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Doctrines Without Borders: Territorial Jurisdiction and the Force of International Law in the Wake of *Rasul v. Bush*

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NOTES

Doctrines Without Borders: Territorial Jurisdiction and the Force of International Law in the Wake of *Rasul v. Bush*

ABSTRACT

Following the attacks of September 11, 2001, the United States responded with military action aimed at eradicating terrorist networks around the world. The action in Afghanistan resulted in several hundred captured enemy combatants being sent to the U.S. naval base at Guantanamo Bay, Cuba. Because the base is not within the territory of the United States, the Bush administration took the position that the detainees could be held indefinitely without review in civilian courts. In a surprising move, the U.S. Supreme Court held that the detainees did have a right to petition civilian courts for habeas corpus review. Thus, the habeas statute was given extraterritorial application by the Court. That decision opened the federal judiciary to these terror suspects and did so in a way that lacks clarity and that could conceivably authorize habeas review of any detention undertaken by the U.S. government anywhere in the world. In November 2005, Congress took steps to curtail the right of detainees at Guantanamo Bay to obtain habeas review, but this move did not address all of the potential sources for confusion, and in some respects the recent action of Congress has added even more ambiguity to the law. Insofar as this has the potential to greatly complicate the war on terror, Congress must consider exercising its authority to amend the habeas corpus statute further than it already has and thereby address the questions that persist.

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Nam cetera malificia tum persequare, ubi facta sunt; hoc, nisi provideris, ne accidat, ubi evenit, frustra iudicia inplores: capta urbe nihil fit reliqui victis.

Sallust, *Bellum Catilinae* 52:4–5

I. INTRODUCTION: WHAT IS “JUSTICE” IN THE WAR ON TERROR?

On September 20, 2001, shortly after the U.S. government determined that Osama bin Laden and al-Qaeda were responsible for the 9/11 terrorist attacks, President George W. Bush addressed a joint session of Congress.¹ Articulating a new doctrine in foreign policy,² he issued the following warning: “[A]ny nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”³ The goal of this doctrine, which makes host nations responsible for the actions of the terrorists they harbor, was and remains the eradication of terrorist safe havens.⁴ Indeed, both the “Bush Doctrine” and the war on terror are intended to “starve terrorists of funding, turn them one against another, [and] drive them from place to place, until there is no refuge or no rest.”⁵

During his September 20th address, the President demanded of the Taliban⁶ that they “close immediately and permanently every

1. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>; see also *A Nation Challenged*, N.Y. TIMES, Sept. 21, 2001, at B2 (discussing President’s address and reporting that the United States had rejected a peace deal offered by Afghanistan).

2. See, e.g., Karen DeYoung, *Allies are Cautious on “Bush Doctrine,”* WASH. POST, Oct. 16, 2001, at A01 (noting that the “use of the word ‘doctrine’ is intentional . . . [and] meant to describe a new paradigm in U.S. foreign policy”).

3. Bush, *supra* note 1.

4. See Vice President Dick Cheney, Remarks at the Federalist Society Annual Convention Dinner (Nov. 15, 2001), <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011127.html> (“As the Bush doctrine makes clear, those who harbor terrorists share guilt for the acts they commit.”).

5. Bush, *supra* note 1.

6. In the years before the 9/11 attacks, the U.N. Security Council had turned its attention to the extreme nature of the Taliban regime and had even passed resolutions in hopes of forcing that government to disassociate itself from terrorism and bin Laden. See, e.g., S.C. Res. 1333, ¶¶ 1–3, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (*inter alia*, reiterating previous Security Council resolution and demanding Afghanistan’s compliance including by such actions as ending support for terrorist organizations, surrendering Osama bin Laden, and closing terrorist camps); S.C. Res. 1267, ¶¶ 1,4,6, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (establishing special committee, imposing sanctions and embargo, and otherwise criticizing Afghanistan and Taliban for committing human rights violations, supporting terrorism, and harboring Osama bin Laden). The actions taken by the United Nations, however, were obviously far from effective.

terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities.”⁷ Similarly, the U.K. Prime Minister Tony Blair, a defender of the Bush Doctrine,⁸ described the objectives of the coalition as follows: “to close down the al-Qaeda network, bring UBL and his associates to justice, and because the Taliban regime have chosen to side with al-Qaeda, to remove them.”⁹ Both leaders, however, were often vague in describing how they envisioned administering “justice” against individual terrorists and the extent to which any formal judicial processes would be employed.¹⁰ Once announced, the Bush administration’s plans for detaining, interrogating, and punishing suspected terrorists met strong criticism from some quarters.¹¹ This presaged the legal difficulties to come.

To support the President’s efforts in the war on terror, the U.S. Congress passed a broad authorization for the use of force against “those nations, organizations, and persons [the President] determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.”¹² When the President’s demands were not met, the United States undertook military action designed explicitly to treat the recalcitrant Taliban regime as one with the terrorists it harbored.¹³ As a consequence of this military campaign, a large number of illegal enemy combatants came within the custody of the U.S. military.¹⁴ Originally, the United States

7. . . Bush, *supra* note 1.

8. *E.g.*, James Harding, *War on Terror Bush Visit: Close friends reunited in struggle against terrorism*, FIN. TIMES (London), Nov. 21, 2003, at 3 (providing example of Blair’s commitment to combating terrorism around the world).

9. Prime Minister Tony Blair, Speech to the Welsh Assembly (Oct. 30, 2001), <http://www.number-10.gov.uk/output/Page1636.asp>.

10. This observation is in no way meant as a criticism of either President Bush or Prime Minister Blair, especially given the circumstances under which their comments were given. The point is simply that the administration of justice against terrorists and their leaders is not easily described. *Cf.* VICTOR DAVIS HANSON, AN AUTUMN OF WAR: WHAT AMERICA LEARNED FROM SEPTEMBER 11 AND THE WAR ON TERRORISM, 132–37 (2002) (providing satiric depiction of hypothetical trial for al-Qaeda members).

11. *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (describing perceived legal problems present in the President’s plan for trying enemy combatants). *But see* John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899 (2003) (defending the legality of the President’s plan for military commissions).

12. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (emphasis added).

13. Bush, *supra* note 1; *cf. generally* Patrick E. Tyler, *U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns ‘Taliban Will Pay a Price,’* N.Y. TIMES, Oct. 8, 2001, at A1.

14. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

transported roughly 600 of these suspected terrorists to the U.S. Navy's facility at Guantanamo Bay, Cuba.¹⁵

Under the Bush administration's policy, an enemy combatant received multiple evaluations by the military.¹⁶ First, upon capturing an individual suspected of being a terrorist, the commander in the field would assess the suspect based upon available evidence.¹⁷ If the commander believed that the individual was "part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States" the suspect was detained for further review.¹⁸ If not released at this stage of the process, the individual was then "sent to a centralized holding in the area of operations" for review by a "military screening team."¹⁹ A general officer reviewed the work of the screening team, and the Department of Defense would review this report if the general officer recommended that the suspect be sent to Guantanamo.²⁰ Finally, upon the detainee's arrival at the base, additional evaluations would occur, including review by "the Secretary of Defense or his designee."²¹

Combatant Status Review Tribunals were made formally responsible for reviewing each detainee at Guantanamo to determine whether the detainee should be held there.²² Furthermore, particularized annual reviews are conducted to evaluate the need for continued detention of each detainee; factors considered include the level of threat presented by the individual as well as potential intelligence value.²³ These reviews are to be distinguished from actual military commissions whose task is to try those non-citizens selected for war crimes prosecution.²⁴ To the dismay of many,²⁵ the

15. *Id.*

16. Brief of Respondents at 5, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343), 2004 WL 425739.

17. *Id.*

18. *Id.* at 4.

19. *Id.* at 5.

20. *Id.*

21. *Id.* at 6.

22. See Guantanamo Detainee Processes, United States Department of Defense, <http://www.defenselink.mil/news/Sep2005/d20050908process.pdf>.

23. *Id.*

24. *Id.*; see also GTMO Detainee Processes (rev. Nov. 14, 2005), United States Department of Defense, <http://www.defenselink.mil/news/Jan2006/d20060215detaineeprocesschart.pdf>; Processes for Guantanamo Detainees, United States Department of Defense, <http://www.defenselink.mil/news/Jan2006/d20060215detaineeprocesses.pdf>; cf. JTF-GTMO Information on Detainees (current as of Mar. 4, 2005), United States Department of Defense, <http://www.defenselink.mil/news/Mar2005/d20050304info.pdf>.

25. Cf., e.g., Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 A.J.I.L. 686, 688 (Oct. 2004) ("To many civil libertarians, this broad assertion of presidential powers looked like an instance of throwing out the rule-of-law baby with the bathwater of inconvenient limits on absolute governmental discretion.").

Bush administration's plan did not provide for scrutiny by the judiciary at any time prior to actual prosecutorial action before a military commission.²⁶ The Administration instead took the position that, since these fighters were not prisoners of war, the full protections of the Geneva Conventions did not apply to their detention and treatment.²⁷ Moreover, because the war on terror is not a traditional conflict among states, it is not possible to look forward to a formal cessation of hostilities. This therefore raised the possibility of perpetual detention, a possibility that has become a source of great consternation to many in the field of international law.²⁸

Although the Administration had stated from the outset that a detainee convicted by a military tribunal would be able to challenge his conviction in a federal civilian court, the fact of detention alone would not itself trigger the right to have judicial review—at least that was the Administration's interpretation of the law.²⁹ Indeed, attempts by detainees to seek the benefit of judicial review by an Article III court were initially unsuccessful.³⁰ The federal government's process met an unanticipated difficulty, however, when *Rasul v. Bush*,³¹ an appeal from a denial of a writ of habeas corpus under the federal habeas statute,³² reached the U.S. Supreme Court.³³ Ruling against the U.S. government's position, the Court

26. See Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (editorial authored by then-White House Counsel explaining and defending administration's proposed use of military tribunals) ("The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court.").

27. Military Order of November 13, 2001: *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002); Sue Anne Pressley, *Preparing for Role in War on Terror: Navy Base in Cuba to House Taliban, Al Qaeda Detainees*, WASH. POST, Jan. 10, 2002 at A12; cf. Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1:

Each of the roughly 540 prisoners at Guantanamo have gone before a three-member military board to have their status as enemy combatants reviewed. A final review has been completed in 487 cases; of those, all but 22 were found to have been properly classified, a status leaving them subject to possible war crimes charges.

28. Cf. George Lardner, Jr., *Legal Scholars Criticize Wording of Bush Order; Accused Can Be Detained Indefinitely*, WASH. POST, Dec. 3, 2001, at A10 (reporting criticism of vagueness in standards applicable to military detentions including limits on time prisoners are able to be held before any trial).

29. See Gonzales, *supra* note 26.

30. See, e.g., *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.C. Cir. 2002) (dismissing for lack of jurisdiction detainees' challenge to their detention in Cuba), *aff'd*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, 542 U.S. 466 (2004).

31. 542 U.S. 466.

32. 28 U.S.C. §§ 2241–2254 (2003).

33. See *Rasul*, 466 U.S. at 485 (reversing lower court's dismissal for lack of jurisdiction).

held that the detainees did have a right under the federal habeas corpus statute to petition U.S. civilian courts for review of their detentions.³⁴ While a majority of the Court determined that “the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention”³⁵ of the detainees at Guantanamo Bay, Justice Scalia penned a vigorous dissent, which characterized the Court’s ruling as “an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.”³⁶ One area that Justice Scalia found particularly egregious was the fact that the Court’s decision “extends to aliens detained by the United States military, *outside the sovereign borders* of the United States and *beyond the territorial jurisdiction* of all its courts.”³⁷ In sum, the dissent was especially troubled by what it viewed as a new extraterritoriality in the jurisdictional power of U.S. courts to grant a writ of habeas corpus under 28 U.S.C. § 2241.³⁸

Part II of this Note will review the major precedents that shaped the legal framework before *Rasul*. It will focus primarily on the World War II-era case of *Johnson v. Eisentrager*,³⁹ a case which the dissent in *Rasul* argued should control.⁴⁰ Part III will shift to discuss the Supreme Court’s opinion in *Rasul v. Bush*, and Part IV will closely examine Justice Scalia’s dissent in order to understand how the law has changed since *Eisentrager*; Part IV will also address the extent to which the Court’s holding does in fact extend U.S. habeas corpus jurisdiction beyond previous bounds. Finally, Part V will discuss subsequent legal developments that have followed *Rasul* (including a recent amendment to the habeas statute), consider the practical impact of the decision, and explore what type of statutory and policy changes are both permissible and necessary in light of the Supreme Court’s current reading of § 2241. On a more general level, this Note also recommends that the role of international law in the current war on terror be both predictable and narrowly circumscribed to prevent it from interfering with the executive’s ability to wage that war.

34. *Id.*

35. *Id.*

36. *Id.* at 489 (Scalia, J., dissenting).

37. *Id.* at 488 (Scalia, J., dissenting) (emphasis added).

38. *Id.* at 489 (Scalia, J., dissenting).

39. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

40. *Cf. Rasul*, 542 U.S. at 493 (Scalia, J., dissenting):

Eisentrager’s directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today . . . the latter course would require the Court to explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, *and*, having set it aside, to explain why the habeas statute does not mean what it plainly says.

II. BACKGROUND CASES

Much of the reasoning in the *Rasul* opinions is influenced by a line of cases that arose after World War II, and the scope of disagreement between the majority and dissent can be fully understood only through examination of this history. One may discern in these cases a broadening of habeas corpus jurisdiction over time, and the question then becomes whether that general broadening in domestic cases ought to apply in the international context as well. In *Rasul*, the majority answered this question in the affirmative.

A. Ahrens v. Clark

In *Ahrens v. Clark*,⁴¹ the Supreme Court considered “whether the presence within the territorial jurisdiction of the District Court of the person detained is a prerequisite to filing a petition for a writ of habeas corpus.”⁴² The case arose out of the petition of 120 Germans “being held at Ellis Island, New York, for deportation to Germany . . . under removal orders issued by the Attorney General who ha[d] found . . . [each of them to be] . . . dangerous to the public peace and safety of the United States[.]”⁴³ Their petitions had been filed in the District Court for the District of Columbia because they alleged that their detentions were ordered by the U.S. Attorney General.⁴⁴ The district court dismissed for lack of jurisdiction, and the court of appeals agreed.⁴⁵ Reviewing the question of territoriality, the Supreme Court also affirmed the lower courts’ decisions.⁴⁶ It held that the phrase “within their respective jurisdictions” as used in the habeas corpus statute does in fact “limit the district courts to inquiries into causes of restraints of liberty of those confined or restrained within the territorial jurisdictions of those courts.”⁴⁷ Responding to the argument that the district court had jurisdiction in this case because it had jurisdiction over the jailer (in this case the Attorney General) the Court declared that “[i]t is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction.”⁴⁸ Although the Court noted that there was little precedent on this

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

42. *Id.* at 189.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 193.

47. *Id.* at 190.

