

## THE PROBLEM OF JURISDICTIONAL NON-PRECEDENT

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In the aftermath of the Second World War, the federal courts—and the Supreme Court, in particular—repeatedly confronted the complicated legal and political questions arising out of the detention of enemy soldiers outside the territorial United States.<sup>1</sup> To be sure, the Court had occasionally grappled with comparable questions in prior conflicts,<sup>2</sup> and it had also resolved a handful of military detention cases during and immediately after the war.<sup>3</sup> But the sheer number of prisoners in U.S. custody, the seemingly indefinite duration of the post-hostilities detention,<sup>4</sup> and the effectively unprecedented use of both domestic and international military tribunals to try many of the detainees as war criminals,<sup>5</sup> all combined to produce a surge of litigation, as

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1. See Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 (1949); see also Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L.J. 1497, 1505–11 (2007) (noting the upsurge in the number of cases the Supreme Court was asked to consider after the war).

2. Although the Court did not rule on the detention of any enemy soldiers during the First World War, its Civil War-era decisions in *Ex parte Milligan*, 71 U.S. 2 (1866), and *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), both involved military commission convictions of alleged Confederate agents—or, at the very least, Confederate sympathizers. See also *Ex parte Merryman*, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9487).

3. See e.g. *In re Yamashita*, 327 U.S. 1, 11–14 (1946); *Ex parte Quirin*, 317 U.S. 1, 7–8 (1942); cf. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (rejecting the use of provost courts in Hawaii to try civilians for non-military offenses).

4. Indeed, the Court in 1948 held that detention of non-citizens under the Alien Enemy Act, 50 U.S.C. §§ 21–24, was still warranted even though formal hostilities had ceased, concluding that the war was not legally “over” until the political branches officially recognized as much; see *Ludecke v. Watkins*, 335 U.S. 160, 166–72 (1948); see also *U.S. ex rel. Jaeger v. Carusi*, 342 U.S. 347 (1952) (per curiam) (ordering the release of German enemy aliens in light of the Act of Oct. 19, 1951, Pub. L. No. 181, 65 Stat. 451 (1951), pursuant to which the political branches had finally declared a formal cession of hostilities).

5. In addition to the more famous “international” military tribunals at Nuremberg and Tokyo, the United States and its allies tried thousands of German and Japanese soldiers in smaller multinational and domestic tribunals. See e.g. *Flick v. Johnson*, 174 F.2d 983, 984–85 (D.C. Cir. 1949) (describing the trials in Germany pursuant to Control Council Law No. 10) [hereinafter *Flick I*].

hundreds of non-citizen detainees sought refuge in the Article III courts.<sup>6</sup>

The questions these cases raised culminated in a pair of Supreme Court decisions—the Court’s terse December 1948 per curiam opinion in *Hirota v. MacArthur*,<sup>7</sup> and its far more involved June 1950 ruling in *Johnson v. Eisentrager*.<sup>8</sup> *Hirota* and its companion case<sup>9</sup> rejected jurisdiction over habeas petitions filed by individuals convicted by the Tokyo war crimes tribunal; *Eisentrager* seemed to hold, more broadly, that non-citizens outside the territorial United States (or, at the very least, “enemy” aliens) had no constitutional right to the writ of habeas corpus and were therefore precluded from challenging their detention and trial by military tribunal given the apparent absence of statutory jurisdiction over their claims.<sup>10</sup>

Whatever the merits of the Supreme Court’s efforts in *Hirota* and *Eisentrager*, both formed the basis for D.C. Circuit decisions in 2007 dismissing habeas petitions brought by individuals in U.S. custody. In particular, the Court of Appeals relied upon *Eisentrager* in supporting the dismissal of habeas petitions brought by non-citizens detained as “enemy combatants” at Guantánamo Bay.<sup>11</sup> And a separate panel of the same court relied upon *Hirota* in supporting the dismissal of a habeas petition brought by a U.S. citizen held by the “Multinational Force—Iraq” (MNF—I).<sup>12</sup>

Toward the end of its 2007 Term (and on the same day), the Supreme Court reversed both decisions. In *Boumediene v. Bush*,<sup>13</sup> a 5–4 majority held that the Guantánamo detainees have a constitutional right to habeas corpus, and that the Military Commissions Act of 2006,<sup>14</sup> by stripping federal habeas corpus jurisdiction without providing an adequate substitute, violated that right.<sup>15</sup> In the process, the majority heavily distinguished *Eisentrager*, with Justice Kennedy concluding that “[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant

6. Indeed, these cases were not limited to non-citizens. The same period witnessed a flurry of habeas petitions brought by U.S. servicemembers detained abroad seeking to challenge their convictions by court-martial. See Vladeck, *supra* n. 1, at 1509–11. Although their petitions raised comparable jurisdictional questions, the Court would ultimately sustain the jurisdiction of the federal courts over the servicemembers’ claims, albeit *sub silentio*; see *id.* at 1514 n. 94 (citing *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality)).

7. 338 U.S. 197 (1948) (per curiam).

8. 339 U.S. 763 (1950) [hereinafter *Eisentrager*].

9. See *Kimura v. MacArthur*, 335 U.S. 898 (1948) (mem.).

10. Statutory jurisdiction was arguably foreclosed by the Court’s decision in *Ahrens v. Clark*, 335 U.S. 188, 189–93 (1948), which held that 28 U.S.C. § 2241 required federal detainees to pursue habeas relief in the district in which they were confined. As I discuss in more detail below, the courts in *Eisentrager* over-read *Ahrens*, which had expressly reserved whether its holding applied to detainees held outside the jurisdiction of any district court. See *id.* at 192 n. 4.

11. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 128 S. Ct. 2229 (2008).

12. See *Munaf v. Geren*, 482 F.3d 582, 583–84 (D.C. Cir. 2007), *vacated*, 128 S. Ct. 2207, 2212 (2008). A different panel of the D.C. Circuit sustained jurisdiction over another habeas petition brought by a U.S. citizen detained by the MNF–I, reasoning that unlike the petitioners in *Hirota*, the petitioner there had not been tried and convicted by a foreign or international court. See *Omar v. Harvey*, 479 F.3d 1, 14–15 (D.C. Cir. 2007). The Supreme Court consolidated *Omar* and *Munaf* in its cert. grant. See *Geren v. Omar*, 128 S. Ct. 741 (2007) (mem.).

13. 128 S. Ct. 2229.

14. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, and 28 U.S.C.).

15. Although my focus here is on the Court’s first holding—i.e., that the Suspension Clause “has full effect at Guantánamo,” *Boumediene*, 128 S. Ct. at 2262—I elsewhere take up this other central aspect of Justice Kennedy’s analysis, and his argument for why the MCA failed to provide an adequate alternative to habeas corpus. See Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. (forthcoming 2009) (copy on file with Notre Dame Law Review).

consideration in determining the geographic reach of the Constitution or of habeas corpus.”<sup>16</sup> To the contrary, the *Boumediene* Court endorsed a functional approach to the resolution of whether particular constitutional provisions apply extraterritorially, a methodology that is necessarily circumstance-specific.<sup>17</sup>

And in *Munaf v. Geren*,<sup>18</sup> the Court unanimously reversed the D.C. Circuit’s conclusion in the *Munaf* case that *Hirota* precluded the exercise of federal habeas jurisdiction over a U.S. citizen in the custody of the MNF—I, with Chief Justice Roberts reasoning that the facts of *Hirota* were easily distinguishable, and that, as such, “[t]hat slip of a case cannot bear the weight the Government would place on it.”<sup>19</sup> Although the Court went on to hold that the substantive claims at issue were without merit,<sup>20</sup> it devoted scarcely two pages to the jurisdictional issue that had preoccupied—and squarely divided—the lower courts.

It is tempting to cast the difference between *Hirota* and *Eisentrager* on one hand and *Munaf* and *Boumediene* on the other in generational terms. The earlier pair came in the context of the greatest military conflict the world has ever seen, and each case threatened to challenge not just the ordinary functioning of the Article III courts, but, more fundamentally, the emerging corpus of international criminal law that the United States was instrumental in creating. In contrast, the later pair came in the context of increasingly unpopular military conflicts conducted by an increasingly unpopular President, whose Administration had arguably missed signals the Court had tried to send in four earlier decisions in related cases.<sup>21</sup> One might also see *Boumediene* (and, to a lesser degree, *Munaf*) in political terms—as coming on the far side of the “rights” revolution, and as resulting from a Court far more concerned about the possibility of legal black holes than its predecessors.<sup>22</sup>

But whatever the influence of these considerations, my own view is that the

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16. *Boumediene*, 128 S. Ct. at 2258.

17. For a thoughtful discussion of *Boumediene*’s potential implications for other constitutional provisions, see Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. Cal. L. Rev. 259 (2009). Although anything more than a cursory discussion of *Boumediene*’s impact on successive litigation is beyond the scope of this article, it bears mentioning that the lower courts have thus far been somewhat reticent to extend other constitutional protections to the Guantánamo detainees. See e.g. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), petition for cert. filed, 77 U.S.L.W. 3577 (U.S. Apr. 2, 2009). However, the Supreme Court may have sent its own signal in December 2008 by vacating (in light of *Boumediene*) a D.C. Circuit decision dismissing a damages lawsuit arising out allegations of torture at Guantánamo and remanding for further proceedings. See *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), vacated, 129 S. Ct. 763 (2008) [hereinafter *Myers*]. But see *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (reaffirming original decision on remand).

18. 128 S. Ct. 2207, 2228.

19. *Id.* at 2217.

20. See *id.* at 2218–28. The decision to reach the merits was surprising, given that the lower courts had only decided the jurisdictional question.

21. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality); *Rasul v. Bush*, 542 U.S. 466 (2004) [hereinafter *Rasul*]; *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). For more on the idea of missed signals, see Stephen I. Vladeck, *Book Review: The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. Rich. L. Rev. 893, 910–13 (2009) (reviewing Ben Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Group 2008)).

22. Indeed, one particularly harsh criticism of *Boumediene* characterized the decision as a product of the “culture wars,” akin to the Court’s decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). See Richard Klingler, *The Court, the Culture Wars, and Real Wars*, 30 ABA Natl. Sec. L. Rpt. 1 (June 2008).

atmospherics of the cases only go so far in explaining why *Hirota* and *Eisentrager* proved so easy for the Court in *Munaf* and *Boumediene* to distinguish, rather than overrule. After all, if both decisions created the categorical preclusions of federal jurisdiction suggested by the government and embraced by the D.C. Circuit, it should have been much harder to get around them.

Instead, this article suggests that there is another critical distinction between the earlier and later cases that helps explain why both World War II-era decisions proved such flimsy precedents: the relationship between the jurisdictional rules they purported to create and the merits. Although *Hirota* and *Eisentrager* both suggested that they were relying on principles wholly unrelated to the merits of the petitioners' claims, a closer reading of the opinions (and of the Justices' papers) reveals that the rules the Court created were incredibly fact-bound, turning as much on the Justices' conclusion that the detainees were bound to *lose* on the merits as on their conclusion that the courts would lack the power to rule to the contrary either way.

