University of California
Irvine
Law Forum Journal

Vol. 6 **Fall 2008**

Guantanamo Bay:
The Jurisdictional and Constitutional Challenges Facing Individuals Detained by the United States on Foreign Soil

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INTRODUCTION

The terrorist attacks of September 11, 2001 dramatically changed the way Americans perceive national security. Since then, national security has become a primary concern of the United States Government, in some cases, overshadowing traditional notions of due process. As specific terrorism-related cases arise, the Supreme Court has been faced with the task of balancing national security with individual rights. This delicate balance has been particularly challenging with regard to suspected terrorists detained by the government at its military base in Guantanamo Bay, Cuba.

Two potential legal impediments could prevent the Guantanamo detainees from challenging their confinement in federal civil court. This article will examine both impediments, first by addressing whether American courts have jurisdiction to hear *habeas corpus* petitions by the foreign nationals detained at Guantanamo Bay. A summary of Supreme Court precedents found in *Johnson v. Eisentrager*, *Braden v. 30th Judicial Circuit Court of Kentucky*, and *Rasul v. Bush* will be followed by an analysis as to how these jurisdictional precedents affect the foreign nationals held at Guantanamo Bay. This discussion will demonstrate that the jurisdictional concern (that the detainees were being held outside U.S. jurisdiction) should not have been an impediment to trial.

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The article will then evaluate whether foreign nationals detained by the U.S. military at Guantanamo Bay have the constitutional right to full *civil* trials in U.S. federal courts, as opposed to appearing before military tribunals. An explanation of the precedent set in *Swain v. Pressley* will be provided, as well as a background of the legislative and executive intervention directed toward Guantanamo detainees in particular. This examination will demonstrate that not only do Guantanamo detainees have the right to seek *habeas corpus*, but that military tribunals do *not* provide an adequate alternative to traditional civil court trials.

Therefore, neither of the potential legal impediments should have been used to block the Guantanamo detainees from challenging their confinement through the U.S. federal court system. Regardless of the fact that these detainees are being held in Cuba, and despite any legislative or executive efforts to the contrary, due process requires that the American justice system provide these detainees with their full day in court.

ISSUE #1:

DOES THE PROTECTION OF THE 'GREAT WRIT' EXTEND TO FOREIGN NATIONALS WHO ARE DETAINED OUTSIDE THE U.S.?

The writ of *habeas corpus*, also referred to as the "Great Writ," predates the U.S. Constitution.[1] When a prisoner hopes to be released from governmental custody, a writ (i.e., court order) of *habeas corpus* mandates that prison officials produce the detainee so that the court can determine whether he or she has been lawfully detained. In other words, the writ of *habeas corpus* is a procedural tool that provides protection against unlawful imprisonment; when a petitioner seeks the writ, the reviewing court is called upon to examine the legitimacy of that petitioner's detention.[2]

[1] The concept of the writ of *habeas corpus* has existed for centuries, but the procedure for issuing the writ was first established in Britain's Habeas Corpus Act of 1679. Giving into public pressure, the English Parliament adopted the Act to legally put an end to wrongful imprisonment and to provide a means for securing the freedom of an individual. Constitution Society, Habeas Corpus Act 1679, http://www.constitution.org/eng/habcorpa.htm (last visited Apr. 16, 2009).

[2] Jurisdiction to hear *habeas corpus* cases is granted to federal courts by statute in 28 U.S.C. § 2241.

The writ is recognized in this country through Article I, section 9, clause 2 of the United States Constitution, which provides: "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."[3] In previous cases, the Supreme Court has ruled that this clause protects the writ of *habeas corpus* in the same form that it existed during the founding era.[4] Over time, however, it has become unclear whether the writ of *habeas corpus* can apply to foreign nationals detained by the U.S. military outside the territorial United States.

Johnson v. Eisentrager

Johnson v. Eisentrager provides useful background with regard to foreign nationals' right to sue when they are held by the U.S. military outside the United States.[5] In the *Eisentrager* case, twenty-one foreign nationals were detained by the U.S. military. They had been civilian employees for the German government in China, who were working against the military interests of the United States.[6] In August of 1946, the petitioners were tried and convicted by an American military commission sitting in China of offenses against the laws of war.[7]

Once convicted, the detainees were transported to an American-occupied part of Germany and held under the custody of the United States Army.[8] The detainees petitioned the U.S. District Court for the District of

[3] U.S. Const. art. I, § 9, cl. 2.

[4] At common law, the writ was available "(1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial process; and (3) to inquire whether a committing court had proper jurisdiction." *Swain v. Pressley*, 430 U.S. 372, 385 (1977). The writ was further codified into American law by the first Judiciary Act.

[5] At the appellate court level, the case was heard under the name *Eisentrager v. Forrestal*. The name changed in 1950 to *Johnson v. Eisentrager* when it was remanded by the Supreme Court.

[6] Despite their country surrendering on May 8, 1945, the petitioners continued to work with China. The Chinese were then under the control of the Japanese Empire, which was still waging war against the United States. *Eisentrager v. Forrestal*, 174 F.2d 961, 962 (D.C. Cir. 1949).

[7] *Id.*

[8] *Eisentrager*, 339 U.S. at 766.

Columbia seeking writs of *habeas corpus*.[9] In denying the detainees' applications, the court held that, during wartime, nonresidents had no right of access to U.S. courts to seek *habeas corpus*.

The Supreme Court reviewed the case and affirmed the district court's decision.[10] Although some foreign nationals had received the right to sue for *habeas corpus* in past cases, the Court noted that those prior detainees had been present within the United States at the time.[11] Specifically addressing the writ of *habeas corpus*, the Court found that there was nothing in the Constitution that extended the right of the writ to foreign enemies who had never been located within the territorial jurisdiction of the United States. According to the Court: "[There is] no instance where a court, in this or any other country, where the writ is known, has issued it on behalf of an alien who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[12]

Justice Jackson, writing for the majority, stated that the writ should not extend to a foreign national captured and imprisoned abroad if he or she:

> (a) is an enemy alien,
>
> (b) has never been or resided in the United States,
>
> (c) was captured outside of our territory and there held in military custody as a prisoner of war,
>
> (d) was tried and convicted by a Military Commission sitting outside the United States,
>
> (e) [was tried and convicted] for offenses against laws of war committed outside the United States, and
>
> (f) is at all times imprisoned outside the United States.[13]

The detainees in *Eisentrager* satisfied all six of these factors: the detainees were never brought within U.S. territory, and their offenses, capture, trial, and punishments all took place outside the territorial jurisdiction of the United

[9] The detainees claimed that their conviction and imprisonment violated Articles I and III of the Constitution, the Fifth Amendment, other parts of the Constitution, laws of the United States, and the Geneva Convention. *Id*. at 767.

[10] *Id*. at 770.

[11] *Id*. at 771.

[12] *Id*. at 768.

[13] *Id*. at 777.

