Saint Louis University Law Journal

Volume 47
Number 4 *Millstone Lecture (Summer 2003)*

Article 13

11-7-2003

Up Guantanamo Without a Paddle: Waves of Afghan Detainees Drown in America's Great Habeas Loophole

Seth J. Hawkins

Follow this and additional works at: https://scholarship.law.slu.edu/lj

 Part of the Law Commons

Recommended Citation

Seth J. Hawkins, *Up Guantanamo Without a Paddle: Waves of Afghan Detainees Drown in America's Great Habeas Loophole*, 47 St. Louis U. L.J. (2003).
Available at: https://scholarship.law.slu.edu/lj/vol47/iss4/13

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact Susie Lee.

UP GUANTANAMO WITHOUT A PADDLE: WAVES OF AFGHAN DETAINEES DROWN IN AMERICA'S GREAT HABEAS LOOPHOLE

A sleeping giant, which United States courts have not seen since World War II, has again reared its ugly head, only to find that societal views on national composition and sovereign identity have drastically changed, while constitutional and international law have eerily stayed the same. Rarely does a Supreme Court opinion with such expansive legal implications lay dormant for more than 50 years without being revisited. But, such is the case with the territorial limitation on the writ of habeas corpus established by *Johnson v. Eisentrager*.[1] During the first half of 2002, a new battle regarding this pivotal issue was waged in the federal District Court for the District of Columbia. In *Rasul v. Bush*,[2] this court held that suspected terrorists detained at the U.S. Naval Base in Guantanamo Bay, Cuba (Guantanamo), could not petition federal courts for a writ of habeas corpus because Guantanamo was outside the sovereign territory of the United States.

The question that will undoubtedly face the Supreme Court is whether *Eisentrager*'s bright-line standard of "sovereignty" is still appropriate. Has the meaning of sovereignty in the context of a world stage changed? Do the connotations implicit in sovereignty remain, such that the idea is effective in drawing definitive lines? Are the constitutional factors and international concerns that guided the *Eisentrager* Court still present? Does the increasing premium placed on human rights alter American views on fairness and justice, especially in dealing with aliens considered enemies of the United States? These are complex questions, and a realistic outlook of the United States' presence in Guantanamo could and should lead the Supreme Court to overrule or modify one of its most impenetrable opinions.

Following the terrorist attacks on September 11, 2001, President Bush ordered the Armed Forces of the United States to "use all necessary and

1. 339 U.S. 763 (1950).

2. 215 F. Supp. 2d 55 (D.D.C. 2002). *See also* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D.Cal. 2002), *vacated by* Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002) (The federal District Court in California in *Coalition* dismissed a petition for habeas corpus on roughly the same grounds as the *Rasul* court. The Ninth Circuit affirmed the dismissal on standing grounds, while vacating the part of the opinion having to do with *Eisentrager*.); John C. Eastman, *Wrong Claim, Wrong Party, Wrong Court: Assessing the Petition Brought by a Coalition of Clergy, Lawyers, & Professors on Behalf of Detainees Held by the U.S. Military in Guantanamo Bay, Cuba*, The Federalist Society for Law and Public Policy Studies, *at* http://www.fed-soc.org/Publications/Terrorism/petition.PDF (Jan. 15, 2003).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

appropriate force" against those responsible.[3] American forces were sent to Afghanistan, in search of members of the "Al Qaeda Terrorist Network." The United States captured suspected individuals and subsequently transported them to the U.S. Naval Base at Guantanamo for detention.[4]

Rasul v. Bush is actually two cases combined, brought on behalf of almost 20 detainees in Gauntanamo.[5] While one group (Rasul) petitioned for a writ of habeas corpus and asked for release, along with counsel, and a cease of all interrogations, the other group (Odah) only sought the right to meet with family, be informed of the charges, and to consult with counsel.[6] Because of the obvious similarities in the two actions, the court consolidated both into petitions for habeas corpus, to which the government responded by moving to dismiss on jurisdictional grounds.[7]

The court in *Rasul* held that "aliens held outside the sovereign territory of the United States [cannot] use the courts of the United States to pursue claims brought under the U.S. Constitution."[8] Further, because of the court's decision that the United States was not the sovereign in Guantanamo, no U.S. court could have jurisdiction and the actions were dismissed with prejudice.[9]

The *Rasul* court relied on *Johnson v. Eisentrager*,[10] in which the Supreme Court established a territorial limitation on the writ of habeas corpus. Justice Jackson, writing for the majority in *Eisentrager*, stated that the Supreme Court "has been at pains to point out it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[11] Jackson further noted,

> [w]e are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.

3. Joint Resolution, Authorization for Use of Military Force, S.J. Res. 23, *at* http://news.findlaw.com/cnn/docs/terrorism/sjres23.enr.html (Nov. 18, 2002).

4. *Rasul*, 215 F. Supp. 2d at 59-61.

5. *Id.* at 56.

6. *Id.* at 57-58. While not explicitly asking for release, the court sees the *Odah* complaint as nothing more than a plain challenge to the validity and legality of their custody. The court notes that "the federal habeas statute [is] the only lawful way for the petitioners to challenge their confinement," and therefore considers the case as such. *Id.* at 63-64 (quoting Chatman-Bey v. Thornburgh, 864 F.2d 804, 809 (D.C. Cir. 1988)). *See also* Monk v. Secretary of the Navy, 793 F.2d 364, 366 (D.C. Cir. 1986) (Congress determined that habeas corpus is the appropriate federal remedy for a prisoner who claims that he is "in custody in violation of the Constitution . . . of the United States.").

7. *Rasul*, 215 F. Supp. 2d at 58-59.

8. *Id.* at 56.

9. *Id.* at 56.

10. 339 U.S. 763 (1950).

11. *Id.* at 771.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

> Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.[12]

The *Rasul* court proceeded to determine whether the United States is the sovereign in Guantanamo. The legal status of Gauntanamo is governed by a lease agreement entered into by the United States and Cuba in 1903 and extended by those countries in 1934.[13] In deciding that Cuba remained the sovereign in Guantanamo, the court looked to the plain language of the lease, which states,

> while on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.[14]

The court noted, "[t]he military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base."[15] Finally, the court cited the only two cases dealing with the issue of sovereignty in Gauntanamo, *Cuban American Bar Assoc. v. Christopher*[16] and *Bird v. U.S.*,[17] in which the base was held to be the sovereign territory of Cuba.[18]

In *Rasul*, the District Court took a literalist and elementary approach in writing its opinion, systematically stating the basic rule of *Eisentrager*, and looking directly to the plain language of the governing lease for the answer. Countering petitioners' and plaintiffs' arguments in *Rasul* was made easy for three reasons: (1) there is minimal precedent in this area; (2) all opinions

12. *Id.* at 768.

13. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418; Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, art. III, 48 Stat. 1682, 1683.

14. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418, art. III, 48 Stat. 1682.

15. Rasul v. Bush, 215 F. Supp. 2d 55, 71 (D.D.C. 2002). *Cf.* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1049 (C.D.Cal. 2002) (The *Coalition* court reasoned that "jurisdiction and control" are not equivalent to "sovereignty" because the lease clearly distinguishes between the two, stating that "there is a difference between territorial jurisdiction and sovereignty, and it is the latter concept that is key.").

16. 43 F.3d 1412, 1425 (11th Cir. 1995) (Guantanamo Bay is not a sovereign territory of the United States simply because the United States asserts "complete jurisdiction and control."); *see infra* notes 106-110 and accompanying text.

17. 923 F. Supp. 338, 342-43 (D.Conn. 1996) (court rejected a *de jure/de facto* sovereignty test in Guantanamo); *see infra* notes 111-115 and accompanying text.

18. *See generally* Vermilya Brown v. Connell, 335 U.S. 377, 380 (1948) ("The determination of sovereignty over an area is for the legislative and executive departments.").

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

relating to these issues have been remarkably consistent; and (3) the only cases dealing specifically with Guantanamo held it to be outside the sovereign territory of the United States. This casenote will analyze the legal environment of the U.S. Naval Base at Guantanamo Bay and other similar bases, ultimately deciding whether the standard set forth in *Eisentrager* is still appropriate. Section I will outline the political, social, and legal atmosphere after the terrorist attacks of September 11, 2001, which lead to the cases at issue. Section II will include an in-depth analysis of the relevant caselaw that preceded *Rasul*. Section III will take a close look at the case, dissecting the court's opinion, and discussing reasons for its approach. Section IV will identify possible theories of sovereignty and analyze how those theories are applied to Guantanamo. Finally, Section V will propose a modification to the rule of *Eisentrager* that maintains the basic boundaries of the limitation, while providing room for judicial interpretation when dealing with ambiguous territories.

PART I – SOCIAL AND POLITICAL ENVIRONMENT

The events of September 11, 2001, will undoubtedly go down as one of the single greatest attacks on the United States in its 225-year history. "This was the bloodiest day on American soil since our Civil War. . ."[19] Four commercial airplanes, "plump with fuel, ripe to explode,"[20] were flown by hijackers directly into proud symbols of U.S. capitalism and culture. "They couldn't carry anything—other than an atom bomb—that could be as bad as what they were flying."[21] Two planes crashed into the World Trade Center in New York, bringing down both towers within hours of impact.[22] Another plane crashed into the side of the Pentagon in Washington D.C. The fourth plane, intended for the Capitol Building, was retaken by passengers and brought crashing down in a Pennsylvania field.[23] As flames billowed from the two massive

19. Nancy Gibbs, *If You Want to Humble an Empire*, TIME, Sept. 14, 2001, at 32, 33; Edward T. Pound et al., *Under Seige*, U.S. NEWS & WORLD REP., Sept. 24, 2001, at 8, 10. "Nineteen men with a killer's cold heart and a martyr's blind will boarded four commercial aircraft, hijacked them, then sacrificed their lives to kill, in just about an hour, twice the number of people slain at Pearl Harbor." *Id.*

20. Gibbs, *supra* note 19, at 34.

21. *Id*.

22. *Id.* "They made it look so easy, you wondered if the only reason the U.S. has not seen a hijacking in 20 years was because hardly anyone was trying. It's a wonder why not; the Microsoft flight simulator and Fly! II—the two most popular simulators for personal computers—allow you to pretend to fly between the World Trade Center towers, and into them." *Id.* at 47.

