University of Florida Journal of Law & Public Policy

Volume 20 | Issue 2 Article 6

2009

Habeas Corpus: What the Closing of Guantanamo Bay Means for Future Challenges to Executive Detention from Abroad

Jay Yagoda

CASE COMMMENT

HABEAS CORPUS: WHAT THE CLOSING OF GUANTANAMO BAY MEANS FOR FUTURE CHALLENGES TO EXECUTIVE DETENTION FROM ABROAD

Boumediene v. Bush, 128 S. Ct. 2229 (2008)

Jay Yagoda[*]

In the wake of September 11, 2001, Congress authorized President Bush to wage a military campaign against al Qaeda and the Taliban regime that supported it.[1] Petitioners, foreign nationals captured by U.S. armed forces in Afghanistan and abroad for their alleged connection to al Qaeda and 9/11, were detained at the U.S. Naval Base in Guantanamo Bay, Cuba, and classified by Combatant Status Review Tribunals as enemy combatants.[2] While the United States exercises jurisdiction over

---

[*] J.D. expected May 2010, University of Florida Fredric G. Levin College of Law; B.A. in Criminology & History, May 2007, University of Florida. I dedicate this Comment to my family and friends for their constant support and continual motivation.

1. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240-41 (2008). After the September 11, 2001 attacks, Congress authorized the President to:

> [U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001). Subsequent to Congress's passing of the Authorization for Use of Military Force, the U.S. Supreme Court recognized that the detention of individuals who fought the United States in Afghanistan during conflict was an "accepted" incident to war and a "necessary and appropriate force" Congress authorized the President to use. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (O'Connor, J., plurality opinion).

2. *See Boumediene*, 128 S. Ct. at 2241. After the Supreme Court's decision in *Hamdi*, "the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo Bay were 'enemy combatants.'" *Id.* Congress defines an "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States . . . who is not a lawful enemy (including a person who is part of the Taliban, al Qaeda, or associated forces) . . . ." 10 U.S.C. § 948a(1)(A)(i) (2006). The term also includes "a person who . . . has been determined to be an unlawful enemy combatant by a [CSRT] or other competent tribunal established under the authority of the President or the Secretary of Defense." 10 U.S.C. § 948(1)(A)(ii). However, in the instant case, each Petitioner denied membership in the al Qaeda

the base, the base's land remains part of Cuba's sovereign territory.[3] In two separate cases, Petitioners sought writs of habeas corpus from the U.S. District Court for the District of Columbia challenging the legality of their detention.[4] On remand,[5] the district court, in one instance, dismissed the petitions for lack of an actionable claim;[6] in a separate action, the court held Petitioners were denied due process.[7] Petitioners' cases were then consolidated, and together, they appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[8] However, while the appeal was pending, Congress passed the Military Commissions Act (MCA), denying alien enemy combatants detained at Guantanamo access to habeas relief.[9] As a result, the court of appeals denied

---

terrorist network or the Taliban regime "that provided sanctuary for al Qaeda." *Boumediene*, 128 S. Ct. at 2241.

3. *See Boumediene*, 128 S. Ct. at 2251-52. Pursuant to a lease agreement with Cuba, the United States possesses forty-five square miles of Cuban soil. *Id.* at 2261. Under the terms of the lease agreement, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." *Id.* at 2251-52 (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418). However, under the terms of a later, and final, 1934 treaty, "Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base." *Id.* at 2252 (citing Treating Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1683, T.S. No. 866). Additionally, the instant Court noted that in relation to the instant facts, "[n]o Cuban court ha[d] jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applie[d] at the naval station." *Id.* at 2251.

4. *Id.* at 2241. Petitioners first sought writs of habeas corpus in February 2002, when the district court dismissed the cases for lack of jurisdiction, citing Guantanamo Bay's location outside of sovereign U.S. territory as its reasoning. *Id.* The U.S. Court of Appeals for the District of Columbia Circuit then affirmed those decisions. *Id.* In *Rasul v. Bush*, the U.S. Supreme Court "reversed, holding that [the pre-amended] 28 U.S.C. § 2241 extended statutory habeas corpus jurisdiction to Guantanamo." *Id.* (citing Rasul v. Bush, 542 U.S. 466, 473 (2004)). However, the *Rasul* Court failed to address the constitutional issue presented in the instant cases. *Id.* (citing *Rasul*, 542 U.S. at 476).