States. Thus, the Court held that it would be inappropriate to extend the writ of *habeas corpus* to these detainees.[14]

At a policy level, Justice Jackson also addressed the danger that could result from allowing enemies to access U.S. courts during times of war. According to Jackson, allowing the writ to be equally available to both American citizens and our enemies would "hamper the war effort and bring aid and comfort to the enemy."[15] Additionally, Jackson worried that extending the writ to enemy detainees could lead to hundreds of frivolous lawsuits, clogging the American legal system. He saw nothing in the Constitution that would confer such a right to America's enemies.

Justice Black wrote a dissenting opinion, cautioning that the Majority's decision adopted a "broad and dangerous principle."[16] Black felt that if the denial of prisoners' rights to the writ rested solely on the location of their imprisonment, this would give the Executive branch unfettered power to decide where the detainees may be tried and imprisoned, effectively depriving the federal courts of their own power to prevent any unlawful detentions.[17] Black argued that the goal of equal justice under the law is to ensure "equal justice not for citizens alone, but for all persons coming within the ambit of our power," such as those held in American-occupied territory.[18] Black therefore believed that the right to *habeas* relief should have been granted because the detainees

[14] *Id.*

[15] Citing an older case, Justice Jackson explained, "[I]n war, the subjects of each country were enemies of each other, and bound to regard and treat each other as such." Jackson elaborated: "Modern 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. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments." *Id.* at 768-69. Extending court access would create the possibility of "forward[ing] the cause of our enemy." *Id.* at 776 (citing Griswold v. Waddington, 16 Johns 438, 477 (N.Y. 1818)).

[16] *Eisentrager*, 339 U.S. at 795.

[17] *Id.*

[18] *Id*. at 791.

were held in an American-controlled part of Germany, under the authority of the United States.[19]

The *Eisentrager* case demonstrates that at one time the Supreme Court looked at a *detainee's physical location* as the dispositive factor in denying the protection of the writ. Since the *Eisentrager* detainees were tried and imprisoned outside the United States, the Court believed that those detainees were not entitled to seek *habeas corpus* through the American court system.

Braden v. 30th Judicial Circuit Court of Kentucky

Twenty-three years after *Eisentrager*, the Supreme Court reviewed the case of *Braden v. 30th Judicial Circuit Court of Kentucky*. The petitioner, Charles Braden, was indicted in Kentucky for "one count of storehouse breaking and one count of safebreaking."[20] Braden managed to escape from Kentucky custody and remained on the loose until he was arrested in Alabama for unspecified felonies.[21] Braden was then incarcerated in Alabama, but while there, he filed for a petition of writ of *habeas corpus* the District Court for the Western District of *Kentucky* in connection with his prior crimes.[22]

Braden's Kentucky petition was dismissed. The court of appeals held that jurisdiction over *habeas corpus* petitions in federal courts is limited to "petitions filed by persons physically present within the territorial limits of the District Court."[23] In other words, the *Kentucky* district court did not have jurisdiction to hear Braden's case since he was not physically being held in Kentucky at the time.

Overturning one of its own prior decisions, the Supreme Court disagreed, holding that the jurisdictional authority to hear a *habeas* petition should not be based upon the location of the *prisoner* (Braden), but on the location of the *custodian*.[24] According to the Court, the writ (if granted) would

[19] *Id*. at 797.

[20] *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 486 (1973).

[21] *Id*. at 486.

[22] *Id*. at 484. Braden filed the petition in connection with a three-year-old Kentucky indictment, alleging that his constitutional right to a speedy trial on the Kentucky charges had been violated. *Id.* at 485.

[23] *Id*. at 486.

[24] *Id*. at 495 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)).

be "directed to, and served upon, not the person confined, but his jailer."[25] In other words, even though Braden was not physically present in Kentucky (where he filed suit), the U.S. District Court for the Western District of Kentucky was found to have jurisdiction to hear the case.[26] The *Braden* Majority stated:

> [T]he prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal *habeas* statute. Rather, because '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,' a district court acts 'within [its] respective jurisdiction' within the meaning of the [*habeas* statute] as long as 'the custodian can be reached by the service of process.'[27]

Thus, Braden *could* ask the Kentucky federal court to consider whether his prior crimes warranted incarceration, even though he was being held in Alabama at the time. More importantly, the *Braden* decision demonstrated a shift in the focus of the Supreme Court's jurisdictional analysis when extending the protection of the writ.

Justice Blackmun wrote a concurrence to the *Braden* Majority's opinion, agreeing with the outcome of the case, but warning that the result of the case demonstrated a great departure from tradition. Blackmun stated: "[W]e have come a long way from the traditional notions of the Great Writ."[28] He argued that the legal scholars of the past would not recognize the Court's new interpretation of the writ, and would further "conclude that it is not for the better."[29] In Blackmun's opinion, the *Braden* ruling made it easy for the Court to lose sight of the intended scope of the Great Writ.

Justice Rehnquist dissented from the *Braden* Majority's opinion. Rehnquist argued that it was not the Court's place to amend the statue defining the writ of *habeas corpus*. According to Rehnquist, only Congress possesses

[25] *Id.*

[26] *Id*. at 500.

[27] *Id*. at 484 (as cited in *Rasul*, 542 U.S. at 478).

[28] *Id*. at 501 (Blackmun, J., dissenting).

[29] *Id*.

the right to change the statute, and if the statute was to be amended to make it simpler to obtain jurisdiction over *habeas* cases, "*Congress must do so*."[30] Rehnquist expressed further concern that courts would begin to ignore the six factors of *Eisentrager*, and only look to *Braden* as precedent in future *habeas corpus* cases.

Notably, in *Braden*, the Court shifted its jurisdictional focus to the *custodian's physical location*, emphasizing that service of process for a writ request could extend beyond a district court's own territorial jurisdiction. The *Braden* opinion did not, however, deal with the specific question as to whether foreign nationals held outside the territorial jurisdiction of *any* U.S. District Court could seek a writ of *habeas corpus*.

Rasul v. Bush

In the case of *Rasul v. Bush*, the Supreme Court finally addressed the jurisdictional question as to whether foreign nationals held at Guantanamo Bay could sue in U.S. federal courts to challenge their detention.[31] In this case, two Australian citizens and twelve Kuwaiti citizens were held at Guantanamo after they were captured abroad during hostilities between the United States and the Taliban.[32] The detainees applied for writs of *habeas corpus*, challenging the legality of their detentions.[33] Their applications were denied by both the district court and appellate court; each court held that foreign nationals held outside U.S. territory had no right to petition for *habeas* relief.[34]

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[30] *Id*. at 509 (Rehnquist, J., dissenting).

[31] *Rasul v. Bush*, 542 U.S. 466 (2004).

[32] *Id*. at 471. The U.S. Department of State has described the Taliban as a group that holds an extreme interpretation of Islam and imposes their beliefs through the committing of serious atrocities and massive human rights violations. They have also been financially and politically supported by suspected terrorist, Osama bin Laden. U.S. Department of State, Background Note: Afghanistan, http://www.state.gov/r/pa/ei/bgn/5380.htm (last visited Apr. 16, 2009).