23. *Id.* at 34-40. "Had [the fourth plane] stayed aloft a few seconds longer, it would have plowed into Shanksville-Stonycreek School and its 501 students . . . There but for the grace of God—two miles." Gibbs, *supra* note 19, at 40. *See also* Peter Maass, *When Al Qaeda Calls*, N.Y. TIMES, Feb. 16, 2003, at 48 (Al Jazeera reporter Yosri Fouda reported that Al Qaeda told him the fourth plane was for the Capitol.).

towers, the United States watched in horror as people were seen jumping to their death, rather than suffocate from the smoke.[24] "They landed with such force, according to an eyewitness who was watching along with New York's mayor, Rudy Giuliani, that a pink mist of gore rose from the sidewalk as they hit."[25] Never before had Americans seen such human peril unfurl in their own backyard.

The final tolls were astonishing. The some 200,000 pounds of structural steel which made up the twin towers of the World Trade Center lay in ruins.[26] Thousands of Americans lost their lives, most of whose bodies were never found or identified.[27] Some companies lost nearly their entire workforce.[28] "But the loss to the [New York Fire Department] known as New York's Bravest was unimaginable: nearly 3 percent of the entire force, including many of the most-experienced commanders."[29] The mighty ripples of these attacks affected the United States in a myriad of ways—psychologically, culturally, militarily, politically, and economically.[30] "The attacks will become a defining reference point for our culture and imagination, a question of before and after, safe and scarred."[31]

The group of individuals held responsible for the horrible attacks is the Afghanistan terrorist group known as "Al Qaeda," a faction to which many of the petitioners are believed to belong.[32] Commentators note, "[t]his is a global

24. Jerry Adler et al., *Ground Zero*, NEWSWEEK, Sept. 24, 2001, at 72, 74. "The first five or seven were dropping right out of the building, almost as if they were trying to hold onto it . . . . As it got hotter, they'd run and leap like they wanted to get as far from the heat as they could." *Id.*

25. *Id.* "A few unlucky pedestrians were struck and killed by objects, including bodies, falling from the planes or the buildings above." *Id.*

26. *Id.* at 76. Many ironworkers that helped build the Twin Towers showed up to work 12-hour volunteer shifts, "cutting steel with torches and pulling away the twisted remnants with cranes, so the rescuers could probe deeper into the rubble. To them, this was not just a civic disaster, but a personal insult as well." Alder, *supra* note 24, at 84. "All that steel turns into spaghetti . . . [a]nd then all of a sudden that structure is untenable, and the weight starts bearing down on floors that were not designed to hold that weight, and you start having collapse." Gibbs, *supra* note 19, at 42.

27. Adler, *supra* note 24, at 74.

28. *Id.* The bond-trading firm of Cantor-Fitzgerald was reported to have lost 680 of 1,000 workers. *Id.*

29. *Id.* at 81. "The largest number of New York City firemen to have died in a single disaster before [the attacks of September 11th] was 12." *Id.* at 74.

30. *See* Sharon Begley et al., *What Price Security?*, NEWSWEEK, Oct. 1, 2001, at 58; Daniel Eisenberg, *The War on Terror/The Economy*, TIME, Oct. 1, 2001, at 80; Michael D. Lemonick et al., *The War on Terror/Terror Weapons*, TIME, Oct. 1, 2001, at 70; Jodie Morse et al., *The War on Terror/Life Resumes*, TIME, Oct. 1, 2001, at 94; David Van Biema et al., *The War on Terror/Backlash*, TIME, Oct. 1, 2001, at 72.

31. *See* Gibbs, *supra* note 19, at 47.

32. Rasul v. Bush, 215 F. Supp. 2d 55, 59-61 (D.D.C. 2002).

cultural war, pitting a pan-Islamic movement of fundamentalist extremists against the modern world and its primary cultural engine, America, 'the Great Satan.'"[33] Muslim fundamentalists see many Muslim governments as "illegitimate," and view the United States as one of their supporters.[34] "Extremists see the U.S. government propping up states they regard as Muslim in name only . . . and doing so to further their own geopolitical interests. They perceive this as hypocrisy on the part of a nation that proclaims democracy, liberalism, and freedom."[35] These radicals believe they are involved in a "holy war," or "jihad," and seek to punish the United States.[36] It is this very attribute of the Muslim martyrdom that makes the extremists so unpredictable. "Once you say you are in a state of jihad, then all the usual rules of society are suspended and the danger is that social structure will end in ruins. . . ."[37]

Aside from any legal implications, the social setting that led to *Rasul* makes this case infinitely important. First, as stated earlier, the terrorist attack of September 11, 2001, is one of the most infamous events in world history, not just American history. Second, these attacks against the world's greatest power occurred during the first year of a new presidency, that of George W. Bush. Whether related or mere coincidence, it should be noted that Bush is the son of the last U.S. President to attack the Middle East. Third, as stated above, the United States faces a fanatical group of terrorists, one with no significant

> There was no small irony in the fact that the world's remaining military superpower might have been crippled by Bin Laden, the wealthy Saudi exile thought to be living in Afghanistan. A man whose personal safety is so compromised that he moves from hut to hut seeking daily refuge, Bin Laden now stands as a foe who committed acts of war Moscow never dared in 50 years of Cold War.

Pound, *supra* note 19, at 15.

33. John Leo, *A War of Two Worlds,* U.S. NEWS & WORLD REP., Sept. 24, 2001, at 47.

34. Kenneth L. Woodward, *A Peaceful Faith, A Fanatic Few,* NEWSWEEK, Sept. 24, 2001, at 66, 67-68.

> For nearly three decades, the Arab world has witnessed a broad Islamic revival that established Muslim governments have systematically repressed. In moderate Muslim nations, governing elites welcome Western support and the secular culture that goes with it. These elites have suppressed or co-opted the popular revivalist movements – thus opening the way for radical freelance sheiks and their terrorist networks.

Id. at 68.

35. *Id.* "And then there is Israel, which Islamists regard as either the surrogate for American interests in the Middle East – especially oil – or a dupe for Zionist expansionism." "Islamic groups are bent on destroying the United States because 'of our Christian faith' . . . 'They would respect the U.S. much more if we did not separate God from governance – if we were in fact a Christian state.'" "Extremists see Western culture as an imperialist acid eating away at Muslim virtue and values." *Id.*

36. Bruce W. Nelan, *The Dark Side of Islam,* TIME, Oct. 4, 1993, at 62.

37. Woodward, *supra* note 34, at 68. "When you're fighting someone who wants to die . . . those old-fashioned rules of war seem rather quaint." Michael Elliot, *"We Will Not Fail"*, TIME, Oct. 1, 2001, at 18, 30.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

political ties or stable location. America is fighting blindly against an unknown opponent. All of these factors only work to sharpen the focus of the world microscope on the United States. In a war waged because of perceived American hypocrisy, how the United States handles this case will go a long way in either improving, or further deteriorating the international U.S. image.

PART II: ANALYSIS OF PRIOR CASELAW

The issue of territorial limitations on an alien's right to a writ of habeas corpus is unique because it has not been dealt with in more than fifty years. Even then, only a few cases spoke directly to the problem.[38] Hence, the history of this law is almost exclusively concentrated in *Johnson v. Eisentrager*.[39] Once articulated, *Eisentrager* has stood alone as the standard in deciding the preliminary question of whether federal courts have jurisdiction to hear these cases. The law's progression in this area can be divided along two distinct lines, leading to the two main issues that laid the foundation for the *Rasul* opinion. In analyzing these cases, courts initially must look to the territorial limitations of the writ of habeas corpus,[40] and then determine whether the location of the alien satisfies those limitations.[41]

To understand the legal implications of the following cases, it is helpful to engage in a brief discussion of the origin, purpose, and importance of the "great constitutional privilege."[42] The writ dates back to the early part of 13th century English law and is widely considered today as "perhaps the most important writ known to the constitutional law of England."[43] The importance of the writ to American law is no less profound;[44] it is described as "the

38. Johnson v. Eisentrager, 339 U.S. 763 (1950); Ahrens v. Clark, 335 U.S. 188 (1948); In re Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).

39. 339 U.S. 763 (1950).

40. *Eisentrager*, 339 U.S. at 763; *Ahrens*, 335 U.S. at 188.

41. United States v. Spelar, 338 U.S. 217 (1949) (Newfoundland); Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (Bermuda); United States v. Corey, 232 F.3d 1166 (9th Cir. 2000) (Japan, Philippines); Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995) (Guantanamo Bay); Burna v. United States, 240 F.2d 720 (4th Cir. 1957) (Okinawa); Cobb v. United States, 191 F.2d 604 (9th Cir. 1951) (Okinawa); Bird v. United States, 923 F.Supp. 338 (D.Conn. 1996) (Guantanamo Bay).

42. *Ex Parte* Bollman, 8 U.S. 75, 95 (1807).

43. WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4261 at n. 5.

44. *Id.* "Article I, Section 9 of the Constitution gives assurance that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, and its use by the federal courts was authorized [as long ago as in] . . . the Judiciary Act of 1789." *Id.* at n. 6-7. *See also* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); *Developments in the Law—Federal Habeas Corpus—Habeas Corpus Procedure*, 83 HARV. L. REV. 1154 (1970); *Developments in the Law—Federal Habeas Corpus—The Suspension Clause*, 83 HARV. L. REV. 1263 (1970).

primary guarantor of the fundamental right of personal liberty."[45] Although there has been disagreement as to the source of the power to grant the writ, recent cases have pointed to the Constitution rather than to a statute. "[J]urisdictional statute implements the constitutional command that the writ of habeas corpus be made available."[46]

The primary federal habeas corpus statute, 28 U.S.C. § 2241, authorizes any person to claim in federal court that he or she is being held "in custody in violation of the Constitution or laws . . . of the United States."[47] The purpose of the writ of habeas corpus is to guarantee "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty,"[48] and to afford "a swift and imperative remedy in all cases of illegal restraint or confinement."[49] The *Rasul* court noted the magnitude of these cases, "which raise concerns about the actions of the Executive Branch."[50]

1. Territorial Limitation on an Alien's Right to Petition for Habeas Corpus

In 1948, the Supreme Court in *Ahrens v. Clark*[51] considered for the first time the jurisdictional limits of U.S. district courts in entertaining habeas corpus decisions. The case arose after the United States Attorney General ordered the deportation of 120 Germans who were found dangerous to public peace and safety because they were citizens of a country at war with the United States.[52] While detained on Ellis Island in New York, they collectively petitioned for a writ of habeas corpus in the District Court for the District of Columbia on the grounds that they were subject to the custody and control of the Attorney General.[53] The issue was whether a district court had jurisdiction to grant a writ of habeas corpus on behalf of those confined outside the territorial borders of their district.[54] Establishing the foundation for *Eisentrager*, the Court stated that, "apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial."[55] Looking at the

45. Fay v. Noia, 372 U.S. 391, 401 (1963).

46. Jones v. Cunningham, 371 U.S. 236, 238 (1963).

47. 28 U.S.C. §2241 (c)(3) (2002).

