

ESSAY

THE LAW CLERK WHO WROTE *RASUL v. BUSH*: JOHN PAUL STEVENS'S INFLUENCE FROM WORLD WAR II TO THE WAR ON TERROR

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INTRODUCTION

IN the landmark case of *Rasul v. Bush*,¹ the Supreme Court held that federal courts have jurisdiction to hear challenges to the de-

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¹542 U.S. 466 (2004). The opinion actually sets forth the Court’s decision in two cases, *Rasul v. Bush* (No. 03-334) and *Al Odah v. United States* (No. 03-343), which

tention at Guantanamo Bay Naval Base, Cuba, of foreign nationals captured abroad in the war on terror. Under entrenched views of precedent shared by lower courts, commentators, and the parties alike, the Court could only reach that result by either distinguishing or overruling *Johnson v. Eisentrager*.² In that case, arising from World War II, the Court had declared that “[n]othing in the text of the Constitution” nor “anything in our statutes” allows enemy aliens detained outside of the United States to contest their confinement in federal court.³ No one since had questioned the continuing vitality of *Eisentrager*, and both lower courts in *Rasul* had found the case controlling.⁴ Rather than distinguishing or overruling *Eisentrager*, however, Justice John Paul Stevens’s opinion for the Court took a more peculiar tact. It declared the case, in relevant part, *already* overruled.⁵

Even stranger, the *Rasul* opinion did so by relying on an obscure dissent from an earlier case that had been largely ignored as irrelevant precedent concerning venue rather than jurisdiction.⁶ While *Ahrens v. Clark* had read the habeas statute to limit a federal court’s jurisdiction strictly to petitions from prisoners located within its geographic territory,⁷ the Court had subsequently overruled the decision and adopted the dissent’s argument that physical presence was not a jurisdictional requirement but instead a venue consideration.⁸ That dissent was drafted in critical parts by a law clerk for Justice Wiley B. Rutledge named John Paul Stevens.⁹

The story of how Justice Stevens ingeniously related *Eisentrager* to the *Ahrens* dissent, and thereby reversed their precedential

were argued together. For the sake of convenience, the consolidated opinion shall be referred to as “*Rasul v. Bush*,” and “petitioners” shall refer to the detainees in both cases unless otherwise distinguished.

² 339 U.S. 763 (1950).

³ *Id.* at 768.

⁴ *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003), *rev’d sub. nom. Rasul v. Bush*, 542 U.S. 466 (2004); *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002), *aff’d sub. nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d*, 542 U.S. 466 (2004).

⁵ *Rasul*, 542 U.S. at 478–479.

⁶ See *id.* at 477 & n.7.

⁷ 335 U.S. 188, 192 (1948).

⁸ *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 499–500 (1973).

⁹ In his capacity as a law clerk, John Paul Stevens will be referred to hereinafter as “Stevens.”

worth in *Rasul*, is a remarkable one in Supreme Court history. As will be told in this Essay, the story reveals the intriguing extent to which Stevens's work in *Ahrens* over fifty years ago influenced the reasoning, if not the result, in *Rasul*.¹⁰

To uncover the roots of *Rasul*, Part I of this Essay will examine Stevens's work on *Ahrens* at the certiorari and opinion-drafting stages and explore its impact on Justice Rutledge's dissent. Part II will describe the Court's opinions in *Eisentrager*, which denied habeas relief to its overseas petitioners without explicit reliance on *Ahrens*'s physical-presence rule, and *Braden v. 30th Judicial Circuit Court of Kentucky*, which overruled *Ahrens* without purporting to affect overseas detainees under *Eisentrager*.¹¹ Part III will recount the exclusive reliance of the lower courts and parties in *Rasul* on *Eisentrager*, and their failure to consider *Ahrens* and *Braden*. As Part III will explain, this restrictive focus flowed from a conventional separation of the cases into two lines of precedent, dealing with the question of jurisdiction for international petitioners, and the question of venue for domestic petitioners. Parts IV and V will explore how, in the *Rasul* argument and opinion, Justice Stevens leveraged the views of the *Ahrens* dissent to radically realign the above cases, turning the dissent into controlling law for prisoners abroad, while transforming *Eisentrager* into overruled precedent. Part VI will then reflect on the fascinating extent to which Stevens's work on *Ahrens* influenced him as a Justice and in turn shaped the Court's decision in *Rasul*. Finally, in light of this impact, Part VII will consider *Rasul*'s ramifications for the ability of another important class of captives in the war on terror—those con-

¹⁰ While other articles have examined *Rasul* on a doctrinal or theoretical level, see, e.g., Kermit Roosevelt III, Guantanamo and the Conflict of Laws: *Rasul* and Beyond, 153 U. Pa. L. Rev. 2017 (2005) (examining substantive rights *Rasul* petitioners may possess on habeas review from the perspective of conflict of laws); Tung Yin, The Role of Article III Courts in the War on Terrorism, 13 Wm. & Mary Bill Rts. J. 1035, 1039 (2005) (arguing that *Rasul*'s interpretation of the habeas statute was "dubious," and considering substantive rights *Rasul* petitioners may possess on habeas review), only one previously has traced the decision back to Stevens's involvement with *Ahrens*. See Charles Lane, Stevens Brings a Historical Perspective to Detainees' Case, Wash. Post, May 3, 2004, at A19 (attributing Justice Stevens's "dim view" of the government's case at oral argument in *Rasul* to his work on the *Ahrens* dissent).

¹¹ 410 U.S. at 499–500.

financed abroad outside of Guantanamo Bay—to challenge their detention in federal court.

I. A LAW CLERK'S WORK ON *AHRENS V. CLARK*

A. *On Certiorari*

Ahrens arrived at the Court during the October Term of 1947 without much promise regarding its own significance. The petitioners in the case were some 120 Germans detained at Ellis Island, New York, for deportation in the wake of World War II.¹² They had petitioned for writs of habeas corpus in the District Court for the District of Columbia, challenging their confinement on the ground that the removal orders issued by the Attorney General exceeded his authority under the Alien Enemy Act of 1798.¹³ The District Court had dismissed the petitions, and the Court of Appeals for the District of Columbia Circuit had upheld the dismissal.¹⁴

In their petition for certiorari, the detainees had argued that the power of the Attorney General to order their removal had ceased after actual hostilities with Germany had ended.¹⁵ This argument did not appear certworthy to Stevens, who noted in a memorandum to his boss that an identical argument had been advanced in another petition which the Court had denied previously that Term.¹⁶ Once the brief in opposition arrived, Stevens submitted a supplemental memorandum setting forth another issue presented for review—whether the removal orders were subject to judicial review.¹⁷ Again he recommended denying the petition, this time because the question was not decided by the court of appeals, and “it would be highly inappropriate to take this apparently unmerito-

¹² *Ahrens*, 335 U.S. at 189.

¹³ *Id.* at 189.

¹⁴ *Id.*

¹⁵ Certiorari Memorandum of John Paul Stevens 1, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter Cert. Mem.], available in Box 156, Wiley Rutledge Collection, Manuscript Reading Room, James Madison Memorial Building, Library of Congress, Washington, D.C. [hereinafter Rutledge Papers Box 156].

¹⁶ *Id.*

¹⁷ Supplement of John Paul Stevens to Certiorari Memorandum 1, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter Supp. Cert. Mem.], available in Rutledge Papers Box 156, supra note 15.

rious case in order to consider an issue not passed on below.”¹⁸ At this stage, there was no suggestion that the case implicated, much less turned on, the separate issue of whether the detainees’ confinement outside the geographic territory of the district court in which they sought habeas relief would preclude review.

That issue did surface after the Court granted certiorari,¹⁹ but not prominently. In a bench memorandum submitted to Justice Rutledge prior to argument, Stevens characterized as a “major issue” the question of the Attorney General’s removal power after the cessation of hostilities.²⁰ He also opined that “the real issues” were “whether there is any judicial review of the proceedings leading up to removal, and if so, what is the scope of judicial review.”²¹ Nevertheless, he did observe that the Court confronted a pair of “jurisdictional” problems at the outset: “whether petitioners may bring their action in any district other than the Southern District of New York where they are confined, and second, whether the Attorney General is a proper party.”²² While the government treated the two issues separately, Stevens wrote that “it seems to me that they are really the same issue.”²³

On those two issues, the government expressed willingness to waive objections, because it was anxious to have the Court decide the case on the merits.²⁴ Nevertheless, the government wanted to avoid a holding that habeas relief may always be sought against the Attorney General in the District of Columbia.²⁵ Accordingly, it suggested the general rule that such suits be brought in the district

¹⁸ *Id.*

¹⁹ *Ahrens v. Clark*, 333 U.S. 826 (1948). From notations on the certiorari memorandum in Justice Rutledge’s handwriting, it appears that he would have denied the petition at the Court’s Conference on January 19, 1948, but that he switched his vote after the Court deferred consideration of the petition to its Conference on February 2, 1948, and Stevens submitted his supplemental memorandum. *Cert. Mem.*, *supra* note 15, at 1.