[33] *Rasul*, 542 U.S. at 471.

[34] *Id*. at 473. For instance, in June 2004, the U.S. court of Appeals for the District of Columbia heard *Al Odah v. United States*, a case regarding twelve Kuwaiti citizens who were arrested in either Afghanistan or Pakistan and detained at Guantanamo Bay by the American military. *Al Odah v. United States*, 355 U.S. App. D.C. 189 (D.C. Cir. 2003) (as cited in *Boumediene*, 476 F.3d at 984). Their families filed suit seeking

The issue before the Supreme Court was whether U.S. courts had proper jurisdiction to consider challenges to the legality of detentions of foreign nationals who had been both captured abroad and then held at the Cuban facility, in "[t]erritory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[35] In order to determine whether the custodians of foreign nationals being held at Guantanamo could be served with a *habeas* request, the *Rasul* Court acknowledged both the *Eisentrager* and *Braden* rulings. Ultimately, as Justice Rehnquist had once predicted, the *Rasul* Court focused specifically on its most recent ruling in *Braden*. In doing so, the Court held that even though the detainees were outside U.S. jurisdiction, service of their *habeas* motions to their custodian would suffice, and the U.S. courts would thereby have jurisdiction to consider their claims. Thus, based on *Braden*, extension of the right to seek a writ of *habeas corpus* was appropriate for anyone detained by a U.S. custodian in Guantanamo Bay.

Justice Kennedy concurred in the result, but he disagreed with the Majority's reasoning. Rather than following *Braden*, he believed the Court should have followed *Eisentrager*.[36] According to *Eisentrager*, foreign nationals captured and detained outside U.S. territory usually do not have the right to seek a writ of *habeas corpus* through the U.S. court system. However, Kennedy would have treated Guantanamo Bay as United States territory because its lease is indefinite.[37] Therefore, he argued that the facts in *Rasul* were distinguishable from those in *Eisentrager*. He would have preserved the *Eisentrager* precedent, while still ruling in favor of the Guantanamo detainees since their situation arguably satisfied the six *Eisentrager* factors.[38]

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habeas corpus relief, claiming that the detentions were unconstitutional because the detainees were being held indefinitely without access to attorneys or the courts. The D.C. Circuit denied the claims and ruled: "[N]o court in this country has jurisdiction to grant habeas relief … to Guantanamo Bay detainees." *Boumediene*, 476 F.3d at 984.

[35] *Rasul*, 542 U.S. at 475.

[36] *Id*. at 485 (Kennedy, J., concurring).

[37] *Id*. at 487.

[38] Justice Kennedy pointed out the factors that distinguished the Rasul detainees from the Eisentrager detainees. In Eisentrager, the detainees were tried and convicted and consequently sentenced to time in prison. The Rasul detainees, on the other hand, were not given this same opportunity since they were being held indefinitely and were not granted any legal proceedings to determine their status. Justice Kennedy stated that this "[i]ndefinite pretrial detention" in addition to the status of Guantanamo Bay as practical

The *Rasul* case demonstrates consistency with the Supreme Court's earlier approach in the *Braden* case. Here, the Court once again placed its emphasis on the *custodian's physical location*, rather than the *detainee's physical location*, in determining that a request for a writ of *habeas corpus* from the American court system could be properly served outside the United States. Although the custodians at Guantanamo Bay were not located within the territorial jurisdiction of the United States, the nation's unique form of sovereignty over the base convinced the Court that service of the request for a writ was jurisdictionally proper. Justice Kennedy's concurrence also demonstrates that not all members of the Court were equally comfortable with turning to *Braden*, rather than *Eisentrager*, to resolve this type of jurisdictional challenge.

Author's Analysis of the Jurisdictional Issue

The precedents found within *Eisentrager*, *Braden*, and *Rasul* illustrate an evolution of the standards for U.S. jurisdiction over requests for *habeas corpus*. The *Eisentrager* Court ruled that the writ did not extend to those outside the territorial jurisdiction of the courts, by outlining six critical factors for consideration.[39] As was made clear in *Eisentrager*, all six factors were relevant in determining a detainee's entitlement to *habeas* relief.[40]

In *Braden*, the Court moved away from this 6-factor analysis. Instead, the Majority simply held that federal courts do have jurisdiction to hear detainees' petitions if the service of process[41] could reach the custodian holding the detainee in custody.[42]

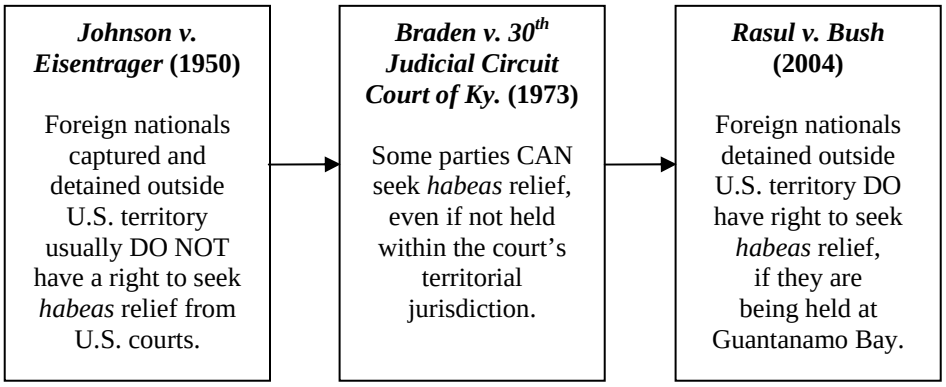
territory of the United States, should result in the extension of the writ of habeas corpus to aliens held at Guantanamo. *Id.* at 488.

[39] The *Eisentrager* factors state that the writ of *habeas corpus* should not be extended to a foreign national captured and imprisoned abroad if the detainee: (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) [was tried and convicted] for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States. *Eisentrager*, 339 U.S. at 763.

[40] *Rasul*, 542 U.S. at 476.

[41] "Service of process" is defined as "the service of writs, summonses, rules, etc., signifies the delivering to or leaving them with the party to whom or with whom they

In *Rasul*, the Court then turned to *Braden*'s simplified approach to hold that the Guantanamo detainees *were* entitled to seek *habeas* relief. Rather than working through the *Eisentrager* factors, the *Rasul* Court reached its outcome by looking to *Braden's* simplified approach as precedent. The table below illustrates the Supreme Court's progression in determining the jurisdictional issue:



Based on the Court's ruling in *Braden*, jurisdiction to grant a writ of *habeas corpus* depends upon the custodian, not the detainee.[43] Thus, *habeas* relief was extended to the Guantanamo detainees in *Rasul*, since their custodians were employed by the U.S. military in a location that fell under U.S. control. The fact that the base was located outside of the United States' geographical territory was not a concern, because the U.S. had control over the base and all persons found there.[44]

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ought to be delivered or left; and, when they are so delivered, they are then said to have been served." Black's Law Dictionary 953 (6th abridged ed. 1991).