48. *Id.*

issue, it expressed the view that this understanding was consistent with the implications to be found in prior cases.⁴⁹

In its rationale, the Court approached the matter pragmatically and focused its inquiry on the pertinent legislative history to understand Congress's intent. First, the Court noted that "the statutory scheme contemplates a procedure which may bring the prisoner before the court."⁵⁰ Reasoning that the petitioners' reading would potentially require transportation of a prisoner held "perhaps thousands of miles from the U.S. District Court that issued the writ,"⁵¹ the Court decided that the risk of escape and the other burdens presented by this alternative weighed against finding that Congress intended the writ to be available in a district other than the district of imprisonment.⁵² Furthermore, this reading accorded with the view of the writ held at the time of the statute's drafting.⁵³ Indeed, the Senate had added the phrase "within their respective jurisdictions" precisely to address concerns that the bill, as originally drafted, would have allowed a judge in one jurisdiction to order prisoners being held in another state to appear before him in his court.⁵⁴ In *Ahrens*, though, the majority specifically left unanswered "the question of what process, if any, a person confined in an area not subject the jurisdiction of any district court might employ to assert federal rights."⁵⁵

The *Ahrens* Court also articulated two important concepts related to habeas relief that are now subject to question as a result of the opinion announced by the Supreme Court in *Rasul*. First, it stated that there is an "accepted premise that apart from the specific exceptions created by Congress the jurisdiction of the district courts is territorial."⁵⁶ Furthermore it held that, if the Court is to have jurisdiction to hear petitions from those like the *Ahrens* prisoners, Congress—not the Court—would have to create it explicitly.⁵⁷

49. *Id.* ("There are few cases on all fours with the present one, the precise question not having frequently arisen in the lower federal courts. But the general view is that their jurisdiction is so confined.")

50. *Id.*

51. *Id.* at 191.

52. *Id.*

53. *Id.* at 191–92.

54. *Id.*

55. *Id.* at 193 n.4 (refusing to address the issue notwithstanding the Government's willingness "to waive the point so that we may make a decision on the merits").

56. *Id.* at 190 (emphasis added).

57. *Id.* at 192–93.

B. Johnson v. Eisentrager

The open question from *Ahrens* concerning an individual detained outside the jurisdiction of any district court was answered a few years later.⁵⁸ This case, *Johnson v. Eisentrager*,⁵⁹ arose from a suit filed by multiple German nationals who had been apprehended in China while engaged in activity contrary to the United States' war effort (*viz.*, espionage).⁶⁰ The actions of the German nationals violated the laws of war.⁶¹ Having been tried and convicted by a military commission, they were sentenced to imprisonment in Germany's Landsberg Prison, a facility that was then under the direct control of the U.S. Army.⁶² When the prisoners attempted to petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia, the court dismissed the action for lack of jurisdiction.⁶³

The Court of Appeals for the D.C. Circuit reversed because, as was stated by Judge E. Barrett Prettyman in his opinion for the court, "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ [of habeas corpus]."⁶⁴ The court went on to hold that the "petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer."⁶⁵ The statute, according to the court of appeals, had to be read in this way lest the prisoners be left without access to the writ of habeas corpus—a situation the court said would be unconstitutional.⁶⁶ The majority in *Rasul* some decades later would describe this action by saying, "In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'"⁶⁷

On appeal, the U.S. Supreme Court reversed the D.C. Circuit and affirmed the district court's ruling.⁶⁸ Writing for the majority,

58. *Rasul*, 542 U.S. at 490–91.

59. *Eisentrager*, 339 U.S. 763 (1950).

60. *Id.* at 765.

61. *Id.* at 766.

62. *Id.*

63. *Id.* at 767 ("Thereupon the petition was dismissed on authority of *Ahrens v. Clark*, 335 U.S. 188 . . .").

64. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd sub nom.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

65. *Id.* at 963.

66. *Id.* at 967 ("[W]e conclude that whatever may be the lack of forum in other cases, the Constitution specifically prohibits that result in respect to habeas corpus. Congress cannot suspend that privilege, unless there be invasion or rebellion.")

67. *Rasul*, 542 U.S. at 478.

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

Justice Robert Jackson sharply departed from the reasoning that had been employed by Judge Prettyman below. As the *Rasul* majority aptly characterized it, Justice Jackson's opinion "proceeded from the premise that 'nothing in our statutes' conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals's resort to 'fundamentals' on its own terms."⁶⁹ The *Eisentrager* Court first differentiated the limited rights of resident enemy aliens—persons to whom the United States does owe legal protections⁷⁰—from those of nonresident enemy aliens. The majority then concluded that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."⁷¹ To underscore how different the case at bar was from prior cases in which habeas had been granted, the opinion enumerated six elements present in *Eisentrager*.⁷² These elements included the fact that each prisoner

(a) is an enemy alien; (b) had never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁷³

Interestingly, each of these—even the first—somehow involves or turns on territoriality. As will be seen, these factors gain increased importance in *Rasul*.⁷⁴

Obviously concerned about the dangers inherent in granting enemy aliens access to U.S. courts, Justice Jackson further criticized the court of appeals: "It could not predicate relief upon any intraterritorial contact of these prisoners with our laws or institutions. Instead, it gave our Constitution an extraterritorial application to embrace our enemies in arms."⁷⁵ Indeed, the opinion extensively rebuked the court below for holding that the Constitution applies to "all persons, whatever their nationality, wherever they are

69. *Rasul*, 542 U.S. at 478 (citing *Eisentrager*, 339 U.S. at 768).

70. See *Eisentrager*, 339 U.S. at 777–78.

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[.]

71. *Id.* at 776.

72. *Id.* at 777.

73. *Id.*

74. See *Rasul*, 542 U.S. at 475–76, 486–88.

75. *Eisentrager*, 339 U.S. at 781.

located and whatever their offenses[.]”⁷⁶ The majority emphasized that this case was not concerned with the rights of U.S. citizens⁷⁷ and also distinguished between the rights possessed by resident aliens and those non-citizens who are not present in the United States.⁷⁸ Regarding the rights of resident aliens, the opinion considered the importance of territoriality to jurisdiction and said, “[I]n extending constitutional protections beyond citizenry, the Court has been at pain to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary the power to act.”⁷⁹

The absurdity of the lower court’s ruling, the Supreme Court explained, was illustrated by the “paradox” that it would “invest[] enemy aliens in unlawful hostile action against us with immunity from military trial,” while still leaving U.S. soldiers subject to punishment following military adjudications.⁸⁰ Indeed, the lower court’s ruling would necessarily “extend coverage of our Constitution to nonresident alien enemies [even though that coverage is] denied to resident alien enemies.”⁸¹

Taking the lower court’s opinion to its perceived logical conclusion, Justice Jackson argued that if, as the court of appeals had held, “the Fifth Amendment confers its rights upon all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments.”⁸² To illustrate the absurdity of extending the protections of the Constitution in this manner, he wrote:

Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and “werewolves” could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trials as in the Fifth and Sixth Amendments.⁸³

76. *Id.* at 783; *see generally id.* at 781–84.

77. *Id.* at 769; *see id.*:

If a person’s claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen “regardless of whether he is within the United States or abroad.” 54 Stat. 1171, 8 U.S.C. § 903. This Court long ago extended habeas corpus to one seeking admission to the country to assure fair hearing of his claims to citizenship . . . and has secured citizenship against forfeiture by involuntary formal acts.

78. *Id.* at 771.

79. *Id.*

80. *Id.* at 783.

81. *Id.* at 784.

82. *Id.*

83. *Id.*

This section, as well as other parts of the opinion, makes clear that Justice Jackson worried about the practical problems presented by any judicial proceeding—other than a military trial—held to assess the rights of those who had been captured while engaged in actions that violated the laws of war.⁸⁴ This rationale illustrates why the Constitution does not apply in foreign theaters of war or elsewhere beyond the territory of the United States. The statute itself, however, could have conferred extraterritorial jurisdiction, but as Justice Jackson wrote, “[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment.”⁸⁵ He then noted the total lack of legal or historical authority to support the notion that the statute was drafted to apply extraterritorially.⁸⁶

Because the Court so thoroughly articulated why the Constitution does not apply to foreign enemy combatants held overseas, the reasoning in the opinion is readily apparent.⁸⁷ That is to say, there is no longer a reason to read the habeas corpus statute as applying to foreign enemy detainees—as the court of appeals had done⁸⁸—once the Constitution is no longer held to require such a reading.⁸⁹

The Court’s opinion proceeded further⁹⁰ to consider the reasons given by the court below for finding the existence of “some action by some official of the United States in excess of his authority which

84. *Id.* at 782–83 (discussing the Fifth and Sixth Amendments to the U.S. Constitution as applicable to the petitioners under the court of appeals’ rationale) (“No suggestion is advanced by the court below, or by prisoners, of any constitutional method by which violations of the laws of war endangering the United States forces could be reached or punished, if it were not by a Military Commission in the theatre where the offense was committed.”).

85. *Id.* at 784.

86. *Id.* at 784–85.

87. *See, e.g., id.* at 778 (“A basic consideration in habeas corpus practice is that the prisoner will be produced before the court.”); *see generally id.* at 778–81 (discussing some practical considerations in affording foreign enemy combatants access to regular U.S. courts).

88. *Cf. Forrestal*, 174 F.2d at 965 (“We think that if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute.”); *id.* at 966 (“So, if the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result.”). *See Eisentrager*, 339 U.S. at 781 (“Right to the writ, it reasoned, is a subsidiary right that follows from possession of substantive procedural constitutional rights. These prisoners, it considered, are invested with a right of personal liberty by our Constitution and therefore must have the right to the remedial writ.”).

89. *Id.* at 768 (“Nothing in the text of the Constitution extends such a right a right, nor does anything in our statutes.”).

90. The *Eisentrager* dissenters consider this part of the opinion to be “wholly irrelevant and lend[ing] no support whatever to the Court’s holding that the District Court was without jurisdiction.” *Id.* at 792 (Black, J., dissenting).

confers a private right to have it judicially voided.”⁹¹ This had been the foundation for granting the writ.⁹² After specifically considering the nature of those claims, however, the Supreme Court concluded, “[w]e are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers.”⁹³ Thus, the Court concluded that “in the present application we find no basis for invoking federal judicial power in any district, [and] we need not debate as to where, if the case were otherwise, the petition should be filed.”⁹⁴

Notably, Justice Black authored a dissenting opinion in which Justices Douglas and Burton concurred.⁹⁵ The dissent’s support for the court of appeals’ opinion below is expressed unambiguously.⁹⁶ The dissenters disagreed with the idea that the Constitution is limited in its extraterritorial effect and declared that its “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.”⁹⁷ While Justice Black qualified this by stating that not “every constitutional provision of the Bill of Rights [must be applied] in controlling temporarily occupied countries[,]” his opinion still contended that this does “not mean that the Constitution is wholly inapplicable in foreign territory that we occupy and govern.”⁹⁸ As such, he would have held that habeas was available in this case “as an instrument to protect against illegal imprisonment . . . written into the Constitution.”⁹⁹ Moreover, he would also have held that habeas may not “be constitutionally abridged by [the] Executive or by Congress.”¹⁰⁰ This line of analysis would seem to foreclose the type of reasoning used by the majority, which based its understanding of habeas on the text and tradition of the actual statute.¹⁰¹

The dissent’s extraterritorial understanding of the statute would have meant that U.S. courts could “exercise [jurisdiction] whenever any United States official illegally imprisons any person in any land we govern.”¹⁰² (Notably, however, none of the justices believed that

91. *Id.* at 785 (majority opinion).

92. *Id.* (“For this reason it thought the writ could be granted.”).

93. *Id.* at 790.

94. *Id.* at 790–91.

95. *Id.* at 791 (Black, J., dissenting).

96. *Id.* at 791–92 (“I agree with the Court of Appeals and need add little to the cogent reasons given for its decision.”) (Black, J., dissenting).

97. *Id.* at 798 (Black, J., dissenting).

98. *Id.* at 797 (Black, J., dissenting).

99. *Id.* at 798 (Black, J., dissenting).

100. *Id.* (Black, J., dissenting).

101. *Cf. id.* at 778–79 (majority opinion).

102. *Id.* at 798 (Black, J., dissenting).

the writ should be issued for enemy prisoners during time of war.¹⁰³) The dissent's view, of course, did not prevail, and post-*Eisentrager* neither the Constitution nor the habeas corpus statute appeared to be available to enemy combatants held by U.S. military forces.

C. *Braden v. 30th Judicial Circuit Court of Kentucky*

Although the majority opinion in *Rasul* relies heavily on the case of *Braden v. 30th Judicial Circuit Court of Kentucky*,¹⁰⁴ the dissent would not consider it to have any bearing on the disposition of the writ when sought by enemy detainees.¹⁰⁵ In *Braden*, Justice Brennan wrote the opinion and was joined by four other justices¹⁰⁶ in holding that "the language of § 2241 (a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian."¹⁰⁷ The case arose from litigation undertaken by a prisoner who was serving a sentence in Alabama and who had previously been indicted in Kentucky.¹⁰⁸ While serving time in Alabama, he petitioned for a writ of habeas corpus in the U.S. District Court for the Western District of Kentucky on various grounds related to the Kentucky indictment, the impact it was having on his confinement in Alabama, and his desire to have a speedy trial on the charges in Kentucky.¹⁰⁹ His attack, therefore, was upon the "validity of the Kentucky indictment which underl[ay] the detainer lodged against him by [Kentucky] officials[.]"¹¹⁰ The majority held that the petitioner-prisoner could be granted a writ of habeas corpus in Kentucky, even though he was physically present in Alabama and thus outside the jurisdiction of a Kentucky court.¹¹¹ The Court there held that

[s]o long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he

103. *Eisentrager*, 339 U.S. at 796 (Black, J., dissenting) ("It would be fantastic to suggest that alien enemies could haul our military leaders into judicial tribunals to account for their day to day activities on the battlefield . . . [but once] a foreign enemy surrenders, the situation changes markedly.")

104. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); see *Rasul*, 542 U.S. at 478 ("subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager's* resort to 'fundamentals'") (citing *Braden*, 410 U.S. at 495).

105. See *id.* at 495 ("Where, as here, present physical custody is at issue, *Braden* is inapposite, and *Eisentrager* unquestionably controls.") (Scalia, J., dissenting).

106. *Braden*, 410 U.S. at 484.

107. *Id.* at 495.

108. *Id.* at 485.

109. *Id.* at 487-88.

110. *Id.* at 486-87.

111. *Id.* at 495.

be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.¹¹²

The majority's holding brought a strong dissent from then-Justice Rehnquist that began by characterizing the Court's action as an overruling of *Ahrens*.¹¹³ The actual effect of *Braden*, though, is susceptible—or at least it was prior to *Rasul*—to being characterized as more concerned with the convenience of venue rather than with the absolutes of jurisdiction.¹¹⁴ Furthermore, as Justice Scalia's dissent in *Rasul* correctly observed, *Braden* does not even address *Eisentrager* or the rights of nonresident aliens.¹¹⁵

D. *Rasul v. Bush*: Action in the Lower Courts

In an effort to challenge their confinement at Guantanamo Bay following capture by U.S. forces in Afghanistan, various plaintiffs sued the United States in the U.S. District Court for the District of Columbia.¹¹⁶ Although a variety of claims were made by *Rasul et al.* (e.g., a claim under the Alien Tort Statute¹¹⁷), the district court held that the “exclusive means for securing the relief Petitioners seek is through a writ of habeas corpus.”¹¹⁸ In the companion *Odah* case, the plaintiffs (twelve Kuwaiti nationals) did not seek release, but again the court considered the action only as a petition for a writ of habeas corpus.¹¹⁹

The district court's opinion, which dismissed the actions based upon a lack of jurisdiction, rested squarely upon *Eisentrager*.¹²⁰ The court considered and rejected the notion that *Eisentrager* did not apply because that case had involved prisoners who had been “deemed to be ‘enemies’ by a competent tribunal.”¹²¹ This decision largely rested upon a pair of Supreme Court cases which established, at least for that court, “that there is no meaningful distinction between the cases at bar and the *Eisentrager* decision on the mere

112. *Id.*

113. *Id.* at 502 (“Today the Court overrules *Ahrens v. Clark*, 335 U.S. 188 (1948), which construed the legislative intent of Congress in enacting the lineal predecessor of 28 U.S.C. § 2241.”) (Rehnquist, J., dissenting).

