

Shanghaied

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IN THE SPRING OF 1941, a 38-year-old German aristocrat named Baron Jesco von Puttkamer left Berlin on a voyage that would take him east across the Soviet Union – then still Germany’s partner in the Hitler-Stalin pact – and on to the Pacific Coast of China. His final destination: Japanese-held Shanghai. His mission: to set up a German propaganda office, from which to broadcast the message of Adolf Hitler’s government to the Far East and beyond. It turned out to be the first part of an odyssey that would lead von Puttkamer to conviction as a war criminal by an American military commission, followed by a stretch at a U.S. Army prison in Bavaria and, ultimately, a failed bid for freedom at the U.S. Supreme Court.

And today, in one more twist of history, von Puttkamer’s case, long consigned to World War II’s military and legal back pages, has re-emerged at the center of a Supreme Court

struggle over the Bush administration’s war on terrorism.

On April 20, the justices will hear oral arguments on petitions brought by 16 foreign nationals alleged to have ties to al Qaeda and the Taliban who are being held at the U.S. naval base in Guantanamo Bay, Cuba.¹ Roughly two months after that, the court will issue a decision that could be one of its most important statements since World War II on the extent of judicial power to review assertions of executive power in wartime.

As Jesco von Puttkamer once did, the detainees are seeking the right to petition for a writ of habeas corpus in the U.S. District Court in Washington, D.C. But the Bush administration says the U.S. courts have no jurisdiction to hear their petitions because they are enemy combatants and foreign nationals, and are being held outside U.S. territory. (Guantanamo was leased from Cuba under a 1903 agreement, reaffirmed in 1934,

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¹ *Shafiq Rasul, et al. v. George W. Bush*, No. 03-334, and *Fawzi Khalid Abdullah Fahad Al Odah, et al. v. U.S.*, No. 03-343. As this article was going to press, the Bush administration was preparing to release two of the British detainee petitioners to the custody of British authorities.

that gave the U.S. “jurisdiction and control,” but reserved “ultimate sovereignty” for Cuba.) Therefore, the administration argues, the U.S. can hold terrorism suspects on Guantanamo indefinitely (or at least until the end of the open-ended war on terrorism), without access to counsel – despite a chorus of denunciation from human rights activists around the world.

As authority for this proposition, the administration cites the Supreme Court’s June 5, 1950 ruling in *Johnson v. Eisentrager*,² as von Puttkamer’s case came to be captioned. In a 6-3 opinion written by Justice Robert H. Jackson, the court held that the Constitutional guarantee of habeas corpus does not apply to enemy aliens who, like von Puttkamer and the 20 other Germans who were his co-respondents in the case, were detained by the U.S. on foreign soil. A district judge in Washington and the U.S. Court of Appeals for the District of Columbia Circuit have agreed with the Bush administration that *Eisentrager* controls.

But does it? Lawyers for the Guantanamo detainees’ families say their cases are distinguishable – which makes a journey back in time to Jesco von Puttkamer’s sojourn in the

Byzantine world of wartime Shanghai relevant to today’s case.

Von Puttkamer was the only child of a colorful Berlin couple, Baron Heinrich von Puttkamer, a major-general in the Kaiser’s Army, and Marie Madeleine Guenter, a writer of erotic poetry and novels whose mother was Jewish. Von Puttkamer’s father died in 1914, when von Puttkamer was 11; von Puttkamer eventually saw his inheritance disappear in the Weimar hyperinflation of 1922-23. Though a graduate of military schools, he did not follow his father’s career path and instead found work as a journalist and advertising man.³

Von Puttkamer signed up for the Nazi Party on October 1, 1932, and until 1935 worked part-time for Nazi ideology chief Alfred Rosenberg, writing and editing propaganda books with titles such as *The Truth is the Truth: The Saarland is German*.⁴ He worked thereafter as an advertising copywriter. Fluent in English, during a stint at McCann-Erickson’s Frankfurt office he handled the General Motors account.

But after the war in Europe began, he again gravitated to official circles. First, he joined an economic espionage unit of German military intelligence, then moved to

2 339 U.S. 763.