[42] *Id*. at 478.

[43] According to the *Braden* ruling, "[T]he 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.… [A] district court acts 'within [its] respective jurisdiction' … as long as the custodian can be reached by the service of process." *Id*. at 478.

[44] The fact that Guantanamo Bay is a U.S. Naval base makes it safe to assume that the majority of the custodians as well as other workers are employed by the United States. Consequently, the service of process can reach those employed by the U.S. at Guantanamo, regardless of the fact that the land is outside of the United States'

While the outcome of the *Rasul* case yields an appropriate result, the Court's reasoning process (and the precedent thereby created) is problematic. The *Braden* ruling had been oversimplified and failed to take into account the value of the *Eisentrager* factors. The Court should have looked to the *Eisentrager* ruling, not the *Braden* ruling, as precedent when deciding the outcome of *Rasul*.[45] This would have allowed the Court to follow Justice Jackson's careful lead when balancing the rights of the detainees with the integrity of the U.S. court system and the security of the nation.

Even if the *Rasul* Court had taken all of the *Eisentrager* factors into account, the unique circumstances at Guantanamo Bay would have led to a different outcome than the one reached in the *Eisentrager* case. The Guantanamo detainees were citizens of friendly nations, who did not have hostile relations with the United States, thus they were not enemy aliens. Additionally, the detainees had not been formally charged with any crimes and had not been granted access to counsel or the courts. Therefore, as Justice Kennedy pointed out, even under a more comprehensive analysis of the *Eisentrager* factors, the Guantanamo detainees could have prevailed.

Ultimately, rather than providing sound precedent for future cases by continuing to use the *Eisentrager* factors, the *Rasul* Court found a truncated way to reach the same outcome in favor of the detainees. By differentiating the situation at Guantanamo Bay on the basis of its unique "custodial" connection to the United States, the Court found reason to give the foreign nationals an opportunity to challenge their detention.[46] This is the same outcome the Court could have reached through a full *Eisentrager* analysis; however, by skipping over the *Eisentrager* factors, the Court has signaled that those factors are no longer being taken seriously.

Given the analytical value of the *Eisentrager* factors, this is an unfortunate "evolution" in the jurisdictional analysis. The Court is no longer resting its decision on the specific relationship between the detainees and the United States, like the *Eisentrager* Court would have done, but is instead

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geographical territory, because the U.S. has control over the persons and items within that land.

[45] In another future case concerning Guantanamo Bay detainees, the Court would make the same mistake of using the oversimplified *Braden* precedent instead of *Eisentrager's* six factor test. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

[46] *Id*. at 992.

shifting its focus to the custodian's physical location and oversimplifying the process. All of the *Eisentrager* Court's concerns regarding abuse of the U.S. court system by the nation's enemies have therefore been abandoned.

All in all, the *Rasul* case did lay the foundation for *habeas corpus* challenges by Guantanamo detainees. The *jurisdictional* impediment was removed, and the detainees were left with what appeared to be an opportunity to file their complaints, challenging their detention, within the U.S. court system. The *Rasul* opinion did *not* speak to whether the detainees would be successful on the merits of their claims; that would remain to be seen. Before their cases could even reach that point, however, the question as to what sort of trial the detainees deserved became an additional impediment, as further discussed below.

ISSUE #2:

DO FOREIGN NATIONALS DETAINED BY THE U.S. MILITARY AT GUANTANAMO BAY HAVE THE RIGHT TO FULL *CIVIL* TRIALS IN U.S. FEDERAL COURTS?

Article I, section 9, clause 2 of the United States Constitution contains language referred to as the "Suspension Clause." Recall that the Constitution states: "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."[47] Given this language, it would seem that the Guantanamo detainees are entitled to have federal courts hear their *habeas corpus* challenges, unless the right of *habeas corpus* is properly suspended. However, through caselaw, another possible alternative for avoiding *habeas corpus* trials has been crafted by the Supreme Court, even when the country is not undergoing formal 'rebellion or invasion.'

Application of the Suspension Clause in SWAIN V. PRESSLEY

In *Swain v. Pressley*, the Supreme Court reviewed a new local court system that had been created in the District of Columbia. In essence, the D.C. Code created a "new local court system and transferred in its entirety the

[47] U.S. Const. art. I, § 9, cl. 2 (emphasis added).

Federal District Court's responsibility for processing local litigation to the Superior Court of the District of Columbia."[48] This system offered its own newly fashioned remedy in the same spirit of *habeas* relief, but in place of the traditional writ of *habeas corpus*. The new local system provided that prisoners could ask the court to vacate, set aside, or correct their sentences, if (1) their detention was a violation of the Constitution, (2) the court that convicted them lacked jurisdiction, or (3) the sentence was excessive or similarly open to attack.[49]

Under the new D.C. procedure, the Superior Court did not provide any other opportunity for writs of *habeas corpus* if the applicant failed to move for relief under the new system. Swain was in custody under an order issued by the Superior Court. He filed for a writ of *habeas corpus* to challenge the validity of his detention.[50] When his request was denied, Swain argued that the new system violated the Suspension Clause because he had been denied access to the writ of *habeas corpus;* he further argued that the nation was not undergoing "rebellion or invasion," so *habeas* relief could not be denied.

The Supreme Court ruled in the government's favor, reasoning that even *without* rebellion or invasion, *habeas* relief could be suspended if the D.C. Superior Court was offering an "adequate and effective alternative" form of relief. The Court then examined the new D.C. Code, and found that the new remedy provided the same basic forms of relief as those provided by *habeas corpus;* the only difference was that the judges in the new local court system did not enjoy life tenure.[51] According to the *Swain* Court, this distinction was of little importance because the state judges, although subject to the reelection process, must still be viewed as competent to decide cases regarding a variety of issues, including constitutional questions.[52]

Thus, the Court found that the new D.C. procedure provided a reasonable alternative to the right to seek a writ of *habeas corpus*, and thereby determined that the Suspension Clause had not been violated. This case laid the groundwork for use of the "adequate alternative" test in future cases as well.

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[48] *Swain*, 430 U.S. at 375 (citing District of Columbia Code § 23-110(g)).

[49] *Id*. at 374 (citing District of Columbia Code § 23-110(g)).

[50] *Id*. at 373.

[51] *Id*. at 382.

[52] *Id*. at 383.

The "adequate alternative" standard created in *Swain* ensured that individuals who had been detained by the government could challenge the detention by seeking either a writ of *habeas corpus* or a reasonably similar form of relief. Thus, it would seem that the "adequate alternative" should have served as the new standard for Guantanamo cases; if Guantanamo detainees were not granted the opportunity to seek writs of *habeas corpus*, they must be offered with an adequate alternative instead.