²⁰ Bench Memorandum of John Paul Stevens 3, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter *Bench Mem.*], *available in* Rutledge Papers Box 156, *supra* note 15.

²¹ *Id.* at 4.

²² *Id.* at 3.

²³ *Id.* Stevens explained the relation between the two issues in the dissent that he later drafted in the case. See *infra* text accompanying notes 40–42.

²⁴ *Bench Mem.*, *supra* note 20, at 3.

²⁵ *Id.*

of confinement, but that the requirement be deemed not “strictly jurisdictional” but waivable or inapplicable in unusual circumstances.²⁶ “This position,” concluded Stevens, “seems reasonable.”²⁷ Without further discussion, he moved on to the other issues.

B. *The Ahrens Majority*

A majority of the Court ultimately saw no need to move on to other issues. At Conference, the Court voted 7-2 to affirm the dismissal of the case for lack of jurisdiction, either because the Attorney General was not the proper party, or because the detainees were not confined in the judicial district in which they filed their petitions.²⁸ On the dissenting side, according to Justice Rutledge’s handwritten conference notes, Justice Black would have accepted the Attorney General’s waiver, but “would qualify this by [a] ‘venue’ ruling” that absent such waiver habeas corpus petitions should be filed in the district “where physically held.”²⁹ For his part, Justice Rutledge noted his position at Conference as simply being “[w]ith Black.”³⁰

In the end, the majority opinion in *Ahrens*, authored by Justice William O. Douglas, settled on the territorial jurisdiction rationale. It held that “the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus*.”³¹ The Court read the habeas corpus statute’s language granting district courts power to issue writs “within their respective jurisdictions”³² as limiting such power to

²⁶ *Id.*

²⁷ *Id.*

²⁸ Apr. 3, 1948 Conference Notes of Justice Wiley Rutledge 1–3, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter WR Conf. Notes], available in Rutledge Papers Box 156, supra note 15.

²⁹ *Id.* at 1.

³⁰ *Id.* at 3. On this important point, Justice Jackson’s conference notes corroborate Justice Rutledge’s indication that he merely expressed agreement with Justice Black’s position. See Apr. 3, 1948 Conference Notes of Justice Robert H. Jackson 1, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter RHJ Conf. Notes], available in Box 146, Robert Houghwout Jackson Collection, Manuscript Reading Room, James Madison Memorial Building, Library of Congress, Washington, D.C. (recording Justice Rutledge’s views only as “Agrees Black”).

³¹ *Ahrens*, 335 U.S. at 189.

³² The statute provided: “The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, *within their respective*

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petitioners restrained within their geographic territories.³³ “It would take compelling reasons,” the Court stated, “to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ.”³⁴ The Court could only find contrary reasons in policy and legislative history.³⁵

Accordingly, the Court concluded that the failure to satisfy the territorial jurisdiction requirement was sufficient to mandate dismissal and found it unnecessary to decide whether the Attorney General was the proper respondent.³⁶ In a footnote, the focus of much discussion later in *Rasul*, the Court also reserved decision on “the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights.”³⁷

C. *The Ahrens Dissent*

1. *The Stevens Draft*

Justice Black assigned the job of writing the dissent to Justice Rutledge,³⁸ who then gave Stevens the task of producing a first draft. This turned out to be a transformative decision, not only for the dissenting opinion in *Ahrens*, but later for the majority opinion in *Rasul* as well. As noted, the position of Justice Black at Conference, and of Justice Rutledge “with Black,” was that absent waiver

jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.” 28 U.S.C. § 452 (1946) (emphasis added). The provision’s successor is now codified at 28 U.S.C. § 2241 (2000).

³³ *Ahrens*, 335 U.S. at 189–90.

³⁴ *Id.* at 191.

³⁵ The Court latched onto an objection Senator Johnson made on the floor of the Senate to a bill (which would become the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385) to amend the habeas statute. See *Ahrens*, 335 U.S. at 191–92. The objection was that the bill as written would permit “a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States.” *Id.* at 192 (quoting Cong. Globe, 39th Cong., 2d Sess. 730 (1867)). To this objection, an amendment was offered and adopted which added the words “within their respective jurisdictions” to the statute. *Ahrens*, 335 U.S. at 192.

³⁶ *Id.* at 193.

³⁷ *Id.* at 192 n.4.

³⁸ At the Court, the power to assign the lead opinion on a particular side rests with the most senior justice on that side. See *The Oxford Companion to the Supreme Court* 607 (Kermit L. Hall et al. eds., 1992).

by the respondent, a petition for a writ of habeas corpus would have to be filed in the district of confinement. As a so-called “venue” ruling, this position came close to being jurisdictional, and was not far from the majority view. The power of a court to review a habeas petition was either present or absent depending on the locality of the body being restrained, with one exception—the respondent’s ability to waive the requirement. By contrast, drawing from his bench memorandum, Stevens ended up drafting a dissent with a more flexible rule, wherein the petitioner’s absence from the district was not a dispositive jurisdictional defect, but rather an important factor for a court to consider in determining the proper venue.³⁹

Stevens began his draft by again connecting the two jurisdictional issues that the government and the majority had separated. In his view, the first issue—the proper respondent question—was “basic to proper consideration of the other” issue—the territorial jurisdiction question.⁴⁰ If, as Stevens argued, the Attorney General was the proper respondent, and he was lawfully served in the territory of the District Court for the District of Columbia, then as a *jurisdictional* matter that court could review the petitions.⁴¹ “[T]he weight of authority” in the lower courts and elsewhere, Stevens observed, “have generally taken the position that jurisdiction over the custodian is sufficient regardless of the location of the party restrained.”⁴² Furthermore, Stevens wrote, the legislative history on the phrase “within their respective jurisdictions” made it “quite clear” that Congress’s concern in adopting that language was the problem of district courts issuing process to custodians beyond their territorial jurisdictions rather than hauling in prisoners from

³⁹ Of course, it is possible (1) that Justice Rutledge’s initial views were closer to those articulated in Stevens’s draft, but simply were not documented as such in his (or Justice Jackson’s) conference notes; or (2) that his views changed after Conference to resemble those in Stevens’s draft, and that Stevens wrote his dissent as directed by Justice Rutledge. However, from the available record, it appears that the views in Stevens’s draft dissent were broader than those of Justices Black and (by reference) Rutledge at Conference.

⁴⁰ Draft Dissent of John Paul Stevens 1, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter Draft Dissent of Stevens], located in Rutledge Papers Box 156, *supra* note 15.

⁴¹ *Id.* at 1–2.

⁴² *Id.* at 2.

distant locations.⁴³ According to Stevens, it did not appear that Congress “had in mind the peculiar situation presented by cases such as this,” in which the custodian is lawfully served within the territory of the district court, but the prisoner is confined elsewhere.⁴⁴

As for the locality of the prisoner, Stevens proposed the alternative holding that, absent waiver by the respondent or “any compelling reason for the exercise of jurisdiction, it would clearly be an abuse of discretion subject to correction on review for the district court to compel the production of the prisoner in such an inconvenient forum.”⁴⁵ This formulation turned the quasi-judicial rule earlier proposed by the government and deemed “reasonable” by Stevens⁴⁶ into an expressly discretionary venue principle. Unlike the majority rule, under which jurisdiction would be strictly limited to the district of confinement, or Justice Black’s rule, under which jurisdiction could extend outside that district only at the pleasure of the respondent, this alternative holding would give a district court leeway to determine for itself whether to exercise jurisdiction when the prisoner is beyond its territorial borders. However, because a “compelling reason” would be required, Stevens argued

⁴³ Id. at 3. The legislative history Stevens referred to was not cited or quoted in his draft dissent. However, he inserted a footnote into the subsequent handwritten draft of Justice Rutledge with directions to quote some of the remarks from Senator Johnson, who had prompted the addition of the “within their respective jurisdictions” language to a bill to amend the habeas statute. See *supra* note 35; Handwritten Draft Dissent of Justice Wiley Rutledge, unnumbered page containing n.23. *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446) [hereinafter Handwritten Rutledge Draft], *available in* Rutledge Papers Box 156, *supra* note 15. Those remarks indicated that the Senator’s concern was with the “practical evil” of judges issuing process “all over the Union.” Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (statement of Sen. Johnson); *Ahrens*, 335 U.S. at 205 n.21 (Rutledge, J., dissenting) (quoting same).