5. *See supra* note 4. After reversing the court of appeals' judgment, the U.S. Supreme Court, in *Rasul*, "remand[ed] these cases for the District Court to consider in the first instance the merits of [P]etitioners' claims." *Rasul*, 542 U.S. at 485.

6. *See* Khalid v. Bush, 355 F. Supp. 2d 311, 324 (D.D.C. 2005), *rev'd*, *Boumediene*, 128 S. Ct. 2229 (2008).

7. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 472 (D.D.C. 2005), *rev'd*, *Boumediene*, 128 S. Ct. 2229 (2008).

8. *See Boumediene*, 128 S. Ct. at 2241.

9. *See id.* While Petitioners' district court decisions were pending, Congress first passed the Detainee Treatment Act (DTA). *Id.* Pursuant to the DTA's terms, Congress amended the federal habeas statute, providing that "no court, justice, or judge shall [have] jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . ." Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1)-(2), 119 Stat. 2739, 2742 (2005), *amended by* Military Commissions Act of 2006, Pub. L. No. 366, § 7, 120 Stat. 2600 (2006) (codified as amended at 28 U.S.C. § 2241(e) (2007)) (repealed by *Boumediene*, 128 S. Ct. 2229)). However, in *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that this provision of the DTA did not

Petitioners' writs, explaining that without statutory authority or U.S. sovereignty over Guantanamo, it lacked jurisdiction.[10] The U.S. Supreme Court reversed, holding that because the United States exercised functional control over Guantanamo, Petitioners were entitled to request habeas relief.[11]

On January 22, 2009, President Obama issued executive orders directing the prompt closure of the Guantanamo Bay detention facilities,[12] ending the CIA's secret overseas prisons, and banning coercive interrogation methods.[13] Reversing President Bush's heavily criticized counterterrorism policies,[14] President Obama's orders rendered moot the instant Court's holding as it pertains to current Guantanamo detainees. The detainees' habeas corpus proceedings have been stayed until the Obama administration "make[s] a broad assessment of detention policy."[15] With Guantanamo's closing, the question remains whether the instant Court's unprecedented extension of the writ will apply to alien enemies held at other U.S. detention facilities abroad.

Since its origins at common law,[16] the writ of habeas corpus has served as a beacon for individual liberty and as a restraint on lawless executive detention.[17] The writ is so important, in fact, that the Suspension Clause of the Constitution expressly limits its formal

---

apply to Petitioners' cases, which were pending when the DTA was enacted. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 576-77 (2006). In response, Congress passed the Military Commissions Act (MCA), which amended the federal habeas statute 28 U.S.C. § 2241 yet again to eliminate federal court jurisdiction to hear habeas petitions from enemy detainees held at Guantanamo, including Petitioners' pending claims. *See Boumediene*, 128 S. Ct. at 2242 (citing Military Commissions Act § 7 (codified as amended at 28 U.S.C. § 2241(e) (repealed by *Boumediene*, 128 S. Ct. 2229))).

10. *See Boumediene*, 128 S. Ct. at 2242 (citing Boumediene v. Bush, 476 F.3d 981, 987, 990-91 (2007)).

11. *See id.* at 2262, 2277.

12. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). Executive Order No. 13,492 mandates that the Guantanamo Bay detention facilities be closed within a year. *Id.*

13. *See* Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, N.Y. TIMES, Jan. 23, 2009, *available at* http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html?pagewanted=1&_r=1.

14. *Id.*

15. *Id.*

16. *See Boumediene*, 128 S. Ct. at 2245 (discussing the history of the writ of habeas corpus and its issuance at common-law in the courts of England "to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner").