(1) President Bush Orders Military Detention

On November 13, 2001, in response to the September 11th attacks on the World Trade Center and the Pentagon,[53] President George W. Bush issued a military order entitled: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[54] This order proclaimed a state of national emergency, and citing his power as Commander-in-Chief of the federal military, President Bush then authorized the use of military force to identify and detain suspected terrorists.[55] His Executive Order further enumerated guidelines for the capture and treatment of foreign nationals who were suspected members of Al Qaeda (or were found to have taken part in any form of international terrorism against the United States).[56]

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[53] On September 11, 2001, agents of the al Qaeda terrorist network hijacked four airplanes and attacked U.S. targets, including the World Trade Center and the Pentagon. The attacks resulted in approximately 3,000 deaths and hundreds of millions of dollars worth of damage. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

[54] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[55] Congress responded to the attacks by passing a joint resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the [September 11, 2001] terrorist attacks." *Rasul*, 542 U.S. at 470. President Bush's military order was issued pursuant to that authorization. While the constitutionality of President Bush's assumption of Commander-in-Chief powers is debatable, that issue is beyond the scope of this paper.

[56] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

Under the authority of this Executive Order, the U.S. military detained numerous suspected terrorists. Those who were foreign nationals were taken to the Guantanamo Bay, Cuba naval base. Once there, they were detained *without* access to seek *habeas corpus* or to otherwise challenge their detention in the *civil* court system.

(2) The Executive Branch Creates 'Combat Status Review Tribunals'

In July 2004, the Secretary of Defense sent a memorandum to the Secretary of the Navy, establishing skeletal procedures for directing any legal challenges by the Guantanamo detainees to "Combat Status Review Tribunals" (CSRTs). The Department of Defense defined Combat Status Review as "a formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant."[57] The CSRTs were to be used as the exclusive method for hearing legal challenges by all Guantanamo detainees.

The Secretary of the Navy then expanded the review procedures in another memorandum, containing procedures often referred to as the DoD Regulations.[58] Under the DoD Regulations, CSRTs were to be used to determine whether the detainee's designation as an "enemy combatant" was appropriate, but CSRTs would *not* be used to address the validity of the detention itself. Thus, under this formulation, Guantanamo detainees could challenge their detention indirectly by arguing before a CSRT that they had been mischaracterized as enemy combatants. However, even if successful, the detainees could not raise broader *habeas*-type arguments at their CSRT hearings and there was no guarantee that they would be released.

[57] "Enemy combatant" was defined as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that were engaged in hostilities against the United States or its coalition partners. This included any person who had committed a belligerent act or had directly supported hostilities in aid of enemy armed forces. U.S. Department of Defense, Guantanamo Detainee Processes, http://www.defenselink.mil/news/Sep2005/d20050908process.pdf (last visited Dec. 11, 2007).

[58] *Bismullah v. Gates*, No. 06-1197, 2007 U.S. App. LEXIS 23244, *1, *1-3 (D.C. Cir. 2007).

(3) Congress Enacts the 'Detainee Treatment Act'

As the process of establishing the CSRTs was under way, Supreme Court decisions in cases such as *Rasul v. Bush* raised the possibility that Guantanamo detainees could survive jurisdictional challenges, bypass the CSRT process, and seek writs of *habeas corpus* through the federal court system instead.[59] In December 2005, Congress effectively overruled the *Rasul* decision by enacting the Detainee Treatment Act (DTA).[60] The DTA mandated that "no court, justice, or judge may exercise jurisdiction over … an application for the writ of *habeas corpus* filed by or on behalf of an alien detained … at Guantanamo Bay."[61] Additionally, the DTA formalized the structure of the CSRTs. This would effectively block any attempt by Guantanamo detainees to pursue *habeas corpus* through the civil (as opposed to military) courts. Thus, Congress' enactment of the DTA served as the legislative branch's attempt to overrule the Court's ruling in *Rasul*. Congress sought to curtail the federal courts' jurisdiction, as well as satisfy the 'adequate alternative' precedent established in *Swain* by providing an alternative to *habeas* proceedings.

This legislative strategy was not successful, however, when it came to the numerous detainees who had been held at Guantanamo for quite some time. In 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the DTA's jurisdiction-stripping did not apply retroactively to *habeas* requests that had already been pending at the time of the DTA's enactment.[62] Therefore, the detainees who were already in the process of petitioning for the *writ* in civil courts could be allowed to proceed.

(4) Congress Fills the Gap with the 'Military Commissions Act'

After *Hamdan*, Congress again intervened in the Guantanamo litigation by enacting the Military Commissions Act of 2006 (MCA). Section seven of the MCA, entitled: "*Habeas corpus* Matters," provided:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or

[59] See a detailed discussion of the jurisdictional challenges and the *Rasul* case, *supra*.

[60] *Detainee Treatment Act of 2005*, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (as cited in *Boumediene*, 476 F.3d at 985).

[61] *Boumediene*, 476 F.3d at 985.

[62] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (as cited in *Boumediene*, 476 F.3d at 985).

> on behalf of 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.[63]

In other words, even the Guantanamo detainees who had filed their petitions *prior* to the DTA and were "awaiting" the outcome could no longer pursue their claims in federal court; instead, they would be redirected to the CSRT system.

The MCA expressly provided that this rule would be applicable to all cases, regardless of the original filing date. Section 7(a) of the MCA provided:

> [This] shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment of this Act* which relate to any aspect of detention, transfer, treatment, trial or conditions of detention of an alien detained by the United States since September 11, 2001.[64]

Thus, the MCA retroactively denied any post-September 11th foreign detainees the opportunity to pursue their *habeas* challenges outside the military system. In the process, Congress and the Executive Branch had created an alternative forum for the Guantanamo detainees to protest their designation as enemy combatants, thereby triggering a *Swain* question as to whether this statutorily-imposed military tribunal system served as a constitutionally "adequate" alternative to the right to seek *habeas corpus* through the civil courts.

BOUMEDIENE v. BUSH:
Does the MCA Provide an Adequate Alternative to the Writ of Habeas Corpus?

In the case of *Boumediene v. Bush*, the Supreme Court was directly faced with the question of whether the MCA and the related military tribunal system could be considered an "adequate alternative" to *habeas corpus* relief. The *Boumediene* case was a consolidation of prior cases involving eleven

[63] *Boumediene*, 476 F.3d at 985.