3 Astrid Freyeisen, *Shanghai und die Politik des Dritten Reichs 272* (Wuerzburg, Germany, 2000). This book, whose title translates as *Shanghai and the Policy of the Third Reich*, is a definitive scholarly study of the German government’s activities in Shanghai during the Nazi period. Unless otherwise indicated, it is my source for biographical details regarding Jesco von Puttkamer. I am grateful to the author for sending me copies of relevant portions of the book, as well as primary source material.

4 *Id.* Like many other Germans captured in China after the war, von Puttkamer was eager to persuade the U.S. that he had been a reluctant bit player. Von Puttkamer told the Americans that he had enlisted in the Nazi Party “to keep my job as an editor,” and that, in any case, he “never became a full member.” He explained that he “withdrew my application for entry in 1935, when I quit my position as a journalist.” Von Puttkamer said that he had to stop working for Rosenberg at the same time because the Nuremberg Race Laws had just been passed; his Jewish maternal grandmother made him a *Mischling*, or “individual of mixed blood.” American interrogators who met him in China in the fall of 1945 concluded that “[p]rior to the collapse of Germany he was a rabid Nazi but is now trying to minimize his past activities and is posing as an ‘anti-Nazi.’” Naval Intelligence Division Document, Intelligence Report at Chungking, Nov. 19, 1945, National Archives Record Group 226 XI 39875. (I am grateful to Prof. Bernard Wasserstein of the University of Chicago for providing me the contents of this document.) But Freyeisen, while deeming elements of von Puttkamer’s story suspiciously self-serving, found no evidence in the relevant archives that von Puttkamer belonged to the party, or sought membership in it, after 1935.

the German foreign ministry's propaganda section. It was in this latter capacity that he first engaged in a tour of the Far East, leaving in early November 1940 and returning to Berlin four months later. His April 1941 report called Shanghai the ideal location for a covert German propaganda base. The foreign "settlement" in the Japanese-occupied city, with its cosmopolitan melange of British, Russian, American, French, German, Jewish, Portuguese and Chinese residents, and its openness to the rest of the globe, would provide "the only place in the whole world" from which German propaganda could reach into the U.S., Canada, and Latin America as well as Asia, von Puttkamer wrote. (Prior to Pearl Harbor, mail from Japanese-controlled China to the Western Hemisphere was not yet censored.) Assigned by Berlin to put this plan into operation himself, von Puttkamer departed for Shanghai, leaving his wife and three children behind.

In Shanghai, von Puttkamer's office, known officially as the German Information Bureau, presented itself to the public as a source of news and information about German life, literature and culture – but, using cut-outs and front organizations, it produced a stream of propaganda broadcasts and leaflets. Most of these were aimed at the British and American governments, but a modest number were anti-Semitic.⁵ At von Puttkamer's invitation, Dr. Robert Neumann, notorious for his experiments on prisoners at the Buchenwald concentration camp, delivered a lecture on his latest findings in racial physiognomy in 1943.⁶

On the first anniversary of the Japanese attack on Pearl Harbor, von Puttkamer celebrated with an article in a Japanese-controlled newspaper. "In Adolf Hitler," he wrote, "a leader arose in Germany who grasped the helm of the Reich with a firm hand and who, step by step, tried to rectify past injustices in order to bring Germany back to her former position as a member of the leading powers."⁷

Von Puttkamer himself cut quite a figure in Shanghai. Operating his propaganda bureau first from a penthouse suite at the Park Hotel and later from a villa next to the German church, he would spend off-hours browsing through bespectacled eyes at the sophisticated Book Mart bookshop. A handsome, stocky man with a wide, toothy smile, he traveled through the town with his Korean bodyguard in a horse-drawn carriage.⁸

Von Puttkamer's Shanghai German Information Bureau worked alongside a larger German intelligence apparatus in China. This network operated out of diplomatic installations in Beijing, Canton and Shanghai. (Berlin was one of the few governments to recognize Japan's puppet government in wartime China.) At its center was a Shanghai spy station affiliated with German military intelligence and known as the Bureau Ehrhardt, in honor of its chief, Ludwig Ehrhardt – whose real name was Lothar Eisentrager.

