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THE ROLE OF ARTICLE III COURTS IN THE WAR ON TERRORISM

Tung Yin*

INTRODUCTION

After determining that the terrorist group Al Qaeda was behind the devastating attacks in New York and Washington, D.C., on September 11, 2001, the United States launched a counterattack against Al Qaeda bases located within Afghanistan, as well as that country's Taliban rulers who had sheltered the terrorists. Within weeks, the United States had ousted the Taliban from power and routed out Al Qaeda, though notably, many of Al Qaeda's top leaders remained on the loose. Nevertheless, the United States and its Afghan ally, the Northern Alliance, captured a number of suspected Al Qaeda and Taliban fighters.

The United States released many of these prisoners after the end of the direct fighting, but it also transported hundreds of others halfway across the world to the U.S. military base located at Guantanamo Bay, Cuba. Since 1903, pursuant to an agreement following the end of the Spanish-American War of 1898, the United States has leased Guantanamo Bay from Cuba.¹ The lease is peculiar in that it continues unless *both* parties agree to terminate it.² Thus, the United States has maintained the base throughout Fidel Castro's reign over Cuba, despite Castro's avowed opposition.³

Initially, the United States kept the suspected Al Qaeda and Taliban fighters at a facility dubbed "Camp X-Ray." This facility resembled a dog pound more than

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¹ See Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.-Cuba, T.S. No. 418 [hereinafter 1903 Agreement]; see also Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 [hereinafter 1903 Lease]; Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682 [hereinafter 1934 Treaty].

² See 1934 Treaty, *supra* note 1, at art. III.

³ In fact, Cuba has refused to cash the lease checks issued by the United States. See *Gherebi v. Bush*, 352 F.3d 1278, 1294 (9th Cir. 2003) (citing Statement by the Government of Cuba to the National and International Public Opinion, Center for International Policy's Cuba Program (Jan. 11, 2002), at <http://ciponline.org/cuba/cubaproject/cubanstatement.htm>).

a prison, as it was little more than wire cages placed together underneath the blazing Cuban sun.⁴ Four months later, the detainees were transferred to “Camp Delta.” Apparently modeled after the so-called “SuperMax” maximum security penitentiaries in the United States, Camp Delta consists of detention cells that measure six feet, eight inches by eight feet.⁵ Since then, over one hundred of the detainees have been released or repatriated to their home countries to be detained there.⁶ However, as of mid-2004, approximately six hundred individuals remained detained at Camp Delta.⁷

Criticism of the United States’ continued detention of the suspected Al Qaeda and Taliban fighters has been intense, to say the least. Camp Delta has been described as a “legal black hole,” “legal limbo,” and even “gulag.”⁸ British House of Lords member Johan Steyn summed up the nature of the criticism by calling the conditions at Camp Delta “utter lawlessness.”⁹ Lead counsel in one litigated case

⁴ See, e.g., Nancy Gibbs & Viveca Novak, *Inside “The Wire,”* TIME, Dec. 8, 2003, at 40, 42.

⁵ See Ted Conover, *In the Land of Guantanamo*, N.Y. TIMES, June 29, 2003, § 6 (Magazine) at 40.

⁶ See News Release, Department of Defense, Detainee Transfer Completed (Apr. 2, 2004), <http://www.defenselink.mil/releases/2004/nr20040402-0505.html>.

⁷ *Id.*

⁸ Kate Allen, *U.S. Administration Should Think Again About the Legal Black Hole Created at Guantanamo*, FIN. TIMES (London), Jan. 14, 2004, at 18 (letter to the editor by the Director of Amnesty International describing the “legal black hole” at Guantanamo); Sidney Blumenthal, *This Is the New Gulag: Bush Has Created a Global Network of Extra-Legal and Secret U.S. Prisons with Thousands of Inmates*, GUARDIAN, May 6, 2004, at 24 (describing the prison system as “what is in effect a gulag” and quoting Human Rights Watch’s characterization of the prison system as a “legal black hole”); Matthew Hay Brown, *Detainees Await an Unknown Fate; Hundreds of Men Captured by Allied Forces in Afghanistan Remain in Custody, Uncharged, at the U.S. Navy Base in Cuba*, ORLANDO SENTINEL, July 20, 2003, at A1 (quoting “[a] panel of senior judges in Britain” who described the Guantanamo base as a “legal black hole”); Katy Daigle, *Reporters Tour Guantanamo Prison Camp*, ASSOCIATED PRESS ONLINE, Dec. 4, 2002 (quoting UN High Commissioner for Human Rights Sergio Vieira de Mello) (“[H]ow long can you keep a person in legal limbo?”), 2002 WL 103840878; Kenneth Roth, *America’s Guilt: The Prisoners in a Legal Black Hole*, TIMES (London), Nov. 21, 2003, at 28; Richard A. Serrano, *U.S. Appellate Court Rules Against Guantanamo Detainees*, L.A. TIMES, Mar. 12, 2003, at A19 (quoting Amnesty International spokesman, Alistair Hodgett) (“To hold people without charge and without access to legal counsel risks the creation of an American gulag.”); *U.N. Rights Chief Lashes Guantanamo Detainee Ruling*, REUTERS, Mar. 13, 2003 (quoting UN High Commissioner for Human Rights Sergio Vieira de Mello, who warned against keeping detainees in a “judicial ‘black hole’”), Factiva, doc. Lba0000020030313dz3d00t61; James Vicini, *U.S. Top Court to Decide Guantanamo Detainees’ Cases*, REUTERS, Nov. 10, 2003, (quoting Amnesty International), Factiva, doc. LBA0000020031110dzba0021j.

