

United States, Johnson v. Eisentrager

[See also Case No. 266, United States, Habeas Corpus for Guantanamo Detainees]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: U.S. Supreme Court JOHNSON v. EISENTRAGER, 339 U.S. 763 (1950); June 5, 1950; available on <http://laws.findlaw.com/us/339/763.html>]

U.S. Supreme Court

JOHNSON v. EISENTRAGER, 339 U.S. 763 (1950)

JOHNSON, SECRETARY OF DEFENSE, *ET AL.*

v. EISENTRAGER, ALIAS EHRHARDT, *ET AL.*

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 306

Argued April 17, 1950

Decided June 5, 1950

[...]

MR. JUSTICE JACKSON delivered the opinion of the Court.

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

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

The prisoners were repatriated to Germany to serve their sentences. [...]

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

I

[...]

It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. While his lot is far more humane [...] and endurable than the experience of our citizens in some enemy lands, it is still not a happy one. But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage. [...]

American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. [...] Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals – wherever they may be – in arms, intrigue and sabotage, attest [...] this Court's earlier teaching that in war "every individual of the one nation must acknowledge every individual of the other nation as his own enemy – because the enemy of his country." [...] And this without regard to his individual sentiments or disposition. [...] The alien enemy is bound by an allegiance which

commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, [...] regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign. [...]

The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied. [...] A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today." [...]

But the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy. [...]

II

[...]

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied [...] protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States. [...]

A basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court. [...] 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.

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands.[...] [T]he writ of *habeas corpus* is generally unknown. [...]

Despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their [...] support and to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens. [...] After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears. [...]

Discussion

1.
 - a. Did a German national, by continuing to fight, together with Japan, against the US after 8 May 1945, violate the “laws of war”? IHL?
 - b. If Geneva Convention III had applied, would the petitioners have been prisoners of war once they had fallen into the power of the US? If they had been prisoners of war, could they have been sentenced for what they did? Without a possibility to petition the US Supreme Court? (GC III, Arts 82, 84, 85, 99, 102 and 106)
 - c. If the petitioners had been civilians protected by Geneva Convention IV, could they have been sentenced for what they did? Without a possibility to petition the US Supreme Court? (GC IV, Arts 64, 66, 70 and 73)
2. How do you consider the restrictions imposed under US law against “enemy aliens”? Are they in conformity with the rules of IHL? (HR, Art. 23(h); GC IV, Arts 35-43)
3. May a protected person bring a legal action before the courts of the adverse party in whose power he or she is? Even if he or she is not on the enemy’s own territory? (HR, Art. 23(h); GC III, Art. 14(3); GC IV, Art. 38)
4. May a prisoner of war present a *habeas corpus* petition to the courts of the detaining power? May a civilian enemy alien present a *habeas corpus* petition to the courts of the detaining power? Is every enemy national either a prisoner of war or a protected civilian? (GC III, Arts 4 and 5; GC IV, Art. 4)