17. *See* Harris v. Nelson, 394 U.S. 286, 290-91 (1969); *see also* Munaf v. Geren, 128 S. Ct. 2207, 2221 (2008) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)) (explaining that habeas is "at its core a remedy for unlawful executive detention"); Peyton v. Rowe, 391 U.S. 54, 58 (1968) (finding that the writ of habeas corpus is "both the symbol and guardian of individual liberty").

suspension to times of war or invasion.[18] With the writ's resilient ability to challenge the legality of imprisonment, both citizens and alien detainees have invoked its protections.[19] During World War II, the U.S. Supreme Court employed two factors—citizenship and location—to determine the writ's scope.[20] However, the twenty-first century's War on Terror persuaded the Court to all but abandon those factors in favor of a third factor—practicality—to restore individual liberty to its lawful position.[21]

More than sixty years before the closing of Guantanamo, in *Ex parte Quirin*, the U.S. Supreme Court established the original framework for an enemy alien detainee's right to seek habeas relief during wartime.[22] In *Quirin*, eight German soldiers, wearing German uniforms and carrying explosives, landed on American soil upon orders from the German Reich to destroy U.S. war industries.[23] But before their plan was executed, the German saboteurs were detained and tried by a U.S. military tribunal for violating the law of war.[24] The soldiers petitioned for writs of habeas corpus,[25] challenging the constitutionality of their trial by military tribunal.[26] Rejecting the government's argument that U.S. courts lacked jurisdiction to hear the claims of aliens and belligerents,[27] the U.S. Supreme Court held that enemy aliens detained within the United States were entitled to petition for habeas relief.[28] Although the *Quirin* Court found the prisoners' foreign status

18. *Boumediene*, 128 S. Ct. at 2246 (quoting U.S. CONST. art. I, § 9, cl. 2).

19. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (considering an American citizen's habeas petition); *Ex parte* Quirin, 317 U.S. 1, 24-25 (1942) (determining whether enemy aliens detained within the United States were entitled to petition for habeas relief).

20. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 790-91 (1950) (denying enemy aliens detained by U.S. forces abroad the right to petition for the writ of habeas corpus because such a right could only be extended to U.S. citizens); *In re* Yamashita, 327 U.S. 1, 4-6 (1946) (allowing consideration for habeas petition filed by enemy alien detained in Philippines because of detainee's location within a U.S. sovereign territory).

21. *See Boumediene*, 128 S. Ct. at 2253-62 (reading previous Supreme Court precedent as applying a practical approach in considering whether enemy aliens detained in Guantanamo Bay, Cuba could petition a U.S. federal court for a writ of habeas corpus).

22. *See Quirin*, 317 U.S. at 24-25.

23. *Id.* at 21.

24. *See id.* at 21, 22.

25. *Id.* at 18-19.

26. *Id.* at 24. The Nazi prisoner's main argument on petition for habeas relief was that the "President [was] without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they [were] charged." *Id.* Further, the prisoners argued that "in consequence they [were] entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee[d] to all persons charged in such courts with criminal offenses." *Id.*

27. *See id.* at 25.

28. *Id.*

inconsequential, the location of their detainment was not.[29] Because the Court did not allow the prisoners' status as aliens to foreclose their access to the U.S. court system, *Quirin* expanded the writ's scope by allowing prisoners detained within U.S. territory to challenge the legality of their detainment, regardless of their citizenship.[30]

While *Quirin* and its progeny[31] underscored the importance of location within U.S borders for enemy aliens seeking habeas relief, just eight years later, *Johnson v. Eisentrager* added an additional element, citizenship, to resolve a similar issue.[32] In *Eisentrager*, during World War II, twenty-one German nationals were tried and convicted in China by a U.S. Military Commission[33] for engaging in continued military activity against the United States after Germany had surrendered.[34] Charged with violating the laws of war, the prisoners were repatriated to Germany to serve their sentences in U.S. Army custody.[35] The prisoners then sought habeas relief in federal court, challenging the legality of their imprisonment.[36] Denying the petitions, the U.S. Supreme Court held that the Constitution did not extend its protections to alien enemies captured and detained by U.S. armed forces outside U.S. territory.[37]

In reaching its conclusion, the *Eisentrager* Court proposed an ascending scale of rights depending on a detainee's connection to the United States.[38] With citizenship on one end and non-citizenship on the

---

29. *Id.* at 24-25.