Stevens’s views on the legislative history were also influenced by his research into the congressional enactment empowering district courts in the district “in which a prisoner is confined” to grant the writ of habeas corpus to aliens in state custody for acts committed for other nations. Act of Aug. 29, 1842, ch. 188, 5 Stat. 539. The quoted language led Stevens to believe that “Congress knew how to make the specific limitation that the Court now makes, and in 1867 it deliberately avoided that language . . .” Memorandum of John Paul Stevens on the 1842 Statute 1, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446), *available in* Rutledge Papers Box 156, *supra* note 15.

⁴⁴ Draft Dissent of Stevens, *supra* note 40, at 3–3a.

⁴⁵ Id. at 3a.

⁴⁶ Bench Mem., *supra* note 20, at 3.

that the majority's concerns associated with courts hauling prisoners across the country would be "of little weight."⁴⁷

Near the close of his draft, Stevens addressed the majority's reservation of decision on cases in which the petitioner is not confined within the territory of any district court. "[I]f any of the reasons advanced for today's decision is deemed controlling," wrote Stevens, then "all such questions will in the future be resolved against such petitioners."⁴⁸ In other words, given the majority's position that a prisoner's physical presence within the district is a jurisdictional prerequisite, the Court effectively decided not only the case before it, involving petitioners located within the territory of some district court, but also those cases involving petitioners confined abroad, outside the territory of any district court.⁴⁹

Therefore, despite the majority's reservation, Stevens read *Ahrens* to preclude petitioners such as those in *Rasul* from seeking habeas review in federal court. The only hope he expressed to the contrary was that "[p]erhaps when those cases arise the Court will ignore the reasons relied on today"⁵⁰ Of course, he did not count on his own return to the Court as a Justice, or on the difference his unique insights into *Ahrens* might make, when the arguably reserved question would be squarely presented.

2. *The Justice Rutledge Draft*

Over twenty pages of elegant and assured script, Justice Rutledge's subsequent draft was substantially longer and more developed than Stevens's five-page typed draft. In critical respects, however, it incorporated Stevens's arguments into its own.⁵¹ First, the draft adopted Stevens's premise that the two jurisdictional

⁴⁷ Draft Dissent of Stevens, *supra* note 40, at 3a.

⁴⁸ *Id.* at 4.

⁴⁹ As examples, Stevens noted recent cases involving United States and foreign citizens detained under military authority in Germany and Japan. *Id.* In addition, he argued that the majority's ruling would also apply to "instances in the future where persons are wrongfully detained in places unknown to those who would apply for habeas corpus in [sic] their behalf." *Id.* at 5.

⁵⁰ *Id.* at 4-5.

⁵¹ Most of this draft made its way into the published dissent, either wholesale or with minor changes. Therefore, for convenient reference, citations to the Handwritten Rutledge Draft will include parallel citations to the published dissent where applicable.

questions presented in the case were interrelated.⁵² From that premise, Justice Rutledge concluded that “[j]urisdictionally speaking, it is, or should be, enough that the respondent named has the power or ability to produce the body when so directed by the court pursuant to process lawfully issued and served upon him.”⁵³ In support, Justice Rutledge observed that the statutory phrase “within their respective jurisdictions” could just as well be construed to refer to a district court’s jurisdiction over the jailor by service of process within its territory as it could be construed to refer to the presence of the prisoner within the district.⁵⁴ As tie-breaking considerations, Justice Rutledge advanced Stevens’s arguments that lower court precedent⁵⁵ and legislative history⁵⁶ favored the dissent’s statutory reading. But in any event, Justice Rutledge added,

⁵² As was often the case when Justice Rutledge adopted Stevens’s points, he incorporated his law clerk’s language as well, with some stylistic changes. On this point, compare

This case presents a jurisdictional problem that has implications going far beyond its immediate facts. The problem involves two questions. The first, which the Court does not reach but which I think basic to proper consideration of the other, is whether the Attorney General is a proper party respondent in this habeas corpus proceeding. The answer to this question turns on whether the petitioners are in his custody.

Draft Dissent of Stevens, *supra* note 40, at 1 (footnote omitted), with

The jurisdictional problem presented by this case involves two questions. The first, which the Court does not reach, is one I think basic to consideration of the other. It is whether the Attorney General is a proper party respondent. The answer turns on whether petitioners are in his custody. In my opinion they are.

Handwritten Rutledge Draft, *supra* note 43, at 8 (first page numbered 8) (footnote omitted); *Ahrens v. Clark*, 335 U.S. 188, 198–99 (1948) (Rutledge, J., dissenting) (using almost identical language).

Justice Rutledge also frequently developed Stevens’s points substantially further, using Stevens’s language at appropriate places, but adding much of his own. See, e.g., *infra* text accompanying notes 53, 57, 63.

⁵³ Handwritten Rutledge Draft, *supra* note 43, at unnumbered page (following page containing footnotes 6–8); *Ahrens*, 335 U.S. at 199. Like Stevens, Justice Rutledge argued that the Attorney General was the proper respondent in the case, and was lawfully served. Handwritten Rutledge Draft, *supra* note 43, at 6 (second page numbered 6); *Ahrens*, 335 U.S. at 199–200 (Rutledge, J., dissenting).

⁵⁴ Handwritten Rutledge Draft, *supra* note 43, at 7–8 (second pages numbered 7 and 8); *Ahrens*, 335 U.S. at 201 (Rutledge, J., dissenting).

⁵⁵ Handwritten Rutledge Draft, *supra* note 43, at 9 (first page numbered 9) (incorporating by reference Draft Dissent of Stevens, *supra* note 40, at 2); *Ahrens*, 335 U.S. at 203–04 (Rutledge, J., dissenting).

⁵⁶ Handwritten Rutledge Draft, *supra* note 43, at 10–11; *Ahrens*, 335 U.S. at 204–05 (Rutledge, J., dissenting).

with the perspective and flourish characteristic of his draft, “a due and hitherto traditional regard for the writ’s high office should dictate resolving any doubt, as between the possible constructions, against a jurisdictional limitation so destructive of the writ’s availability and adaptability to all the varying conditions and devices by which liberty may be unlawfully restrained.”⁵⁷

Second, Justice Rutledge adopted the alternative rule articulated in Stevens’s draft rather than the one proposed by Justice Black and seconded by Justice Rutledge himself at Conference. After critiquing the “narrow and rigid” restriction imposed by the majority,⁵⁸ Justice Rutledge directed, “Continue with J.S. p.2.”⁵⁹ The instruction referred to Stevens’s carefully circumscribed language that petitioners would not enjoy “a right to be heard in a distant court whenever the Attorney General may there be served,” but rather, “their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances if the respondent so desires or if the court finds that justice so requires.”⁶⁰ As noted, this alternative broadened the dissenters’ rule at Conference by turning the presence of the prisoner from a dispositive but waivable jurisdictional criterion into a strong but discretionary venue consideration.⁶¹

Third, Justice Rutledge’s draft inserted Stevens’s observation that the majority had effectively decided the question it reserved on whether habeas jurisdiction would exist for petitioners not con-

⁵⁷ Handwritten Rutledge Draft, *supra* note 43, at 13; *Ahrens*, 335 U.S. at 206–07 (Rutledge, J., dissenting).

⁵⁸ Handwritten Rutledge Draft, *supra* note 43, at 9; *Ahrens*, 335 U.S. at 202 (Rutledge, J., dissenting).

⁵⁹ Handwritten Rutledge Draft, *supra* note 43, at 9.

⁶⁰ Draft Dissent of Stevens, *supra* note 40, at 2; see also *Ahrens*, 335 U.S. at 202 (Rutledge, J., dissenting) (using almost identical language).

⁶¹ See *supra* text accompanying note 39. Given the importance of the case and the government’s willingness to reach the merits, Justice Rutledge viewed venue as well as jurisdiction as proper in the District Court for the District of Columbia. See Handwritten Rutledge Draft, *supra* note 43, at 1, 6 (second page numbered 6) & n.14 (on unnumbered page containing nn.12–14); *Ahrens*, 335 U.S. at 193, 200 & n.13 (Rutledge, J., dissenting).

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fined within the territory of any district court.⁶² Developing the point, Justice Rutledge wrote:

For if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailor creates a total and irremediable void in the court's capacity to act . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had⁶³

This language is the only part of the *Ahrens* dissent that Justice Stevens would later quote in *Rasul*.⁶⁴

Justice Rutledge's handwritten draft went through one typed and several type-set iterations, but all of the substance and most of the language above remained unchanged. What did change, however, was the join line. The circulated drafts convinced one Justice in the majority at Conference—Justice Murphy—to switch sides. In a note joining the dissent, Justice Murphy wrote to Justice Rutledge: "I voted the other way but I now believe you are right & that your opinion is a fine job."⁶⁵ Justice Black thereafter joined as well, leaving the dissent still two votes shy of a majority.⁶⁶

II. *JOHNSON V. EISENTRAGER* AND *BRADEN V. 30TH JUDICIAL CIRCUIT COURT OF KENTUCKY*

In the years between *Ahrens v. Clark* and *Rasul v. Bush*, the Court decided two cases which, along with *Ahrens*, would figure prominently in *Rasul*.