114. *Cf., e.g., id.* at 499–500 (“In view of these developments since *Ahrens v. Clark*, we can no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision.”) (majority opinion).

115. *Rasul*, 542 U.S. at 488–89 (Scalia, J., dissenting).

116. *Rasul*, 215 F. Supp. 2d at 56.

117. 28 U.S.C. § 1350 (2005).

118. *Rasul*, 215 F. Supp. 2d at 62.

119. *Id.* at 65.

120. *Id.*; see also *id.* at 68 (“Accordingly the Court finds that *Eisentrager* is applicable to the aliens in these cases, who are held at Guantanamo Bay, even in the absence of a determination by a military commission that they are ‘enemies.’”).

121. *Id.* at 67.

basis that the petitioners in *Eisentrager* had been found by a military commission to be 'enemy' aliens."¹²² Then the court undertook an extensive analysis to determine "whether Guantanamo Bay, Cuba is part of the sovereign territory of the United States."¹²³ Looking to several cases in a variety of contexts,¹²⁴ the district court concluded that the naval base is indeed outside the sovereign territory of the United States.¹²⁵ Upon that basis, the court found a want of jurisdiction and dismissed both cases with prejudice.¹²⁶

The Court of Appeals for the District of Columbia affirmed the district court's dismissal.¹²⁷ First, it endorsed the district court's conclusion that the status of the Guantanamo detainees does not differ from that of the prisoners seeking relief in *Eisentrager*.¹²⁸ It then likewise affirmed the district court's reliance upon that case:

[N]o court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our

122. *Id.*; see *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (noting that the same constitutional protections do not apply to aliens outside the U.S. as would apply within the country's borders); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing to *Eisentrager* as evidence that the Fifth Amendment does not apply extraterritorially).

123. *Rasul*, 215 F. Supp. 2d at 68; see *id.* at 68–72 (discussing cases defining the scope of U.S. sovereignty).

124. For cases discussed in the district court's opinion, see *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that Guantanamo Bay is not a U.S. territory); *Ralpho v. Bell*, 569 F.2d 607, 619 (D.C. Cir. 1977) (holding Micronesia, a trust territory from the U.N., to be the equivalent of a U.S. territory and that persons living there are entitled to certain constitutional protections); *Bird v. United States*, 923 F. Supp. 338, 343 (D. Conn. 1996) (holding that under the Federal Tort Claims Act the U.S. Medical Facility at Guantanamo Bay falls under the act's "foreign country" exception because Cuba exercises de jure sovereignty according to the 1903 Lease Agreement). *But see Haitian Centers Council, Inc. v. McNairy*, 969 F.2d 1326, 1332–33 (2d Cir. 1992) (holding that, once migrants claiming asylum had been evaluated by INS, the U.S. government could not deny them due process of law), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918, 918 (1993).

125. *Rasul*, 215 F. Supp. 2d at 72–73.

126. *Id.* at 73.

127. *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003).

128. *Id.* at 1140:

Nonetheless the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States. For the reasons that follow we believe that under *Eisentrager* these factors preclude the detainees from seeking habeas relief in the courts of the United States.

courts to test the constitutionality or the legality of restraints on their liberty.¹²⁹

Finally, the court reviewed the status of the base where the detainees are being held.¹³⁰ The court concluded that “[t]he text of the leases . . . shows that Cuba—not the United States—has sovereignty over Guantanamo Bay.”¹³¹ With this background, the Supreme Court would review the case, all but eviscerate the part of *Eisentrager* that had been applied below, and thus reshape the entire legal framework surrounding the issues implicated in the detention of aliens outside of the United States.

III. *RASUL V. BUSH* AT THE SUPREME COURT

A. *The Majority Opinion*

In an opinion authored by Justice Stevens and joined by four other justices, the Court reversed the court of appeals’ affirmation of the district court.¹³² In light of prior case law on this issue, the Court’s decision must be viewed as startling. It found habeas jurisdiction for federal courts, but did not expressly overrule *Eisentrager*. Instead, the Court relied upon *Braden*: “Because *Braden* overruled the statutory predicate to *Eisentrager*’s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners’ claims.”¹³³ The Court thus held that cases since *Eisentrager* have “filled the statutory gap that had occasioned *Eisentrager*’s resort to ‘fundamentals,’ [and therefore] persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review.”¹³⁴ This readily explains why the constitutional question presented by *Eisentrager* was not addressed in *Rasul*: the “statutory predicate” (i.e., the prisoner’s presence in the jurisdiction of the court) was no longer required in the wake of *Braden*. What is seemingly left then is a case of statutory, not constitutional, interpretation.¹³⁵

129. *Id.* at 1141.

130. *Id.* at 1142–44.

131. *Id.* at 1143; *see also id.* (“[U]nder *Eisentrager*, control is surely not the test. Our military forces may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany.”).

132. *Rasul*, 542 U.S. at 469.

133. *Id.* at 479.

134. *Id.* at 478.

135. *Cf. id.* at 493 (Scalia, J., dissenting) (“And the latter course would require the Court to explain why our almost categorical rule of *stare decisis* in *statutory cases* should be set aside in order to complicate the present war . . .”).

Having addressed that issue and having held that the statute applied to the detainees, the Court proceeded to discuss the nature of U.S. jurisdiction over the Guantanamo Bay naval facility.¹³⁶ This part of the decision is arguably of greatest importance for the scope of this Note; therefore the precise logic of Justice Stevens's opinion merits close analysis. Although all three federal courts addressed jurisdiction over the naval base, the Supreme Court's methods differed markedly from those of the two lower courts that had addressed this question. Whereas the district and appeals courts had undertaken this examination to determine what rights are extended to aliens there¹³⁷ (which was part of the district court's examination of territorial sovereignty¹³⁸), the Supreme Court discussed the status of Guantanamo Bay merely to counter the Government's claim that "we can discern a limit on § 2241 through application of the 'longstanding principle of American law' that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested."¹³⁹

In a statement that is as laconic as it is bold, Justice Stevens wrote, "Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States."¹⁴⁰ Interestingly, Justice Stevens here cited to *Foley Bros., Inc. v. Filardo*,¹⁴¹ a case which addressed whether Congress had intended to apply the so-called "eight hour law"¹⁴² to work performed in foreign countries. While in *Foley Brothers* it was undisputed that Congress possessed the power to apply the law beyond U.S. borders, the Court determined there that it was not Congress's intent to exercise that power in the statute.¹⁴³ Indeed, the case was a matter of statutory interpretation; hence the Court looked for "any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control."¹⁴⁴ Moreover, the Court in *Foley Brothers* mentioned the considerations Congress would have had in determining the scope of the legislation by noting that "Congress is primarily concerned with domestic conditions. We find nothing in the

136. *Id.* at 480–82 (majority opinion).

137. *See Rasul*, 215 F. Supp. 2d at 72–73; *Al-Odah*, 321 F.3d at 1134.

138. *Rasul*, 215 F. Supp. 2d at 68–69.

139. *Rasul*, 542 U.S. at 480 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

140. *Id.* It remains unclear what would follow from a finding that the base is part of the U.S.'s "territorial jurisdiction."

141. 336 U.S. 281, 285 (1949).

142. 40 U.S.C. §§ 321–326 (1949).

143. *Foley Bros.*, 336 U.S. at 284–85.

144. *Id.* at 285.

Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case."¹⁴⁵ The *Foley Brothers* Court also contrasted the statute before it with a prior case holding that the Fair Labor Standards Act did apply extraterritorially precisely because Congress had used the term "possessions" in drafting the law.¹⁴⁶

Because *Foley Bros. v. Filardo* did so explicitly affirm that "[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained,"¹⁴⁷ it is striking that Justice Stevens would have used this case in support of his opinion here. Justice Stevens's point, however, appears to have been that Guantanamo Bay is in some sense under the "territorial jurisdiction" of the United States, and to support this notion he cited to the 1903 Lease Agreement between the United States and Cuba, which had given the United States "complete jurisdiction and control" over the property there.¹⁴⁸ The opinion itself does not provide any further discussion of what constitutes "territorial jurisdiction." Rather, it returned to reasoning that habeas jurisdiction lies because (1) it would reach U.S. citizens held there¹⁴⁹ and (2) the text of "the statute draws no distinction between American and aliens held in federal custody."¹⁵⁰ Presumably Justice Stevens's comment that "there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship"¹⁵¹ substitutes for the Court's investigation into congressional intent that was conducted in *Foley Brothers*.

By this point in the majority's opinion, it seems inescapable that two independent rationales are at work in the Court's reasoning. One notion is that habeas jurisdiction exists in *Rasul* as a result of the federal courts' having jurisdiction over the custodian (that being the only jurisdiction necessary in the wake of *Braden*). The other notion is that federal courts have jurisdiction over the facility at Guantanamo Bay because of the base's status. If the second notion were in fact forming part of an additional requirement for the exercise of federal habeas jurisdiction, the scope of the Court's opinion would be much more limited. That is, it might apply to prisoners held in a longstanding territory leased formally by the

145. *Id.*

146. *Id.*; see *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 389 (1948) (applying the Fair Labor Standards Act so as to cover American contractors in Bermuda).

147. *Foley Bros.*, 336 U.S. at 285.

148. *Rasul*, 542 U.S. at 480.

149. *Id.* (a point with which the Government had agreed).

150. *Id.*

151. *Id.*

United States, but not to prisoners at an ad hoc facility on foreign territory in or near a war zone. The Court, however, did not elevate this to an explicit requirement. In fact, the majority's entire discussion of "territorial jurisdiction" is apparently rendered unnecessary by its conclusion that "Section 2241, by its terms, requires nothing more" than "the District Court's jurisdiction over petitioners' custodians."¹⁵² This is certainly how Justice Scalia viewed the Court's holding.¹⁵³ The Court's conclusion then about the proper construction of the habeas statute apparently obviates any requirement of territorial jurisdiction over the petitioner. Moreover, such a conclusion logically means that a federal court's jurisdiction would reach any prisoner detained anywhere in the world by U.S. armed forces or another government agency.¹⁵⁴ As a result, there would also seem to be no requirement that the prisoner be located in anything able to be described as "within the 'territorial jurisdiction' of the United States."

It might very well be that the Court's discussion of "territorial jurisdiction" is a signal that the Court will treat an ad hoc detention on a battlefield differently than detention at Guantanamo Bay, but nothing in the Court's opinion provides a firm foundation for this conclusion. Even a more modest reading of the opinion's effect on territorial jurisdiction is difficult to establish insofar as the Court totally avoided making the prisoner's location a matter of concern for a petitioned court.¹⁵⁵ (This point will be clarified later in this Note's analysis.)

Justice Stevens's discussion of the common law history of the writ's jurisdiction also gives rise to some confusion regarding the territorial basis for habeas jurisdiction. The opinion states: "Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus."¹⁵⁶ After writing this, Justice Stevens then discussed the history of the writ at common law in Britain, asserting that in the eighteenth century the "there was 'no doubt' as to the court's power to issue writs

152. *Id.* at 483–84.

153. *Id.* at 500 (Scalia, J., dissenting) ("The habeas statute is (according to the court) being applied *domestically*, to 'petitioners' custodians,' and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application . . . Fortunately, however, the Court's irrelevant discussion also happens to be wrong.").

154. *Cf. id.* at 498 (Scalia, J., dissenting) ("In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth.").

155. This reasoning is more like that contained in the concurrence authored by Justice Kennedy.

156. *Rasul*, 542 U.S. at 481.

of habeas corpus if the territory was 'under the subjection of the Crown."¹⁵⁷

The Court was, of course, not performing a direct inquiry into congressional intent at the time the U.S. habeas corpus statute was written. An analysis based upon legislative history would have cast doubt upon the Court's argument here regarding the reach of the statute to persons over whom the petitioned court does not have jurisdiction,¹⁵⁸ and indeed, the Supreme Court had already engaged in such an analysis in *Ahrens*.¹⁵⁹ There it reviewed the statute's enactment in 1842 and the changes made to the bill by Senator Trumbull to placate those who worried that the bill as drafted "would permit 'a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further states."¹⁶⁰ As a result of that analysis, the *Ahrens* Court concluded explicitly that "the language of the statute" and "legislative history" along with "considerations of policy" all support denial of the writ when it is sought by a petitioner outside the jurisdiction of any court.¹⁶¹

As such, Justice Stevens's historical discussion is a discussion of the writ's common law tradition and features,¹⁶² which it could be argued (albeit with difficulty, given how the *Ahrens* court characterized the legislative history) Congress did not intend to curtail with the passage of the statute.¹⁶³ Moreover, Justice Stevens's argument avoided mentioning the fact that the jurisdiction of federal courts does not necessarily extend to grant review of every action taken by the president; this is the case *a fortiori* when the presidential action in question is within the sphere of foreign relations.¹⁶⁴

157. *Id.* at 482 (citing Lord Mansfield in *King v. Cowle*, 97 Eng. Rep. 587, 598–99 (K.B. 1759)).

158. *See Ahrens*, 335 U.S. at 191–93.

159. *Id.*

160. *Id.* at 192 (citing Cong. Globe, 39th Cong., 2d Sess. 730 (1867)).

161. *Id.*

162. It should be acknowledged that Justice Stevens did at the beginning of his opinion undertake a brief historical survey of the functioning of the writ in U.S. courts, but it is not clear what significance that has upon the holding in the case sub judice. *See Rasul*, 542 U.S. at 473–75. The gist of his discussion there appears to be that the writ is meant, at least in part, to challenge detentions undertaken by the executive without a trial, and that judicial review of habeas petitions has occurred "in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Id.*

163. *Contra Ahrens*, 335 U.S. at 191 ("Prior to that date [Aug. 1842] it was the accepted view that a prisoner must be within the territorial jurisdiction of the District Court in order to obtain from it a writ of habeas corpus.").

164. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936):

Nevertheless, the majority concluded its discussion of the traditional power of British habeas jurisdiction by stating that “the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of ‘the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.’”¹⁶⁵ Again, the significance of this statement is problematic. The Court’s treatment of the “exact extent and nature of the jurisdiction or dominion exercised” by the United States over the naval base in Cuba is cursory at best.¹⁶⁶ Instead, the majority made clear elsewhere in the opinion that the dispositive question for the petitioned court post-*Rasul* is whether the court has jurisdiction over the “custodians,” a term which is notably not limited simply to the administrator of the prison facility.¹⁶⁷ That being the case, the right under the statute to petition for a writ of habeas corpus would apparently extend to a prisoner held by the United States regardless of the nature of the jurisdiction possessed over the territory wherein he is held. Therefore, it seems necessary to conclude that the Court in *Rasul* allowed, just as Justice Scalia’s dissent claimed,¹⁶⁸ extensive (even worldwide) extraterritorial application of the statutory writ of habeas corpus.

