

Rasul v. Bush

SUPREME COURT OF THE UNITED STATES

542 U.S. 466 (2004)

Author's Note: Alien detainees at the U.S. Naval Base in Guantanamo Bay, Cuba, brought several suits to contest the legality and conditions of their confinement. The federal trial court dismissed this case for lack of jurisdiction. The Court of Appeals for the District of Columbia Circuit affirmed the dismissal. The Supreme Court granted certiorari in these consolidated cases, which were closely watched by supporters and critics of the US War on Terror.

Court's Opinion:

JUSTICE STEVENS delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. ... [T]he President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban.¹ Since early 2002, the U.S. military has held them—along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad—at the Naval Base at Guantanamo Bay. The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba. ... Under the [lease] Agreement, “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” while “the Republic of Cuba consents that during the period of the occupation by the United States ... the United States shall exercise complete jurisdiction and control over and within said areas.” ...

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts.⁴

The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was

¹. When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal [who] ... have since been released from custody.

⁴. Relatives of the Kuwaiti detainees allege that the detainees were taken captive “by local villagers seeking promised bounties or other financial rewards” while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U.S.

turned over to the United States. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U.S. custody.

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

The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. ...

Construing all three actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held ... that “aliens detained outside the sovereign territory of the United States [may not] invoc[e] a petition for a writ of habeas corpus.” The Court of Appeals affirmed. Reading [Johnson v.] *Eisentrager* [339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950)], to hold that “ ‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign,’” it [too] held that the District Court lacked jurisdiction over petitioners’ habeas actions. ... We granted certiorari, and now reverse.

II

Congress has granted federal district courts, “within their respective jurisdictions,” the authority to hear applications for habeas corpus by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241(a), (c)(3). ... In 1867, Congress extended the protections of the writ to “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”

Habeas corpus ... received explicit recognition in the Constitution, which forbids suspension of “[t]he Privilege of the Writ of Habeas Corpus ... unless when in Cases of Rebellion or Invasion the public Safety may require it,” Art. I, § 9, cl. 2.

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus “beyond the limits that obtained during the 17th and 18th centuries.” ... (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”). ...

Consistent with the historic purpose of the writ, this Court has recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace. ...

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

III

Respondents’ primary submission is that the ... jurisdictional question is

they are being held in federal custody in violation of the laws of the United States.¹⁵ We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

...
VI

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

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. ...

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

The decision in *Eisentrager* indicates that there is a realm of political authority

¹⁵ Petitioners allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”

over military affairs where the judicial power may not enter. ... A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. ...

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. ... Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases.

...

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court today holds that the habeas statute extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson v. Eisentrager*. ... This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change § 2241, and dissent from the Court's unprecedented holding.

I

...

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager*; today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. ... Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.

II

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth. ...

The consequence of this holding, as applied to aliens outside the country, is

breathhtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. ... A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints—real or contrived—about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the Court says that the “[p]etitioners’ allegations ... unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.

...

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

...

III

Part IV of the Court’s opinion, dealing with the status of Guantanamo Bay, is a puzzlement.

...

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

...

In sum, the Court’s treatment of Guantanamo Bay, like its treatment of § 2241, is a wrenching departure from [sixty years of] precedent.

...

The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. ... If [Congress] ... wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute,⁷ instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their confinement, whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. ... For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.

⁷. It could, for example, provide for jurisdiction by placing Guantanamo Bay within the territory of an existing district court; or by creating a district court for Guantanamo Bay, as it did for the Panama Canal Zone, see 22 U.S.C. § 3841(a) (repealed 1979).

Notes & Questions

1. The *Rasul* majority opinion says that “the presumption against extraterritoriality [textbook §5.2.A] . . . has no application ... within ‘the territorial jurisdiction’ of the United States.” Scalia’s dissent laments that “the Court boldly extends the scope of the habeas statute to the four corners of the earth.” Is the majority saying that part of Cuba is now within US territory?