In that regard, both *Hirota* and *Eisentrager* manifest a kind of analytical methodology that is no longer in vogue, as reflected, *inter alia*, in the Supreme Court's 1998 decision in *Steel Co. v. Citizens for a Better Environment*.<sup>23</sup> There, the Court forcefully rejected the doctrine of "hypothetical jurisdiction," reasoning instead that the Article III courts have no power to assume the existence of jurisdiction in order to reach the merits.<sup>24</sup> *Steel Co.* thus presaged a kind of "jurisdictional formalism,"<sup>25</sup> pursuant to which the lower federal courts have had to demonstrate far greater care in distinguishing "jurisdictional" holdings from decisions on the merits—a teaching the Supreme Court has had to reinforce repeatedly in the decade since *Steel Co.* was handed down.<sup>26</sup>

My thesis, then, is that *Hirota* and *Eisentrager* are relics of the pre-*Steel Co.* era, when "jurisdictional" rules were far more likely to be intensely fact-bound than they are today. In that sense, the cases are almost "non-precedent,"<sup>27</sup> because it will be

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23. 523 U.S. 83 (1998).

24. *See id.* at 94–96, 101 ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." (citations omitted)).

25. Useful academic discussions of such an approach abound. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?* 95 *Nw. U. L. Rev.* 1207, 1214–17 (2001); Jack H. Friedenthal, *The Crack in the Steel Case*, 68 *Geo. Wash. L. Rev.* 258, 269–73 (2000); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 *Cornell L. Rev.* 1 (2001); Joshua Schwartz, Student Author, *Limiting Steel Co.: Recapturing a Broader "Arising under" Jurisdictional Question*, 104 *Colum. L. Rev.* 2255 (2004).

26. Aside from cases where the Court has specifically addressed the order of decision making required by *Steel Co.* (see e.g. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–88 (1999); see also *Tenet v. Doe*, 544 U.S. 1, 6 n. 4 (2005)), the Court has also devoted a number of opinions in recent terms to the question of whether particular rules are, in fact, "jurisdictional." *See e.g. Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. U.S.*, 546 U.S. 12 (2005) (per curiam); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004). For a summary of the relevant considerations, see Howard M. Wasserman, *Jurisdiction and Merits*, 80 *Wash. L. Rev.* 643 (2005).

27. The term "anti-precedent" (or "anti-canonical") is often used to describe judicial decisions that come to be cited only to prove the now-accepted incorrectness of their holding—cases like *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Lochner v. New York*, 198 U.S. 45 (1905), and *Korematsu v. United States*, 323 U.S. 214 (1944). *See e.g.* Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 *Alb. L. Rev.* 803, 803–04 n. 3 (2004). I use "non-precedent," in contrast, to indicate the *uselessness* of a particular precedent,

remarkably easy to distinguish them on anything short of entirely parallel facts. And although *Munaf* and *Boumediene* are particularly prominent exemplars of this idea, my thesis cuts more broadly, suggesting that we have yet to fully appreciate the impact of *Steel Co.* on pre-*Steel Co.* precedent, especially those instances where the courts conflated a jurisdictional defect with its analysis of the merits.<sup>28</sup>

To unpack this argument, Part I begins with *Hirota* and *Eisentrager*, and the complicated series of cases forerunning the Supreme Court's twin decisions. As Part I suggests, at least some of the Justices thought there might be merit to some of the claims brought by other non-citizens detained overseas and so were careful to argue in favor of a merits-based jurisdictional holding in both cases—that is, a holding that could be read to rest the absence of jurisdiction on the lack of merit to those particular detainees' claims. In Part II, I turn to *Steel Co.* and its aftermath and summarize the impact that the Court's decision has had on “jurisdictional” rules in the decade since it was handed down.

Finally, Part III focuses on the lower-court decisions in *Munaf* and *Boumediene* and the Supreme Court's justifications for effectively doing away with *Hirota* and *Eisentrager*. What is particularly telling about the relationship between *Boumediene* and *Eisentrager* is the extent to which most external criticisms of Justice Kennedy's opinion have centered on the charge leveled throughout Justice Scalia's dissent, i.e., that the decision is unfaithful to *Eisentrager*.<sup>29</sup> As I conclude, though, these critiques miss the significance of the methodological shift that *Steel Co.* may not have caused, but of which it is emblematic. There may be flaws in Justice Kennedy's analysis, but a lack of fidelity to precedent simply is not one of them.

### I. HIROTA AND EISENTRAGER

As one student commentator observed in 1951, “the exercise of criminal jurisdiction over aliens by American institutions abroad applying American law [was] indeed a rather peculiar phenomenon of the post-World War II period.”<sup>30</sup> With the

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rather than its complete inversion. A more familiar example might be decisions that explicitly limit themselves to their facts and that, therefore, become all-but impossible to rely upon as controlling authority in future litigation. See e.g. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

28. To be clear, *Steel Co.* has no bearing on those rare cases where the existence of jurisdiction merges with the merits, as is true, for example, for writs of mandamus under 28 U.S.C. § 1361 (2006). See e.g. *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Similarly, the Supreme Court has noted that a “‘serious constitutional question’ . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.” *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citations omitted). The natural implication is that whether the constitutional claim is colorable may affect whether the deprivation of a judicial forum is constitutional, and in such cases, too, the merits and the jurisdictional question merge. My target here, though, is cases in which the questions do not merge analytically, but rather are conflated only descriptively.

29. See e.g. *Boumediene*, 128 S. Ct. at 2298–99 (Scalia, J., dissenting) (“*Eisentrager* thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.” (emphasis in original) (footnote omitted)); *id.* at 2302 (“By blatantly distorting *Eisentrager*, the Court avoids the difficulty of explaining why it should be overruled.”); see also *id.* at 2299 n. 3 (referring to the majority's “failed attempt to distinguish *Eisentrager*”); *id.* at 2299 (describing the majority's description of *Eisentrager* as a “sheer rewriting of the case”); *id.* at 2300 (“*Eisentrager* nowhere mentions a ‘functional’ test, and the notion that it is based upon such a principle is patently false.”). For the external critics, see sources cited *infra* note 162.

30. Douglas E. Dayton, Student Author, *A Critique of the Eisentrager Case: American Law Abroad—Habeas Corpus at Home?* 36 Cornell L.Q. 303, 330 (1951).

tremendous proliferation of war crimes prosecutions in the post-war years came challenging questions about the legality and fairness of such proceedings—and, as a threshold matter, whether any American civilian court could properly sit in judgment thereof. And if those questions were not complex enough, many of the applications for relief were filed directly in the Supreme Court, raising separate but equally challenging questions about the Court’s jurisdiction to issue writs of habeas corpus as an “original” rather than “appellate” manner.<sup>31</sup>

#### A. Ahrens

It was against this backdrop that the Court decided *Ahrens v. Clark*<sup>32</sup> on June 21, 1948, the last day of its 1947 Term.<sup>33</sup> In *Ahrens*, the Court held that the federal habeas corpus statute, 28 U.S.C. § 2241, required petitioners to seek relief in the federal district court for the territory in which they were confined, even if another district court could also exercise jurisdiction over the petitioner’s custodian. Writing for a 6–3 majority, Justice Douglas explained that

the view that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment.<sup>34</sup>

Douglas’s opinion was careful to characterize its result as venue-driven. Thus, “[w]e need not determine 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.”<sup>35</sup> Nevertheless, contemporary commentators viewed *Ahrens*’s logic as extending to those cases, as well—and as foreclosing jurisdiction.<sup>36</sup> Just over three months after *Ahrens*, when 21 German nationals convicted of war crimes by a U.S. military tribunal in China and detained at Landsberg Prison in Germany sought to challenge their convictions through a federal habeas petition,<sup>37</sup> the U.S. District Court

31. See e.g. Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 S. Ct. Rev. 153; see also Vladeck, *supra* n. 1, at 1511–15.

32. 335 U.S. 188.

33. More than just a critical starting point for the doctrinal evolution charted herein, *Ahrens* is also fascinating for the role played in it by Justice Stevens, then a law clerk for Justice Rutledge (and, apparently, the principal author of Rutledge’s dissent in the same case). See Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens’s Influence from World War II to the War on Terror*, 92 Va. L. Rev. 501 (2006); see also Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 Conn. L. Rev. 211 (2008).

34. *Ahrens*, 335 U.S. at 192 (footnote omitted).

35. *Id.* at 192 n. 4. Tellingly, Douglas cited as examples the “original” habeas petitions in war crimes cases that the Court had disposed of during the 1946 term. See *id.*; see also Vladeck, *supra* n. 1, at 1509–11 (discussing these cases).

36. See Fairman, *supra* n. 1, at 632 (“[I]f the statute makes the presence of the petitioner a requisite to jurisdiction, how can it make any difference whether the detention is in no district rather than in a different district?” (emphasis in original)); see also *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1163 n. 54 (1970) (“[I]f *Ahrens* is based on the power of a court to act it is hard to see what difference it should make to the court’s power that the petitioner has no alternative forum.”).

37. The record suggests that the petitioners were all civilian employees of the German government in China although there is some dispute as to whether they were employed by the German military or not. See *Eisentrager v. Forrestal*, 174 F.2d 961, 962 n. 3 (D.C. Cir. 1949) [hereinafter *Forrestal*]; see also *Eisentrager*, 339 U.S. at 765. The petitioners were charged and convicted for war crimes for continuing to support the

for the District of Columbia cursorily dismissed their claims for want of statutory jurisdiction, citing only *Ahrens* in support.<sup>38</sup> The question *Ahrens* sought to reserve was thus squarely decided, raising the related question of whether such preclusion of jurisdiction created any constitutional problems.<sup>39</sup>

#### B. Hirota

Seven weeks after the district court's decision in *Eisentrager*, the Supreme Court was confronted with perhaps the most vexing application for original habeas relief that it had yet received in a war crimes case—from seven of the “Class A” defendants before the Tokyo war crimes tribunal, formally the International Military Tribunal for the Far East (IMTFE). Although each of the petitioners raised a host of challenges to the jurisdiction and procedures of the tribunal, the lead plaintiff—Kōki Hirota—presented a unique set of claims, both because he was a civilian and because he had retired from public service in the mid-1930s, well before the escalation of hostilities in the Pacific theater.

The unique facts of Hirota's case were made clear to the rest of the Court by Justice Rutledge. Apparently believing the Court was about to refuse to set Hirota's application for argument (as it had done in all of the previous “original” war crimes cases), Rutledge circulated a harshly worded draft dissent that he would file from such a denial:

If the *Yamashita* and *Homma*<sup>[40]</sup> cases determined, as I thought, that enemy belligerents have none of our constitutional protections, it does not follow that they held enemy civilians to occupy the same denuded status. Nor has this Court yet decided that such persons or others, including our own citizens, but exceptions [sic] perhaps enemy combatants, having access to no inferior court, can have no remedy for reviewing action by an American military tribunal in disregard of all constitutional limitations or like action of any such tribunal in which our officials may participate.

