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**RASUL V. BUSH,
124 S. CT. 2686 (2004)**

FACTS

In response to the September 11, 2001 terrorist attacks, Congress enacted an initiative to use force against the responsible groups.¹ Soon after, President George W. Bush acted on the resolution and commenced military operations against the Al Qaeda and Taliban regimes in Afghanistan.² The United States kept many of the foreign prisoners taken during these operations at its naval base (Base) in Guantanamo Bay, Cuba.³ According to the lease on the land, both Cuba and the United States have agreed that the United States exercises full jurisdiction and control over the specified area, so long as the United States does not leave the Base.⁴

Petitioners in this case, which included two Australian citizens and twelve Kuwaiti citizens, never received a trial and had been held at the base since early 2002.⁵ That same year, they filed suit in the United States District Court for the District of Columbia and argued that their detention at the Base was illegal.⁶ The plaintiffs sought the federal court's jurisdiction under the federal question statute⁷ and the Alien Tort Statute (ATS)⁸, and challenged their imprisonment through the federal habeas corpus statute.⁹ The District Court, citing the Supreme Court's ruling in *Johnson v. Eisentrager*¹⁰, concluded that it lacked jurisdiction and dismissed the petitions.

In *Eisentrager*, 21 German citizens filed for habeas corpus in a federal district court after having been captured by the United States in China, tried and convicted of war crimes, and detained at a prison in occupied Germany.¹¹ The case came to the Supreme Court, which denied district court jurisdiction after looking at six facts concerning whether the

¹ Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ 28 U.S.C. § 1331 (1980) (granting original jurisdiction to district courts in cases involving "all civil actions arising under the Constitution, laws, or treaties of the United States").

⁸ 28 U.S.C. § 1350 (1948) (allowing aliens to sue for "an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States . . .").

⁹ 28 U.S.C. § 2241 (1966) (allowing that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit within their respective jurisdictions. . . ." In addition, "the writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution or laws or treaties of the United States").

¹⁰ *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that aliens detained in territories outside the United States' control could not file a habeas corpus petition).

¹¹ *Id.* at 765.

prisoners 1) were enemy aliens; 2) had been in the United States; 3) were captured and held outside United States territory; 4) received a trial in front of a commission outside the United States; 5) committed war crimes outside the United States; and 6) were imprisoned outside the United States at all times.¹² The primary reasons for dismissal in *Eisentrager* were that the prisoners had already been tried and convicted as enemies and had been detained outside United States territory.¹³

The Court of Appeals for the District of Columbia cited *Eisentrager* in affirming the District Court's decision and dismissed the complaints.¹⁴ The Supreme Court of the United States granted certiorari and considered the following two issues: whether the habeas corpus statute gave the district court jurisdiction over alien detainee cases at the Base, and whether the federal question statute and the Alien Tort Statute precluded district court jurisdiction.¹⁵

HOLDING

The Court ruled that the federal habeas corpus statute gave jurisdiction to the district court.¹⁶ Furthermore, the Court found that neither the federal question statute nor the Alien Tort Statute barred the district court's jurisdiction.¹⁷

ANALYSIS

The Supreme Court began its analysis by rejecting the respondents' arguments that *Eisentrager* was controlling precedent and that Congress never expressly intended for § 2241, the federal habeas corpus statute, to apply outside United States territories.¹⁸ In addition, the Court concluded that the district court had jurisdiction under § 2241 to hear plaintiffs' claim that their federal detention violated United States laws.¹⁹

The respondents initially argued that *Eisentrager* was sufficiently similar to the instant case to act as controlling precedent.²⁰ However, the

¹² *Id.* at 777.

¹³ *Id.* The Supreme Court concluded that application of the facts to these six factors outweighed the detainees' constitutional right to due process, and denied federal jurisdiction. *Id.* at 781.

¹⁴ *Eisentrager*, 339 U.S. at 777-78.

¹⁵ *Rasul*, 124 S. Ct. at 2690.

¹⁶ *Id.* at 2691-92.

¹⁷ *Id.*

¹⁸ *Id.* at 2693.