48. *Jones*, 371 U.S. at 243.

49. *Fay*, 372 U.S. at 400; Price v. Johnston, 334 U.S. 266, 283 (1948).

50. Rasul v. Bush, 215 F. Supp. 2d 55, 59 (D.D.C. 2002); *see infra* note 78 and accompanying text.

51. 335 U.S. 188 (1948).

52. *Id.* at 189.

53. *Id.*

54. *Id.* at 190.

55. *Id.* For example, "[i]t is true that [§] 5 of the Sherman Act empowers the court before whom proceedings under [§] 4 are pending to bring in parties who reside outside the district in which the court is held. That procedure is available in civil suits brought by the United States . . . But since [§] 4 is limited to suits brought by the United States, [§] 5 is similarly confined."

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

language of the statute and the policy concerns behind it,[56] the Court concluded that the petitioners were in the wrong district court.[57] The Supreme Court in *Ahrens* held "that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court."[58]

Two years later, the Supreme Court further refined the rule from *Ahrens* in *Johnson v. Eisentrager* when it formulated the standard by which courts should analyze and construe the territorial limitations of the writ.[59] In this case, twenty-one German nationals were captured while fighting the Japanese in China after Germany surrendered. A military commission convicted them of war crimes[60] and sent them to Germany to serve out their sentences.[61] The detainees petitioned the U.S. District Court for the District of Columbia for a writ of habeas corpus, which the court dismissed on the authority of *Ahrens*. The Court of Appeals reversed however, holding that "any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his cases of any constitutional rights or limitations would show his imprisonment illegal."[62] The appellate court also held that "where deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over *officials* who have directive power over the immediate jailer."[63] Inconsistent with *Ahrens*, the appellate court took a broader approach, one in which jurisdiction could be obtained by the location of either the prisoner or the captor.

Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 466-67 (1945). *See also* Robertson v. R.R. Labor Bd., 268 U.S. 619, 622-23 (1925).

56. *Ahrens*, 335 U.S. at 191. As was also argued later in *Eisentrager*, the Court stated that "[i]t would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose." *Id. See also* Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950).

57. *Ahrens*, 335 U.S. at 190-92.

58. *Id.* at 192.

59. 339 U.S. 763 (1950).

60. *See generally* Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345 (2002).

61. *Eisentrager*, 339 U.S. at 766.

62. *Id.* at 767 (citing Eisentrager v. Forrestal, 174 F.2d 961, 964 (D.C. Cir. 1949)).

63. *Id.* (emphasis added) (citing *Eisentrager*, 174 F.2d at 967). *See generally Habeas Corpus – Jurisdiction – District Court Has Jurisdiction to Issue Writ Although Petitioners are Confined in Foreign Country*, 63 HARV. L. REV. 531 (1950); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1399-1400 (1953); *Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 868-70 (1957).

In a 6-3 decision, the Supreme Court tightened the rule holding that any alien outside the sovereign territory of the United States does not have the right to a writ of habeas corpus.

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.[64]

"[T]he Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[65] "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection."[66]

In opposition, the petitioners cited two cases in which aliens captured during World War II were afforded the opportunity to bring writs of habeas corpus in federal court. In *Ex parte Quirin*,[67] seven enemy German nationals enlisted in the German Reich during World War II entered the United States with direct orders to destroy war industries and facilities.[68] Four years later, in *In re Yamashita*, [69] a similar case arose involving a General of the Japanese Army being held in the Philippines. The *Eisentrager* petitioners argued that they stood in much the same position as the prisoners in *Quirin* and *Yamashita*, and should therefore be afforded the same opportunities in federal court.

The *Eisentrager* Court distinguished both decisions by noting that specific "heads of jurisdiction"[70] were present in *Quirin* and *Yamashita* but were absent

64. *Eisentrager*, 339 U.S. at 768.

65. *Id.* at 771.

66. *Id.* at 777-78.

67. 317 U.S. 1 (1942).

68. *Id.* at 7-8. The petitioners in *Quirin*, after receiving sabotage training in Germany, were transported by submarine to Long Island, New York, and Ponte Verde Beach, Florida. *Id.* at 7. After hiding their German infantry uniforms, they were instructed to "destroy war industries and war facilities;" their families were to receive payment in return. *Id.* at 7-8. All the petitioners were captured in New York or Chicago, and were subsequently held in the District of Columbia. *Id.*

69. 327 U.S. 1 (1946). The petitioner in *Yamashita* was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. *Id.* at 5. After his surrender, the petitioner was detained in the Philippines awaiting trial by military commission. *Id.*

70. *See infra* notes 119-120 and accompanying text. The constitutional rights afforded aliens increase as their identification with the United States grows. Rights are increased when an alien is present in the United States, and again when he/she declares an intent to become a citizen. This process culminates when the alien completes the naturalization process. *See* Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329 (1994); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Bryan William

from the instant case, most notably the fact that petitioners in each case were held captive in the sovereign territory of the United States.[71] In *Quirin*, the prisoners were held in the District of Columbia[72] and in *Yamashita*, the prisoners were held in the Philippines, which at the time was under the sovereign control of the United States.[73]

The *Eisentrager* Court denied the petitions of the Germans because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the senses [sic] of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[74] Although the Court engaged in a thorough discussion of the rights of non-belligerent aliens as opposed to enemy aliens,[75] the true holding of *Eisentrager* established presence in United States sovereign territory as a firm prerequisite in habeas corpus cases.

In the ten years preceding *Eisentrager*, the United States fought a World War, began the Cold War, and reached an all-time high of diplomatic prudence. Preservation of national security was a primary goal of the Supreme Court when handing down the *Eisentrager* opinion.[76] When analyzing the rationale for the decision, two entangled policy considerations are born from a single overriding theme of caution. First, the Court was extremely worried about the seemingly eminent negative effect that a contrary rule would have on the health of the war effort:

> 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.[77]

Horn, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367 (1992); Mark L. LaBollita, *The Extraterritorial Rights of Nonresident Aliens: An Alternative Theoretical Approach*, 12 B.C. THIRD WORLD L.J. 363 (1992).

71. *Eisentrager*, 339 U.S. at 780.

72. *Id.* at 779. One prisoner even claimed to be a citizen. As noted in *Eisentrager*, an ascending scale of rights is given to aliens as their identification and connection with the United States grows. *Id.* at 770.

73. *Id.* at 780. The Philippines were given their independence on July 4, 1946; *Yamashita* was decided on February 4, 1946. *Yamashita*, 327 U.S. 1 (1946).

74. *Eisentrager*, 339 U.S. at 778.

75. *Id.* at 771-80.

76. *Id.* at 778-79.

77. *Id.* at 779.

> To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of 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 second policy rationale aimed at minimizing or eliminating dispute between conflicting government branches. "In establishing the territorial test, the Court is thus able to avoid the internal governmental friction that might occur if the judiciary were required to review the actions of the executive in the conduct of extraterritorial military operations."[78] Again, the Court effectively created an artificially congruent atmosphere in government, citing national security as the central purpose. But, as will be discussed later, societal views and the cultural backdrop have dramatically changed since 1950, rendering the policy considerations pertinent to *Eisentrager* severely diminished.[79]

2. Sovereignty and What Constitutes a "Foreign Country"

As stated earlier, the *Rasul* court was faced with two questions, the first of which was decided by *Eisentrager*, which held that sovereignty is a territorial limitation on the writ of habeas corpus. In turn, analysis shifted toward ascertaining the sovereign in Guantanamo. Essential to this determination is the examination of how courts have handled other U.S. bases with similar arrangements. Again, no cases have dealt with the specific issue of labeling a country in the context of a habeas petition, but the ideas of sovereignty, control, and jurisdiction remain consistent throughout.[80]

Id. at 778-79. This rationale was consistent with that seen in *Ahrens v. Clark*, a similar Supreme Court opinion handed down just two years earlier. *See supra* note 56. The *Eisentrager* Court also reasoned that the United States could not expect to receive reciprocal treatment from other countries. *Eisentrager*, 339 U.S. at 779.

78. *The Supreme Court, 1949 Term – Administrative Jurisdiction*, 64 HARV. L. REV. 114, 154 (1950) [hereinafter *The Supreme Court*]. "Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Eisentrager*, 339 U.S. at 779. *See also* Rasul v. Bush, 215 F. Supp. 2d 55, 59 (D.D.C. 2002).

79. Ominously, Justice Black's dissent "[objected] to the Court's distinction because it would permit constitutional rights to vary with the choice of the executive as to the alien's place of imprisonment." *The Supreme Court*, *supra* note 78, at 154. *See Eisentrager*, 339 U.S. at 795.