⁹ *Top U.K. Judge Slams Camp Delta*, BBC NEWS (U.K. Edition), Nov. 26, 2003, available at http://news.bbc.co.uk/1/hi/uk_politics/3238624.stm.

involving Camp Delta referred to Guantanamo Bay as a “law-free zone” where the United States has “dispens[ed] with the Geneva Conventions as a mere legalism and turn[ed] its back on our own military regulations . . . creat[ing] a culture of disrespect for the law.”¹⁰

Litigation challenging the Bush administration’s actions ensued despite the fact that none of the Guantanamo detainees had access to lawyers. Friends or relatives of a number of detainees filed petitions for writs of habeas corpus, challenging their detention with district courts in the District of Columbia and the Central District of California.¹¹ During this same time, the administration was also detaining two American citizens, Jose Padilla and Yaser Esam Hamdi, at navy brigs in the United States; they too filed habeas petitions.¹² Padilla had been arrested as a material witness on May 8, 2002 at O’Hare International Airport in Chicago, just as he deplaned a flight from Pakistan. A month later, while a motion to vacate the material witness warrant was pending before a district court, President Bush designated Padilla an “enemy combatant” and ordered him detained by the military.¹³ Hamdi was captured in Afghanistan in late 2001 by the Northern Alliance, which turned him over to the United States; he was sent to detention at Guantanamo Bay in January 2002, but when the military learned that he was a U.S. citizen, he was transferred to a navy brig in April 2002.¹⁴ Like Padilla, he was detained in military custody as an “enemy combatant.”

Issuing decisions in all three cases on June 28, 2004, the Supreme Court asserted a role for itself in the war on terror.¹⁵ In *Hamdi v. Rumsfeld*,¹⁶ a badly fractured Court cobbled together a majority to remand the case with directions to the lower court to provide Hamdi — due to his American citizenship — with a “fair opportunity to rebut the Government’s factual assertions before a neutral

¹⁰ Thomas B. Wilner, *Law-Free Zone*, WALLST. J., May 13, 2004, at A12 (op-ed by lead counsel in *Al Odah v. United States*).

¹¹ *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom.*, *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d*, 124 S. Ct. 2686 (2004); *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal.), *rev’d*, 374 F.3d 727 (9th Cir. 2004) (transferring case to the U.S. District Court for the District of Columbia).

¹² *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *aff’d*, 352 F.3d 695 (2d Cir. 2003), *rev’d on other grounds sub nom.*, *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev’d*, 316 F.3d 450 (4th Cir. 2003), *vacated and remanded*, 124 S. Ct. 2633 (2004).

¹³ *Padilla*, 124 S. Ct. at 2715. The government appeared to believe that Padilla was engaged on a mission with Al Qaeda to build a “dirty bomb” and set it off in an American city. See Eric Lichtblau et al., *U.S. Citizen Accused of Planning an Attack Using a ‘Dirty’ Bomb*, L.A. TIMES, June 11, 2002, at A1.

¹⁴ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2636 (2004).

¹⁵ See *Padilla*, 124 S. Ct. 2711; *Hamdi*, 124 S. Ct. 2633; *Rasul*, 124 S. Ct. 2686.