¹⁹ *Id.*

²⁰ *Id.*

Supreme Court concluded that unlike the prisoners in *Eisentrager*, the *Rasul* detainees: 1) were not from countries at war with the United States; 2) denied participation in acts against the United States; 3) were never convicted of or tried for wrongdoing; and 4) were imprisoned in a territory over which the United States had exclusive jurisdiction.²¹ The Court's ruling on these distinctions contributed to weakening *Eisentrager's* value as precedent.²²

Furthermore, the Court concluded that the holding in *Eisentrager* only applied to the constitutional right to habeas corpus in Article I, not the habeas corpus statute.²³ More specifically, there were a string of three cases that the Court assessed: *Ahrens v. Clark*,²⁴ a 1948 decision which dealt with the habeas corpus statute, *Eisentrager*, and *Braden v. 30th Judicial Circuit Court of Ky.*,²⁵ a 1973 decision which dealt with the habeas corpus statute.

In *Ahrens*, 120 German detainees who held been held in New York petitioned for writ of habeas corpus in the District of Columbia.²⁶ The Court denied the petition, concluding that federal jurisdiction required the prisoners' physical presence in the federal court's jurisdiction under the habeas corpus statute.²⁷ Two years later, the *Eisentrager* Court concluded that there was no federal jurisdiction because historically, "executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."²⁸ In addition, *Eisentrager* implicitly followed the habeas corpus statute interpretation in *Ahrens* in denying federal jurisdiction.²⁹

After *Eisentrager*, *Braden* addressed the question of when a prisoner held in an Alabama prison had a right to a speedy trial after subsequently being indicted in Kentucky.³⁰ The petitioner petitioned for writ of habeas corpus in Kentucky after he was under indictment for three years.³¹ The Court noted that "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."³² Therefore, in contrast to *Ahrens*, the *Braden* Court ruled that under the habeas corpus statute, federal jurisdiction required only

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Ahrens v. Clark*, 335 U.S. 188 (1948).

²⁵ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

²⁶ *Ahrens*, 335 U.S. at 189.

²⁷ *Id.* at 192.

²⁸ *Eisentrager*, 339 U.S. at 774.

²⁹ *Rasul*, 124 S. Ct. 2694.

³⁰ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 485 (1973).

³¹ *Id.*

³² *Id.* at 494-95.

that the court can serve notice upon the *custodian* who holds the prisoners.³³ In short, the Court concluded that because *Braden* overruled *Ahrens*, and *Eisentrager* used the statutory interpretation in *Ahrens*, *Eisentrager* could not preclude federal jurisdiction under the habeas corpus statute.³⁴

The respondents also argued that Congress never expressly included extraterritorial affairs under § 2241, and therefore the statute did not apply to the plaintiffs.³⁵ The Court considered the United States lease on Guantanamo Bay and concluded that "by the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control'" over the naval base.³⁶ The only way the United States could lose control would be to abandon the land.³⁷ Furthermore, because the habeas corpus statute does not distinguish Americans from alien detainees, the Court concluded that citizenship would have no effect on jurisdiction.³⁸ Guantanamo Bay therefore represented a territory within United States jurisdiction and acts occurring there were subject to § 2241.³⁹

In addition to their claim under the habeas corpus statute, the petitioners claimed that both the federal question statute and the Alien Tort Statute granted jurisdiction to the federal district court.⁴⁰ The Court then considered the reasoning used by the Court of Appeals, which dismissed the federal question jurisdiction and ATS claims based on the limitations imposed by the habeas corpus statute under the Court's interpretation in *Eisentrager*.⁴¹ In doing so, the Court focused on two sources: case law (*Eisentrager* and related precedent), and statutory language (ATS).⁴²

First, the Court found that nothing in *Eisentrager* or any related precedent specifically excluded "aliens detained in military custody outside the United States" from litigating their cases in the United States.⁴³ Secondly, the Court found that the ATS "explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone."⁴⁴ Therefore, the federal district court would have jurisdiction in this case because the plaintiffs were not precluded

³³ *Rasul*, 124 S. Ct. at 2695.

³⁴ *Id.*

³⁵ *Id.* at 2696. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)(ruling that legislation has no extraterritorial effect unless Congress clearly shows this intent).

³⁶ *Rasul*, 124 S. Ct. at 2696.

³⁷ *Id.* at 2690-2691.

³⁸ *Id.* at 2696.

³⁹ *Id.* at 2698.

⁴⁰ *Id.*

⁴¹ *Rasul*, 124 S. Ct. at 2698.

⁴² *Id.* at 2698-99.

⁴³ *Id.* at 2698.