80. Almost all of the cases in the next section are claims brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2000), which is a limited waiver of the United States' sovereign immunity to civil suit. The Act contains a provision that states that the United States shall not be liable to a claim "arising in a foreign country." 28 U. S.C. § 2680(k) (2000). Hence, these cases require courts to decide whether certain military bases are considered "foreign countries," or land subject to the sovereignty of another. *See* James C. Conley, *Federal Tort Claims Act – Waiver of Sovereign Immunity*, 32 DUQ. L. REV. 167 (1993); Kelly McCracken, *Away from Justice and Fairness: The Foreign Country Exception to the Federal Tort Claims Act*, 22 LOY. L.A. L. REV. 603 (1989).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

A. "Possessions" v. Sovereignty Territory

In 1948, two years before *Eisentrager*, the Supreme Court in *Vermilya-Brown Co., Inc. v. Connell*[81] considered the legal status of United States military bases abroad. Specifically, the Court considered whether military bases subject to lease agreements were considered possessions of the United States, such that U.S. courts would have jurisdiction to decide any tort claims arising on the bases.[82] The plaintiff, Connell, and others filed suit against Vermilya-Brown Company, Inc., under the Fair Labor Standards Act[83] for recovery of overtime compensation and damages. The defendant contractor was working for the United States on a U.S. military base in Bermuda.[84] The United States obtained the base through a lease the British government executed, which closely resembled leases for military bases in the Philippines, Panama and Guantanamo.[85] The Court cited the words of the Secretary of State in deciding that "[t]he arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States."[86] Further, the Court rejected the argument that having "all rights, power, and authority" was equal to sovereignty.[87] The Court ultimately held that the Fair Labor Standards Act was applicable,[88] finding the Bermuda base to be a "possession" of the United States, while being perfectly clear that sovereignty was not transferred by the lease.[89] The decision was reinforced the following

81. 335 U.S. 377 (1948).

82. *Id.* at 380. *See supra* note 80; *infra* note 83.

83. 29 U.S.C. § 201 (2002). The Fair Labor Standards Act covers commerce "among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b) (2002). "'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States." 29 U.S.C. § 203(c) (2002).

84. *Vermilya-Brown*, 335 U.S. at 379.

85. *Id.* at 383-84 nn.4-8.

86. *Id.* at 380.

87. *Id.* at 383 n.4 (citing Agreement and exchanges of notes between United States of America and Great Britain respecting leased naval and air bases, and protocol between the United States of America, Great Britain, and Canada concerning the defense of Newfoundland, March 27, 1941, United States of America and Great Britain, 55 Stat. 1560.).

88. *Id.* at 390. "Where as here the purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than to limit the coverage to sovereignty." *Vermilya-Brown*, 335 U.S. at 390.

89. *Id.* at 386-90. The dissent, in arguing against application of the law, points out that, "[i]t was President Roosevelt himself who determined for this country that it was the part of wisdom neither to seek nor to accept sovereignty or supreme authority over any part of these islands." *Id.* at 393 (Jackson, J., dissenting).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

year in *United States v. Spelar*,[90] which held a U.S. military base in Newfoundland was outside the sovereign territory of the United States.[91]

B. De jure v. De facto sovereignty?

In 1951, the Ninth Circuit in *Cobb v. United States*, held the island of Okinawa was a "foreign country."[92] In this case, an American citizen sued the United States for injuries he suffered in an automobile accident under the Federal Tort Claims Act.[93] The United States took control of Okinawa immediately following World War II, established military bases (not subject to any lease) on the island, and expressed no intention of giving the island back to Japan.[94] By "evicting" the Japanese and "acquir[ing] the exclusive power to control and govern the island," the court stated, "[t]he will of the United States is in fact the 'supreme will' on Okinawa."[95] This, the court concluded, vested the United States with "de facto" sovereignty, but not "de jure" sovereignty.[96] With Okinawa's status at issue, the court decided the case almost exclusively on the fact that pre-war Japanese or Okinawa law must apply to the case.[97] Therefore, *Cobb* stands for a more definitive line between *de facto* and *de jure* sovereignty, and again reinforces the idea that applicable law plays a large part in these determinations.[98]

90. 338 U.S. 217 (1949).

91. *See id.* at 221-22. This case was brought under the Federal Tort Claims Act, and the Court decided to employ the following two part test to decide whether the Newfoundland base was a "foreign country": (1) sovereignty, and (2) applicable law. *See id. Vermilya-Brown* established that applicable law was an issue of great importance.

92. 191 F.2d 604, 611 (9th Cir. 1951).

93. 28 U.S.C. §§ 2671-80 (2000).

94. *Cobb*, 191 F.2d at 605-607. Actually, the State Department had announced a policy to remove Okinawa outside the sovereignty of Japan. Because "sovereignty is never held in suspense" and Japan no longer has sovereignty, the court attempted to put a label on the legal status of the island. *See id.* at 607.

95. *Id.* at 608.

96. *Id.* "The conqueror does not acquire the full rights of sovereignty merely by occupying and governing the conquered territory without a formal act of annexation or at least an expression of intention to retain the conquered territory permanently." *Id.*

97. *Cobb*, 191 F.2d at 609-611.

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." In signing this treaty the United States has undertaken a duty, in cases to which the Hague Convention is applicable, to maintain the tort law of the occupied country.

Id. at 610 (citing the Hague Convention of 1907, 36 Stat. 2277, 2306).

98. *See supra* note 91. *But cf.* Burna v. United States, 240 F.2d 720, 722 (4th Cir. 1957) (holding that Okinawa was a "foreign country," but somewhat belittling the importance of applicable law, and hinting to the fact that Congress may have not intended "foreign country" to

C. "Practical Usage and Dominion" and Concurrent Sovereignty

In 2000, the Ninth Circuit in *United States v. Corey*,[99] held that a U.S. Air Force Base in Japan and a private apartment in the Philippines (leased by the United States for embassy employees) were subject to the jurisdiction of the United States.[100] The Federal District Court of Hawaii convicted the defendant of aggravated sexual abuse. The defendant challenged U.S. jurisdiction.[101] The court held that it had jurisdiction over the base and the apartment building because they were "acquired for the use of the United States."[102] The court applied a "practical usage and dominion" standard,[103] and conceded that the United States has considerably more power than the host country.[104] Yet, this did not amount to United States sovereignty because "[t]wo sovereignties may exercise concurrent jurisdiction when their relationship is regulated by law."[105] Here again is another instance where U.S. courts have exercised jurisdiction in areas realistically under the exclusive control of the United States, while refusing to accept complete "sovereignty."

D. Guantanamo Bay

It was not until 1995 that a federal court considered the status of the United States Naval Base in Guantanamo Bay. In *Cuban American Bar Association, Inc. v. Christopher*,[106] the Eleventh Circuit considered the rights of Cuban and Haitian immigrants who were provided safe haven at Guantanamo. In finding that "any statutory or constitutional claim . . . must be based upon an extraterritorial application of that statute or constitutional provision,"[107] the court held that Guantanamo was outside the sovereign territory of the United States.[108] The court looked to the plain language of the lease, which states that Cuba remains sovereign while the United States has "complete jurisdiction and

carry with it the "fine distinctions [of] sovereignty"). *See also* Fuji Photo Film Co., Inc. v. Shinohara Shoji Kabushiki Kaisha, 754 F.2d 591 (5th Cir. 1985).

99. 232 F.3d 1166 (9th Cir. 2000).

100. *Id.* at 1183.

101. *Id.* at 1169.

102. *Id.* at 1177.

103. *Id.* at 1178.

104. *Corey*, 232 F.3d at 1181. "[T]he United States may take all the measures necessary for their establishment, operation, safeguarding and control" at the Yokota Air Force Base. *See id.* at 1181. "The host country may not enter the embassy grounds without the consent of the sending state." *Id.* at 1182.

105. *Id.* at 1180. "[T]he American experience belies the notion that the atom of sovereignty cannot be split." *Id.*

106. 43 F.3d 1412 (11th Cir. 1995).

107. *Id.* at 1425.

108. *Id.* at 1424-25.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

control,"[109] but it "disagree[d] that 'control and jurisdiction' is equivalent to sovereignty."[110]

This line of reasoning and the conclusion were upheld the following year in *Bird v. United States*.[111] In *Bird*, the wife of a U.S. Naval officer sued a physician under the Federal Tort Claims Act for negligently failing to properly diagnose her brain tumor.[112] The court rejected the *de jure*/*de facto* distinction of *Cobb* and *Burna*,[113] stating that the "then-ambiguous legal status of post-war Okinawa" is quite different than Guantanamo, which is governed by a "valid treaty delineating the sovereignty rights."[114] Following the court in *Cuban American Bar Association*, the *Bird* court looked to the plain language of the lease in distinguishing "complete jurisdiction and control" from "sovereignty."[115]

3. Conclusion of Historical Review

Eisentrager stands as a remarkably distinct, specific, and powerful limitation on the right to petition federal courts for habeas corpus. Focus is strictly given to the location of the individual petitioning the court, and sovereignty is the lone determining factor. Yet, help for the courts in deciding this issue is sparse, as the circumstances are admittedly unique. Courts must look to how Guantanamo and other bases are regarded in cases concerning different standards and means of analysis. Although jurisdictional conclusions have differed depending on the statute under which they are brought, the idea of ultimate sovereignty and the fact that the United States does not retain it in regards to these bases is a consistent phenomenon. The fairly straight-forward

109. Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418; *see* Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683.

110. *Cuban Am. Bar Ass'n*, 43 F.3d at 1425. Courts interpreting the lease governing the Clark Air Force Base in the Philippines reach the same result. The Republic of the Philippines retains sovereignty, while the United States is given the "assurance of unhampered . . . military operations." Heller v. United States, 605 F. Supp. 144, 146 (E.D. Pa. 1985).

111. 923 F. Supp. 338 (D. Conn. 1996).

112. *Id.* at 339. The United States moved to dismiss for lack of subject matter jurisdiction. *Id.*

113. *See supra* notes 92-98 and accompanying text.

114. *Bird*, 923 F. Supp. at 342. "The conqueror does not acquire the full rights of sovereignty merely by occupying and governing the conquered territory without a formal act of annexation or at least an expression of intention to retain the conquered territory permanently." *Id.* (citing Cobb v. United States, 191 F.2d 604, 608 (9th Cir. 1951)).

115. *Id.* at 343. "The fact that the United States does not provide diplomatic recognition of the present Cuban government does not bar the validity of the treaties it previously entered into with this sovereign nation." *Id.* at 341. "In addition, the fact that Cuba has been excluded from Guantanamo for over ninety years and that the government of Cuba changed in 1959 has no effect on Cuba's status as the 'ultimate sovereign' of Guantanamo Bay." *Id.* at n.10 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316-17 (1936)).

language of the leases along with the sheer number of similar arrangements around the world gives courts ample room to analogize and agree.