For me the applications set forth serious challenges to the validity of the Tribunal's constitution and jurisdiction. Thereby in turn they raise grave questions concerning this Court's power to set [sic] in review of what has been done. If the Tribunal is in fact a validly constituted international one, presumably its action is beyond our reach. If it is in fact a political body, exercising power under forms of legal procedure strange to our institutions and traditions, established wholly or in part by the political departments of our

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Japanese military in China after Germany's surrender on May 8, 1945. *Id.*

38. *Eisentrager v. Forrester*, unpublished opinion (D.D.C. Oct. 6, 1948) (reprinted in Transcript of Record at 16-17, *Eisentrager*, 339 U.S. 763 (No. 306)).

39. See Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. Miami L. Rev. 275, 294 (2008) (“*Ahrens* thus forced the issue that the Supreme Court had otherwise been able to avoid . . . . If the habeas statute did not itself authorize jurisdiction over petitions filed by detainees held outside the jurisdiction of any district court . . . , then the question whether the statute so construed would violate the Suspension Clause was thrust to the forefront.” (footnote omitted)).

40. In *In re Homma*, 327 U.S. 759 (1946) (mem.), the Court declined to hear a challenge to the military commission conviction of the Japanese officer responsible for the Bataan Death Match, relying on its decision one week earlier in *In re Yamashita*, 327 U.S. 1 (1946). Justices Murphy and Rutledge dissented from the denial of leave to file, though, arguing that *Homma*'s case raised questions distinct from—and not resolved by—*Yamashita*'s. See *Homma*, 327 U.S. at 759–61 (Murphy, J., dissenting); *id.* at 761–63 (Rutledge, J., dissenting).

Government by action our judicial institutions have no authority or power to check, the same consequences must follow. These consequences however are not for me either self-evident or frivolous matters, to be decided without hearing or argument.<sup>41</sup>

Unlike the prior war crimes cases, though, where Justice Jackson had been forced to recuse himself because of his role as chief prosecutor at Nuremberg, he was able to break the 4–4 deadlock over whether *Hirota* should be set for argument. And although he was quite ambivalent about the Court’s power to decide the questions presented, Jackson voted to break the tie in favor of hearing argument, issuing a rare concurrence explaining his decision.<sup>42</sup>

Argument, however, failed to persuade a majority of the Justices that the Court had the power to reach the merits. Instead, a 6–1<sup>43</sup> Court held in a terse per curiam opinion that it lacked jurisdiction to entertain the petitioners’ claims:

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied.<sup>44</sup>

Unfortunately, the Court’s short opinion raised more questions than it answered. Other than its allusion to “the foregoing circumstances,” the opinion did not specify *why* “the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners.”<sup>45</sup> Was the jurisdictional defect based upon the Supreme Court’s lack of original jurisdiction (in which case the same claims could be brought in the lower federal courts), or on a defect in all federal jurisdiction? Contemporary courts and commentators assumed that the Court had reached the latter (broader) holding,<sup>46</sup> even though the narrower ground was arguably available.<sup>47</sup>

And which “circumstances” were so central to the Court’s analysis? Did it matter, for example, that the petitioners in *Hirota* were all non-citizens, even though neither the

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41. Draft Opinion of Justice Rutledge 3-4 (Dec. 6, 1948) (on file with the Lib. of Cong., Ms. Div., Papers of Wiley Rutledge, Container 168, *Hirota v. MacArthur* Case File) (quoted in Vladeck, *supra* n. 1, at 1516).

42. See *Hirota v. MacArthur*, 335 U.S. 876 (1948) (mem.) (Jackson, J.).

43. Although the vote was 6–1, Justice Douglas’s post-hoc concurrence was arguably only in the judgment, since he would have held that the petitioners’ claims raised a political question and not that the Court lacked subject-matter jurisdiction. See *Hirota*, 338 U.S. at 204–15 (Douglas, J., concurring). Otherwise, Justice Murphy dissented without opinion. Justice Rutledge reserved his vote (although he died over a year later without ever expressing a view), and Justice Jackson, whose vote was no longer necessary, declined to participate in the final decision. See *id.* at 198–99; see also Vladeck, *supra* n. 1, at 1517–18 nn. 105–06.

44. *Hirota*, 338 U.S. at 198 (per curiam).

45. See generally *id.* at 203.

46. See e.g. *Flick I*, 174 F.2d 983 (applying *Hirota* in the lower courts to dismiss a habeas petition challenging a conviction by a military tribunal in Germany that was “international in character”); see also *Hirota*, 338 U.S. at 201 (Douglas, J., concurring).

47. See e.g. *Munaf*, 128 S. Ct. at 2218 n. 3 (2008).

habeas statute nor the relevant provisions of Article III seemed to draw any distinctions based upon citizenship? Justice Douglas, who filed his “conurrence” in *Hirota* over six months after the per curiam opinion was released, believed that the Court’s opinion did not distinguish between citizen and non-citizen petitioners and that this was a crucial defect in the majority’s analysis.<sup>48</sup>

Similarly, was it significant that the tribunal the petitioners sought to challenge was at least officially a multinational—as opposed to distinctly American—enterprise? One of the most significant early implementations of the *Hirota* decision saw its holding in precisely those terms, with the D.C. Circuit distinguishing the *Eisentrager* case (where there was no question that the tribunal was a wholly American enterprise)<sup>49</sup> from the tribunals convened under Control Council Law No. 10.<sup>50</sup>

Whatever the significance of each of these factors, the one point that is clear is that the *Hirota* Court’s lack of clarity was deliberate. According to the Conference notes of Justices Douglas, Jackson, and Rutledge, Justice Black—who, given the unclear intentions of Justice Douglas, provided the key fifth vote for the majority’s rationale—insisted on ambiguity and terseness.<sup>51</sup>

### C. Eisentrager

Less than two months after *Hirota* came down, the D.C. Circuit heard argument in *Eisentrager*, on appeal from the district court’s dismissal for lack of jurisdiction under *Ahrens*. Two months later, it reversed concluding that “any person deprived of his liberty by an official of the United States Government in violation of constitutional prohibitions, has a substantive right to a writ of habeas corpus,”<sup>52</sup> the Court of Appeals found it immaterial that the habeas statute, under *Ahrens*, appeared to deprive the petitioners of access to the federal courts. Instead, “if the case presented by these appellants arises under the Constitution, laws or treaties of the United States, as it clearly does, jurisdiction to entertain it is in some district court by compulsion of the Constitution itself.”<sup>53</sup> Thus, although the D.C. Circuit could have simply reversed on the ground that *Ahrens* only reserved the jurisdictional question there at issue, the court instead rested its holding on a sweeping conception of habeas corpus—as extending to anyone, anywhere, who alleges that their detention is “in violation of constitutional prohibitions.”<sup>54</sup>

By a 6–3 vote, the Supreme Court overturned the D.C. Circuit’s decision.<sup>55</sup> And

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48. See e.g. *Hirota*, 338 U.S. at 204–05 (Douglas, J., concurring).

49. See *Forrestal*, 174 F.2d at 963 n. 4 (D.C. Cir. 1949).

50. See *Flick I*, 174 F.2d at 986; see also Note, *Habeas Corpus Protection against Illegal Extraterritorial Detention*, 51 Colum. L. Rev. 368, 369 n. 8 (1951). To be sure, the D.C. Circuit’s reasoning in *Flick* was hardly beyond question. See e.g. *Review of International Criminal Convictions*, 59 Yale L.J. 997, 1001–03 (1950). But over Justice Black’s dissent, the Supreme Court denied certiorari to review the Court of Appeals’s dubious application of *Hirota*—and on the same day it granted certiorari in *Eisentrager*. See *Flick v. Johnson*, 338 U.S. 879 (1949) (mem.) [hereinafter *Flick II*].

51. See Vladeck, *supra* n. 1, at 1518 n. 107.

52. *Forrestal*, 174 F.2d at 965.

53. *Id.* at 966.

54. *Id.* at 967.

55. See *Eisentrager*, 339 U.S. 763.

although Justice Jackson's opinion for the *Eisentrager* majority was emphatic, it was hardly a model—especially for Jackson—of analytical clarity.<sup>56</sup> After reciting the facts and the procedural posture, Jackson concluded his introduction by noting that “[w]e 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.”<sup>57</sup> Thus, “[t]he breadth of the [D.C. Circuit'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.”<sup>58</sup>

Jackson divided his opinion for the *Eisentrager* majority into five distinct parts (although Part V merely stated the majority's conclusion and judgment). In Part I, Jackson thoroughly traced two sets of distinctions traditionally drawn by American law: the myriad of differences in the legal status of citizens and non-citizens, and, within the latter class, the distinction between “friendly” and “enemy” aliens. For non-citizens, Jackson wrote, the critical point was that constitutional protections derived from their physical presence within the territorial jurisdiction of the U.S. courts, and not a broader obligation owed to them by the U.S. government.<sup>59</sup> And “[s]ince most cases involving aliens afford this ground of jurisdiction, and the civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens, courts in peace time have little occasion to inquire whether litigants before them are alien or citizen.”<sup>60</sup>

In time of war, Jackson continued, the calculus changes, because a critical distinction must be drawn between aliens who owe allegiance to an ally of the United States and those who adhere to our belligerent enemies. Invoking the Alien Enemy Act as support,<sup>61</sup> Jackson noted that “[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.”<sup>62</sup> And although various U.S. courts had historically recognized a limited ability of alien enemies to resort to the judicial process, Jackson concluded Part I by noting that those cases involved *resident* enemy aliens, as opposed to nonresident aliens such as the detainees.<sup>63</sup> The latter class of individuals, Jackson wrote, had never been entitled, under British or American law, to pursue relief in the courts of their enemies.<sup>64</sup>

Having surveyed precedent in Part I, Jackson turned to practical considerations in Part II. He began by noting what it would mean if the Court affirmed the D.C. Circuit's sweeping analysis:

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56. The idiosyncrasies of Justice Jackson's published opinion in *Eisentrager* were also present throughout his drafts. Indeed, the final version differed substantively only in minor ways from Jackson's initial (and uncirculated) type-set draft, dated May 20. See Draft Opinion of Justice Jackson (May 20, 1950) (on file with the Lib. of Cong. Ms. Div., Papers of Robert H. Jackson, Container 163, Folder 7, *Johnson v. Eisentrager* Case File) [hereinafter “Draft *Eisentrager* Opinion”].

57. *Eisentrager*, 339 U.S. at 768.

58. *Id.*

59. *See id.* at 770–71.

60. *Id.* at 771.

61. *See Eisentrager*, 339 U.S. at 773–75.

62. *Id.* at 774.

63. *See id.* at 776.

64. *See id.* at 776–77.