⁴⁴ *Id.* at 2699.

from access to federal courts under federal question jurisdiction and were granted jurisdiction under the ATS.⁴⁵

CONCURRING OPINION

Justice Kennedy did not agree with the majority that *Braden* overruled *Ahrens*, the statutory predicate to *Eisentrager*.⁴⁶ Instead, he examined how the *Eisentrager* court reached its decision to deny federal jurisdiction.⁴⁷ Kennedy based his concurrence solely on the factual differences between this case and *Eisentrager*.⁴⁸ He concluded that *Eisentrager* established a general test that would grant federal jurisdiction under the facts of this case.⁴⁹

DISSENTING OPINION

Justice Scalia, dissenting, writing for Chief Justice Rehnquist and Justice Thomas, initially argued that the statutory language in the habeas corpus statute clearly shows that prisoners who are "not located within the territorial jurisdiction of any federal district court" should not receive federal jurisdiction.⁵⁰ He then addressed the alternative explanations for granting federal jurisdiction offered by the majority and concurrence.⁵¹

Scalia warned that applying the facts in this case to the factors in *Eisentrager* would create uncertainty.⁵² The opinion specifically noted that threats to national security require decisive action.⁵³ As a result, spending an excessive amount of time distinguishing each potential case from

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2699-700.

⁴⁸ *Id.* at 2700.

⁴⁹ *Id.* ("A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated").

⁵⁰ *Id.* at 2701. As Justice Scalia noted, the habeas corpus statute "requires that '[t]he order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.' 28 U.S.C. 2241(a) (emphasis added)." *Id.* Scalia argued that the italicized words show legislative intent that "some federal district court have territorial jurisdiction over the detainee . . . Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal court. One would think that is the end of this case." *Id.*

⁵¹ *Id.* at 2702.

⁵² *Id.* at 2705 n.4 (Scalia, J., dissenting).

⁵³ *Id.*

Eisentrager could very well undermine the public interest in bringing alleged enemies to justice.⁵⁴

The dissent then argued that *Braden* could not have overruled the statutory predicate to *Eisentrager* because the cases were unrelated.⁵⁵ According to Scalia, the majority failed to recognize that *Braden* never mentioned *Eisentrager*, or that the two cases established different rules for different circumstances.⁵⁶ *Braden* dealt with American citizens detained overseas, while *Eisentrager* dealt specifically with foreign detainees.⁵⁷ As a result, the dissent argued, the two cases had no bearing on each other.⁵⁸

As for the majority's argument that *Braden* made *Eisentrager* inapplicable by overruling *Ahrens*, Justice Scalia argued that the *Braden* decision was too narrow to affect *Ahrens*.⁵⁹ He pointed out that *Braden* involved a very specific situation where the petitioner successfully sought habeas in Kentucky to challenge his *legal* confinement (through his indictment in Kentucky), not his *physical* confinement in Alabama, which was the issue for both *Eisentrager* and the prisoners in Guantanamo Bay.⁶⁰ As a result, according to the Justice Scalia, the *Ahrens* rule still applied, and would not undermine the applicability of *Eisentrager*.⁶¹

The dissent rejected the majority's argument that the lease over Guantanamo Bay granted the United States sufficient federal jurisdiction.⁶² Justice Scalia argued that despite the lease, Cuba and the United States "explicitly recognized 'the continuance of ultimate sovereignty of the Republic of Cuba over the [leased areas].'"⁶³ Based on this reasoning, the majority did not meet its burden of showing how the United States' inferior

⁵⁴ *Id.* ("[T]he Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus. And among the questions this approach raises: When does definite detention become indefinite? How much process will suffice to stave off jurisdiction?").

⁵⁵ *Id.* at 2705.

⁵⁶ *Id.* at 2704 ("*Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never mentioned *Eisentrager*."). (emphasis in original).

⁵⁷ *Id.* at 2705-06.

⁵⁸ *Id.* at 2705-06 ("'With the citizen,' *Eisentrager* said, 'we are now little concerned, except to set his [the citizen's] case apart *as untouched by this decision* and to take measure of the difference between his status and that of all categories of aliens.'") (emphasis in original).

⁵⁹ *Id.* at 2704-05.

⁶⁰ *Id.* at 2704. ("*Braden* stands for the proposition . . . that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement... Where, as here, present physical custody is at issue, *Braden* is inapposite, and *Eisentrager* unquestionably controls.")

⁶¹ *Id.* at 2705-06.

⁶² *Id.* at 2707.