PART III: CRITICAL EVALUATION OF *RASUL*

1. Rasul v. Bush[116]

The court decided *Rasul* pursuant to the standard set out in *Johnson v. Eisentrager*. [117] As stated earlier, *Eisentrager* stands for the proposition that the right to petition federal courts for a writ of habeas corpus is afforded only when the alien held is within the sovereign territory of the United States.[118] For the application of the *Eisentrager* standard to have been correct in *Rasul*, the court must have identified the petitioners and plaintiffs ("petitioners") as aliens. The *Eisentrager* court noted the distinctions between citizens and aliens, and the resulting hierarchy in applicable rights.[119] Consequently, the *Rasul* court pointed out that the Guantanamo detainees did not seek to become citizens, did not assert any previous presence or a present intention to enter the United States, and are aliens in the most elementary and literal of senses.[120]

The petitioners in *Rasul* did not dispute their alien status or the fact that Guantanamo is not a part of the sovereign territory of the United States, but rather chose to pursue more technical arguments.[121] First, Petitioners argued

116. 215 F. Supp. 2d 55 (D.D.C. 2002). As mentioned earlier, the *Rasul* court considered both the Rasul petition and the Odah complaint as petitions for a writ of habeas corpus. For an extended discussion of the writ of habeas corpus, see *supra* notes 42-50 and accompanying text.

117. 339 U.S. 763 (1950).

118. *Id.* at 777-78 ("[T]he privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign . . . .").

119. *Id.* at 769. *See supra* note 70. Justice Jackson, writing for the majority, stated that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Eisentrager*, 339 U.S. at 770. "For example, presence within the country provides an alien with certain rights that expand and become more secure as he or she declares an intent to become a citizen, culminating in the full panoply of rights afforded to the citizen upon the alien's naturalization." *Rasul*, 215 F. Supp. 2d at 66 (citing *Eisentrager*, 339 U.S. at 770).

120. *Id.*

121. Although the conclusion is substantially the same, the court opinion in *Rasul* has a decidedly different tone and approach than that of the U.S. District Court of California in *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002). The petitioners in *Coalition* posed flimsy theoretical arguments, long on "swaggering," "tyrants," and extended Rolling Stones references, which fell short on substance. Albeit a valiant effort, this seemed to annoy the California court, which effortlessly countered some points, while refusing to even recognize others. Petitioner's Response to Respondents' Response to Order to Show Cause Regarding Jurisdiction at 4-5, Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (No. Civ. –02-0 0570-AHM (JTLx)), *available at* http://news.findlaw.com/hdocs/docs/terrorism/

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

that *Eisentrager* is distinguishable on its facts because the petitioners in that case were considered "enemy" aliens.[122] The detainees were Kuwaiti nationals and suspected terrorists from Afghanistan, citizens of countries with which the United States was not at war. The *Rasul* court emphatically disagreed, stating "[t]he Supreme Court's conclusion in *Eisentrager* . . . did not hinge on the fact that the petitioners were enemy aliens, but on the fact that they were aliens outside territory over which the United States was sovereign."[123] "[T]he Supreme Court has consistently taken the position that *Eisentrager* does not apply only to those aliens deemed to be 'enemies' by a competent tribunal."[124] As if the sweeping nature of the rule was still in doubt, the court pointed to Justice Black's dissent in *Eisentrager* for further proof.[125]

To conclude the point, the court discussed the two-dimensional paradigm *Eisentrager* created.[126] On the one hand, if the person in question has some sort of connection with the United States, courts will focus on the status of the individual.[127] On the other hand, if the person is an alien, courts will focus on

cltnbsh020802rsp2osc.pdf; s*ee Coalition*, 189 F. Supp. 2d at 1036. Petitioners and plaintiffs in *Rasul*, however, hang their hat on two distinct, more concrete notions. Although the court rejects these contentions, the visibly more tolerant tenor of the opinion suggests that the arguments at least inch closer to hitting the target. *Rasul*, 215 F. Supp. 2d at 66-69.

122. *Id.* at 66-68. "[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have . . . this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." *Eisentrager*, 339 U.S. at 776. "'A lawful residence implies protection . . .'" *Id.* (quoting Clarke v. Morey, 10 Johns. 69, 72 (N.Y. 1813).

123. *Rasul*, 215 F. Supp. 2d at 67. "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection." *Eisentrager*, 339 U.S. at 777-78.

124. *Rasul*, 215 F. Supp. 2d at 67 (citing Zadvydas v. Davis, 533 U.S. 678, 693 (2001), which held that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"; also citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), which held that aliens outside territorial borders of the United States do not have Fifth Amendment rights).

125. *Id.* at 68.

> If the [majority's] opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle . . . . [T]he Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.

Eisentrager, 339 U.S. at 795-96.

126. *Rasul*, 215 F. Supp. 2d at 68.

127. When courts determine an alien's identification with the United States, they can also ascertain which rights are applicable. *See supra* notes 70, 119.

the "situs"[128] of the individual.[129] Hence, aliens held outside the sovereign territory of the United States, as with petitioners in *Rasul*, are not allowed to petition U.S. courts.[130] If the synopsis of this part of the court's opinion seems rather matter-of-fact, it was no mistake. The court saw this argument as inadequate on its face, methodically lining up its arsenal of support.

Petitioners' second argument was that the United States exercised *de facto* sovereignty over the Guantanamo base "due to the unique nature of the control and jurisdiction."[131] They pointed to *Ralpho v. Bell*,[132] a case involving a claim brought under the Micronesian Claims Act of 1971.[133] Although the United States was not the sovereign in Micronesia, the District of Columbia Circuit found that the Due Process Clause protected the Plaintiff.[134] Petitioners argued that if constitutional rights are extended to the Plaintiff in *Ralpho*, an alien outside the sovereign territory of the United States, then the same opportunity should be afforded to those in places where the United States is the *de facto* sovereign.[135]

The court pointed out that *Ralpho* did not hold that an area of *de facto* sovereignty carries with it constitutional rights; *Ralpho* was merely a "limited extension of the uncontested proposition that aliens residing in the sovereign territories of the United States are entitled to certain basic constitutional rights."[136] The United States held Micronesia in trust, and the *Ralpho* court considered it to be equivalent to Puerto Rico or Guam.[137] In contrast, the

128. Situs: "The location or position (of something) for legal purposes, as in *lex situs*, the law of the place where the thing in issue is situated." BLACK'S LAW DICTIONARY 1392 (7th ed. 1999).

129. *Rasul*, 215 F. Supp. 2d at 68.

130. *Id.*

131. *Id.* at 69.

132. 569 F.2d 607 (D.C. Cir. 1977).

133. *Rasul*, 215 F. Supp. 2d at 69-70. The Micronesian Claims Act was enacted by the United States Congress to establish "a fund for compensation of losses incurred by Micronesians during World War II." *Ralpho*, 569 F.2d at 611.

134. *Rasul*, 215 F. Supp. 2d at 69 (citing *Ralpho*, 569 F.2d at 618-19). The United States government was "answerable to the United Nations for its treatment of Micronesians," and felt that it "has a duty toward the people of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign territory." *Ralpho*, 569 F.2d at 618-19, n.72. "[T]he *Ralpho* [c]ourt treated Micronesia as the equivalent of a United States territory, such as Puerto Rico or Guam." *Rasul*, 215 F. Supp. 2d at 70.

135. *Rasul*, 215 F. Supp. 2d. at 69-70.

136. *Id.* at 70. "That the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories." *Ralpho*, 569 F.2d at 619.

137. *Rasul*, 215 F. Supp. 2d at 70. The court also distinguished Micronesia because no other nation retained sovereignty over the territory and the United States had "'full powers of administration, legislation, and jurisdiction over the territory . . .'" *Id.* (quoting Trusteeship

Rasul court stated that Guantanamo "is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base."[138]

The court also pointed to two other cases, not cited by petitioners, in which a *de facto* sovereignty test for Guantanamo was denied.[139] In *Bird*,[140] the Plaintiff attempted to define the United States' "unique territorial status" in Guantanamo as *de facto* sovereignty.[141] The court held that the plain language of the lease established Cuba's *de jure* sovereignty over the base, rendering the consideration of *de facto* sovereignty moot.[142] In *Cuban American Bar Association v. Christopher*,[143] the Eleventh Circuit stated, "[w]e disagree that 'control and jurisdiction' is equivalent to sovereignty. . . . [W]e again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functionally equivalent' to being . . . the United States."[144]

PART IV: ANALYSIS OF THE CURRENT LAW

Pursuant to *Eisentrager*, the right of an alien to bring a writ of habeas corpus depends on three things: location, location, location. *Eisentrager* establishes a bright-line rule that completely hinges on a single word: sovereignty. In fact, the Supreme Court even had the foresight to create a standard effectively outside of their judicial interpretive powers. "Who is sovereign . . . is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government."[145]

The question that should be asked is, while the application of other statutes and constitutional rights afford courts the opportunity for substantial judicial interpretation, why is the law in regards to the writ of habeas corpus so cut and dry? Are the courts protective of a right of such considerable importance? Do the courts fear that extending the right will result in a windfall, such that anyone, anywhere, can question and challenge the authority of the United

Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, July 18, 1947, art. 3, 61 Stat. 3301).

138. *Id.* at 71.

139. *Id.* (citing Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996); Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995)).

140. *See supra* notes 111-115 and accompanying text.

141. *Rasul*, 215 F. Supp. 2d at 71.

142. *Bird*, 923 F. Supp. at 343.

143. *See supra* notes 106-110 and accompanying text.

144. *Cuban Am. Bar Ass'n*, 43 F.3d at 1425.

145. Jones v. United States, 137 U.S. 202, 212 (1890).

States to hold them captive? Or is this just a stodgy, outdated law that should be taken off the shelf, dusted, and remodeled?