A friend and protégé of German military intelligence chief Adm. Wilhelm Canaris, who would later be executed for his role in the failed 1944 coup attempt against Hitler,

5 *Id.*, at 446-447. On October 26, 1941, tens of thousands of anti-Semitic leaflets blew across the field during a soccer game between the Jewish Recreation Club and the Portuguese Club Lusitano at the Shanghai race course. The leaflets, signed by the "Aryan Union" and calling for "economic war against Jewish commerce in Shanghai," could be seen fluttering from the top floors of the Park Hotel, where von Puttkamer's group had its offices at the time.

6 Bernard Wasserstein, *Secret War In Shanghai* 130 (1998).

7 Baron Jesco von Puttkamer, *Fate of World is Already Decided; Axis Unassailable After Nippon's Entry War*, *Shanghai Times*, Dec. 8, 1942. (Thanks to Astrid Freyeisen.)

8 Wasserstein, *supra* note 6, at 130.



The Landsberg Prison in Bavaria, where von Puttkamer, Eisentrager, and their colleagues were imprisoned.

Eisentrager was 46 years old when he took charge of the Shanghai office in December 1942. An officer in the German Army in World War I, he joined the Nazi party in 1932, entered German military intelligence in the mid-30s, and rose to the rank of major.⁹ He first came to Shanghai in 1941, having slipped across the Chinese-Soviet border posing as a businessman just eight hours before the German invasion of Russia began on June 22. In Shanghai, his office's principal jobs were to monitor Soviet, U.S. and British radio traffic and troop movements in the East Asian theater, to keep track of war-related raw material sources – and to report back to Berlin on the actual strength of Germany's Japanese allies.¹⁰

What success Eisentrager actually had is debatable. His operation was plagued by tensions with the Japanese, intra-German factional intrigues and personal quarrels – his own erratic personality was regarded by some as a liability, too. His secretary, Gerda

Kocher, described him to American interrogators after the war as “very talkative, especially when he had drunk one too many.”¹¹

The German Reich capitulated on May 8, 1945; that day, an Allied plane circling over Shanghai cheered residents by tracing “V-E” in the sky.¹² But Eisentrager, von Puttkamer and the other China-based Germans found themselves thousands of miles from a devastated homeland with no mission and no money. Approached by representatives of the Japanese high command, they signed contracts to help Japan's military, in exchange for gold or food. Until Japan surrendered the following August 15, the U.S. later charged, the Germans supplied the Japanese with intercepts of U.S. naval communications (including key information during the Battle of Okinawa), German-made aircraft parts and tens of thousands of leaflets aimed at U.S. troops. Von Puttkamer, who had signed a secret agreement in 1944 to make English-language propaganda leaflets for the

⁹ Freyeisen, *supra* note 3, at 376-377.

¹⁰ Wasserstein, *supra* note 6, at 222-229.

¹¹ *Id.*, at 225.

¹² *Id.*, at 259.

Japanese Army, allegedly kept up this bargain after Germany's surrender. Signed "Organization of American Soldiers Overseas," the leaflets spoke of the horror and senselessness of war, and urged G.I.'s to lay down their arms.¹³

By early 1946, von Puttkamer, Eisentrager and 25 other German intelligence officers, propaganda agents and diplomats had been rounded up by the American Military Mission in China. An American military commission convened at the Ward Road Jail in Shanghai to hear the case against them. The Americans had decided to prosecute the Germans' post-V-E collaboration with the Japanese as a war crime – specifically, contributing to the military efforts of the United States' enemies after their own country's unconditional surrender.

Though obviously convened in a prosecutorial spirit (an April 1946 cable from the commanding general in China to Washington sought "authority to appoint such court and punish guilty after trial in about 30 days"),¹⁴ the proceeding was no kangaroo court. Including hearings on pre-trial motions, it lasted from mid-September 1946 until January 14, 1947, and the Germans' American defense lawyers fought vigorously. They first challenged the legitimacy of the commission itself, arguing that, since China was not under U.S. occupation, only a Chinese court had authority to try the Germans. But the commission overruled that motion, holding that war crimes are crimes against *ius gentium* – the law of nations – and, as such, punishable by any competent authority. The defense also argued that,

though the Germans might indeed have aided Japan, the acts they were accused of were not in themselves war crimes. That claim, too, was rejected; Germany's capitulation was binding on all German citizens, not just those in uniform, the commission ruled. Violating it was a crime.¹⁵