The Court, however, did not stop at apparently allowing extraterritorial jurisdiction for habeas corpus claims. Reversing the court of appeals, which had affirmed the district court’s dismissal of the petitioners’ actions under the federal question¹⁶⁹ and Alien Tort Claims statutes,¹⁷⁰ the Supreme Court held that the petitioners could also pursue claims under these statutory authorities.¹⁷¹ The critical distinction is the view that each of the various courts took of *Eisentrager* and its force regarding the habeas statute. The lower courts had viewed the other statutory actions as essentially habeas

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Dellums v. Bush, 752 F. Supp. 1141, 1149 (D.C. Cir. 1990) (“The principle that the courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs.”).

165. *Rasul*, 542 U.S. at 482 (citing *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (U.K.)).

166. *Id.* at 482; cf. *id.* at 471–72 (describing the U.S.-Cuba lease agreements).

167. *Id.* at 483.

168. *Id.* at 497–99 (Scalia, J., dissenting).

169. 28 U.S.C. § 1331.

170. *Id.* § 1350.

171. *Rasul*, 542 U.S. at 484.

actions under alternative guises, and therefore they had to be dismissed under *Eisentrager*.¹⁷² In contrast, the Supreme Court held that "*Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicated the 'same category of laws listed in the habeas corpus statute.'"¹⁷³ These claims could be heard in U.S. courts regardless of the petitioners' status as detainees.¹⁷⁴

B. Justice Kennedy's Concurrence

In his concurring opinion, Justice Anthony Kennedy did not take issue with the Court's endorsement of extraterritorial jurisdiction as such, but his various points of disagreement with the majority clarify the Court's actual holding. Although Justice Kennedy endorsed this extraterritorial application of the statute, he also agreed with Justice Scalia that the majority had erred in concluding that *Braden* overruled the "statutory predicate" to *Eisentrager*.¹⁷⁵ Instead, Justice Kennedy argued that *Eisentrager* should be applied in this case, but that application of *Eisentrager* would still result in granting these petitioners writs of habeas corpus.¹⁷⁶ What he preferred to avoid, however, was an "automatic statutory authority to adjudicate the claims of persons located outside the United States."¹⁷⁷

Justice Kennedy's approach interpreted *Eisentrager* as having established an "ascending scale of rights' that courts have recognized for individuals depending on their connection to the United States."¹⁷⁸ Moreover, he saw *Eisentrager* as identifying factors to be considered in deciding not just whether the courts have jurisdiction, but also whether the executive should be given free rein in that "realm of political authority over military affairs where the judicial power may not enter."¹⁷⁹ This provides for a subtle but significant distinction that focuses on the power of the branches of the government, not a reading of the habeas statute or even a determination of territorial jurisdiction, when defining the reach of the federal courts' powers. This also, however, appears to implicitly approve of an extraterritorial application of that judicial power

172. *Id.*

173. *Id.*

174. *Id.* at 485.

175. *Id.* (Kennedy, J., concurring) ("Justice Scalia exposes the weakness in the Court's conclusion . . . As he explains, the Court's approach is not a plausible reading of *Braden* or *Johnson v. Eisentrager*.").

176. *Id.* (Kennedy, J., concurring).

177. *Id.* at 488 (Kennedy, J., concurring).

178. *Id.* at 486 (Kennedy, J., concurring).

179. *Id.* at 487 (Kennedy, J., concurring).

absent certain elements that would place it with in the province of the executive.

Looking at several factors present in the case of the *Eisentrager* prisoners, Justice Kennedy concluded as follows:

Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts to hear the prisoners' claims.¹⁸⁰

He sees the case of the Guantanamo Bay prisoners as "distinguishable from those in *Eisentrager* in two critical ways."¹⁸¹ One of these is that "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceedings to determine their status."¹⁸² A detainment of a few weeks, he asserts, might "be justified by military necessity" but as time passes, "the case for continued detention to meet military exigencies becomes weaker."¹⁸³ It is arguable that Justice Kennedy has created this standard out of whole cloth, and it is not at all clear how a reviewing court is to judge "military necessity" without substantial risk of crossing into an area that Justice Kennedy has already declared off-limits to courts.¹⁸⁴

Of greater concern for the scope of this Note, though, is Justice Kennedy's first criterion concerning territoriality. For him, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."¹⁸⁵ It is not clear how he determined that the naval base is a U.S. territory, although he does cite to the various leases between the United States and Cuba.¹⁸⁶ This type of reasoning, if it were not merely in a concurring opinion, could present major problems. It does not provide any guidance on how other bases, especially those that might be closer to hostile action, would be evaluated.

Moreover, while the majority seemed to completely abandon the need for the prisoners to be held in a territory over which a court has jurisdiction and the dissent would retain that requirement, Justice Kennedy would make the concept of territorial jurisdiction essentially nondirective. It is not clear whether an analogous leasehold would allow for prolonged detention if other factors from *Eisentrager* are present. An even more potent question is whether the significance of

180. *Id.* at 486 (Kennedy, J., concurring).

181. *Id.* at 487 (Kennedy, J., concurring).

182. *Id.* at 487–88 (Kennedy, J., concurring).

183. *Id.* at 488 (Kennedy, J., concurring).

184. *Id.* at 487 (Kennedy, J., concurring) ("the judicial power may not enter").

185. *Id.* (Kennedy, J., concurring).

186. *Id.* (Kennedy, J., concurring).

territoriality would disappear entirely under appropriate circumstances, even theoretically allowing for denial of the writ to a prisoner detained across the street from the courthouse, provided there are appropriate military exigencies. Thus, while he may not have made territoriality a talisman for jurisdiction either way, he also did not provide anything else that could be clearly understood and relied upon in the future.

Another ambiguity present in Justice Kennedy's concurring opinion is his source of authority. Indeed, the main authority cited in his opinion other than U.S.-Cuba leases is *Eisentrager*.¹⁸⁷ If *Eisentrager* is read solely as a case interpreting § 2241, then it would have to follow that Justice Kennedy's logic ultimately rests upon the statute itself. A close reading of his opinion, though, makes that conclusion questionable. He did not cite or express reliance upon the language of the statute. His discussion of *Eisentrager* is rather one of balancing elements from that case in the context of balancing the powers of the executive and the judiciary. This fact leaves open the possibility that his decision may turn on factors other than the text of the statute itself. In this way, his logic might be capable of morphing into something more akin to Judge Prettyman's opinion for the court of appeals in *Eisentrager*. It also raises doubts as to how Congress could use its powers to reshape the statutory writ, if it so desired, to remove certain classes of enemy detainees from judicial review. As such, what appears at first to be a more modest approach could become far more expansive than the majority's opinion, which at least purported to rest upon the language of the statute itself.

IV. *RASUL V. BUSH*—THE DISSENTING ANALYSIS OF THE COURT RATIONALE

A. *Justice Scalia's Dissent*

The dissent, authored by Justice Scalia and joined by the late Chief Justice Rehnquist and Justice Thomas, argued very passionately that the Court had rendered a "novel holding" constituting an "an irresponsible overturning of settled law."¹⁸⁸ It takes great exception to the expansion of jurisdiction and engages in a thorough analysis of the majority opinion. Because its logic illustrates the extent of the post-*Rasul* extraterritoriality, it is outlined here.¹⁸⁹

187. See *id.* at 487–88 (Kennedy, J., concurring).

188. *Id.* at 489 (Scalia, J., dissenting).

189. One section of his dissent—that discussing the impact of the decision on the conduct of the war on terror—is contained in Part V rather than Part IV of this Note.

1. The Court Fails to Give Due Weight to the Text of § 2241 which Obviously Requires Territorial Jurisdiction over the Petitioner

The Constitution does not require jurisdiction by federal courts over aliens held beyond U.S. borders, and thus Justice Scalia would have held that “this case turns on the words of § 2241, a text the Court today largely ignores.”¹⁹⁰ “Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee,” he wrote.¹⁹¹ Unlike the majority, he read the statute as requiring “some federal district court [to] have territorial jurisdiction over the detainee.”¹⁹² Insofar as the majority agreed that “the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court,” his dissent argued that on that basis alone the Court should have affirmed the lower courts’ dismissal.¹⁹³

2. *Eisentrager* is Directly on Point and Should Apply

Justice Scalia noted that *Eisentrager* was “largely devoted to rejecting the lower court’s constitutional analysis, since the doctrine of constitutional avoidance underlay its statutory conclusion.”¹⁹⁴ The reasoning in *Eisentrager* did not greatly concern itself with construing the statute because “the Court considered it obvious (as indeed it is) that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.”¹⁹⁵ Of course, the majority relied upon *Braden* to prevent strict adherence to *Eisentrager* and its result.

3. The Court Misappropriates *Braden*

Justice Scalia then asserted that the majority’s characterization of *Braden* as an overruling of a “statutory predicate” is merely an “oblique course” around either holding that *Braden* overruled *Eisentrager* or overruling *Eisentrager* in this present case.¹⁹⁶ The first he said would be laughable and the second would be a violation of the Court’s “almost categorical rule of *stare decisis* in statutory cases.”¹⁹⁷

Rather than giving *Braden* the same force that the majority did, the dissent would have seen that case as standing

190. *Rasul*, 542 U.S. at 489 (Scalia, J., dissenting).

191. *Id.* (Scalia, J., dissenting).

192. *Id.* at 490 (Scalia, J., dissenting) (emphasis in original).

193. *Id.* (Scalia, J., dissenting).

194. *Id.* at 492 (Scalia, J., dissenting).

195. *Id.* at 493 (Scalia, J., dissenting).

196. *Id.* at 493–94 (Scalia, J., dissenting).

197. *Id.* at 493 (Scalia, J., dissenting).

for the proposition, and only 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.¹⁹⁸

Such a reading would mean here that “*Eisentrager* unquestionably controls.”¹⁹⁹ That would have ensured that U.S. federal jurisdiction remain confined to the territory of the United States.

4. The Court’s Description of the Guantanamo Facility is Baseless

In addressing Guantanamo’s legal status, Justice Scalia used the concept of territoriality to assail the majority’s reasoning. First, he challenged the idea that the United States’ “complete jurisdiction and control” brings the base within the scope of U.S. domestic law.²⁰⁰ Rather, he noted that the “lease agreements explicitly recognize ‘the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas].’”²⁰¹ Justice Scalia further asserted that the Court’s logic would make lands in Iraq and Afghanistan currently held because of military force subject to U.S. domestic jurisdiction as well.²⁰²

Second, Justice Scalia took on the idea that somehow jurisdiction over non-citizens held abroad is proper because the government (as conceded at oral argument) would recognize greater rights for a U.S. citizen detained at Guantanamo.²⁰³ The dissent appears to be quite correct in countering that this would have “*nothing to do with the special status of Guantanamo Bay*” and that the government’s argument here is exactly what the court held in *Eisentrager*.²⁰⁴ It is therefore quite unclear how this part of the majority’s opinion may be employed in later cases.

5. The Court Misinterprets the History of the Writ

The dissent concluded by taking issue with a line of British cases extending into the twentieth century that the majority characterized as “consistent with” its holding.²⁰⁵ This debate is rather arcane and beyond the scope of this Note. Suffice it to point out that the main argument urged by the dissenters was that “Guantanamo Bay is not

198. *Id.* at 494 (Scalia, J., dissenting) (emphasis added).

199. *Id.* at 495 (Scalia, J., dissenting).

200. *Id.* at 501 (Scalia, J., dissenting).

201. *Id.* (Scalia, J., dissenting) (citing Lease of Lands for Coaling and Naval Stations, art. 3, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418).

202. *Id.* (Scalia, J., dissenting).

203. *Id.* at 501–02 (Scalia, J., dissenting).

204. *Id.* (Scalia, J., dissenting) (emphasis in original).

205. *Id.* (Scalia, J., dissenting).

a sovereign dominion, and even if it were, jurisdiction would be limited to subjects.”²⁰⁶

6. Conclusion

While some may not see the consequences as being harmful, it is nevertheless irrefutable that the Court’s decision greatly expanded the jurisdiction of U.S. courts beyond previous bounds. The majority cited no instances in which this type of extraterritorial jurisdiction has previously been exercised by federal courts.²⁰⁷ And, the opinion does indeed appear to have authorized habeas review for all enemy alien detainees held by the United States anywhere in the world—or as Justice Scalia put it: “[T]he Court boldly extends the scope of the habeas statute to the four corners of the earth.”²⁰⁸ As has been shown, there is little in the majority’s logic that would work to cabin it. Moreover, it may even be possible for prisoners to challenge detention by foreign governments when the person held alleges that his detention is at the request of the United States; the policy of “rendition” would be one such example of this. This could even conceivably create something of a transnational *Braden* doctrine for cases in which there is a nexus between the U.S. government and the foreign state’s action. The possibilities at this juncture truly do appear that boundless.

B. *Parallel Paths and the Roads Not Taken*

Although not an integral part of the discussion here, it should be noted that the government was less than wholly successful in two other terrorism-related cases at the same time it lost in *Rasul*. In *Rumsfeld v. Padilla*, the Court considered the case of a U.S. citizen who was arrested at Chicago O’Hare International Airport and then held by the military in South Carolina under Presidential orders.²⁰⁹ The Court, however, declined to reach the merits of the case because it ruled that the district in which the petition was filed did not have jurisdiction over Padilla’s immediate custodian (Commander Marr); Secretary Rumsfeld was not the proper custodian to have named.²¹⁰ Thus, then-Chief Justice Rehnquist writing for the majority held that the “District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition.”²¹¹ The case was then dismissed without

206. *Id.* at 502 (Scalia, J., dissenting).

207. *Cf. id.* at 505 (Scalia, J., dissenting) (referring to the Court’s treatment of Guantanamo Bay as “a wrenching departure from precedent”).

208. *Id.* at 498 (Scalia, J., dissenting).

209. 542 U.S. 426, 430–31 (2004).

210. *Id.* at 445–45.

211. *Id.* at 451.

prejudice.²¹² In so doing, the Court declined to accept the dissent's invitation to carve out an exception to the requirement that the defendant named in the suit be the immediate custodian.²¹³

In the case of *Hamdi v. Rumsfeld*, the Court considered the petition of a U.S. citizen who was captured while allegedly fighting for the Taliban in Afghanistan.²¹⁴ The U.S. government attempted to hold him indefinitely. In disposing of the case, the Court produced an intricate set of arguments and lengthy opinions, which cannot be addressed meaningfully in the confines of this Note. It should be acknowledged, though, that the plurality opinion held that, while there is no bar to holding a U.S. citizen as an "enemy combatant,"²¹⁵ there are still due process rights available to the citizen-detainee.²¹⁶ Therefore, the Court concluded that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification[] and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."²¹⁷

More importantly for this discussion, the Court expressly rejected the "heavily circumscribed role for the courts" that the Administration had urged.²¹⁸ The Court stated that the Government's "approach serves only to *condense* power into a single branch of government."²¹⁹ Justice Scalia's dissent, which was joined (interestingly enough) by Justice Stevens, rejected the Administration's view even more pointedly: "It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus."²²⁰ Stating that members of the Court "lack the expertise and capacity to second-guess" the Administration in this area, only Justice Thomas proved truly amenable to the Government's argument.²²¹ He dissented, believing the appeal should fail with no remand.

V. DEVELOPMENTS SUBSEQUENT TO *RASUL* AND RECOMMENDATION

Returning to *Rasul*, it is necessary to consider what effects its holding may have over time for the war on terror. Obviously, many in

212. *Id.*

213. *Id.* at 449–50.