[64] *Id*. at 986 (emphasis added).

foreign nationals detained at Guantanamo Bay.[65] The detainees were citizens of friendly nations, who had been seized in Afghanistan, Bosnia, Herzegovina, The Gambia, Pakistan, Thailand, and Zambia.[66] These detainees filed applications for writs of *habeas corpus*, challenging the legality of their detentions and alleging constitutional violations.[67] Their cases moved back and forth through the appellate process for several reasons.[68] Ultimately, the United States Circuit Court of Appeals for the District of Columbia held that their *habeas* requests should be dismissed from the federal courts due to the retroactive application of the MCA.[69]

The D.C. Circuit specifically examined *habeas corpus* rights in the *Boumediene* case in order to determine what type of protection the writ was meant to provide. The majority reasoned that even though the MCA stripped federal civil courts of their jurisdiction to hear *habeas* cases, the MCA *did not* violate the Suspension Clause, because the federal courts would not have had territorial jurisdiction to hear these detainees' cases in the first place. In other words, the majority (1) reexamined the jurisdiction reach of the writ (i.e., the issue discussed in the prior section of this article), (2) reached its own conclusion that the federal courts did *not* have proper jurisdiction to hear Guantanamo detainee claims, and (3) used this finding to conclude that the right to seek the writ had not been improperly "suspended" because it did not actually exist for these detainees in the first place.[70]

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[65] At the Supreme Court level, the *Boumediene* case represented a consolidation of *Al Odah v. U.S*, 542 U.S. 466 (2004*)* and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

[66] *Boumediene*, 476 F.3d at 1007. The detainees were citizens of friendly nations including: Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen. A "friendly nation" is a nation that is at peace with the United States. *Id.*

[67] *Id*. at 984.

[68] The *Boumediene* case addressed two issues: first, whether the MCA applied to the detainees' petitions for *habeas* relief, and second, whether the MCA was an unconstitutional suspension of the writ of *habeas corpus*. *Id*. at 986. The first issue is beyond the scope of this paper.

[69] On July 12, 2008, the United States Supreme Court ruled on this case.

[70] The majority reached its conclusion that the writ did not extend to prisoners held at Guantanamo Bay after examining the jurisdictional reach of the writ as it existed in 1789, when it was first codified into American law by statute. *Id.* at 988.

(footnote continued on next page)

Judge Rogers filed a dissent, arguing that the MCA did violate the Suspension Clause. First, Rogers concluded that the Guantanamo detainees *could* survive the jurisdictional challenge, and that they did have a constitutional right to seek *habeas* relief through the U.S. court system. Rogers then reasoned that the MCA violated the Suspension Clause because: (1) the writ of *habeas corpus* could only be suspended in times of rebellion or invasion, *unless* Congress provides an adequate alternative,[71] and (2) the detainees had been denied their constitutional right to seek *habeas* relief *without* any meaningful alternative.

On the issue of adequate alternatives, Judge Rogers examined whether Congress had provided an adequate alternative to *habeas* challenges through

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The detainees, on the other hand, had claimed that three earlier historical cases illustrated instances in which the King exercised civil jurisdiction over claims by individuals being held abroad. The first cases is the *Lockington's Case;* here, a British resident of Philadelphia was put in prison after failing to fulfill an order to relocate. Lockington was declared an enemy alien under the Alien Enemies Act of 1798. Lockington filed for a writ of *habeas corpus*. His request was denied, but two of the three justices held that he was entitled to the review of his detention. The second case, *The Case of Three Spanish Sailors*, dealt with three Spanish seamen who boarded a merchant ship that was bound for England. They were promised that they would be paid upon arrival, but when they docked, the captain refused to pay them and turned them in to a warship as prisoners of war. They then applied for writs of *habeas corpus* and were denied under the theory that alien enemies and prisoners of war were not entitled to any rights that an Englishman would be entitled to. The third case, *Rex v. Schiever*, involved a Swedish citizen who, while at sea on an English merchant ship, was taken as prisoner by a French privateer. Following some ship transfers, Schiever was imprisoned in Liverpool, and he then petitioned for *habeas corpus*. The court denied his request because evidence showed that he was a prisoner of war. *Id*. at 988-89.

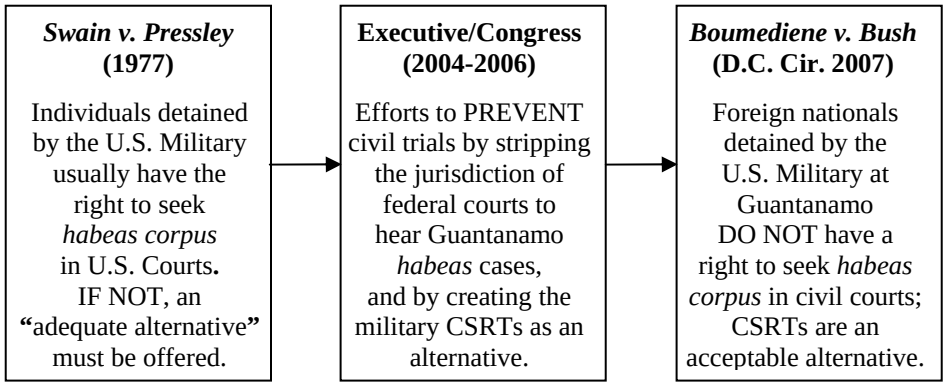
In actuality, however, none of these cases involved aliens held outside the territory of the King. Lockington was a citizen of Philadelphia and the three sailors and Schiever were held within English territory. Thus, the detainees failed to cite any case under which English common law extended the writ of *habeas corpus* to foreign nationals outside of the sovereign territory. Because of this absence of any historical precedent providing foreign nationals outside of a sovereign's territory a writ to *habeas corpus*, the court concluded that it could logically be implied that in 1789 that the writ would not extend to those outside the territory, and thus it should be the case with Guantanamo as well. *Id*. at 989.

[71] *Id*. at 995 (Rogers, J., dissenting) (emphasis added).

operation of the CSRTs, DTA and MCA. Rogers explained that *habeas corpus* is a mean of reviewing the validity of a detention and argued that the military-style CSRTs, which would simply determine whether a detainee was an "enemy combatant," did not provide the same form of relief. Instead, Rogers argued that the CSRTs failed to reach broader constitutional questions and did not realistically guarantee any definite form of relief from detention at all.[72] Rogers bolstered this argument by citing three cases in which military panels had already determined that Guantanamo detainees were *not* enemy combatants. Instead of being released, these detainees were subjected to ongoing military proceedings instead.[73]

Author's Analysis of the Constitutional Issue

The main issue before the *Boumediene* Court was whether foreign nationals detained by the U.S. military at Guantanamo Bay had the right to full civil trials in U.S. courts. According to *Swain*, if foreign nationals were not given *habeas corpus* rights, and were consequently not allowed civil trials in U.S. courts, an "adequate alternative" had to be presented. The Legislative and Executive branches sought to satisfy this requirement in the Guantanamo cases by enacting the Detainee Treatment Act (DTA), extending its reach through the Military Commissions Act (MCA), and creating the Combat Status Review Tribunals (CSRTs). In *Boumediene*, a majority of the D.C. Circuit panel held that these efforts had been successful. This progression on the constitutional issue of the "adequate alternative" can be illustrated as follows:



[72] *Id*. at 1005.
[73] *Id*. at 1006.

The constitutional progression at issue in *Boumediene* illustrates how Congress attempted to block civil *habeas* trials for Guantanamo detainees, thereby denying these foreign nationals any reasonable relief if they were detained unjustly. As held in *Swain*, the Suspension Clause is not violated if there is a substitution for the writ with a remedy that adequately and effectively tests the legality of their detention.[74] In *Swain*, the Court held that the substitute remedy created by the new District of Columbia Code was neither inadequate nor ineffective because the new local courts would still have the authority to provide *habeas*-style relief from unlawful detentions.[75] However, as demonstrated below, the outcome should be different in the *Boumediene* case.

