detention facilities across the world within the jurisdiction of the U.S. courts. Fortunately, in that opinion, Justice Kennedy did limit the application of the holding to Guantanamo Bay, Cuba.

Congress, however, addressed the issue because, remember, this was based on the Supreme Court's interpretation of a statute Congress passed and which Congress changed, not on the Constitution ratified by the American people.

So less than a year ago, Congress addressed the issue when it passed the Military Commissions Act, which precluded detainees from challenging their detention through habeas petitions.

Now, if the Court relied on the statute as we wrote it before, we can change that statute, and we did. In doing so, Congress adhered to Supreme Court precedent and created an effective and adequate substitute in the form of a Combatant Status Review Tribunals and allowing detainees an opportunity to challenge the determinations made by the tribunals, even in the district court in the District of Columbia.

So it set up a Combatant Status Review Tribunal so they can bring and make their argument, and if they do not like the military's determination on that, they can get to a Federal court. That is not habeas, but it is a pretty good procedure, more than ever has been given before to prisoners of war. So it seems we finally worked this thing out.

On February 20 of this year, the DC Circuit Court dismissed all pending habeas cases from the Guantanamo Bay detainees for lack of jurisdiction. Furthermore, on April 2 of this year, the Supreme Court denied a certiorari petition from the petitioners in *Boumediene v. Bush* and *Al Odah v. United States*, refusing to review their claims that the Military Commissions Act—that last year we passed—does not deprive courts of jurisdiction to hear their habeas corpus claims and that it would be unconstitutional to do so, for Congress to pass it. They rejected that.

The Court did not find it was unconstitutional, what Congress passed, and, in fact, found that Congress did what Congress intended to do, creating a substitute appellate process so prisoners could have a review of their detention but not give them the full panoply of habeas corpus rights provided to American citizens.

The Supreme Court, however, reversed itself on June 29 of this year and agreed to review both the *Boumediene* and *Al Odah* cases. This review could very well address the constitutionality of the habeas bars in the Military Commissions Act, and, much like this amendment, further undermine the executive's constitutional authority to detain enemy combatants in a time of war.

I hope the Supreme Court will not do that, but they have agreed to hear that case and give it one more final review. Certainly, as of this date, the case authority is clear, that the Constitution does not provide habeas protection to noncitizen enemy combatants on foreign territory not part of the United States.

I say that because people have come in on several points along the way and accused President Bush or the Attorney General or others of taking improper positions.

In most instances, the courts have ruled in favor of the executive in these cases, on a few cases they found those procedures not to be statutory or pass muster. But what I will say to you is, in these cases, in almost each instance