

# Deconstructing *Hirota*: Habeas Corpus, Citizenship, and Article III

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*The jurisdiction of the federal courts to consider habeas petitions brought by detainees held as part of the “war on terrorism” has been a popular topic to courts and commentators alike. Little attention has been paid, however, to whether the Constitution itself interposes any jurisdictional limits over such petitions. In a series of recent cases, the U.S. government has invoked the Supreme Court’s obscure (and obtuse) 1948 decision in *Hirota v. MacArthur* for the proposition that Article III forecloses jurisdiction over any petition brought by a detainee in foreign or international custody, including that of the “Multinational Force—Iraq.” This Article takes on that argument, along with the citizenship-based distinction that the courts in the current cases have thus far drawn to distinguish *Hirota*, and explains why Article III imposes no such bar, even where the detainee is not a U.S. citizen. Instead, Article III only bars such a petition if the detainee is not in the actual or constructive custody of the United States. It concludes that the distinction that courts have drawn in the current cases is not only untenable, but is indicative of *Hirota*’s deeper flaw—namely, that it misconceived the relationship between Article III, citizenship, and habeas corpus, and obfuscated the more important debate over the scope of the substantive rights enforceable through the “Great Writ.”*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1498
I. <i>HIROTA</i> . . . . .	1505
A. <i>QUIRIN AND YAMASHITA</i> . . . . .	1506
B. U.S. CITIZENS AND THE GERMAN POW CASES . . . . .	1509
C. WHY “ORIGINAL” PETITIONS? . . . . .	1511
D. JUSTICE JACKSON FORCES THE COURT’S HAND—OR WAS IT JUSTICE RUTLEDGE? . . . . .	1515
E. THE QUESTIONS <i>HIROTA</i> LEFT UNANSWERED . . . . .	1518
1. <i>Hirota</i> and “the Judicial Power of the United States” . . . . .	1519

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2. <i>Hirota</i> and the Appellate Jurisdiction of the Supreme Court . . . . .	1521
F. JUSTICE DOUGLAS’S CONCURRENCE . . . . .	1522
II. <i>HIROTA</i> DISCUSSED, APPLIED, AND MISUNDERSTOOD . . . . .	1525
A. <i>FLICK</i> . . . . .	1526
B. <i>EISENTRAGER</i> . . . . .	1527
C. AFTER <i>EISENTRAGER</i> . . . . .	1531
III. THE MODERN <i>HIROTA</i> : <i>ABU ALI</i> AND <i>OMAR</i> . . . . .	1532
A. <i>ABU ALI</i> AND CONSTRUCTIVE CUSTODY . . . . .	1532
B. <i>OMAR</i> , <i>MOHAMMED</i> , AND JURISDICTION OVER “MULTINATIONAL” FORCES . . . . .	1535
C. THE COURT’S EVOLVING JURISPRUDENCE: WERE <i>ABU ALI</i> AND <i>OMAR</i> RIGHT? . . . . .	1539
D. STRUCTURAL RIGHTS AND ARTICLE III: WAS JUSTICE DOUGLAS RIGHT? . . . . .	1541
E. AN ARTICLE III BARRIER: WAS JUSTICE DOUGLAS WRONG? . . . . .	1545
F. WHITHER <i>HIROTA</i> ? . . . . .	1548
CONCLUSION . . . . .	1549

#### INTRODUCTION

In two recent cases, a pair of federal district court judges (and the D.C. Circuit, on appeal) sustained subject-matter jurisdiction over habeas petitions brought by U.S. citizens in the custody of Saudi Arabia and the Multinational Force-Iraq (“MNF-I”), respectively.<sup>1</sup> In both cases, the courts rejected the government’s argument that federal jurisdiction was foreclosed by the Supreme Court’s 1948 decision in *Hirota v. MacArthur*.<sup>2</sup> *Hirota*, in the government’s view, holds that the federal jurisdiction contemplated by Article III does not

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1. *Omar v. Harvey*, 416 F. Supp. 2d 19, 27 (D.D.C. 2006), *aff’d*, No. 06-5126, 2007 WL 420137 (D.C. Cir. Feb. 9, 2007); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004). In a third case, decided after the first two, the district court concluded that there was no jurisdiction. *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 117 (D.D.C. 2006), *aff’d sub nom. Mohammed ex rel. Munaf v. Geren*, No. 06-5324 (D.C. Cir. Apr. 6, 2007); *cf. In re Hussein*, 468 F. Supp. 2d 126, 129–30 (D.D.C. 2006) (holding that there is no federal jurisdiction over a non-citizen seeking post-conviction relief in the custody of the MNF-I); *Ramadan v. Bush*, No. 07-0297, 2007 WL 589795, at \*1 (D.D.C. Feb. 27, 2007) (same).

2. 338 U.S. 197 (1948) (per curiam).

extend to petitions filed by *anyone* in foreign or international custody. Distinguishing *Hirota*, both cases concluded that the rule for which it stands does not apply to U.S. citizens;<sup>3</sup> so long as the petitioners sufficiently allege that they are in the “constructive custody” of the United States, federal jurisdiction exists.

Very little has been written about *Hirota*. Even less has been written about the implications of the absolute jurisdictional rule it purportedly erects. Given media reports about the U.S. government’s program of “extraordinary rendition,”<sup>4</sup> and the ever-increasing upsurge in U.S.-related overseas detention as part of the war on terrorism,<sup>5</sup> *Hirota*’s potential sweep is breathtaking, and the time is ripe for a thorough recounting of the decision, its background, and its implications.

Questions about *Hirota* abound. Just what *did* the decision hold? Why is it so difficult to unpack? Why was it so quickly relegated to little more than a historical footnote, only to resurface so quickly after September 11? Perhaps most importantly, in broader strokes, can Article III possibly countenance either (1) the absolute jurisdictional rule that the government has argued for in *Abu Ali* and *Omar*; or (2) the citizenship-based distinction that both district courts used to conclude to the contrary? If nothing else, these questions suggest that the deconstruction of *Hirota* is long overdue.

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Baron Kōki Hirota, the “‘godfather’ of Japanese politics in the 1930s,”<sup>6</sup> was the one civilian sentenced to death by the Tokyo war crimes tribunal—officially, the International Military Tribunal for the Far East (IMTFE).<sup>7</sup> A one-time Prime Minister of Japan and Foreign Minister during the earliest stages of World War

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3. See, e.g., *Omar*, 2007 WL 420137, at \*5 (noting that one of the two major distinctions between *Omar* and *Hirota* is the citizenship of the petitioner); *Omar*, 416 F. Supp. 2d at 24–25; *Abu Ali*, 350 F. Supp. 2d at 55. *But see Omar*, 2007 WL 420137, at \*13 n.1 (Brown, J., dissenting in part) (rebutting that citizenship was a deciding factor in *Hirota*).

As this Article went to press, a divided panel of the D.C. Circuit affirmed the dismissal of a habeas petition brought by a U.S. citizen in the custody of the MNF-I. See *Munaf*, No. 06-5324, slip op. at 2. The sole point of disagreement between the majority and Judge Randolph, who concurred in the judgment, was whether *Hirota*’s jurisdictional rule applied to U.S. citizens. *Compare id.* at 3–4, *with id.* at 1–2 (Randolph, J., concurring in the judgment).

4. See, e.g., Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, THE NEW YORKER, Feb. 14, 2005, at 106; see also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

5. One significant class of such detainees is those transferred from Guantánamo. For a cogent and comprehensive survey, see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006).

6. JOHN L. GINN, SUGAMO PRISON, TOKYO: AN ACCOUNT OF THE TRIAL AND SENTENCING OF JAPANESE WAR CRIMINALS IN 1948 BY A U.S. PARTICIPANT 20 (1992); see generally SABURO SHIROYAMA, WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI (John Bester trans., 1977).

7. For surveys of the background of the International Military Tribunal for the Far East (IMTFE), see ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987); TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS (2001); and RICHARD H. MINEAR, VICTORS’ JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971). See also HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 62–86 (1999); Zhang Wanhong, *From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the*

II in Asia, Hirota was convicted on three of nine counts—for his role as one of the leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or “conspiracy . . . [to wage] . . . wars of aggression, and wars in violation of international law”; for “waging a war of aggression against . . . China”; and for deliberately and recklessly disregarding his duty to take adequate steps to prevent atrocities.<sup>8</sup> Effectively, Hirota was convicted for his complicity in the Rape of Nanking.<sup>9</sup> One of twenty-eight “Class A”<sup>10</sup> defendants tried before the IMTFE,<sup>11</sup> Hirota was one of the eleven who sought post-conviction relief in the courts of the United States.<sup>12</sup>

The relief Hirota sought was, to be sure, atypical. Bypassing the lower federal courts, Hirota filed a petition for a writ of habeas corpus directly in the U.S. Supreme Court, invoking the Court’s “original”<sup>13</sup> jurisdiction over such petitions pursuant to section 14 of the Judiciary Act of 1789,<sup>14</sup> the descendant of which provides that “[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”<sup>15</sup> Although irregular, the procedure was hardly uncommon, especially after World War II. Instead, Hirota’s was one of hundreds of similar applications for “original” habeas relief filed in the U.S. Supreme Court by Axis prisoners convicted of war crimes by American or Allied military tribunals. The Court denied every other original application without argument or an opinion (and usually by a 4–4 vote with Justice Jackson recused). *Hirota* would be the one original war crimes case where the Court heard argument and

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*Nuremberg Trials*), 27 CARDOZO L. REV. 1673 (2006). For the charges against each defendant and the verdicts, see MINEAR, *supra*, at 203.

8. See MINEAR, *supra* note 7, at 198–99.

9. See BRACKMAN, *supra* note 7, at 407; GINN, *supra* note 6, at 19–20. As Ginn describes, “Hirota was either derelict in his duty by not insisting before the cabinet that immediate action be taken to stop the [Nanking] atrocities, or he failed in other actions available to him to get the same results.” GINN, *supra* note 6, at 20.

10. The Tokyo defendants were divided into three groups: “A” defendants were those charged with crimes against peace; “B” defendants were charged with “conventional” war crimes; and “C” defendants were charged with crimes against humanity. See JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 456 (1999).

11. Notwithstanding his complicity for Nanking, Hirota’s indictment was hardly a given. The U.S. prosecutor responsible for developing the charges against Hirota described it as a “borderline case,” at best. BRACKMAN, *supra* note 7, at 80; see also DOWER, *supra* note 10, at 459 & 628 n.29 (noting that Hirota was convicted by the IMTFE with a 6 to 5 vote).

12. Along with an application filed by General Kenji Doihara and one filed by Marquis Koichi Kidō on behalf of himself and four additional defendants, which the Supreme Court considered together with Hirota’s, the Court also rejected an application for leave to file an original habeas petition by four other convicted IMTFE defendants on the same day it decided *Hirota*. See *Kimura v. MacArthur*, 335 U.S. 898 (1948) (mem.).

13. See *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring) (“Such a petition is commonly understood to be ‘original’ in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court’s appellate (rather than original) jurisdiction.” (citing Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153)).

14. Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 73, 81–82 (1789).

15. 28 U.S.C. §2241(a) (2000).

issued more than a summary disposition—although not much more, as it would turn out.

That *Hirota* was unusual, even among the war crimes cases, was clear from the outset. Four Justices publicly dissented from the purely procedural order setting the case for argument,<sup>16</sup> provoking a response (given his tie-breaking vote to the contrary) from Justice Jackson, who would otherwise recuse himself from the subsequent proceedings because of his role as lead American prosecutor at the International Military Tribunal at Nuremberg.<sup>17</sup> On the merits, the per curiam decision denying the applications ran only three short and largely inscrutable paragraphs. The only other opinion—a lengthy concurrence by Justice Douglas—was filed more than six months later.<sup>18</sup> And Justice Rutledge, who announced that he was reserving his decision for a later date, died almost an entire year later without ever recording his vote, perhaps the only non-recusal “abstention” ever recorded in the *U.S. Reports*.

But *Hirota*’s true importance, and its broader implications for our understanding of the relationship between Article III, citizenship, and habeas corpus, comes from what it held. The crux of the decision was the per curiam’s conclusions that “the tribunal sentencing the[] petitioners is not a tribunal of the United States,” and that, as such, “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>19</sup> Although the opinion nowhere invoked the Constitution generally or Article III specifically,<sup>20</sup> it has since been understood, as it was by Justice Douglas in his post hoc concurrence, to hold that the Constitution itself provides the jurisdictional bar to consideration of such petitions,<sup>21</sup> and that jurisdiction was inappropriate not just in the Supreme Court, but in any U.S. court. *Hirota* thus suggests, at first glance, that Article III stands as a categorical and insurmountable obstacle to federal jurisdiction over *any* habeas petition brought by *any* individual in foreign or international custody.

In so closely studying *Hirota*, my aim is to excavate the underpinnings both

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16. *Hirota v. MacArthur*, 335 U.S. 876 (1948) (mem.).

17. *Id.* at 876–81 (Jackson, J.). Jackson characterized himself as “one who has been so identified with controversial phases of war crimes law that he cannot expect others to consider him as detached and dispassionate on the subject as he thinks himself to be.” *Id.* at 881. *Hirota* was to be the only war crimes case in which he participated. And even in that case, he ultimately recused on the merits when his vote was no longer dispositive.

18. Justice Douglas’s opinion, which appears consecutively in the *U.S. Reports*, 338 U.S. 197 (1949) but not in the *Supreme Court Reporter*, see *Hirota v. MacArthur*, 69 S. Ct. 1238 (1949) (Douglas, J., concurring), was filed on the last day of the 1948 Term—June 27, 1949,—six months and seven days after the per curiam was announced on December 20, 1948.

19. *Hirota*, 338 U.S. at 198.

20. In the order setting the case for argument, the four “dissenters,” Chief Justice Vinson and Justices Reed, Frankfurter, and Burton noted that they were “of the opinion that there is want of jurisdiction.” *Hirota*, 335 U.S. at 876 (citing U.S. CONST. art. III, §2, cl. 2).

21. See, e.g., Respondents’ Opposition to Petitioners’ *Ex Parte* Motion for a Temporary Restraining Order at 16–17, *Omar v. Harvey*, No. 05-2374 (D.D.C. Feb. 7, 2006).

of *Hirota* and of Justice Douglas's post hoc concurrence, which has since been read, at least in the lower courts, as creating a citizenship-based doctrinal rule. The central question this Article attempts to answer is how Article III could possibly countenance the distinction that the case law purportedly draws—between the availability of habeas corpus to citizens held in foreign or international custody, and the unavailability of habeas corpus to similarly situated *non*-citizens.

As I explain, quite to the contrary of how courts and scholars have read Justice Douglas's *Hirota* concurrence, its rationale portends a jurisdictional result fundamentally at odds with the *Hirota* majority. If Justice Douglas was correct that the *Hirota* majority's rule cannot apply to citizens, then it cannot apply to non-citizens either, because of what might best be described as the "structural rights" view of Article III. Instead, I argue that the federal question jurisdiction contemplated by Article III can tolerate no distinction based upon citizenship entirely because the "rights" it confers are structural, and therefore exist irrespective of the status of those who invoke it. As Justice Souter put it: "The writ is the writ. . . . There are not two writs of habeas corpus for some cases and for other cases. . . . [T]he rights that may be asserted and the rights that may be vindicated will vary with the circumstances, but jurisdiction over habeas corpus is jurisdiction over habeas corpus."<sup>22</sup>

Thus, although the scope of the substantive rights enforceable via habeas may turn on the citizenship of the petitioner, the notion that Article III's jurisdictional limit in such cases is citizenship-based was wrong when *Hirota* was decided, and remains dangerously wrong today. Properly understood, *Hirota* is an absolute bar to all such habeas petitions, which is precisely why, for the reasons Justice Douglas suggested in his concurrence, it cannot stand.

To be clear from the outset, my target is not the equally important but distinct questions arising out of the Detainee Treatment Act of 2005,<sup>23</sup> the Military Commissions Act of 2006,<sup>24</sup> and Congress's power to strip jurisdiction over habeas petitions by Guantánamo detainees,<sup>25</sup> which the Supreme Court largely sidestepped in *Hamdan v. Rumsfeld*,<sup>26</sup> "and appears to have avoided reaching, at least for the time being, by denying certiorari to review the D.C. Circuit's February 2007 decision in *Boumediene v. Bush*."<sup>27</sup> Much has been written—and

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22. Transcript of Oral Argument at 59, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-184.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf).

23. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739–44 (2005).

24. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

25. See Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 259 (2006); see also Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593 (2006); Maxim O. Mayer-Cesiano, Comment, *On Jurisdiction-Stripping: The Proper Scope of Inferior Federal Courts' Independence from Congress*, 8 U. PA. J. CONST. L. 559 (2006).

26. 126 S. Ct. 2749 (2006).

27. 476 F.3d 981 (D.C. Cir. 2007) (upholding constitutionality of Military Commissions Act), *cert. denied*, No. 06-1195, 2007 WL 957363 (U.S. Apr. 2, 2007), 75 U.S.L.W. 3483 (U.S. Mar. 5, 2007) (No.

more certainly will be—about the implications of the Supreme Court’s 2004 decision in *Rasul v. Bush*,<sup>28</sup> the statutory availability of habeas jurisdiction to non-citizens held outside the United States, and the constitutional limits on Congress’s power to foreclose judicial review of claims brought by such detainees.<sup>29</sup> But *Hirota* and its modern descendants bespeak a different kind of jurisdictional question: Leaving aside the scope of Congress’s authority to restrict the habeas corpus jurisdiction of the federal courts, does Article III itself impose substantive limitations on the jurisdiction of U.S. courts to consider habeas petitions by detainees in foreign or international custody?

As I argue, because there can be no citizenship-based distinction, the answer to the underlying question must be no. Where any habeas petitioner alleges sufficient facts to establish that he is in the “custody” of the United States, at least within the meaning of evolving habeas jurisprudence, there is nothing in Article III that should otherwise be read to limit the jurisdiction of the federal courts. Although the petitioners in *Abu Ali* and *Omar* were both U.S. citizens, and the facts therefore (at least purportedly) allow *Hirota* to be distinguished rather than overruled, their logic should extend with equal force to habeas petitions brought by non-citizens. Whereas *other* constitutional provisions might be—and have been<sup>30</sup>—read to countenance distinctions based upon citizenship (or the absence thereof), whereas the rights enforceable via habeas may turn on citizenship, and whereas Congress might constitutionally provide that *statutory* jurisdiction turn on citizenship-based distinctions,<sup>31</sup> it is difficult, if not impos-

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06-1195); see also *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006) (same); cf. *Al-Marri ex rel. Berman v. Wright*, No. 06-7427 (4th Cir. argued Feb. 1, 2007) (raising whether the Military Commissions Act constitutionally deprives the federal courts of jurisdiction over a habeas petition brought by a non-citizen detained within the United States).

28. 542 U.S. 466 (2004).

29. For three excellent surveys of the contemporary jurisdictional issues from somewhat different perspectives, see Richard H. Fallon Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. (forthcoming June 2007); James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006); and Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005). See also Morad Fakhimi, *Terrorism and Habeas Corpus: A Jurisdictional Escape*, 30 J. SUP. CT. HIST. 226 (2005). Pfander, the only of the above-cited authors to address *Hirota*, views its holding as “refusing to exercise original jurisdiction,” Pfander, *supra*, at 517 n.132, without getting into the messier issue of *why* the Court lacked power to proceed.

30. E.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990) (plurality opinion) (holding that the Fourth Amendment does not apply to a non-citizen in Mexico). At the heart of the current debate over the rights of the Guantánamo detainees is their entitlement to the protection of the Due Process Clause of the Fifth Amendment. See also *Zadvydas v. Davis*, 533 U.S. 678, 690–96 (2001); cf. *Clark v. Suarez Martinez*, 543 U.S. 371, 377–87 (2005) (extending *Zadvydas* to inadmissible aliens).