214. 542 U.S. 507, 509–10 (2004).

215. *Id.* at 519.

216. *Id.* at 532–33.

217. *Id.* at 533.

218. *Id.* at 535.

219. *Id.* at 536 (emphasis in original).

220. *Id.* at 573 (Scalia, J., dissenting).

221. *Id.* at 579 (Thomas, J., dissenting).

the legal community were pleased by the Court's ruling,²²² but others expressed concern over the reach of such an opinion.²²³ Because, however, the case seemingly involved only statutory interpretation,²²⁴ the key issues implicated in the debate remain subject to congressional control.

A. Dealing with the "Breathtaking" Impact

"The consequence of this holding, as applied to aliens outside the country, is breathtaking," says the *Rasul* dissent.²²⁵ This appears to be quite true when one considers the conclusion, expressed by Justice Scalia and left unanswered by the majority in its opinion, that the "Guantanamo Bay detainees can petition in any of the 94 federal judicial districts," but domestic detainees "must challenge their present physical confinement in the district of their confinement."²²⁶ Indeed, the dissenters asserted that the prisoners' extraterritoriality had been transformed into a license to forum shop.²²⁷

Of course, those are essentially procedural changes. Justice Scalia also noted that the members of the majority "disregard, without a word of acknowledgement, the dire warning of a more circumspect court in *Eisentrager*."²²⁸ Indeed, the Court did not discuss the practical effects of its decision, and the habeas actions made available by *Rasul* have opened the courthouse doors to any number of legal claims—spurious or otherwise—from the detainees.²²⁹ As mentioned above, *Rasul*'s unfettering of federal habeas jurisdiction could conceivably even apply to detainees in a

222. See, e.g., Press Release, American Civil Liberties Union, Supreme Court Says Courts Can Review Bush Administration Actions in Terrorism Fight (June 28, 2004), <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16019&c=280> (praising the rulings as necessary judicial review of the President's wartime actions).

223. See, e.g., Robert Alt, *Terrorists Welcome*, Ashbrook Center for Public Affairs at Ashland University, June 29, 2004, <http://www.ashbrook.org/publicat/oped/alt/04/rasul.html> (criticizing the decision in *Rasul* as both "bad law" and "bad policy").

224. At least, the decision was apparently on statutory grounds.

225. *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting).

226. *Id.* at 506 (Scalia, J., dissenting).

227. *Id.* But see *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2003) (*amended* July 8, 2004). The Ninth Circuit had upheld the exercise of jurisdiction over Guantanamo Bay even prior to *Rasul*, but after the issuance of the Supreme Court opinions in *Rasul* and *Padilla* it transferred the *Gherebi* matter to the D.C. Circuit.

228. *Rasul*, 542 U.S. at 506 (Scalia, J., dissenting).

229. Several detainees who had been released by the military's own review after a determination that it was safe to free them have returned to fight against the United States in the war on terror. See, e.g., John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A01 ("At least 10 detainees released from the Guantanamo Bay prison after U.S. officials concluded they posed little threat have been recaptured or killed fighting U.S. or coalition forces in Pakistan and Afghanistan[.]").

theater of combat²³⁰ and to those held in foreign countries by or at the request of the CIA.²³¹

Increased scrutiny has in fact been given to the number of persons detained throughout the world at the request of the United States. The *New York Times* reported at one point that the policy of rendition, which involves sending prisoners from U.S. custody to other countries (including, in some cases, the detainee's country of birth or citizenship) for the purpose of obtaining intelligence,²³² was responsible for the detention of roughly 100 to 150 terrorist suspects in foreign countries.²³³ Other reports have estimated that roughly 83,000 individuals have been in some way detained in places around the world in recent years,²³⁴ and there has been much attention paid to the holding of such persons.²³⁵ While the Court may not have intended to address such individuals, nothing in the logic of the *Rasul* opinion obviously prevents it from extending to these persons as well. Even if these suspects are being held merely at the request of the

230. In oral argument before the Supreme Court, the petitioners asserted that they did not seek to have the writ made available on the battlefield because habeas has never been available at common law to those so held. See Transcript of Oral Argument at 15–16, *Rasul*, 524 U.S. 466 (Nos. 03-334, 03-343).

231. See Douglas Jehl, *Questions Left By C.I.A. Chief On Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1 (“In addition, an estimated three dozen people suspected of being terrorist leaders, including Khalid Shaikh Mohammed, who is suspected of being the mastermind of the Sept. 11 attacks, remain in C.I.A. custody in secret sites around the world.”). For an explanation as to how *Rasul* may be read broadly by those seeking a way to constrain the manner in which the U.S. handles enemy combatants, see James E. Pfander, *The Limits of Habeas Jurisdiction and the War on Terror*, 91 CORNELL L. REV. 497 (2006). Professor Pfander argues that

Rasul's rejection of the immediate-custodian model of habeas jurisdiction provides the foundation for a more capacious model of nonstatutory review in which overseas detention gives rise to an action for injunctive and declaratory relief . . . [and this] would invite federal courts to recognize that U.S. law follows the U.S. military into bases and detention centers around the world.

Id. at 539.

232. Cf. generally Reuel Marc Gerecht, *Against Rendition: Why the CIA Shouldn't Outsource Interrogations to Countries that Torture*, WKLY. STANDARD, May 16, 2005, at 21 (arguing against policy of rendition).

233. Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 1 (“As part of its broad new latitude, current and former government officials say, the C.I.A. has been authorized to transfer prisoners to other countries solely for the purpose of detention and interrogation.”).

234. See Katherine Shrader, *U.S. Has Detained 83,000 in War on Terror*, WASH. POST, Nov. 16, 2005, (“The United States has detained more than 83,000 foreigners in the four years of the war on terror, enough to nearly fill the NFL's largest stadium.”).

235. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A01 (“But the revelations of widespread prisoner abuse in Afghanistan and Iraq by the U.S. military—which operates under published rules and transparent oversight of Congress—have increased concern among lawmakers, foreign governments and human rights groups about the opaque CIA system.”).

United States, there is conceivably a right to judicial review on the grounds that the detention is being directed by and for the U.S. government—a party over whom the courts do possess the requisite jurisdiction.²³⁶ With so great a need for secrecy in the war on terror, particularly in the collection of intelligence, judicial review of these detentions could prove to be exceptionally cumbersome, diplomatically problematic, and even gravely dangerous.²³⁷

Defense Department plans for moving Guantanamo detainees to other countries suggest that the Administration did not interpret *Rasul* to extend to certain overseas detentions.²³⁸ But the removals themselves encountered judicial obstacles.²³⁹ For instance, on March 12, 2005, a judge for the U.S. District Court for the District of Columbia issued an injunction temporarily barring the removal of thirteen Yemeni nationals from Guantanamo Bay to the territory of another government.²⁴⁰ As long as the foreign nation is the one exercising ultimate authority over the detention, the Government's apparent interpretation of the opinion might prove to be permissible. Anything short of that, however, could potentially cause *Rasul* to obtain. *Rasul* could even be seen as creating a sliding scale, with the Guantanamo detainment sitting at one end and detainment in a foreign state wholly at the desire of that nation sitting at the other. If that is the case, the key question may be what level of control the U.S. exercises in a particular situation. Moreover, if that is the case, it may also mean that Justice Kennedy's concurrence takes on new significance.

236. The Supreme Court might be pushed to take such a position given human rights concerns or criticism that the Bush administration has been overly reliant on legal technicalities as a means of insulating detainees from U.S. judicial protections. See, e.g., Editorial, *Torture by Proxy*, N.Y. TIMES, Mar. 8, 2005, at A22 ("American officials have offered pretzel logic to defend these practices. Attorney General Alberto Gonzales has said that if the United States sends a prisoner abroad, then our nation's constitution no longer applies."); cf. Patricia M. Wald, *The Supreme Court Goes to War*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 37, 41–42 (Peter Berkowitz, ed., 2005) (noting that *Rasul* was heard against a backdrop of international criticism towards the U.S. and suggesting that this prompted the Supreme Court to rule as it did).

237. Cf. Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power to Wage War Successfully,"* 53 DRAKE L. REV. 851, 890–91 (2005) (discussing the practical justifications for military tribunals) ("There are multiple reasons [for military tribunals], but these reasons make sense only in the context of a bona fide war, and especially where the war is being lodged against a global terror network").

238. See Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1 ("The proposal is part of a Pentagon effort to cut a Guantanamo population that stands at about 540 detainees by releasing some outright and by transferring others for continued detention elsewhere.").

239. *Abdah v. Bush*, No. 04-1254, 2005 U.S. Dist. LEXIS 4144, at *3 (D.D.C. Mar. 12, 2005).

240. *Id.*

Some effects need no speculation. In an early habeas ruling, Judge Joyce Hens Green of the U.S. District Court for the District of Columbia held that detainees at Guantanamo Bay were entitled to rights and privileges under both the U.S. Constitution and the Geneva Conventions.²⁴¹ She even found that the prisoners are entitled to due process rights.²⁴² Such rulings make clear the extent to which *Rasul* has become a viable vehicle for detainees to seek protections that could quickly become burdens to both the war effort and intelligence operations generally.²⁴³

Contrasting with that case is an earlier decision by another district court judge also sitting for the D.C. District. In *Kahlid v. Bush*, Judge Richard Leon started with the President's order empowering the Secretary of Defense to detain certain types of terrorist suspects; he found this order to be legitimate.²⁴⁴ His opinion then noted that "[d]ue to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the petitioners possess no cognizable constitutional rights."²⁴⁵ He thus read *Rasul* narrowly and in such a manner as to preserve the force of *Eisentrager*, stating that "by focusing on the petitioners' statutory right to file a writ of habeas corpus, the *Rasul* majority left intact the holding in *Eisentrager* and its progeny."²⁴⁶

After reviewing various claims by the petitioner-detainees, Judge Leon found no violation of any specific federal law and concluded, "The mere fact that the petitioners are in custody, of course, does not violate any specific federal statutory law because Congress has not,

241. *In re Guantanamo Detainees Cases*, 355 F. Supp. 2d 443, 457, 478–79 (D.D.C. 2005). *But see* *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005) (rejecting applicability of Geneva Conventions).

242. *In re Guantanamo Detainees Cases*, 355 F. Supp. 2d at 464 ("In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly . . . the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment.").

243. *See, e.g.*, Andrew McCarthy, *A Mixed Bag*, NAT'L REV. ONLINE, June 30, 2004, <http://www.nationalreview.com/mccarthy/mccarthy200406300915.asp>.

Rasul could, if it unfolds to the full extent of its logic, become a profound blow to the capacity of the United States to conduct a successful war against a modern, international terrorist network . . . Empirically, judicial demands on governmental procedural compliance become steadily more demanding over time, and government naturally responds by being even more internally exacting to avoid problems. In no time flat, what was once thought a trifling inconvenience becomes a major expenditure—in this case one that will inevitably detract from the military mission which is the bedrock of our safety.

244. 355 F. Supp. 2d 311, 315 (D.D.C. 2005) (citing Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)).

245. *Id.* at 321.

246. *Id.* at 323.

to-date, enacted any legislation restricting the President's ability to capture and detain alien combatants in the manner applicable to these petitioners."²⁴⁷ Finding the petitioners' many other arguments to be unavailing as well, the court granted the Government's motion to dismiss as a matter of law and stated that any rights of the detainees are "subject to both the military review process already in place and the laws Congress has passed defining the appropriate scope of military conduct towards" them.²⁴⁸

B. Congressional Power after *Rasul*

These cases implicate vital national security concerns and demand a more uniform approach. As such, congressional examination, as has recently been undertaken, is most appropriate.²⁴⁹ And, although this recent legislative action has not

247. *Id.* at 324.

248. *Id.* at 330. The sharp differences between these two cases illustrate another genuine problem with the exercise of federal jurisdiction in this area—the diversity of rulings that may result among the various districts and circuits. *See Rasul*, 542 U.S. at 506 (Scalia, J., dissenting) ("license to forum shop"). Obviously, given the extreme importance of the national security issues involved, such splits among jurisdictions (and, as shown here, among judges on the same court) are hardly desirable.

249. *See generally* U.S. CONST. art. III, § 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."); U.S. CONST. art III, § 2 ("In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."); THE FEDERALIST NO. 80, at 408 (Alexander Hamilton) (Gary Wills ed., 1982):

If some partial inconveniences should appear to be connected with the incorporation of [the powers of the federal judiciary] into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.

This is not in any way meant to endorse other proposals that have been made throughout the years to remove jurisdiction of certain matters from the courts simply because of substantive policy differences between the judiciary and the political branches. The central issues implicated in such debates are not even present to the same extent (if at all) when discussing the rights of those whose rights are not constitutionally guaranteed. *See, e.g.*, Richard H. Fallon, Jr., *Some Confusion about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 367 (1993):

[A] number of important cases suggest that the right to due process sometimes entails a right to judicial process and especially to judicial review of constitutional questions. In other series of cases, however, the Supreme Court has not only implied that claims to governmental largesse fall within a category of public rights that permit, but do not require, judicial resolution; the Court has also enforced immunity doctrines that sometimes preclude effective remediation for constitutional violations.

resolved all the procedural and substantive questions left after *Rasul*, Congress should be commended for finally doing what many scholars had long been urging it to do.²⁵⁰

1. The Graham-Levin Amendment on Guantanamo

Congress's foray into addressing these issues came in November 2005.²⁵¹ Taking the lead, Senator Lindsay Graham, a Republican from South Carolina, proposed an amendment to the National Defense Authorization Act for Fiscal Year 2006²⁵² that would have ended attempts of Guantanamo detainees to obtain judicial review in federal courts.²⁵³ Under the original version of the Graham Amendment, the D.C. Circuit Court of Appeals would have been the only court able to hear claims from enemy combatants held in Cuba. Even then, the court's scope of review would have been very limited. For instance, in review of a decision to hold a prisoner, the court

Cf. Dalton v. Specter, 511 U.S. 462, 477 (1993) ("The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."). But, for a discussion of the importance of the right to habeas review generally see, e.g., *Davis v. Straub*, 430 F.3d 281, 298 (6th Cir. 2005) (Merritt, J., dissenting) ("Had not some state ratification conventions insisted on a Bill of Rights, the federal courts would have had to create an unwritten Bill of Rights using the writ of habeas corpus and the doctrine that the elected branches are limited to the enumerate powers named in the Constitution."). Because action concerning enemy combatants, however, would not affect the rights of citizens or foreigners present within the borders of the United States, the real constitutional issue arises in considering whether the removal would result in a structural imbalance, leaving the judiciary as less than coequal or otherwise upsetting the separation of powers within the U.S. system of government.

250. See Carl W. Tobias, *Congress Should Act Fast*, NAT'L L.J., Aug. 15, 2005, at 22 ("Should Congress fail to legislate, the executive will likely maintain the status quo, and this inaction will exacerbate a deteriorating situation."); John Yoo, *The Supreme Court Goes to War*, American Enterprise Institute, June 30, 2004, http://www.aei.org/publications/pubID.20825,filter.all/pub_detail.asp.

Now is the time for Congress and the president, vested by the Constitution with all of the war power and directly elected by the American people, to establish these procedures with a broader view of the costs and benefits for the war on terrorism. They should not wait for district judges to make these choices *ad hoc* simply because they happen to hear the early cases.