⁶³ *Id.* at 2708 (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418).

right to the land could trump Cuba's ultimate sovereignty and grant federal jurisdiction.⁶⁴

Finally, the dissent used the statutory language in § 2241 to make the detainees' arguments under federal question jurisdiction invalid.⁶⁵ More specifically, Justice Scalia argued that federal courts would grant jurisdiction to aliens only if their detention location was within the United States.⁶⁶ He concluded that because the military kept the detainees at Guantanamo Bay (over which Cuba exercised ultimate sovereignty), no right to federal jurisdiction existed.⁶⁷

CONCLUSION

In the short term, this ruling protects innocent-until-proven-guilty foreign detainees from federal courts that may be overeager to dismiss these cases in the wake of the traumatic September 11 attacks. The majority maintained that the government had imprisoned the detainees for two years without even giving them the chance to challenge the justification for their detainment.⁶⁸ In fact, Justice Kennedy's concurring opinion points out that "the detainees at Guantanamo Bay are being held indefinitely."⁶⁹ While the government should naturally seek justice and deter terrorists from harming innocent citizens, this case would help make the United States more accountable for what could amount to unjustified military retribution.⁷⁰

Rasul seems to expand habeas corpus from national to international boundaries. However, the question remains as to whether the Court overextended federal jurisdiction in protecting detainees' interests. The dissent points to two ways in which the Court may have set a dangerous precedent in liberally construing precedent and statutory language: the fact that *Braden*, which involved domestically held prisoners, "overrules the statutory predicate" to *Eisentrager*, and the conclusion that the Guantanamo

⁶⁴ *Id.* ("The Court does not explain how 'complete jurisdiction and control' without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws.")

⁶⁵ *Id.* at 2707-08.

⁶⁶ *Id.* at 2708.

⁶⁷ *Id.* at 2710 n.6 (Scalia, J., dissenting) ("In *Eisentrager* . . . its [the Court's] analysis spoke more broadly: 'We have pointed out that the privilege of litigation has been extended to aliens . . . only because permitting their presence in the country implied protection' That reasoning dooms petitioners' claims under § 1331 . . .") (citing *Eisentrager*, 339 U.S. at 777-78).

⁶⁸ *Id.* at 2698 n.15.

⁶⁹ *Id.* at 2700.

⁷⁰ *Id.* (Kennedy, J., concurring) ("Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case for military necessity and much greater alignment with the traditional function of habeas corpus").

Bay treaty clearly gives federal courts extraterritorial jurisdiction under § 2241.⁷¹

First, the Court may have stretched related precedent by fitting *Braden* into its reasoning.⁷² The dissent concludes that "for the Court to reach the result it desires today . . . it must either argue that our decision in *Braden* overruled *Eisentrager*, or admit that it is overruling *Eisentrager*."⁷³ Even the concurring opinion agrees, and recommends an emphasis on the factual distinctions between *Braden* and *Eisentrager* before endorsing the majority's ultimate conclusion.⁷⁴

More specifically, *Braden* involved a prisoner indicted in Kentucky and detained in Alabama, which made federal jurisdiction more clear-cut than in *Rasul*.⁷⁵ By ignoring the distinction between the two cases, future federal courts might focus on the habeas corpus petitioner's status as a prisoner instead of his actual proximity to a district court.

In any event, overruling *Eisentrager* establishes a potentially dangerous standard that would encourage future federal courts bent on expanding jurisdiction to overrule valuable precedent recklessly.⁷⁶ The ruling could limit future federal courts' ability to call on *Eisentrager* in times of war when convicted enemies have already had their day in court and might not deserve another opportunity to be heard.

The second point seems to greatly expand habeas corpus jurisdiction to detainees held at overseas military bases over which the United States may not have complete control.⁷⁷ The court holds that the United States need not possess "ultimate sovereignty" over a territory to invoke federal habeas corpus jurisdiction.⁷⁸ In this case, though Cuba maintains a reversionary right over Guantanamo Bay, the reversion occurs only after the United States decides to leave the naval base.⁷⁹ Foreign detainees would benefit through

⁷¹ *Rasul*, 124 S. Ct. at 2701 (Scalia, J., dissenting).

⁷² *Id.* ("The Court's contention that *Eisentrager* was somehow negated by *Braden* . . . is implausible in the extreme").

⁷³ *Id.* at 2703.

⁷⁴ *Id.* at 2699 ("As he [Scalia] explains, the Court's approach is not a plausible reading of *Braden* or *Johnson v. Eisentrager*").

⁷⁵ *Id.* at 2704 ("*Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never mentioned *Eisentrager*").

⁷⁶ *Id.* at 2699.

⁷⁷ *Id.* at 2701 ("The Court today holds that the habeas statute . . . extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts").