[W]e 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.<sup>65</sup>

Then, he turned to the myriad of practical and logistical difficulties that would result from allowing the D.C. Circuit's reasoning to stand:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.<sup>66</sup>

After emphasizing the practical considerations cutting against the D.C. Circuit's view, Jackson then turned to the two precedents on which the detainees relied—*Ex parte Quirin*<sup>67</sup> and *In re Yamashita*<sup>68</sup>—and explained why they were inapposite.<sup>69</sup> In concluding Part II, Jackson noted (perhaps counter-intuitively) that “the doors of our courts have not been summarily closed upon these prisoners,”<sup>70</sup> suggesting that three courts (presumably, the district court, D.C. Circuit, and Supreme Court) had considered “why they should not be subject to the usual disabilities of non-resident enemy aliens.”<sup>71</sup> But,

[a]fter 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 these cases [*Quirin*, *Yamashita*, and *Hirota*], viz.: that no right to the writ of habeas corpus appears.<sup>72</sup>

Had Jackson stopped there, there might have been less confusion over what *Eisenrager* actually held. Based on the analysis in Parts I and II alone, Jackson's opinion could reasonably have been understood, at bottom, to deny to *all* enemy aliens outside the territorial United States a constitutional right to habeas corpus. But Jackson

65. *Id.* at 777.

66. *Eisenrager*, 339 U.S. at 778–79.

67. 317 U.S. 1.

68. 327 U.S. 1.

69. *See Eisenrager*, 339 U.S. at 779–81.

70. *Id.* at 780.

71. *Id.* at 781.

72. *Id.*

did not stop there. Instead, his opinion turned in Part III to the merits of the detainees' claims, especially the argument that they could not properly be subjected to military jurisdiction. Emphasizing that the Fifth Amendment squarely exempts *American* military personnel from such protection, and that even *resident* alien enemies are entitled to a judicial hearing only to determine the relevant jurisdictional fact—i.e., that they are in fact alien enemies—Jackson concluded 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.”<sup>73</sup>

Having dispensed in Part III with the claim that the detainees could not be subjected to military trial, Jackson turned in Part IV to the second part of the detainees' case on the merits—that even if they were properly subject to military jurisdiction in the abstract, the tribunal in which they were convicted lacked jurisdiction.<sup>74</sup> After briefly rehashing (and implicitly rejecting) the detainees' argument that their underlying conduct was not a war crime, Jackson turned to the jurisdiction of the commission.<sup>75</sup> First, Jackson dismissed the argument that the United States had no authority to convene a military commission in China, holding that the President surely had the power to station troops there, and that, even if China objected, “China's grievance does not become these prisoners' right.”<sup>76</sup> Jackson then rejected the contention that anything in the 1929 Geneva Convention precluded the assertion of military jurisdiction, noting in a footnote that “[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.”<sup>77</sup>

Finally, Jackson dismissed the two potential procedural irregularities that might have undermined the tribunal's jurisdiction. The first issue (concerning the Geneva Convention's requirement of pre-trial notice to the protecting power) had already been resolved against the detainees, he reasoned, by *Quirin* and *Yamashita*.<sup>78</sup> As to the second—that the tribunal's procedures were not sufficiently comparable to those used in court-martial proceedings—Jackson observed that “no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank.”<sup>79</sup> In any event, though, he concluded that

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73. *Id.* at 785. This holding is often mischaracterized as denying *any* due process rights to “alien enemies” outside the territorial United States. A closer read of Part III of Jackson's opinion, though, makes clear that he was addressing only whether the Due Process Clause barred the subjection of alien enemies to military jurisdiction—and not whether, as a categorical matter, it did not apply.

74. *See id.* at 785–86. It was well-established by 1950 that the Article III courts *could* inquire into the jurisdiction of a military tribunal and could grant relief where it concluded that the military proceeding was *ultra vires*. *See e.g. Yamashita*, 327 U.S. at 8 (“If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.”); *see also In re Grimley*, 137 U.S. 147, 150 (1890) (“[T]he civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . . The single inquiry, the test, is jurisdiction.”).

75. *See Eisentrager*, 339 U.S. at 786–88.

76. *Id.* at 789.

77. *Id.* at 789 n. 14.

78. *See id.* at 789–90.

79. *Id.* at 790.

any such protection applied to trials for disciplinary offenses, and not for war crimes.<sup>80</sup> Thus, “[w]e 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.”<sup>81</sup>

What, then, did *Eisentrager* actually hold? Or, put another way, which facts were central to the holding, whatever it was? Was *Eisentrager* merely a rule about enemy aliens, convicted by a military tribunal (that properly exercised jurisdiction), who did not contest their status as such? Was it a rule about all enemy aliens outside the territorial jurisdiction of the United States? Was it a rule about all *aliens* outside that jurisdiction? Was it a rule about the Suspension Clause? Was it a rule about the Fifth Amendment?<sup>82</sup>

One thing is clear: The dissenters—Black, Douglas, and Burton—had no idea. Instead, their opinion, per Justice Black, tried to underscore the irony of Jackson’s analysis in Parts III and IV, given the apparently jurisdictional nature of the holding in Part II:

[T]he Court apparently bases its holding that the District Court was without jurisdiction on its own conclusion that the petition for habeas corpus failed to show facts authorizing the relief prayed for. But jurisdiction of a federal district court does not depend on whether the initial pleading sufficiently states a cause of action; if a court has jurisdiction of subject matter and parties, it should proceed to try the case, beginning with consideration of the pleadings. Therefore Part IV of the opinion is wholly irrelevant and lends no support whatever to the Court’s holding that the District Court was without jurisdiction.<sup>83</sup>

Notwithstanding its assertion that the analysis of the merits was irrelevant to ascertaining the district court’s jurisdiction, Black’s dissent left open the possibility that the rule *Eisentrager* enunciated *may* have turned on the “gratuitous conclusions” in Part IV.<sup>84</sup> Nonetheless, the dissenters warned that “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.”<sup>85</sup>

The lack of clarity as to *Eisentrager*’s holding was magnified by the lack of opportunities in the ensuing years to clarify its scope. In a series of cases decided during the 1950s, the Court distinguished *Eisentrager* in cases involving U.S. citizens,

80. See *Eisentrager*, 339 U.S. at 790.

81. *Id.*

82. Justice Jackson’s initial draft, which followed the same rough outline, titled Part I *Capacity to Sue for Writ*, Part II *Claim of Constitutional Rights as Basis for Writ*, Part III *Unconstitutional Acts as Basis for Writ*, and Part IV *Prisoners’ Claims under Geneva Convention*. See Draft *Eisentrager* Opinion, *supra* n. 56, at 4, 8, 12, 17. To whatever extent the organization of the initial draft provides further insight into Jackson’s intent, it suggests that Jackson’s methodology was to eliminate each possible basis for habeas jurisdiction. The negative implication of that inference, though, is that any of the individual bases for jurisdiction would have sufficed, had they been present.

83. *Id.* at 792 (Black, Douglas & Burton JJ., dissenting) (citations and footnote omitted); see also *id.* at 793 (“To decide this unargued question under these circumstances seems an unwarranted and highly improper deviation from ordinary judicial procedure.”).

84. See *e.g. id.* at 794 (“Except insofar as this holding depends on the gratuitous conclusions in Part IV (and I cannot tell how far it does), it is based on the facts that (1) they were enemy aliens who were belligerents when captured, and (2) they were captured, tried, and imprisoned outside our realm, never having been in the United States.”).

85. *Id.* at 796.

holding—albeit *sub silentio*—that the federal courts *could* exercise jurisdiction over habeas petitions filed by U.S. citizens held overseas, and notwithstanding *Ahrens*.<sup>86</sup> And in 1973, the Court finally healed *Ahrens*'s “self-inflicted . . . wound,”<sup>87</sup> holding in *Braden v. 30th Judicial Circuit Court of Kentucky*<sup>88</sup> that a district court could exercise subject-matter jurisdiction over a habeas petition so long as it could exercise personal jurisdiction over the respondent.<sup>89</sup>

Indeed, only once in the five decades between *Eisentrager* and September 11 did the Supreme Court discuss that decision in any meaningful detail. In his opinion for the plurality in *United States v. Verdugo-Urquidez*,<sup>90</sup> Chief Justice Rehnquist adopted a particularly expansive view of Jackson's holding, citing the decision for the idea that “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States,”<sup>91</sup> in support of his conclusion that the same should be true for the Fourth Amendment.

Whatever *Eisentrager* held as to the extraterritorial scope of habeas corpus, Rehnquist's reading of the opinion with respect to the Fifth Amendment is simply unsupported by its text. For starters, at most, *Eisentrager* rejected the claim that *enemy* aliens are entitled to Fifth Amendment rights outside the territorial United States—as Justice Brennan observed in his dissent in *Verdugo-Urquidez*.<sup>92</sup> But as noted above, Jackson did not even categorically reject due process rights for *enemy* aliens; he concluded instead that the Fifth Amendment did not preclude the U.S. government from subjecting the *Eisentrager* detainees to military jurisdiction<sup>93</sup>—hardly a categorical preclusion of constitutional protection.<sup>94</sup>

The merits of the *Verdugo-Urquidez* debate notwithstanding, the 1990 decision helps to illustrate, at the very least, how un-careful treatments of *Eisentrager* have historically been and how unclear the “rule” *Eisentrager* enunciated actually was, even before September 11. It undoubtedly *was* clear that *Eisentrager*'s holding was putatively jurisdictional, but the specific reason(s) why the detainees in *Eisentrager* were not protected by the Suspension Clause were left open to debate.

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86. See e.g. *Burns*, 346 U.S. 137; see also *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). See generally Vladeck, *supra* n. 39, at 298–300 (discussing the significance of these decisions).

87. See *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1128 (2d Cir. 1974).

88. 410 U.S. 484 (1973).

89. But see Vladeck, *supra* n. 1, at 1512 n. 78 (noting the Supreme Court's back-door resurrection of *Ahrens* through its adoption of the “immediate custodian rule” in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)).

90. 494 U.S. 259 (1990) (plurality).

91. *Id.* at 269 (noting that “our rejection of extraterritorial application of the Fifth Amendment was emphatic”).

92. See *id.* at 290–91 (Brennan & Marshall, JJ., dissenting).

93. See *supra* n. 73 and accompanying text.

94. Even after *Boumediene*, the D.C. Circuit has continued to cite *Eisentrager* for the overbroad proposition that it categorically forecloses due process rights for non-citizens detained outside the territorial United States. See *Kiyemba*, 555 F.3d 1022, 1026, 1028 (D.C. Cir. 2009).