¹⁶ 124 S. Ct. 2633.

decisionmaker.”¹⁷ Of the six Justices who made up that majority, however, two Justices specifically disagreed with the other four about the government’s power to detain citizens as enemy combatants. Those two (Justices Souter and Ginsburg) joined the other four solely to provide a majority to remand the matter for a hearing.¹⁸ Meanwhile, in *Rumsfeld v. Padilla*,¹⁹ the Court held, by a five to four vote, that the appropriate respondent was not Secretary Rumsfeld, but the navy commander supervising the brig in which Padilla was detained, and that the Southern District of New York, where Padilla filed his petition, lacked territorial jurisdiction over that commander.²⁰ Therefore, the Court dismissed Padilla’s habeas petition without prejudice.²¹ Finally, in *Rasul v. Bush*,²² the Court held, six to three, that the suspected Al Qaeda and Taliban fighters detained at Guantanamo Bay have a statutory right to file petitions for writs of habeas corpus to test the legality of their confinement.²³ Various groups immediately praised the decisions as “a very stinging and watershed defeat”²⁴ for the administration and as a “complete win”²⁵ for the detainees. Conventional wisdom suggested that President Bush had suffered “a major blow”²⁶ and the “most damaging legal defeat since he assumed office,”²⁷ and had been “rebuffed” by the Court.²⁸

In this Article, I conclude that *Rasul* is far from being the major defeat to the administration that it has been portrayed as. It is true that *Rasul* may have prompted the administration’s decision to convene combatant status review hearings to evaluate the detainees’ combatant classification. And while those hearings have been criticized as “sham hearings” or even as efforts to undermine the Court’s decisions,²⁹ the

¹⁷ *Id.* at 2648.

¹⁸ *Id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

¹⁹ 124 S. Ct. 2711.

²⁰ *Id.* at 2721–22.

²¹ Given the decision in *Hamdi*, however, the administration’s victory would be short lived. See *Padilla v. Hanft*, No. Civ.A. 2:04-2221-26A, 2005 WL 465691 (D.S.C. Feb. 28, 2005) (granting Padilla’s petition for a writ of habeas corpus).

²² 124 S. Ct. 2686 (2004).

²³ *Id.* at 2698.

²⁴ Tony Mauro, *Court Affirms Due Process Rights of Enemy Combatants*, N.Y.L.J., June 29, 2004, at col. 4 (quoting ACLU director Steve Shapiro).

²⁵ Charles Lane, *Suspects Can’t Be Held in Legal Limbo: “Enemy Combatants” Can Challenge Detentions, Get Legal Counsel, Court Rules*, STAR TRIB. (Minneapolis-St. Paul), June 29, 2004, at A1.

²⁶ Alan Freeman, *Top U.S. Court Undercuts Bush: Guantanamo Detainees Have Right To Question Status Before Neutral Court*, GLOBE & MAIL (Toronto), June 29, 2004, at A28.

²⁷ Andrew Buncombe, *Court Defies White House with Ruling on Prisoners*, THE INDEPENDENT (London), June 29, 2004, at 24.

²⁸ Gail Gibson, *Bush Rebuffed on Detention of Terror Suspects*, BALTIMORE SUN, June 29, 2004, at 1A.

²⁹ See *infra* note 431.

habeas corpus and procedural due process jurisprudence suggest that hearings, perhaps with some adjustments, will satisfy the government's obligations under *Rasul*.³⁰

First, I will show how *Rasul* used a dubious interpretation of the federal habeas corpus statute to reach the conclusion that the Guantanamo detainees have a right to petition for writs of habeas corpus. The majority opinion takes a "kitchen sink" approach, holding that, (a) as a matter of statutory interpretation, the federal habeas corpus statute gives federal courts jurisdiction over habeas petitions filed by aliens detained outside the United States — at least, those held on Guantanamo Bay;³¹ (b) the presumption against extraterritorial application of federal statutes is inapplicable because the United States exercises exclusive jurisdiction over Guantanamo Bay; and (c) because the Secretary of Defense is deemed to be the custodian against whom the writ would be issued, there is nothing extraterritorial (or even extraordinary) about the decision to entertain petitions brought by the Guantanamo detainees.

I then analyze the issue left open by *Rasul*: what exactly are the cognizable claims that Guantanamo detainees could raise in their habeas petitions? Most notably, *Rasul* cannot be read as authorizing federal courts to hold hearings to determine the combatant status of each detainee, as such "actual innocence" claims are not cognizable on federal habeas corpus.³² While a due process claim would be cognizable, the hearing boards formed by the Department of Defense shortly after the *Rasul* decision probably provide sufficient procedural due process, such that the detainees will be unable to claim that they are being detained in violation of the Due Process Clause.