30. *See id.* The Court reasoned that the sheer fact the Nazi prisoners were enemy aliens could not foreclose "consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forb[ade] their trial by military commission." *Id.* at 25.

31. *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 8-9 (1946) (applying the holding in *Quirin* when considering a habeas petition filed by an enemy alien detained in the Philippines, a U.S. territory).

32. *See* Johnson v. Eisentrager, 339 U.S. 763, 769-71 (1950).

33. *See id.* at 765-66. The U.S. Military Commission, authorized by the U.S. Joint Chiefs of Staff, sat in China with the Chinese government's express consent. *Id.* at 766.

34. *Id.*

35. *Id.* After being repatriated to Germany to serve their sentences, the German nationals were kept under the custody of an American Army officer. *Id.*

36. *Id.* at 767.

37. *Id.* at 785 (finding that the "Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States").

38. *Id.* at 770. The *Eisentrager* Court explained:

> The 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. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon

other, citizenship provided a much stronger basis for constitutional protection.[39] However, in the absence of citizenship, physical presence within sovereign U.S. territory granted an alien the most identifiable rights.[40] Thus, in *Eisentrager*, lack of citizenship and location abroad weighed heavily against granting the German prisoners relief.[41] Holding otherwise, the Court reasoned, would have led to an absurd[42] and impractical result.[43]

Over fifty years later, in *Rasul v. Bush*,[44] the U.S. Supreme Court, for the first time, appeared to limit *Eisentrager*'s holding.[45] In *Rasul*, after the 9/11 attacks, the U.S. government captured alien enemies abroad and detained them in Guantanamo Bay, Cuba.[46] Pursuant to the federal habeas statute[47] that authorized district courts within their

---

> naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing.

Id. at 770-71.

39. *Id.* at 770; *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (finding that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens").

40. *See Eisentrager*, 339 U.S. at 770; *supra* text accompanying note 39.

41. *See Eisentrager*, 339 U.S at 778.

42. *Id.* at 777. The Court reasoned that to support an opposite conclusion, allowing the German prisoners to petition for the writ, the Court would then have to hold that:

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

Id. In light of all these factors, the Court concluded that it would have to go much further to "invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts." *Id.*

43. In *Eisentrager*, the majority explained that "[t]o grant the writ to these prisoners might mean that our army must transport them across the seas for hearing." *Id.* at 778-79. This would require "allocation of shipping space, guarding personnel and rations" and "might also require transportation for whatever witnesses the prisoners desire to call as well as transportation for those necessary to defend the legality of the sentence." *Id.* at 778-79.

44. 542 U.S. 466 (2004).

45. *See id.* at 472-73. Prior to *Rasul*, the courts interpreted *Eisentrager* to hold that the right to petition for habeas corpus did not extend to aliens in military custody who were not physically present in any sovereign U.S. territory. *Id.*

46. In *Rasul*, the aliens detained at Guantanamo originally consisted of two Australian citizens and twelve Kuwaiti citizens. *Id.* at 470. All the detainees were captured abroad during hostilities between the United States and the Taliban. *Id.* at 470-71.

47. 28 U.S.C. § 2241 (2000).

respective jurisdictions[48] to entertain habeas applications for detainees held in violation of the laws of the United States,[49] the alien detainees in *Rasul* petitioned for habeas relief to challenge the legality of their confinement.[50] In addressing whether the statute granted federal courts the jurisdiction to hear petitions from aliens detained at Guantanamo, the Supreme Court concluded that although the United States lacked "ultimate sovereignty" over the Cuban base, its "plenary and exclusive jurisdiction" over the territory sufficiently justified jurisdiction.[51]

Although the *Rasul* Court acknowledged *Eisentrager*'s precedent that aliens being held in non-sovereign U.S. territory precluded any right to habeas relief, it easily distinguished the facts of *Rasul* from *Eisentrager*.[52] First, *Rasul*'s reasoning rested on statutory interpretation.[53] Second, the *Rasul* detainees were not nationals of a country at war with the United States, were refused access to any adjudicatory tribunal, and admitted to no wrongdoing.[54] Third, the U.S. government's plenary control of Guantanamo was the practical equivalent of "sovereignty" over that territory.[55] Despite allowing the petitions to proceed, the Court left unresolved the question of whether

48. *Rasul*, 542 U.S. at 473 (quoting 28 U.S.C. § 2241(a)).

