RASUL v. BUSH
SUPREME COURT OF THE UNITED STATES
542 U.S. 466
June 28, 2004
[6-3]

OPINION: Justice Stevens...On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U.S. economy. In response to the attacks, **Congress passed 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 terrorist attacks...or harbored such organizations or persons." **AUMF**. Acting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U.S. military has held them--along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad--at the Naval Base at Guantanamo Bay. The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the leased areas," while "the Republic of Cuba consents that during the period of the occupation by the United States...the United States shall exercise complete jurisdiction and control over and within said areas." In 1934, the parties entered into a treaty providing that...the lease would remain in effect "so long as the United States of America shall not abandon the...naval station of Guantanamo."

In 2002, petitioners...filed various actions in the U.S. District Court for the District of Columbia **challenging the legality of their detention at the Base**. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also

alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal...

> As predicted. Captured during hostilities with the Taliban and now "claiming" they have never been a combatant against the U.S. We are not required to charge POWs with anything. You take them into custody and feed, clothe and shelter them until the war is over. That is it, plain and simple. They are now making a mockery of our lenience and of our Constitution.

Construing all...actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. **The court held, in reliance on our opinion in *Johnson v. Eisentrager*[1] that "aliens detained outside the sovereign territory of the United States may not invoke a petition for a writ of habeas corpus."** The Court of Appeals affirmed. Reading *Eisentrager* to hold that "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," it held that the District Court lacked jurisdiction over petitioners' habeas actions, as well as their remaining federal statutory claims...We granted certiorari...and now reverse.

Congress has granted federal district courts "**within their respective jurisdictions**" the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. §§2241(a), (c)(3)...*

The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens **in a territory over which the United States exercises... exclusive jurisdiction, but not "ultimate sovereignty."**

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager*. In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." In reversing that determination, this Court summarized the six critical facts in the case:

> "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus.* To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured

[1]Case 2-12 on this website.

> 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) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States."

On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears."

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

You can just feel the result in this case already, right? This majority is about to provide leniency to GTMO detainees precisely because they fight dirty. They are our enemy, yet they have no country. They are our enemy, yet they have no uniforms of war. They deny acts against the U.S. If that is all that is necessary to obtain a full blown hearing in a U.S. court of law, won't all POWs follow suit? If this turns out like it "feels" it will, must we permit all GTMO detainees access to our courts with full protection of our Constitution, a document which they are trying to destroy and in which they do not believe and for which they have not earned its rights?

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

Reference to the historical context in which *Eisentrager* was decided explains why the opinion devoted so little attention to [the] question of statutory jurisdiction. In 1948, just two months after the *Eisentrager* petitioners filed their petition for habeas corpus in the U.S. District Court for the District of Columbia, this Court issued its decision in *Ahrens v. Clark*, a case concerning the application of the habeas statute to the petitions of 120 Germans who were then being detained at Ellis Island, New York, for deportation to Germany. The *Ahrens* detainees had also filed their petitions in the U.S. District Court for the District of Columbia, naming the Attorney General as the respondent. Reading the phrase "within their respective jurisdictions" as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims. *Ahrens* expressly 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."...

When the District Court for the District of Columbia reviewed the German prisoners' habeas application in *Eisentrager*, it thus dismissed their action on the authority of *Ahrens.* Although the Court of Appeals reversed the District Court, it implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens.* The Court of Appeals instead held that petitioners had a constitutional right to habeas corpus secured by the Suspension Clause, *U.S. Const., Art. I, §9, cl. 2*, reasoning that "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute." In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to "fundamentals." In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that "nothing in our statutes" conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to "fundamentals" on its own terms.

Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484(1973)*, this Court held, contrary to *Ahrens*, that the 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 *§2241* as long as "the custodian can be reached by service of process." *Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision." These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all.

Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of *§2241* jurisdiction over petitioners' claims.

Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on *§2241* through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. Whatever traction the presumption against extra-territoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so

chooses. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of **an American citizen** held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depend-ing on the detainee's citizen-ship. Aliens held at the base, no less than American citizens, are entitled to in-voke the federal courts' authority under *§2241*...

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. *Section 2241*, by its terms, requires nothing more. We therefore hold that *§2241* confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base...

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who **claim to be wholly innocent** of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims...

Prediction – all persons taken prisoner found shooting against U.S. armed forces on the battlefield will now (1) **claim** U.S. citizenship and (2) **deny** he was fighting against the U.S. Bingo! He then gets his own private lawsuit against the United States and all that entails, including causing military witnesses to spend time in court, etc., WHILE WE ARE TRYING TO FIGHT A WAR. The majority has lost any semblance of credibility in my opinion. And, regardless of whether anyone agrees with my conclusions, it is a safe bet that most Americans know precious little about these prior cases with similar issues that all favored our past Presidents.