251. See Dan Eggen, *Senate Approves Plan to Limit Detainee Access to Courts*, WASH. POST, Nov. 11, 2005, at A07 (reporting on passage of first Graham amendment); see generally Press Release, Sen. Lindsay Graham, Senate Passes Graham Detainee Plan: Amendment Sets Guidelines For the Detention of Enemy Combatants and Clarifies that Foreign Terrorists Do Not Have Unlimited Access to U.S. Courts (Nov. 10, 2006), <http://lgraham.senate.gov/index.cfm?mode=presspage&id=248690> (asserting that the ultimate goal of the various changes is to "clarif[y] the previous understanding of the habeas statute that aliens outside the United States do not have access to our federal courts").

252. S. 1042, 109th Cong. (2005).

253. Amd. 2516 to Amd. 2515 to S. 1042, 109th Cong. (2005).

could have asked only “whether the status determination of the . . . Combatant Status Review Tribunal with regard to such alien was consistent with the procedures and standards specified by the Secretary of Defense for Combatant Status Review Tribunals.”²⁵⁴

Although this amendment was adopted by a vote of forty-nine to forty-two,²⁵⁵ the Senate soon reversed course as Senator Graham offered a second amendment in the nature of a substitute and forged a compromise with his more liberal colleagues, including Michigan’s Carl Levin, the ranking Democrat on the Senate Armed Services Committee.²⁵⁶ This time by a vote of eighty-four to fourteen, the Senate voted to relax the restrictions on the scope of review.²⁵⁷ The Graham amendment as modified (now the Graham-Levin Amendment) also essentially allows for direct review by the D.C. Circuit Court of Appeals of any conviction by a military tribunal.²⁵⁸

The senators, however, obviously desired to place some limits on the current rights of detainees. In between these two votes, an amendment by New Mexico Democrat Jeff Bingaman that would have provided for even more elaborate judicial review of enemy combatant detentions failed by a vote of fifty-four to forty-four.²⁵⁹ Senator Graham said that he opposed the Bingaman alternative “because it preserves habeas rights for noncitizen, foreign terrorists to come into Federal court at the . . . DC Court of Appeals, to put a wide variety of issues on the table.”²⁶⁰ In essence, Graham believed it would both hinder intelligence gathering and keep the courts open to virtually any claim.

Because, however, the Graham-Levin Amendment also permits a court to consider “whether subjecting an alien enemy combatant to such standards and procedures . . . is consistent with the Constitution and laws of the United States,” the legislation may not actually prove as limiting as Senator Graham and others desired.²⁶¹ (The same standard applies to judicial review of any final decision by a Combatant Status Review Tribunal or a military commission.²⁶²) The phrase sounds innocuous enough, but this Note will later discuss the

254. *Id.* at 2516 (d)(2)(C).

255. 151 CONG. REC. S12,667-68 (daily ed. Nov. 10, 2005) (Roll Call Vote No. 319 Leg. on Amd. 2516 to Amd. 2515 to S. 1042, 109th Cong. (2005)).

256. 151 CONG. REC. S12,753 (daily ed. Nov. 14, 2005) (containing text of Amd. 2524 to Amd. 2515 to S. 1042, 109th Cong. (2005) and statement of Sen. Graham).

257. 151 CONG. REC. S12,803-04 (daily ed. Nov. 15, 2005) (Roll Call Vote No. 325 Leg. on Amd. 2524 to Amd. 2515 to S. 1042, 109th Cong. (2005)).

258. Amd. 2524 to Amd. 2515 to S. 1042, 109th Cong. (2005).

259. 151 CONG. REC. S12,800 (daily ed. Nov. 15, 2005) (Roll Call Vote No. 324 Leg. on Amd. 2523 to Amd. 2515 to S. 1042, 109th Cong. (2005)).

260. 151 CONG. REC. S12,756 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

261. Amd. 2524 (d)(2)(C)(ii) to Amd. 2515 to S. 1042, 109th Cong. (2005).

262. *See id.*; *id.* at (d)(3)(D)(ii) (“whether subjecting an alien enemy combatant to such order is consistent with the Constitution and laws of the United States”).

extent to which “Constitution and laws of the United States” is susceptible to a variety of interpretations, particularly depending upon how (if at all) treaty obligations and international law are incorporated into its meaning.²⁶³ Although it may sound alarmist, the inclusion of this standard could prove to be the exception that swallows all the other limitations sought by the Amendment. There are also provisions in the Amendment that raise separation of powers concerns as between the President and Congress,²⁶⁴ but those are minor (at least on this issue at this time) compared to the larger question of judicial review for enemy combatants.²⁶⁵

Moreover, the Graham-Levin Amendment leaves unanswered the broader questions surrounding extraterritorial jurisdiction after *Rasul*.²⁶⁶ Indeed, the Amendment appears to apply only to those held

263. See *infra* note 307.

264. See, e.g., Amd. 2524 (a)–(c) to Amd. 2515 to S. 1042, 109th Cong. (2005) (requiring the Secretary of Defense to report to Congress the procedures used by the tribunals and mandating certain procedural elements).

265. For a discussion of presidential war powers that deviates from the more traditional pro-Congress view see generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 143–83 (2005); cf. J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465 (2005) (exploring extent to which Supreme Court precedent truly supports prevailing constitutional opinion that the president may only in engage in a very narrow type of military engagement without the authorization of Congress). It is also useful to compare congressional attempts to control prosecution of the war on terror with attempts by Congress to control aspects of the president’s domestic powers. See, e.g., *Printz v. United States*, 521 U.S. 898, 922 (1997) (striking down provision of the 1993 Brady Act) (holding that, because of Article II’s language concerning the president’s duty “to take Care that the Laws be faithfully executed,” Congress may not circumvent him by requiring state and local government agents to enforce federal laws); *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988) (upholding Independent Counsel statute because it did not impermissibly undermine or disrupt the executive in performing duties and functions); *id.* at 705 (Scalia, J., dissenting) (rejecting the majority’s balancing test and arguing that any reduction in the executive’s power is impermissible because the Constitution vests the president with all executive powers). By logic similar to that used in Justice Scalia’s opinion for the Court in *Printz*, it seems possible to argue that any congressional action which purports to limit the president’s ability to detain enemy combatants and/or try them with military tribunals might constitute a violation of the Constitution’s separation of powers by diminishing the “vigor and accountability” present in the execution of the president’s powers as commander in chief. Cf. generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS*, 31–36 (2002) (discussing Justice Scalia’s view of executive power as expressed in *Printz* and elsewhere).

266. Although originally offered as an amendment to the Defense Authorization Bill, the Graham-Levin Amendment first became law as part of the Department of Defense Appropriations Act when that legislation was signed by President Bush on December 30, 2005. Act Making Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2006 and for Other Purposes, Pub. L. No. 109-148, 119 Stat. 2680 (2005); see Press Release, President George W. Bush, President’s Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and

at Guantanamo Bay, which leaves open the possibility of extraterritorial application of the habeas statute in other geographical areas.²⁶⁷ And, the effect the Amendment is supposed to have on cases currently pending in federal courts has become a matter of great dispute.²⁶⁸ While the Bush administration contends that the action by Congress precludes any further review,²⁶⁹ lawyers

Pandemic Influenza Act, 2006 (Dec. 30, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. [hereinafter Bush, *Statement on Defense Appropriations Bill*]. Title X of the appropriations bill was designated as the Detainee Treatment Act of 2005, and that same language is likewise found in the 2006 Defense Authorization Act, which was signed by President Bush on January 6, 2006. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136; see also Press Release, President George W. Bush, President's Statement on H.R. 1815, the National Defense Authorization Act for Fiscal Year 2006 (Jan. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/01/20060106-12.html>. The Detainee Treatment Act of 2005 also includes provisions prohibiting inhumane treatment (Section 1003) as well as a clear (but odd) statement that the new law does not "confer any constitutional right on an alien detained as an enemy combatant outside the United States" (Subsection 1005(f)). Furthermore, the Act defines the term "United States" for these purposes so as to expressly exclude Guantanamo Bay, Cuba (Subsection 1005(g)).

267. That is to say, the amendment to § 2241 is not a wholesale return to the interpretation of the habeas statute that prevailed prior to *Rasul*.

268. See, e.g., Josh White, *Justices May Hear Detainee's Appeal*, WASH. POST, Feb. 22, 2006, at A06 (reporting on Supreme Court's refusal to grant Government's motion for an immediate dismissal of Hamdan's appeal) (also containing dispute between Senators Graham and Levin as to the effect of their amendment on pending cases: "Graham said the courts should decide whether they could continue to hear previously filed complaints, but Levin said the law was meant to apply only to cases filed after it was enacted."); Josh White, *Levin Protests Move to Dismiss Detainee Petitions*, WASH. POST, Jan. 5, 2006 at A02 ("Legal experts said yesterday that the administration may have room to interpret the law because its language is somewhat vague."); see also Neil A. Lewis, *U.S. to Seek Dismissal of Guantanamo Suits*, N.Y. TIMES, Jan. 3, 2006, at A11 ("The Bush administration notified federal trial judges in Washington that it would soon ask them to dismiss all lawsuits brought by prisoners at Guantanamo Bay, Cuba, challenging their detentions, Justice Department officials said Tuesday.").

269. See Brief of Respondents in Support of Motion to Dismiss for lack of Jurisdiction, *Hamdan v. Rumsfeld*, No. 05-184 (U.S. Jan. 12, 2006). In signing the Defense Appropriations Bill, President Bush made clear that he interpreted the act as applying to pending cases. Bush, *Statement on Defense Appropriations Bill*, *supra* note 266:

Finally, given . . . [Congress's decision that] amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section . . . the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.

But see 151 CONG. REC. S12,755 (daily ed. Nov. 14, 2005) (statement of Sen. Levin) ("[W]e have said that the standards in the amendment will be applied in pending cases, but the amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in *Hamdan* is not affected."). President

for the detainees argue that pending cases remained unaffected; this uncertainty also extends to whether the Supreme Court still retains jurisdiction over the case of *Hamdan v. Rumsfeld* (a case on which the Supreme Court had granted cert just days before the passage of the Graham-Levin Amendment). Most if not all of these questions, however, could be addressed by additional legislative action. Thus, there is still much work to be done so that future controversies regarding statutory construction over territoriality may be avoided.

2. A Focus on the Jurisdiction of U.S. Courts

The baseline question in any such evaluation of extraterritorial jurisdiction remains whether Congress possesses the authority to deny the detainees all judicial review after *Rasul*. Because the case was apparently decided on statutory rather than constitutional grounds, a statutory amendment removing jurisdiction over the detainees at Guantanamo is thus left completely within Congress's power.²⁷⁰ Congress need only restore the "statutory predicate" that the Court found to no longer exist. This idea might be derided as a simple act of jurisdiction stripping aimed at achieving a particular result. But in reality it is not, as so many jurisdiction stripping proposals are, an attempt to use procedure to change the substantive law in a manner that Congress could not constitutionally do otherwise.²⁷¹ Amending the habeas statute to prevent its application

Bush's reading better accords with the plain language of the statute. See Detainee Treatment Act of 2005, § 1005 (h)(2) ("Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."). Indeed, a plain reading would indicate that all pending cases are affected and that, until a final order is rendered by a military commission, the only action even conceivably available to detainees at Guantanamo Bay would be one challenging the validity of a "final decision" (whatever that may be) from a Combatant Status Review Tribunal according to the scope of review established by the Graham-Levin language. For a discussion of how broadly that language may be read depending upon the extent to which international law is incorporated into the standard, see *infra* Part V.C.2.

270. The same is also true, of course, of potential action under the Alien Tort Claims Act.

271. The ability of Congress to alter the jurisdiction of the federal judiciary (and particularly of the Supreme Court) was famously, though controversially, addressed in the 1868 case of *Ex parte McCordle*. 74 U.S. (7 Wall.) 506, 514–15 (1868). *But see* *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting) ("There is a serious question whether the *McCordle* case could command a majority view today."). There the Court specifically countenanced Congress's removal of jurisdiction from the Supreme Court, saying that its "power to make exceptions to the appellate jurisdiction of this court is given by express words" in the Constitution. *Ex parte McCordle*, 74 U.S. at 514. Given that *McCordle* involved the repeal of jurisdiction after petitioner McCordle had sought to invoke the Court's jurisdiction, the fact that there has already been substantial legal action by Guantanamo detainees would not seem to be a barrier to removing jurisdiction. Relying in part on *Ex parte McCordle*, the Supreme Court held in 1902 that "a repealing statute which contains no saving clause

extraterritorially to non-citizens effects a reading of the statute that the Court had repeatedly approved as constitutionally permissible and that was only read differently so as to protect the rights due to a U.S. citizen.²⁷² The Supreme Court did not ground its rationale in *Rasul* on the detainees' possession of any constitutional rights—or, if it did, the Court did not articulate what those rights are.²⁷³ The case of U.S. citizens, of course, raises constitutional concerns, which is one reason—among many others—that this class of persons is and ought to be treated differently;²⁷⁴ aliens within the United States are similarly situated. Without a claim that any substantive right has been denied, there is no cognizable necessity for the detainees to possess a constitutionally enforceable procedural right—unless the exercise of jurisdiction by the judiciary is necessary to preserve some structural and systemic requirement that is integral to the U.S.'s system of government; but that does not appear to be implicated by an issue such as this.²⁷⁵ In dealing with war and peace as well as

operates as well upon pending cases as upon those thereafter commenced.” *Gwinn v. United States*, 184 U.S. 669, 675 (1902). The fact that McCardle had alternative means to assert his rights even after the passage of the intervening statute in his case would not appear to impact a law addressing the Guantanamo detainees. For an overview of the various cases addressing congressional power to restrict the jurisdiction of the courts as well as the policy implications of such action see generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* §§ 3.2–3.3 (4th ed. 2003).

272. See discussion *supra* at Part II of cases decided prior to *Rasul*. This is what differentiates this proposal from one which seeks to remove the Supreme Court's jurisdiction to hear, for example, Establishment Clause cases. In the latter, Congress is attempting to use procedure to control what it cannot otherwise alter through ordinary legislation (i.e., the protections of the First Amendment). By contrast, the Congress has broad power to extend or deny rights to non-citizens outside U.S. borders.

273. A footnote in the majority opinion regarding detention in violation of the laws of the United States tends to support the notion that the Court did believe that the detainees do possess some substantive rights, but it is unclear what Justice Stevens meant by this. *Rasul*, 542 U.S. at 484 n.15 (“Petitioners’ allegations . . . unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”).

274. Cf. *Rasul*, 542 U.S. at 481 (noting that the Government concedes “that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base”).

275. There is also certainly an argument—and a very powerful argument in that it implicates the very structural integrity of the federal system—that the judiciary must play the role of a “referee” as to the allocation of governmental power to protect either itself or another branch. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (invalidating “legislative veto”) (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”); *United States v. Nixon*, 418 U.S. 683, 708-08 (1972) (holding that an unqualified presidential privilege would unconstitutionally interfere with the “primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions”); *Pocket Veto Case*, 279 U.S. 655, 677–78 (1929) (“The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly.”); *Myers v. United States*, 272 U.S. 52, 176 (1926) (invalidating a law that encroached upon presidential power to remove certain officials); *City of New York v. Clinton*, 985 F.

matters of foreign policy the judiciary has historically been most deferential to the political branches.²⁷⁶ Unless the Supreme Court recognizes some substantive right conferred upon terrorist detainees by the laws or Constitution of the United States,²⁷⁷ Congress would retain the prerogative to bar the exercise of jurisdiction over their

Supp. 168, 181 (D.C. Cir. 1998) (invalidating the “Line Item Veto”), *aff’d*, 524 U.S. 417 (1999). Nevertheless, the Court has also not readily discarded standing requirements nor has it ignored the political question doctrine merely because of an alleged constitutional violation. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (dismissing for lack of Article III standing a case brought by members of Congress); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (dismissing case for lack of standing and for presenting nonjusticiable political question); *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 1999) (dismissing for lack of standing suit by member of Congress challenging use of force in Kosovo), *cert. denied*, 531 U.S. 815 (2000); *see also* *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring):

I am of the view that the basic question presented by the petitioners in this case is ‘political’ and therefore nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.