In the first case, *Johnson v. Eisentrager*, twenty-one Germans captured in China, convicted of war crimes there by a military tribunal, and imprisoned in Germany under American authority, pe-

⁶² Handwritten Rutledge Draft, *supra* note 43, at 15 ("Insert J.S. text pp. 4, 5, as indicated."); *Ahrens*, 335 U.S. at 208–10 (Rutledge, J., dissenting).

⁶³ Handwritten Rutledge Draft, *supra* note 43, at 16; *Ahrens*, 335 U.S. at 209 (Rutledge, J., dissenting).

⁶⁴ See *Rasul v. Bush*, 542 U.S. 466, 477 n.7 (2004); *infra* note 128 and accompanying text.

⁶⁵ Join Note of Justice Frank W. Murphy, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446), *available in* Rutledge Papers Box 156, *supra* note 15.

⁶⁶ Justice Black joined by simply stating: "I am with you." Join Note of Justice Hugo L. Black, *Ahrens v. Clark*, 335 U.S. 188 (1948) (No. 446), *available in* Rutledge Papers Box 156, *supra* note 15.

tioned for habeas relief in the District Court for the District of Columbia.⁶⁷ The Supreme Court found the lower court lacked jurisdiction. The Court noted, among other things, that “[n]othing in the text of the Constitution” grants foreign nationals access to the federal courts who “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.”⁶⁸ “[N]or,” the Court added, without elaboration, “does anything in our statutes” entitle petitioners to habeas review.⁶⁹

Over two decades later, the Court decided *Braden v. 30th Judicial Circuit Court of Kentucky*.⁷⁰ The petitioner in that case was serving time in an Alabama prison pursuant to Alabama convictions.⁷¹ He filed a petition for a writ of habeas corpus in the District Court for the Western District of Kentucky, challenging the legality of an interstate detainer lodged against him by Kentucky officials.⁷² This time, the Supreme Court held that the lower court had jurisdiction. The Court read the “within their respective jurisdictions” language at issue in *Ahrens* to “require[] nothing more than that the court issuing the writ have jurisdiction over the *custodian*” through proper service of process.⁷³ As for *Ahrens*, the Court could

⁶⁷ 339 U.S. 763, 765-66 (1950).

⁶⁸ *Id.* at 768, 778. In the Court’s view, “the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.” *Id.* at 777-78. The Court further stated that, to find for petitioners,

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.

Id. at 777.

⁶⁹ *Id.* at 768.

⁷⁰ 410 U.S. 484 (1973).

⁷¹ *Id.* at 486.

⁷² *Id.* at 486-87. The detainer sought petitioner’s return to Kentucky to stand trial for offenses he allegedly committed in that state before escaping to Alabama. *Id.* at 486.

⁷³ *Id.* at 495-96 (emphasis added). The habeas statute had been recodified at 28 U.S.C. § 2241, and the relevant language then read (as it does now): “Writs of habeas

“no longer view that decision as establishing an inflexible jurisdictional rule.”⁷⁴ Rather, the Court confined *Ahrens* to “no broader proposition” than one of determining the more convenient forum under traditional principles of venue.⁷⁵

III. PRE-ARGUMENT IN *RASUL V. BUSH*

Although *Ahrens*, *Eisentrager*, and *Braden* all would come into play in Justice Stevens’s *Rasul* opinion, the cases did not all receive prominent treatment in the *Rasul* litigation prior to oral argument before the Supreme Court.⁷⁶ In fact, the lower courts and the parties focused almost exclusively on *Eisentrager*, and virtually ignored *Ahrens* and *Braden*.

In the lower courts, the focus was entirely on *Eisentrager*. At the trial level, the case provided the basis for dismissal of the detainees’ petitions for habeas relief. As construed by the district court, “*Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.”⁷⁷ The court made no mention of either *Ahrens* or *Braden*. Likewise, the Court of Appeals for the District of Columbia Circuit found *Eisentrager* controlling and did not address the other cases. The court held that, under *Eisentrager*, “‘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.’”⁷⁸

The parties themselves made *Eisentrager* the focus of their briefs before the Supreme Court, where the question presented was “whether United States courts lack jurisdiction to consider chal-

corpus may be granted by the . . . district courts . . . within their respective jurisdictions.” 28 U.S.C. § 2241(a) (1964), amended by 28 U.S.C. § 2241(d) (Supp. V 1966).

⁷⁴ *Braden*, 410 U.S. at 499–500.

⁷⁵ *Id.* at 500. Joining the majority in *Braden*, Justice Douglas apparently had come around to the reading of the habeas statute espoused by the *Ahrens* dissent.

⁷⁶ As in the Supreme Court, the *Rasul* litigation in the lower courts consisted of two cases, *Rasul v. Bush* and *Al Odah v. United States*, considered together by both the district court and the court of appeals. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002). As with the Supreme Court litigation, the lower court cases shall be referred to as “*Rasul*” for the sake of simplicity.

⁷⁷ *Rasul*, 215 F. Supp. 2d at 68.

⁷⁸ *Al Odah*, 321 F.3d at 1144 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777–78 (1950)).

lenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base.⁷⁹ The government relied entirely on *Eisentrager* to argue against jurisdiction. In its view, *Eisentrager* controlled the outcome of the case because the petitioners, “like the detainees in *Eisentrager*, are aliens who were captured overseas in connection with an armed conflict, . . . have no connection to the United States,” and “are being held by the U.S. military outside the sovereign territory of the United States.”⁸⁰ For their part, both sets of petitioners contended that *Eisentrager* did not preclude habeas review entirely; instead, it permitted limited inquiry into whether the prisoners were enemy aliens detained abroad pursuant to lawful trial and conviction by a military tribunal.⁸¹ *Eisentrager* therefore would not apply to aliens detained abroad who, like petitioners, have not even been charged or heard, much less tried and convicted.⁸² Rather, federal courts have authority to review the legality of their detention under “our most fundamental traditions”⁸³ as well as the habeas statute, in which “nothing . . . purports to limit jurisdiction based on nationality or territory.”⁸⁴

None of the parties relied on *Ahrens* or *Braden* for their jurisdictional arguments. The government did not refer to them. One set of petitioners made limited use of *Ahrens* and *Braden*, citing them

⁷⁹ *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

⁸⁰ Brief for Respondents at 14, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) [hereinafter Brief for Resp.]. Respondents further argued that “[p]etitioners’ attempts to relitigate and evade *Eisentrager* are unavailing,” and that “[d]eparting from *Eisentrager* would raise grave separation-of-powers concerns.” *Id.* at 31, 52.

⁸¹ See Brief for Petitioners at 9, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) [hereinafter Brief for *Rasul* Pet.] (“*Johnson* . . . is best understood as a restraint on the exercise of habeas, rather than a limitation on the power of the federal courts. . . . In *Johnson*, the Court limited habeas to a determination that the prisoners were convicted enemy aliens detained outside our territory lawfully tried by a properly constituted military commission.”); Brief for Petitioners at 8, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-343) [hereinafter Brief for *Al Odah* Pet.] (“*Eisentrager* stands for the sensible proposition that enemy aliens, who had been tried and convicted overseas by a duly constituted military tribunal established under law, could not obtain review of their convictions in the U.S. civil courts.”); *Id.* at 33 (“[*Eisentrager*] addressed, though it ultimately rejected, the petitioners’ claim that the military commission which tried, convicted, and sentenced them, acted *ultra vires* . . .”).

⁸² See Brief for *Al Odah* Pet., *supra* note 81, at 8–9.

⁸³ *Id.* at 5.

⁸⁴ Brief for *Rasul* Pet., *supra* note 81, at 7.

in a footnote solely for the venue proposition that suit was properly filed in the District of Columbia, notwithstanding the absence of petitioners, because the custodian could be served there.⁸⁵ The other set of petitioners briefly referred to *Ahrens* in relating the lower court disposition in *Eisentrager*, which included the district court's dismissal of the case for lack of jurisdiction based on *Ahrens's* physical-presence rule.⁸⁶ They did not make further use of *Ahrens* or mention *Braden*.

