SUPREME COURT OF THE UNITED STATES

Nos. 03–334 and 03–343

SHAFIQ RASUL, ET AL., PETITIONERS
03–334 *v.*
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS
03–343 *v.*
UNITED STATES ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 28, 2004]

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. While I reach the same conclusion, my analysis follows a different course. JUSTICE SCALIA exposes the weakness in the Court's conclusion that *Braden* v. *30th Judicial Circuit Court of Ky.,* 410 U. S. 484 (1973), "overruled the statutory predicate to *Eisentrager*'s holding," *ante,* at 10–11. As he explains, the Court's approach is not a plausible reading of *Braden* or *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950). In my view, the correct course is to follow the framework of *Eisentrager.*

Eisentrager considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the constitutional command of the separation of powers. The issue before the Court was whether the Judiciary could

exercise jurisdiction over the claims of German prisoners held in the Landsberg prison in Germany following the cessation of hostilities in Europe. The Court concluded the petition could not be entertained. The petition was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.

The Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. *Id.*, at 770. 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." *Id.*, at 769, 771. This contrasted with the "essential pattern for seasonable Executive constraint of enemy aliens." *Id.*, at 773. The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection," *id.*, at 777–778, whereas in *Eisentrager* "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign," *id.,* at 778. 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. *Id.*, at 778. Finally, the Court considered the extent to which jurisdiction would "hamper the war effort and bring aid and comfort to the enemy." *Id.*, at 779. 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 over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated. See also *Ex parte Milligan,* 4 Wall. 2 (1866).

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 opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it. *Eisentrager, supra,* at 777–778.

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. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. 339 U. S., at 778. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

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