49. *Id.* (quoting 28 U.S.C. § 2241(c)(3)). Subsequent to the Court's decision in *Rasul*, Congress enacted the MCA in 2006 to prohibit federal court jurisdiction over habeas claims of Guantanamo Bay detainees labeled as "enemy combatants." *See also supra* note 9.

50. *Rasul*, 542 U.S. at 470-72.

51. *Id.* at 475, 483.

52. *Id.* at 475-76.

53. *See id.* at 476 (observing the *Eisentrager* Court's failure to analyze the question of statutory entitlement to habeas review). The *Eisentrager* Court was unable to locate any statute that conferred jurisdiction upon federal courts to entertain habeas petitions from detainees captured and detained outside U.S. borders. Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

54. *Rasul*, 542 U.S. at 476. In distinguishing *Eisentrager* from *Rasul*, the Court explicitly stated:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing . . . .

Id.

55. *Id.* at 476, 481-82. The express terms of the U.S. agreement with Cuba dictates that the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base. *Id.* at 480. In addition, the United States "may continue to exercise such control permanently if it so chooses." *Id.* Furthermore, the writ's reach did not depend on "formal notions of territorial sovereignty," but on practical questions regarding the extent and nature of the government's jurisdiction over a given territory. *Id.* at 482; *see also supra* note 3.

aliens detained at Guantanamo could challenge the legality of their detention absent statutory entitlement.[56]

Four years later, the U.S. Supreme Court, in *Boumediene*, upheld the *Rasul* standard against the MCA's elimination of statutory habeas jurisdiction for any enemy combatant held in U.S. custody.[57] The instant Court concluded that the Constitution extended to alien detainees held in Guantanamo, making Congress's suspension of habeas corpus through the MCA a violation of the Suspension Clause.[58] Criticizing the government's view that the Constitution lacked any force in non-sovereign territory, the instant Court reasoned that to allow such a callous proposition to stand would effectively permit Congress and the President to "switch the Constitution on or off at will."[59]

Troubled by the outcome if it were to accept the government's argument as true,[60] the instant Court was faced with the dilemma of preserving *Eisentrager*'s fifty-year precedent while holding the opposite to be true.[61] Unlike *Rasul*, the instant Court did not rest its decision on distinguishing the instant facts from *Eisentrager*; instead, it interpreted *Eisentrager*'s holding as relying on practical considerations that examined the entire circumstances of a prisoner's detention.[62] The instant Court explained that based on *Eisentrager*'s language, at least three factors were relevant in determining the Suspension Clause's reach.[63] To determine where and when the Clause applied, the instant Court examined: (1) the citizenship and status of the detainee, including the adequacy of such designations; (2) the nature of the sites of apprehension and detention; and (3) the "practical obstacles" that could impede resolving a "prisoner's entitlement to the writ."[64]

---

56. *See Rasul*, 542 U.S. at 484 (limiting the Court's holding to alien detainee petitions based on the federal habeas statute 28 U.S.C. § 2241 prior to its amendment by the MCA).

57. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2241, 2259-62 (2008).

58. *Id.* at 2262.

59. *Id.* at 2259.

60. *See id.* The Court explained:

> [T]he necessary implication of the government's argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Id.

61. *Id.* at 2257-62; *see also id.* at 2298 (Scalia, J., dissenting) (discussing that *Eisentrager* stands for the exact opposite of proposing a "functional" test for determining the extraterritorial reach of the writ of habeas corpus).

62. *See id.* at 2257.

63. *Id.* at 2259.