Were they actually guilty? Some of the testimony against the Germans came from bureaucratic rivals with axes to grind.¹⁶ But some of it was more reliable. Lt. Col. Mori Akiri, the former chief of Japanese military intelligence in Shanghai, swore that Eisentrager and von Puttkamer had voluntarily signed agreements to aid Japan, but had probably burned their copies. Eisentrager's German secretary and three Italian radio operators for the Bureau Ehrhardt backed up this testimony.¹⁷

Higher-ranking defendants such as Eisentrager protested that they had no authority over their subordinates after May 8, and therefore could not be guilty of ordering them to do anything. Their subordinates, on the other hand, claimed that they had just been following orders – or had been acting under irresistible pressure from the Japanese. Some defense witnesses tried to persuade the court that the Germans had not actually done much of anything. A cook from the Bureau Ehrhardt headquarters, for example, told the court that he had never seen Eisentrager do any work after the German surrender – or before it.¹⁸ For her part, German historian Astrid Freyisen, who has studied the trial record and written a definitive account in German of the Bureau

13 14 Law Reports of Trials of War Criminals 14.

14 Supreme Court of the United States, October Term 1949, Transcript of Record, No. 306, *Johnson v. Eisentrager*, p. 47.

15 14 Law Rep., *supra* note 13, at 15.

16 Wasserstein, *supra* note 6, at 275-276.

17 *Id.*

18 *Id.* Facing trial, Eisentrager also tried to minimize his Nazi affiliations, telling the Americans that he had been arrested by the Gestapo in 1935 and thrown out of the party. But there is no record of any such episode in his official Nazi party membership file. Freyisen, *supra* note 3, at 377.

Ehrhardt's activities, found the prosecution's evidence strongest against von Puttkamer, but "quite unproven" with respect to Eisentrager and his colleagues.¹⁹

In the end, the commission convicted Eisentrager, von Puttkamer and 19 others, but acquitted six defendants – five because they were deemed legitimate diplomats and a sixth because the prosecution had not shown that his anti-Allied activity did indeed continue past V-E Day.²⁰ Eisentrager was sentenced to life; von Puttkamer got 30 years; the others convicted got terms ranging from two to twenty years. The sentences were to be served back in the U.S. occupation zone in Germany, at the famous Landsberg Prison in Bavaria, where all war criminals convicted by U.S. tribunals were housed – and 284 hanged between 1946 and 1951. Landsberg was the very location, ironically, where Hitler himself had been jailed after the 1923 Munich *Putsch*, and where he drafted *Mein Kampf*.

From Landsberg, however, von Puttkamer and the others were able to contact an American lawyer named A. Frank Reel.²¹ As a young Army officer, Reel had represented Japanese Gen. Tomoyuki Yamashita both at his 1945 military trial for atrocities in the Philippines and in his failed 1946 bid to overturn his death sentence at the Supreme Court. He emerged from that experience embittered at American war crimes prosecutions in general, and he would later argue in a book about the case that Gen. Douglas MacArthur had essentially rigged the military

commission to produce a death sentence for Yamashita.²² The Yamashita case was "a watershed" for Reel, Reel's son, Tom Reel, told me.

On April 26, 1948, Reel, by that time in private practice in Boston, filed for a writ of habeas corpus in the U.S. District Court in Washington, offering many of the same arguments against the military commission's legitimacy that the defense had made in Shanghai almost two years earlier. Five months later, on September 30, 1948, the judge, Edward A. Tamm, dismissed the petition in a four-paragraph opinion, noting that the Supreme Court, in a just-decided case called *Ahrens v. Clark*,²³ had held that a district court could not hear a petition for habeas corpus from someone not physically present within its jurisdiction. Since the Germans "are not now and have never been in the United States," Tamm wrote, they had no case.

But on April 15, 1949, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously reversed.²⁴ *Ahrens* did not control, Judge E. Barrett Prettyman wrote. Rather, the Constitution, with its guarantee of the Great Writ, applied to conduct by U.S. government officials anywhere in the world. Thus, those deprived of their liberty by U.S. officials outside the U.S. may file for habeas in the District Court having personal jurisdiction over the officials' supervisors in Washington, *i.e.*, the one in D.C., Prettyman concluded.