31. Cf. *Rasul*, 542 U.S. at 486–87 (Kennedy, J., concurring in the judgment). For one prominent and current example, the jurisdiction-stripping provision of the Military Commissions Act, codified at 28 U.S.C. § 2241(e), applies *only* to non-citizens. See Military Commissions Act of 2006, § 7(a), 120 Stat. 2600, 2635–36 (2006) (“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

sible, to read such a distinction into “the judicial Power of the United States.”<sup>32</sup>

To make this argument, I begin, in Part I, with *Hirota* itself. The brevity of the per curiam opinion notwithstanding, the background of the case, the deeper issues concerning the Supreme Court’s involvement in war crimes cases, the strange opinion of Justice Jackson explaining his vote to set the case for argument, the odd procedural posture of Justice Douglas’s concurrence, and the still odder non-vote of Justice Rutledge, all testify to the uniqueness of the case and the difficulty of the questions presented. Thus, Part I situates *Hirota* in the broader context in which it was decided—in a post-war period during which U.S. courts were on the verge of being flooded with habeas petitions filed by German and Japanese war criminals.

To understand just what the majority in *Hirota* held, Part I summarizes the pre-*Hirota* case law concerning the substantive scope of the Supreme Court’s jurisdiction to review non-Article III military tribunals, before concluding with Justice Douglas’s cautious, if not reluctant, concurrence. Douglas wrote that he would have sustained jurisdiction over the petitions, given the extent of the authority that the U.S. government exercised over the Tokyo war crimes tribunal and its defendants. But he concurred nevertheless because, in his words, “the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.”<sup>33</sup> After exhaustively explaining why he thought the Constitution did not bar the Court’s exercise of jurisdiction, in his last sentence, Douglas equivocated, and concluded that the political question doctrine did.

In Part II, I turn to how *Hirota* has since been understood, both in the academy and in the courts. Thanks to its decision two years later in *Johnson v. Eisentrager*, in which it appeared to reject extraterritorial due process rights for non-citizens in their entirety,<sup>34</sup> the Court was never again confronted with a case raising the question of whether the Constitution bars its jurisdiction over a detainee in foreign or international custody.<sup>35</sup> As Part II explains, although a small handful of lower courts revisited the per curiam opinion and Justice Douglas’s concurrence in the ensuing years, *Hirota* remained mostly ignored until after September 11, when once more U.S. courts have been confronted with habeas petitions brought by foreign and international detainees, and have found, in *Hirota*, a messy and largely unsatisfactory precedent.

Part III compares the argument behind *Hirota* with the approach of the

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who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”)

32. U.S. CONST. art. III, § 1.

33. *Hirota v. MacArthur*, 338 U.S. 197, 215 (1948) (Douglas, J., concurring).

34. 339 U.S. 763, 781–85 (1950). *But see Rasul*, 542 U.S. at 475–79 (suggesting that the holding in *Eisentrager* was far narrower).

35. The Court continued to issue orders denying such petitions after *Hirota*, but never again published anything more than a cursory explanation of its reasoning.

district courts and D.C. Circuit in three of the cases to consider this question after 9/11: *Abu Ali*, *Omar*, and *Mohammed*. To that end, Part III summarizes these three cases, briefly recounts the Supreme Court's jurisprudence with respect to "custody" in habeas cases, and then situates the courts' approaches in *Abu Ali*, *Omar*, and *Mohammed* in light of that case law. As Part III argues, the distinctions drawn by the district courts in *Abu Ali* and *Omar* (and affirmed by the D.C. Circuit in *Omar*), while appealing, are ultimately unconvincing. Because of the structural rights theory of Article III, *Hirota*'s applicability cannot possibly turn on citizenship, as Judge Lamberth recognized and as the D.C. Circuit affirmed in *Mohammed*.<sup>36</sup> And because the other grounds relied upon to distinguish the 1948 decision are, as I argue, equally unavailing,<sup>37</sup> *Hirota* rises and falls as an absolute bar on jurisdiction. If Justice Douglas was right that such a rule could not possibly apply to citizens, then the same logic compels the conclusion that it does not apply to non-citizens either. Instead, as Part III concludes, the real Article III issue in these cases, as implicitly suggested by Justice Douglas in *Hirota*, is justiciability, not jurisdiction. Where petitioners can satisfy Article III's redressability requirement, which is perhaps the true purpose served by *Abu Ali*'s and *Omar*'s custody analysis (and where the decision in *Mohammed* is dangerously near-sighted), there is simply no *constitutional* jurisdictional defect in habeas petitions brought by detainees in foreign or international custody.

Finally, the Conclusion explains the importance of so thoroughly "deconstructing" *Hirota*. Given the Supreme Court's recent *Hamdan* decision and the ongoing debate over the continuing vitality of *Eisentrager* (and the concomitant questions concerning the substantive scope of extraterritorial constitutional rights for non-citizens),<sup>38</sup> the importance of clearing away *Hirota*'s unnecessary jurisdictional underbrush is undeniable.

## I. *HIROTA*

Before turning to *Hirota*, it is important to set the stage by examining the Supreme Court's inconsistent and contested dispositions of habeas petitions brought by convicted war criminals after World War II.<sup>39</sup>

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36. *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 124 (D.D.C. 2006); see also *Omar v. Harvey*, No. 06-5126, 2007 WL 420137, at \*13 n.1 (D.C. Cir. Feb. 9, 2007) (Brown, J., dissenting in part).

37. See *infra* notes 204–13 and accompanying text.

38. One recent example of a case involving a non-citizen attempting to enforce recognized extraterritorial constitutional rights is *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005), which highlights the extent to which the questions addressed herein are not purely academic. See *infra* note 262.

39. For a helpful contemporaneous summary of the state of the Supreme Court's habeas jurisprudence at the time *Hirota* was decided, see Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948). See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463–99 (1963) (summarizing the evolution of federal habeas corpus from 1789 to 1952).

A. *QUIRIN* AND *YAMASHITA*

With one famous and important exception, the Supreme Court did not consider any habeas petitions during World War II filed by Japanese or German soldiers, including those convicted of war crimes by military tribunals. The absence of wartime business is easily explained: for the most part, the military tribunals that would give rise to the flurry of post-war legal activity were only convened once the fighting was over.<sup>40</sup>

The exception, of course, was the case of the Nazi saboteurs, *Ex parte Quirin*.<sup>41</sup> Decided at Special Term in the summer of 1942, *Quirin* unanimously (but controversially<sup>42</sup>) affirmed the constitutionality and lawfulness of a military commission created by President Roosevelt to try eight German soldiers captured within the United States. Although the result was not necessarily obvious based on extant case law, the Court dealt quickly and summarily with any question as to its jurisdiction, noting that “denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari.”<sup>43</sup>

On the merits, the Court emphasized that “[w]e are not here concerned with any question of the guilt or innocence of petitioners,”<sup>44</sup> and inquired only into the authority for the commissions and the extent to which they ran afoul of the petitioners’ constitutional rights. Holding that the petitioners were not entitled to a jury trial, that the commissions were lawful, and that *Ex parte Milligan*<sup>45</sup> was distinguishable,<sup>46</sup> the Court concluded that

We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the

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40. In addition, few habeas petitions were filed by enemy prisoners of war. A rare counterexample was *In re Territo*, 156 F.2d 142 (9th Cir. 1946), in which the Ninth Circuit denied, on the merits, a habeas petition filed by a U.S. citizen captured while fighting for the Italian Army. The Court also entertained only one habeas petition brought by a Japanese-American internee—*Ex parte Endo*, 323 U.S. 283 (1944). See *infra* note 128.

41. 317 U.S. 1 (1942).

42. Justice Scalia has derided the decision as “not this Court’s finest hour.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006) (noting *Quirin*’s “controversial characterization of Article of War 15 as congressional authorization for military commissions”). For recent discussions, see Jack Goldsmith, *Justice Jackson’s Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223 (2006) and Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 894–99 (2006). For more comprehensive summaries of the case and its troubling background, see LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2003) and MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* (2004).

43. *Quirin*, 317 U.S. at 24; see also *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942) (denying the petitions). In that regard, *Quirin* was one of the earliest examples of “certiorari before judgment,” where the Court’s appellate jurisdiction is properly triggered once a case is properly filed in the courts of appeals. See *Hohn v. United States*, 524 U.S. 236 (1998).

44. *Quirin*, 317 U.S. at 25.

45. 71 U.S. (4 Wall.) 2 (1866).

46. *Quirin*, 317 U.S. at 38–45.

law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.<sup>47</sup>

A little more than three years later, *Quirin* was reaffirmed, although not unanimously, in the first challenge to a post-war military tribunal—*In re Yamashita*.<sup>48</sup> General Tomoyuki Yamashita, the Japanese military governor of the Philippines at the end of the war, was tried by an American military tribunal for his alleged complicity in atrocities committed by Japanese troops in Manila in the weeks after General MacArthur had trapped them in the city. Although serious questions existed at the time (and remain today<sup>49</sup>) concerning Yamashita's knowledge of—and liability for—the brutality of his troops, many of whom had disregarded his orders by remaining in Manila, Yamashita was found guilty of all 123 offenses with which he was charged, and was sentenced to death.<sup>50</sup> Yamashita filed a petition for a writ of habeas corpus with the Supreme Court of the Philippines, which was denied,<sup>51</sup> before seeking review in the U.S. Supreme Court.

As Judge Ferren summarizes, the Court was initially inclined to refuse to hear the case, but eventually gave in to the strong views to the contrary expressed by Justice Rutledge.<sup>52</sup> On February 4, 1946, the Court issued its opinion, holding that: (1) as in *Quirin*, Congress had authorized Yamashita's trial by military commission;<sup>53</sup> (2) the fact that hostilities had terminated was not itself a bar to the commission;<sup>54</sup> (3) the allegations sufficiently established violations of the laws of war to bring Yamashita's trial within the military jurisdiction that *Quirin* had recognized;<sup>55</sup> (4) the procedures prescribed by General MacArthur were not inconsistent with those set forth by the Articles of War or other Acts of

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47. *Id.* at 45–46.

48. 327 U.S. 1 (1946). See generally RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982) (providing an exhaustive recounting of the background to *Yamashita*); A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949) (same).

49. See, e.g., Bruce D. Landrum, Note, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995); cf. Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 150–74 (2006) (analyzing what remains of *Yamashita* after *Hamdan*).

50. See JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 301–02, 308 (2004).

51. See LAEL, *supra* note 48, at 93–94.

52. John M. Ferren, *General Yamashita and Justice Rutledge*, 28 J. SUP. CT. HIST. 54, 60 (2003).

53. *Yamashita*, 327 U.S. at 7–11.

54. *Id.* at 11–13; see Stephen I. Vladeck, *Ludecke's Lengthening Shadow: Limits on the War Powers When Wars Don't End*, 2 J. NAT'L SEC. L. & POL'Y (forthcoming Winter 2007).

55. *Yamashita*, 327 U.S. at 13–18.

Congress;<sup>56</sup> and (5) the requirement in the 1929 Geneva Convention that notice of the trial be provided to “the protecting power”—in Japan’s case, Switzerland—did not apply because Yamashita’s offenses were not committed while he was a prisoner of war.<sup>57</sup>

Justices Murphy and Rutledge each wrote separate, erudite, and angry dissents from the majority opinion. For present purposes, however, their dissents are not as significant as the Court’s own conception of its authority to review the Manila military commission. As Chief Justice Stone noted:

We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power “to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.” The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. 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 . . . .<sup>58</sup>

The Court thus *did* have jurisdiction over a habeas petition brought by a foreign national convicted by a U.S. military tribunal and held overseas, but only to “inquire whether the detention complained of is within the authority of those detaining the petitioner.”<sup>59</sup> One week later, the Court, relying entirely on *Yamashita*, summarily denied a similar application from General Masaharu Homma (the Japanese officer responsible for the infamous “Bataan Death March”), who had been convicted by another military commission in Manila.<sup>60</sup> Justices Murphy and Rutledge again dissented on the merits,<sup>61</sup> but none of the Justices expressed any concern as to the Court’s jurisdiction.

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56. *Id.* at 18–23.

57. *Id.* at 23–24.

58. *Id.* at 8 (citations omitted).

59. *Id.*

60. *In re Homma*, 327 U.S. 759 (1946) (mem.).

61. *Id.* at 759–61 (Murphy, J., dissenting); *id.* at 761–63 (Rutledge, J., dissenting). According to Justice Rutledge, the reliance on *Yamashita* was misplaced given that “[o]ther serious questions, affecting the validity and fairness of the commission’s constitution are presented which were not raised in the *Yamashita* petitions.” *Id.* at 763.

## B. U.S. CITIZENS AND THE GERMAN POW CASES

Later in 1946, the Court was asked to review a series of original habeas petitions brought by U.S. citizens detained in conjunction with offenses committed while overseas. As Charles Fairman summarizes,

Betz . . . was an American civilian whom a base section commander in Germany had ordered to be held in confinement “prior to being turned over to American Military Government to be tried for making an illegal entry into the European Theater of Operations.” McKinley was an American civilian detained on suspicion of having purchased platinum with counterfeit United States currency. Pfc. Walczak was held on suspicion of being an accessory to a murder. Captain Kathleen B. Nash Durant, WAC . . . asserted that she was a commissioned officer and alleged fatal irregularities in the bringing of charges; later she amended her petition to assert that she was a civilian not subject to the Articles of War. . . . Wills was an officer in the merchant marine, Cutino was a merchant seaman; each was held in the Kobe Base stockade in Japan, without prompt trial, on suspicion of having committed a crime of which, each asserted in a letter to the Chief Justice, he was innocent. Petitioner Murphy, a priest in New York, prayed the Court to “intercede” for one of his parishioners, an Air Corps private, held in Japan under sentence of death; it appeared that this soldier had deserted his unit and joined another in the guise of an officer.<sup>62</sup>

In refusing to hear the seven applications, the Court, for the first time in a post-World War II habeas case, invoked the limits on its jurisdiction:

The motion for leave to file petition for writ of habeas corpus is denied for want of original jurisdiction. MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE are of the opinion that as in *Ex parte Hawk*, where this Court declined to entertain an application for relief by habeas corpus, the petition for habeas corpus should be denied without prejudice to it being filed in the appropriate District Court. MR. JUSTICE MURPHY is of the view that this petition raises questions as to jurisdiction and proper procedure which should be heard and determined by this Court. MR. JUSTICE JACKSON took no part in the consideration or decision of the application in No. 19, Miscellaneous.<sup>63</sup>

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62. Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 592 (1949).

63. *Ex parte Betz*, 329 U.S. 672 (1946) (mem.) (citations omitted). *Hawk*, an “original” habeas petition filed by a state prisoner, held that the proper procedure for seeking federal habeas relief where “resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised” was to “proceed in the federal district court before resorting to [the Supreme] Court by petition for habeas corpus.” 321 U.S. 114, 118 (1944) (per curiam); cf. *Boumediene v. Bush*, No. 06-1195, 2007 WL 957363, at \*1 (U.S. Apr. 2, 2007) (Stevens and Kennedy, JJ., respecting the denial of certiorari) (citing *Hawk* as establishing “our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus”).

There matters stood until October 1947, when the Court summarily disposed of the first original habeas petition brought by a convicted German war criminal, voting 4–4, with Justice Jackson recused, to deny review in *Milch v. United States*.<sup>64</sup> Justice Douglas joined the three dissenting Justices from *Betz*—Black, Murphy, and Rutledge—in recording his vote that the case be set for argument on the jurisdictional question, and the battle lines were drawn. As Henry Hart and Herbert Wechsler noted in the first edition of *The Federal Courts and the Federal System*, “[f]ourteen other war crimes cases were disposed of in February 1948 by an identical order . . . . However, three more cases in April 1948 met simply the response, ‘Petition denied’, without notation of dissent.”<sup>65</sup>

In *Everett v. Truman*,<sup>66</sup> the last major original war crimes case to come before the Court before *Hirota*, the Court again voted 4–4 to deny a petition filed on behalf of seventy-four German soldiers convicted at Dachau for their role in the Malmedy massacre. As the order denying review provided:

The CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U.S. Constitution, Article III, Sec. 2, Clause 2; [also citing *Betz*, *Milch*, *Brandt*, and *Eichel*].

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that the motion for leave to file the petition should be granted and that the case should be set for argument forthwith.

MR. JUSTICE JACKSON took no part in the consideration or decision of the motion.<sup>67</sup>

Of all the original applications the Court had thus far considered, *Everett* was perhaps the case that most “cried for relief, even though the Supreme Court was not the appropriate forum for granting it.”<sup>68</sup> In a memorandum to the Conference urging that the case be set for argument, Justice Black maintained that the petition “alleges a total lack of jurisdiction of the tribunal sentencing the prisoners and charges that the convictions were the product of confessions obtained by ‘mock trials’ and that the trials themselves were conducted in such way as to deprive the prisoners and their counsel of any possible chance

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64. 332 U.S. 789 (1947) (mem.); see also Fairman, *supra* note 62, at 593–94 (discussing the background to *Milch*).

65. HENRY M. HART JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 284 (1953). For the denials to which they referred, see *Brandt v. United States*, 333 U.S. 836 (1948) (mem.), and *In re Eichel*, 333 U.S. 865 (1948) (mem.). Justice Douglas, who joined the dissenters in *Milch*, did not record his dissent in *Brandt*. See also Fairman, *supra* note 62, at 594–97 (summarizing the facts of the applications denied in *Brandt* and *Eichel*).

66. *Everett ex rel. Bersin v. Truman*, 334 U.S. 824, 824 (1948) (mem.).

67. *Id.*

68. Fairman, *supra* note 62, at 597; see also *id.* at 597–99. For a recent summary of the allegations in *Everett*, see Maj. Warren L. Wells, *Justice at Dachau*, 181 MIL. L. REV. 164, 166 n.21 (2004) (book review).

adequately to set up their defenses.”<sup>69</sup> But if Justice Black could not find four votes for his argument in *Everett*, it was unlikely that another case, or at least another case involving German soldiers, would come along where he could.

Repeating the language from *Everett*, the Court disposed of another fifteen original petitions at the end of the 1947 Term,<sup>70</sup> and thirteen more at the beginning of the 1948 Term.<sup>71</sup> And so, when Kōki Hirota’s application for original relief came to the Supreme Court in November 1948, the badly fractured Court seemed poised to again deny the application in a 4–4 vote.

### C. WHY “ORIGINAL” PETITIONS?

Before turning to *Hirota*, a brief aside is warranted given the odd procedural history of the post-World War II war crimes cases. Looking backward with six decades of hindsight, reliance on such an unusual and extraordinary procedural vehicle—an original habeas petition filed directly in the Supreme Court—seems odd, if not downright inexplicable. After all, the Supreme Court has not granted an original habeas petition since 1925,<sup>72</sup> and has only issued such extraordinary relief three times since the Evarts Act of 1891<sup>73</sup> fundamentally altered the structure of the federal court system<sup>74</sup> (and provided the Supreme Court, for the first time, with general appellate jurisdiction in federal criminal cases,<sup>75</sup> render-

69. Memorandum for the Conference at 1 (May 17, 1948) (on file with the Library of Congress, Manuscript Division, Papers of Hugo L. Black, Container No. 292, *Everett v. Truman* Case File); *see also id.* (“These grave charges in my judgment cannot be brushed aside.”). Although the Memorandum was unsigned and copies appear in various of the Justices’ papers, the original, handwritten draft appears in the files of Justice Black.

70. *See* HART & WECHSLER, *supra* note 65, at 285 (citing Fairman, *supra* note 62, at 599–600); *see also In re Gronwald*, 334 U.S. 857 (1948) (mem.); *In re Ehlen*, 334 U.S. 836 (1948) (mem.); *In re Krautwurst*, 334 U.S. 826 (1948) (mem.).

71. *See* Fairman, *supra* note 62, at 600 & n.40a; *see also In re Heim*, 335 U.S. 856 (1948) (mem.); *In re Eckstein*, 335 U.S. 851 (1948) (mem.); *In re Vetter*, 335 U.S. 841 (1948) (mem.); *In re Stattman*, 335 U.S. 805 (1948) (mem.).

