. . . Insofar as American participation is concerned, there is no constitutional objection to that action. For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.[b]

JOHNSON v. EISENTRAGER

339 U.S. 763, 70 Sup. Ct. 936, 94 L. Ed. 1255 (1950)

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas. The issues come here in this way:

Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of habeas corpus. They alleged that, prior to May 8, 1945, they were in service of German armed forces in China. They amended to allege that their employment there was by civilian agencies of the German Government. Their exact affiliation is disputed, and, for our purposes, immaterial. On May 8, 1945, the German High Command executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They, with six others who were acquitted, were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theatre, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation. After conviction, the sentences were duly reviewed and, with immaterial modification, approved by military reviewing authority.

The prisoners were repatriated to Germany to serve their sentences. Their immediate custodian is Commandant of Landsberg Prison, an American Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. He could not be reached by process from the District Court. Respondents named in the petition are Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States.

The petition alleges, and respondents denied, that the jailer is subject to their direction. The Court of Appeals assumed, and we do likewise, that, while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect their release.

[b] For a number of memoranda decisions in which the Supreme Court held that it had no jurisdiction to review judgments of military tribunals set up in Germany, see note 1 of Mr. Justice Jackson's memorandum in Hirota v. MacArthur, 335 U.S. 876 (1948). — ED.

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The petition prays an order that the prisoners be produced before the District Court, that it may inquire into their confinement and order them discharged from such offenses and confinement. It is claimed that their trial, conviction and imprisonment violate Articles I and III of the Constitution, and the Fifth Amendment thereto, and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war.

A rule to show cause issued, to which the United States made return. Thereupon the petition was dismissed on authority of Ahrens v. Clark, 335 U.S. 188.

The Court of Appeals reversed and, reinstating the petition, remanded for further proceedings. 84 App. D.C. 396. It concluded 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 case of any constitutional rights or limitations would show his imprisonment illegal; that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States; 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.

The obvious importance of these holdings to both judicial administration and military operations impelled us to grant certiorari. 338 U.S. 877. The case is before us only on issues of law. The writ of habeas corpus must be granted "unless it appears from the application" that the applicants are not entitled to it. 28 U.S.C. §2243.

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. Absence of support from legislative or juridical sources is implicit in the statement of the court below that "The answers stem directly from fundamentals. They cannot be found by casual reference to statutes or cases." The breadth of the court's premises and solution requires us to consider questions basic to alien enemy and kindred litigation which for some years have been beating upon our doors.[1]

[1] From January 1948 to today, motions for leave to file petitions for habeas corpus in this Court, and applications treated by the Court as such, on behalf of over 200 German enemy aliens confined by American military authorities abroad were filed and denied. Brandt v. United States, and 13 companion cases, 333 U.S. 836; Re Eichel [one petition on behalf of three persons], 333 U.S. 865; Everett v. Truman [one petition on behalf of 74 persons], 334 U.S. 824; Re Krautwurst, and 11 companion cases, 334 U.S. 826; Re Ehlen and Re Girke, 334 U.S. 836; Re Gronwald, 334 U.S. 857; Re Stattmann, and 3 companion cases, 335 U.S. 805; Re Vetter, and 6 companion cases, 335 U.S. 841; Re Eckstein, 335 U.S. 851; Re Heim, 335 U.S. 856; Re Dammann, and 4 companion cases, 336 U.S. 922, 923; Re Muhlbauer, and 57 companion cases, covering at least 80 persons, 336 U.S. 964; Re Felsch, 337 U.S. 953; Re Buerger, 338 U.S. 884; Re Hans, 339 U.S. 976; Re Schmidt, 339 U.S. 976; Lammers v. United States, 339 U.S. 976. And see also Milch v. United States, 332 U.S. 789.

These cases and the variety of questions they raised are analyzed and discussed by Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford L. Rev. 587.

I

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,[2] 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.

With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. . . .

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; . . .

But, in extending constitutional protections beyond the citizenry, the 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. In the pioneer case of Yick Wo v. Hopkins, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction,* without regard to any differences of race, of color, or of nationality; . . ." (Italics supplied.) 118 U.S. 356, 369. . . .

II

The foregoing demonstrates how much further we must go if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.

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.

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. No such basis can be invoked here, for

[2] ". . . In the primary meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States . . .

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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.

Another reason for a limited opening of our courts to resident aliens is that among them are many of friendly personal disposition to whom the status of enemy is only one imputed by law. But these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity. Yet the decision below confers upon them a right to use our courts, free even of the limitation we have imposed upon resident alien enemies, to whom we deny any use of our courts that would hamper our war effort or aid the enemy.

A basic consideration in habeas practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress,[9] indeed, it is inherent in the very term "habeas corpus." And though production of the prisoner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists, Walker v. Johnston, 312 U.S. 275, 284, we have consistently adhered to and recognized the general rule. Ahrens v. Clark, 335 U.S. 188, 190, 191. To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. . . .

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers. . . .

The prisoners rely, however, upon two decisions of this Court to get them over the threshold — Ex parte Quirin, 317 U.S. 1, and Re Yamashita, 327 U.S. 1. . . .

. . . After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of habeas corpus appears.