64. *Id.*

While the instant Court initially explained that the alien enemies detained at Guantanamo were not citizens, it did contest their designation as enemy combatants.[65] Equally important, the instant Court reasoned, was that nothing indicated that adjudicating the petitions would cause friction with the Cuban government or compromise the military mission at Guantanamo.[66] While it was true that the detainees were apprehended and technically detained outside the U.S.'s sovereign territory, the instant Court found that Guantanamo was in every functional sense "not abroad."[67] Taken together, the instant Court concluded that the Suspension Clause had full effect in Guantanamo Bay.[68]

In declaring the MCA unconstitutional, the instant Court, for the first time, extended constitutional protections to non-citizens detained outside U.S. territory during wartime.[69] Citing the absence of any historic parallel to the War on Terror, the instant Court's departure from its prior case law was an obvious response to that war's unprecedented course.[70] As the instant case demonstrated, securing entitlement to habeas relief during an incomparable conflict demanded much more than a bright-line test;[71] rather, it required examining the totality of the circumstances.[72] With this realization, the instant Court reaffirmed the writ's earnest ability to secure individual liberty[73] while simultaneously altering the future of the U.S. government's fight against terrorism abroad.[74] The *Quirin* Court emphasized, and the instant Court willingly

---

65. *Id.*

66. *Id.* at 2261.

67. *Id.* at 2260-61.

68. *Id.* at 2262.

69. *See id.* at 2293-94 (Scalia, J., dissenting) (declaring that "[t]oday, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war").

70. *See id.* at 2262.

71. *See* Johnson v. Eisentrager, 339 U.S. 763, 785 (1950). *Eisentrager* created a categorical rule that aliens captured and detained on non-sovereign U.S. territory could not petition the courts for habeas corpus. *See id.*; *see also supra* note 42.

72. *Boumediene*, 128 S. Ct. at 2257. In reaching its ultimate decision, the instant Court relied on practical considerations that "weighed heavily" in cases such as *Eisentrager*. *Id.*

73. *Id.* at 2259. The instant Court explained:

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside of its borders, its powers are not "absolute and unlimited" but are subject to "such restrictions as are expressed in the Constitution."

Id. (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

74. *See id.* at 2294 (Scalia, J., dissenting). In his vocal dissent, Justice Scalia admonished that the "game of bait-and-switch that today's [majority] opinion plays upon the Nation's

embraced, the concept that in times of war, it is the courts' duty to preserve the constitutional safeguards of civil liberty.[75] In executing this duty, the instant Court recognized that complete reliance on a World War II response to a similar issue could not resolve problems afflicting today's War on Terror.[76]

In *Quirin*, the Court extended the writ to alien enemies detained within U.S. territory when their alleged wrongdoing was quite apparent.[77] In *Eisentrager*, the same Court denied extending the writ to enemy aliens detained in Germany, citing lack of citizenship as a basis for its denial.[78] In both *Eisentrager* and *Quirin*, degradation of individual liberty — what the writ assertively protects — was not implicated.[79] The prisoners in *Quirin* were allowed to petition for the writ.[80] Conversely, although the prisoners in *Eisentrager* were denied the writ, the Court noted that the prisoners still obtained a lawful adjudicatory process in the writ's absence.[81] Thus, individual liberty was secured.[82]

Unlike executive detainment during World War II, President Bush selected Guantanamo Bay because he assumed the Constitution did not apply there — leaving all executive actions taken there unchecked by law.[83] The *Quirin* and *Eisentrager* Courts declined to question

---

Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed." *Id.*

75. *See id.* at 2259; *Ex parte* Quirin, 317 U.S. 1, 19 (1942).

76. *Boumediene*, 128 S. Ct. at 2261.

77. *Quirin*, 317 U.S. at 25. In *Quirin*, German saboteurs landed on U.S. soil at night with their German uniforms, carrying with them "a supply of explosives, fuses, and incendiary and timing devices." *Id.* at 21. After landing, the saboteurs buried their uniforms and attempted to proceed with their mission to "destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government." *Id.* The *Quirin* Court explained that spies "who secretly and without uniform pass[] the military lines of a belligerent in time of war . . . for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are . . . offenders against the law of war." *Id.* at 31.

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

79. *See Boumediene*, 128 S. Ct. at 2271 (explaining that "[f]or on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that [was] lacking here").