72. *See Ex parte Grossman*, 267 U.S. 87 (1925). Notwithstanding the eight decades that have elapsed since such relief was granted, the Court relied on the continuing availability of an original habeas petition in *Felker v. Turpin*, to avoid a constitutional challenge to a statute divesting it of appellate jurisdiction from the Courts of Appeals. *See Felker v. Turpin*, 518 U.S. 651, 659–61 (1996). *But see id.* at 667 (Souter, J., concurring) (“[I]f it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress’s Exceptions Clause power would be open.”). Just last Term, while denying certiorari in the case of U.S. citizen “enemy combatant” Jose Padilla after his transfer to civilian criminal custody, three Justices emphasized that, should the government return Padilla to military custody, Padilla would be able to invoke the Court’s original habeas jurisdiction to expedite his claims. *See Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J., concurring in the denial of certiorari); *see also Boumediene v. Bush*, No. 06-1195, 2007 WL 957363, at \*1 (U.S. Apr. 2, 2007) (Stevens and Kennedy, JJ., respecting the denial of certiorari) (noting the potential availability of original relief “[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, or some other and ongoing injury” (citation omitted)).

73. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826–30 (1891).

74. *See* Oaks, *supra* note 13, at 193; *see also Ex parte Hudgings*, 249 U.S. 378 (1919); *In re Huff*, 197 U.S. 488 (1905).

75. Act of Mar. 3, 1891, §5, 26 Stat. at 827–28.

ing original habeas relief far less necessary<sup>76</sup>).

Why, then, were none of the habeas petitions in the war crimes cases filed in the district courts, as the *Betz* order explicitly suggested they could be (at least where U.S. citizens were involved)? The likely explanation is one of the last decisions handed down by the Court during its 1947 Term: *Ahrens v. Clark*.<sup>77</sup> In *Ahrens*, over the dissents of Justices Rutledge, Black, and Murphy, the Court held, as a matter of statutory interpretation, that federal district courts were generally without jurisdiction to entertain habeas petitions from any detainee not physically present within that district. As Justice Douglas wrote for the Court,

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>78</sup>

In a footnote to the same passage, however, *Ahrens* expressly reserved “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,” citing for that proposition *Betz* and its six companion cases.<sup>79</sup> *Ahrens* at least formally left unanswered whether district courts could exercise jurisdiction over habeas petitions filed by overseas detainees. After *Ahrens*, however, the answer at least appeared to be “no,” especially if some alternative form of relief remained available.

Writing shortly after *Hirota* was handed down, and before Justice Douglas

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76. See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2072–73 (1992). As Liebman notes, “Congress gave capital prisoners a right of appeal two years earlier.” *Id.* at 2072 n.453 (citing Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656).

77. 335 U.S. 188 (1948), *modified by* *Braden v. Thirtieth Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) (holding that a district court need only have personal jurisdiction over the respondent, not the petitioner, to satisfy § 2241). For an intriguing modern account of the decision, 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, 504–15 (2006).

78. *Ahrens*, 335 U.S. at 192 (footnote omitted). *Ahrens*'s district-of-confinement rule was met with significant hostility, and would later be described as “a self-inflicted judicial wound.” *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1128 (2d Cir. 1974).

Yet, to whatever extent *Ahrens* was vitiated by *Braden*, see, e.g., 410 U.S. at 502 (Rehnquist, J., dissenting) (“Today the Court overrules *Ahrens* . . .”), but see *Rasul v. Bush*, 542 U.S. 466, 494 (2004) (Scalia, J., dissenting) (“*Braden* did not overrule *Ahrens*; it distinguished *Ahrens*.”), it was largely resurrected by the Supreme Court, albeit via the so-called “immediate custodian” rule, in *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). Whereas *Braden* held that district courts need only have personal jurisdiction over the respondent, *Padilla* held that the respondent must be the “immediate” custodian, who is almost always in the same district as the petitioner. After *Padilla*, “core” habeas challenges in which the detainee is physically present within some judicial district must usually be filed in that district. See *Armentero v. INS*, 412 F.3d 1088, 1101–02 (9th Cir. 2005) (Berzon, J., dissenting).

79. *Ahrens*, 335 U.S. at 192 n.4.

filed his concurrence, Fairman saw this as the prevailing view of *Ahrens*: “[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 a different district?”<sup>80</sup> If *Ahrens* turned on a particular construction of the “within their respective jurisdictions” language in the federal habeas statute, how could the location of the habeas petitioner affect (and perhaps provide an exception to) the district court’s territorial jurisdiction?<sup>81</sup> *Ahrens* may have reserved the question, but its own analysis appeared to compel the answer. Moreover, this reading was made explicit by the unreported—and heretofore overlooked—decision of the D.C. district court in *Eisentrager v. Forrestal* (what would later become *Johnson v. Eisentrager*).<sup>82</sup> There, the court, citing only *Ahrens*, dismissed for lack of jurisdiction statutory habeas petitions filed by twenty-two German soldiers convicted of war crimes by a U.S. military tribunal and imprisoned at Landsberg Prison in Germany.

With *Ahrens* suggesting that the federal district courts lacked jurisdiction over petitioners not confined in any district, original relief in the Supreme Court may well have seemed the only practicable alternative.<sup>83</sup> In a series of cases during the nineteenth century, the Court had established a number of propositions concerning its ability to entertain “original” habeas petitions pursuant to section 14 of the Judiciary Act of 1789.<sup>84</sup> First, in *Ex parte Bollman* in 1807, the Court emphasized that it could only usually issue the writ as an exercise of its constitutional “appellate” jurisdiction,<sup>85</sup> a result that necessarily followed from *Marbury v. Madison*.<sup>86</sup> As Chief Justice Marshall wrote, “The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that

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80. Fairman, *supra* note 62, at 632; *see also id.* at 632–41 (suggesting that *Ahrens* was wrongly decided, and should not apply to the war crimes cases).

81. *See 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.”).

82. *Eisentrager v. Forrestal*, unpublished opinion (D.D.C. Oct. 6, 1948), *reprinted in* Transcript of Record at 16–17, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306), *rev’d*, 174 F.2d 961 (D.C. Cir. 1949), *rev’d*, 339 U.S. 763.

83. On the Supreme Court’s “original” habeas jurisdiction, *see generally* Oaks, *supra* note 13.

84. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 2241(a) (2000)).

85. 8 U.S. (4 Cranch) 75, 100–01 (1807). In *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449 (1806), Chief Justice Marshall cited an earlier decision, *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795), as support for the Court’s independent authority to issue the writ in aid of its constitutional appellate jurisdiction, but *Bollman* settled the issue beyond doubt.

The Court would later clarify that, technically, it *could* issue an “original” writ of habeas corpus as an exercise of its constitutional “original” jurisdiction in “cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party.” *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883). Indeed, one of Hirota’s arguments was that he could invoke the Court’s constitutional “original” jurisdiction directly, owing to his former responsibilities within the Japanese government. *See* Brief on Behalf of the Petitioner at 5–7, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239, Misc.) (on file with author).

86. 5 U.S. (1 Cranch) 137 (1803).

decision, and therefore appellate in its nature.”<sup>87</sup>

*Bollman*’s conception of the Supreme Court’s original habeas jurisdiction—original as a statutory matter but appellate as a constitutional matter—was reaffirmed in *Ex parte Watkins* in 1833,<sup>88</sup> and expanded upon in *Ex parte Yerger* in 1869.<sup>89</sup> In *Yerger*, the petitioner challenged his prospective trial by military commission without judicial warrant. His petition was denied by the circuit court, and, pursuant to the statute upheld in *Ex parte McCardle*, the Supreme Court lacked appellate jurisdiction over that decision.<sup>90</sup> Yerger nevertheless filed an “original” habeas petition, and the Court, relying on the denial of Yerger’s petition by the circuit court, sustained its constitutional jurisdiction.<sup>91</sup>

As *Yerger* emphasized, an “original” habeas petition remained available under the terms of the 1789 Judiciary Act especially when Congress had otherwise constrained the habeas jurisdiction of the federal courts (by then, the Court had disavowed state-court habeas for federal prisoners<sup>92</sup>). *Yerger*, the last major case on the subject, suggested that an “original” habeas petition was a proper vehicle when there were serious questions as to the jurisdiction of the lower courts, and where some court had already passed, to some degree, on the lawfulness of the petitioner’s confinement.<sup>93</sup>

One additional point bears mention. As noted above, unlike in *Everett*, in which the petitioners were all German, the order in *Betz* and its companion cases, in which all of the petitioners were U.S. citizens, intimated that at least two Justices—Black and Murphy—saw no problem with the petitioners re-filing in the appropriate district court. Thus, prior to *Ahrens*, there was some sentiment on the Court for the availability of *lower-court* federal jurisdiction over overseas petitions so long as they were filed by U.S. citizens. *Ahrens* and subsequent cases apparently left that sentiment undisturbed.<sup>94</sup> But *Ahrens*’s

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87. *Bollman*, 8 U.S. (4 Cranch) at 101. For a modern recounting of Chief Justice Marshall’s opinion, see ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 20–41 (2001). See also WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 135–41 (1980) (discussing *Bollman*); Oaks, *supra* note 13, at 159–62 (same). For a contemporary view of the broader implications of *Bollman*, especially in conjunction with *Tarble’s Case*, see Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251 (2005).

88. 32 U.S. (7 Pet.) 568, 573 (1833).

89. 75 U.S. (8 Wall.) 85, 106 (1869).

90. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513–14 (1869).

91. For a summary of the background to *McCardle* and *Yerger*, see William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

92. See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514–18, 525–26 (1858); see also *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411–12 (1872).

93. *Yerger*, 75 U.S. (8 Wall.) at 96–98. To whatever extent such a conclusion did not follow directly from *Yerger*, it was made explicit in subsequent cases. See, e.g., *Ex parte Terry*, 128 U.S. 289, 320 (1888); *In re Sawyer*, 124 U.S. 200, 220 (1888). See generally Oaks, *supra* note 13, at 191–92 & nn.88–89.

94. The Court implicitly hinted as much in *In re Bush*, in which it denied a “motion [by U.S. servicemen] for leave to file petition for writ of habeas corpus . . . without prejudice to the right to apply to any appropriate court that may have jurisdiction.” 336 U.S. 971, 971 (1949) (mem.). Bush subsequently re-filed in a court that determined that it *did* have jurisdiction. See *In re Bush*, 84 F. Supp.

interpretation of the habeas statute posed a formidable obstacle to the statutory jurisdiction of district courts over petitions filed by non-citizens outside the United States, so resorting to an original petition in the Supreme Court as in *Yerger* may have been the only viable option for relief. Moreover, to whatever extent that result may have only implicitly followed from *Ahrens*, it was made more explicit by the district court decision in *Eisentrager*, which was handed down just seven weeks before the applications for leave to file original habeas petitions in *Hirota* were docketed. It is thus little surprise that in his habeas petition, Hirota emphasized the extent to which *Ahrens* compelled the “original” filing.<sup>95</sup>

D. JUSTICE JACKSON FORCES THE COURT’S HAND—OR WAS IT JUSTICE RUTLEDGE?

Perhaps it was the combination of the *Ahrens* decision, at the end of the 1947 Term, and the *Eisentrager* district court decision in October 1948, that explains Justice Jackson’s tie-breaking change of heart—and unusual memorandum to that effect—in *Hirota*. Or maybe it was the fact that, unlike the cases on which the Court had previously deadlocked 4–4, *Hirota* was the first petition (not counting *Yamashita*,<sup>96</sup> in which Justice Jackson had also recused himself), brought by a Japanese, rather than a German, war criminal.

Perhaps the real catalyst was a draft opinion, circulated by Justice Rutledge on December 4, which would have publicly excoriated the Court for not at least hearing argument in the IMTFE cases. Writing in apparent anticipation of another summary denial of review, Rutledge repeatedly emphasized how *Hirota* presented the Court with questions profoundly different from those it had considered in *Quirin*, *Yamashita*, and *Homma*, because: (1) Hirota was not a soldier; (2) Hirota had retired from public service well before December 7, 1941; (3) the legality of the United States’ participation in the IMTFE was at least an open question; and (4) the IMTFE’s jurisdiction was in some dispute.<sup>97</sup> As Rutledge presciently wrote:

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873 (D.D.C. 1949). Four years later, in *Burns v. Wilson*, the Court saw no jurisdictional defect in habeas petitions originally filed in the D.C. federal district court by U.S. servicemen who were court-martialed overseas. See 346 U.S. 137 (1953) (plurality). The Court was sharply divided on the merits, but raised no *Ahrens*-based question as to the jurisdiction of the lower courts, or its jurisdiction on appeal. Justice Frankfurter, dissenting from the denial of rehearing, expressed as one of his concerns his discomfort with the Court’s failure to squarely decide the jurisdictional question. See *Burns v. Wilson*, 346 U.S. 844, 851–52 (1953) (opinion of Frankfurter, J.).

95. See Brief for the Petitioner at 2, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239, Misc.).

96. See *In re Yamashita*, 327 U.S. 1, 26 (1946). Whereas Justice Jackson recused himself from the original German habeas cases because of the obvious substantive conflict stemming from his role as the lead U.S. prosecutor at Nuremberg, his recusal from *Yamashita* was a byproduct of simple geography—Jackson was still in Nuremberg for the entire time that *Yamashita* was before the Court.

97. Draft Opinion of Justice Rutledge, at 3–4 (Dec. 6, 1948) (on file with the Library of Congress, Manuscript Division, Papers of Wiley Rutledge, Container 168, *Hirota v. MacArthur* Case File). Although the draft is dated “December 6,” the copy in Justice Rutledge’s papers has a handwritten notation suggesting that it was circulated on Saturday, December 4. See *id.* at 1.

If the *Yamashita* and *Homma* 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 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 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>98</sup>

Regardless of the ultimate reason, Jackson hardly disguised his motives.<sup>99</sup> After summarizing the split amongst his brethren, Jackson observed that, "[b]y reason of nonparticipation in the German cases, for reasons which are obvious, I remain uncommitted on the jurisdictional issues. My nonparticipation has prevented their resolution heretofore and I must decide whether another nonparticipation will prevent it now. The issue transcends the particular litigation."<sup>100</sup> Moreover, as *Everett* had made clear, "[t]he fact that neither side in good grace can retreat puts to me disagreeable alternatives as to whether I should break the deadlock or permit it to continue."<sup>101</sup> Thus:

If I add my vote to those who favor denying these applications for want of jurisdiction, it is irrevocable. The Japanese will be executed and their partisans will forever point to the dissents of four members of the Court to support their accusation that the United States gave them less than justice. This stain, whether deserved or not, would be impressed upon the record of the United States in Oriental memory. If, however, I vote with those who would grant temporary relief, it may be that fuller argument and hearing will convert one

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98. *Id.* at 3–4.

99. One of Justice Rutledge's clerks, in a memo dated November 30, 1948, suggested that because Justice Jackson had no reason to recuse, he "would be forced to state his position—which would, I assume, mean a five-to-four denial of jurisdiction." Memo from LHP to Justice Rutledge, at 2 (Nov. 30, 1948) (on file with the Library of Congress, Manuscript Division, Papers of Wiley Rutledge, Container 168, *Hirota v. MacArthur* Case File). At least in some of the Justices' chambers, then, it was unclear not whether Justice Jackson would vote, but how.

100. *Hirota v. MacArthur*, 335 U.S. 876, 877 (1948) (mem.) (Jackson, J.).

101. *Id.* at 879.

or more of the Justices on one side or the other from the views that have equally divided them in the German cases. In those cases I did not feel at liberty to cast the deciding vote and there was no course to avoid leaving the question unresolved. But here I feel that a tentative assertion of jurisdiction, which four members of the Court believe does not exist, will not be irreparable if they ultimately are right.<sup>102</sup>

Over the recorded dissents of four Justices, the Court set *Hirota* for oral argument on Thursday and Friday, December 16 and 17, 1948.<sup>103</sup> After Conference on Saturday, December 18, the Court issued a three-paragraph per curiam decision denying the applications on Monday, December 20:

The petitioners, all residents and citizens of Japan, are being held in custody pursuant to the judgments of a military tribunal in Japan. Two of the petitioners have been sentenced to death, the others to terms of imprisonment. They filed motions in this Court for leave to file petitions for habeas corpus. We set all the motions for hearing on the question of our power to grant the relief prayed, 335 U.S. 876, 69 S.Ct. 157, and that issue has now been fully presented and argued.

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>104</sup>

As noted, Justice Douglas recorded his concurrence, and stated that an opinion expressing his views would follow; Justice Murphy recorded his dissent without opinion; Justice Rutledge reserved his vote;<sup>105</sup> and Justice Jackson, no

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102. *Id.* at 880.

103. Owing to its remarkable length, the argument does not admit of easy distillation. For an excellent summary, see generally *Arguments Before the Court—Status of Japanese War Crimes Trial*, 17 U.S.L.W. 3181 (1948).

104. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (per curiam). There is remarkably little evidence in the papers of the Justices with respect to the authorship of the per curiam. Even Justice Rutledge's usually meticulous assignment sheets make no note of *Hirota*. Given the absence of any indication to the contrary in Justice Douglas's, Justice Jackson's, or Justice Rutledge's conference notes, the best assumption is likely either that Chief Justice Vinson assigned it to himself or that it was written at Conference.

105. There is no indication in Justice Rutledge's papers either why he was unable to reach a decision or whether he ever came closer to recording his vote. In a letter to Justice Douglas concerning a revision to the *U.S. Reports* to indicate that Rutledge died before announcing his vote, Walter Wyatt, the Court's Reporter of Decisions, noted that he "discussed the matter with Mr. Justice Rutledge shortly

longer in a tie-breaking position thanks to Justice Black—who joined the per curiam without comment—declined to participate in the final decision.<sup>106</sup>

E. THE QUESTIONS *HIROTA* LEFT UNANSWERED

Save for a reference to the order setting the case for argument, the per curiam opinion was entirely devoid of any citations to authority. Two textual clauses therefore stand out as the opinion's critical language: First, the Court noted that "the tribunal sentencing these petitioners is not a tribunal of the United States." Second, and as a consequence, "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." But given the extent to which Hirota challenged General MacArthur's authority over (and role in) the IMTFE, and the extent to which Hirota, pointedly, did *not* challenge the IMTFE judgment, why did these two assertions compel the conclusion that the Court was without jurisdiction? Was the barrier on the Court's jurisdiction the conclusion that the "judicial power of the United States" could not extend to reviewing an international court—that is to say that no federal court could exercise jurisdiction over any of Hirota's claims consistently with Article III? Or was it a result of the case falling outside of its constitutional "appellate" jurisdiction, leaving the petitioners free to re-file in the appropriate district court? The per curiam opinion, somewhat deliberately,<sup>107</sup> offered little help in answering these questions, which is all the more distressing given the drastic distinction in the prospective implications of the two theories.

On the broader view, Article III provides an outright bar to jurisdiction in any federal court, including the Supreme Court. *Hirota* would therefore stand as an insurmountable hurdle to any federal habeas petition brought by anyone held in custody established by a foreign or international tribunal. On the narrower view, the jurisdictional defect in *Hirota* was with the unusual step of invoking the Supreme Court's jurisdiction over "original" habeas petitions. Given the absence of any lower court proceedings, there was no decision to "review," and therefore no basis for the Court to exercise its constitutional appellate jurisdiction. Such a reading of Article III would hardly preclude similarly situated

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after the Fourth of July last year [1949]; and he told me that he had not yet made up his mind how he would vote in this case." Letter from Walter Wyatt to Justice Douglas, Apr. 18, 1950, at 1 (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Container 186, *Hirota v. MacArthur* Case File, unnamed folder).

106. See *Hirota*, 338 U.S. at 198–99. Jackson attended the Conference but did not participate, writing in his own Conference notes that he had "not decided whether to participate." Justice Jackson, Conference Notes, at 2 (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Container 155, *Hirota v. MacArthur* Case File).