19 Telephone Interview with Astrid Freyeisen (Jan. 2004).

20 Wasserstein, *supra* note 6, at 275.

21 I was unable to determine exactly how the Germans made contact with American appellate attorneys. It is worth noting, however, that several of them, including von Puttkamer, spoke fluent English, and before the war some had previously served in a similar German propaganda agency in New York, where they may have developed American contacts. Alfred Romain, von Puttkamer's top aide, who was also among those tried and convicted in Shanghai, received his B.A. from Dickinson College in Carlisle, Pa. in 1939. Freyeisen, *supra* note 3, at 275.

22 See generally A. Frank Reel, *The Case of General Yamashita* (1949).

23 335 U.S. 188 (1948).

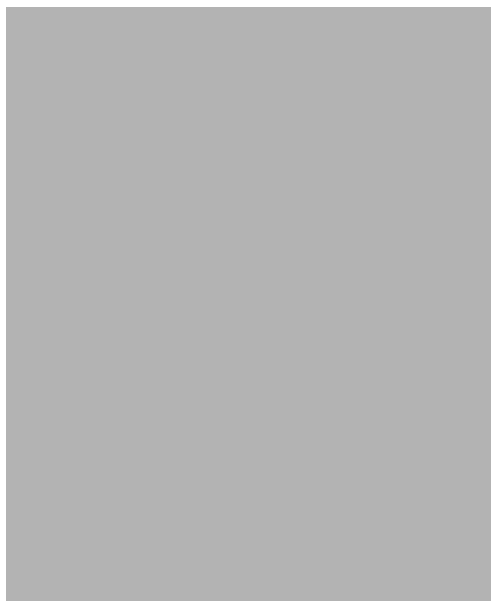
24 *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949).

The Truman administration appealed to the Supreme Court. In his brief, Solicitor General Philip B. Perlman argued that, even if the Constitution follows the flag, as the D.C. Circuit had ruled, “it does not necessarily follow ... that a *judicial* remedy is available. ... There are many instances, particularly in the realm of foreign affairs and the conduct of war, in which the Executive is the primary and often the sole guardian of the Constitution.” Reel countered that the D.C. Circuit was “correct, because any other decision would result in an indefensible situation. It would make the exercise of fundamental rights depend on the accident of locus of incarceration.” As a matter of international law, Reel argued, the Germans were no different from those Dutch, Filipinos and Free French who had fought on against Germany and Japan in alliance with the U.S. after their own countries were overrun – and who were regarded as heroes for having done so.

Such a spirited defense for alleged henchmen of Hitler may seem odd today, but American priorities in global and domestic affairs, and the corresponding official and public sympathies, had changed since 1945.²⁵ The World War II struggle against fascism had given way to the Cold War struggle against Communism, which had already produced one crisis over the Soviet blockade of Berlin. U.S. foreign policy under the Truman administration was increasingly concerned with finding a way to rearm West Germany as a bulwark against the Soviet Union – and decreasingly concerned with punishing Nazi war criminals. Many in Washington argued that the continued pursuit of German war

criminals was an unnecessary irritant to the West Germans.

If the Supreme Court’s members regarded *Eisentrager* as a momentous piece of business, little evidence of that survives today. During October Term 1949 the justices were more preoccupied with such cases as *Sweatt v. Painter*,²⁶ which ruled Texas’s system of



Jesco von Puttkamer (left), with an American friend after the war. Family photo.

separate law schools for blacks and whites unconstitutional.

Still, the case of the Germans from China prompted debate within the court. On one side, supporting the Germans, were Justices William O. Douglas, Hugo Black, and Harold Burton. Douglas’s and Burton’s notes from the case, on file in their respective papers at the Library of Congress, show that Justice

²⁵ According to a March 29, 1950 memorandum to Douglas from his law clerk, Warren M. Christopher, the American Civil Liberties Union moved the court for permission to file a brief *amicus curiae* in support of the Germans’ case. The Solicitor General objected. Christopher recommended that Douglas vote in favor of the motion, but for reasons still unclear, the full court voted to deny it. William O. Douglas papers, Manuscript Division, The Library of Congress, Washington, D.C., Box 192.