80. *See Quirin*, 317 U.S. at 24-25.

81. *See Eisentrager*, 339 U.S. at 786. The Court held that the Military Commission was "a lawful tribunal to adjudge enemy offenses against the laws of war." *Id.* Additionally, the prisoners' petitions illustrated that they were formally accused of violating the laws of war and "fully informed of [the] particulars of these charges."

82. *See* case cited *supra* note 79 and *supra* text accompanying note 81.

83. *See Boumediene*, 128 S. Ct. at 2258-59; *id.* at 2294 (Scalia, J., dissenting) ("The President relied on our settled precedent in *Johnson v. Eisentrager* . . . when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him 'that the great of legal authority indicate[d] that a federal district court

executive detainment of enemies, not only for national security's sake, but largely because of that branch's abidance with the laws of war.[84] In *Rasul* and the instant case, however, the Court found unpersuasive President Bush and the executive branch's general reliance on national security to justify their unchecked powers at Guantanamo.[85]

In each case, the Court employed a balancing test, pitting national security against individual liberty.[86] In *Quirin* and *Eisentrager*, the executive's maintenance of national security did not detract from the writ's effect, and a careful balance between the two was maintained.[87] However, in the instant case, the executive's unbridled authority at Guantanamo tipped the scale too heavily in favor of national security, allowing the writ's protection of individual liberty to fall at the waist side.[88] To find a proper balance during the War on Terror between the competing interests of national security and individual liberty, the instant Court relied on *Eisentrager*'s less-quoted analysis detailing the impracticalities of extending the writ to alien enemy combatants detained abroad.[89]

The instant Court, taking its cue from *Rasul*'s unanswered questions, generated a non-inclusive, three-factor test to determine whether detainees at Guantanamo were entitled to the privilege of habeas corpus.[90] To make this determination, the instant Court examined three factors: the detainee's status and the process by which that status was determined; the nature of the detention site; and any practical obstacles blocking entitlement to the writ.[91] By injecting fluidity into writ-entitlement determinations for alien enemy detainees, the instant Court struck a new balance between challenges to the legality of detention and

---

could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].'") (quoting Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001)). In Justice Scalia's dissent, he also noted that "[h]ad the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, and turned them over to allies for detention." *Id.* at 2294 (Scalia, J., dissenting).

84. *See Quirin*, 317 U.S. at 26; *supra* text accompanying note 81.

85. *See Boumediene*, 128 S. Ct. at 2277 (discussing the reconciliation that liberty and security must make with one another).

86. *See id.* ("Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."); Rasul v. Bush, 542 U.S. 466, 499 (2004) (Scalia, J., dissenting); *Eisentrager*, 339 U.S. at 770, 773-75 ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."); *Quirin*, 317 U.S. at 25.

87. *See Eisentrager*, 339 U.S. at 773-75; *Quirin*, 317 U.S. at 25.

88. *See Boumediene*, 128 S. Ct. at 2277.

89. *Id.* at 2257-62.

90. *Id.* at 2259.

91. *Id.*

national security concerns.[92] Subsequent case law and government action will test the strength of this balance and its reliance on practicality.[93]

The first challenge to the instant Court's holding to preserve individual liberty arose during subsequent habeas petitions filed by the numerous alien detainees held at Guantanamo after the instant case was decided.[94] Of the first twenty-six petitions filed, the U.S. government has lost twenty-three, indicating the executive's authoritative overstep in the name of national security.[95] Although all Guantanamo detainee petitions are currently stayed, more than two hundred petitions have already been filed.[96]

Above all else, the instant case has signaled the paradigmatic shift from President Bush's executive policies to those of newly-elected President Obama.[97] Opening its fenced-in gates under President Bush, Guantanamo Bay will ultimately close its doors pursuant to one of President Obama's first executive orders.[98] In what may resemble a short-lived victory for alien detainees at Guantanamo, the instant case serves as a warning to President Obama when employing tactics to increase combat operations in Afghanistan.[99]

In Justice Scalia's emotional dissent, he admonished that the majority's foreclosure of *Eisentrager* would make it more difficult for the President to fight terrorism and protect U.S. national security.[100] Although President Obama has issued orders to close Guantanamo, he must now decide, in light of the instant case, whether and how to continue holding alien enemies detained at other U.S. bases abroad.[101] For example, at Bagram, a U.S. military base in Afghanistan, over six hundred prisoners are being held indefinitely and without charge in a

92. *See id.* at 2262.