107. That the per curiam opinion was short on explanation was largely at the suggestion of Justice Black, who, according to the Conference notes of Justices Douglas, Jackson, and Rutledge, preferred a disposition that did not explicitly rely on either jurisdictional defect. See, e.g., Conference Notes, at 2 (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Container 177, Certiorari, Conference & Misc Memos—Nos. 200 thru 299, Argued Cases folder).

petitioners from proceeding first in the district courts, as court-martialed U.S. soldiers would successfully do in *Burns v. Wilson*.<sup>108</sup>

### 1. *Hirota* and “the Judicial Power of the United States”

Further obfuscating the logic of the per curiam opinion is the fact that the propositions on which it purportedly relied were both well-settled and irrelevant. The conclusion that “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” was already well established with respect to entirely *domestic* military tribunals,<sup>109</sup> let alone multinational military tribunals. It nevertheless did not bar civilian courts from exercising jurisdiction over petitions challenging military detention *en toto*. Recall that Chief Justice Stone in *Yamashita* had already emphasized how, “[i]f 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.”<sup>110</sup>

For those propositions, Stone relied on a pair of Civil War-era cases—*Dynes v. Hoover*,<sup>111</sup> in which the Court held that the civil courts lacked jurisdiction to review judgments of courts martial unless the military courts acted without jurisdiction, and *Ex parte Vallandigham*,<sup>112</sup> where the Court held that it lacked appellate jurisdiction via certiorari to review judgments of military commissions convened during the Civil War. *Dynes* and *Vallandigham* stood for the proposition that, even through habeas corpus, “the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . . The single inquiry, the test, is jurisdiction.”<sup>113</sup> Critically, though, the Court’s constitutional appellate jurisdiction *did* extend to habeas petitions that *did* challenge the jurisdiction of military tribunals, as *Yerger* demonstrated, even though the case law was unequivocal that such entities were not, in the first instance, “courts of the United States.”<sup>114</sup> As Chief Justice Chase concluded in *Yerger*:

108. See *supra* note 94 and accompanying text.

109. For a contemporaneous study emphasizing the point, see William F. Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals*, 10 OHIO ST. L.J. 271, 271 (1949) (“It follows that the civil courts have no appellate power over military tribunals and may review their judgments, if at all, only by way of collateral attack based on the tribunal’s want of jurisdiction.”). Cf. Note, *Review of International Criminal Convictions*, 59 YALE L.J. 997, 1001 n.12 (1950) (surveying precedent for the proposition that “[i]t is traditional doctrine that American courts will not directly review an act of a foreign State even for compliance with fundamental rights.”).

110. *In re Yamashita*, 327 U.S. 1, 8 (1946) (citations omitted); see *supra* text accompanying note 58.

111. 61 U.S. (20 How.) 65, 83–84 (1858).

112. 68 U.S. (1 Wall.) 243, 251–52 (1864).

113. *United States v. Grimley*, 137 U.S. 147, 150 (1890); see also *Collins v. McDonald*, 258 U.S. 416, 418 (1922); *In re Vidal*, 179 U.S. 126, 127 (1900); *Ex parte Mason*, 105 U.S. 696, 697 (1882).

114. *Mechs.’ & Traders’ Bank v. Union Bank of La.*, 89 U.S. (22 Wall.) 276, 295 (1874); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946) (“[M]ilitary tribunals are not part of our judicial system.”).

[I]t is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.<sup>115</sup>

Nor, for these purposes, should the distinction between a “domestic” and an “international” military tribunal matter, because the Court is not “reviewing” the military judgment in either instance. Because of *Dynes* and its progeny, the Article III courts cannot review *any* military tribunal judgment; their jurisdiction extends solely to inquiring into the jurisdiction of the tribunal, and, where extant, into other constitutional challenges to the prisoner’s detention wholly unrelated to the tribunal. Thus, the vital point is that the Supreme Court would have lacked jurisdiction to review the judgment of the Tokyo war crimes tribunal even if it were a *domestic* court, on the strength of the Civil War-era cases. Indeed, habeas jurisprudence more generally, at the time of *Hirota*, reflected this limited conception of review. With *Brown v. Allen*<sup>116</sup> still four years away, “it was not . . . thought to be the task of the federal court on habeas to test for error the disposition of all federal constitutional questions made in previous . . . state adjudications.”<sup>117</sup>

But those cases did not resolve either of the two questions implicated in *Hirota*: Could civilian courts resolve jurisdictional challenges to foreign or international military tribunals? Separately, could civilian courts entertain challenges to the authority of U.S. custodians wholly unrelated to the foreign or international court? *Hirota*’s petition was unambiguous that “the petitioner is not asking this court to review the decision of an international court . . .”<sup>118</sup> Instead, “[a]ll the questions petitioner raises here with respect to violation of rights under the Constitution, laws, treaties and international engagements of the United States, . . . deal solely with official actions taken by General MacArthur as citizen and army officer of the United States.”<sup>119</sup>

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115. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102–03 (1869).

116. 344 U.S. 443, 458 (1953) (holding that federal constitutional questions determined in state court proceedings could be collaterally re-litigated in federal habeas corpus proceedings).

117. Bator, *supra* note 39, at 465.

118. Brief for the Petitioner, *supra* note 95, at 14.

119. *Id.* *Hirota* argued that (1) General MacArthur had no authority from Congress or the President to create the IMTFE; (2) nothing in the Potsdam Declaration or the instrument of Japanese surrender provided legal authority for the IMTFE; (3) General MacArthur, in accepting authority from ten Allied nations, had violated the Foreign Emoluments Clause of the U.S. Constitution, U.S. CONST. art. I, § 9,

To the extent that Hirota and his fellow petitioners sought review of the IMTFE judgment, then, *Dynes* and *Vallandigham* cut against the Supreme Court's jurisdiction to hear their claims. But to the extent that they challenged the underlying jurisdiction of the IMTFE itself, or, separately, the constitutionality of the United States' (and particularly General MacArthur's) participation therein, it did not follow that Article III precluded their claims.

## 2. *Hirota* and the Appellate Jurisdiction of the Supreme Court

An alternate, narrower reading of the per curiam opinion is that the Court could not exercise its constitutional "appellate" jurisdiction over Hirota's "original" habeas petition because there was no decision by an inferior U.S. court for it to "review" (unlike, for example, in *Bollman*, *Yerger*, and *Quirin*), but that Article III imposed no bar on federal jurisdiction at large. Although such a reading would render the current cases distinguishable, and would largely—if not entirely—vitiate the significance of *Hirota*, it also runs into three insurmountable obstacles.

First, as a practical matter, if the decision rested on the absence only of appellate jurisdiction, one would have expected a decision that mirrored the order in *Betz*, where Justices Black and Rutledge noted that they would deny the original petitions without prejudice to re-filing in the appropriate district court. But Justice Black joined the per curiam without comment, allowing Justice Jackson to recuse, and Justice Rutledge did not vote one way or the other. It stood to reason that if the Court saw its holding as being limited to a defect in its appellate jurisdiction, either the per curiam or Justice Douglas's concurrence would have said as much. Second, and along similar lines, if the only jurisdictional flaw was with going directly to the Supreme Court, Hirota could have—and surely *would* have—re-filed in an appropriate district court, as a U.S. serviceman would do in 1949 when the Court denied his original petition without prejudice to re-filing.<sup>120</sup>

Third, as a precedential matter, it was debatable, at best, whether a holding that the Court lacked constitutional appellate jurisdiction was consistent with *Yamashita* and *Homma*, wherein the only lower court proceedings were summary denials of relief by the Supreme Court of the Philippines, a territorial

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cl. 8 ("[N]o person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State."); (4) given General MacArthur's role, only Congress *could* create the IMTFE, pursuant to its authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* § 8, cl. 14, and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10; and (5) the IMTFE charter violated the Ex Post Facto Clause, *id.* § 9, cl. 3. See Brief for the Petitioner, *supra* note 95, at 16–19.

Hirota also made a series of arguments based on the IMTFE charter's alleged inconsistency with the Fifth and Sixth Amendments, but the bulk of his legal theories were, as the above summary suggests, jurisdictional—they went to the IMTFE's (and General MacArthur's) authority ab initio. See *id.* at 19–20.

120. See *supra* note 94 (discussing the case of U.S. serviceman Arthur Bush).

court, and certainly not, especially at the time, a “court of the United States.”<sup>121</sup> If nothing else, it was not obvious enough to assume without any discussion. Even Professor Oaks, who viewed this distinction as determinative both of the existence of constitutional appellate jurisdiction in *Yamashita* and the absence thereof in *Hirota*, nevertheless read the per curiam as reaching the broader jurisdictional argument—as “plac[ing] its disclaimer of jurisdiction . . . on a ground common to all United States courts, rather than on its own want of appellate jurisdiction,” which “served further to disguise the fact that relief was specifically outside the range of Supreme Court power.”<sup>122</sup> In their assessment of the 1948 Term, the editors of the *Harvard Law Review* expressed a similar view.<sup>123</sup>

#### F. JUSTICE DOUGLAS’S CONCURRENCE

When it was finally filed on the last day of the 1948 Term (over six months after the per curiam),<sup>124</sup> Justice Douglas’s concurrence, too, saw the holding at its broadest—that all federal jurisdiction over the Petitioners’ claims was beyond the scope of Article III. And it was upon this point that Justice Douglas seized. First, Douglas emphasized why *Ahrens* was not a barrier to the exercise of jurisdiction. “[I]t does not follow” from *Ahrens*, Douglas wrote, “that where [the] place [of confinement] is not within the territorial jurisdiction of any District Court, judicial power to issue the writ is rendered impotent.”<sup>125</sup> Instead:

In *Ahrens v. Clark*, denial of a remedy in one District Court was not a denial of a remedy in all of them. There was a District Court to which those petitioners could resort. But in these cases there is none if the jurisdiction of the District Court is in all respects restricted to cases of prisoners who are confined within their geographical boundaries.<sup>126</sup>

Next, Douglas went on to reject the notion that the federal courts lacked jurisdiction because of the IMTFE convictions. In his words:

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121. In his circulated but unpublished opinion dissenting from what he saw as the Court’s impending summary denial of review in *Hirota*, Justice Rutledge had expressly noted how, in *Yamashita* and *Homma*, “[o]ne application was for certiorari from the denial of *habeas corpus* by the Supreme Court of the Philippines. Other applications, however, came directly to this Court in the first instance and were considered in the same hearing.” Draft Opinion of Justice Rutledge, *supra* note 97, at 3 n.6.

122. Oaks, *supra* note 13, at 173.

123. See Note, *The Supreme Court, 1948 Term—Leading Cases*, 63 HARV. L. REV. 119, 129 (1949) (*Hirota* was decided “apparently on the ground that *no* federal court had jurisdiction to issue a writ of *habeas corpus*” (emphasis added)).

124. The timing appears to have been deliberate. On the cover of a typeset draft in Justice Douglas’s papers dated “5-19-49,” there is a handwritten note stating “HOLD ‘till last.” Draft Opinion of Justice Douglas, at 1 (May 19, 1949) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Container 186, *Hirota v. MacArthur* Case File, “Final Galley” folder).

125. *Hirota v. MacArthur*, 338 U.S. 197, 201 (1948) (Douglas, J., concurring).

126. *Id.* at 201 (citation omitted). Justice Douglas was uniquely qualified to explain why *Ahrens* was inapposite, since he authored the majority opinion in that case.

The fact that the tribunal has been set up by the Allied Powers should not of itself preclude our inquiry. Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. Our writ would run not to an official of an Allied Power but to our own official. We would want to know not what authority our Allies had to do what they did but what authority our officials had.

If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. . . . There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well.<sup>127</sup>

Although Douglas's language was general, he was emphatic that his concern was not raised so much by the instant case as by a future case specifically involving U.S. citizens. Douglas's objection was that he viewed the rule laid down by the majority as *not* turning on citizenship, even though he could not envision the Court endorsing a similar result where the petitioner *was* American. In his words:

I cannot believe that we would adhere to that formula if these petitioners were American citizens. I cannot believe we would adhere to it if this tribunal or some other tribunal were trying American citizens for offenses committed either before or during the occupation. In those cases we would, I feel, look beyond the character of the tribunal to the persons being tried and the offenses with which they were charged. We would ascertain whether, so far as American participation is concerned, there was authority to try the defendants for the precise crimes with which they are charged. That is what we should do here.<sup>128</sup>

Thus, Douglas did not concur on jurisdictional grounds; he disagreed with the

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127. *Id.* at 204.

128. *Id.* at 205. That Justice Douglas was so preoccupied with a potential case involving U.S. citizens and access to the federal courts during wartime is consistent with another overlooked opinion from the World War II era, *Ex parte Endo*, 323 U.S. 283 (1944), in which the Court, per Douglas, ordered the release of a *loyal* U.S. citizen held at a Japanese internment camp, as distinguished from *Korematsu v. United States*, 323 U.S. 214 (1944), decided the same day. For a compelling account of the case and of Justice Douglas's central role therein, see generally Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

majority's resolution of the jurisdictional issue entirely because it would also apply to U.S. citizens, and not only to non-citizens such as Hirota. He concurred, however, because while "the Tokyo Tribunal acted as an instrument of the military power of the Executive Branch of [the U.S.] government,"<sup>129</sup> and was therefore not an international tribunal, "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."<sup>130</sup> Justice Douglas agreed that the applications should be dismissed, but on political question grounds, and not for want of jurisdiction.

The political question holding is itself worthy of note. First, on Douglas's view, the petition presented a political question on substantive, rather than remedial, grounds: The Court was not asked to decide a question the resolution of which the political branches would ignore; it was asked to decide a question that was not judicially cognizable.<sup>131</sup> As such, Justice Douglas, unlike his brethren, viewed the flaw with the petitions as going to their *justiciability*, and not to the Court's jurisdiction over them.<sup>132</sup>

By then, though, it did not matter. Along with six other defendants convicted by the IMTFE,<sup>133</sup> Kōki Hirota had been hanged at Tokyo's Sugamo Prison shortly after midnight local time on December 23, 1948, just three days after the Supreme Court's *per curiam* was handed down.<sup>134</sup> *Hirota* also marked the end of the Court's short-lived experiment with hearing argument in any of the original habeas cases. On March 7, 1949, the Court, again divided 4–4 with Justice Jackson recused, denied five new original petitions filed in the Dachau cases,<sup>135</sup> and on May 2, the Court denied fifty-eight new applications,<sup>136</sup> all but one of which, as Fairman recounts, arose out of Nuremberg.<sup>137</sup> The only

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129. *Hirota*, 338 U.S. at 215 (Douglas, J., concurring).

130. *Id.*

131. The pre-*Hirota* political question cases hardly shed light on the viability of Justice Douglas's reasoning. *See, e.g.*, *Rescue Army v. Mun. Court*, 331 U.S. 549 (1947); *Coleman v. Miller*, 307 U.S. 433 (1939). But that is not to say that there is nothing to commend it. To the extent that American participation in the IMTFE was part-and-parcel of its occupation of post-war Japan, legal challenges thereto implicated a very different aspect of the government's constitutional authority than that considered in, for example, the Hawaiian martial law case, *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). *See, e.g.*, *Madsen v. Kinsella*, 343 U.S. 341 (1952) (taking an expansive view of the government's constitutional authority to conduct military tribunals in occupied Germany).

132. For a contemporaneous analysis of Justice Douglas's intentions, see Leon D. Epstein, *Justice Douglas and Civil Liberties*, 1951 WIS. L. REV. 125, 154–56.

133. The other six men were General Kenji Doihara, General Seishirō Itagaki, General Heitarō Kimura, General Iwane Matsui, General Akira Mutō, and Prime Minister (and former General) Hideki Tōjō. *See* MINEAR, *supra* note 7, at 203.

134. *See id.* at 172; *see also* BRACKMAN, *supra* note 7, at 399–400; GINN, *supra* note 6, at 177. The executions were carried out (some hours earlier, given the time difference) on the same day that the Court summarily denied Hirota's *pro forma* petition for rehearing.

135. *In re Dammann*, 336 U.S. 932, 932 (1949) (mem.).

136. *In re Muhlbauer*, 336 U.S. 964 (1949) (mem.).

137. *See* Fairman, *supra* note 62, at 600.

tangible effect *Hirota* had on the subsequent cases was the wording of the denial order: after *Hirota*, the four dissenting Justices—Black, Douglas, Murphy, and Rutledge—noted that, instead of setting the cases for argument on the jurisdictional question, the cases should be heard “in order to settle what remedy, if any, the petitioners have.”<sup>138</sup> Without a fifth vote, the question answered itself—none, insofar as the U.S. courts were concerned.

## II. *HIROTA* DISCUSSED, APPLIED, AND MISUNDERSTOOD

For two distinct, but equally important reasons, *Hirota*'s significance waned rather quickly.<sup>139</sup> First, a diminishing number of German and Japanese soldiers remained in U.S. custody,<sup>140</sup> especially after the political branches of the U.S. government officially recognized the “end” of hostilities with both countries in 1951 and 1952, respectively.<sup>141</sup> Second, the Supreme Court would soon hold, in *Johnson v. Eisentrager*, that enemy aliens convicted by military tribunals had no constitutional right to habeas corpus, and had little to nothing in the way of other rights enforceable in U.S. courts.<sup>142</sup> *Eisentrager* thus rendered the underlying jurisdictional question largely superfluous, since it made little sense, especially pre-*Steel Co.*,<sup>143</sup> to devote any serious attention to complex questions of

138. *E.g.*, *Muhlbauer*, 336 U.S. at 965. Again, Justice Black's unexplained switch in position back to the dissenting side is difficult to decipher, given his crucial fifth vote for the majority in *Hirota*.

139. *Hirota* thus received fairly skimpy treatment in the academy. Although numerous reviews of the 1948 Term cited the decision, few gave it more than a cursory discussion. For two of the only counterexamples, see J.R. Mackenzie, Recent Decisions, 47 MICH. L. REV. 835 (1949); and Willis B. Snell, Comment, 49 MICH. L. REV. 870 (1951).

140. As Dower recounts, “[o]n December 24, 1948, the day after the seven defendants were hanged at Sugamo, all nineteen remaining [un-indicted Class A] suspects were released on grounds of insufficient evidence.” DOWER, *supra* note 10, at 454.

141. See Act of Oct. 19, 1951, ch. 519, 65 Stat. 451 (1951) (Germany); see also United States *ex rel.* Jaegeler v. Carusi, 342 U.S. 347 (1952) (per curiam). The war with Japan formally ended on April 28, 1952, the date on which the peace treaty between Japan and forty-eight nations, including the United States, became effective. See Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. See generally Vladeck, *supra* note 54 (manuscript at 33–34 & n.120) (explaining the significance of the political branches' actions).

142. See 339 U.S. 763 (1950).

143. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court rejected the doctrine of “hypothetical jurisdiction,” holding that federal courts must settle questions of subject-matter jurisdiction before reaching any substantive questions presented, notwithstanding the complexity of the jurisdictional question vis-à-vis the merits. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583–88 (1999) (clarifying that *Steel Co.* does not require resolution of subject-matter jurisdiction before other threshold issues, including personal jurisdiction and standing); see also Laura S. Fitzgerald, *Is Jurisdiction Jurisdiction?*, 95 NW. U. L. REV. 1207 (2001); Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258 (2000); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001); Joshua Schwartz, Note, *Limiting Steel Co.: Recapturing a Broader “Arising Under” Jurisdictional Question*, 104 COLUM. L. REV. 2255 (2004).

Whether *Steel Co.* extends to constitutional jurisdictional questions, as in *Hirota* (and therefore overrides the constitutional avoidance canon), is not necessarily settled. As one prominent example to the contrary, in the *Schiavo* litigation, both the district court and the Eleventh Circuit assumed the constitutionality of the jurisdiction conferred by “Terri's Bill,” Act of Mar. 21, 2005, Pub. L. No. 109-3,

the constitutional availability of jurisdiction when the merits were so unequivocally foreordained.