1. Guantanamo Lease

The logical beginning to any discussion of the sovereign in Guantanamo is the lease itself. The United States originally entered into the lease with Cuba in 1903.[146] The 1903 agreement stated:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . . .[147]

In 1934, the lease was amended to provide that it shall "continue in effect" until both parties agree to its modification or cessation.[148] The lease clearly distinguishes between "sovereignty" and "complete jurisdiction and control," which other courts have cited as being dispositive.[149] As stated in *Cuban American Bar Association*, "[w]e disagree that 'control and jurisdiction' is equivalent to sovereignty."[150] The Guantanamo lease is certainly not alone in this distinction. One need only look to other leases governing U.S. military bases around the world to see striking similarities.[151]

In analyzing the Bermuda lease, the dissent in *Vermilya-Brown Co. v. Connell* noted that this distinction was not a mistake:

146. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418.

147. *Id.* at art. III.

148. Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683.

149. *See Cuban Am. Bar Ass'n*, 43 F.3d at 1425; Rasul v. Bush, 215 F. Supp. 2d 55, 71-72 (D.D.C. 2002); Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1049-50 (C.D. Cal. 2002); Bird v. United States, 923 F. Supp. 338, 343 (D. Conn. 1996).

150. 43 F.3d at 1425.

151. In Bermuda, the United States has "all the rights, power and authority . . . for the establishment, use, operation and defense [sic] thereof, or appropriate for their control." Great Britain, Canada-Naval and Air Bases, Mar. 27, 1941, U.S.-Gr. Brit.-Can., art. I, 55 Stat. 1560. In Guantanamo, the United States has "complete jurisdiction and control." Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418. In Panama, the United States has "all the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign. . . ." Isthmian Canal Convention, Nov. 18, 1903, U.S.-Pan., art. III, 33 Stat. 2234, 2235. *See* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380-88 n.4-8 (1949); *see also* Heller v. United States, 605 F. Supp. 144, 146 (E.D. Penn. 1985) (governing Clark Air Force Base in the Philippines is a lease that states, "[t]he Base Commanders and United States Commanders shall be guided by full respect for Philippine sovereignty on the one hand and the assurance of unhampered United States military operations on the other.").

> But it was President Roosevelt himself who determined for this country that it was the part of wisdom neither to seek nor to accept sovereignty or supreme authority over any part of these islands. He decided that it was in our self-interest to limit the responsibilities of the United States strictly to establishment, maintenance and operation of military, naval and air installations . . . . Thus it was settled American policy, grounded, as I think, on the highest wisdom, that, whatever technical form the transaction should take, we should acquire no such responsibilities as would require us to import to those islands our laws, institutions and social conditions beyond the necessities of controlling a military base. . . .[152]

Drafter's intent is normally afforded considerable deference by the court, and the intent of President Theodore Roosevelt in contracting these leases is evident; the United States did not intend to become sovereign of these areas.[153] But, should the inquiry stop there? Are the political boundaries of 100 years ago still appropriate? Answers to those questions inevitably lie in the definition of sovereignty and the actual conditions in Guantanamo.

2. Sovereignty Defined

Sovereignty: n.: 1. Supreme dominion, authority, or rule. 2. The supreme political authority of an independent state. 3. The state itself.[154]

Unfortunately, the definition of sovereignty provides little help in practical application because it begs the question of what "supreme dominion" or "supreme political authority" actually entails. Sovereignty is an elusive term and, to put it politely, one of minimal concreteness but of great significance. As with most legal terms, there are various philosophies that lead to differing levels of structure. This uncertainty is cause for heated debate, because with sovereignty comes immense power, extensive rights, and far-reaching obligations.[155] There are basically two ways to look at sovereignty: (1) through citizenry, national identity, and social factors,[156] and (2) through an examination of the specific powers asserted.[157] In order to determine who should be considered the sovereign in Guantanamo, courts must examine the relevance and effects of both competing means of analysis.

152. *Vermilya-Brown*, 335 U.S. at 393-94 (Jackson, J., dissenting).

153. *Id.*

154. BLACK'S LAW DICTIONARY, *supra* note 128, at 1402.

155. *See generally* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959 (2000) (reviewing Krasner's above-cited book).

156. *See* Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519 (2000).

157. *See* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

A. Sovereignty: The National Identity Approach

In analyzing a sovereign state, one approach is to look intrinsically at the make-up, or guts, of the specific entity. This is to say that some commentators have defined sovereignty by its citizenry, culture, and national identity. "[C]itizenship in a bound political community, with shared cultural interests, is the basis for sovereignty . . . ."[158] This theory would suggest that sovereignty is an adaptive concept, one that changes color and tone in accordance with people's values. Further, a nation claiming sovereignty over a new territory would require exposing, or some would say imposing, its political ideals and cultural norms on the new territory. President Roosevelt cited this as a specific motivating factor for refusing sovereignty in drafting the military base leases:

> His reasons have been partially disclosed and one of them . . . was the great disparity of social, economic and labor conditions between the islands and our Continent. Also he knew full well the different customs and institutions prevailing there, particularly the relations between the white, colored and native races, and the difficulty of assimilating them into the American pattern – a prospect that would arouse emotional tensions in this country as well as in the Islands . . . .[159]

Yet, a modern trend in globalization, seen in all facets of life, inevitably takes its toll on any definitive lines of nationality. "Globalization strains the ideals so that people redefine groups based on culture, religion, moral and political values, instead of defining groups based on the division of borders."[160] "Nation-states are altered by the growth and interconnection of relationships with other nation-states . . . as a result altering sovereignty . . . ."[161] As early as 1949, a year before *Eisentrager*, certain members of the Supreme Court noted this trend. "The very concept of 'sovereignty' is in a state of more or less solution these days."[162] Clearly, as the idea of strictly defined national identities dissipates, so too should its weight as an indicator of sovereignty.

158. Danielle S. Petito, Comment, *Sovereignty and Globalization: Fallacies, Truth, and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139, 1140 (2001) (citing Rubenstein & Adler, *supra* note 156, at 543).

159. Vermilya-Brown, Co. v. Connell, 335 U.S. 377, 393-94 (1949) (Jackson, J., dissenting). Justice Jackson also wrote the majority opinion a year later in *Eisentrager*.

160. Petito, *supra* note 158, at 1142-43 (citing NIKOS PAPASTERGIADIS, THE TURBULENCE OF MIGRATION 87 (2000)). "A 'modernized' definition of sovereignty demands concern for a wide-range of social issues, cultural identity, ethnic identity, and justice, which affords individual connections to the society, politics, and culture of each individual situation." Petito, *supra* note 158, at 1141 (citing Rubenstein & Adler, *supra* note 156, at 519, 546).

161. Petito, *supra* note 158, at 1140-41 (citing Rubenstein & Adler, *supra* note 156, at 526).

162. United States v. Spelar, 338 U.S. 217, 224 (1949) (Frankfurter, J., concurring). Curiously, Justice Frankfurter joined the majority opinion in *Eisentrager*.

B. Sovereignty: The Attribute Approach

As stated above, the national identity approach looks to define sovereignty by its internal parts, or the make-up of the nation-state. Inversely, the attribute approach takes an external view by analyzing the nation-state by the powers it asserts on others.[163] Hence, the attribute approach is less a claim of sovereignty and more an identification of sovereignty by action. Courts and commentators have characterized these powers as "attributes of sovereignty."[164] Examples would include: (1) the right to declare war, conclude peace, and make treaties;[165] (2) the right to regulate conduct by law to the exclusion of jurisdiction of other states;[166] (3) the right to make searches and to effect seizures;[167] (4) the right to expel or exclude aliens,[168] and (5) the right to levee taxes and raise funds.[169] In analyzing Guantanamo, the issues are whether the United States asserts the aforementioned powers, and whether they do so alone.

(i) Applicable Law in Guantanamo

The United States asserts the full spectrum of laws to all situations or circumstances arising on or from the Naval Base at Guantanamo Bay. Obviously, it should be no surprise that the United States applies U.S. military law to its personnel for acts committed in Guantanamo.[170] But, the United States goes further, applying criminal law to civilians on the base,[171] criminal law to aliens on the base,[172] civil law to both,[173] and tax law to individuals

163. *See generally* Cleveland, *supra* note 157.

164. Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L. J. 983, 997 (2002); Howard O. Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 EMORY L. J. 89, 112-13 (1983); Cleveland, *supra* note 157; *infra* notes 165-169.

165. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

166. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1020 (3d ed. 1999) [hereinafter CARTER & TRIMBLE].

167. United States v. Wilmot, 29 C.M.R. 514, 517 (C.M.A. 1960).

168. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953).

169. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 855 n.6 (1995).

170. United States v. Elmore, 56 M.J. 533 (N-M. Ct. Crim. App. 2001); *Wilmot*, 29 C.M.R. 514; United States v. Bobroff, 23 M.J. 872 (C.M.R. 1987).

171. United States v. Rogers, 388 F.Supp. 298 (E.D.Va. 1975) (prosecuting civilian serving on the base for cocaine possession).

172. United States v. Lee, 906 F.2d 117 (4th Cir. 1990) (prosecuting Jamaican national for sexually abusing a child on the Guantanamo base). "[B]oth United States citizens and aliens alike, charged with the commission of crimes on Guantanamo Bay, are prosecuted under United States laws." *See* Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2nd Cir. 1992), *vacated as moot*.

173. Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573 (Fed. Cir. 1993) (finding that United States committed per se taking compensable under Fifth Amendment when U.S. Navy broke into subcontractor's warehouse); Nielsen v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970)

employed on the base.[174] There seem to be no boundaries to the assertion of United States law in Guantanamo. To be sure, this fact speaks volumes about the United States' true presence in Guantanamo. A few courts, including the Supreme Court, have clearly or implicitly stated that applicable law means everything in these cases.[175]

First, the Supreme Court in *United States v. Spelar*[176] came up with a two-part test for considering the "foreign country exception"[177] of the Federal Tort Claims Act.[178] Part II of the test addressed the question of whether the United States would be subject to the laws of a foreign power.[179] The Court found that the purpose of the exception was "to avoid subjecting the United States to liabilities depending upon the laws of a foreign power."[180] Hence, the Court explicitly stated the importance of applicable law, noting that it was imperative both in the drafting of the Act, and in deciding whether the leased territory is a "foreign country."