In several respects, the failure to consider the possible relevance of *Ahrens* or *Braden* is understandable. First, *Eisentrager* did not expressly rely on *Ahrens's* reading of the habeas statute for the proposition that neither the Constitution "nor . . . anything in our statutes" conferred habeas jurisdiction on federal courts to consider the petitions in that case.⁸⁷ Second, when *Braden* transformed *Ahrens's* "inflexible jurisdictional rule" into a discretionary venue principle, *Braden* did not allude to any effect that transformation might have on *Eisentrager's* jurisdictional views, constitutional or statutory.⁸⁸ Third, commentators on federal jurisdiction had generally separated *Ahrens* and *Braden*, on the one hand, and *Eisentrager*, on the other, into doctrinally distinct areas. Discussions of *Ahrens* and *Braden* concerned the appropriate venue in which to file a habeas petition, while discussions of *Eisentrager* concerned the availability of habeas relief for aliens detained outside the United States.⁸⁹

⁸⁵ Id. at 12 n.8 ("At one time, the Court interpreted [the 'within their respective jurisdictions' language of the habeas statute, 28 U.S.C. § 2241(a)] to require the petitioner's presence within the jurisdiction. See *Ahrens v. Clark*, 335 U.S. 188, 189–93 (1948). This is no longer the law, however, see *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494–95 (1973), and petitions challenging military detention overseas are properly filed in the District of Columbia because the courts have jurisdiction over the custodian.").

⁸⁶ See Brief for *Al Odah* Pet., supra note 81, at 30.

⁸⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

⁸⁸ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 500 (1973).

⁸⁹ See, e.g., Erwin Chemerinsky, *Federal Jurisdiction* § 15.3, at 876–77 (4th ed. 2003); Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 346 n.6, 365, 1342–43 (4th ed. 1996); 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 8.2a n.7, § 10.2b, at 462–63 (4th ed. 2001); 17A Charles Alan Wright et al., *Federal Practice and Procedure* § 4268.1, at 489, 493–97 (2d ed. 1988); Jill M. Marks, Annotation, *Jurisdiction of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning Alien Detainees Held Outside the United States*, 192 A.L.R. Fed. § 3, at 604-07 (2004).

In other words, the position of the *Ahrens* majority that its reserved question (the availability of habeas relief for aliens abroad) was distinct from its decided question (the availability of habeas relief for petitioners in another district) had largely prevailed. No one therefore viewed *Braden's* relaxation of *Ahrens's* requirement that a petitioner be physically within the district petitioned to have impacted *Eisentrager's* preclusion of habeas relief for petitioners outside of any district.⁹⁰ That connection would first be made by Justice Stevens at oral argument in *Rasul*.⁹¹

IV. ORAL ARGUMENT IN *RASUL V. BUSH*

In the *Rasul* argument, Justice Stevens did what no one else in the case, or indeed anywhere else, had done before. He related *Ahrens*, *Eisentrager*, and *Braden* to each other doctrinally, and what is more, he turned *Eisentrager* on its head as precedent that spoke *in favor of* rather than *against* habeas review for detainees abroad. To capture how Justice Stevens managed to do this, the argument is examined below essentially as it unfolded.

Given the rulings in the lower courts and the arguments in the briefs, counsel for both parties appeared ready at oral argument to battle over *Eisentrager*. Nevertheless, neither seemed prepared for the attack that Justice Stevens would mount against the case. For the petitioners, John J. Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit, staked out the position that "*Eisentrager* was a decision on the merits," rather than one precluding review as a jurisdictional matter.⁹² To this view of

⁹⁰ Professor Erwin Chemerinsky came close, however. In discussing the District of Columbia Circuit's decision in *Eisentrager*, which found that jurisdiction existed under Article III of the Constitution, Professor Chemerinsky observed that the federal habeas statute "as then interpreted" only provided for habeas jurisdiction in the district of confinement. Chemerinsky, *supra* note 89, § 3.3, at 198. The footnote documenting that statement read, "See *Ahrens v. Clark*, 335 U.S. 188 (1948); *but see Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973)." *Id.* § 3.3, at 198 n.31. Although Professor Chemerinsky thereby suggested that *Ahrens*, as the statutory predicate for the appellate court's decision in *Eisentrager*, had been contradicted by *Braden*, he did not explore the impact of *Braden* on *Eisentrager* itself.

⁹¹ Notably, in light of *Rasul*, commentators have begun to connect the two lines of cases. See, e.g., Wright, *supra* note 89, § 4268.1, at 129 (Supp. 2005); Marks, *supra* note 89, § 5[a] at 12-15 (Supp. 2005).

⁹² Transcript of Oral Argument at 11, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) [hereinafter Oral Arg. Tr.]. This transcript, contracted by the Court and

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the case, Chief Justice William H. Rehnquist responded that, “in several different places . . . in *Eisentrager*, the Court says that we are talking about the Habeas Statute, and we are saying these Petitioners are not entitled to habeas.”⁹³ Mr. Gibbons could offer no reply other than the reassertion that the Court in fact had reviewed the merits of the habeas petitions.⁹⁴

Justice Stevens, however, had an entirely different response:

Well, there is another problem [with *Eisentrager*]. At that time, that case was decided when *Ahrens* against Clark was the statement of the law, so there is no statutory basis for jurisdiction there, and the issue is whether the Constitution by itself provided jurisdiction. And of course, all that’s changed now.⁹⁵

Mr. Gibbons failed to grasp the meaning or implication of Justice Stevens’s response. Apparently assuming it to be hostile, he attempted to distinguish *Ahrens* as a decision that “does not go to subject matter jurisdiction” under the habeas statute, but rather goes to “whether a proper Respondent is before the Court” under the Federal Rules of Civil Procedure.⁹⁶ Ignoring this response, Justice Stevens observed that *Eisentrager* assumed a lack of jurisdiction under the habeas statute. Since the petitioners “were outside the district under the ruling in *Ahrens* against Clark, . . . they had to rely on the *Constitution* to support jurisdiction, which in turn means that once they have overruled *Ahrens* against Clark, which

posted on its website, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf, does not attribute questions from the bench to particular Justices. Another website, www.oyez.org, has posted an oral argument transcript for *Rasul* that identifies the questioners, <http://www.oyez.org/oyez/resource/case/1706/argument/transcript> (last visited Nov. 19, 2005). This website also has posted an audio recording of the argument, Oyez Project, *Rasul v. Bush* audiorecording, <http://www.oyez.org/oyez/resource/case/1706/resources> [hereinafter Oral Arg. Audio]. Where the author identifies a particular questioner, the author has checked the audio recording to confirm the identification based on the author’s own familiarity with the voices of the individual Justices.

⁹³ Oral Arg. Tr., *supra* note 92, at 12.

⁹⁴ *Id.* (“The result on the merits in *Eisentrager* is perfectly correct. What the Court did in *Eisentrager* was apply the scope of review on habeas corpus, which was standard at that time.”).

⁹⁵ *Id.*

⁹⁶ *Id.* at 13.

they did, there is now a *statutory* basis for jurisdiction that did not then exist.”⁹⁷

The tactical gist of Justice Stevens’s line of reasoning still was lost on counsel, who continued to resist. “I don’t think you can fairly read Justice Jackson’s opinion [for the Court in *Eisentrager*] as adopting the *Ahrens v. Clark* position,” Mr. Gibbons argued.⁹⁸ But, Justice Stevens again explained, *Ahrens* “was the law at the time,” and thus *Eisentrager* “was decided when the legal climate was different than it has been since *Ahrens* against *Clark* was overruled.”⁹⁹ Not appreciating Justice Stevens’s point, counsel moved on to a different argument, and Justice Stevens concluded with a chuckle that counsel would not “[l]et me help you.”¹⁰⁰

When Solicitor General Theodore B. Olson took the podium for the government, he asserted that *Eisentrager* concerned “jurisdiction under the Habeas Statute.”¹⁰¹ To this, Justice Stevens responded, “[W]as it really under the Habeas Statute or under the Constitution?”¹⁰² Before Mr. Olson could reply, Justice Stevens observed, “[I]f the views of the dissenters in *Ahrens* against *Clark* were the law at that time *as they perhaps are now*, then there would have been statutory jurisdiction, which was not present at that time.”¹⁰³

This first mention of the dissent in *Ahrens* was the last piece of the argument that Justice Stevens had earlier constructed. Audaciously, it suggested that the relevant precedent governing the case before the Court was not the *Eisentrager* majority but the *Ahrens* dissent.

This suggestion was not lost on some of Justice Stevens’s colleagues, who took up his argument. As Mr. Olson attempted to bolster his view that *Eisentrager* precluded statutory relief, Justice Sandra Day O’Connor interrupted. “[T]he *Eisentrager* Court never once mentioned the statute, the Habeas Statute in its opinion,” she

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Oral Arg. Audio, *supra* note 92, at 17:50–55 (mp3 format)/13:34–38 (RealAudio format); Oral Arg. Tr., *supra* note 92, at 14.

¹⁰¹ Oral Arg. Tr., *supra* note 92, at 32.