2. Footnote 15 states that the detainees’ allegations “unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” While the majority paints these petitions as “unquestionable,” note that: (a) the president chose Guantanamo Bay, Cuba for the post 9-11 detention facility; (b) the two lower courts dismissed these petitions on the basis of the Supreme Court precedent in *Eisentrager*; (c) this issue simmered in the media and on the public conscience for two years before being decided by the highest court in the United States; and (d) the facts spawned three separate opinions—including Justice Kennedy’s concurring opinion.

3. Per Justice Scalia’s dissent: “Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts ... thus making it a foolish place to have housed alien wartime detainees.” The Bush Administration’s strategy of holding the detainees in Cuba was the best one that could have been made. These suspected terrorists were thus taken out of the military theaters where they were supposedly fighting along with the Taliban or al-Qa’ida. The 1950 *Eisentrager* case held that alien detainees (Germans), captured outside of the United States (China), and held outside of the United States (on a US base in Germany) could not challenge the legal validity of their detentions in a US civilian court via habeas corpus. Of course, Justice Scalia likely meant that the location of incarceration decision was made “foolish” by the “puzzlement” of the majority’s “monstrous” decision in *Rasul*.

4. Six months later, a special panel of the House of Lords ruled 8-1 in favor of nine foreign Muslim men in what human rights organizations refer to as “Britain’s Guantanamo.” This institutional equivalent of the US Supreme Court determined that Britain’s unlimited detention policy for London’s Belmarsh prison was Draconian,

discriminated against foreigners, and was an unjustifiable violation of the European Convention on Human Rights. In Lord Hoffman's words: "It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention ... posing a greater threat to the nation than terrorism." *A (FC) and others (FC) v. Secretary of State for the Home Dep't*, [2004] UKHL 56, *and* [2005] UKHL 71, at: <<http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm>>.

5. The Court does not address "[w]hether and what further proceedings may become necessary after respondents [government officials] make their response to the merits of petitioners' claims." This ensuing phase of the Cuban detainee cases is addressed in the next subsection of this section on post-9—11 US applications of the Laws of War regarding trial by a US military commission.

6. Justice Kennedy's concurring opinion refers to the "ascending scale of rights" that "courts have recognized for individuals depending on their connection to the United States." Two related cases were decided by the US Supreme Court on the same day as *Rasul*. Both involved US citizens held as enemy combatants on the US mainland. Both cases triggered the potential application of 18 US Code §4001(a): "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

(a) In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the detainee was captured on the battlefield in Afghanistan and brought to a naval brig in Charleston, S.C. In his case, the Court held that constitutional due process required that a US citizen, being held as enemy combatant, must be given a meaningful opportunity to contest the factual basis for his detention in the United States. After this decision, the government released Hamdi, and then sent him to Saudi Arabia, where he was raised as a child. Justice O'Connor therein penned the constitutional limitation that "a state of war is not a blank check for the president."

(b) In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Court held only that the federal trial court did not have jurisdiction to proceed. Padilla is a US citizen and former Chicago gang member, who was captured in the Chicago airport upon his return from abroad. He was dubbed the "Dirty Bomber," because he allegedly planned to detonate a nuclear-contaminated bomb somewhere in the United States.

(c) A federal appeals court (when overruling the trial judge) unanimously ruled that the president *does* have the authority to detain him indefinitely, and without charges, as an "enemy combatant." *Padilla v. Hanft*, 423F.3d 386 (2005). The U.S. Attorney General then sought authorization to first, transfer Padilla for prosecution in the U.S. criminal justice system; and second, to vacate the favorable Court of Appeals decision.

This was an apparent attempt to avoid the case being reviewed by the U.S. Supreme Court. The Attorney General did not want to risk the high court's reversal of the foregoing intermediate appellate decision. That could adversely impact the government's desire to hold even a U.S. citizen, captured on U.S. soil, for an indefinite period (already three-and-a-half years in Padilla's case). The government's motion was denied. The Attorney General then charged Padilla with criminal conduct, to effectuate the plan to transfer Padilla into the civilian criminal justice system. That would hopefully moot any further Supreme Court involvement in the *Padilla* case.