Second, the Ninth Circuit in *Cobb v. United States*[181] discussed the ideas of *de facto* and *de jure* sovereignty. The court applied the *Spelar* test, and found that "[t]he United States has therefore acquired . . . what may be termed a 'de facto sovereignty'" over Okinawa.[182] But, in applying part II of the test as

(applying U.S. commercial law to Cubans of Cuban corporation supplying water to Guantanamo base).

174. Wanda Faye Alberts v. Comm'r of Internal Revenue, 52 T.C.M. (CCH) 665 (1986) (finding Petitioner liable for failing to report income received from employment on Guantanamo base).

175. *See supra* notes 91, 97-98.

176. 338 U.S. 217 (1949).

177. 28 U.S.C. § 2680(k) (2000). For a discussion of the function and importance of the exception, see *supra* note 80.

178. 28 U.S.C. §§ 2671-80 (2000). In this case, an administratrix of an estate sued the United States for the death of the decedent in an airplane crash on the U.S. air base in Newfoundland. The United States leased this base from Great Britain on essentially the same terms as the Guantanamo base lease. *See Spelar*, 338 U.S. at 218-19 (citing Vermilya-Brown v. Connell, 335 U.S. 377, 383 n.4 (1949) ("The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control . . . .").

179. *Spelar*, 338 U.S. at 221. Part I is whether the claim arose in a territory subject to the sovereignty of a foreign country. *See id.* at 219.

180. *Id.* at 221.

181. 191 F.2d 604 (9th Cir. 1951). The United States had obtained total control of Okinawa as a result of World War II, and had expressed no intention of giving it back. This somewhat parallels the situation in Guantanamo because the United States asserts complete control indefinitely. *Id.* at 607.

182. *Id.* at 608. Part I of the test required the court to determine the sovereign in Okinawa. The court noted that unlike Newfoundland, which was clearly under the sovereignty of Great Britain, Okinawa's sovereign was in doubt because Japan had been stripped of the title. Hence, part I of the test gave no satisfactory answer, and the court had to then turn to part II. *Id.* at 607-08.

mentioned above, the court ultimately found that Okinawa was a foreign country because Japanese law would still apply.[183] The court again distinguished another territory because of applicable law, therefore recognizing its significance.

The only remaining question is whether the United States asserts its laws exclusively in Guantanamo, or whether Cuban laws would apply as well. No court has ever applied, or even recognized, any sort of Cuban law to an act occurring at the Guantanamo base. At the end of the opinion, the *Rasul* court noted that petitioners might have a remedy in international law, but cited no specific forum.[184] No other case mentions the rights or options of anyone trying to bring a claim arising on these leased bases, and logic would tend to say that an American or alien in Guantanamo would receive no relief from the Cuban Government. In fact, Cuban nationals who fled their country, were intercepted by the United States, and subsequently detained at Guantanamo, were not allowed to reenter Cuba even upon their request.[185]

It seems clear that the United States asserts the sovereign attribute of regulating conduct exclusively on the U.S. Naval Base at Guantanamo Bay. No evidence to the contrary could lead to any different conclusion. U.S. courts emphatically put a premium on applicable law as a factor in deciding whether a territory is a "foreign country." The law of Guantanamo is undoubtedly the law of the United States.

(ii) The Right to Exclude

"Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute . . . .'"[186] "[T]he power to expel undesirable aliens . . . [is] inherently inseparable from the conception of nationality."[187] Besides the fact that this principle is deeply rooted in American law, the right to expel aliens is especially significant because of its international qualities; it is an affirmative showing of authority readily visible on a world stage. The assertion of this right is, in effect, claiming supreme authority over the territory.

As to Guantanamo, inferential analysis of the relevant caselaw and public information is required to reach a conclusion. In *Cuban American Bar*

183. *Id.* at 609.

184. Rasul v. Bush, 215 F. Supp. 2d 55, 73 (D.C. 2002). *See also* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1050 (C.D.Cal. 2002). The *Coalition* court suggested that the Geneva Convention could be a possible source of relief, but noted that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*

185. Cuban Am. Bar Ass'n v. Christopher, Inc., 43 F.3d 1412, 1417-18 (11th Cir. 1995).

186. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

187. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 314, 318 (1936).

Association, the United States held thousands of Cuban nationals in a safe haven at Guantanamo after they were intercepted trying to migrate to the United States.[188] Although "the [United States] has offered the Cuban migrants safe haven for as long as the migrants wished,"[189] "[t]he government's position is that it could return the migrants to Cuba legally without a migrant's request."[190] Hence, although not asserted, the U.S. government clearly maintained that it held the sovereign right to expel the Cubans from Guantanamo at any time.

Analysis of United States procedure on the base provides evidence of a more telling sort. In the early 1960s, the United States was preparing to assist in the overthrow of Fidel Castro and the Cuban government (Bay of Pigs).[191] In preparation for a Cuban denunciation of the Guantanamo base arrangements, the United States released rules of engagement for the U.S. military to counter any attack:

> If Cuba were to denounce and repudiate the arrangements by which the United States has a base at Guantanamo, the United States would be on strong ground to assert (1) that the Cuban denunciation and repudiation were ineffective; (2) that we retained our base rights; and (3) that we would be justified in resisting with force any attempt to evict our armed forces from the base. These conclusions stem from the following considerations: (a) The right of the United States in Guantanamo is more than a right to maintain a base on territory under the sovereignty of Cuba and governed by Cuban law; by international agreement and treaty the United States obtained the lease of a defined area and received from Cuba the right of "complete jurisdiction and control" in that area. (b) No date was set for the termination of these rights, and the relevant international instruments specify that they are to continue until modified or abrogated by agreement between the United States and Cuba.[192]

Oddly enough, the United States' arguments to justify their right to forcefully remain in Guantanamo mirror the arguments made by the Petitioners in *Bird*[193] and *Cuban American Bar Association*[194] for United States sovereignty over the

188. *Cuban Am. Bar Ass'n*, 43 F.3d at 1417-18; *see supra* notes 106-110 and accompanying text.

189. *Cuban Am. Bar Ass'n*, 43 F.3d at 1418.

190. *Id.*

191. TRUMBULL HIGGINS, THE PERFECT FAILURE: KENNEDY, EISENHOWER, AND THE CIA AT THE BAY OF PIGS (1987).

192. Memorandum From the Deputy Legal Adviser Meeker to Secretary of State Rusk. (on file with the Department of State), *available at* http://www.fas.org/irp/ops/policy/docs/frusX/301_315.html (last visited Feb. 28, 2003).

193. Bird v. United States, 923 F. Supp. 338, 340-41 (D.Conn. 1996); *see supra* notes 111-115 and accompanying text.

194. *Cuban Am. Bar Ass'n*, 43 F.3d at 1424-25; *see supra* notes 106-110 and accompanying text.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

base.[195] Of course, these were released forty years ago in preparation for possible warfare. But, there have been no signs of improvement in relations between the United States and Cuba. Beginning in 1961 and until 1999, the United States used approximately 50,000 antipersonnel and antitank mines along the perimeter of its facilities at Guantanamo Bay.[196]

The United States has made it quite clear, both inferentially and explicitly, that it intends to assert the sovereign right of exclusion on the Guantanamo base. There is no doubt that any undesirable alien, Cuban or otherwise, would not be allowed to enter the Guantanamo base without the specific authorization of the U.S. government or its military. It should not be forgotten that this is a military base, and additional safety measures are more than reasonable for national security purposes. But the excess guarding of this particular perimeter, along with the history of tensions between the two governments, inevitably supports the argument that the United States asserts the right of exclusion.

(iii) Right of Search and Seizure

"The right to make searches and to effect seizures is the right of the sovereign."[197] In *United States v. Wilmot*,[198] the Court of Military Appeals considered whether the Narcotic Drugs Import and Export Act[199] applied to the Yokota Air Force Base in Japan. In finding that the Act did not apply because the Yokota base was not a territory under the "control or jurisdiction" of the United States, the Military Board of Review distinguished the Guantanamo base because there the United States was "at least technically sovereign."[200] On review, the Military Court of Appeals reversed, stating: (1) there was no difference between the bases; (2) these bases were under the "control and jurisdiction" of the United States, and (3) the United States had the right to control drug flow by search and seizure.[201] "The United States was granted the exclusive power to conduct searches and make seizures of persons and property within the physical areas granted to it."[202] Although this case does

195. The lease gave the United States "complete jurisdiction and control," or seemingly something more than that, indefinitely.

196. Use of Antipersonnel Landmines, Human Rights Watch, *available at* http://www.hrw.org/reports/2000/uslm/USALM007-06.htm#P572_74029 (last visited Feb. 28, 2003).

197. United States v. Wilmot, 29 C.M.R. 514, 517 (C.M.A. 1960).

198. *Id.*

199. 21 U.S.C. §§ 171-85 (2000). "A person violates the narcotic import act if he fraudulently or knowingly 'imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction.'" *See Wilmot*, 29 C.M.R. at 515 (quoting § 174 of the Drug Import Act).

200. *Id.* at 517.

201. *Id.* at 517-19.

202. *Id.* at 517.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

not specifically deal with a search and seizure at Guantanamo, there again seems no doubt that the United States could assert this sovereign power.

(iv) Other Considerations

In addition to the assertion of certain attributes of sovereignty, the United States exercises other powers normally reserved for a territory's governing body. The United States, explicitly or implicitly, applies U.S. labor laws,[203] commercial rights,[204] and property rights.[205] It also seems that the United States can move the detainees without having to go through foreign customs procedures. Both the *Ahrens* and *Eisentrager* opinions cite the difficulties of transporting the detainees and the hampering effect it would have on the war effort as reasons for instituting this standard.[206] Yet, when elaborating on the cumbersome process, neither court mentions any sort of extradition proceedings. Unfortunately, information regarding U.S. operations in Guantanamo is limited because of its military nature. But, from what can be discerned, Cuban rights are neither exercised nor recognized in Guantanamo.