That is not to say, however, that there were no subsequent cases interpreting and applying *Hirota*. To the contrary, one significant pre-*Eisenstrager* D.C. Circuit decision, *Flick v. Johnson*, is particularly noteworthy, for it suggests that the *Hirota* per curiam was understood to sweep at least as broadly as Justice Douglas saw it, if not more so.<sup>144</sup>

#### A. FLICK

To understand the significance of *Flick*, we must first briefly return to *Eisenstrager*, which was making its way through the courts while both *Hirota* and *Flick* were decided. As noted above, the district court in *Eisenstrager* had concluded, in October 1948, that it lacked statutory jurisdiction over habeas petitions filed by German citizens convicted by military tribunals and imprisoned in Germany, summarily (and perhaps erroneously) relying on *Ahrens*.<sup>145</sup> The D.C. Circuit made matters worse the following April, reversing the district court not because it had misread *Ahrens* on the statutory question, but because, in its view, the petitioners had a constitutional right to habeas corpus, one that could not be constrained by *Ahrens*'s reading of the federal habeas statute.<sup>146</sup> Up until the Supreme Court reversed the D.C. Circuit in June 1950, then, the law of the circuit supported the jurisdictional availability of habeas corpus as a matter of constitutional law—even for non-citizens—subject only to the ambiguous limits created in *Hirota*.<sup>147</sup>

And so, when the D.C. Circuit decided *Flick* on May 11, 1949, the question was whether *Hirota* barred the exercise of jurisdiction over a habeas petition brought by a German industrial magnate convicted by a military tribunal in occupied Germany, notwithstanding the same court's holding one month earlier in *Eisenstrager*.<sup>148</sup> *Flick* distinguished the D.C. Circuit's decision in *Eisenstrager*

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§1, 119 Stat. 15, 15 (2005), in order to reach the merits of the Schindlers' claims. See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1382–83 (M.D. Fla.), *aff'd*, 403 F.3d 1223 (11th Cir. 2005) (per curiam). But see *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1272–75 (11th Cir. 2005) (Birch, J., specially concurring in the denial of rehearing en banc) (arguing that Public Law 109-3 is unconstitutional and that the *Rooker-Feldman* doctrine therefore deprived the federal courts of subject-matter jurisdiction). For a survey of the jurisdictional issue (and an intriguing alternative theory of federal jurisdiction in *Schiavo*), see generally Patrick O. Gudridge, *Pangloss*, 61 U. MIAMI L. REV. (forthcoming 2007).

144. 174 F.2d 983 (D.C. Cir. 1949).

145. See *supra* note 82 and accompanying text.

146. *Eisenstrager v. Forrestal*, 174 F.2d 961, 965–66 (D.C. Cir. 1949), *rev'd*, 339 U.S. 763 (1950).

147. The district courts themselves struggled to reconcile *Hirota* and *Eisenstrager*. For one particularly messy example, compare the D.C. district court's decision in *Shirakura v. Royall*, 89 F. Supp. 711, 713 (D.D.C. 1948) (holding that *Ahrens* foreclosed jurisdiction over a habeas petition brought by Japanese soldiers sentenced to death by American military commissions in the Philippines), five days before *Hirota* was decided, with its reaffirmance upon rehearing in light of *Hirota* and *Eisenstrager*. *Shirakura v. Royall*, 89 F. Supp. 713, 714–15 (D.D.C. 1949).

148. For an overview of the background and the difficult questions raised by the nature of the tribunal that tried *Flick*, see Note, *supra* note 109. The district court denied *Flick*'s habeas petition in

by concluding that, unlike the military tribunal at issue in the earlier case, the tribunal convened in *Flick* was an “Allied” court, and was therefore, “in all essential respects, an international court.”<sup>149</sup> Because it was not “a tribunal of the United States,” the court cited *Hirota* for the conclusion that “no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed on Flick.”<sup>150</sup> Although *Flick* did not explicitly say as much, it therefore effectively held that, notwithstanding the constitutional rights identified in *Eisentrager*, federal courts lacked constitutional jurisdiction to entertain habeas petitions brought by non-citizens convicted by “international” military tribunals; a statutory holding to the contrary would have been inconsistent with *Eisentrager*.<sup>151</sup>

The necessary implication of *Flick*, then, when read together with *Hirota* and the D.C. Circuit’s decision in *Eisentrager*, is that Article III imposes a constitutional bar on all federal jurisdiction (and not just the Supreme Court’s “appellate” jurisdiction) over habeas petitions brought by non-citizens convicted by “international” military tribunals.<sup>152</sup> But the implications of *Flick* were even broader, for the D.C. Circuit applied *Hirota*’s jurisdictional bar notwithstanding the facts that (1) its decision in *Eisentrager* established that the petitioner in *Flick* had a constitutional right to habeas corpus (which had not been true at the time of *Hirota*); and (2) the petition was filed, in the first instance, in the district court. Even where detainees had constitutional rights to enforce, then, *Flick* read *Hirota* as holding that the Constitution foreclosed jurisdiction over such claims in any U.S. court.

#### B. *EISENTRAGER*

For its broad reading of *Hirota* and its somewhat questionable conclusion that

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April 1948, before *Hirota* and the district court’s decision in *Eisentrager*. See *Ex parte Flick*, 76 F. Supp. 979 (D.D.C. 1948), *aff’d*, 174 F.2d 983.

149. *Flick*, 174 F.2d at 985. The conclusion that the tribunal was “international in character” was dubious, at best. See Note, *supra* note 109, at 1001–03; see also Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 369 n.8 (1951) (describing *Flick* as extending *Hirota*’s rationale “to those Nuremberg tribunals which were American in composition but derived authority from Law No. 10 issued by the quadripartite control council”).

150. *Flick*, 174 F.2d at 984.

151. The Supreme Court denied certiorari in *Flick* on November 14, 1949, on the same day that it granted certiorari in *Eisentrager*. See *Flick v. Johnson*, 338 U.S. 879 (1949) (mem.); *Johnson v. Eisentrager*, 338 U.S. 877 (1949) (mem.). In *Flick*, Justice Black noted that he would have granted certiorari. 338 U.S. at 879.

152. The D.C. Circuit emphasized this point in *Omar* in rejecting the argument that “*Hirota*’s holding concerns the scope of Supreme Court jurisdiction.” *Omar v. Harvey*, No. 06-5126, 2007 WL 420137, at \*4 (D.C. Cir. Feb. 9, 2007). As Judge Tatel observed:

[J]ust six months after *Hirota*, in *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), we applied *Hirota* to a habeas corpus petition filed not in the Supreme Court, but in the district court by an individual who, like the *Hirota* petitioners, had been convicted by an international tribunal. In this circuit, then, *Hirota* applies to habeas proceedings in the district court. *Id.*

an American military tribunal was “Allied” in character, *Flick* might have become a remarkably significant decision, were it not for the Supreme Court’s disposition of *Eisentrager* thirteen months later. At its simplest, *Eisentrager* held that enemy aliens convicted by an overseas military tribunal had no constitutional right to the writ of habeas corpus, a holding best understood in the context of the D.C. Circuit’s broad conclusion to the contrary.<sup>153</sup> Justice Jackson’s majority opinion, hardly a model of clarity, is nevertheless fairly clear in reaching the substance of the petitioners’ claims, and not following *Hirota* and holding that Article III foreclosed jurisdiction. Nor could the Court have followed *Hirota*. Unlike in *Flick*, there was no colorable argument that the tribunal that convicted the petitioners was “Allied,” and therefore “international” in character.<sup>154</sup>

Instead, the Supreme Court employed two different rationales to reverse. First, the Court relied on the fact that the petitioners were enemy aliens detained during the course of the war, and that, as such, they had no grounds for contesting their detention, invoking the Alien Enemy Act of 1798 as an analogy.<sup>155</sup> As Justice Jackson wrote, “the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have . . . 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.”<sup>156</sup> In one of the most important and unprecedented passages, Jackson continued:

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153. For a comprehensive discussion of the background, see Douglas E. Dayton, Comment, *A Critique of the Eisentrager Case: American Law Abroad—Habeas Corpus at Home?*, 36 CORNELL L.Q. 303, 306–07 (1951). See also Note, *supra* note 149.

154. As Justice Jackson explained:

the *Eisentrager* petitioners were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theatre, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation.

*Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950). See also *In re Bush*, 84 F. Supp. 873, 875 (D.D.C. 1949) (summarizing the distinction between the nature of the tribunals at issue in *Eisentrager* and *Flick*).

155. Act of July 6, 1798, ch. 66, 1 Stat. 577 (current version at 50 U.S.C. §§ 21–24 (2000)); see also Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39 (2005) (discussing the Act and an interesting, if forgotten, early interpretation thereof by Chief Justice Marshall while riding circuit); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992) (summarizing the Act’s background and application); Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. (forthcoming 2007) (summarizing the evolution of the Act’s jurisprudence). “Enemy aliens” under the Act are “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized” when war is declared. 50 U.S.C. § 21 (2000).

156. *Eisentrager*, 339 U.S. at 776.

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.<sup>157</sup>

Only after arguing that the petitioners' status as enemy aliens foreclosed judicial review did the Court separately reiterate the importance of their extraterritorial situs and the logistical difficulties inherent in entertaining the petitions.<sup>158</sup> Yet this argument—that the Court lacked statutory jurisdiction over habeas petitioners detained abroad—was as much at the core of *Eisentrager* as the Court's emphasis that the petitioners were enemy aliens unlikely to prevail on the merits. Indeed, as noted by Professors Laurence Tribe and Neal Katyal, “[t]he opinion is unclear about which of two rationales justified its holding that no habeas review was permissible. . . . The Court mentioned both factors and did not get into the tricky business of which was doing the work.”<sup>159</sup>

Perhaps the best way to understand *Eisentrager* is to analyze it backwards, in light of the decisions below: the majority opinion held that (1) enemy aliens detained overseas have no constitutional right to habeas corpus (overruling the D.C. Circuit); and therefore, (2) the D.C. district court's construction of the habeas statute as not conferring jurisdiction over the petitioners' claims raised no constitutional concerns. Thus, the jurisdictional holding was statutory, unlike in *Hirota*, but turned on the resolution of a constitutional question as to the rights of the petitioners.<sup>160</sup> When *Braden* overruled *Ahrens*, it “overruled the statutory predicate to *Eisentrager*'s holding,” without implicating, in any meaningful way, the underlying constitutional issues.<sup>161</sup> In the Supreme Court,

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157. *Id.* at 777–78.

158. *Id.* at 778.

159. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259, 1306 n.174 (2002); see also Dayton, *supra* note 153, at 322 (noting that the decision was “difficult indeed to disentangle”); *Developments in the Law, supra* note 81, at 1163 n.55 (“it is not clear whether reversal was on the basis of the *Ahrens* rule or on the merits of the claim”).

160. For comparable analysis, see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2818–19 (2006) (Scalia, J., dissenting) (arguing that *Hamdan* has no rights under the Suspension Clause, and that the Detainee Treatment Act would therefore raise no constitutional question if interpreted to deprive federal courts of jurisdiction over his claims); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (reaching same conclusions with respect to Military Commissions Act of 2006), *cert. denied*, No. 06-1195, 2007 WL 957363 (U.S. Apr. 2, 2007); and *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006) (same).

161. *Rasul v. Bush*, 542 U.S. 466, 479 (2004). This passage from *Rasul* is not without criticism, including the brunt of Justice Scalia's intemperate dissent in the same case. See *id.* at 493–95 (Scalia, J., dissenting). But like those scholars who have criticized the *Rasul* majority's rationale, Justice Scalia's dissent ignores the relevance of the lower-court decisions in *Eisentrager*. Consider Justice Scalia's assertion that, “inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*, it is hard to see how any of that case's ‘statutory predicate’ could have been impaired.” *Id.* at 494. But that has it entirely backwards. In *Eisentrager*, the district court *relied* on *Ahrens*, a holding

*Eisenrager*, at least on the jurisdictional question, was never about the limits of Article III.

In dissent, Justice Black, joined by Justices Burton and Douglas, vehemently disagreed with the majority, particularly the extent to which the holding was based on the merits of the constitutional question—on the petitioners’ status as “enemies.” As the dissenters noted, because the Court did not speak negatively of *Quirin* or *Yamashita*, the constitutional rule *Eisenrager* enunciated was not for “enemy” aliens, but rather for all non-citizens detained abroad. Because *Quirin* and *Yamashita* both reached the merits of the detainees’ claims, *Eisenrager*, if it did not overrule them, turned on the extraterritorial *location* of the petitioners, and not their status as “enemy aliens.” As Justice Black wrote,

The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations. . . . [T]he 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>162</sup>

Critically, in holding that enemy aliens convicted by wholly “American” military tribunals lacked any rights enforceable via habeas corpus, *Eisenrager* necessarily foreclosed similar arguments by enemy aliens convicted by foreign or international military tribunals. In that regard, *Eisenrager* rendered *Hirota*’s complicated jurisdictional holding beside the point. Deep questions as to the constitutional availability of jurisdiction over habeas petitions filed by non-citizens held overseas need not be answered when such detainees had no rights that such jurisdiction could be used to enforce.

Nor was it necessarily clear that *Eisenrager* was limited to *enemy* aliens. Some later cases would suggest that it foreclosed extraterritorial constitutional rights for *all* non-citizens,<sup>163</sup> as the government has repeatedly argued in the

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that the Supreme Court *restored*. Thus, *Eisenrager* did in fact turn on the statutory issue decided in *Ahrens*, and *Braden* therefore undermined at least some aspect of the holding in *Eisenrager*—the district court’s decision, if nothing else. *See also supra* notes 77–78.

162. *Johnson v. Eisenrager*, 339 U.S. 763, 795–96 (1950) (Black, J., dissenting).

163. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990) (plurality opinion) (suggesting that *Eisenrager* reinforces the conclusion that the Fourth Amendment does not apply to non-citizens overseas); *Al Odah v. United States*, 321 F.3d 1134, 1138–42 (D.C. Cir. 2003) (relying on *Eisenrager* to conclude that habeas jurisdiction did not extend to Guantánamo Bay, Cuba, because detainees lacked Fifth Amendment rights), *rev’d on other grounds sub nom. Rasul*, 542 U.S. 466; *Harbury v. Deutsch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (relying on *Eisenrager* to deny claim for deprivation of Fifth Amendment rights by widow of Guatemalan citizen killed in Guatemala), *rev’d on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

Guantánamo litigation.<sup>164</sup> At the very least, in most cases involving non-citizens, *Hirota* became a dead-letter.

### C. AFTER *EISENTRAGER*

And so, in the years after *Eisenrager*, the only cases where *Hirota* played any role were habeas petitions filed by foreign and international detainees who were not convicted “enemy aliens” and who had constitutional rights capable of enforcement. Needless to say, such cases were few and far between.

Typical of these decisions was *United States ex rel. Keefe v. Dulles*, in which the D.C. Circuit held that it lacked jurisdiction to entertain a habeas petition filed by a U.S. serviceman convicted of robbery by a French court and serving his sentence in France.<sup>165</sup> As the court noted, “The petition shows on its face that Keefe is not in the custody of the respondents. It also shows, because it alleges he is detained by French civil authorities, that there is no one within the jurisdiction of the court who is responsible for his detention and who would be an appropriate respondent.”<sup>166</sup>

Later cases were to similar effect. For example, a series of cases held that federal courts lacked jurisdiction to inquire into convictions of U.S. nationals overseas, even when the sentences were being served in U.S. prisons pursuant to treaty and when the citizens were in American custody, albeit pursuant to a conviction by a foreign court.<sup>167</sup> Along similar lines, in *Duchow v. United States*, the Eastern District of Louisiana district court dismissed a habeas petition for lack of subject-matter jurisdiction where the petitioner, a U.S. citizen, was in Bolivian custody for offenses committed while in Bolivia.<sup>168</sup>

The notion that U.S. courts lacked jurisdiction to inquire into foreign convic-

164. Although the Supreme Court has now twice heard cases arising out of the detention of “enemy combatants” at Guantánamo, the closest it has come to deciding the question of whether the detainees have *any* constitutional rights was a dictum in a footnote in *Rasul*:

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.”

*Rasul*, 542 U.S. at 483 n.15 (citations omitted; emphasis added).

165. 222 F.2d 390 (D.C. Cir. 1954).

166. *Id.* at 392. The court nevertheless construed the suit as alternatively seeking a writ of mandamus, and reached the merits of Keefe’s claims. *See id.* at 392–94.

167. *See, e.g.*, *Bishop v. Reno*, 210 F.3d 1295 (11th Cir. 2000) (holding no jurisdiction to grant habeas relief of foreign-imposed sentence of a U.S. citizen); *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir. 1980) (holding no ability to challenge continued detention by U.S. authorities after transfer from Mexican prison); *Pfeifer v. Bureau of Prisons*, 615 F.2d 873 (9th Cir. 1980) (holding portions of treaty between United States and Mexico precluding transferred prisoners from challenging foreign convictions in U.S. courts constitutional). *See generally* *Kanasola v. Civiletti*, 630 F.2d 472 (6th Cir. 1980) (per curiam) (summarizing the practice). In *Kanasola*, the Court emphasized that it was unable to act on the petition because of the *extradition treaty*, and not because of Article III. 630 F.2d at 474.

168. No. 95-2121, 1995 WL 425037 (E.D. La. July 19, 1995).

tions was hardly new, as the absence of citations to *Hirota* suggested. Virtually all of the post-*Hirota* cases relied instead on the Supreme Court's 1901 decision in *Neely v. Henkel*,<sup>169</sup> which reiterated the uncontroversial proposition that U.S. courts could not inquire into the constitutionality of criminal convictions in foreign courts even via challenges to extradition requests.<sup>170</sup> The reliance on *Neely*, instead of *Hirota*, only further hastened *Hirota*'s relegation to little more than a historical afterthought. Only in cases in which detainees alleged that they were in the constructive custody of the United States and did not seek to challenge a foreign conviction—where detainees were held overseas without trial—could *Hirota* have mattered.<sup>171</sup> Unsurprisingly, no such cases were reported before September 11, 2001.

### III. THE MODERN *HIROTA*: *ABU ALI* AND *OMAR*

*Hirota* did not begin to reemerge until several years after September 11, 2001, as increasing numbers of detainees were held overseas without charges in conjunction with the war on terrorism. The decision took on a special importance in cases arising out of the “extraordinary rendition” program, wherein U.S. detainees were transferred to the custody of cooperative foreign powers, which would incarcerate the individuals and allegedly interrogate them using methods disapproved of within the United States.<sup>172</sup>

#### A. *ABU ALI* AND CONSTRUCTIVE CUSTODY

Like the case of Canadian Maher Arar,<sup>173</sup> the habeas petition brought by U.S. citizen Omar Abu Ali arose out of the U.S. government's extraordinary rendition program.<sup>174</sup> Abu Ali filed a federal habeas petition in the D.C. federal district court in July 2004, alleging that, although he was in the formal custody of the Saudi Arabian government, he was being held—and tortured—at the behest of the United States. As Judge Bates summarized:

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169. 180 U.S. 109 (1901).

170. See, e.g., *Sahagian v. United States*, 864 F.2d 509, 514 (7th Cir. 1988) (“This principle is most often applied in cases where the courts have held that a person cannot defeat his extradition to a foreign country on the ground that his trial in the country requesting extradition will not contain all the safeguards guaranteed by the Bill of Rights.”). In many ways, the rule of *Neely v. Henkel* is a more specific version of the general axiom that “[t]he Courts of no country execute the penal laws of another.” *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.).

171. For a poignant example of a case where *Hirota* had no impact—and was cited as such—see the fascinating decision of the “United States Court of Berlin” in *United States v. Tiede*, 86 F.R.D. 227, 245 n.74 (U.S. Ct. Berlin 1979).

172. See, e.g., sources cited *supra* note 4; see also *TORTURE: A COLLECTION* (Sanford Levinson ed., 2004).

173. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006). See generally Ian Austen, *Canadians Fault U.S. for its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006, at A1.