Given that federal courts entertaining habeas petitions by the detainees will likely dismiss the petitions, it is reasonable to wonder what the Court has accomplished. *Rasul* reflects a judgment by the Court that the alternative to assuming jurisdiction over habeas petitions — specifically, leaving the matter to the political branches — is inadequate because those branches will not respond to the concerns of nonresident aliens. Habeas corpus is the only weapon available to the Court in forcing the political branches to act; however, *Rasul* does not necessarily reflect a desire or the Court's willingness to assume a co-equal role in the war on terrorism. Rather, the Court's decision is best understood as a reminder to the President and Congress that they need to ensure that there is *some* process to address individual concerns. Due process being flexible, that process will necessarily vary depending on the circumstances. If we were detaining 20,000 prisoners of war in a nation-state conflict, those prisoners would presumably be entitled to much less process than the 595 detainees at Guantanamo Bay would be entitled to given the practical problems of providing equivalent levels of due process in the two scenarios.

³⁰ See *infra* Part II.B.2.

³¹ The significance of Guantanamo Bay as the detention location remains unclear, given the Court's subsequent assertion of jurisdiction over the Secretary of Defense.

³² See *infra* Part II.A.

I. THE FEDERAL HABEAS STATUTE: "WITHIN THEIR RESPECTIVE JURISDICTIONS"

Habeas corpus has been described as "[t]he most important human rights provision in the Constitution."³³ The federal habeas corpus statute currently reads in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

...

(c) The writ of habeas corpus shall not extend to a prisoner unless . . . (3) [he] is in custody in violation of the Constitution or laws or treaties of the United States.³⁴

The writ of habeas corpus historically has been the vehicle for a person detained by the government to challenge the legality of that detention in court.³⁵ As the Supreme Court explained in *Fay v. Noia*,³⁶ the "root principle [of the writ] is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."³⁷ This right has not been limited to citizens. An alien facing deportation also has the statutory right to seek review of the deportation order via a habeas petition.³⁸

³³ Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952).

³⁴ 28 U.S.C. § 2241 (a), (c) (1994).

³⁵ See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that habeas challenges to judicially imposed confinement — for example, sentences following convictions — were intended to be limited to challenging the jurisdiction of the sentencing court, and not the underlying judgment itself).

³⁶ 372 U.S. 391 (1963), *overruled on other grounds*, *Wainwright v. Sykes*, 433 U.S. 72 (1977).

³⁷ *Id.* at 402.

³⁸ See, e.g., *St. Cyr*, 533 U.S. at 309; *Heikkila v. Barber*, 345 U.S. 229, 235 (1953); *Ahrens v. Clark*, 335 U.S. 188, 196–97 (1948).

A. *The Initial Extraterritorial Decisions*

It is the phrase “within their respective jurisdictions” that lies at the crux of the Court’s decision in *Rasul*.³⁹ When habeas petitions were brought by persons detained within the United States, that phrase presented few problems of interpretation. A state prisoner seeking habeas relief would simply file his or her petition in the district court where he or she was being incarcerated. The custodian of the prisoner, typically the warden, would therefore physically be present within the district court’s jurisdiction, and hence “within [its] respective jurisdiction.”⁴⁰

Deciding in which court to file a petition was not always so easy, however, and in *Ahrens v. Clark*,⁴¹ the Court held that detention of immigrants on Ellis Island was not within the respective jurisdiction of the Washington, D.C. district court because the petitioners were not physically present in the district court’s territorial jurisdiction — the District of Columbia.⁴² The proper district in which to file the habeas petition was the Eastern District of New York, which had territorial jurisdiction over Ellis Island.⁴³ A subsequent case, *Braden v. 30th Judicial Circuit Court*,⁴⁴ clarified that “respective jurisdictions” focused on the custodian, not the petitioner, because the writ, if issued, directed the custodian to release the petitioner.⁴⁵ In most instances, the detainee and the custodian will be in the same district, but in *Braden*, the petitioner, who was incarcerated in Alabama, sought to challenge a detainer lodged against him with a Kentucky court. He filed his petition with the district court in the Western District of Kentucky, rather than in a district court in Alabama, where he was being held.⁴⁶ The Court held, sensibly, that the choice of the court was proper, as the Western District of Kentucky could reach the Kentucky state court by service of process.⁴⁷ Moreover, as a matter of forum convenience, the Western District of Kentucky was far preferable to a district in Alabama because the witnesses (apart from the petitioner) and documents were located in Kentucky.⁴⁸

With extraterritorial detention, a problem arises as to which district court, if any, would have territorial jurisdiction to entertain a habeas petition challenging such

³⁹ 124 S. Ct. at 2688 (quoting *Ahrens*, 335 U.S. at 192).

⁴⁰ *See id.*

⁴¹ 335 U.S. 188.