CONCURRENCE: Justice Kennedy...Justice Scalia exposes the weakness in the Court's conclusion that *Braden* "overruled the statutory predicate to *Eisentrager*'s holding." As he explains, the Court's

approach is not a plausible reading of *Braden* or *Eisentrager*. In my view, the correct course is to follow the framework of *Eisentrager.*

Eisentrager considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the constitutional command of the separation of powers. The issue before the Court was whether the Judiciary could exercise jurisdiction over the claims of German prisoners held in the Landsberg prison in Germany following the cessation of hostilities in Europe. The Court concluded the petition could not be entertained. The petition was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.

The Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. Citizenship provides a longstanding basis for jurisdiction, the Court noted, and among aliens physical presence within the United States also "gave the Judiciary power to act."...The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection," whereas in *Eisentrager* "the prisoners at no relevant time were within any territory over which the United States is sovereign." The Court next noted that the prisoners in *Eisentrager* "were actual enemies" of the United States, proven to be so at trial, and thus could not justify "a limited opening of our courts" to distinguish the "many aliens of friendly personal disposition to whom the status of enemy" was unproven. Finally, the Court considered the extent to which jurisdiction would "hamper the war effort and bring aid and comfort to the enemy." Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts to hear the prisoners' claims.

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary 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.

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities...[T]he 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that

belongs to the United States, extending the "implied protection" of the United States to it. *Eisentrager*...

[S]econd..., the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager.* For these reasons, I concur in the judgment of the Court.

DISSENT: Justice Scalia/Rehnquist/Thomas...The Court today holds that the habeas statute, *28 U.S.C. §2241*, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. **This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied.** *Johnson v. Eisentrager*. The Court's contention that *Eisentrager* was somehow negated by *Braden* – a decision that dealt with a different issue and did not so much as mention *Eisentrager* – is implausible in the extreme. **This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.** I would leave it to Congress to change *§2241* and dissent from the Court's unprecedented holding.

As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree..." The petitioners do not argue that the Constitution independently requires jurisdiction here. Accordingly, this case turns on the words of *§2241*, a text the Court today largely ignores. Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee. *Section 2241(a)* states:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*"

It further requires that "the order of a circuit judge shall be entered in the records of *the* district court *...wherein the restraint complained of is had.*" *28 U.S.C. §2241(a)*. And *§2242* provides that a

petition "addressed to the Supreme Court, a justice thereof or a circuit judge...shall state the reasons for not making application to *the* district court of *the district in which the applicant is held.*" No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee. Here,...the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of this case.

The Court asserts, however, that the decisions of this Court have placed a gloss on the phrase "within their respective jurisdictions" in *§2241* which allows jurisdiction in this case. That is not so. In fact, the only case in point holds just the opposite (and just what the statute plainly says). That case is *Eisentrager*, but to fully understand its implications for the present dispute, I must also discuss our decisions in the earlier case of *Ahrens v. Clark* and the later case of *Braden.*

In *Ahrens*, the Court considered "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of habeas corpus." The *Ahrens* detainees were held at Ellis Island, New York, but brought their petitions in the District Court for the District of Columbia. Interpreting "within their respective jurisdictions," the Court held that a district court has jurisdiction to issue the writ only on behalf of petitioners detained within its territorial jurisdiction. It was "not sufficient...that the jailer or custodian alone be found in the jurisdiction."

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." That question, the same question presented to this Court today, was shortly thereafter resolved in *Eisentrager* **insofar as non-citizens are concerned**. *Eisentrager* involved petitions for writs of habeas corpus filed in the District Court for the District of Columbia by German nationals imprisoned in Landsberg Prison, Germany. The District Court, relying on *Ahrens*, dismissed the petitions because the petitioners were not located within its territorial jurisdiction. The Court of Appeals reversed. According to the Court today, the Court of Appeals "implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*," and "in essence... concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'" **That is not so.** The Court of Appeals concluded that there *was* statutory jurisdiction. It arrived at that conclusion by applying the canon of constitutional avoidance: "If the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result." In cases where there was no territorial jurisdiction over the detainee, the Court of Appeals held, the writ would lie at the place of a respondent with directive power over the detainee. "It is not too violent an interpretation of 'custody' to construe it 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...*The statute must be so construed*, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision."