174. For a short summary of the merits of the decision in *Arar*, and an argument for why it is wrongly decided, see Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, A.B.A. NAT'L SEC. L. REP., July 2006, at 1, available at [http://www.abanet.org/natsecurity/nslr/NSLR\\_july2006.pdf](http://www.abanet.org/natsecurity/nslr/NSLR_july2006.pdf).

Abu Ali is a citizen of the United States who was born and raised in this country. He was arrested by Saudi officials while taking an examination at the university he was attending in Saudi Arabia. The United States orchestrated the detention and was intimately involved from the very beginning. FBI agents attended his interrogation by Saudi officials mere days after his arrest; FBI agents raided his parents' home in Virginia at roughly the same time; and three other United States citizens living in Saudi Arabia were arrested almost simultaneous with Abu Ali and extradited to the United States to stand trial, where one of them testified that he was told by United States and Saudi officials that he was arrested at the behest of the United States. Abu Ali has said that he was told the same thing by an official from the United States Embassy.

Saudi officials have described the detention privately as a United States matter, have acknowledged publicly that the United States has been involved throughout his detention, and have told United States officials that they would release Abu Ali at the request of the United States. FBI agents have interrogated Abu Ali at length in the Saudi prison. United States officials have also indicated to Abu Ali and to his parents on several occasions that they could release him if he cooperated or, if he did not, either keep him in the Saudi prison where he would be tried without counsel or send him to Guantanamo Bay where he would be detained as an "enemy combatant." . . .

According to petitioners, the United States has chosen to keep Abu Ali in Saudi Arabia because a grand jury refused to return an indictment against Abu Ali in the United States, and because United States officials want to continue to obtain information from him in a context that is free of constitutional scrutiny. There is at least some circumstantial evidence that Abu Ali has been tortured during interrogations with the knowledge of the United States. FBI agents have despaired at his continued detention and more than one United States official has stated that Abu Ali is no longer a threat to the United States and there is no active interrogation. Nonetheless, he has been held indefinitely without charge, explanation for his detention, or access to counsel since the time of his arrest . . . .<sup>175</sup>

The government moved to dismiss, arguing, inter alia, that *Hirota* barred the exercise of federal jurisdiction over Abu Ali's petition because Abu Ali was formally in the custody of a foreign power—Saudi Arabia. The court rejected the argument, relying on Abu Ali's U.S. citizenship:

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. The differences between the rights of citizens and the rights of aliens are considerable in this context, and the Supreme

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175. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 38 (D.D.C. 2004).

Court has expressly declined to enter the debate on the rights of citizens to habeas in cases involving the rights of aliens.<sup>176</sup>

In other words, the district court saw *Hirota* as distinguishable based upon Abu Ali's citizenship, notwithstanding the absence of any citizenship-based reference in the per curiam opinion itself.

Because the district court found the government's other arguments unavailing, it looked to Abu Ali's allegations of U.S. custody. Because Abu Ali had sufficiently alleged that he was in the constructive custody of the United States, the court concluded that, taking his allegations as true, his petition satisfied the federal habeas statute:

[G]iven the accepted breadth of the habeas statute, the imperative to construe the "in custody" requirement expansively in favor of the petitioner and without regard for formalisms, the absence of any language in the text that carves out an exception where the physical custodian is a foreign body, the many circumstances in which habeas jurisdiction has been found where the individual was not in the immediate possession of the respondent, and the decisions in which habeas jurisdiction was found when the executive or some other government official was working through the intermediary of a State, a private individual or a private corporation, the Court cannot find any basis *in the habeas statute* for denying jurisdiction merely because the executive is allegedly working through the intermediary of a foreign ally.<sup>177</sup>

After denying the government's motion to dismiss, the district court ordered limited discovery with respect to Abu Ali's jurisdictional allegations.<sup>178</sup> Although the case never made it that far,<sup>179</sup> the post-9/11 attempt to distinguish *Hirota* had begun.

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176. *Id.* at 55. For this last point, the district court relied on a passage from *Eisentrager*, stating that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." Johnson v. Eisentrager, 339 U.S. 763, 769 (1950).

177. *Abu Ali*, 350 F. Supp. 2d at 49 (citations omitted).

178. *Id.* at 67–69.

179. Although it is largely immaterial to the analysis herein, I would be remiss in not noting what subsequently transpired in *Abu Ali*. Shortly after Judge Bates's ruling, the U.S. government announced that it had (1) arranged for Abu Ali's return to U.S. custody (vindicating one of Abu Ali's central claims); (2) transferred Abu Ali to Virginia; and (3) unsealed an indictment against him for, inter alia, providing material support to al Qaeda, conspiring to assassinate the President of the United States, and conspiring to commit aircraft piracy. See *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16, 17 (D.D.C. 2005) (citing *United States v. Abu Ali*, No. 05-CR-0053 (E.D. Va. 2005)).

As in the case of accused "dirty bomber" Jose Padilla, see *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005); *Padilla v. Hanft*, 126 S. Ct. 1649, 1649–50 (2006) (Kennedy, J., concurring in the denial of certiorari), the government avoided a ruling on the merits of Abu Ali's habeas claims by transferring him to the criminal justice system, after which Judge Bates dismissed the habeas petition as moot. See *Abu Ali*, 387 F. Supp. 2d at 20.

B. *OMAR, MOHAMMED*, AND JURISDICTION OVER “MULTINATIONAL” FORCES

The government next resorted to *Hirota* in early 2006 in a case with facts somewhat analogous to *Abu Ali*, but also closer to those at issue in *Hirota*. Shawqi Ahmad Omar, a U.S. citizen, was detained in Iraq in late 2004. After members of his family filed a habeas petition challenging his detention on his behalf in late 2005,<sup>180</sup> Omar sought a temporary restraining order, and subsequently a permanent injunction, to avoid his transfer to the custody of the Central Criminal Court of Iraq (CCC-I).<sup>181</sup> On February 6, 2006, the district court granted Omar’s *ex parte* request for a temporary restraining order,<sup>182</sup> and, in a more thorough opinion filed on February 13, granted a preliminary injunction.<sup>183</sup>

In opposing the injunction, the government argued that Omar could not make out a showing of “substantial likelihood of success on the merits” because, under *Hirota*, the district court lacked jurisdiction over a detainee in the custody of the Multinational Force—Iraq, “an international coalition force, acting on behalf and at the request of a foreign government.”<sup>184</sup>

The district court rejected the reliance on *Hirota* for three distinct reasons. First, following *Abu Ali* and relying on Justice Douglas’s *Hirota* concurrence,<sup>185</sup> the court emphasized that Omar was a U.S. citizen and that *Hirota* applied only to non-citizens in international custody.<sup>186</sup> Second, the court noted that Omar alleged that he was in the constructive custody of the United States, and that *Hirota* therefore did not apply.<sup>187</sup> Finally, the court noted 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

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180. In his petition, Omar alleged that his detention violated the Due Process Clause, the Suspension Clause, the Non-Detention Act, 18 U.S.C. §4001(a) (2000), Army regulations, international law, and his right of access to counsel under the Sixth Amendment. See Petition for Writ of Habeas Corpus, Omar v. Harvey, No. 05-2374 (D.D.C. filed Dec. 12, 2005), available at <http://www.burkepile.com/Omar/Petition-for-Habeas-Corpus.pdf>.

181. See Omar v. Harvey, 416 F. Supp. 2d 19, 21–22 (D.D.C. 2006). For an overview of the CCC-I—and the many shortcomings that have marked its proceedings—see Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT’L L. 645 (2006).

182. See Omar, 416 F. Supp. 2d at 22.

183. *Id.* at 30.

184. *Id.* at 23.

185. Indeed, Judge Urbina explicitly invoked Justice Douglas’s concurrence four times, describing it, in one reference, as “prescient insight” into the case sub judice. *Id.* at 24 n.7.

186. *Id.* at 24.

187. *Id.* at 25 (“[W]hereas the *Hirota* decision indicates that the Japanese detainees were held by an entity other than the United States, the petitioner here has presented strong evidence that he is in the constructive custody of the United States military.”); see also *id.* at 25 nn.8–9; *id.* at 26 n.11 (“Where a habeas petitioner challenges actions taken allegedly at the behest of the United States, the court engages in a constructive custody analysis.”).

ultimate purpose of allowing an individual to present “a simple challenge to physical custody imposed by the Executive.”<sup>188</sup>

Given these considerations, the district court concluded that “the jurisdictional issues in the present case do not pose a fatal obstacle at this stage of the litigation,”<sup>189</sup> and, after rejecting the government’s other arguments, entered a preliminary injunction.<sup>190</sup>

The government appealed the preliminary injunction to the U.S. Court of Appeals for the D.C. Circuit, arguing that the injunction “contravenes the rule of *Hirota*,” and “exceeds the boundaries of Article III and habeas principles.”<sup>191</sup> On February 9, 2007, the Court of Appeals unanimously affirmed the district court’s jurisdictional analysis, although the panel divided 2–1 on the merits—*i.e.*, on Omar’s entitlement to a preliminary injunction.<sup>192</sup>

Writing for the majority, Judge Tatel was quick to emphasize *Hirota*’s lack of clarity: “*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>193</sup> Emphasizing instead that “the opinion articulates no general legal principle at all,”<sup>194</sup> the Court of Appeals concluded that “*Hirota* would ‘control’ this case only if the ‘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>195</sup> Rather than expressly rely upon the citizenship distinction as the district courts had done in *Omar* and in *Abu Ali*, however, the D.C. Circuit emphasized the absence of a “multinational” criminal conviction as the critical distinction between *Hirota* and the current challenges. As *Omar* concluded, “*Flick* . . . holds that the critical factor in *Hirota* was the petitioners’ convictions by an international tribunal.”<sup>196</sup>

Although there is much to commend in the D.C. Circuit’s analysis of *Hirota*, it is ultimately unconvincing on this last—and key—point. Indeed, as noted above, the argument that *Flick* and *Hirota* are distinguishable from *Omar* because the earlier cases sought to collaterally challenge a conviction by a multinational tribunal is difficult to reconcile with the nature of the habeas relief sought in *Hirota*. Because the petitioners in *Hirota* could not use habeas to

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188. *Id.* at 25 (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004)).

189. *Id.* at 27.

190. *Id.* at 30.

191. See Brief for the Appellants at i–ii, *Omar v. Harvey*, No. 06-5126, 2006 WL 1706559 (D.C. Cir. filed June 2, 2006).

192. See *Omar v. Harvey*, No. 06-5126, 2007 WL 420137 (D.C. Cir. Feb. 9, 2007).

193. *Id.* at \*5.

194. *Id.*

195. *Id.*

196. *Id.* at \*6.

collaterally challenge the underlying conviction (it was available only for jurisdictional challenges), the fact that the petition technically sought “post-conviction” relief was irrelevant; Hirota challenged the very authority of the IMTFE to try him in the first place, thus his challenge was not “collateral” in any meaningful sense of the word. And yet, as Judge Tatel noted, there are only two grounds on which to distinguish *Omar* from *Hirota*: the absence of a conviction by a multinational tribunal and the citizenship of the detainee. If the former ground is unconvincing, then the result reached by the D.C. Circuit in *Omar* must, ultimately, turn upon Omar’s U.S. citizenship.<sup>197</sup>

While the appeal in *Omar* was pending before the D.C. Circuit, two more cases arose raising the question of *Hirota*’s current significance. Like *Omar*, the first case, *Mohammed v. Harvey*, concerned a habeas petition brought by a U.S. citizen—Mohammed Munaf<sup>198</sup>—detained by the MNF-I. Unlike Omar, who sought an injunction barring his transfer to the custody of the CCC-I, Munaf was in the custody of the MNF-I pursuant to a CCC-I conviction and death sentence at the time he sought habeas relief. Thus, borrowing from Judge Tatel’s analysis in *Omar*, *Munaf* raised only *one* point of distinction from *Hirota*: citizenship. Judge Lamberth distinguished *Omar*, concluding that Munaf had not sufficiently alleged that he was in the actual or constructive custody of the United States, and that *Hirota* therefore precluded jurisdiction.<sup>199</sup> Although Munaf, relying on *Omar*, suggested that *Hirota* did not apply to cases involving U.S. citizens, Judge Lamberth disagreed, stating that:

nothing in *Hirota* or *Flick* purported to turn on whether the petitioners were citizens. The courts were without jurisdiction because the petitioners were held under the authority of entities that were ‘not a tribunal of the United States.’ The identity of the custodian, and the concomitant lack of habeas

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197. In her partial dissent, Judge Brown suggested that the only part of the majority’s jurisdictional analysis in which she did not fully concur was the suggestion that *Hirota* was distinguishable based upon the citizenship of the detainee. *See id.* at \*13 & n.1 (“To the extent the majority’s opinion might be read to imply citizenship was one of the determinative factors in *Hirota v. MacArthur*, 338 U.S. 197 (1948), I note the question remains open in this circuit.”).

198. Munaf’s petition was brought by Maisoon Mohammed, Munaf’s sister. *See Mohammed v. Harvey*, 456 F. Supp. 2d 115, 117 n.1 (D.D.C. 2006), *aff’d sub nom. Mohammed ex rel. Munaf v. Geren*, No. 06-5324 (D.C. Cir. Apr. 6, 2007).

199. Specifically:

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.

*Id.* at 122.

jurisdiction, would remain the same regardless of the petitioners' citizenship.<sup>200</sup>

*Mohammed* therefore is distinguishable from *Omar* on two counts. First, and explicitly, Judge Lamberth did not agree that the petitioners had sufficiently alleged the constructive custody of the United States.<sup>201</sup> Second, and implicitly, Judge Lamberth also disagreed that *Hirota* was a citizenship-specific jurisdictional rule inapplicable to cases involving U.S. citizens. Whereas the first source of disagreement is largely fact-specific, and does not seriously implicate the underlying thesis of this Article, the second warrants further attention as it was the basis on which the D.C. Circuit affirmed Judge Lamberth's decision in April 2007.<sup>202</sup>

Specifically, Judge Sentelle, writing for himself and Judge Kavanaugh, emphasized that "*Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to the judgment of a non-U.S. tribunal. Indeed, Justice Douglas wrote a separate opinion criticizing the *Hirota* majority for seeming to foreclose habeas review even for American citizens held in such circumstances."<sup>203</sup> Although the *Mohammed* majority emphasized that "*Hirota* does not explain why, in cases such as this, the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute,"<sup>204</sup> the court nevertheless distinguished *Omar* on the ground that Munaf had already been convicted by the CCC-I, reading *Hirota* and *Flick* for the proposition that "American citizenship cannot displace the fact of a criminal conviction in a non United States court and permit the district court to exercise jurisdiction over Munaf's habeas petition."<sup>205</sup> In addition, the majority also rejected the argument that *Hirota* and *Flick* were distinguishable because Munaf's challenge was not a collateral attack on his conviction: "[A]s in those cases, continued confinement is dependent on a conviction by a court not of the United States—specifically, a multinational tribunal in *Hirota* and *Flick* and, in

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200. *Id.* at 124. Judge Lamberth was quick to emphasize that he was not disagreeing with the logic of *Abu Ali*. *See id.* at 126 ("This is not to say that the United States military may purposefully evade the habeas jurisdiction of the courts, or otherwise deprive citizens of their rights, merely by cloaking its conduct in the guise of a multinational force. Nothing in today's holding is inconsistent with *Abu Ali v. Ashcroft*, which held that 'the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen.'") (citation and footnote omitted); *see also id.* ("Petitioner has not alleged the kind of jurisdictional facts that would qualify this case as one of the 'exceptional' instances where the United States is acting through an intermediary to detain a citizen.").

201. *See id.* at 128 n.12.

202. *See Mohammed ex rel. Munaf v. Geren*, No. 06-5324, slip op. at 2–3 (D.C. Cir. Apr. 6, 2007).

203. *Id.* at 4.

204. *Id.* at 6. Indeed, the majority hinted in several places that it might have reached a different result if it did not think it was bound to follow *Hirota*. *See, e.g., id.* at 2 (noting that the court was "[c]onstrained by precedent"); *id.* at 6 ("[W]e are not free to disregard *Hirota* simply because we may find its logic less than compelling.").

205. *Id.* at 5.

this case, the CCC-I, which is a foreign tribunal.”<sup>206</sup>

Concurring in the judgment on the merits,<sup>207</sup> Judge Randolph strongly disagreed with the majority’s jurisdictional analysis, suggesting that both *Eisen-trager* and *Rasul* had settled the global scope of habeas jurisdiction for U.S. citizens beyond question.<sup>208</sup> As Judge Randolph—the author of the D.C. Circuit’s decisions in *Rasul*, *Hamdan*, and *Boumediene*—concluded, “[h]abeas petitions test the legality of detention. The fact that the United States is holding Munaf because of his conviction by a foreign tribunal thus goes to the question whether he is entitled to the writ, not to the question whether the court has jurisdiction to consider the petition.”<sup>209</sup> We will return shortly to this last—and central—point, for to the extent that it is correct, it is not clear either how the D.C. Circuit could so hold without overruling *Hirota*, or why the same logic would not also apply to habeas petitions brought by non-citizens.

The second case, which concerned a last-minute application for a stay of execution filed by lawyers on behalf of Saddam Hussein, presented the closest analogy to *Hirota*. Relying on *Flick* and *Hirota*, Judge Kollar-Kotelly quoted an unreported decision in a strikingly similar case for the proposition that “this ‘Court lacks habeas corpus jurisdiction over an Iraqi citizen, convicted by an Iraqi court for violations of Iraqi law, who is held pursuant to that conviction by members of the Multi-National Force-Iraq.’”<sup>210</sup> *Hussein*, then, provides the strongest case for the modern force of *Hirota*. The harder question is whether *Hirota* also precludes the suits in *Mohammed*, *Omar*, and *Abu Ali*.

#### C. THE COURT’S EVOLVING JURISPRUDENCE: WERE *ABU ALI* AND *OMAR* RIGHT?

To a significant degree, the district court’s decisions in both *Abu Ali* and *Omar* were based on the argument that constructive custody was all that the federal habeas statute (and, *a fortiori*, Article III) required for federal courts to exercise jurisdiction where the petition was filed by a U.S. citizen.

It is certainly true, as the district court in *Omar* suggested, that Supreme Court decisions subsequent to *Hirota* took a broader view of the custody requirement in habeas cases. Central among these was *Jones v. Cunningham*,<sup>211</sup>

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206. *Id.*

207. *See id.* at 2–3 (Randolph, J., concurring in the judgment) (suggesting that Munaf’s claims on the merits are precluded by the Supreme Court’s decision in *Wilson v. Girard*, 354 U.S. 529 (1957)).

208. *See id.* at 1–2.

209. *Id.* at 2 (citing *Bell v. Hood*, 327 U.S. 678, 681 (1946)).

210. *In re Saddam Hussein*, 468 F. Supp. 2d 126, 129 (D.D.C. 2006) (quoting *Al-Bandar v. Bush*, No. 06-2209 (D.D.C. Dec. 27, 2006)); *accord Ramadan v. Bush*, No. 07-0297, 2007 WL 589795 (D.D.C. Feb. 27, 2007) (to similar effect).

211. 371 U.S. 236 (1963). As the Court concluded, “[w]hile petitioner’s parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the ‘custody’ of the members of the Virginia Parole Board within the meaning of the habeas corpus statute . . . .” *Id.* at 243. For a concise summary of the law prior to *Jones*, and the reaction to the sea-change that the decision brought about, see *DUKER*, *supra* note 87, at 287–96. The decision, or at least its historical analysis, was harshly criticized. *See, e.g.*, Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

in which Justice Black, writing for a unanimous Court, wrote that “[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man’s liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.”<sup>212</sup> Although *Jones* did not set a specific threshold for custody, later cases, particularly *Hensley v. Municipal Court*<sup>213</sup> (which might fairly be described as the high-water mark of the Court’s expansive habeas jurisprudence), emphasized that actual, physical custody was not necessary to satisfy the “custody” requirement of the federal habeas statute. Instead, “constructive” custody—“[c]ustody of a person (such as a parolee or probationer) whose freedom is controlled by legal authority but who is not under direct physical control”<sup>214</sup>—would be sufficient.<sup>215</sup>

The flaw in the district court opinions, however, is that custody was not an issue in *Hirota*. The petitioners in *Hirota*, detained at Sugamo Prison in Tokyo, were in the actual, physical custody of the U.S. Eighth Army, as Justice Douglas recognized in his concurrence.<sup>216</sup> Moreover, well before *Jones*, the D.C. Circuit recognized the sufficiency of “constructive custody” in *United States ex rel. Keefe v. Dulles* in 1954, all the while refusing to sustain jurisdiction over a habeas petition brought by a U.S. serviceman in French custody.<sup>217</sup> *Keefe* suggests not that constructive custody was a means around the constitutional bar created by *Hirota*; it was the relevant inquiry in cases where that bar did not apply.<sup>218</sup> The district courts’ custody analysis was therefore insufficient to distinguish *Hirota*.