²⁶ 339 U.S. 629 (1950).

Felix Frankfurter initially supported the Germans as well.²⁷ At the conference, he concluded a rambling discussion of the issue by remarking that he had decided that *Abrens* was wrong, so the District Court in Washington would have jurisdiction over a habeas petition such as this. But, for reasons still unclear, Frankfurter eventually joined the six-justice majority, led by Jackson, in favor of the government's position.

As all members of the court were aware, the petition by the China-based Germans was just one of many such; since January 1948, suits on behalf of more than 200 Germans detained by the U.S. had been filed at the Supreme Court alone.²⁸ The court had deflected them, but, with Jackson, the former Nuremberg prosecutor, writing for the majority, the court now endeavored to settle this leftover business from the war.

Jackson left no written record of his private views of *Eisenstrager*, according to his biographer, John Q. Barrett, a professor of law at St. John's University. But Jackson's strong rejection of the claims put forward by von Puttkamer and his comrades at least implies that he wanted to avoid setting a precedent that might undermine war crimes convictions in Europe more generally. His opinion portrayed the arguments of these erstwhile enemies of the U.S. as both preposterous and dangerous. "To grant the writ to these prisoners," he wrote, "might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of

the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy."²⁹

The Washington Post proclaimed that Jackson's opinion "will appeal to most citizens as conforming to common sense as well as to the Constitution."³⁰ But Black, the great civil libertarian, seems to have been quite outraged by it. A draft of his dissenting opinion, on file in Black's papers at the Library of Congress, includes a sentence noting acidly that the Germans were being punished for doing what "any patriotic American" would have done in similar circumstances. Douglas made a margin notation urging Black to take that language out, and it does not appear in the published version, which both Douglas and Burton joined.³¹

Black also disagreed with the majority on the jurisdictional question that was before the Court: "Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies," he wrote in the published version of his dissent. "Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. ... I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power

27 Douglas papers, *supra* note 25; Harold H. Burton papers, Manuscript Division, The Library of Congress, Washington, D.C., Box 182.

28 339 U.S. 763, 768 n.1.

29 *Id.* at 779.

30 Editorial, *When Flag Outruns Law*, Wash. Post, p. 10 (June 14, 1950).

31 Hugo L. Black papers, Manuscript Division, The Library of Congress, Washington, D.C., Box 304.

with which the Constitution has endowed them.”³²

Clear echoes of Jackson’s opinion can be heard in the arguments of the Bush administration in the Guantanamo case today – just as echoes of Black can be heard in the arguments raised by the administration’s critics. Yet an understanding of the history behind the *Eisentrager* ruling helps clarify the degree to which the issues before the court 54 years ago are analagous to or distinguishable from those the justices will grapple with in April.

Jackson’s opinion held “that the Constitution does not confer ... an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.” Yet, unlike the China-based Germans, the Guantanamo detainees do not seek to overturn the results of a trial against them; they are *demanding* to have one. Having not yet faced *any* legal proceeding, military or civilian, to determine their culpability, they do not come to the court in the same position as the *Eisentrager* Germans did. Granted, this is not a factor that bears directly on the jurisdictional question presented in the *Rasul* case, but it is difficult to believe that the Court will be as sanguine about denying jurisdiction in the context of a complete denial of any representation for the petitioners or adjudication of their cases as it was in *Eisentrager*, where von Puttkamer and his fellow petitioners had at least had the benefit of counsel and some substantial judicial process.

In declaring the Germans “enemy aliens,” Jackson was applying to them a legal category – that of citizens of a country with which the U.S. was in a declared state of war – that was both clearly defined and widely understood to limit their rights. All such persons were presumptively subject to summary detention, limited only by judicial inquiry into whether a

war existed, and whether they were, indeed, citizens of a hostile power. The Germans in *Eisentrager* easily qualified – but the petitioners contesting their detention at Guantanamo are citizens of friendly countries: Britain, Australia, and Kuwait. They allegedly fought not for a hostile government, but for a hostile irregular force made up of people from all over the world. Thus, while they may be enemy combatants, in the sense that they had taken up arms against the U.S., that does not make them “enemy aliens” in the sense so pivotal to *Eisentrager*.