With regard to the detainees being held at Guantanamo, the MCA provides no meaningful alternative to the *habeas* remedy. The only avenue available to detainees is the Combat Status Review Tribunal (CSRT) proceeding created by the Detainee Treatment Act. In order for the CSRT proceeding to be considered an "adequate" alternative, the CSRT should determine whether a detention is valid or invalid, and ultimately determine whether a detainee will remain in custody or be set free.

The purpose of the CSRT, however, is not to examine the validity of a detainee's *detention*; the CSRTs were created merely to examine a detainee's underlying status designation as an enemy combatant. While a CSRT finding that an erroneous designation may be a first step toward release, nothing legally guarantees the detainee's release. In fact, anecdotal evidence gathered by Judge Rogers demonstrates that release is *not* immediately forthcoming.[76] Thus, because the CSRTs are not designed to properly review the legality of a detention or create the possibility for *release*, they cannot be considered an effective alternative to full *habeas corpus* trials in the civil court system.

Additionally, the CSRT *procedures* are not commensurate to *habeas corpus* procedures. Specifically, in *habeas corpus* proceedings the burden of proof lies with the government to justify the detention, whereas in CSRT proceedings, the burden of proof lies with the detainee to prove that the

[74] *Swain*, 430 U.S. at 381.

[75] *Id.*

[76] Rogers cited three cases in which the detainees were deemed to not be enemy combatants. Instead of being released, however, the detainees were subjected to continual military proceedings instead. *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting).

detention is *in*valid. The method of obtaining information for the review is also questionable because torture might be employed, or evidence may be withheld from the detainee. In CSRT proceedings, detainees do not have the ability to rebut the evidence against them, which could certainly lead to unjust conclusions as to their status as enemy combatants.[77]

[77] See, e.g., Robert Axelrod, *Military Tribunals*, 1:2 The Heinz Sch. Rev. (Oct. 2004), http://journal.heinz.cmu.edu/articles/military-tribunals/ (last visited Sept. 15, 2008). As summarized by the author, DoD guidelines would provide for the following characteristics when foreign nationals are suspected of terrorism:

1. [The military tribunals will make] use of juries comprised of three to seven panelists, all of who will be military officers. This is as opposed to the typically twelve-member public panels that are used in federal criminal courts.
2. Criminal convictions in the federal courts must be unanimous, while the administration's proposed military tribunals would be able to convict by a two-thirds majority, except in cases where the death penalty is involved, in which case the panelists must reach a unanimous decision.
3. Different rules of evidence apply, with lower standards for admission in military tribunals. For example, secondhand evidence and hearsay, which are generally banned from traditional courts (though many exceptions do exist) are admissible, so long as it would have probative value to a reasonable person. In other words, if a reasonable person would expect it to be true, evidence based on hearsay is admissible.
4. Prosecutors are not required to establish the "chain of custody" of evidence – that is, to account for how the evidence was transported and who had custody of it from the time it was found to the time it reached the courtroom.
5. Defendants will be provided with military lawyers, but if representation by a civilian attorney is desired they must obtain one at their own expense.
6. Defendants are not guaranteed the right to appeal against convictions in military tribunals. They are not allowed to appeal decisions in federal courts, but instead may petition a panel of review, which may include civilians as well as military officers, to review decisions. The president, as commander in chief, will have final review.
7. Civilian trials must be open to the public, while military tribunals can be held in secret.

Id. (citing Council of Foreign Relations, Terrorism: Questions & Answers: Military Tribunals; http://www.terrorismanswers.org/responses/tribunals.html (date omitted)).

(footnote continued on next page)

Furthermore, commentators have noted that the *appellate review* process created by the DTA, MCA and CSRTs is equally inadequate.[78] As a result, the MCA is inadequate in a variety of its procedures and ineffective in rendering similar results as those rendered by *habeas corpus* proceedings. The CSRT's very nature is incompatible with the requirements of due process provided in the civil court system, and the MCA has created no adequate alternative to the writ of *habeas corpus*.

Because the differences between a CSRT and civil *habeas corpus* proceeding are great in both number and significance, the suspension of *habeas* rights caused by the CSRTs should not be dismissed as easily as the suspension at issue in *Swain*. Furthermore, the *Boumediene* Court should have determined that the MCA was an unconstitutional attempt by Congress to block the *habeas corpus* cases brought by foreign nationals held at the U.S. facility in Guantanamo Bay. The legislative and executive attempt to circumvent the *habeas* process for these detainees must fail as a constitutional matter, and the D.C. Circuit Majority erred in ruling otherwise.

CONCLUSION

At the time of this writing, the *Boumediene* case has been accepted for review by the U.S. Supreme Court. Due to the high number of Guantanamo Bay detainee cases that have arisen since the terrorist attacks of September 11, 2001, it is important for the Supreme Court to establish a system for hearing such cases. If the detainees seek writs of *habeas corpus*, U.S. civil courts must either hear the cases or insist that the alternative provided to the detainees is constitutionally adequate.

In addition, the author notes that these military tribunals should be distinguished from the traditional "court martial" process used by the U.S. military to try its own soldiers for crimes. Procedurally, a traditional court martial resembles the civilian court system more than it resembles the new military tribunal procedures outlined above. *Id.*

[78] See *id.* See also Christopher J. Schantz & Noah A. F. Host, *Will Justice Delayed be Justice Denied?*, 11 Lewis & Clark L. Rev. 539, 601 (2007): "[The MCA/DTA system] directs the [D.C.] court of appeals to focus its review solely on the CSRT enemy combatant determination [and] does not authorize or contemplate review of the constitutional legitimacy of the Executive's action in taking the detainee into custody in the first place."

As seen in *Eisentrager*, *Braden*, and *Rasul*, courts have given careful consideration over the years as to whether an individual detained outside a federal court's territorial jurisdiction can still petition for *habeas* relief. As ultimately determined by the Supreme Court in *Rasul*, Guantanamo detainees *do* survive this jurisdictional hurdle. Although this is an appropriate result, the Court strayed from a valuable case precedent in reaching it. In the future, the *Eisentrager* Majority's more detailed six-factor analysis should be fully considered when determining the jurisdictional reach of *habeas corpus* requests.

Solving the jurisdictional issue in these *habeas corpus* cases then leads to examination of the constitutional issue raised when the writ of *habeas corpus* is statutorily or militarily suspended. According to the Supreme Court in *Swain*, if individuals are not given *habeas corpus* rights, an "adequate alternative" must be presented. With regard to Guantanamo detainees, the Legislative and Executive branches tried to meet this requirement of an "adequate alternative" by enacting the Detainee Treatment Act (DTA) and creating the Combat Status Review Tribunals (CSRTs). Congress then suspended the writ of *habeas corpus* through the Military Commissions Act (MCA), relying upon this unique military tribunal system as an alternative.