Nor is there much to commend the argument that the Supreme Court’s habeas jurisprudence has otherwise expanded to render *Hirota* toothless, for none of the

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212. *Jones*, 371 U.S. at 240.

213. 411 U.S. 345 (1973). For a fascinating—and rather delayed—circuit split over just how expansive *Jones* is to be read in immigration cases, compare *Subias v. Meese*, 835 F.2d 1288 (9th Cir. 1987) (broadly interpreting “custody” to generally include restriction from entry into the United States), with *Samirah v. O’Connell*, 335 F.3d 545 (7th Cir. 2003) (requiring a more particularized showing of unique restraint).

214. BLACK’S LAW DICTIONARY 412 (8th ed. 2004).

215. See, e.g., *United States ex rel. Johnson v. Dep’t of Corr. Servs.*, 461 F.2d 956, 957 n.1 (2d Cir. 1972); see also *Carafas v. LaVallee*, 391 U.S. 234, 238–40 (1968) (holding that, once federal jurisdiction attached in the district court, release of the petitioner while appeal was pending would not defeat jurisdiction); *Peyton v. Rowe*, 391 U.S. 54, 64–67 (1968) (holding that a prisoner serving consecutive sentences is in custody under any of the sentences for purposes of the federal habeas statute); *Walker v. Wainwright*, 390 U.S. 335, 336–37 (1968) (per curiam) (holding that petitioner could challenge murder conviction by petition for federal habeas corpus even though granting of petition would not result in his immediate release from prison). For a useful recent decision on the limits of “custody” under the habeas statute, see *Sadhvani v. Chertoff*, 460 F. Supp. 2d 114, 118–20 (D.D.C. 2006).

216. See *Hirota v. MacArthur*, 338 U.S. 197, 199 (1948) (Douglas, J., concurring) (“Petitioners at the time of argument of these cases were confined in Tokyo, Japan, under the custody of respondent Walker, Commanding General of the United States Eighth Army . . .”).

217. 222 F.2d 390, 392 (D.C. Cir. 1954).

218. See *id.*

cases relied upon by the district courts dealt with the issue in *Hirota*—the limits placed by Article III on federal jurisdiction.<sup>219</sup> Rather, the “expansion” of the Court’s habeas jurisprudence dealt entirely with the scope of the federal habeas statute, particularly the meaning of the phrase “respective jurisdictions” within 28 U.S.C. §2241(a).<sup>220</sup> It should require little in the way of analysis to conclude that decisions regarding the scope of the federal habeas statute have no bearing on the substantive scope of Article III.<sup>221</sup>

#### D. STRUCTURAL RIGHTS AND ARTICLE III: WAS JUSTICE DOUGLAS RIGHT?

The only remaining basis on which *Hirota* can be distinguished from the present cases, then, is the citizenship of the petitioners. Relying on Justice Douglas’s concurrence, the government has steadfastly argued in the present cases that *Hirota* embraced no such distinction. As the above analysis should by now suggest, this argument is correct.

It is true, of course, that the *Hirota* per curiam made no such distinction. And it is equally true that Justice Douglas’s concurrence may be read as turning on the extent to which such a distinction would be untenable. After all, why would the concurrence devote so much attention to the implications of the majority’s holding in cases involving U.S. citizens if the holding were limited along the lines described by the district courts in *Omar* and *Abu Ali*?

Moreover, such a reading of *Hirota*—as applying irrespective of citizenship—is consistent with the structural nature of Article III and with what little has been definitively established about the nature of the “rights” that follow from Article III’s heads of subject-matter jurisdiction. Here, we confront the oft-invoked—but seldom explored—distinction between individual and “structural” rights.

It is not obvious, although perhaps it should be, that, as Judge Higginbotham has written, “[s]ubject matter jurisdiction is best understood as a structural right, for ‘it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign.’”<sup>222</sup> Indeed, it is odd to conceive of

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219. The only possible exception is the citizenship-based dictum from *Eisentrager* quoted in *Abu Ali*. See *supra* note 176 and accompanying text. But *Eisentrager*, which concerned non-citizens held overseas, can hardly call into question *Hirota*’s applicability to U.S. citizens.

220. See, e.g., *Armentero v. INS*, 340 F.3d 1058, 1061–64 (9th Cir. 2003) (summarizing the evolution), *withdrawn*, 382 F.3d 1153 (9th Cir. 2004).

221. For this reason, Judge Randolph’s suggestion in his *Mohammed* concurrence that *Rasul* called *Hirota* into question is simply untenable. See *Mohammed ex rel. Munaf v. Gersen*, No. 06-5324, slip op. at 1–2 (D.C. Cir. Apr. 6, 2007) (Randolph, J., concurring in the judgment). *Rasul* merely interpreted the habeas statute, 28 U.S.C. §2241, as extending to habeas petitions filed by detainees at Guantánamo Bay, Cuba. See *Rasul v. Bush*, 542 U.S. 466 (2004). However obtuse *Hirota*’s holding may be, that it is based upon a construction of Article III is beyond question. Given the extent to which *Rasul* carefully avoided reaching any question as to the detainees’ constitutional rights, see *supra* note 164 and accompanying text, it could not possibly have undermined *Hirota*.

222. *Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211, 228 (5th Cir. 1998) (en banc) (Higginbotham, J., dissenting) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)), *rev’d*, 526 U.S. 574 (1999).

subject-matter jurisdiction as a structural right not because it is not structural, but because it is not obvious that it is a “right.” But whereas other provisions of Article III protect interests that may be—and have been—characterized as individual rights, it is difficult to view the constitutional authorization of federal question jurisdiction as anything other than a structural delegation of authority to Congress to empower the federal courts. That Congress could choose to confer such jurisdiction to varying degrees,<sup>223</sup> including, perhaps, only to certain classes of individuals, is, at least for present purposes, beside the point. The constitutional heads of jurisdiction, to the extent that they are structural, exist irrespective of the nature of those who would invoke them.

The closest that the modern Supreme Court has ever come to explaining Article III’s internal distinction between structural and individual rights was in *Commodity Futures Trading Commission (CFTC) v. Schor*, where the Court held that the CFTC could entertain state-law counterclaims even though it was a non-Article III court, and that the agency’s assumption of jurisdiction over such claims did not violate Article III.<sup>224</sup> In discussing whether a party had waived its right to an Article III adjudication by allowing proceedings before an administrative law judge, the Court commented at some length on the distinction between “personal” rights and Article III’s structural protections:

Article III, § 1, serves both to protect “the role of the independent judiciary within the constitutional scheme of tripartite government,” and to safeguard litigants’ “right to have claims decided before judges who are free from potential domination by other branches of government.” Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1’s guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.

Our precedents also demonstrate, however, that Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. Moreover, as a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication.<sup>225</sup>

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223. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.”).

224. 478 U.S. 833, 857 (1986).

225. *Id.* at 848–49 (citations omitted); see *Freytag v. Comm’r*, 501 U.S. 868, 897–98 (1991) (Scalia, J., concurring in part and concurring in the judgment) (summarizing the holding in *Schor*); see also

Thus, although *Schor* dealt with the “personal” Article III right to “an independent and impartial adjudication by the federal judiciary,”<sup>226</sup> its logic suggests that we may understand the “structural” interests enmeshed in Article III as those that are not waivable. This distinction, of course, makes sense: whereas personal rights, such as those rights protected by the Due Process Clause,<sup>227</sup> can be surrendered,<sup>228</sup> structural protections such as subject-matter jurisdiction (or the composition of the panel on an Article III court<sup>229</sup>) cannot be. To the contrary, as is familiar law, structural protections must be satisfied at every stage of the litigation, notwithstanding the position of the parties.<sup>230</sup>

The critical point, then, is that whereas the Supreme Court has repeatedly recognized that personal or individual rights can differ in their scope based on the nature of the parties invoking them,<sup>231</sup> structural rights, in contrast, apply with equal force to all. Structural rights, by virtue of being *structural*, are independent of the parties. Thus, to the extent that the heads of subject-matter jurisdiction contemplated by Article III, Section 2, are structural, they are therefore not amenable to bifurcation—to applying with different force in

*Peretz v. United States*, 501 U.S. 923, 937 (1991) (holding that the right to a district judge, instead of a magistrate judge, does not implicate the “structural protections provided by Article III”).

226. Another example is the trial-by-jury right protected by Article III, Section 2, Clause 3. *See, e.g.*, *Patton v. United States*, 281 U.S. 276, 298 (1930) (“[W]e conclude that article 3, § 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego [sic] at his election.”), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970); *see also Singer v. United States*, 380 U.S. 24, 33–34 (1965) (affirming the right to waive a jury and discussing *Patton*).

227. For a thorough survey of the due process issues specific to the detention of “enemy combatants,” *see Tung Yin, Procedural Due Process to Determine Enemy Combatant Status in the War on Terrorism*, 73 TENN. L. REV. 351 (2006). *See also* Joseph Blocher, Policy Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006).

228. Personal jurisdiction is an obvious example. As the Supreme Court has explained:

The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. . . .

Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.

*Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982) (citations and footnote omitted).

229. *Cf. Nguyen v. United States*, 539 U.S. 69, 77–83 (2003) (holding, as a statutory matter, that a Ninth Circuit panel that included an Article I judge was improperly constituted, even though the Petitioner had failed to preserve the objection in the court of appeals).

230. *See, e.g.*, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998) (discussing the establishment of subject-matter jurisdiction as a threshold matter); *Ins. Corp. of Ir.*, 456 U.S. at 702 (“no action of the parties can confer subject-matter jurisdiction upon a federal court”); *see also* FED. R. CIV. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”).

231. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (“[C]onstitutional decisions of this Court expressly according differing protection to aliens than to citizens [are] based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens.”).

different classes of cases to which they otherwise apply on their face.<sup>232</sup> Instead, the scope of the jurisdiction contemplated by Article III is absolute as a constitutional matter and admits of no internal distinctions.<sup>233</sup>

So construed, it would make little sense to view *Hirota*, under either possible reading of the per curiam—that is, as barring all federal jurisdiction or as reaching only the Supreme Court’s constitutional appellate jurisdiction—as supporting a distinction based upon the citizenship of the party seeking to invoke federal jurisdiction. To the contrary, entirely because constitutional federal question jurisdiction exists irrespective of the citizenship of the parties, it would be counter-textual to conclude that Article III foreclosed jurisdiction over federal question suits brought by non-citizens where it did not similarly foreclose jurisdiction over such suits by citizens.<sup>234</sup>

To be sure, citizenship, whether of a particular state or country, plays an entirely obvious role in the federal jurisdiction contemplated by Article III. As first-year law students learn chapter and verse, fully four of the nine heads of federal jurisdiction prescribed by Article III, Section 2, Clause 1, are keyed to the citizenship of the parties.<sup>235</sup> But it hardly follows from the role citizenship plays in the availability of federal jurisdiction in Section 2 of Article III that

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232. Of course, those heads of jurisdiction that turn on the citizenship of the parties present something of a different case, but not entirely. Consider, for example, a situation wherein courts construed the alienage basis of Article III jurisdiction—which authorizes jurisdiction “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”—as not extending to foreign states with which the United States is at war. U.S. CONST. art. III, § 2, cl. 1. The same analysis, I submit, would apply, and would preclude such a holding.

233. Defenses such as sovereign immunity and the “act of state” doctrine, which have sometimes been referred to in jurisdictional terms and might be thought of as examples of such “distinctions,” are not jurisdictional in the constitutional sense, because they are waivable. *See, e.g.*, *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (sovereign immunity); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (same); *First City Nat’l Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767–70 (1972) (plurality opinion) (act of state doctrine waivable); *cf. Moore v. United Kingdom*, 384 F.3d 1079, 1083 n.4 (9th Cir. 2004) (noting the somewhat unusual interaction between sovereign immunity, waiver, and federal jurisdiction). *See generally* Katherine Florey, Comment, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CAL. L. REV. 1375 (2004) (exploring the “jurisdictional” nature of sovereign immunity in more depth).

234. This argument—that structural constitutional provisions that serve to limit the power of the federal government apply equally irrespective of the citizenship of the plaintiff—has significant ramifications vis-à-vis the Suspension Clause in the current detainee cases, and was at the heart of Judge Rogers’s dissent in *Boumediene*. *See Boumediene v. Bush*, 476 F.3d 981, 995–98 & n.3 (D.C. Cir. 2007) (Rogers, J., dissenting); *see also infra* text accompanying notes 268–77.

235. *See* U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to controversies . . . between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

The first citizenship-based head, of course, was narrowed and effectively vitiated by the Eleventh Amendment (and subsequent interpretations thereof by the Supreme Court). *See* U.S. CONST. amend. XI; *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 & n.8 (2002). *But see* *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 994 (2006) (holding that Congress may abrogate the sovereign immunity of the states pursuant to its power under the Article I Bankruptcy Clause); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (holding that Congress may abrogate the sovereign immunity of the states pursuant to Section 5 of the Fourteenth Amendment).

citizenship should also factor into the substantive limits on the “judicial Power of the United States” recognized in Section 1.<sup>236</sup>

E. AN ARTICLE III BARRIER: WAS JUSTICE DOUGLAS WRONG?

One fundamental question remains: I have endeavored to explain that *Hirota* was not compelled by then-extant precedent, and that the distinction for which it has since come to be read cannot be sustained under a structural rights-based view of Article III. If, then, *Hirota* stands as an outright jurisdictional bar to all habeas petitions brought by detainees in foreign or international custody regardless of their citizenship, can it possibly stand?

Here, it is worth revisiting Justice Douglas’s concurrence, which remains the most detailed argument on record against applying such a jurisdictional bar to habeas petitions brought by citizens. Recall the following passage from Douglas’s opinion:

The fact that the tribunal has been set up by the Allied Powers should not of itself preclude our inquiry. Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. Our writ would run not to an official of an Allied Power but to our own official. We would want to know not what authority our Allies had to do what they did but what authority our officials had.<sup>237</sup>

It is along this axis of reasoning that the focus on custody in *Omar* and *Abu Ali*, although impracticable as a means of distinguishing *Hirota*, might better support the modern restoration of Justice Douglas’s concurrence. Of course, Article III imposes various requirements on federal question lawsuits separate from the minimum requirements for subject-matter jurisdiction, including standing, ripeness, mootness, and the amorphous but uncontested prohibition on “advisory opinions” that the first three justiciability doctrines are intended to protect.<sup>238</sup>

Although it has seldom been explored as such, the custody requirement of the federal habeas statute serves, in most cases, to vindicate justiciability concerns. So long as a detainee is “in custody” within the meaning of the statute, it is unlikely, in the typical case, that a challenge to the legality of that custody will be moot, unripe, or that the detainee will lack standing to bring such a

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236. See U.S. CONST. art. III, § 1, cl. 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

237. *Hirota v. MacArthur*, 338 U.S. 197, 204 (1948) (Douglas, J., concurring).

238. See, e.g., *Levy v. Miami-Dade County*, 358 F.3d 1303, 1305 (11th Cir. 2004) (per curiam) (“Generally, justiciability encompasses a range of doctrines such as standing, mootness, ripeness, political question[s], and the prohibition against advisory opinions.” (citations omitted)); see also ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.2, at 56 (4th ed. 2003) (discussing the relation of the ban on advisory opinions to other justiciability requirements).

challenge.<sup>239</sup> Viewing habeas petitions brought by foreign or international detainees through the lens of justiciability doctrine, then, the *Hirota* problem takes on a somewhat different form: If the issue in these cases is the ability of U.S. federal courts to provide the relief requested by the petitioner, the Article III problem is not the absence of subject-matter jurisdiction; it is the absence of *redressability*, and as such, the absence of standing.<sup>240</sup>

What is therefore fascinating about Justice Douglas's concurrence in hindsight is that redressability *was* his preeminent concern:

The conclusion is therefore plain that the Tokyo Tribunal acted as an instrument of military power of the Executive branch of government. It responded to the will of the Supreme Commander as expressed in the military order by which he constituted it. It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power. Insofar as American participation is concerned, there is no constitutional objection to that action. For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.<sup>241</sup>

Thus, the flaw in the relief the petitions sought was that it was relief from what Justice Douglas viewed as an entirely political act—the constitution and administration of the tribunal—to which Justice Douglas saw the Court as being required to defer. Additionally, because of *Quirin* and *Yamashita*, in both of which Justice Douglas joined the majority, any of Hirota's serious constitutional challenges to the validity of the IMTFE's jurisdiction to try him were arguably foreclosed,<sup>242</sup> leading to Douglas's conclusion that “[i]nsofar as American

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239. I am oversimplifying because legion are the cases wherein third parties are held to lack standing to challenge an individual's custody, or challenges to *past* custody have become moot, as the recent *Padilla* case typifies. But the underlying point—that the detainee himself will seldom face constitutional justiciability prohibitions if he satisfies the custody requirement of the federal habeas statute—remains uncontroversial.

240. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (under “Article III standing, which enforces the Constitution's case or controversy requirement, . . . [t]he plaintiff must show that the conduct of which he complains has caused him to suffer an ‘injury in fact’ that a favorable judgment will redress” (citations omitted)); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (“Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”).

241. *Hirota*, 338 U.S. at 215.

242. That American constitutional law has evolved to render Douglas's analysis of the merits anachronistic is evident from two of the Court's post-September 11 decisions—*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Leaving aside the merits of the decisions in *Hamdi* and *Hamdan*, both suggest that, if nothing else, such war powers questions are no longer presumptively non-justiciable. Cf. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006) (analyzing whether the substantive scope of the Suspension Clause is justiciable); Vladeck, *supra* note 155 (summarizing the numerous examples of courts reaching questions as to who the “enemy” is).

participation is concerned, there is no constitutional objection.”<sup>243</sup> But Justice Douglas understood a point that the majority did not: Because there might be future habeas cases brought by U.S. citizens in foreign or international custody, and because Article III would not support a distinction based upon citizenship, “[t]here is no room for niggardly restrictions when questions relating to [the] availability [of habeas] are raised.”<sup>244</sup>

The flipside of Justice Douglas’s analysis, then, is that where the various justiciability doctrines *are* satisfied in a habeas case brought by a foreign or international detainee, it strains credulity to conclude, as one must read *Hirota* as holding, that Article III is nevertheless a bar to consideration of such a lawsuit. *Hirota* itself should have proved this point. As summarized above, most of Hirota’s legal claims went not to deficiencies in his conviction, but rather to infirmities, under American constitutional law, in General MacArthur’s authority to create the tribunal in the first place. Hirota challenged the constitutionality of actions by a U.S. general. Such claims may well have proven unsuccessful, either (1) because of the political question doctrine-based reasons suggested by Justice Douglas in his concurrence; (2) because, in point of fact, General MacArthur had done nothing wrong; or (3) because Hirota’s claims, to the extent they challenged actions of General MacArthur as part of an international body, would not be redressable.