⁴² *Id.* at 189, 192.

⁴³ *See Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973).

⁴⁴ *Id.*

⁴⁵ *Id.* at 494–95 (quoting 28 U.S.C. § 2241(a)).

⁴⁶ *Id.* at 484.

⁴⁷ *Id.* at 500. The Court also based its holding on several intervening extraterritorial cases, such as *Burns v. Wilson*, 346 U.S. 137 (1953), *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Hirota v. MacArthur*, 338 U.S. 197 (1948). *Braden*, 410 U.S. at 498.

⁴⁸ *Id.* at 493–94.

detention. Both the detainee and the custodian (at least, the immediate custodian) might be out of reach of service of process by any district court. This problem could have arisen during World War I, but surprisingly did not reach the Court until after the end of World War II.

In the initial post-World War II prisoner cases, such as *Ex parte Betz*,⁴⁹ the Court declared a lack of jurisdiction over habeas petitions brought by American soldiers and civilians detained in Europe and Japan.⁵⁰ In *Betz*, the Court stated only that leave to file the petition was “denied for want of original jurisdiction.”⁵¹ This somewhat cryptic passage suggests that the problem with the petitions was that they had been filed directly with the Court, thereby attempting to invoke the Court’s original jurisdiction. The problem arises because Article III specifies that the Court’s original jurisdiction is limited to cases involving states or ambassadors as parties.⁵² Since *Marbury v. Madison*⁵³ held that Congress had no power to add to or subtract from the Court’s original jurisdiction,⁵⁴ and because the habeas petitions by the prisoners did not involve ambassadors or states, the case could not come before the Court on original jurisdiction.⁵⁵ This reading is confirmed by the subsequent case of *Everett v. Truman*,⁵⁶ which cites *Betz* along with Article III, section 2, clause 2.⁵⁷

⁴⁹ 329 U.S. 672 (1946).

⁵⁰ For specific details about *Betz* and the petitioners in the companion cases, see Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 591–92 (1949).

⁵¹ *Betz*, 329 U.S. at 672.

⁵² U.S. CONST. art. III.

⁵³ 5 U.S. (1 Cranch) 137 (1803).

⁵⁴ *Id.* at 174 (“If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.”).

⁵⁵ This explanation is problematic, however, because in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court (per Chief Justice Marshall) held that it was an exercise of appellate jurisdiction for the Court to review an original habeas petition. See generally Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 558–61 (2000).

⁵⁶ 334 U.S. 824 (1948). Everett was an American colonel assigned to serve as the defense lawyer for seventy-four German soldiers accused of war crimes during the Battle of the Bulge. See Fairman, *supra* note 50, at 597.

⁵⁷ However, this reading cannot be squared with *Ex parte Bollman*, 8 U.S. (4 Cranch) at 101, which held that the Court exercised appellate jurisdiction, not original jurisdiction, when it acted on habeas petitions, even those filed directly with it, because the Court was reviewing the judgment of an inferior court. Perhaps what the Court meant in *Betz*, and subsequent cases, was that the direct petitions were appellate in nature, but that the Court lacked jurisdiction to review decisions of military tribunals, which were not inferior courts

The subsequent cases in which the Court did hear habeas petitions brought by American citizens detained outside the United States, *Burns v. Wilson*⁵⁸ and *United States ex rel. Toth v. Quarles*,⁵⁹ shed precious little light on the jurisdictional basis for entertaining such habeas petitions. This is because both cases essentially assume that statutory jurisdiction existed, in part because of the respondents' failure to argue that the court lacked jurisdiction. For example, the entire discussion of jurisdiction in *Burns* consisted of the following:

In this case, we are dealing with habeas corpus applicants who assert — rightly or wrongly — that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power.⁶⁰

To support this assertion, the Court cited the federal habeas statute and *In re Yamashita*.⁶¹ *Yamashita* was a post-World War II case in which a military tribunal sentenced a Japanese general to death for violating the laws of war by failing to control his troops in the Philippine Islands.⁶² Held in the Philippines, the tribunal was commissioned by the Commanding General of the U.S. Western Pacific Army Forces, who was the named respondent. The sum total of the Court's discussion of statutory jurisdiction to hear the petition is no more illuminating than that found in *Burns*.⁶³ Moreover, *Yamashita* had two avenues to the Court: direct petition for habeas and petition for certiorari to review the denial of his habeas petition by the Supreme Court of the Commonwealth of the Philippines.⁶⁴ Thus, Congress arguably

subject to review by the Court. *See Hirota v. MacArthur*, 338 U.S. 197, 203 (1948) (per curiam) (Douglas, J., concurring) (“We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States.”).