In *Boumediene*, the D.C. Circuit Court of Appeals held that Congress did provide an adequate alternative to the writ of *habeas corpus*; however, this article has shown that the D.C. Circuit erred in its *Boumediene* ruling. The DTA and CSRTs fall significantly short of creating adequate procedures or substitute relief for *habeas corpus*, and the MCA therefore represents an unconstitutional attempt to suspend these detainees' *habeas* rights. The Supreme Court should reverse the D.C. Circuit, instead ruling that the Guantanamo detainees must be given the opportunity to proceed with their *habeas* petitions in the federal civil courts.

The *Boumediene* case demonstrates the effect of fear on the legal system. Fear stemming from the 9/11 terrorists attacks led the United States Government to seize too much power. As a precaution against future terrorist attacks, the Government assumed the power to restrict one of history's most venerated civil liberties, the right to *habeas corpus*. The Government's convoluted system of military justice failed to capture the spirit of the "Great Writ," and although reasonable precautions are necessary to ensure the security of our nation, we must never let fear compromise the very liberties that we are afraid to lose.

University of California
Irvine
Law Forum Journal
Vol. 6 **Fall 2008**

EDITOR'S NOTE

On June 12, 2008, after this article was written, the United States Supreme Court issued its decision in *Boumediene v. Bush*. In a 5-4 ruling, the Supreme Court reversed the D.C. Circuit's decision, stating that the Detainee Treatment Act of 2005 (DTA) and Combat Status Review Tribunals (CSRTs) did not provide an adequate alternative to *habeas corpus* review, and that the Military Commissions Act of 2006 (MCA) was an unconstitutional suspension of the writ.[79] Though the Court reached the same conclusion as the author of this article, the Court's reasoning process differs somewhat.

The author of this article, Ms. Remigio, argues that the Combat Status Review Tribunal (CSRT) created by the DTA is flawed in its effectiveness for reviewing the legality of a detention, in large part due to its failure to guarantee any expectation of an exonerated detainee's release. Ms. Remigio also notes that the burden of proof employed by the CSRT differs from traditional *habeas corpus* proceedings because, in the former, detainees must prove that their detentions are invalid while, in the latter, the government must justify the detentions. Since detainees would not have realistic tools to rebut any evidence held against them, she foresees that the military tribunals would lead to unmerited court decisions. Lastly, Ms. Remigio explains that the DTA/CSRT appellate review process falls short because the reviewing court has limited appellate jurisdiction and does not consider the legality of the underlying decision to hold the detainee in military custody. From this, she concludes that the military CSRTs do not create a constitutionally adequate alternative to federal court *habeas* review.

The Supreme Court also examined this broad range of issues in its decision. First, the Court clarified that it had already resolved the jurisdictional challenge in favor of the Guantanamo detainees in the *Rasul* case.[80] The *Boumediene* Court also devoted a great deal of attention to reexamination of the jurisdictional issue, and reached the same result.[81]

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[79] *Boumediene v. Bush*, 2008 U.S. LEXIS 4887 *1, *19 (2008).

[80] *Id.* at *21-22 (citing *Rasul*, 542 U.S. at 473).

[81] See *id.* at *40-84. Justice Scalia, in a dissenting opinion, reached a different conclusion on the jurisdictional issue. See, e.g., *id.* at *177 (Scalia, J., dissenting): "The writ of *habeas corpus* does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military

Next, the Court pointed out that it had never directly spoken to the detainees' constitutional "Suspension Clause" challenge in its prior cases.[82] In addressing the Suspension Clause issue, the Court began with a detailed review of the Great Writ's history and function. According to the Court:

> [T]he privilege of *habeas corpus* was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause. … 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. … That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.[83]

Following numerous historical examples of the writ's use and abuse, the Court continued:

> This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. … That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension….[84]

Based upon further historical analysis, the Court concluded:

> In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, *except during periods of*

matter is entirely [inappropriate]." Ironically, Justice Scalia agrees with Ms. Remigio that the *Eisentrager* factors could have been explored and applied more carefully, but in doing so, he would have reached the opposite conclusion (i.e., the U.S. courts have *no* territorial jurisdiction to hear *habeas* claims by Guantanamo detainees). See *id.* at *190-204.

[82] *Id.* at *22.

[83] *Id.* at *30. See also the Court's detailed historical discussion at *30-41.

[84] *Id.* at *35-36.

> *formal suspension*, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty.[85]

Against this backdrop, the Court then conducted a careful examination of the CSRT military tribunals. In reaching the determination that the CSRTs were not adequate alternatives to *habeas corpus*, Justice Kennedy, writing for the Majority, articulated an unacceptable difference between the two:

> Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." … And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.[86]

Though the Court acknowledged that the CSRTs contained inherent risks, it offered no specific prescription for fixing these problems. Instead, it seemed to view the CSRT process as fatally flawed.

However, the Court next reasoned that the *Swain* precedent provided little guidance, because cases like *Swain* dealt with attempts to "streamline *habeas corpus* relief, not to cut it back."[87] Rather than compare the two cases to determine whether Congress had created an "adequate" alternative to *habeas* relief, Justice Kennedy determined that Congress had not intended to create any real equivalent to *habeas* relief at all. Rather, Kennedy believed the DTA's legislative history clearly demonstrated that Congress had attempted to create a more limited (and thereby less meaningful) form of review for the Guantanamo detainees.[88] After considering, but not deciding, what might have been a constitutionally acceptable *habeas* alternative, Kennedy and the Majority

[85] *Id.* at *40 (emphasis added).

[86] *Id.* at *107-08.

[87] *Id.* at *90.

[88] *Id.* at *95-96.

explained that Congress simply had not shown enough respect for the Great Writ and the constitutional requirements of the Suspension Clause.[89]

The Supreme Court may not have reached a result that would fully satisfy Ms. Remigio. The *Swain* precedent received indirect attention, but has not been applied in a manner that might fully inform Congress or future courts as to what changes to the DTA/CSRTs could have cured the constitutional defect. In addition, the Court did not directly reinstate the six *Eisentrager* factors as a basis for future jurisdictional analyses. However, the Court did reach the same case-specific outcome that Ms. Remigio advocates. Although the legality of their detention remains to be addressed by the lower federal courts, the Guantanamo detainees' right to raise their *habeas* challenges in the U.S. civil court system has been vindicated.[90]

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[89] See generally *id.* at *96-119. See also *id.* at *110:

> The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue *habeas corpus* properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

[90] *Id.* at *129. In his dissenting opinion, Justice Scalia vehemently disagreed with the outcome of the case:

> Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable … test for the extraterritorial reach of *habeas corpus* (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.
>
> *The Nation will live to regret what the Court has done today.*

Id. at *216-17 (Scalia, J., dissenting) (emphasis added).

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Irvine
Law Forum Journal

Vol. 6 **Fall 2008**