This Court's judgment in *Eisentrager* reversed the Court of Appeals. The opinion was largely

devoted to rejecting the lower court's constitutional analysis, since the doctrine of constitutional avoidance underlay its statutory conclusion. But the opinion *had* to pass judgment on whether the statute granted jurisdiction, since that was the basis for the judgments of both lower courts. A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment that rested upon a statutorily conferred right. And absence of a right to the writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "Nothing in the text of the Constitution extends such a right, *nor does anything in our statutes.*" "These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment *were all beyond the territorial jurisdiction of any court of the United States.*" "No right to the writ of *habeas corpus* appears"; finding "no basis for invoking federal judicial power in any district." The brevity of the Court's statutory analysis signifies nothing more than that the Court considered it obvious (as indeed it is) that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.

Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today. To do so neatly and cleanly, it must either argue that our decision in *Braden* overruled *Eisentrager*, or admit that *it* is overruling *Eisentrager.* The former course would not pass the laugh test, inasmuch as *Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never mentioned *Eisentrager.* And the latter course would require the Court to explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, *and*, having set it aside, to explain why the habeas statute does not mean what it plainly says. So instead the Court tries an oblique course: "*Braden*," it claims, "overruled *the statutory predicate* to *Eisentrager*'s holding" by which it means the statutory analysis of *Ahrens.* Even assuming, for the moment, that *Braden* overruled some aspect of *Ahrens*, inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*, it is hard to see how any of that case's "statutory predicate" could have been impaired.

But in fact *Braden* did not overrule *Ahrens;* it distinguished *Ahrens. Braden* dealt with a habeas petitioner incarcerated in Alabama. The petitioner filed an application for a writ of habeas corpus in Kentucky, challenging an indictment that had been filed against him in that Commonwealth and naming as respondent the Kentucky court in which the proceedings were pending. This Court held that Braden was in custody because a detainer had been issued against him by Kentucky, and was being executed by Alabama, serving as an agent for Kentucky. We found that jurisdiction existed in Kentucky for Braden's petition challenging the Kentucky detainer, notwithstanding his physical confinement in Alabama. *Braden* was careful to *distinguish* that situation from the general rule established in *Ahrens.*

> *"*A further, *critical* development since our decision in *Ahrens* is the emergence of *new classes of prisoners* who are able to petition for habeas corpus because of the adoption of a more expansive definition of the 'custody' requirement of the habeas statute. The overruling of *McNally v. Hill* made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And

> it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. *Under these circumstances*, it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama."

This cannot conceivably be construed as an overturning of the *Ahrens* rule *in other circumstances.* See also *Braden* (noting that *Ahrens* does not establish "an inflexible jurisdictional rule dictating the choice of an inconvenient forum *even in a class of cases which could not have been foreseen at the time of that decision*."). Thus, *Braden* stands for the proposition, and only the proposition, that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement. Outside that class of cases, *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*). Where, as here, present physical custody is at issue, *Braden* is inapposite, and *Eisentrager* unquestionably controls.

The considerations of forum convenience that drove the analysis in *Braden* do not call into question *Eisentrager*'s holding. The *Braden* opinion is littered with venue reasoning of the following sort: "The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined." Of course nothing could be *more* inconvenient than what the Court (on the alleged authority of *Braden*) prescribes today: a domestic hearing for persons held abroad, dealing with events that transpired abroad.

Attempting to paint *Braden* as a refutation of *Ahrens* (and thereby, it is suggested, *Eisentrager*), today's Court imprecisely describes *Braden* as citing with approval post-*Ahrens* cases in which "habeas petitioners" located overseas were allowed to proceed (without consideration of the jurisdictional issue) in the District Court for the District of Columbia. In fact, what *Braden* said is that "where ***American citizens*** confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to consideration of the claim." Of course "the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis v. Casey,* but we need not "overrule" those implicit holdings to decide this case. Since *Eisentrager itself* made an exception for such cases, they in no way impugn its holding. "With the citizen," *Eisentrager* said, "we are now little concerned, except to set his case apart *as untouched by this decision* and to take measure of the difference between his status and that of all categories of aliens." The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad--justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas. Neither

party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts; but the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, *and why Eisentrager was wrong.* Normally, we consider the interests of those who have relied on our decisions. Today, the Court 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 jurisdiction--and thus making it a foolish place to have housed alien wartime detainees.

Did everyone hear that right? Today's opinion extends monumental rights for the first time to aliens held beyond the sovereign territory of the U.S. Yet, in asserting the same flexibility of past Presidents, Bush is labeled abusing his authority like no other before him. Let there be no mistake — there is a huge difference between the Bush policies and fundamental fairness. Americans do not know what you now know. They do not know the history of habeas corpus and war.