⁵⁸ 346 U.S. 137 (1953).

⁵⁹ 350 U.S. 11 (1955).

⁶⁰ *Burns*, 346 U.S. at 139 (citation omitted).

⁶¹ 327 U.S. 1 (1946).

⁶² *Id.*

⁶³ *See id.* at 8.

Congress conferred on the courts no power to review their determinations save only as it has granted judicial power “to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.” The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner.

Id. (quoting 28 U.S.C. §§ 451, 452) (citation omitted).

⁶⁴ Pursuant to 28 U.S.C. § 349 (1946), since repealed, the Court had jurisdiction to review decisions from the Supreme Court of the Commonwealth of the Philippines during the time that the Philippine Islands were a U.S. territory.

had established a clear jurisdictional path in *Yamashita* for the possibility of Court review, whereas in *Burns*, no such clear path existed.

Toth presented a different scenario. In this case, the petitioner sought review of his detention in Korea, following court martial conviction; however, he had been arrested in Pittsburgh and whisked out of the country to stand trial in the court-martial.⁶⁵ *Toth* might be read, therefore, as implicitly holding that the government cannot frustrate the purpose of the habeas statute by transferring detainees within its control from within the territorial jurisdiction of *some* federal court to a place outside the territorial jurisdiction of *any* federal court.⁶⁶

Ultimately, the prior doctrine regarding the actual statutory jurisdiction of federal courts to hear habeas petitions brought by American citizens to challenge extraterritorial detention was frustratingly threadbare, existing more by judicial fiat than by clear reasoning. Yet, as it turns out, that threadbare assertion — unbriefed and unchallenged — has turned out to be the key to the Court's ability to entertain the habeas petitions brought by the Guantanamo detainees.⁶⁷

For aliens detained outside the United States prior to *Rasul*, the story was different. Initially, hundreds of German and Japanese soldiers sought review of their war crimes convictions,⁶⁸ and just as in the initial cases of American citizens, the Court denied the habeas petitions for lack of original jurisdiction.⁶⁹ Finally, in *Johnson v. Eisentrager*,⁷⁰ the Court provided the most detailed articulation of the theory behind denying nonresident aliens outside the United States access to Article III courts. The defendants in *Eisentrager* were twenty-one German nationals convicted in a post-World War II U.S. military tribunal for violating the laws of war by continuing to fight against the United States after Germany had already

⁶⁵ United States *ex rel.* *Toth v. Quarles*, 350 U.S. 11, 13 (1955).

⁶⁶ *Cf.* *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2729 (2004) (Kennedy, J., concurring) (arguing for an exception to the immediate custodian rule “if there is an indication that the Government’s purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed”); *Ex parte Endo*, 323 U.S. 283, 305–07 (1944) (holding that the district court retained jurisdiction over habeas petitions despite petitioner’s being moved from California to Utah, because a custodian remained within the Northern District of California). *But see* United States *ex rel.* *Lynn v. Downer*, 322 U.S. 756, 756–57 (1944); United States *ex rel.* *Innes v. Crystal*, 319 U.S. 755, 755 (1943) (both cases dismissed the petitions as moot when petitioner was no longer in particular respondent’s custody).

⁶⁷ *See infra* Part I.B.

⁶⁸ *Ex parte Quirin*, 317 U.S. 1 (1942), is not an exception, as the petitioners in that case (seven German soldiers, one of whom was a dual U.S.-German citizen) were captured on U.S. soil.

⁶⁹ *See, e.g.,* *Everett v. Truman*, 334 U.S. 824 (1948); *In re Eichel*, 333 U.S. 865 (1948); *Brandt v. United States*, 333 U.S. 836 (1948); *Milch v. United States*, 332 U.S. 789 (1947).

⁷⁰ 339 U.S. 763 (1950).

surrendered unconditionally.⁷¹ They petitioned for a writ of habeas corpus, naming various high-level U.S. government officials (though not their actual custodian, who was beyond service of process) as defendants and alleging that their trials, convictions, and imprisonment violated the Constitution, federal law, and the Geneva Convention.⁷²