Moreover, the task of determining who is or is not an “enemy combatant” is nowhere near as straightforward as identifying an “enemy alien.” After all, determining whether someone is a “combatant” at least implies the necessity of identifying hostile acts in which such a person has engaged, while identifying an “alien” merely requires a determination of that person’s citizenship status – a distinction that is probably highly relevant, because what the *Rasul* detainees are ultimately seeking is to have the courts make the factual determination in question, or at least to require the government to set up a commission or some other body that will do so.

On the question of whether Guantanamo is U.S. territory, however, *Eisentrager* offers less in the way of useful analogy or distinction. The men were captured in China and held in Germany, both clearly foreign countries. Black argued, in effect, that the Constitution follows the flag – but that was a dissenting view, one that was never to be adopted later by the Court. And today’s Court seems to take that precedent as a given, inasmuch as its question presented implies that it will parse the constitutional significance of the U.S. presence in Guantanamo only in the context of the U.S.-Cuba agreement’s references to “ultimate sovereignty” and “jurisdiction and control.”

³² 339 U.S. 763, 954.

Nevertheless, the unusual extent and duration of U.S. control over Guantanamo – especially in the context of the other factors discussed above – may provide the basis for an extension of jurisdiction to include that one small piece of territory, without reaching the slippery slope of full jurisdictional flag-following.

Even though they lost their case, Jesco von Puttkamer and his comrades soon won their freedom. By 1950, the Truman administration was already responding to the political pressure for a different approach to German war criminals that was coming both from within the United States and from the nascent West German government led by the conservative Konrad Adenauer. In March of that year, John J. McCloy, the U.S. High Commissioner in Germany, had set up a clemency commission to reconsider the German cases. In January 1951, McCloy announced that he was reducing many of the sentences; a few final death sentences were carried out, but by 1958, the prison at Landsberg was empty. In *Eisentrager*, the Truman administration had won the legal authority to deal with German war criminals more or less as it pleased. Yet, for political reasons, it and its successor chose to use that authority to let most of them go.

It appears that the formerly China-based Germans, though not mentioned in McCloy's report, benefited from this change in U.S. policy. Indeed, Reel, in a private memorandum, recorded his belief that the Truman administration wanted to let his clients out even earlier – and would have, but for the need to appeal its defeat in the D.C. Circuit. The reason, Reel wrote, was that their crimes were

“more technical than real.”³³ Historian Bernard Wasserstein writes that all of the Germans convicted in Shanghai were released in 1950 thanks to “further investigation of the case by a U.S. army inquiry commission.”³⁴

A final lesson of the case may be that, at least in practical terms (the terms that probably matter most to someone who is actually sitting in jail), politics can succeed even where resort to the courts fails. If today's detainees lose in the Supreme Court, they need not despair of ever being released. The day may come when a British, Kuwaiti or Australian government will say “enough” with the same sort of leverage that West Germans and other critics of that era's war-crimes process had half a century ago. Indeed, in the face of diplomatic pressure from those governments, the Bush administration made some small concessions with respect to granting detainees access to attorneys – before it had lost a single court ruling on Guantanamo. More recently, the administration agreed to release several Europeans detained at Guantanamo,³⁵ and announced its first charges against detainees who will be tried before a military commission.³⁶

As for Jesco von Puttkamer, he remarried in 1952, dabbled in business in Germany, and, finally, pursuing a life-long interest in the North American West, emigrated to Canada in 1958. He and his new family operated a British Columbia fishing resort with a Native American theme. Apparently unhindered by his war record, von Puttkamer traveled frequently to the U.S., including at least one visit to one of his former jailers at Landsberg. He died in Vancouver in 1973.³⁷ *CB*

33 I am indebted to Tom Reel for making the contents of this memorandum available to me.

34 Wasserstein, *supra* note 6, at 276.

35 Glenn Frankel, *U.S. Agrees to Free 5 Britons, Dane From Guantanamo Jail*, Wash. Post, A20 (Feb. 19, 2004).

36 United States Department of Defense, “Two Guantanamo Detainees Charged,” Press Release, Feb. 24, 2004, available at www.dod.gov/releases/2004/nr20040224-0363.html.

37 Telephone interview and correspondence with von Puttkamer Family Member, Name Withheld (Jan. 2004).