¹⁰² *Id.*

¹⁰³ *Id.* (emphasis added).

remarked.¹⁰⁴ Moreover, Justice David H. Souter added, “wasn’t the problem that *Eisentrager* had to confront, the problem created by *Ahrens* . . . and therefore, the only way there could be habeas jurisdiction in *Eisentrager* was if due process demanded it[?]”¹⁰⁵ Thus, Justice Souter queried, after *Ahrens* was overruled, why is *Eisentrager* “not undercut to the point where it’s no further authority on the jurisdictional point?”¹⁰⁶

To each of Mr. Olson’s subsequent responses, Justice Stevens returned a conclusive answer based on *Ahrens*. For example, when Mr. Olson noted that “[t]he Court did specifically say that there is no statutory authority,”¹⁰⁷ Justice Stevens responded that “[t]he reason it said that was because *Ahrens* was then the law.”¹⁰⁸ When Mr. Olson argued that the overruling of *Ahrens* had no bearing on *Eisentrager*’s vitality because *Eisentrager* focused on entirely different considerations, such as the petitioners’ lack of “sufficient contacts with the United States,”¹⁰⁹ Justice Stevens responded that the considerations differed because the Court gave “a complete response to an argument resting entirely on the Constitution.”¹¹⁰ When Mr. Olson tried to characterize *Eisentrager*’s considerations as statutory ones,¹¹¹ Justice Stevens recharacterized the decision as one that “did not *construe* the statute,” but “*assumed* the statute was inapplicable and concluded that the Constitution was not a substitute for the statute.”¹¹² And when, in apparent exasperation, Mr. Olson simply asserted that he had to “respectfully disagree,” because he thought “the Court was construing the statute not to be applicable” before reaching the constitutional question,¹¹³ Justice Stevens responded with finality that there is “[n]ot a word, not a word in the opinion that supports [that].”¹¹⁴ In fact, the only words that Mr. Olson then could allude to for support, the *Eisen-*

¹⁰⁴ Id. Instead, according to Justice O’Connor, what *Eisentrager* “seemed to do was to reach the merits and say at the end of the day, these people have no rights.” Id.

¹⁰⁵ Id. at 33.

¹⁰⁶ Id.

¹⁰⁷ Id. at 33–34.

¹⁰⁸ Id. at 34.

¹⁰⁹ Id. at 35.

¹¹⁰ Id.

¹¹¹ Id. at 41.

¹¹² Id. (emphasis added).

¹¹³ Id.

¹¹⁴ Id.

trager phrase “nor does anything in our statutes,”¹¹⁵ were the very words already seized by Justice Stevens as evidence that *Eisen-trager* took *Ahrens*’s preclusion of statutory jurisdiction for granted. As a result, Mr. Olson could not find a way out of the *Ahrens* box that Justice Stevens had built around the government’s *Eisen-trager* argument.

In one hour of oral argument, then, Justice Stevens managed to undermine the previously unquestioned validity of a decades-old decision, and to raise from historical obscurity to doctrinal relevance a dissent he had helped draft as a law clerk. As connected by Justice Stevens, *Ahrens*, *Eisen-trager*, and *Braden* now lined up completely in the petitioners’ favor. *Eisen-trager* no longer barred aliens captured and detained abroad from seeking habeas review in the federal courts. On the contrary, when viewed in light of *Braden*’s overruling of *Ahrens*, *Eisen-trager* actually supported the existence of statutory jurisdiction. To be sure, *Eisen-trager* quite clearly stated that neither the Constitution “nor . . . anything in our statutes” granted federal courts such jurisdiction.¹¹⁶ But the unexplained statement referred merely to the then-governing *Ahrens* rule that no statutory jurisdiction existed for petitioners detained outside a court’s geographic territory. Thus, once *Braden* transformed *Ahrens* from “an inflexible jurisdictional rule” into a less rigid venue principle of forum convenience,¹¹⁷ *Eisen-trager* could stand for no broader proposition with respect to the habeas statute. *Braden*, by way of overruling *Ahrens*, had implicitly limited *Eisen-trager* to its constitutional holding, and superceded its statutory position with that of the *Ahrens* dissent.

V. JUSTICE STEVENS’S *RASUL V. BUSH* OPINION

The views that Justice Stevens articulated at oral argument garnered the votes of four other colleagues—Justices O’Connor, Souter, Ginsburg, and Breyer.¹¹⁸ Thus, he commanded a majority of

¹¹⁵ *Johnson v. Eisen-trager*, 339 U.S. 763, 768 (1950); see Oral Arg. Tr., supra note 92, at 41 (referring by implication to the *Eisen-trager* language).

¹¹⁶ *Eisen-trager*, 339 U.S. at 768.

¹¹⁷ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 499–500 (1973).

¹¹⁸ *Rasul v. Bush*, 542 U.S. 466, 468 (2004). Justice Breyer appeared to convert to Justice Stevens’s views after oral argument, where he had stated that “it’s obvious that there is language in *Eisen-trager* that supports [the government],” and “also lan-

the Court, and as its most senior member, he could assign the opinion to himself. The opinion he wrote in relevant part built upon the doctrinal groundwork that he had laid at oral argument, and that the *Ahrens* dissent had laid much earlier.

As Justice Stevens observed in his opinion for the Court, the government's primary submission was that *Eisentrager* controlled and precluded habeas review in the case.¹¹⁹ To this argument, he responded first that the *Rasul* petitioners were "differently situated" from the *Eisentrager* detainees in several important respects—they were not citizens of nations at war with the United States, and they denied involvement in acts against the United States; they had not been charged or convicted by any tribunal; and they had been detained "in territory over which the United States exercises exclusive jurisdiction and control."¹²⁰ Moreover, wrote Justice Stevens, the *Eisentrager* Court viewed its differing facts¹²¹ as "relevant only to the question of the prisoners' constitutional entitlement to habeas corpus."¹²² On the other hand, *Eisentrager* had "far less to say" on the question of statutory jurisdiction, and in fact made only "passing reference"¹²³ to its absence in the phrase "nor does anything in our statutes."¹²⁴

This "passing reference," of course, provided Justice Stevens with the fulcrum by which to invert *Eisentrager*'s significance in light of *Ahrens*'s history. Fleshing out his theory from oral argument, Justice Stevens referred to "the historical context" of *Eisentrager* to explain why it "devoted so little attention" to the availability of statutory review.¹²⁵ *Ahrens*, he noted, was decided just two months after the *Eisentrager* detainees had filed suit.¹²⁶ In its decision, the *Ahrens* majority purported to reserve the question "of what process, if any, a person confined in an area not subject to the

guage . . . that's against [it]." Oral Arg. Tr., supra note 92, at 42. As for the rest of the Court, Justice Kennedy concurred in the judgment, and Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

¹¹⁹ *Rasul*, 542 U.S. at 475.

¹²⁰ *Id.* at 476.

¹²¹ *Id.* at 475. See supra note 68 for those facts listed by the *Eisentrager* Court which the *Rasul* opinion characterized as "critical" to *Eisentrager*'s disposition.

¹²² *Rasul*, 542 U.S. at 476.

¹²³ *Id.*

¹²⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

¹²⁵ *Rasul*, 542 U.S. at 476.

¹²⁶ *Id.*

jurisdiction of any district court may employ to assert federal rights.”¹²⁷ However, Justice Stevens observed pivotally, “the dissent noted” in *Ahrens* that “if the presence of the petitioner in the territorial jurisdiction of a federal district court were truly a jurisdictional requirement, there could be only one response to that question.”¹²⁸ As a result, Justice Stevens continued, the district court in *Eisentrager* dismissed the case on the basis of *Ahrens*’s recently-announced physical presence rule.¹²⁹ Furthermore, both the court of appeals and the Supreme Court proceeded on the “premise” that *Ahrens* had created a “statutory gap” in jurisdiction, and considered whether the Constitution itself entitled petitioners to habeas review.¹³⁰

Having thus leveraged the logic of the *Ahrens* dissent to make *Eisentrager*’s statutory position dependent on the *Ahrens* rule, Justice Stevens then easily disposed of *Eisentrager* as controlling precedent on the question of statutory jurisdiction. As noted, while *Ahrens* read the habeas statute’s requirement that district courts act “within their respective jurisdictions” to require the physical presence of the prisoner within the district, *Braden* construed the same language to require only that a district court be able to reach the custodian by service of process.¹³¹ Reviewing *Braden*’s overruling of *Ahrens* on this point, Justice Stevens highlighted one influential development—intervening decisions of the Court which permitted, “if only implicitly,” detainees “confined overseas (and thus

¹²⁷ *Ahrens v. Clark*, 335 U.S. 188, 192 n.4 (1948); see also *Rasul*, 542 U.S. at 477.

¹²⁸ *Rasul*, 542 U.S. at 472 (citing *Ahrens*, 335 U.S. at 209 (Rutledge, J., dissenting)). Here, Justice Stevens dropped a footnote quoting in full the following passage from the *Ahrens* dissent, which was the only quote from *Ahrens* in his *Rasul* opinion:

[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court’s capacity to act, . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had . . . 335 U.S. at 209 (Rutledge, J., dissenting).