II

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the **four corners of the earth**. Part III of its opinion asserts that *Braden* stands for the proposition that "a district court acts 'within its respective jurisdiction' within the meaning of *§2241* as long as 'the custodian can be reached by service of process.'" Endorsement of that proposition is repeated in Part IV. ("*Section 2241*, by its terms, requires nothing more than the District Court's jurisdiction over petitioners' custodians.")

The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a *§2241* petition against the secretary of defense. Over the course of the last century, the united states has held millions of alien prisoners abroad..."by the end of hostilities in World War II, U. S. forces had in custody approximately two million enemy soldiers." A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints--real or contrived--about those terms and circumstances. The court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the court says that the "petitioners' allegations...unques-

tionably describe custody in violation of the constitution or laws or treaties of the United States." From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the executive's conduct of a foreign war.

Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager*:

> "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States."

These results should not be brought about lightly, and certainly not without a textual basis in the statute and on the strength of nothing more than a decision dealing with an Alabama prisoner's ability to seek habeas in Kentucky.

I challenge you to go back and read *Eisentrager*. Did it support Bush or not?

III

Part IV of the Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. The Court might have made an effort (a vain one, as I shall discuss) to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg Prison in Germany and Guantanamo Bay Naval Base. But [they] flatly rejected such an approach, holding that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." That rejection is repeated [later]: "In the end, the answer to the question presented is clear...No party questions the District Court's jurisdiction over petitioners' custodians...*Section 2241*, by its terms, requires nothing more." Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here. The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are

presumed to have no extraterritorial effect simply has no application.

Nevertheless, the Court spends [a good deal of time] rejecting respondents' invocation of that doctrine on the peculiar ground that it has no application to Guantanamo Bay. Of course if the Court is right about that, not only *§2241* but presumably *all* United States law applies there--including, for example, the federal cause of action recognized in *Bivens v. Six Unknown Fed. Narcotics Agents,* which would allow prisoners to sue their captors for damages. Fortunately, however, the Court's irrelevant discussion also happens to be wrong.

The Court gives only two reasons why the presumption against extraterritorial effect does not apply to Guantanamo Bay. First, the Court says (without any further elaboration) that "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base under the terms of a 1903 lease agreement, and may continue to exercise such control permanently if it so chooses under the terms of a 1934 Treaty." But that lease agreement explicitly recognized "the continuance of the ultimate sovereignty of the Republic of Cuba over the leased areas" and the Executive Branch--whose head is "exclusively responsible" for the "conduct of diplomatic and foreign affairs" (*Eisentrager*) – affirms that the lease and treaty do not render Guantanamo Bay the sovereign territory of the United States.

The Court does not explain how "complete jurisdiction and control" without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if "jurisdiction and control" rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.

The second and last reason the Court gives for the proposition that domestic law applies to Guantanamo Bay is the Solicitor General's concession that there would be habeas jurisdiction over a United States citizen in Guantanamo Bay...But the reason the Solicitor General conceded there would be jurisdiction over a detainee who was a United States citizen had *nothing to do* with the special status of Guantanamo Bay: "Our answer to that question, Justice Souter, is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it." **And *that* position – the position that United States citizens throughout the world may be entitled to habeas corpus rights – is precisely the position that this Court adopted in *Eisentrager*, even while holding that aliens abroad *did not have* habeas corpus rights.** Quite obviously, the Court's second reason has no force whatever.

The last part of the Court's...analysis digresses from the point that the presumption against extraterritorial application does not apply to Guantanamo Bay. Rather, it is directed to the contention that the Court's approach to habeas jurisdiction--applying it to aliens abroad--is "consistent with the historical reach of the writ." None of the authorities it cites comes close to supporting that claim. Its first set of authorities involves claims by aliens detained in what is indisputably domestic

territory. Those cases are irrelevant because they do not purport to address the territorial reach of the writ. The remaining cases involve issuance of the writ to "'exempt jurisdictions'" and "other dominions under the sovereign's control." These cases are inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects...

The Court's historical analysis fails for yet another reason: To the extent the writ's "extraordinary territorial ambit" did extend to exempt jurisdictions, outlying dominions, and the like, that extension applied **only to British *subjects***...None of the exempt-jurisdiction or dominion cases the Court cites involves someone not a subject of the Crown...**In sum, the Court's treatment of Guantanamo Bay, like its treatment of *§2241*, is a wrenching departure from precedent.**

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, instead of by today's clumsy, counter-textual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their confinement, see *Rumsfeld v Padilla*, whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish--and, as a result, to forum shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.