The ultimate separation of powers argument to be had on this topic is not easy and requires far more consideration than can be provided by this Note. But, it can be said that the president is owed great deference in waging war and managing foreign affairs. Congressional action supporting the president increases his authority. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). And, whether any rights are owed to non-citizens not present within the borders of the United States is highly questionable both in terms of precedent and jurisprudential theory. Thus, because there is no constitutional question at issue, removing jurisdiction over claims by non-citizen enemy combatants held abroad is not the same as a case in which altering the jurisdiction of the courts would result in the Constitution’s being violated with impunity absent judicial intervention. *Cf. Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987):

[A] statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a limitation on the jurisdiction of both state and federal courts to review the constitutionality of federal legislation . . . would be [an] unconstitutional infringement of due process. (internal quotations omitted).

276. *See, e.g.*, *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) (“As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.”); *Atlee v. Laird*, 347 F. Supp. 689, 697 (E.D. Pa. 1972) (“[B]ecause any interference by the judiciary might have led to untoward consequences in our foreign relations, the Supreme Court recognized the necessary limitations on the exercise of its power to adjudicate certain questions.”).

277. This also includes the “law of nations” or international law, which has been reaffirmed as part of the domestic law. *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”).

claims.²⁷⁸ After all, this was the holding of *Eisentrager*, a case which the majority in *Rasul* does not wholly overrule or explicitly reject.²⁷⁹

The other conceivable problem for post-*Rasul* congressional action arises if the Court's decision was driven by a determination that Guantanamo must, because of its territorial status, receive the same or similar treatment as territory that is unquestionably part of the United States (e.g., as if the detainees were being held in a civilian facility in a U.S. state). Such an interpretation might be supported by some of the Court's cryptic language, such as that describing Guantanamo Bay as "a territory over which the United States exercises exclusive jurisdiction and control . . . [without possessing] . . . ultimate sovereignty."²⁸⁰ As was discussed above, the Court eventually concluded, however, that the only question necessary for the determination of *Rasul* was jurisdiction over the guardian, and the Court only spoke to any requirement of territoriality obliquely.²⁸¹ In point of fact, the discussion about "the exercise of control" may have been a subtle attempt to restrict the precedential force of the opinion. In any event, while this language is most likely dicta and the legal status of Guantanamo was not likely changed by *Rasul*, in certain hands it could always turn out to be the genesis for a more expansive interpretation of federal jurisdiction in this area.

278. Probably the most important concern raised by military detentions is that they may result in the imprisonment of individuals who are not in fact enemy combatants. But, the seriousness of this concern does not necessarily mean that the judiciary should have jurisdiction, and it is far from certain that judicial review would be any more effective at identifying those who present a true threat.

279. Some, of course, view *Eisentrager* as ambiguous and as having been determined (at least in part) by the petitioners' lack of enforceable substantive rights. See Transcript of Oral Argument at 25–31, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343).

280. *Rasul*, 524 U.S. at 476. *But see id.* at 501 (Scalia, J., dissenting):

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. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if 'jurisdiction and control' rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.

281. *See id.* at 500 (Scalia, J., dissenting):

[T]he Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. The Court might have made an effort . . . to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg Prison in Germany and Guantanamo Bay Naval Base. But [it] flatly rejected such an approach, holding that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum" . . . Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here.

3. The International Law Question

Some forcefully argue that the detainees do possess rights that are both substantive and enforceable because of international obligations, including treaty obligations (like the Geneva Conventions), owed by the United States.²⁸² Justice Stevens's majority in *Rasul* even asserted in a footnote to the Court's opinion that the detentions presented violations of U.S. law.²⁸³ Because the basis for this conclusion is subject to much uncertainty, it is entirely possible that the Court thereby signaled its concern for the status of these individuals under treaty law and even international legal norms.²⁸⁴

The argument that aliens outside U.S. territory lack constitutional rights finds support in the 2001 case of *Zadvydas v. Davis*, in which the Supreme Court held that aliens present in the United States could not be detained indefinitely simply because there was no country willing to receive them upon deportation.²⁸⁵ There the Court reiterated that substantive rights (including due process rights) apply to persons within the territory of the United States.²⁸⁶ But, the Court also clearly stated as follows: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic

282. See, e.g., *In re Guantanamo Detainees Cases*, 355 F. Supp. 2d at 478–79.

283. *Rasul*, 542 U.S. at 484 n.15; cf. also *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 n.19 (D.D.C. 2004) ("The Supreme Court's recent decision in *Rasul* does little to clarify the Constitutional status of Guantanamo Bay but may contain some hint that non-citizens held at Guantanamo Bay have some Constitutional protection.") (citing *Rasul*, 542 U.S. at 484 n.15), *rev'd*, 415 F.3d 33, 37 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005).

284. In the entirely subjective opinion of this Author, however, the Court probably was not referring to international law or norms or any thing else specifically, but rather likely rendering a generalized statement of disapproval.

285. 533 U.S. 678, 699–700 (2001); see *Verdugo-Urquidez*, 494 U.S. at 268–69 ("not every constitutional provision applies to governmental activity even where the United States has sovereign power"). The Court in *Verdugo-Urquidez* cited a number of instances in which a constitutional protection was held inapplicable in a possession or territory: *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (no constitutional right to jury trial in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (no constitutional grand jury protections in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (no constitutional right to jury trial in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (inapplicability of indictment by grand jury and jury trial constitutional protections in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico); see also *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring) ("The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."); cf. *id.* at 277 ("[W]e must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad[.]").

286. *Id.* at 693.

borders.”²⁸⁷ (The Court even cited *Eisenrager* to support this conclusion.) Rights are extended only “once an alien enters the country” because then “the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²⁸⁸

The meaning of *Zadvydas* and other similar cases is that, where a person is not a U.S. citizen and is not present within the territory of the United States, any rights owed are due because they have been extended by Congress rather than mandated by the Constitution. Thus, just because the Court in *Rasul* decided that the “statutory predicate” for the exercise of habeas jurisdiction had been removed by *Braden*, this should not foreclose Congress’s ability to reinstate that predicate in the cases of those who have no constitutional right to be free of it. Accordingly, Congress (theoretically) has the power to deny the detainees any substantive and procedural rights in U.S. courts. If the detainees successfully find treaty or international law that affords them substantive and enforceable rights, this would present a new set of issues, but even then simple legislation is sufficient to authorize and enable the President to detain and interrogate persons free of those constraints.²⁸⁹ Thus, it may be correct as a matter of

287. *Id.*

288. *Id.* For example, the Court has also previously recognized that no constitutional or statutory right was implicated when an alien was refused entry to the United States and no other nation would accept him, which left him as a detainee on Ellis Island. *Shaughnessy v. United States*, 345 U.S. 206, 215–16 (1953); see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”).

289. *But cf. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, the majority opinion empowered the federal judiciary to enforce certain international law norms through the recognition of federal causes of action. Nevertheless, it did not alter the longstanding notion that Congress may derogate international law and treaties in favor of its own enactments. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 209–11 (1996) (explaining the power of Congress to legislate in contravention of treaty obligations and also noting that treaties and statutes are equal in force); see also *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) (“the last expression of the sovereign will must control”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888):

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

United States v. Howard-Arias, 679 F.2d 363, 371–72 (4th Cir. 1982):

legal theory that a president inherently possesses this power by virtue of his office—*viz.*, to hold enemy combatants outside of the judicial process because of his status as the executive²⁹⁰—and an executive certainly must always be cautious about casually relinquishing powers that are intrinsically associated with Article II.²⁹¹ Reality, however, may dictate a different strategy. Even if executive detention of enemy combatants is authorized by the president's inherent authority under Article II,²⁹² the current debate is focused upon the Authorization for Use of Military Force and other legislation.²⁹³ As such, the various contours of prior congressional actions—ranging from the habeas statute to the extent to which international law is recognized as part of U.S. law—have the potential to become assorted Trojan Horses for the Bush administration's position unless their role is clarified and narrowed. The better part of valor is to seek unambiguous support from

While 'international law' is part of this nation's laws . . . 'international law' must give way when it conflicts with or is superseded by a federal statute . . . to the extent permitted by the due process clause of the Fifth Amendment . . . and the United States may violate international law principles in order to effectively carry out this nation's policies.

See also *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972):

[I]f Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.

See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 (1987) (describing manner in which to resolve inconsistencies between international and domestic law). It also bears noting that in *Sosa* Justice Scalia, joined by Justice Thomas and the late Chief Justice, vigorously disagreed with the manner in which the majority opinion had extended judicial recognition to international law. *See Sosa*, 542 U.S. at 737–51.

290. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting) ("This Court has long recognized these features and has accordingly held that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion.").

291. *Cf. generally* Hadley Arkes, "The Reasoning Spirit of It." *The President, the Separation of Powers, and the Laws of Reason*, in PRINCIPLES OF THE CONSTITUTIONAL ORDER: THE RATIFICATION DEBATES 89, 89–107 (Robert L. Utley, Jr. ed., 1989) (discussing the duty of the president and Congress to interpret the Constitution independently of the Supreme Court).

292. *Cf. Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 ("Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited.").

293. For instance, no opinion in *Rasul* appeared to consider that the habeas statute should be read in such a way as to avoid conflict with the president's intrinsic Article II authority.

Congress. Of course, if the president is legitimately acting from Article II power, then congressional backing is, at least legally speaking, probably superfluous.²⁹⁴ But with the legal status of Guantanamo Bay apparently being so enigmatic,²⁹⁵ the more efficient course for the Administration would be to obtain clear congressional support, where practicable, rather than by taking the precarious approach of relying upon arcane interpretations of Article II which may be valid but which or may not be sustained when challenged in court.²⁹⁶ Ironically, this may prove to be the only ready means to pay proper deference to the executive's constitutional role as commander in chief and "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."²⁹⁷

C. Applying *Rasul*: Some Early Guidance and Potential Dangers

Although the Supreme Court has not yet had an opportunity to clarify any of these lingering questions,²⁹⁸ the D.C. Circuit Court of Appeals addressed some of them in *Hamdan v. Rumsfeld*.²⁹⁹ The Supreme Court has since granted Hamdan's petition for a writ of certiorari, and thus the court of appeals' opinion is subject to change.³⁰⁰ Nevertheless, it is a useful guide for how the Administration's position may still prevail even post-*Rasul*.

294. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 Reporters' Note 3 (1987) ("There is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States . . .") (citing *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454-55 (11th Cir.1986), *cert. denied sub nom.*, *Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986)).

295. See, e.g., Transcript of Oral Argument at 44-47, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343) (discussing the type of authority and jurisdiction exercised by the United States over the territory at Guantanamo Bay).

296. There are some intriguing proposals for how Congress could construct schemes that provide judicial review in a manner that is arguably more solicitous to the position of the would-be detainee. See, e.g., David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125, 127 (2005).

297. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320 (1936).

298. For a discussion of the major questions left unanswered by the Supreme Court, see Benjamin Wittes, *Judicial Baby-Splitting, in TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 101, 103-04 (Peter Berkowitz ed., 2005).

299. 415 F.3d 33 (D.C. Cir. 2005).

300. *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005) (granting petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit). The questions certified by the Court were as follows: (1) "Whether the military commission established by the President to try [enemy combatants] . . . is duly authorized under Congress's Authorization for the Use of Military Force . . . or the inherent powers of the President?" and (2) "Whether [enemy combatants] . . . can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of

1. *Hamdan's* Narrow Application of *Rasul*

In *Hamdan*, a three-judge panel, including then-judge, now-Chief Justice John Roberts, reversed the federal district court below and approved the government's use of military commissions to try an accused enemy combatant.³⁰¹ The defendant, Salim Ahmed Hamdan, was originally held at Guantanamo Bay after being captured in Afghanistan, but the government formally charged him following his filing of a habeas petition.³⁰² A military commission established by the President was set to try Hamdan, but the action in the D.C. District Court delayed the initiation of that process.³⁰³

Hamdan first claimed that the use of military tribunals is unconstitutional and violates separation of powers because "Article I, § 8, of the Constitution gives Congress the power 'to constitute Tribunals inferior to the Supreme Court,' that Congress has not established military commissions, and that the President has no inherent authority to do so under Article II."³⁰⁴ On appeal, the court rejected this claim and held that under "the joint resolution and the two statutes just mentioned [i.e., 10 U.S.C. § 821 and 10 U.S.C. § 836], Congress authorized the military commission that will try Hamdan."³⁰⁵ The court did not address whether the President would have had this authority based solely upon his powers as commander in chief under Article II had there not been congressional authorization.

With *Hamdan*, the use of military commissions to try accused enemy combatants has specifically received judicial imprimatur. The court's response to Hamdan's next argument, however, provides guidance for evaluating the scope of international law in this field. The district court had held that Hamdan should prevail because of the 1949 Geneva Conventions.³⁰⁶ The court of appeals again disagreed and noted instead that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."³⁰⁷ As a major part of its analysis, the court in fact looked to

their detention by the Executive branch?"—and on both the Administration's position had prevailed in the D.C. Circuit.

301. *Hamdan*, 415 F.3d at 40.

302. *Id.* at 35.

303. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). District Judge James Robertson there held, *inter alia*, that "unless and until a competent tribunal determines that Hamdan is not entitled to POW status," Hamdan could only be tried by a court martial under the Uniform Code of Military Justice. *Id.* at 173.

304. *Hamdan v. Rumsfeld*, 415 F.3d 33, 37 (D.C. Cir. 2005).

305. *Id.* at 38.

306. *Id.*

307. *Hamdan*, 415 F.3d at 39 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987)). Although classified as part of the supreme law of the land by the U.S. Constitution, treaties do not automatically

Eisentrager: “The Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the [1929 Geneva] Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but ‘responsibility for observance and enforcement of these rights is upon political and military authorities.’”³⁰⁸ The court noted that part of *Eisentrager* was affected by *Rasul*, but it then stated as follows:

This aspect of *Eisentrager* is still good law and demands our adherence. *Rasul v. Bush* . . . decided a different and “narrow” question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 “to consider challenges to the legality of the detention of foreign nationals” at Guantanamo Bay. The Court’s decision in *Rasul* had nothing to say about enforcing any Geneva Convention. Its holding that federal courts had habeas corpus jurisdiction had no effect on *Eisentrager*’s interpretation of the 1929 Geneva Convention. That interpretation, we believe, leads to the conclusion that the 1949 Geneva Convention cannot be judicially enforced.³⁰⁹

After analyzing the two Conventions and deciding that any differences between them would not result in the 1949 Convention’s being enforceable, it unequivocally stated that “*Rasul* did not render

give rise to private rights that are judicially enforceable. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

Absent authorizing legislation, an individual has access to courts for enforcement of a treaty’s provisions only when the treaty is self-executing[;] that is, when it expressly or impliedly provides a private right of action. When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action.