III

The Court of Appeals dispensed with all requirement of territorial jurisdiction based on place of residence, captivity, trial, offense, or confinement. It could not predicate relief upon any intraterritorial contact of these prisoners with our laws or institutions. Instead, it gave our Constitution an extraterritorial application to embrace our enemies in arms. Right to the writ, it reasoned, is a subsidiary procedural right that follows from possession of substantive constitutional rights. These prisoners, it considered, are invested with a right of personal liberty by our Constitution and therefore must have the right to the remedial writ. The court stated the steps in its own reasoning as follows: "First. The Fifth Amendment, by its terms, applies to 'any person.' Second. Action of Government officials in violation of the Constitution is void. This is the ultimate essence of the present controversy. Third. A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action

[9] 28 U.S.C.A. §2243 provides in part: "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

by government officials, and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power. Fourth. The writ of habeas corpus is the established, time-honored process in our law for testing the authority of one who deprives another of his liberty, — 'the best and only sufficient defense of personal freedom.' . . ." 84 App. D.C. 396, 398, 399.

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: . . .

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. . . .

The decision below would extend coverage of our Constitution to nonresident alien enemies denied to resident alien enemies. The latter are entitled only to judicial hearing to determine what the petition of these prisoners admits: that they are really alien enemies. When that appears, those resident here may be deprived of liberty by Executive action without hearing. Ludecke v. Watkins, 335 U.S. 160. While this is preventive rather than punitive detention, no reason is apparent why an alien enemy charged with having committed a crime should have greater immunities from Executive action than one who it is only feared might at some future time commit a hostile act.

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 "werewolves" 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. Cf. Downes v. Bidwell, 182 U.S. 244. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

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.

IV

The Court of Appeals appears to have been of opinion that the petition shows some action by some official of the United States in excess of his authority which confers a private right to have it judicially voided. Its Second and Third propositions were that "action by Government officials in violation of the Constitution is void" and "a basic and inherent function of the judicial branch . . . is to set aside void action by government officials. . . ." For this reason it thought the writ could be granted. . . .

We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers.

V

. . . Since in the present application we find no basis for invoking federal judicial power in any district, we need not debate as to where, if the case were otherwise, the petition should be filed.

For reasons stated, the judgment of the Court of Appeals is reversed and the judgment of the District Court dismissing the petition is affirmed.

Reversed.

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

This case tests the power of courts to exercise habeas corpus jurisdiction on behalf of aliens, imprisoned in Germany, under sentences imposed by the executive through military tribunals. The trial court held that, because the persons involved are imprisoned overseas, it had no territorial jurisdiction even to consider their petitions. The Court of Appeals reversed the District Court's dismissal on the ground that the judicial rather than the executive branch of government is vested with final authority to determine the legality of imprisonment for crime. 84 App. D.C. 396. This Court now affirms the District Court's dismissal. I agree with the Court of Appeals and need add little to the cogent reasons given for its decision. The broad reach of today's opinion, however, requires discussion. . . .

. . . The Court cannot, and despite its rhetoric on the point does not, deny that if they were imprisoned in the United States our courts would clearly have jurisdiction to hear their habeas corpus complaints. Does a prisoner's right to test legality of a sentence then depend on where the Government chooses to imprison him? Certainly the Quirin and Yamashita opinions lend no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location. The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all

federal courts of their power to protect against a federal executive's illegal incarcerations.

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.[3]

. . . 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 battlefront. 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. See Downes v. Bidwell, 182 U.S. 244.

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. The extent of such a judicial test of legality under charges like these, as we have already held in the Yamashita Case, is of most limited scope. We ask only whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged. 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

[3] The Court indicates that not even today can a nonresident German or Japanese bring even a civil suit in American courts. With this restrictive philosophy compare Ex parte Kawato, 317 U.S. 69. See also McKenna v. Fisk, 1 How. 241, 249.

these prisoners would somehow give them a preferred position in the law cannot be taken seriously.

Though the scope of habeas corpus review of military tribunal sentences is narrow, I think it should not be denied to these partitioners and others like them. 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.

As the Court points out, Paul was fortunate enough to be a Roman citizen when he was made the victim of prejudicial charges; that privileged status afforded him an appeal to Rome, with a right to meet his "accusers face to face." Acts 25:16. But other martyrized disciples were not so fortunate. Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.

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." [4] 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.[5] Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them.

NOTE

For a review of authorities see Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587 (1949).

Removing a trial overseas. Toth was a civilian living in Pittsburgh, Pennsylvania. He was a former member of the armed forces of the United States and had served as such in Korea. He was arrested by military police in Pittsburgh and taken to Korea for trial by court-martial on a charge of having committed murder there while a member of the armed forces. A petition for habeas corputs was filed on his behalf in the United States

[4] This goal for government is not new. According to Tacitus, it was achieved by another people almost 2,000 years ago. See 2 Works of Tacitus 326 (Oxford trans., New York, 1869).

[5] See the concurring opinion of Mr. Justice Douglas in Hirota v. MacArthur, 338 U.S. 197, 199.

trict Court for the District of Columbia. What result? See United States ex rel. Toth v. Quarles, 350 U.S. II (1955).

Quaere: Could the Congress provide for holding terms of United States District Courts overseas, for the trial of dependents of the armed forces, and of civilian employees, thus affording the protections of Article III and the Fifth and Sixth Amendments and avoiding the problems presented by Reid v. Covert, 354 U.S. 1 (1957), page 302 supra, and McElroy v. Guagliardo, 361 U.S. 281 (1960), discussed in a note, pages 1280 and 1281 infra? See Sutherland, The Constitution, the Civilian, and Military Justice, 36 St. John's L. Rev. 215 (1961).

An International Criminal Court? From time to time proposals have been made for the establishment of an International Criminal Court. See pella, Towards an International Criminal Court, 44 Am. J. Int. 37 (1950); Parker, An International Criminal Court: The Case for Its Adoption, 38 A.B.A.J. 641 (1952); Finch, An International Criminal Court: The Case Against Its Adoption, id. 644 (1952).