93. *Id.* at 2295 (Scalia, J., dissenting).

94. *See* Jacob Sullum, Editorial, *Guantanamo Fiasco is Lesson for New President*, CHI. SUN-TIMES, Jan. 22, 2009, at 21.

95. *Id.* As those petitions and other reports later confirmed, over ninety percent of the Guantanamo prisoners were captured, not by Americans, but by foreign forces to whom the United States had promised monetary rewards. *Id.* In fact, many Guantanamo detainees were entirely innocent, held based on either the "uncorroborated words of self-interested captors," or on accusations extracted from tortured prisoners. *Id.*

96. *See* Shane, *supra* note 13.

97. *See id.*

98. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

99. Eric Schmitt, *Two Prisons, Similar Issues for President*, N.Y. TIMES, Jan. 27, 2009, at A1. President Obama's plan to increase combat operations in Afghanistan "will almost inevitably generate new waves of detainees." *Id.*

100. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2294-95 (2008) (Scalia, J., dissenting).

101. *See* Schmitt, *supra* note 99, at A1.

"makeshift prison" with few privileges and limited access to lawyers.[102] The question the instant case begs is whether the Suspension Clause should also extend to Bagram and other undisclosed, short-term prisons.[103]

Questions concerning the instant case's scope after Guantanamo's closing will not go unanswered for long, as four Bagram detainees have already petitioned the district court for habeas corpus challenging their detention.[104] While the Bush administration responded that the Bagram prison was different from Guantanamo because the Bagram detainees were captured on active battle zones, the district court has requested that the Obama administration "refine" that position.[105] If the district court applies the instant Court's three-factor test and determines that the U.S. exercises the same functional control over Bagram as it did at Guantanamo and that no practical obstacles stand in the court's way of hearing habeas claims, it will likely grant the detainees' petitions.[106]

Considering the success of the Guantanamo detainees' petitions that followed the instant case, Bagram's description, as "tougher and more spartan"[107] than Guantanamo, does not bode well for the government's defense to such petitions. If the petitions are allowed to proceed, President Obama will be required to rethink his detainment strategy for enemy combatants abroad — including what to do about dangerous detainees who cannot be tried in American courts, whether to keep certain interrogation techniques secret, and whether to guarantee that transferred prisoners will be free of torture in other countries.[108] Faced with solving the problems that plagued Guantanamo, President Obama's own fight against terrorism abroad must be reconciled with three interests — the instant holding, what past habeas petitions have revealed, and national security.

Even after the order to close Guantanamo Bay's detention facilities, the instant case's holding remains relevant to the War on Terror's future and the habeas corpus petitions it produces from abroad.[109] If courts choose to apply the instant Court's test for writ-entitlement broadly, the government will have to find effective, yet constitutional, ways to

---

102. *See id.* Many of the prisoners at Bagram are held in communal cages. *Id.* Furthermore, the Bush administration has never granted journalists or human rights advocates access to the Bagram detention center. *Id.*

103. *See* Shane, *supra* note 13. The CIA, under President Bush's directive, "built a network of secret prisons in 2002 to house and interrogate senior [al] Qaeda figures captured overseas." *Id.*

104. *See* Schmitt, *supra* note 99, at A1.

105. *See id.*

106. *See supra* text accompanying note 72.

107. Schmitt, *supra* note 99, at A1.

108. *See* Shane, *supra* note 13.

109. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2294-95 (2008) (Scalia, J., dissenting).

handle alien enemy combatants.[110] To keep the integrity of the instant Court's analysis intact, it will no longer be constitutional for the U.S. government to imprison a suspected terrorist, throw away the key, and expect no questions to be asked.[111] If anything, the instant case's legacy demands that citizens not only ask questions, but that the government answer those questions truthfully.

110. *See id.* at 2277.
111. *See id.*