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (citations omitted); *see Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (“Treaties of the United States rarely bear such a direct relationship to a private claim that the claim may be said to ‘arise under’ the treaty as required by § 1331.”) (citing 13B WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 3562 (1984)); *see also Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (“Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.”). As to the Geneva Conventions specifically, *see Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 126–27 (2004) (“Judicial opinion is divided on the question of whether the Geneva Conventions are self-executing. Two district courts have expressly held that at least some provisions of the Geneva Conventions are self-executing. In contrast, the majority of courts that have explicitly addressed the question have held that the Conventions are not self-executing.”).

308. *Id.* (citing *Eisentrager*, 339 U.S. at 789 n.14). The court also noted that it has relied upon this part of *Eisentrager* to hold that the NATO Status of Forces Agreement was not judicially enforceable. *Id.* (referencing *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972)).

309. *Hamdan*, 415 F.3d at 39 (internal citations omitted).

the Geneva Convention judicially enforceable. That a court has jurisdiction over a claim does not mean the claim is valid.”³¹⁰ The court went on to dispose of Hamdan’s other arguments regarding the effect of the Geneva Conventions (even assuming they were to apply) and then his argument regarding the effect of domestic laws.³¹¹ The court concluded that none of these paths was availing.

Although he otherwise fully concurred in the court’s decision, Senior Judge Williams disagreed with Judges Randolph and Roberts on the applicability of Common Article 3 of the Geneva Conventions.³¹² According to him, “Common Article 3 fills [a] gap, providing some minimal protection for such non-eligibles in an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.’ The gap being filled is the non-eligible party’s failure to be a nation.”³¹³ Under this reading, “conflict not of an international character” is usually understood to mean a civil war, but it need not be so limited.

[C]ontext compels the view that a conflict between a signatory and a non-state actor is a conflict “not of an international character.” In such a conflict, the signatory is bound to Common Article 3’s modest requirements of ‘humane[.]’ treatment and ‘the judicial guarantees which are recognized as indispensable by civilized peoples.’³¹⁴

Notwithstanding that conclusion, however, Judge Williams agreed that the Geneva Conventions are not judicially enforceable.

Hamdan not only makes clear that much of *Eisentrager* is (or at least may be) good law; it also firmly holds that the Geneva Conventions are not judicially enforceable. If this were to become the uniform view, it would suggest that, in both habeas and other types of proceedings, enemy combatants are without recourse to treaty law and probably other customary international norms in determining whether their detentions are legal. The opinion in *Hamdan* also emphasizes that rights derived from international agreements are, judicially speaking, irrelevant unless those rights have been made judicially enforceable. Indeed, it even suggests that the courts will not easily find that a treaty was intended to be self-executing. That would leave only rights that may exist at generally accepted customary international law. But even that law may not necessarily grant a private right of action and, even if it should so grant, Congress retains the power to prevent its application by enacting its own measures to the contrary.³¹⁵

310. *Id.* at 40.

311. *Id.* at 40–43.

312. *Id.* at 44 (Williams, J., concurring).

313. *Id.* (Williams, J., concurring).

314. *Id.* (Williams, J., concurring).

315. *Howard-Arias*, 679 F.2d at 371–72 (4th Cir. 1982); see *United States v. Allen*, 760 F.2d 447, 454 (2d Cir. 1985) (“[I]n enacting statutes, Congress is not bound

Thus, *Hamdan* effectuates a swing back towards the views of the Bush administration. At the same time, it illustrates the twilight zone that currently exists at this nebulous intersection of federal jurisdiction, international law, and executive authority to wage war. There nevertheless remains the chance that a reviewing court will interpret U.S. laws so as to avoid conflict with “international law or with an international agreement of the United States,”³¹⁶ and in this process the Administration’s policy may suffer severe hindrances. *Rasul*’s extension of habeas jurisdiction is in fact what now allows this wide range of issues to be brought into a court of law; nothing in the *Rasul* opinion requires that the legal action now allowed not result in the release of potentially dangerous individuals; and, *Rasul* does not appear to carve out an exception for detentions conducted solely for the purposes intelligence collection. As such, notwithstanding the fact that the recent Graham-Levin Amendment has to be seen as a ratification of the Bush administration’s policy on detention and trial of the Guantanamo prisoners, this does not mean that the expression of congressional desires could not have been clearer. Indeed, more particularity by Congress would certainly prove helpful in resolving these lingering ambiguities one way or the other.

2. The Court’s Open Door Policy

The 2004 case of *Sosa v. Alvarez-Machain*³¹⁷ provides a ready illustration of the federal judiciary’s increased willingness to consider international law, not just as persuasive authority,³¹⁸ but as

by international law. . . . If it chooses to do so, it may legislate [in a manner contrary to the limits posed by international law].” (citing *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983), *modified on other grounds*, 728 F.2d 142 (2d Cir. 1984)); *see, e.g.*, *United States v. Greer*, 956 F. Supp. 531, 535 (D. Vt. 1997) (“Although it is clear that Congress has the power to enact statutes that exceed the limits of international law, it may not exceed the limits of the due process clause.”); *cf. Rainey v. United States*, 232 U.S. 310, 316 (1914) (“[I]t is well settled that when a treaty is inconsistent with a subsequent Act of Congress, the latter will prevail.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations[.]”).

316. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); *see Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *see also* Ingrid Brunk Wuerth, *Authorization for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 330–31 (2005).

317. 542 U.S. 692 (2004).

318. *See, e.g., Roper v. Simmons*, 125 S. Ct. 1183, 1198–1200 (2005) (discussing foreign law as justification in part for imposing restrictions on the use of the death penalty on those whose crimes were committed below the age of 18).

substantive law to be applied domestically by the federal judiciary.³¹⁹ There the Court held that an alien who had allegedly been abducted at the direction of the U.S. government was not entitled to remedies under either the Federal Tort Claims Act or the Alien Tort Statute.³²⁰ In so doing, however, the majority explicitly (via metaphor) left the door “open to a narrow class of international norms” when determining the applicable law in cases such as this.³²¹

As in *Rasul*, the prevailing rationale put forward by the Court prompted a vigorous opinion from Justice Scalia, who was joined by Justice Thomas and Chief Justice Rehnquist in criticizing the majority opinion. He argued that in the post-*Erie* world “courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.”³²² But, his opinion went even further. According to Justice Scalia, the Constitution’s reference to “the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates).”³²³ Since the majority envisioned a much broader class of international law that might apply, the possibility for application of norms that were unknown to the Founders remains.³²⁴

Although not at issue in *Sosa*, there is also the concept of a peremptory norm or *jus cogens*, a command of international law from which no nation can exempt itself.³²⁵ The *Restatement (Third)*

319. An example of this may be found in a suit recently filed by a plaintiff claiming that he was injured as a result of the U.S.’s policy of rendition. The complaint specifically seeks relief by recourse to international law—including the Geneva Conventions and other treaties—arguing that “the challenged conduct falls within the body of acts deemed actionable under the federal common law by the United States Supreme Court in *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).” Complaint for Plaintiff at ¶ 15, *El-Masri v. Tenet* (E.D. Va.), http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf. The same complaint also seeks to place the plaintiff’s claim under the Alien Tort Statute because, under *Sosa*, the Act “recognizes as federal common law those international norms that have definite content and acceptance among civilized nations.” *Id.* at ¶ 14.

320. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

321. *Id.* at 729.

322. *Id.* at 739 (Scalia, J., concurring).

323. *Id.* at 747 (Scalia, J., concurring).

324. Justice Scalia was very clear about his views: “American law—the law made by the people’s democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.” *Id.* at 748 (Scalia, J., concurring).

325. If accepted on its own terms, this principle would seem to say that Congress may not have the ability to legislate in contravention of such peremptory norms, but such an extra-constitutional limitation on Congress’s power to legislate is exceptionally

includes “prolonged arbitrary detention” among prohibitions covered by this phrase,³²⁶ which may or may not be understood to include the detentions at Guantanamo Bay. On the one hand, the whole notion of a “peremptory norm” does not readily accord with the United States’ usual manner of recognizing international standards.³²⁷ But on the other hand, given the increasing tendency of the federal judiciary to be more amenable to such claims,³²⁸ those who would prefer to have the judiciary play a circumscribed role in the war on terror may be resting on a slender reed that will snap sooner or later as the implications of language like that found in *Sosa* emerge. Even those on the other side, who welcome the coming of broader judicial review that incorporates international legal principles, must be wary of the judiciary’s assumption of these powers without recourse to a more coherent and predictable set of principles.

Thus, there are two concomitant trends that may be discerned within the federal judiciary: (1) a growing extraterritoriality of domestic courts’ jurisdiction and (2) an increasing willingness by those same courts to recognize international norms. Cases like *Rasul* may adumbrate a new era of ambiguous, ad hoc judicial activity in the area of foreign affairs unless Congress takes seriously the task of defining what role it wishes the judiciary to play and to what extent it desires to make legal protections available in civil actions by enemy combatants. If the judiciary does not agree that certain powers inherently belong to the president because of his role as the commander in chief, then the backing of Congress becomes all the

dubious. See *Burnet v. Brooks*, 288 U.S. 378, 396 (1933) (“As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.”); cf. *Reid v. Covert*, 341 U.S. 1, 74 (Harlan, J., concurring):

[T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.

326. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

327. See Ruth Wedgwood, *The Supreme Court and the Guantanamo Controversy*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 159, 177–81 (Peter Berkowitz, ed., 2005) (calling the notion of a peremptory norm “controversial” and discussing the role of practical experience for judging humanitarian conditions).

328. See *Sosa*, 542 U.S. at 750–51 (2004) (Scalia, J., concurring):

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. . . [b]ut in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.

more important lest U.S. law be left in a state of jurisdictional schizophrenia. The stakes of the war on terror are too high for Congress to engage in the kind of passivity and acquiescence that is common in the general process of ordinary statutory interpretation.³²⁹

3. Recommendation: Consider the Entire Context when Deciding *Hamdan*

Assuming that the Supreme Court does not dismiss *Hamdan* as a result of the Graham-Levin Amendment, the Court will face the difficult task of deciding two questions. The first asks whether the Authorization for the Use of Military Force (AUMF) or the inherent powers of the presidency authorize the trial of detainees by military commissions. The second inquires into the availability of relief predicated upon the Geneva Conventions. The appellate court below, of course, had decided that the detentions and trials were perfectly legal.

Given the actions of the Congress in late 2005, both of these questions would appear to implicate classic *Youngstown* considerations.³³⁰ For, even if the 2001 AUMF and the inherent powers of the executive do not give the Bush administration the power to try enemy combatants, the recent legislation presumes that there is some legitimate authority currently existing in the presidency to try these individuals. At the very least this has to represent some implicit authorization by Congress for the use of military tribunals. Accordingly, it would seem to follow that presidential power here, in Justice Jackson's words, "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."³³¹ For a court to hold under these circumstances that the President lacks this authority would be to insist upon levels of legislative precision that would have to be considered surprising—especially given the foreign policy context.³³²

329. See generally KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* 226–27 (2002) (describing the process of statutory interpretation as a "conversation between Congress and the courts").

330. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

331. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); cf. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (refusing to invalidate presidential action undertaken with congressional acquiescence since the action had "been determined to be a necessary incident to the resolution of a major foreign policy dispute").

332. See *Curtiss-Wright*, 299 U.S. at 322 ("When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action . . . This consideration, in connection with what we

The second question is more difficult, in part for the reasons encountered above in the discussion of how broadly the term “Constitution and laws of United States” as used in the Graham-Levin Amendment might be interpreted by a court. The Graham-Levin Amendment embodies congressional will, which is expressed both explicitly and implicitly: explicitly it establishes certain procedures, but implicitly it approves of certain powers being exercised by the Administration. Thus, in any claim that the Administration’s actions potentially conflict with a prior expression of law by Congress as derived from treaty and international law, the Court would have to consider carefully the argument that the Graham-Levin Amendment has ratified President Bush’s policies and thereby made this ratification the undisputed latter expression of the sovereign will—an expression which must be controlling.³³³ Indeed, to read the Graham-Levin Amendment as not necessarily approving of the Administration’s policy on detentions risks leaving a maddening circularity—to wit, that the Congress has authorized detentions only insofar as detentions are legal, but they are legal only insofar as Congress has authorized them. Notwithstanding such a common sense and pragmatic understanding of the recent action, it would not be at all surprising if a federal court were to conclude that phrase “Constitution and laws of the United States” is so ambiguous that the court itself is empowered to decide whether the detainees possess privately enforceable rights as a result of non-statutory, non-constitutional sources. And, this is why Congress likely needs to clarify this language.

Whether or not the Supreme Court ultimately approves of the reasoning of the court below in *Hamdan* regarding the judicial enforceability of the Conventions, pragmatic and prudential concerns can provide a guide as to how it should proceed. The mere absence of a detainee’s right to bring a civil claim in federal court does not necessarily mean that the detainee is left wholly without protections. The Bush administration itself has promulgated standards to be used in the treatment of such personnel, and moreover certain violations of the law are already subject to criminal sanction, including the Uniform Code of Military Justice.³³⁴ Indeed, there have been many such prosecutions and other disciplinary actions.³³⁵ While it is not a

have already said on the subject, discloses the *unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards* by which the President is to be governed.”) (emphasis added).

333. See sources cited *supra* note 289.

334. 10 U.S.C. §§ 801 *et seq.*; see also *id.* § 802 (persons subject to UCMJ provisions); *id.* § 805 (extraterritorial application of UCMJ).

335. See, e.g., Donna Miles, *Rumsfeld: Military Always Has Banned Detainee Abuse*, Am. Forces Press Service, Dec. 16, 2006 (reporting that “DoD has conducted 12 major reviews, reports and investigations, multiple internal reviews and more than 600 investigations” into allegations of detainee mistreatment and “more than 200 soldiers,

perfect means by which to prevent torture, abuse, and neglect, allowing the executive to police itself enables it to differentiate between genuine claims and those that are spurious. It also pays greater heed to the executive's constitutional primacy in the area of foreign relations. Thus, the most meaningful efforts to secure humanitarian protections are those criminal prosecutions brought by the U.S. government against individual offenders; such is vastly preferable to expanding the rights of a detainee to obtain civil relief and redress in an Article III court. This will not satisfy those who contend that the Guantanamo detentions are *ipso facto* illegitimate, but nothing demands that these critics be satisfied, especially if their interpretation of current legal principles is erroneous.

VI. CONCLUSION

Regardless of one's view on the current detainment policy and the scope of judicial jurisdiction, it seems inescapable that *Rasul* significantly changed the landscape for the war on terror. Thorough congressional review would at least allow a chance for further investigation into just how the detainee cases affect the war on terror over time. The review that has thus far officially occurred in Congress—the debate and votes relating to the Graham, Bingaman, and Graham-Levin amendments—was undertaken hastily in the midst of debate on the 2006 defense authorization bill and did not allow for much deliberation. Ultimately, it must be concluded that the Supreme Court's decision in *Rasul* leaves too much uncertainty, which suggests that congressional narrowing of judicial review by the courts was and remains a wise course of action. Indeed, this may be the only effective means by which to “bring terrorists to justice” as was pledged by President Bush and Prime Minister Blair so soon after 9/11.

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sailors and Marines have been punished”), available at http://www.defenselink.mil/news/Dec2005/20051216_3679.html.

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