Rasul, 542 U.S. at 477 n.7.

¹²⁹ *Id.* at 477.

¹³⁰ *Id.* at 478. More specifically, Justice Stevens described the court of appeals as having read *Ahrens* to create “an unconstitutional gap that had to be filled by reference to ‘fundamentals,’” and the Supreme Court as having reviewed the lower court’s “resort to ‘fundamentals’ on its own terms.” *Id.* (quoting *Eisentrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949); *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950)).

¹³¹ See *supra* notes 32–35, 73 and accompanying text.

outside the territory of any district court)” to obtain statutory habeas review.¹³² Accordingly, wrote Justice Stevens, when *Braden* relaxed the physical presence requirement of *Ahrens* from a rigid jurisdictional rule to a factor “strictly relevant only to the question of the appropriate forum,” the “statutory predicate” to *Eisen-trager*’s holding likewise was relaxed.¹³³ As a result, Justice Stevens pronounced, *Eisen-trager* “plainly” no longer bars statutory review, even for overseas petitioners.¹³⁴

Given this conclusion, the answer to the question of statutory jurisdiction became clear for Justice Stevens.¹³⁵ The government did not contest the district court’s jurisdiction over the detainees’ custodians by service of process, and pursuant to the habeas statute, those detainees claimed their custody violated federal law.¹³⁶ Because the statute, “by its terms, requires nothing more,” Justice Stevens declared for the majority that the district court could exercise jurisdiction over the petitioners’ challenges to the legality of their detention at Guantanamo Bay.¹³⁷

¹³² *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 498 (1973); see *Rasul*, 542 U.S. at 478–79. The cases the *Braden* court referred to involved U.S. citizens. See *Braden*, 410 U.S. at 498. This prompted the dissenters in *Rasul* to contend that, while applying *Eisen-trager* to citizens may raise constitutional concerns “justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas,” no such concerns justify reading the habeas statute to grant aliens abroad a right to review. *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting). However, for the majority, Justice Stevens reasoned that, “[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.” *Id.* at 481.

¹³³ *Rasul*, 542 U.S. at 479.

¹³⁴ *Id.*

¹³⁵ *Id.* at 483.

¹³⁶ *Id.*

¹³⁷ See *id.* at 484. In holding that petitioners had a procedural right to challenge the legality of their detention under federal law, the Court did not express an opinion on the merits of petitioners’ underlying claims. See *id.* at 485. Compare *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 445 (D.D.C. 2005) (holding on habeas review that government procedures to confirm that Guantanamo Bay detainees are “enemy combatants” subject to indefinite detention “violate the petitioners’ rights to due process of law”), with *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (holding on habeas review that Guantanamo Bay detainees have no “viable legal theory” to contest their indefinite detention).

VI. A LAW CLERK'S INFLUENCE IN *RASUL V. BUSH*

The doctrinal connections that Justice Stevens drew in *Rasul* between *Ahrens*, *Eisentrager*, and *Braden* are notable for their originality and ingenuity. To borrow from Sir Arthur Conan Doyle, Justice Stevens turned *Eisentrager*'s unexplained statutory reference to the lack of habeas review into the dog that did not bark because of its familiarity with the *Ahrens* rule.¹³⁸ From this Holmesian interpretation of *Eisentrager*, the reasoning and result in *Rasul* easily followed. Yet as clever as Justice Stevens's analysis was, the most remarkable aspect of *Rasul* may be less doctrinal and more personal. As explored in this Part, what makes *Rasul* especially fascinating as a decision is the way that Stevens's work on *Ahrens* as a law clerk may have influenced his thinking as a Justice over half a century later.

Stevens's work on *Ahrens* left him with an intimate familiarity with the case and a unique understanding of its scope. In a short judicial biography of Justice Rutledge published in 1956, then-practitioner Stevens suggested how large *Ahrens* loomed in his thinking after his clerkship. In the article, Stevens centered his discussion of Justice Rutledge's jurisprudence on the *Ahrens* dissent. "[T]hough by no means his finest," Stevens wrote with a touch of modesty, the dissent was "sufficiently representative to provide . . . an introduction to its author's judicial career."¹³⁹ Stevens's selection of the *Ahrens* dissent for that purpose reveals something of its prominence in his reflections. Even more revealing, Stevens chose to quote at length from a passage in the dissent criticizing "the full ramifications" of the decision, including its impact on cases in which "the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority."¹⁴⁰ As Stevens wrote, the passage demonstrates the significance of the case and the majority's failure to give it a "careful and thorough

¹³⁸ The dog's failure to bark during the commission of the crime led Sherlock Holmes to infer its familiarity with the perpetrator. Arthur Conan Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 383, 400 (1938).

¹³⁹ John Paul Stevens, *Mr. Justice Rutledge*, in *Mr. Justice 177, 178* (Allison Dunham & Philip B. Kurland eds., 1956).

¹⁴⁰ *Ahrens v. Clark*, 335 U.S. 188, 195 (1948) (Rutledge, J., dissenting); see also Stevens, *supra* note 139, at 180.

study” commensurate with its importance.¹⁴¹ Thus, to Stevens, *Ahrens*’s enduring importance lay not so much in its effect on petitioners such as those in *Ahrens*, who may be able to seek habeas relief in their district of confinement. Rather, *Ahrens* remained significant because it would preclude review for those who had no statutory remedy available under his continuing view of the case, such as those detained abroad.

More recently, in a speech to the Chicago Bar following the *Rasul* decision,¹⁴² Justice Stevens indirectly gave some credit to his firsthand knowledge of *Ahrens* for his views in *Rasul*. Discussing a recent biography of Justice Rutledge¹⁴³ and its observations of *Ahrens*, Justice Stevens revealed that the case “has had special significance for [him].”¹⁴⁴ As he related, he used it extensively in his own article on Justice Rutledge, and “incidentally,” he was “particularly familiar with that dissent because the case just so happened to be decided during the year in which [he] was a law clerk for Justice Rutledge.”¹⁴⁵ Justice Stevens then summarized *Ahrens*’s subsequent history and observed that “once the Court overruled *Ahrens* and adopted Rutledge’s dissent as the governing interpretation of federal law, *Johnson v. Eisentrager* lost most of its force.”¹⁴⁶ Hence, he concluded, the *Ahrens* dissent from 1948 “significantly influenced an important case decided less than three months ago.”¹⁴⁷

By alluding to his personal involvement with *Ahrens* before discussing the impact of its later history, Justice Stevens conveyed several relevant messages.¹⁴⁸ Foremost, he supplied an unstated explanation for his ability to recognize the “important role” that

¹⁴¹ Stevens, *supra* note 139, at 181.

¹⁴² See Justice John Paul Stevens, Address at the Chicago Bar Association & Chicago Bar Foundation Fifth Annual Justice John Paul Stevens Awards Luncheon (Sept. 15, 2004) [hereinafter Stevens Speech] (transcript on file with the Virginia Law Review Association).

¹⁴³ John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* (2004).

¹⁴⁴ Stevens Speech, *supra* note 142, at 8–9.

¹⁴⁵ *Id.* at 9–10.

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.* at 11.

¹⁴⁸ Whether Justice Stevens intended to do so is difficult to say, given the indirect nature of his passing remark on his connection with *Ahrens*. Nonetheless, taken in context, the remark is suggestive.

Ahrens's overruling would play in *Rasul*.¹⁴⁹ Along the same line, he provided mitigation for the mistake made by the "many observers" who "wrongly assumed that [*Eisentrager*] would control the outcome" of the case.¹⁵⁰ Unlike him, they had no personal familiarity with *Ahrens*, so could not as easily recognize that *Eisentrager* had relied on it, or that, after *Braden*, the Court simply "had not had the opportunity to revisit *Eisentrager* and explain its diminished relevance."¹⁵¹ Accordingly, his "incidental" remark highlighted how his personal connection with the *Ahrens* dissent may have made possible the doctrinal connections he drew in *Rasul*.

To be sure, it is possible for anyone reading *Ahrens*, *Eisentrager*, and *Braden* to craft the views articulated by Justice Stevens in *Rasul*. But the fact that no one actually advanced such views before, and that even petitioners' counsel had failed to grasp their favorable import at oral argument, suggests how unlikely Justice Stevens's reading of the cases was. Indeed, because *Ahrens* and *Braden* both dealt with domestic detainees, while *Eisentrager* involved petitioners confined abroad, the cases themselves furnished a ready distinction. Furthermore, the legal credence that *Ahrens* lent this distinction by limiting its effect to the former category of prisoners, and the absence of discussion in *Braden* as to its effect on the latter category—much less on *Eisentrager* itself—made it especially difficult to read these cases as interlocking precedent. Consequently, putting a less-fine point on the matter, Justice Scalia could argue in dissent in *Rasul* that such a reading "would not pass the laugh test."¹⁵²

Nevertheless, Justice Stevens's unlikely reading not only made some immediate headway with colleagues at oral argument, but ultimately garnered majority support. The persuasive linchpin that

¹⁴⁹ Stevens Speech, *supra* note 142, at 10.