## II. STEEL CO. AND THE DEMISE OF “HYPOTHETICAL JURISDICTION”

A. *Justifying Jurisdictional Formalism: Steel Co.*

At first blush, *Steel Co. v. Citizens for a Better Environment*<sup>95</sup> came to the Supreme Court as a run-of-the-mill environmental protection lawsuit, arising out of a circuit split over the scope of the citizen-suit provision of the Emergency Planning and Community Right-to-Know Act of 1996 (EPCRA).<sup>96</sup> Specifically, the EPCRA authorizes suits when a manufacturer fails to timely file toxic- and hazardous-chemical storage and emission reports, and the lower courts divided on whether that cause of action extends to cases where the offending company *did* subsequently file the required paperwork—i.e., where the violation was historical, rather than ongoing. Although the Sixth Circuit (and the district court in *Steel Co.*) answered that question in the negative,<sup>97</sup> the Seventh Circuit held that citizens may seek penalties against EPCRA violators like *Steel Co.* who file after the statutory deadline and after receiving notice.<sup>98</sup>

Before the Supreme Court, though, *Steel Co.* also challenged whether *Citizens for a Better Environment* (“CBE”) had Article III standing to bring such a claim. Thus, the Court was not only tasked with resolving the standing question, but also the order-of-battle as between whether the plaintiffs had standing and whether they had properly stated a cause of action (the basis for the circuit split). After explaining that the existence of a valid cause of action did not implicate the jurisdiction of the federal courts so long as the cause of action alleged was arguable,<sup>99</sup> Justice Scalia then turned to why the federal courts could not assume the existence of subject-matter jurisdiction—what the lower courts had called “hypothetical jurisdiction”—in order to reach the merits:

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”

On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power of the United States” and is “inflexible and without exception.”<sup>100</sup>

Thus, Justice Scalia reasoned, the Court could not reach whether the citizen-suit

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95. 523 U.S. 83 [hereinafter *Steel Co.*].

96. 42 U.S.C. § 11001–11050 (2006) (providing the citizen-suit provision at § 11046(a)(1)).

97. See *A. Sts. Leg. Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995); *Citizens for a Better Env't. v. Steel Co.*, 1995 WL 758122 (N.D. Ill. Dec. 21, 1995) [hereinafter *Steel Co. I*].

98. See *Citizens for a Better Env't. v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) [hereinafter *Steel Co. II*].

99. See *Steel Co.*, 523 U.S. at 89–93.

100. *Id.* at 94–95 (alteration in original) (citations omitted).

provision of the ECPRA conferred a cause of action along the lines found by the Seventh Circuit without first resolving whether CBE in fact had Article III standing. Moreover, Scalia rejected the extent to which earlier decisions seemed to allow resolution of the cause-of-action question as an antecedent matter (assuming without deciding jurisdiction), noting that “[w]e have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect.”<sup>101</sup> Even though a host of earlier decisions had seemed to recognize the suitability of assuming jurisdiction in certain circumstances, Justice Scalia concluded that

none of them even approaches approval of a doctrine of “hypothetical jurisdiction” that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.<sup>102</sup>

On the merits, the Court concluded that CBE could not satisfy the third prong of Article III standing—redressability. As Justice Scalia explained, “None of the specific items of relief sought, and none that we can envision as ‘appropriate’ under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.”<sup>103</sup>

Concurring, Justice O’Connor (who, with Justice Kennedy, formed the votes necessary for the majority) suggested that there might be circumstances other than those identified in previous cases where it was appropriate to reserve the difficult jurisdictional question in order to reach the merits.<sup>104</sup> Justice Breyer would have gone even further, noting in a partial concurrence his concern that such a formalistic rule would unduly burden lower federal court judges.<sup>105</sup> But whatever the misgivings about *Steel Co.*’s scope, its meaning was unambiguous: Federal courts were to decide subject-matter jurisdiction questions first in all but the rarest of cases, and irrespective of the merits.

#### B. *Steel Co.’s Impact: Jurisdiction First, Merits Last*

To be sure, subsequent decisions have somewhat diluted the force of *Steel Co.*’s holding. In *Ruhrgas AG v. Marathon Oil Co.*,<sup>106</sup> for example, a unanimous Court held that *Steel Co.* does *not* require the federal courts to reach difficult questions of subject-matter jurisdiction before easier questions of personal jurisdiction that produce the same result—dismissal.<sup>107</sup> Similarly, a unanimous Court held in 2007 that the lower federal courts could dismiss a lawsuit on *forum non conveniens* grounds without resolving difficult questions as to their subject-matter jurisdiction.<sup>108</sup> As Justice Ginsburg wrote

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101. *Id.* at 91 (citing *Lewis v. Casey*, 518 U.S. 343, 352 n. 2 (1996); *Fed. Election Commn. v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)).

102. *Id.* at 101 (citing *Muskrat v. U.S.*, 219 U.S. 346, 362 (1911); *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792)).

103. *Id.* at 105–06 (footnote omitted).

104. *See Steel Co.*, 523 U.S. at 110–11 (O’Connor & Kennedy, JJ., concurring).

105. *See id.* at 111–12 (Breyer, J., concurring in part and concurring in the judgment).

106. 526 U.S. 574.

107. *See id.* at 583–88.

108. *See Sinochem*, 549 U.S. at 430–31.

for the Court in *Sinochem International Co. v. Malaysia International Shipping Corp.*,

Both *Steel Co.* and *Ruhrgas* recognized that a federal court has leeway “to choose among threshold grounds for denying audience to a case on the merits.” Dismissal short of reaching the merits means that the court will not “proceed at all” to an adjudication of the cause. Thus, a district court declining to adjudicate state-law claims on discretionary grounds need not first determine whether those claims fall within its pendent jurisdiction. Nor must a federal court decide whether the parties present an Article III case or controversy before abstaining under *Younger v. Harris*. A dismissal under *Totten v. United States*,<sup>[109]</sup> . . . , we recently observed, also “represents the sort of ‘threshold question’ [that] . . . may be resolved before addressing jurisdiction.” The principle underlying these decisions was well stated by the Seventh Circuit: “[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.”<sup>110</sup>

But these subsequent decisions only drive home the point that *Steel Co.* compels resolution of subject-matter jurisdiction before reaching any questions as to the merits (as distinct from other non-jurisdictional non-merits questions). Thus, *Steel Co.* suggests that the merits are completely irrelevant to any bar on subject-matter jurisdiction that is itself unrelated to the merits. The Justices may have quarreled over *Steel Co.*’s application to other non-merits-based grounds for dismissal, but the unanimity of the decisions in *Ruhrgas* and *Sinochem* suggests that this central principle of *Steel Co.* was—and remains—undisputed.

### C. The Vitality of Pre-Steel Co. Jurisdictional Rules

*Steel Co.*’s effect on judicial decision-making has been well-documented elsewhere.<sup>111</sup> Of relevance here, it unquestionably has prompted heightened sensitivity in the lower courts to the distinction between “jurisdictional” and non-jurisdictional “claim processing” rules—so much so, in fact, that the Supreme Court has had to reverse a number of lower-court decisions construing as “jurisdictional” rules that are, in the Court’s view, anything but.<sup>112</sup>

But of more interest here is the effect of *Steel Co.* on pre-*Steel Co.* decisions. Justice Scalia himself expressed skepticism in *Steel Co.* as to the precedential value of “drive-by jurisdictional rulings,” by which he meant decisions where courts described particular issues as “jurisdictional,” even though they were not.<sup>113</sup> After *Steel Co.*, both the Supreme Court and the lower federal courts have routinely brushed aside the

109. 92 U.S. 105 (1876) (prohibiting suits against the U.S. based upon covert espionage agreements); see also *Tenet v. Doe*, 544 U.S. 1, 6 n. 4 (2005) (noting that applicability of the *Totten* bar can be resolved before subject-matter jurisdiction).

110. *Sinochem*, 549 U.S. at 431 (alterations in original) (citations omitted).

111. See e.g. sources cited *supra* n. 25.

112. See e.g. *Arbaugh*, 546 U.S. 500 (holding that Title VII’s employee-numerosity requirement is not “jurisdictional”); *Eberhart*, 546 U.S. at 19 (per curiam) (holding that the seven-day time limit for pursuing a new trial under Fed. R. Crim. P. 33(a) is not “jurisdictional”); *Scarborough*, 541 U.S. at 418–21 (holding that the Equal Access to Justice Act’s 30-day deadline for attorney fee applications under 28 U.S.C. § 2412(d)(1)(B) is not “jurisdictional”); *Kontrick*, 540 U.S. at 456–60 (holding that the time limit for a creditor to file objections to a bankruptcy discharge under Fed. R. Bankr. P. 4004 is not “jurisdictional”). For one counterexample to this trend, see *Bowles v. Russell*, 551 U.S. 205 (2007) (holding that the timely filing of notice in a civil appeal is jurisdictional). See generally Alex Lees, Student Author, *The Jurisdictional Label: Use and Misuse*, 58 Stan. L. Rev. 1457 (2006) (discussing the values at stake in these cases).

113. See *Steel Co.*, 523 U.S. at 91.

precedential value of such decisions, noting that they “should be accorded ‘no precedential effect’ on the question whether the federal court had authority to adjudicate the claim in suit.”<sup>114</sup>

Moreover, although Justice Scalia did not expand his analysis beyond decisions describing as “jurisdictional” holdings that in fact were not, it should follow that similar concerns would attach to decisions that (1) failed to address apparent jurisdictional defects (and whether they thereby served as precedent *in favor of* jurisdiction); or (2) left unclear the extent to which the merits bore on the absence of “jurisdiction.” Under *Steel Co.*’s approach to the judicial order-of-battle, *any* resolution of the merits of the plaintiffs’ claims in a decision dismissing for lack of jurisdiction would necessarily imply that the merits (or lack thereof) were relevant to the absence of jurisdiction. Thus, where the precise nature of a pre-*Steel Co.* jurisdictional rule was unclear, *Steel Co.*’s approach suggested that courts should attempt to parameterize that rule by reference to the role that the facts and the merits did or did not play in the original decision. It was not that such decisions were entitled to “no precedential effect,” but rather that such decisions should, for lack of a better term, be narrowly construed, on the assumption that the rendering court would not have paid so much attention to circumstances that did not meaningfully bear on the result.