But none of those points, if true, would have compelled the conclusion that the subject-matter jurisdiction authorized by Article III would not extend to consideration of such a claim. Thus, *Hirota*’s signal defect was the Court’s failure to apprehend that the relief Hirota sought was against a *U.S. official* (MacArthur) who was alleged to be holding Hirota in violation of his constitutional rights. That Hirota (1) was held under the authority of a non-U.S. tribunal and (2) might have had no constitutional rights to enforce were irrelevant to the subject-matter jurisdiction inquiry; they might (as Justice Douglas concluded) have provided a winning defense on the merits. But, as is generally true, the strength of non-jurisdictional defenses is not relevant to the subject-matter jurisdiction inquiry.<sup>245</sup>

Thus, whereas *Abu Ali* and *Omar* may have been incorrect to rely on allegations of constructive custody as the grounds for distinguishing *Hirota*, they were both ultimately correct on the deeper point—that such custody is all that Article III requires, in those cases, for federal courts to constitutionally exercise subject-matter jurisdiction over the habeas petitions at issue. Put differently, the district courts, in relying solely on the question of custody, understood a point that the *Hirota* Court did not: the limits imposed by Article III over cases involving detainees in foreign or international custody go solely

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243. *Hirota v. MacArthur*, 338 U.S. 197, 215 (1948).

244. *Id.* at 201.

245. *See, e.g.,* *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1242–45 (2006) (holding that the numerosity requirement for a company to be an “employer” for Title VII purposes is a non-jurisdictional defense and is therefore waivable).

to the nature of the relief sought, and not to the constitutional availability of federal jurisdiction in the abstract.

F. WHITHER HIROTA?

Given the D.C. Circuit's February 2007 decision in *Omar*,<sup>246</sup> and its April 2007 decision in *Mohammed*,<sup>247</sup> it is entirely possible that the Supreme Court will soon be presented with the chance to reconsider *Hirota*.<sup>248</sup> In some ways, *Omar* is a particularly bad vehicle for reevaluating the force of the 1948 decision. First, Omar is a U.S. citizen, and so the Supreme Court could always accept the dubious citizenship-based distinction explicitly drawn by the district court in *Omar* (and implicitly affirmed by the D.C. Circuit) to avoid reaching the deeper (and constitutionally based) question about *Hirota*'s continuing applicability to non-citizens. Second, as Judge Lamberth's decision in *Mohammed* suggests, the constructive custody claim is somewhat weaker in *Omar* than it was in *Abu Ali*, and so the basis for habeas jurisdiction is rather attenuated, even on Justice Douglas's view.

In a way, however, both of these points make *Omar* perhaps the perfect vehicle for revisiting *Hirota*. On the citizenship point, if the thesis of this Article is correct that Article III cannot tolerate a distinction based upon citizenship along the lines expounded in *Abu Ali* and *Omar*, then so much the better for the Supreme Court to so hold in a case where there is no question as to whether the detainee has any substantive constitutional rights capable of enforcement in U.S. courts.<sup>249</sup> Similarly, on the custody point, if habeas jurisdiction *is* available on the facts of *Omar* (notwithstanding the other potential hurdles to reaching the merits of his claim<sup>250</sup>), then it is difficult to imagine a case wherein there is

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246. *Omar v. Harvey*, No. 06-5126, 2007 WL 420137 (D.C. Cir. Feb. 9, 2007).

247. *Mohammed ex rel. Munaf v. Gersen*, No. 06-5324 (D.C. Cir. Apr. 6, 2007).

248. It is difficult to predict how the present Court would react to such a case. Certainly, several of the current Justices have been outspoken, either in support of broad conceptions of the constitutional scope of habeas jurisdiction, see, for example, *supra* note 22, or in support of very formalistic and rigid approaches to the statutory requirements for habeas jurisdiction as in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) and *Rasul v. Bush*, 542 U.S. 466, 488–506 (2004) (Scalia, J., dissenting). But notwithstanding the venom and vitriol that has saturated some of the Court's recent cases over the scope of the federal habeas statute, for example, *Hamdan*, *Rasul*, and *Padilla*, the scope of Article III presents a far different question, the answer to which may not necessarily be easily predictable based upon prior decisional law.

249. This same argument explains why the *Al-Marri* case, see *supra* note 27, presents a better case for the constitutionality of the Military Commissions Act of 2006 than *Hamdan* or *Boumediene*.

250. If the real hurdle in these cases is redressability, then the issue in *Omar* is whether the petitioner can show a meaningful entitlement to relief as against the U.S. officials *acting under* U.S. authority. Thus, to the extent that Omar's lawsuit seeks to bar his transfer to the custody of the CCC-I because of his fear of torture, the redressability question on the merits of his suit would be whether the respondent, Francis Harvey, Secretary of the U.S. Army, could prevent such a transfer if so ordered by a U.S. federal district court. Given what little is known about the "MNF-I," see, e.g., *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 117–20 (D.D.C. 2006), it does not strain credulity to conclude that such an argument may have merit.

Nor does it seem that there is any serious argument, unlike in *Hirota*, that such relief would be

any meaningful and non-frivolous allegation of U.S. involvement in foreign or international custody that would not also satisfy the custody requirement of the habeas statute. Put differently, if Justice Douglas's concurrence, at least on the jurisdictional point, is to be the new doctrinal rule, then there may be no better vehicle through which to solidify such a conception of the relationship between habeas corpus, citizenship, and Article III than *Omar*.

#### CONCLUSION

The writ of habeas corpus, we are consistently told, is special.<sup>251</sup> The rules are different, both figuratively and literally, when it comes to the "Great Writ."<sup>252</sup> Its "privilege," the fight over the meaning of that term notwithstanding,<sup>253</sup> is enshrined in the text of the Constitution.<sup>254</sup> Lawsuits by federal prisoners invoking it present one of the few federal questions that state courts have been held to lack competence to decide.<sup>255</sup> And legislative attempts to curtail the writ, or at least the jurisdiction of the federal courts *over* it, have generated a disproportionate share of the cases at the core of the federal courts canon, from *McCardle*<sup>256</sup> to *Felker*<sup>257</sup> to *St. Cyr*.<sup>258</sup> Moreover, nearly all of these cases have witnessed unusual gymnastics by the Court to avoid reaching what Justice Breyer has called the "terribly difficult and important constitutional question of whether Congress can constitutionally deprive [the Supreme] Court

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precluded by the political question doctrine. Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 198, U.N. Doc. A/39/51 (Dec. 10, 1984), recognizes (and Congress has implemented) the principle of *nonrefoulement*, which is binding upon the U.S. government, and violations of which are enforceable in U.S. courts. *See, e.g., Omar v. Harvey*, No. 06-5126, 2007 WL 420137, at \*7-9 (D.C. Cir. Feb. 9, 2007) (holding that Omar's claims are not precluded by the political question doctrine).

251. *See, e.g., Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) ("Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution." (citation omitted)); *see also Rose v. Mitchell*, 443 U.S. 545, 579 n.1 (1979) (Powell, J., concurring) ("Both advocates and opponents of broad federal habeas corpus relief have recognized the unusual role the Great Writ plays in our federal system.").

For an intriguing look at the importance of habeas as a domestic matter and a multinational conception of the writ that might solve some of the contemporary legal issues, see Vicki C. Jackson, Symposium, *World Habeas Corpus*, 91 CORNELL L. REV. 303 (2006).

252. *See, e.g., Mayle v. Felix*, 545 U.S. 644, 648-50 (2005) (noting differences between the Federal Rules of Civil Procedure and the Rules Governing Habeas Corpus Cases).

253. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 337-38 (2001) (Scalia, J., dissenting).

254. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

255. *See Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

256. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

257. *Felker v. Turpin*, 518 U.S. 651 (1996).

258. *St. Cyr*, 533 U.S. at 289.

of jurisdiction in habeas cases,”<sup>259</sup> as typified in *St. Cyr*<sup>260</sup> and *Hamdan*.<sup>261</sup>

Notwithstanding the special place habeas has come to occupy in American jurisprudence, and putting aside the important and extant questions over Congress’s constitutional power to limit or wholly remove the jurisdiction of federal courts over habeas cases, *Hirota*’s odd and oft-ignored footnote to the Court’s habeas jurisprudence has resurfaced without a meaningful reexamination of its origins, its holding, or what it might possibly have meant. It is long-past time for such a project.

Although the *Hamdan* decision had very little to do with *Hirota*, this Article owes both its origins and its potential implications to that case, and particularly the Supreme Court’s June 2006 decision<sup>262</sup> reversing the D.C. Circuit<sup>263</sup> and holding that the military commissions created pursuant to President Bush’s November 13, 2001, Military Order<sup>264</sup> were inconsistent with both the Uniform Code of Military Justice (UCMJ)<sup>265</sup> and Common Article 3 of the 1949 Geneva Conventions.<sup>266</sup> While *Hamdan* has virtually nothing to do with Article III specifically,<sup>267</sup> or with constitutional law generally,<sup>268</sup> it is nevertheless significant with respect to the issues discussed in this Article because it recognizes that the U.S. government’s treatment of detainees at Guantánamo Bay is restrained

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259. Transcript of Oral Argument, *supra* note 22, at 49.

260. In *St. Cyr*, the Court refused to construe a statutory provision titled “Elimination of Custody Review by Habeas Corpus” to eliminate custody review by habeas corpus because “[t]he fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.” 533 U.S. at 301 n.13; *see also* *Demore v. Kim*, 538 U.S. 510, 517 (2003) (reaffirming *St. Cyr*’s jurisdictional analysis).

261. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006); *see also id.* at 2810–18 (Scalia, J., dissenting) (criticizing the majority’s resolution of the jurisdictional question).

262. *Id.* at 2749.

263. *See Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 126 S. Ct. 2749, 2749 (2006).

264. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001); *see also* 32 C.F.R. §§ 9.1 *et seq.* (2006).

265. *See generally* 10 U.S.C. § 801 (2000).

266. *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 137.

267. Only Justice Scalia’s dissent in *Hamdan*, where, owing to his construction of the Detainee Treatment Act, he was required to reach the constitutional questions that would result from such jurisdiction-stripping, addressed the DTA’s compatibility with Article III, and summarily, at that. *See Hamdan*, 126 S. Ct. at 2818–19 (Scalia, J., dissenting).

268. The one exception worthy of highlighting is the Court’s apparent acceptance of the argument that Congress may place substantive limits on the President’s war powers, including his authority to try captured “enemy combatants” by military commission. *See, e.g., id.* at 2774 n.23 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

The citation to Justice Jackson’s *Youngstown* concurrence is perhaps misplaced, for in so holding, *Hamdan* better reflects the spirit of the more decisive majority opinion delivered by Justice Black, or at least the concurrence of Justice Clark. For more on the relationship between *Hamdan* and *Youngstown*, see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* (forthcoming 2007).

by both U.S. domestic and international law.<sup>269</sup> In much the same way that the D.C. Circuit's 1949 decision in *Eisenstrager* held that the twenty-one petitioners had a constitutional right to judicial review in U.S. courts,<sup>270</sup> *Hamdan* compels the conclusion that the merits of habeas petitions brought by detainees as part of the "war on terrorism," even non-citizens, are not as unequivocally foreordained as, since the Supreme Court's 1950 reversal of the D.C. Circuit in *Eisenstrager*, they might well have been thought to be.<sup>271</sup>

With the merits of the detainees' claims once again an open question,<sup>272</sup> especially as *Eisenstrager* is increasingly called into doubt (or in cases involving U.S. citizens, where *Eisenstrager* is inapposite), the reemerging importance of *Hirota* becomes manifest where detainees are held in "multinational" custody, such as *Omar*, or cases wherein the U.S. government, possibly wary of the impending U.S. judicial review of claims by specific detainees, transfers the detainees to foreign custody, such as *Abu Ali*.<sup>273</sup> Put another way, so long as *Hirota* remains on the books, it could potentially stand as a bar to consideration of habeas petitions such as those in *Abu Ali* and *Omar* no matter how significant the involvement of the United States, how unconstitutional the treatment of the detainees, nor how much the unconstitutional treatment was caused by U.S.

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269. *Hamdan*, 126 S. Ct. at 2786–98.

270. See *Eisenstrager v. Forrestal*, 174 F.2d 961, 967 (D.C. Cir. 1949); see also *supra* note 146 and accompanying text.

271. One recent example of a case where non-citizens sought to enforce extraterritorial constitutional rights helps to demonstrate the urgency of this project. In *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004), cert. denied, 541 U.S. 1139 (2005), the Federal Circuit dismissed, on political question grounds, a takings claim brought by a Sudanese company arising out of the U.S. military's 1998 destruction of a pharmaceutical plant in the Sudan. The court reached justiciability because an earlier decision of the Court of Claims had recognized the availability of extraterritorial takings claims for non-citizens. See *id.* at 1351–52 (citing *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953)). Yet, if the Federal Circuit's application of the political question doctrine was incorrect, see sources cited *supra* note 234, then the merits of the lawsuit become unavoidable—and, as earlier cases suggest, extremely difficult to resolve. See, e.g., *Ramirez de Arellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983) (Scalia, J.) (dismissing on political question grounds), rev'd, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985) (mem.).

272. The two competing decisions of the D.C. district court assessing the legal claims of those Guantánamo detainees challenging only their underlying detention are themselves emblematic of the thorny and complex legal questions presented by the "merits" of these suits. Compare *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), with *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Unfortunately, neither decision survives the D.C. Circuit's dismissals of the suits on jurisdictional grounds in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. denied, No. 06-1195, 2007 WL 957363 (U.S. Apr. 2, 2007). For a discussion of the two decisions, especially in light of *Rasul*'s "footnote 15," see Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. Pa. J. CONST. L. 165 (2006).

273. For an excellent and comprehensive summary of the legal issues that would arise from such transfers, see Chesney, *supra* note 5. Chesney's focus on what "domestic and international legal frameworks apply to the transfer of a detainee from U.S. custody to the custody of another state, particularly where fear of torture is a concern," *id.* at 658, dovetails with the themes of this Article, which suggests the extent to which there may be a jurisdictional bar over *post-transfer* petitions by these detainees (*Ex parte Endo*, 323 U.S. 283 (1944), would arguably preserve jurisdiction over pre-transfer petitions, absent mootness concerns).

officials. Given the increasingly skeptical view that the Supreme Court has taken to both doctrinal and statutory exceptions to its jurisdiction,<sup>274</sup> and the significance of the underlying questions presented in these cases, the importance of a detailed understanding of what *Hirota* did and did not hold, and how it was wrongly decided, should be obvious.

To be sure, there are profound questions about the extent and scope of the rights that non-citizens, especially “enemy aliens” like *Hirota*, may enforce in the federal courts. Some might well believe in the continuing viability of the “enemy alien disability rule,” which provides that enemy aliens generally have no right of access to the courts for any purpose;<sup>275</sup> others might contend that even enemy aliens are entitled to minimum procedural protections under U.S. constitutional or international law (and that it is hardly clear, in the present climate, who the “enemy” even is).<sup>276</sup> Those who favor the latter view would, of course, endorse the preservation of federal jurisdiction to conduct the threshold inquiry of whether a detainee is, in fact, an “enemy alien,” and, if so, what rights he nevertheless retains.

There are also intriguing ways in which the questions considered in this Article dovetail with the current debate concerning Congress’s power over the statutory jurisdiction of the federal courts, particularly in habeas cases. Perhaps most poignantly, the conclusion that Article III can tolerate no distinction based upon citizenship also calls into question many of the arguments concerning citizenship-based distinctions that have been read into other “structural” constitutional provisions, including, most notably, the Suspension Clause.<sup>277</sup>

Although the habeas-stripping provision of the Military Commissions Act<sup>278</sup> may not implicate the Suspension Clause at all if the appellate remedy provided

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274. Indeed, the Court’s jurisdictional decisions in the past two Terms might fairly be characterized as evincing an ever-expanding view of the federal courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). See generally Stephen I. Vladeck, *The Increasingly “Unflagging Obligation”: Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. (forthcoming 2007).

275. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 780–82 (1950); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 322 & n.283 (2001). But see Vladeck, *supra* note 155 (arguing that the “enemy alien disability rule” does not apply to any lawsuit where the plaintiff contests his status as an “enemy alien”).

276. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463–64 (D.D.C. 2005); see also Blocher, *supra* note 219 (highlighting flaws in the current CSRT process). Although the Supreme Court, in its last decision before September 11, underscored the Fifth Amendment concerns implicated by the potentially indefinite detention of aliens, see *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), it was clear that the decision did not “consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” *Id.* at 696.

277. U.S. CONST. art. I, § 9, cl. 2.

278. Military Commissions Act of 2006, § 7(a), Pub. L. No. 109-368, 120 Stat. 2600, 2635–36 (2006) (“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.”).

for in the D.C. Circuit turns out to be meaningful and adequate,<sup>279</sup> it may, particularly in cases in which *no* appeal to the D.C. Circuit, let alone *no meaningful* appeal, is provided. Justice Scalia's response, at least, would be that non-citizens have no Suspension Clause rights, and that such citizenship-based jurisdiction-stripping therefore withstands constitutional scrutiny.<sup>280</sup> To similar effect is Judge Robertson's opinion on remand in *Hamdan*,<sup>281</sup> and Judge Randolph's opinion for the divided D.C. Circuit in *Boumediene*.<sup>282</sup> But if the Suspension Clause is "structural" along the lines of the jurisdictional grants within Article III, it is difficult to conclude anything other than that non-citizens have exactly the same "right" of access to the writ of habeas corpus as citizens. After all, does the Bill of Attainder and Ex Post Facto Clause (which, like the Suspension Clause, appears in Article I, Section 9)<sup>283</sup> only apply to citizens?<sup>284</sup>

Certainly, Justice Scalia's position on the vitality of the Suspension Clause in the *latter* (citizen) context is abundantly clear,<sup>285</sup> as is the analogy to Justice Douglas's concurrence in *Hirota*, and the notion that, because the writ must be available for citizens, it must be available for *non*-citizens as well. This Article's broader argument about *Hirota* and Article III may well suggest, then, that arguments against the constitutionality of the Military Commissions Act on Suspension Clause grounds are on far sounder footing.<sup>286</sup>

But regardless of where one comes down on these substantive rights questions, the purpose of this Article is to ensure that they are being asked. To avoid the merits of these questions because of a strained construction of Article III is, in short, to ignore the unique and vital role that the writ of habeas corpus has come to play in the American legal system and to effectively vitiate Chief Justice Chase's impassioned reminder that "the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus*

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279. See *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (holding that the Suspension Clause is not implicated if a meaningful and adequate procedure for review is available).

280. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2818–19 (2006) (Scalia, J., dissenting); *INS v. St. Cyr*, 533 U.S. 289, 336–45 (2001) (Scalia, J., dissenting).

281. See *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006).

282. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, No. 06-1195, 2007 WL 957363 (U.S. Apr. 2, 2007).

283. U.S. CONST. art. I, § 9, cl. 3.

284. In her thorough and forceful dissent in *Boumediene*, Judge Rogers seized on precisely this structural argument. See 476 F.3d at 995–98 & n.3 (arguing that the Suspension Clause, like the Bill of Attainder and Ex Post Facto Clauses, operates as a general prohibition on congressional action). *But see id.* at 992 n.11 (majority opinion) (arguing that the Suspension Clause does not apply extraterritorially (citing Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 521–24 (2007))). In a future article, I take up both sides of this important—and heretofore understudied—debate. See Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. (forthcoming 2008).

285. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–58, 563–69 (2004) (Scalia, J., dissenting).

286. Of course, with respect to detainees such as the petitioners in *Hamdan* and *Boumediene*, the Suspension Clause may only protect their right of access to the courts. If the D.C. Circuit is correct that these detainees have no due process rights, such access to the courts may, as a practical matter, be illusory at best.

jurisdiction of the courts and judges of the United States . . . . We are not at liberty to except from it any cases not plainly excepted by law . . . .”<sup>287</sup> At an irreducible constitutional minimum, then, the federal jurisdiction contemplated by Article III should extend to any case where a habeas petitioner alleges “custody in violation of the Constitution or laws or treaties of the United States,”<sup>288</sup> and where the court can fashion meaningful relief against an officer of the United States.

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287. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869).

288. 28 U.S.C. §2241(c)(3) (2000).