¹⁵⁰ *Id.* at 10–11.

¹⁵¹ *Id.* at 10.

¹⁵² *Rasul v. Bush*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting). For the same reasons, Justice Kennedy also failed to find Justice Stevens's reading persuasive. *Id.* at 485 (Kennedy, J., concurring in the judgment). Instead, he opined that "the framework of *Eisentrager*" would allow statutory review, because the facts "suggest[] a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Id.* at 485, 488. Additionally, according to Justice Kennedy, "Guantanamo Bay is in every practical respect a United States territory," to which the protections of the nation should extend. *Id.* at 487.

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made this possible no doubt lay in his novel explanation that *Eisen-trager*'s reference to the lack of statutory review merely restated the then-valid *Ahrens* rule, and thus lacked any force independent of *Ahrens*'s fate. That explanation fit with the lower court history in *Eisen-trager*, and sequenced *Ahrens*, *Eisen-trager*, and *Braden* in a logical line of precedent.

Out of everyone involved in *Rasul*, Justice Stevens was best situated to form this interpretation of *Eisen-trager*, for he had already prophesied such an application of *Ahrens* as a law clerk. Indeed, in arguing that the *Ahrens* rule necessarily would preclude relief in cases involving petitioners outside of the United States, Stevens cited as examples suits brought by petitioners detained in Germany and Japan.¹⁵³ As a result, he naturally would have read *Eisen-trager*'s reference, two years later, to the lack of statutory review for petitioners confined in Germany as an allusion to the *Ahrens* rule. Moreover, the impact of *Ahrens*'s overruling on *Eisen-trager* would have been as obvious to him as it would have been welcome.

Thus, Stevens's work on the *Ahrens* dissent not only supplied the doctrinal pivot for *Rasul*, but also helped him to recognize the dissent's value as such. In that regard, *Rasul* stands out as both fascinating and fortuitous. The case turned on dissenting views developed by a law clerk who just happened to serve as a Justice when, over fifty years later, the opportunity arose to vindicate those views, and he alone perhaps had the peculiar insight to seize it.

VII. JUSTICE STEVENS'S FUTURE INFLUENCE

The story of how Stevens's work on *Ahrens* as a law clerk exerted a remarkable influence over the *Rasul* decision is an intriguing part of Supreme Court history. Apart from historical interest, however, exposing the doctrinal and personal roots of *Rasul* also yields some clues as to how the Court may answer a question that *Rasul* itself purportedly reserved—whether captives in the war on terror, confined abroad beyond Guantanamo Bay, may also challenge the legality of their detention under the habeas statute.

In his opinion for the Court, Justice Stevens made that reservation in response to the government's fallback position that the habeas statute has no application to the petitioners under the “long-

¹⁵³ See supra note 49 and accompanying text.

standing principle of American law' that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested."¹⁵⁴ Justice Stevens responded that, "[w]hatever traction the presumption against extraterritoriality might have *in other contexts*, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States."¹⁵⁵ He then distinguished Guantanamo Bay from other foreign locales as a place where the United States effectively exercises total jurisdiction and control under its lease agreement with Cuba, and he observed that application of the statute to Guantanamo Bay would be "consistent with the historical reach of the writ," which relies on "practical" rather than "formal" concepts of territorial sovereignty.¹⁵⁶

Setting aside the merits of Justice Stevens's attempt to deflect application of the extraterritoriality principle to Guantanamo Bay detainees, and to defer discussion of its application to other detainees confined abroad,¹⁵⁷ this attempt is at the very least unnecessary. If, as Justice Stevens reasoned earlier in his opinion, *Ahrens's* physical-presence rule is "strictly relevant only to the question of the appropriate forum," and a district court acts "'within [its] respective jurisdiction' . . . as long as 'the custodian can be reached by service of process,'"¹⁵⁸ then statutory jurisdiction in no way should depend on whether the prisoner is confined within the United States, within a foreign territory over which the United States effectively exercises sovereignty, or within any other location abroad.¹⁵⁹ In other words, as Justice Scalia argued in dissent,

¹⁵⁴ *Rasul*, 542 U.S. at 480 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

¹⁵⁵ *Id.* (emphasis added) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

¹⁵⁶ *Id.* at 481–482 (quotations omitted).

¹⁵⁷ Cf. *id.* at 500–05 (Scalia, J., dissenting) (critiquing the merits of the majority's extraterritoriality discussion).

¹⁵⁸ *Id.* at 478 (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–495 (1973)).

¹⁵⁹ Nevertheless, on the same day that the Court decided *Rasul*, it held in *Rumsfeld v. Padilla* that the proper respondent for a domestic detainee challenging his present confinement is "the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." 542 U.S. 426, 435 (2004). Consequently, given that "the district of confinement is *synonymous* with the

the locality of the detainee has no bearing on the applicability of the extraterritoriality principle because the majority read the habeas statute to operate not on the prisoner but on the custodian.¹⁶⁰

Ironically, then, Justice Stevens's attempt to reserve decision on whether the habeas statute reaches other petitioners confined abroad fails for the very opposite reason that *Ahrens's* similar reservation failed—the physical location of the detainee is wholly irrelevant. As a result, the reservation in *Rasul* has the opposite effect of that in *Ahrens*. By logical necessity, *Rasul* “extends the scope of the habeas statute to the four corners of the earth.”¹⁶¹

Will the Court step back from such a far-reaching conclusion when confronted with petitioners detained on the field of war in Afghanistan or Iraq, or at locations undisclosed outside of the United States?¹⁶² Certainly, the purported reservation inserted by

district court that has territorial jurisdiction over the proper respondent,” the Court further held that a domestic detainee may only file his petition in the district of confinement. *Id.* at 444. In other words, through limiting the proper respondent to the immediate custodian, *Padilla* effectively reinstated *Ahrens's* physical-presence rule for domestic detainees without necessarily overruling *Braden*. From this “slavish application” of the so-called immediate-custodian rule, Justice Stevens dissented, favoring instead “a more functional approach that focuses on the person with the power to produce the body.” *Id.* at 455, 461 (Stevens, J. dissenting). However, consistent with *Rasul*, *Padilla* circumscribed its holding to apply only to prisoners within the United States, and not to those confined at undisclosed locations by unknown immediate custodians. *Id.* at 447, 450 n.18.

¹⁶⁰ See *Rasul*, 542 U.S. at 500 (Scalia, J. dissenting). Indeed, Justice Stevens himself reinforced this reading at the end of his extraterritoriality discussion by concluding that, “[i]n the end,” the habeas statute requires “nothing more” than jurisdiction over the custodian and an allegation that custody violates federal law. *Id.* at 483–84.

¹⁶¹ *Id.* at 498 (Scalia, J., dissenting). If so, then Congress's recent attempt to overrule *Rasul* by depriving federal courts of habeas jurisdiction to review challenges to the detention of any alien detained “at Guantanamo Bay, Cuba,” ironically left intact habeas review for detainees held abroad elsewhere. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (2005) (to be codified at 28 U.S.C. § 2241(e)).

¹⁶² See, e.g., Dan Eggen, 9/11 Report Says Plotter Saw Self as Superterrorist, *Wash. Post*, July 27, 2004, at A1 (reporting that Khalid Sheik Mohammed, architect of the September 11th, 2001, terrorist attacks, has been held by the United States at “an undisclosed location” overseas since his capture in 2003); Dana Priest, CIA Holds Terror Suspects in Secret Prisons, *Wash. Post*, Nov. 2, 2005, at A1 (reporting that the CIA has held high level Al Qaeda captives in secret prisons it set up abroad). Cf. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 30–31, 42–45 (D.C. Cir. 2004) (finding statutory jurisdiction exists to review habeas petition of American citizen detained in Saudi Arabia under United States supervision, and rejecting extraterritoriality argument on basis of *Rasul* and *Rumsfeld v. Padilla*).

Justice Stevens will give more queasy members of the majority, or others so inclined, a linguistic way out. But if the influence of Stevens's work in *Ahrens* on his thinking in *Rasul* is any indicator, then it is likely that at least Justice Stevens would follow the logic of *Rasul* to its fullest extent. After all, that logic extends the statute no farther than suggested by Stevens himself in the *Ahrens* dissent, where he had expressed the faint hope that the Court would fail to apply the *Ahrens* rule when squarely confronted with the question of habeas relief for petitioners confined abroad.¹⁶³ After Stevens made his influence felt in *Rasul*, that hope is surely no longer as faint.

¹⁶³ See *supra* note 50 and accompanying text.