### III. HIROTA AND EISENTRAGER AS “NON-PRECEDENT”

#### A. Rasul and Eisentrager’s “Statutory Predicate”

For obvious reasons, the vitality of *Eisentrager* as precedent became a central issue in the aftermath of the September 11 attacks, especially with the onset of U.S. military operations in Afghanistan in the fall of 2001 and the subsequent detention of captured “enemy combatants” at Guantánamo Bay, Cuba. Indeed, the Justice Department’s Office of Legal Counsel heavily relied on the 1950 decision in a December 2001 opinion suggesting that it was unlikely that federal courts would have the power to review detentions at Guantánamo.<sup>115</sup>

Thus, when the first Guantánamo detainees sought to challenge their detention through federal habeas petitions filed in the D.C. district court in the summer of 2002, the lower courts dismissed their claims entirely on the authority of *Eisentrager*.<sup>116</sup>

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114. *Arbaugh*, 546 U.S. at 511 (citing *Steel Co.*, 523 U.S. at 91); see also e.g. *Winnett v. Caterpillar Inc.*, 553 F.3d 1000 (6th Cir. 2009); *Beazer E., Inc. v. Mead Corp.*, 525 F.3d 255 (3d Cir. 2008); *DDB Techs., L.L.C. v. MLB Adv. Media, L.P.*, 517 F.3d 1284 (Fed. Cir. 2008); *Metro. Life Ins. Co. v. Price*, 501 F.3d 271 (3d Cir. 2007); *Moreno-Bravo v. Gonzales*, 463 F.3d 253 (2d Cir. 2006); *Bell v. Bonneville Power Admin.*, 340 F.3d 945, 951–52 (9th Cir. 2003). For one counterexample—where the lower court rejected the argument that *Steel Co.* undermined the precedential value of a prior decision—see *Hanson v. Wyatt*, 552 F.3d 1148, 1162–64 (10th Cir. 2008).

115. See Memo. from Patrick F. Philbin, Dep. Asst. Atty. Gen., & John C. Yoo, Dep. Asst. Atty. Gen., Off. Leg. Counsel, to William J. Haynes II, Gen. Counsel, Dept. Def., 1–4 (Dec. 28, 2001). The memorandum *did* stress that, “[b]ecause the issue has not yet been definitively been resolved by the courts, however, we caution there is some possibility that a district court would entertain such an application.” *Id.* at 9.

116. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 65 (D.D.C. 2002) (“[T]he Court concludes that the Supreme Court’s ruling in *Johnson v. Eisentrager*, and its progeny, are controlling and bars the Court’s consideration of the merits of these two cases.” (citation omitted)), *aff’d sub nom. Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom. Rasul v. Bush*, 542 U.S. 466.

Indeed, even though the D.C. Circuit conceded that “it follows that none of the Guantanamo detainees are within the category of ‘enemy aliens,’ at least as *Eisentrager* used the term,”<sup>117</sup> it nonetheless concluded that

the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States. . . . [U]nder *Eisentrager* these factors preclude the detainees from seeking habeas relief in the courts of the United States.<sup>118</sup>

The Supreme Court reversed, holding that *Eisentrager* was inapposite. As Justice Stevens explained, “the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners’ constitutional entitlement to habeas corpus. The Court had far less to say on the question of the petitioners’ statutory entitlement to habeas review.”<sup>119</sup> The *Eisentrager* Court, Stevens argued, proceeded on the assumption that, per *Ahrens*, statutory habeas was unavailable. In contrast, because *Ahrens* had since been overruled, the question before the Court in *Rasul* was only whether the statute conferred jurisdiction over the detainees’ claims, a question on which *Eisentrager* had nothing to say.<sup>120</sup> As a question of first impression, then, the *Rasul* majority concluded that the habeas statute *should* be read as conferring jurisdiction over the detainees’ petitions, given that the D.C. district court unquestionably had jurisdiction over the detainees’ custodians.<sup>121</sup>

Concurring in the judgment, Justice Kennedy argued that “the correct course is to follow the framework of *Eisentrager*,”<sup>122</sup> and then explained why he believed *Eisentrager* did not control the question of habeas jurisdiction over Guantánamo. Specifically, Kennedy explained that “[t]he facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities.”<sup>123</sup> Second, “the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status.”<sup>124</sup> In contrast, the *Eisentrager* petitioners were challenging their trial by military tribunal—in which they had received precisely that kind of adversarial status determination.<sup>125</sup>

Justice Scalia—on behalf of Chief Justice Rehnquist and Justice Thomas—dissented, arguing that “*Eisentrager*’s directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today.”<sup>126</sup> Instead, Scalia

117. *Al Odah v. U.S.*, 321 F.3d at 1140.

118. *Id.*

119. *Rasul*, 542 U.S. at 476 (emphasis in original) (citation omitted).

120. *Id.* at 479 (“Because *Braden* overruled the statutory predicate to *Eisentrager*’s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners’ claims.” (footnote omitted)).

121. *See id.* at 483–84.

122. *Id.* at 485 (Kennedy, J., concurring).

123. *Id.* at 487.

124. *Rasul*, 542 U.S. at 487–88.

125. *See id.* at 488.

126. *Id.* at 493 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

argued that *Braden* had left undisturbed the unavailability of statutory jurisdiction, and that the majority had no recourse other than to overrule *Eisentrager sub silentio*:

The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum-shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.<sup>127</sup>

Whatever the merits of the different readings of case law in the *Rasul* opinions, it is significant that no part of the dispute centered on *Eisentrager*'s constitutional analysis. Indeed, with the exception of a tantalizing yet obtuse footnote in Justice Stevens's majority opinion,<sup>128</sup> none of the Justices squarely engaged the constitutional questions lurking in the background. *Rasul* was, at least in the foreground, a case about statutory interpretation.

#### B. Boumediene's and Eisentrager's Constitutional Methodology

Congress eventually responded to *Rasul* (after the Supreme Court granted certiorari in *Hamdan*) in the Detainee Treatment Act of 2005 (DTA),<sup>129</sup> in which it codified the process created by the Department of Defense for detainee review,<sup>130</sup> providing for appeals of Combatant Status Review Tribunals (CSRTs) and military commission convictions to the D.C. Circuit,<sup>131</sup> and otherwise purporting to divest the federal courts of jurisdiction over the Guantánamo detainees' claims.<sup>132</sup> In *Hamdan v. Rumsfeld*,<sup>133</sup> the Supreme Court held that the DTA was insufficiently clear as to whether it applied to pending cases.<sup>134</sup> In response, Congress enacted the Military Commissions Act of 2006 (MCA),<sup>135</sup> which was far more explicit as to the stripping of jurisdiction:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>136</sup>

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127. *Id.* at 506.

128. *See id.* at 483 n. 15 (majority) (“Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”).

129. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739–46 (2005) (codified in scattered sections of 10, 28, and 42 U.S.C.).

130. In the aftermath of *Rasul* and *Hamdi*, the Defense Department created the Combatant Status Review Tribunals (CSRTs) to provide the amount of process it believed that those decisions required. *See Hamdan*, 548 U.S. at 570 n. 1 (describing the creation of the CSRT process).

131. DTA § 1005(e)(2)–(3), 119 Stat. at 2742.

132. *Id.* at § 1005(e)(1), 119 Stat. at 2742.

133. 548 U.S. 557.

134. *See id.* at 572–84.

135. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, and 28 U.S.C.).

136. *Id.* at § 7(a), 120 Stat. at 2635–2636 § 7(e) (codified at 28 U.S.C. § 2241(e) (2006)). Another (and heretofore overlooked) provision of the MCA, codified at 10 U.S.C. § 950j(b) (2006), provides comparable constraints on federal jurisdiction for individuals seeking collaterally to challenge their trial by military

In short, the MCA forced the constitutional question that the Supreme Court had evaded in *Rasul*, i.e., whether non-citizens detained at Guantánamo have a constitutional right to habeas corpus. For the D.C. Circuit, at least, that question was easily resolved on the authority of *Eisentrager*. As Judge Randolph explained, “*Johnson v. Eisentrager* ends any doubt about the scope of common law habeas,”<sup>137</sup> and “[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause.”<sup>138</sup> The Court of Appeals thus concluded that the Suspension Clause did not apply to the Guantánamo detainees, and that the MCA was therefore not unconstitutional to the extent it deprived the detainees of access to habeas corpus.<sup>139</sup>

The Supreme Court, in an opinion by Justice Kennedy, reversed.<sup>140</sup> Kennedy’s discussion of *Eisentrager* came as part of his larger analysis of the extraterritorial application of the Constitution, a survey that included a detailed summary of the *Insular Cases*,<sup>141</sup> *Reid v. Covert*,<sup>142</sup> and *In re Ross*.<sup>143</sup> As Justice Kennedy summarized, “noting the inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere, . . .’ the Court [in these cases] devised . . . a doctrine that allowed it to use its power sparingly and where it would be most needed.”<sup>144</sup> In other words, the Court’s precedents contemplated a doctrine based upon “[p]ractical considerations,” rather than formal territory- or citizenship-driven rules.<sup>145</sup>

“True,” Kennedy continued,

the Court in *Eisentrager* denied access to the writ, and it noted the prisoners “at no relevant time were within any territory over which the United States is sovereign, and [that] 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.”<sup>146</sup>

But Kennedy identified three reasons why *Eisentrager* should not be read as categorically resting the scope of the Suspension Clause on formal conceptions of sovereignty. First, Jackson’s opinion nonetheless devoted several pages to “practical considerations, [which] were integral to Part II of its opinion and came before the decision announced its holding.”<sup>147</sup> Second, and related, Kennedy emphasized that the *Eisentrager* Court did not focus its analysis on questions of territorial sovereignty. In his

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commission. See Stephen I. Vladeck, *Military Jurisdiction, the Right Not to Be Tried, and the Suspension Clause after Boumediene*, 16 Hum. Rts. Brief 6 (2008) (describing § 950j(b) and arguing why it is unconstitutional in light of *Boumediene*).

137. *Boumediene*, 476 F.3d at 990 (citation omitted).

138. *Id.* at 992.

139. *See id.*

140. *Boumediene*, 128 S. Ct. 2229.

141. The *Insular Cases* were actually a series of decisions issued over a roughly two-decade-long span concerning the applicability of specific constitutional provisions in the U.S. territories, including Puerto Rico, Guam, the Philippines, and Hawaii. *See id.* at 2254 (citing cases). *See generally* Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (U. Press Kan. 2006).

142. 354 U.S. 1 (1957) (plurality).

143. 140 U.S. 453 (1891).

144. *Boumediene*, 128 S. Ct. at 2255.

145. *See id.* at 2253–57 (citation omitted).

146. *Id.* at 2257 (citation omitted) (alteration in original).

147. *Id.*

words,

That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality.<sup>148</sup>

Finally, Kennedy noted that if *Eisentrager* really *had* adopted a formalistic approach to the extraterritorial scope of the Constitution, it would have been "a complete repudiation" of the Court's approach in the *Insular Cases*, as largely adopted after *Eisentrager* in *Reid v. Covert*, but "[o]ur cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."<sup>149</sup>

Justice Kennedy's opinion went on to suggest that the government's formalistic approach would raise troubling separation-of-powers concerns as well,<sup>150</sup> but his analysis of *Eisentrager* is what matters for present purposes. Reiterating his concurrence in the judgment in *Rasul*, Kennedy observed that

[A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>151</sup>

Each of these factors, in Kennedy's view, tilted in favor of extending the Suspension Clause to apply to non-citizens detained at Guantánamo Bay.<sup>152</sup> Although Kennedy conceded that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution,"<sup>153</sup> he suggested that "the cases before us lack any precise historical parallel. . . . Under these circumstances the lack of a precedent on point is no barrier to our holding."<sup>154</sup> Instead, the Court concluded that the Suspension Clause "has full effect at Guantanamo Bay,"<sup>155</sup> and proceeded to decide whether the DTA and MCA between them satisfied the Suspension Clause (by providing an adequate substitute for habeas).<sup>156</sup> Reasoning that the statutes failed to so provide, the Court struck down section 7 as applied to the Guantánamo detainees.<sup>157</sup>

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148. *Id.* at 2258.