Although the D.C. district court dismissed the petition for lack of jurisdiction, the U.S. Court of Appeals for the D.C. Circuit reinstated the petition on the ground that the federal courts were available to redress violations of the Constitution or federal law even where no statutory jurisdiction existed to issue the habeas writ.⁷³ The Supreme Court, per Justice Jackson, reversed.⁷⁴ As a prelude, the Court noted that no court, U.S. or foreign, recognizing the writ of habeas corpus had ever extended it to “an alien enemy who, at no relevant time and in no stage of his captivity, has been within [the] territorial jurisdiction” of this nation.⁷⁵ While lawful resident aliens were entitled to some — but not all — civil rights,⁷⁶ such as “full and fair hearings” prior to deportation⁷⁷ and due process of law,⁷⁸ it was “the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act” in those cases.⁷⁹ Justice Jackson’s opinion identifies six different relevant factors for depriving the German prisoners of the right to access United States courts:

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

⁷¹ *Id.* at 766. Specifically, the defendants spied on American forces and passed information to the Japanese military, which was still fighting against the Allied forces. The military courts were convened in China with the consent of the Chinese government. *Id.*

⁷² *Id.* at 766–67.

⁷³ See *Eisentrager v. Forrestal*, 174 F.2d 961, 965–66 (D.C. Cir. 1949) (holding that (a) constitutional prohibitions applied directly to the government without regard to territory, and (b) if the right of habeas corpus exists, it cannot be denied through jurisdictional omission), *rev’d sub nom.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁷⁴ *Eisentrager*, 339 U.S. 763.

⁷⁵ *Id.* at 768.

⁷⁶ *Id.* at 770–71 (explaining that the rights available to a resident alien “become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization”) (emphasis added); *cf. id.* at 771 (“[T]he civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens, courts in peace time have little occasion to inquire whether litigants before them are alien or citizen.”).

⁷⁷ See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86 (1903).

⁷⁸ See, e.g., *Yick Wo v Hopkins*, 118 U.S. 356 (1886).

⁷⁹ *Eisentrager*, 339 U.S. at 771.

the United States; (f) and is at all times imprisoned outside the United States.⁸⁰

Justice Black dissented. He read *Ex parte Quirin*⁸¹ and *In re Yamashita*⁸² as standing for the proposition that enemy aliens were not barred from access to the federal courts.⁸³ *Ex parte Quirin*, of course, is easily distinguished by noting that the petitioners there were caught inside the United States; *Yamashita* could have been a more troublesome precedent, as the petitioner was a Japanese general tried and convicted in a military tribunal held in the Philippines after the end of World War II. Justice Black did not, however, highlight that fact. Rather, Justice Black phrased the operative question as: “Does a prisoner’s right to test legality of a sentence then depend on where the Government chooses to imprison him?”⁸⁴

While Justice Black agreed that enemy aliens could not use the courts to “hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefield,” he argued that the calculus changed once the enemy nation surrendered and was occupied by the United States.⁸⁵ At that point, federal courts should be able to exercise jurisdiction to hear habeas petitions “whenever any United States official illegally imprisons any person in any land we govern.”⁸⁶

B. The Court Enters the War on Terrorism

Two years after the September 11 terrorist attacks, major terrorism cases reached the Court. Although the Court in the past has avoided or delayed deciding major constitutional issues raised during times of crisis, in this instance the passage of time is largely due to the course of litigation in the lower courts. For example, Yaser Esam Hamdi’s habeas petition bounced between the district court and the Fourth Circuit a number of times before being ripe for review by the Court.⁸⁷ Similarly, *Al Odah* and *Rasul* presented the first true opportunity for the Court to

⁸⁰ *Id.* at 777.

⁸¹ 317 U.S. 1 (1942).

⁸² 327 U.S. 1 (1946).

⁸³ *Eisenrager*, 339 U.S. at 794 (Black, J., dissenting).

⁸⁴ *Id.* at 795. This was a verbal sleight of hand because the majority opinion did not rest solely on the fact that petitioners were imprisoned outside the United States; rather, it was the combination of status as nonresident enemy aliens who had been captured outside the United States and had not set foot in the country.

⁸⁵ *Id.* at 796.

⁸⁶ *Id.* at 798 (citation omitted).

⁸⁷ See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va.), *on remand from* 296 F.3d 278 (4th Cir. 2002), *rev’d*, 316 F.3d 450 (4th Cir. 2003); see also *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002).

review the Guantanamo detainee situation.⁸⁸ This section discusses *Rasul* and shows how that case fits in with — and alters — the prior habeas corpus jurisprudence.

