

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Foundations/Scope/Extraterritoriality

Johnson v. Eisentrager, 339 U.S. 763 (1950)

Lothar Eisentrager was a member of the German intelligence service stationed in China during World War II. The United States charged him with committing war crimes by continuing to provide intelligence services to Japan after the German surrender on May 8, 1945. Eisentrager and twenty-six other German nationals in China were tried before a military commission. Six were found not guilty. Twenty-one were found guilty of violating the laws of war and sentenced to terms ranging from five years to life in Landsberg Prison in Germany. Eisentrager and his colleagues petitioned for a writ of habeas corpus, claiming that their military trial violated Articles I and III of the Constitution, as well as the Fifth Amendment. The federal government responded by claiming that foreign spies captured, tried, and imprisoned in foreign countries had no constitutional right to that writ. The federal district court agreed with the federal government, but that decision was reversed by the Court of Appeals for the District of Columbia. Louis Johnson, the secretary of defense and nominal custodian of the German prisoners, appealed that decision to the Supreme Court of the United States.

The Supreme Court by a 6-3 vote ruled that Eisentrager had no right to habeas corpus. Justice Jackson listed six reasons why Eisentrager and his fellow prisoners had no right to habeas corpus. What were they? Must all six conditions be present for habeas to be denied? What additional conditions did the dissenters demand? Notice that crucial constitutional provisions do not explicitly distinguish between crimes committed in the United States at home and abroad. On what basis did Justice Jackson constitutionally distinguish the two? What distinctions did the dissent draw? What distinctions would you draw?

Eisentrager was largely forgotten for fifty years. As noted in Chapter 11, however, the proper interpretation of that opinion played a crucial role when Americans debated military trials and habeas corpus issues during the war against terrorism.

JUSTICE JACKSON delivered the opinion of the Court.

...
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. . . .

Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

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

. . . [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, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

. . .
A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term 'habeas corpus.' . . . 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 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 a conflict between judicial and military opinion highly comforting to enemies of the United States.

. . .
The doctrine that the term 'any person' in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us, should be weighed in light of the full text of that Amendment: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

When we analyze the claim prisoners are asserting and the court below sustained, it amounts to a right not to be tried at all for an offense against our armed forces. If the Fifth Amendment protects them from military trial, the Sixth Amendment as clearly prohibits their trial by civil courts. The latter requires in all criminal prosecutions that 'the accused' be tried 'by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' And if the Fifth be held to embrace these prisoners because it uses the inclusive term 'no person,' the Sixth must, for it applies to all 'accused.' No suggestion is advanced by the court below or by prisoners of any constitutional method by which any violations of the laws of war endangering the United States forces could be reached or punished, if it were not by a Military Commission in the theatre where the offense was committed.

. . .
If this Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans. . . . It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies. . . .

. . .
If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' could require the

American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . .

We hold 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.

JUSTICE BLACK, with whom JUSTICE DOUGLAS and JUSTICE BURTON concur, dissenting.

...
If the 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. The range of that principle is underlined by the argument of the Government brief that habeas corpus is not even available for American citizens convicted and imprisoned in Germany by American military tribunals. While the Court wisely disclaims any such necessary effect for its holding, rejection of the Government's argument is certainly made difficult by the logic of today's opinion. Conceivably a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction and thus permit courts to protect Americans from illegal sentences. But the 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.

...
... It has always been recognized that actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations. Our Constitution is not so impractical or inflexible that it unduly restricts such necessary independence. It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day to day activities on the battlefield. Active fighting forces must be free to fight while hostilities are in progress. But that undisputable axiom has no bearing on this case or the general problem from which it arises.

When a foreign enemy surrenders, the situation changes markedly. If our country decides to occupy conquered territory either temporarily or permanently, it assumes the problem of deciding how the subjugated people will be ruled, what laws will govern, who will promulgate them, and what governmental agency of ours will see that they are properly administered. This responsibility immediately raises questions concerning the extent to which our domestic laws, constitutional and statutory, are transplanted abroad. Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries. But that does not mean that the Constitution is wholly inapplicable in foreign territories that we occupy and govern. . . .

The question here involves a far narrower issue. Springing from recognition that our government is composed of three separate and independent branches, it is whether the judiciary has power in habeas corpus proceedings to test the legality of criminal sentences imposed by the executive through military tribunals in a country which we have occupied for years. . . . Such a limited habeas corpus review is the right of every citizen of the United States, civilian or soldier (unless the Court adopts the Government's argument that Americans imprisoned abroad have lost their right to habeas corpus). Any contention that a similarly limited use of habeas corpus for these prisoners would somehow give them a preferred position in the law cannot be taken seriously.

. . . We control that part of Germany we occupy. These prisoners were convicted by our own military tribunals under our own Articles of War, years after hostilities had ceased. However illegal their sentences might be, they can expect no relief from German courts or any other branch of the German Government we permit to function. Only our own courts can inquire into the legality of their

imprisonment. Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy.

...

Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. For our people 'choose to maintain their greatness by justice rather than violence.' Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.



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