149. *Boumediene*, 128 S. Ct. at 2258.

150. *See id.* at 2258–59. I devote far more attention to the origins and significance of Kennedy's separation-of-powers analysis in Vladeck, *supra* note 15.

151. *Boumediene*, 128 S. Ct. at 2259.

152. *See id.* at 2259–62.

153. *Id.* at 2262.

154. *Id.*

155. *Id.*

156. *See Boumediene*, 128 S. Ct. at 2263–74.

157. *See id.* at 2275–77.

In addition to a dissent from Chief Justice Roberts focusing on Kennedy's analysis of whether the DTA and MCA provided an adequate substitute for habeas corpus, Justice Scalia's vigorous dissent focused on the majority's analysis of *Eisentrager* and the Suspension Clause's extraterritorial application. In his words, "[t]he Court purports to derive from our precedents a 'functional' test for the extraterritorial reach of the writ, which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson v. Eisentrager*, conclusively establishes the opposite."<sup>158</sup> Thus, after quoting various passages from Jackson's *Eisentrager* opinion, Scalia concluded that "*Eisentrager* thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."<sup>159</sup>

Justice Scalia went on to belittle the majority's suggestion that *Eisentrager* turned on "practical considerations," noting that *Eisentrager* cited such concerns "not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad . . . [but] to support *its holding* that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances*."<sup>160</sup> Thus:

There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory, and *Eisentrager* could not be clearer that the privilege of habeas corpus does not extend to aliens abroad. By blatantly distorting *Eisentrager*, the Court avoids the difficulty of explaining why it should be overruled. The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court's "functional" test that does not (and never will) provide clear guidance for the future. *Eisentrager* forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. . . . It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.<sup>161</sup>

Scalia then went on to suggest why, even on a blank slate, the Court should not extend the Suspension Clause to the non-citizens detained at Guantánamo, but the gravamen of his dissent was the charge that the Court was unfaithful to *Eisentrager*. Scholarly critiques of *Boumediene* thus far have similarly focused on the majority's fidelity to precedent—or, more precisely, its lack thereof.<sup>162</sup>

What the above analysis should make clear is that Jackson's opinion in *Eisentrager* has, as then-Solicitor General Paul Clement put it at oral argument in the Supreme Court in *Hamdan*, "an awful lot of alternative holdings."<sup>163</sup> At most, the majority opinion seemed to conclude that *enemy* aliens detained abroad have no constitutional right of

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158. *Id.* at 2298 (Scalia, J., Roberts C.J., Thomas & Alito, JJ., dissenting) (citations omitted).

159. *Id.* at 2298–99.

160. *Id.* at 2299 (emphasis in original).

161. *Boumediene*, 128 S. Ct. at 2302 (citations omitted).

162. See e.g. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 Cato S. Ct. Rev. 23, 25–32 (arguing that *Boumediene* is largely unfaithful to *Eisentrager*); Robert J. Pushaw, *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?* 84 Notre Dame L. Rev. \_\_\_ (forthcoming 2009) (ms. at 79, copy on file with author).

163. Oral Argument Transcr. at 72, *Hamdan*, 548 U.S. 557 (statement of Sol. Gen. Paul Clement) (available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-184.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf)).

access to habeas corpus, and even that much may have turned on the fact-specific conclusions that Jackson reached in Parts III and IV, including (1) that the detainees there had been convicted of war crimes by a military tribunal; (2) that the Constitution did not bar their trial by military tribunal; and (3) that the military tribunal properly exercised jurisdiction over the detainees. As such, it is simply unclear, looking backwards at *Eisentrager*, how central a role each of these considerations played in the Court's analysis of whether habeas corpus should extend to the detainees. It would certainly not be fair to call *Eisentrager* a "drive-by jurisdictional ruling," as Justice Scalia used the term in *Steel Co.*, but Jackson's analysis does seem to allow for disagreement among reasonable readers over the significance of the merits. In such circumstances, *Steel Co.*'s logic seems to suggest that one should take *Eisentrager*'s discussion of the merits into account in ascertaining the specific contours of the jurisdictional rule it enunciated.

After all, if *Eisentrager* meant to preclude the constitutional protection of habeas corpus to all non-citizens outside the territorial United States, none of its discussion of the detainees' status as "enemy" aliens should have mattered. If, instead, *Eisentrager* meant to deny a constitutional right to habeas corpus to all *enemy* aliens outside the territorial United States, the conclusions that the Fifth Amendment did not bar their trial by military tribunal, and that the tribunal that convicted the detainees properly exercised jurisdiction, equally should not have mattered. Viewed in light of *Steel Co.*, though, these discussions would not just have been irrelevant; they would have been almost lawless to the extent that *Eisentrager*'s jurisdictional rule rendered them irrelevant. As seen through *Steel Co.*'s lens, then, the presumption should be that the facts *did* matter, and that the *Eisentrager* majority did not mean to reach cases where non-citizens held outside the territorial United States either had not been convicted by a military tribunal, or had been convicted by a tribunal that acted without jurisdiction.

To be sure, reasonable people will disagree—strongly, I am sure—over the extent to which the Constitution, including the Suspension Clause, *should* apply to non-citizens detained outside the territorial United States. My point here is only that whether or not *Eisentrager* or *Boumediene* were rightly decided, the Court in the latter case was not bound in any meaningful way to follow the "rule" articulated in the former.

### C. Omar, Munaf, and Hirota's "Foregoing Circumstances"

Compared to the competing views of the significance of *Eisentrager* to the Guantánamo litigation, the dispute over the relevance of *Hirota* in the cases of two U.S. citizens detained in Iraq has proven far less controversial.<sup>164</sup>

*Hirota* first surfaced in a 2004 D.C. district court decision arising out of allegations by a U.S. citizen that he was subjected to the government's "extraordinary rendition" program.<sup>165</sup> Although the citizen—Omar Abu Ali—was in the formal custody of Saudi Arabia at the time he filed his petition, he alleged that he was in the "constructive

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164. Indeed, scholarly discussions of *Munaf* have generally been few and far between, except as footnotes to discussions of *Boumediene*. For one of the few exceptions, see *The Supreme Court, 2007 Term—Leading Cases*, 122 Harv. L. Rev. 415 (2008).

165. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 55–57 (D.D.C. 2004).

custody” of the U.S. government, which was therefore sufficient to satisfy the jurisdictional prerequisites of the federal habeas statute.<sup>166</sup> In response, the government moved to dismiss, arguing that *Hirota* precluded the exercise of habeas jurisdiction over any individual in foreign custody. The district court denied the motion to dismiss, though, concluding that:

The United States can hardly rely on a decision involving *non-resident aliens* challenging the sentence of a foreign military tribunal as controlling precedent for a rule that *citizens* lack any rights in habeas to challenge their detention (without charges, much less convictions) by a foreign government allegedly at the behest of the United States.<sup>167</sup>

Although the district court ordered discovery with respect to the U.S. government’s role in Abu Ali’s detention in Saudi Arabia, the government subsequently mooted the petition—and the *Hirota* question—by transferring Abu Ali stateside and indicting him on various criminal charges.<sup>168</sup>

Instead, the applicability of *Hirota* came to the forefront in a pair of cases arising out of the detention of two U.S. citizens by the Multinational Force–Iraq (“MNF–I”), Shawqi Ahmed Omar and Mohammed Munaf. Omar sought to challenge his transfer to the custody of the Central Criminal Court of Iraq (“CCC–I”), where he claimed he faced trial. Munaf, in contrast, had already been convicted and sentenced to death by the CCC–I, and sought to collaterally attack his conviction and sentence through habeas corpus.<sup>169</sup>

In Omar’s case, the district court concluded that *Hirota* did not preclude jurisdiction, relying on the fact that Omar was a U.S. citizen, that he claimed that he was in U.S. (rather than international) custody, and that:

the *Hirota* case was decided prior to significant evolution of the Supreme Court’s habeas jurisprudence. In the time between the *Hirota* decision and the Supreme Court’s most recent habeas decisions, the Supreme Court has expanded and clarified the application of the “Great Writ” to better fulfill its ultimate purpose of allowing an individual to present “a simple challenge to physical custody imposed by the Executive.”<sup>170</sup>

The D.C. Circuit unanimously affirmed the district court’s jurisdictional analysis, although it divided on the merits—i.e., on Omar’s entitlement to a preliminary injunction.<sup>171</sup> But the panel was clear that *Hirota* did not control. As Judge Tatel wrote for the court, “*Hirota* nowhere explains which ‘circumstances’ were controlling. Nor does anything in the opinion hold that federal courts lack habeas jurisdiction whenever, as the government insists, American officials detaining a petitioner are functioning as part of a multinational force.”<sup>172</sup> Thus, “*Hirota* would ‘control’ this case only if the

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166. For a more detailed discussion of the “constructive custody” requirement, see Karen E. Shafir, Student Author, *Habeas Corpus, Constructive Custody, and the Future of Federal Jurisdiction after Munaf*, 16 U. Miami Intl. & Comp. L. Rev. 91 (2008).

167. *Abu Ali*, 350 F. Supp. 2d at 55 (emphasis in original).

168. See *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005); see also *U.S. v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009).

169. See Vladeck, *supra* n. 1, at 1535–39 (summarizing the background).

170. See *Omar v. Harvey*, 416 F. Supp. 2d 19, 25 (D.D.C. 2006) (citation omitted).

171. See *Omar*, 479 F.3d 1.

172. *Id.* at 7.