PART V: MODIFYING *EISENTRAGER*

As stated earlier, *Eisentrager* sets forth a bright-line rule that an alien petitioning the federal courts for a writ of habeas corpus must be within the sovereign territory of the United States. A standard based on sovereignty is rigid, lasting, and unwavering. "Sovereignty is never held in suspense."[207] "Rulers come and go; governments end and forms of government change; but sovereignty survives."[208] As stated earlier, sovereignty has become an increasingly hollow term, with its internal components being discarded

203. *See* Vermilya-Brown v. Connell, 335 U.S. 377, 386 (1949) (applying Fair Labor Standards Act to Bermuda base, which the majority pointed out is essentially the same as Guantanamo); Vega-Mena v. United States, 990 F.2d 684, 690 n.6 (1st Cir. 1993) (citing 42 U.S.C. §1651, Longshoreman's and Harbor Workers' Compensation Act applies to Guantanamo Bay).

204. *See Vermilya-Brown*, 335 U.S. at 390-409 (Jackson, J. dissenting). Jackson argued in his dissent that the Bermuda base was not a "possession" because Great Britain retained commercial rights. The majority held that these were "possessions," inferring that the United States may assert some commercial rights. *Id.* As stated earlier, the court held the Bermuda lease was almost identical to the Guantanamo lease. *See also* Nielson v. Sec'y of Treasury, 424 F.2d 833, 836-38 (D.C. Cir. 1970) (United States froze assets of Cuban company that supplied water to Guantanamo, citing the Trading with Enemy Act, 50 U.S.C. app. §5 (2000)).

205. *See* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1580-83 (Fed. Cir. 1993) (U.S. Navy asserted property rights by committing a per se taking of subcontractor's warehouse compensable under the 5th Amendment).

206. Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950); Ahrens v. Clark, 335 U.S. 188, 191 (1948); *see supra* notes 56, 77.

207. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 317 (1936)

208. *Id.* at 316.

gradually by globalization and international assimilation. A half-century after *Eisentrager*, the Supreme Court will be called upon again to consider this question, and the need for a more workable, practical, and realistic standard is clear. Yet, in doing so, the Court must be careful not to overly extend the boundaries of U.S. jurisdiction.

Aside from the minimal social and cultural influences still applicable, "exclusive control" is the concept consistent throughout most definitions of sovereignty.[209] This Note proposes a two-part test, in which a court would ask: (1) whether the United States exercises control in the territory, and (2) whether the United States exercises that control exclusively. The court should look at each factor under a totality of the circumstances analysis, looking not only to the plain language of any governing agreement (lease or otherwise), but also to the realistic extent of U.S. power over the area.[210] Under this test, the court would not be forced to stray too far from the traditional analysis, therefore continuing to protect U.S. boundaries. At bottom, the two parts of the proposed test make up the real substance of sovereignty. The court would merely be replacing a rigid standard with a manageable test more attune to today's environment. Further, the test would provide for considerable judicial interpretation, subsequently giving the court flexibility[211] to deal with future cases.

In the case of most U.S. bases abroad, the United States asserts sufficient control to satisfy part I of the test. The United States is given almost total control in these areas by the agreements themselves, consequently asserting most or all relevant powers of sovereignty.[212] It is the second part of the test

209. *See* MERRIAM-WEBSTER'S DICTIONARY OF LAW, 461 (1996) (freedom from external control); BLACK'S LAW DICTIONARY, *supra* note 128 (supreme dominion, authority, or rule); CARTER & TRIMBLE, *supra* note 166 ("Sovereignty . . . is the right of a state in regard to certain areas of the world to exercise jurisdiction over persons and things to the exclusion of the jurisdiction of other states.").

210. The Fourth Circuit, in *Burna v. United States*, stated in dicta that "it is not a conclusive test that under the Treaty attributes of sovereignty can be exercised for the time being by the United States . . . [t]hat the United States could at any time set aside Japanese laws does not, as we see it, signify that Okinawa has lost its foreign character." 240 F.2d 720, 722 (4th Cir. 1957). The persuasive authority of this case is no doubt miniscule, as it has only been cited to one time since the early 1980s. *See* Bird v. United States, 923 F. Supp. 338, 342 (D.Conn. 1996). In fact, no court has ever cited *Burna* for the specific quotes mentioned above. But, the ideas serve as a good example of what courts should be looking for - something more than a relaxed, intermittent presence.

211. It can be argued that courts may not want this flexibility, especially considering the premium placed by some on national security, and the cumbersome, ambiguous nature of the problem. *See supra* note 77 and accompanying text; *supra* note 56, 155; *infra* note 214.

212. *See, e.g.*, Vermilya-Brown Co. v. Connell, 335 U.S. 377, 383 n.4 (1948) (The United States obtained "all the rights, power and authority . . . necessary for the establishment, use, operation and defense thereof, or appropriate for their control" on the Bermuda base.); Heller v. United States, 605 F. Supp. 144, 146 (E.D.Penn. 1985) (The United States acquired "the

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

that will cause the most trouble for any military base detainee. Most bases either apply, or at least recognize, the law of the host country.[213] But therein lies the beauty of the test. The court is forced to ascertain the appropriate forum, directly pointing the individual to where the opportunity for a remedy lies.[214] Whether pass or fail, U.S. law or foreign, the detainee will know which law applies, and where he/she should proceed. This test may not change many outcomes, but the effect of a more appropriate, adaptable approach sufficiently increases the assurance that each decision will be correct.

1. Application to Guantanamo

As to Guantanamo, the circumstances are more complex, but the answer should still be easy. The lease itself gives the United States "complete jurisdiction and control."[215] As seen above, the United States asserts all relevant powers over the area. In addition, these powers are exercised exclusively by the United States, free from any Cuban influence.[216] Guantanamo is not governed under U.S. law "for the time being."[217] The United States' indefinite presence in Guantanamo is unlike their presence at any other facility. The United States acts freely, without regard for Cuban law or rights. It is this strong, forceful, and declarative existence of the United States that sets Guantanamo apart, and ultimately demands recognition.

CONCLUSION

Although presented with a peculiar and difficult set of facts, the *Rasul* court did its best to maintain the status quo. Petitioners asserted a strong pair of substantive and technical arguments, all of which were disposed of systematically by the legal weapons of *Eisentrager*, its progeny, and the plain language of the lease. *Eisentrager* sets forth a strict, immovable standard, and the lease itself provided a definitive answer. No doubt, further petitioners will

assurance of unhampered . . . military operations" on Clark Air Force Base in the Philippines.); United States v. Wilmot, 29 C.M.R. 514, 516 (C.M.A. 1960) (The United States has "police power unfettered by Japan within the area" of Yokota Air Force Base.).

213. *See, e.g.*, United States v. Spelar, 338 U.S. 217, 221 (1949) (Newfoundland law applies); *Heller*, 605 F. Supp. at 146 (Clark Air Force Base subject to Philippine law). *But see*, *Wilmot*, 29 C.M.R. at 516 ("[I]t is well established that Yokota Air Force Base . . . has been delivered over to the United States for its 'exclusive use'. . .).

214. Both the *Eisentrager* and *Rasul* Courts limited their opinions to U.S. federal courts, while hinting that the detainees may have had a remedy elsewhere, namely the Geneva Convention. Unfortunately, this option poses many problems of its own. *See* Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, Congressional Research Service, *available at* http://www.fas.org/irp/crs/RL31367.pdf (last visited Feb. 28, 2003).

215. *See* Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

216. *See supra* notes 163-206 and accompanying text.

217. Burna v. United States, 240 F.2d 720, 722 (4th Cir. 1957).

be wary of bringing these cases until *Rasul* has run its course through the Supreme Court. But if the Supreme Court does alter or modify its position on Guantanamo, the decision could have far-reaching effects on the international jurisdiction of the United States.

First, this case could change the way the United States handles international enemies, both in how they are detained and how they are tried. The dissolution of the legal gray area that these detainees now face could bring both positive and negative results. True, the logistical dangers of transporting and trying these individuals expressed by *Eisentrager* and other courts could have a dampening effect on U.S. military operations abroad. But, this case can also be seen as an improvement on U.S. treatment of aliens, enemy or friendly—an effect that would not go unnoticed internationally.

Second, this case could enhance the rights of civilians to bring civil suits against the government for acts occurring on military bases or at embassies. Right now, the United States retains sovereign immunity against claims arising in "foreign countries" pursuant to the Federal Tort Claims Act.[218] In fact, most of the cases relied on by the *Rasul* court dealt specifically with this Act. If the rigid lines of what constitutes a foreign country are relaxed, and the weight afforded sovereignty is decreased, subsequent courts dealing with the Act may lower the walls around federal jurisdiction. This too may have both positive and negative effects. Although, as is the case domestically, there could be an influx of frivolous suits, the expansion of rights for U.S. citizens abroad and the possibility of truly aggrieved parties obtaining compensation for injuries would be undoubtedly positive.

Ultimately, justice requires a change in this area of law. *Eisentrager* is an outdated rule established against a completely different international backdrop which relies too heavily on an intangible word or idea. Times have changed and have ushered in fresh and diverse views on how our country handles itself abroad. Our society has closely held its political opinions, its cultural views, and most of all, its power. Now, people are no longer bent on world domination, but are more concerned with world equality and the betterment of mankind. The United States can no longer adhere to international laws that blindly contradict the facts.

That being said, this is neither a popular case nor a popular argument with the American public. Assuming these detainees are guilty of terrorism, they struck directly at the heart of the United States. The greatest and proudest pillars of American life were attacked, and regardless of any individual thoughts on the need for consistent fairness for all, the masses are out for blood. Hence, the short-sided view of any court deciding to hear the detainees' petition will inevitably be that of disapproval. But, the greatest and proudest pillars of American culture, pride, and history (in essence the reason why

218. 28 U.S.C. § 2680(k) (2000); *supra* notes 80, 83.

Americans love being American) must shine onward. The beauty of the United States, and its justice system, is that the focus is not on the individual, or the specific act, but on the pursuit of justice, equality, and the general welfare. As these staple qualities are not forgotten, the belief that U.S. courts strive for greatness, rather than vengeance will unwaveringly remain.

SETH J. HAWKINS*

* J.D. Candidate, Saint Louis University School of Law. I would like to thank Professor Derek Jinks for his insight and patience, my parents, Steven, Cynthia, Cheryl, and Gregory, for their unconditional love, and the Kilo's for their support and encouragement.