⁷⁸ *Id.* at 2696.

⁷⁹ *Id.* ("By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control if it so chooses").

this expanded jurisdiction when imprisoned in bases held under leases similar in language to the Guantanamo Bay agreement.⁸⁰

On one hand, if the government seeks to protect detainees and grant expansive federal jurisdiction, it may want to include terms similar to the Guantanamo Bay treaty when leasing future properties outside the United States⁸¹ On the other hand, the government may want to aggressively pursue retaliatory military operations without judiciary involvement. Implementing such a policy may require checking the terms under which the United States controls each of its prisons and bases before deciding where to detain prisoners.⁸²

Overall, *Rasul* raises valid concerns that "the Court boldly extends the scope of the habeas statute to the four corners of the earth."⁸³ Granting federal jurisdiction could give potential enemies an unwarranted second chance to escape punishment, while overburdening the United States court system. Furthermore, broader jurisdiction may undermine the military's operations in Afghanistan.⁸⁴ United States soldiers may have a disincentive to hunt terrorists aggressively, knowing that it may take years in a federal court before they can bring prisoners to justice.⁸⁵

However, it appears that the Court has placed the appropriate limit on its ruling. Part of the majority's analysis focused on factual distinctions between *Rasul* and *Eisentrager*. Unlike the *Rasul* plaintiffs,⁸⁶ the government imprisoned the detainees in *Eisentrager* after trying and convicting them in formal proceedings.⁸⁷ This distinction indicates a willingness to apply the ruling to detainees who have not had the chance to

⁸⁰ *Id.* "The fact that extraterritorially located detainees lack the district of detention that the statute requires . . . frees them to petition wherever they wish—and, as a result, to forum shop. For this Court to create such a monstrous scheme in time of war . . . is judicial adventurism of the worst sort." *Id.* at 2711 (Scalia, J., dissenting).

⁸¹ *Id.* at 2696.

⁸² For example, if the objective is to deny prisoners access to federal habeas corpus jurisdiction, the United States may want to keep foreign detainees at bases where it has less jurisdiction than in Guantanamo Bay. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2643 (2004) ("Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad").

⁸³ *Rasul*, 124 S. Ct. at 2706.

⁸⁴ *Id.* at 2707 (Scalia, J., dissenting) ("Today's carefree court disregards . . . the dire warning in *Eisentrager*: 'To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing . . . Such trials would hamper the war effort and bring aid and comfort to the enemy . . .'" Also, a potential separation of powers issue arises in times of war, which could include the post 9/11 operations in Afghanistan: "From this point forward, federal courts will entertain petitions from these prisoners . . . forcing the courts to oversee one aspect of the Executive's conduct of a foreign war." See U.S. CONST. art. II, § 2, cl. 1 (providing for the President's Commander in Chief powers).

⁸⁵ *Rasul*, 124 S. Ct. at 2707 (Scalia, J., dissenting)

⁸⁶ *Id.* at 2693.

⁸⁷ *Eisentrager*, 339 U.S. at 777.

defend themselves, thereby using judicial resources only when the habeas corpus petitioners have exhausted their due process rights. Even with this limitation, the ruling gives the government an incentive to be more accountable for its actions, while opening the door to federal court for innocent foreign detainees wrongfully captured and held by an overzealous military. The dissent's silence regarding these policy considerations appears to weaken its argument that the majority cannot distinguish *Rasul* based on the factors in *Eisentrager*.⁸⁸

Despite the ruling's positive implications for foreign detainees, the question still remains as to whether or not they will receive a fair trial once a court has taken jurisdiction. The majority emphasized that "what is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."⁸⁹ However, more broadly, constitutional due process requires not only notice and a date in court, but also a sufficient opportunity for the plaintiff to be heard.⁹⁰ Only time will tell whether *Rasul* represents a step towards moderation in the war on terrorism or a trapdoor into a deeper judicial conundrum.

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⁸⁸ *Rasul*, 124 S. Ct. at 2705 n.4 (Scalia, J., dissenting) ("Justice KENNEDY . . . thinks it [the holding in *Eisentrager*] makes jurisdiction under the habeas statute turn on the circumstances of the detainees' confinement—including . . . the availability of legal proceedings and the length of detention . . . the *Eisentrager* court mentioned these circumstances, however, only in the course of its *constitutional* analysis, and not in its application of the statute").

⁸⁹ *Id.* at 2699.

⁹⁰ *Mulhane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).