‘circumstances’ significant to the Court’s decision are present here. Two circumstances are clearly the same: detention overseas and the existence of a multinational force. But two other circumstances—foreign citizenship and criminal conviction—are absent.”<sup>173</sup>

Munaf’s case, in contrast, raised a more challenging question, since he *had* been convicted by the CCC–I. Based on that fact, the district court found that *Hirota* was indistinguishable, concluding that:

Petitioner is . . . under the actual, physical custody of MNF–I, a multinational entity separate and distinct from the United States or its army. He is in the constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him, and which controls his ultimate disposition. Petitioner thus has two custodians, one actual and the other constructive: MNF–I and the government of Iraq. Petitioner has not shown that either custodian is the equivalent of the United States for the purposes of habeas corpus jurisdiction.<sup>174</sup>

Tellingly, though, Judge Lamberth did not believe that Munaf’s case was thus distinguishable from Omar’s; rather, he believed that *Omar* was wrongly decided.<sup>175</sup>

On appeal, a different panel of the D.C. Circuit agreed with Judge Lamberth that *Hirota* was indistinguishable, although it believed such a holding was faithful to *Omar*. As Judge Sentelle wrote, “Our result is required by the Supreme Court’s decision in *Hirota v. MacArthur*, as that decision has been applied by this court in *Flick v. Johnson* and interpreted by *Omar v. Harvey*.”<sup>176</sup> Specifically,

Unlike *Omar*, the instant case is controlled by *Hirota* and *Flick*. The MNF–I is a multinational force, authorized by the United Nations Security Council, that operates in Iraq in coordination with the Iraqi government. The CCCI is an Iraqi criminal court of nationwide jurisdiction and is administered by the government of Iraq; it is not a tribunal of the United States. Accordingly, the district court has no power or authority to hear this case.<sup>177</sup>

Thus, although the judges in the majority were at pains to point out that they did “not mean to suggest that we find the logic of *Hirota* especially clear or compelling,”<sup>178</sup> they nonetheless felt bound to follow what they believed was valid precedent.<sup>179</sup>

The Supreme Court granted certiorari in both cases and consolidated them for

173. *Id.* In her partial dissent, Judge Brown took issue with the suggestion that *Hirota* could be distinguished based largely on citizenship—but otherwise agreed that it was not controlling. *See id.* at 15 n. 1 (Brown, J., dissenting in part).

174. *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 122, 124 (D.D.C. 2006) (“*Hirota* and *Yamashita*, taken together, recognized that General MacArthur acted in two capacities, as both an American and Allied commander, and evaluated the derivation of authority by which he and his subordinates held prisoners in custody. Therefore, prisoners who were in custody of the United States alone, under the sole authority of the United States, could invoke habeas jurisdiction. But prisoners who were held pursuant to the authority of the Allies, and who were in the physical custody of American soldiers acting as members of the Allied Powers, were in the custody of the Allies, not the United States, and therefore could not invoke the jurisdiction of the U.S. courts.” (footnote omitted)).

175. *Id.* at 128 n. 12.

176. *Munaf*, 482 F.3d at 583.

177. *Id.*

178. *Id.* at 584.

179. *See id.* at 585–86 (Randolph, J., concurring in the judgment). Judge Randolph—author of the majority opinions in *Rasul*, *Hamdan*, and *Boumediene*—concurred in the judgment. He believed that the courts *did* have jurisdiction notwithstanding *Hirota*, but that Munaf was bound to lose on the merits in any event. *Id.*

argument.<sup>180</sup> And although the Iraqi courts vacated Munaf's conviction while the appeal was pending,<sup>181</sup> the Court found the factual gymnastics performed by the district courts and the D.C. Circuit wholly unnecessary. After noting how the plain text of 28 U.S.C. § 2241 seemed to contemplate jurisdiction, Chief Justice Roberts quickly disposed of the government's contention that *Hirota* counseled to the contrary:

The Court in *Hirota* . . . may have found it significant, in considering the nature of the tribunal established by General MacArthur, that the Solicitor General expressly contended that General MacArthur, as pertinent, was not subject to United States authority. The facts suggesting that the tribunal in *Hirota* was subject to an "unbroken" United States chain of command were not among the "foregoing circumstances" cited in the *per curiam* opinion disposing of the case . . . . Indeed, arguing before this Court, Solicitor General Perlman stated that General MacArthur did not serve "under the Joint Chiefs of Staff," that his duty was "to obey the directives of the Far Eastern Commission and not our War Department," and that "no process that could be issued from this court . . . would have any effect on his action." Here, in contrast, the Government acknowledges that our military commanders do answer to the President.

Even if the Government is correct that the international authority at issue in *Hirota* is no different from the international authority at issue here, the present "circumstances" differ in another respect. These cases concern American citizens while *Hirota* did not, and the Court has indicated that habeas jurisdiction can depend on citizenship. "Under the foregoing circumstances," we decline to extend our holding in *Hirota* to preclude American citizens held overseas by American soldiers subject to a United States chain of command from filing habeas petitions.<sup>182</sup>

Although the Court reached out to decide the merits (where neither lower court had), and held that neither Omar nor Munaf was entitled to relief,<sup>183</sup> its jurisdictional holding seemed to limit *Hirota* to *all* of its unique facts—and on the same day as *Boumediene* comparably limited *Eisentrager*.

#### D. Implications: The "Problem" of Jurisdictional Non-Precedent

There is an obvious difference, of course, between *Hirota* and *Eisentrager*. The decision in the former case was deliberately cryptic and vague as to which of the various possible grounds it was based on. The decision in the latter was almost the opposite—suggesting first that the courts lacked jurisdiction over any enemy alien held outside the territorial United States, and then attempting to explain why these detainees, in particular, had no cognizable claim on the merits.

But the exchanges over *Eisentrager* in the Supreme Court in *Boumediene* and over

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180. See *Geren*, 128 S. Ct. 741 (mem.).

181. *Munaf*, 128 S. Ct. at 2215.

182. *Id.* at 2217–18 (citations and footnote omitted). In a footnote, Chief Justice Roberts noted another relevant "circumstance"—the fact that unlike Omar and Munaf, the petitioners in *Hirota* sought relief as an original matter in the Supreme Court. See *id.* at 2218 n. 3.

183. See *id.* at 2218–28. Justice Souter—joined by Justices Ginsburg and Breyer—concurring separately, emphasizing the narrowness of the majority's holding on the merits, and the extent to which the decision would not foreclose relief in appropriate future cases, including those where "the probability of torture is well documented, even if the Executive fails to acknowledge it." *Id.* at 2228 (Souter, Ginsburg, & Breyer, JJ., concurring).

*Hirota* in the lower courts in *Omar* and *Munaf* highlight how the cases are perhaps more similar than first appears, because in both cases, the majority's opinion reasonably left unclear how significant the factual circumstances actually were. And that is where *Steel Co.* comes in, because it suggests that courts lack the power to unnecessarily conflate jurisdiction with the merits, and must endeavor to stress the basis on which their holding rests. Put another way, *Steel Co.* serves as a reminder as to what it actually means for a rule to be "jurisdictional"—simply put, nothing else should matter once the facts necessary to show that a jurisdictional bar applies have been established. Thus, as I have previously suggested with respect to *Eisentrager*, "if the writ protected by the Suspension Clause could not reach noncitizens outside the territorial jurisdiction of the United States then the merits should not have mattered."<sup>184</sup>

The significance of *Steel Co.*, then, is not in undermining the viability of pre-*Steel Co.* precedent per se, but in requiring contemporary jurists to resolve the extent to which "jurisdictional" dismissals in pre-*Steel Co.* cases can meaningfully be separated from a more specific analysis of the merits. When such separation is not possible, the earlier decision's vitality as precedent is questionable, at least on even remotely distinguishable facts. One need look no further than the unanimous Court's treatment of *Hirota* in *Munaf* for evidence of that point. And that is the point that I think has been lost on commentators post-*Steel Co.*, for these cases really do become "non-precedent," citable as much to support the opposite of their holdings as to support their applicability in factually distinguishable cases. Perhaps, as in *Hirota*, the original court deliberately sought to minimize the precedential effect of their analysis. Perhaps not. Either way, if *Boumediene* and *Munaf* are any guide, we have not even begun to fully appreciate the significance to past precedent of the methodological shift that *Steel Co.* demands.

#### IV. CONCLUSION

Although the relationship between *Boumediene* and *Eisentrager* is more superficially interesting—and more controversial—I was actually motivated to undertake this project by *Munaf*.<sup>185</sup> I argued in an earlier article that, notwithstanding the deliberately vague language of the Supreme Court's 1948 decision in *Hirota*, there was no easy or obvious *theory* on which to distinguish *Hirota* from the modern cases.<sup>186</sup> In short, the article assumed that the decision in *Hirota* must have turned on the Court's construction of *some* constitutional provision, and none of the likely candidates, I reasoned, could meaningfully countenance the types of distinctions that subsequent courts and commentators have argued for, including citizenship, formal custody, or the existence *vel non* of a conviction before a foreign or international tribunal.<sup>187</sup>

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184. Vladeck, *supra* n. 39, at 298.

185. As noted above, I co-authored an amicus brief in support of jurisdiction in *Munaf* that harped on the myriad factual distinctions between the *Omar* and *Munaf* cases and *Hirota*. See Br. for Amici Curiae Professors of Constitutional Law and of the Federal Courts in Support of the Habeas Petitioners, *Munaf*, 128 S. Ct. 2207. Many of the ideas in this article were prompted by my work on that brief.

186. See Vladeck, *supra* n. 1.

187. See *id.* at 1498–04 (describing the project). One thought was that *Hirota* could be distinguished on the narrowest possible ground—i.e., that the defect ran only to the Court's original jurisdiction. Even if that were a faithful reading of *Hirota*, though (and I am not sure it is), the D.C. Circuit extended *Hirota* to the lower courts in *Flick I*, 174 F.2d at 984–86.

Thus, in my view, the only way that *Hirota* could make sense is if it turned on propositions that would compel its applicability to most—if not all—of the current cases. In other words, I thought the optimal outcome in *Munaf* would be for the Court to overrule *Hirota* outright, and to thereby vitiate any remaining questions as to how far its cryptic holding extends. That argument, though, presupposes that *Hirota* was not just wrongly reasoned, but wrongly *decided*. And on that point, I am not convinced. Instead, I have come to think that *Munaf* does right by *Hirota*, and that *Steel Co.* and the methodological shift it heralded help to explain why.

In a strange way, *Eisentrager* is the easier case for my thesis, because it is so clear from a careful and nuanced reading of Jackson's opinion that Jackson just was not clear, an unusual shortcoming for one of most highly regarded writers in the Court's history.<sup>188</sup> It is possible, I think, that Justice Scalia may be right—i.e., that Jackson meant to go through the merits of the detainees' claims in Parts III and IV simply to show that a categorical jurisdictional rule predicated simply on citizenship and territory would not produce unjust results. But it is equally possible that there was a point to his analysis—that the merits mattered, at least to him, and the result might have been different where the petitioners had a meritorious claim. Put another way, there is nuance here, even when the political atmospherics seem so black and white.

And that is the significance of *Steel Co.*, for it suggests that we should not assume the broader implications of jurisdictional dismissals when narrower constructions are available. More than a rule of convenience, *Steel Co.* is a rule of necessity, for the Court was unyielding in emphasizing that the Article III courts lack the authority to reach the merits when the merits do not matter. The logical inference, then, is that judicial discussions of the merits *do* matter and should be understood as such whenever assessing the value and continuing vitality of pre-*Steel Co.* decisions purporting to articulate “jurisdictional” rules.

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188. As I alluded to above, Jackson's papers refute the possibility that we might trace *Eisentrager*'s lack of analytical precision to the other Justices in the majority. Other than Justice Frankfurter, whose edits did little to alter the structure or substance of the draft, and Justice Clark, who offered one minor revision, the other three Justices in the majority (Chief Justice Vinson and Justices Reed and Minton) signed onto Jackson's circulated opinion without condition.