Perhaps the biggest irony of these cases is that Shafiq Rasul, the first named petitioner, had already been released from Guantanamo Bay by the time his case was argued before the Court.⁸⁹ Rasul, a British citizen, claimed to have traveled to Pakistan after September 11, 2001 “to visit relatives . . . , explore his culture, and continue his computer studies.”⁹⁰ The Northern Alliance captured him in Pakistan and turned him over to the United States in December 2001,⁹¹ a month later, the United States shipped him to Guantanamo Bay. Rasul’s co-petitioners, one British citizen and two Australian citizens, made similar claims.⁹² All four men denied being enemy aliens or unlawful combatants.⁹³ The district court dismissed their habeas petition for lack of jurisdiction, relying on *Johnson v. Eisentrager*, and the D.C. Circuit affirmed.

Writing for the majority,⁹⁴ Justice Stevens framed the issue as whether the “habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’”⁹⁵ Stating the issue this way, as opposed to the simpler “whether non-resident aliens detained outside United States territory have statutory rights under the habeas statute,” foreshadowed the Court’s distinguishing of *Eisentrager*. Citing the six factors that Justice Jackson had listed in *Eisentrager*, Justice Stevens argued that all six factors were required before *Eisentrager* would apply.⁹⁶ This is an implausible reading of *Eisentrager*. For example, one of the six factors was the conviction in a military court for violating laws of war.⁹⁷ If this truly were a requirement, a nonresident enemy alien detained

⁸⁸ An earlier attempt to litigate the detainees’ case out of the Ninth Circuit failed for lack of standing. *See Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), *aff’d*, 310 F.3d 1153 (9th Cir. 2002).

⁸⁹ *Rasul v. Bush*, 124 S. Ct. 2686, 2690 n.1 (2004). The case remained a live controversy because of the presence of other petitioners in *Rasul*, as well as those in the consolidated case, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

⁹⁰ Petitioners’ Brief on the Merits at 3, *Rasul* (No. 03-334).

⁹¹ *Id.* The Northern Alliance was allegedly collecting cash bounties for turning over suspected Al Qaeda or Taliban fighters to the United States. *See, e.g.*, Bill Dedman, *U.S. To Hold Most Detainees at Guantanamo Indefinitely*, BOSTON GLOBE, Apr. 25, 2004, at A1.

⁹² Petitioners’ Brief on the Merits at 3–4, *Rasul* (No. 03-334).

⁹³ *Id.* at 4. However, petitioner David Hicks’s father (who brought the petition on his behalf) admitted that Hicks may have joined the Taliban, resulting in the secondary argument that “the Taliban had caused no American casualties.” *Id.*

⁹⁴ Justices O’Connor, Souter, Breyer, and Ginsburg joined Justice Stevens.

⁹⁵ *Rasul*, 124 S. Ct. at 2693 (quoting 1903 Agreement, *supra* note 1, at art. III) (citation omitted).

⁹⁶ *Id.* at 2693–94.

⁹⁷ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

overseas as a prisoner of war would not fall within *Eisentrager*'s bar on access to the federal courts. Yet, given Justice Jackson's stated concern about the use of litigation as a war-time weapon by enemy aliens,⁹⁸ it is extremely unlikely that Justice Jackson would have sanctioned the granting of the writ to all nonresident enemy aliens who had not been tried and convicted for war crimes.⁹⁹ A more natural reading of *Eisentrager* is that the conviction in military court was relevant for the petitioners in that case precisely because they were being detained at a time when other prisoners of war had already been repatriated to their home countries. But for the convictions, the United States would have had no reason not to release the *Eisentrager* prisoners.

Justice Stevens also pointed out that none of the Guantanamo detainees were citizens of countries with whom the United States was at war.¹⁰⁰ This too would have surprised Justice Jackson as a basis for distinguishing *Eisentrager* because Justice Jackson concluded in *Shaughnessy v. United States ex rel. Mezei*¹⁰¹ that individuals at war with the United States could be detained even if their home countries were not.¹⁰²

The heart of Justice Stevens's opinion focused on the interplay among *Ahrens v. Clark*,¹⁰³ *Eisentrager*,¹⁰⁴ and *Braden v. 30th Judicial Circuit Court*.¹⁰⁵ Recall that *Ahrens* held that the federal habeas corpus statute, in limiting authorization of the writ to instances "within [courts'] respective jurisdiction," required that the petitioner be within the territorial jurisdiction of the court issuing the writ.¹⁰⁶ Justice Stevens concluded that *Eisentrager*'s denial of court access to the German prisoners imprisoned outside the United States rested implicitly on this statutory jurisdiction analysis, which was subsequently overruled by *Braden*.¹⁰⁷ Because *Eisentrager* followed *Ahrens* with respect to the lack of statutory jurisdiction, the *Eisentrager* Court went on to decide the additional question of whether denying nonresident aliens access to federal courts violated the Constitution.¹⁰⁸ But that additional analysis is no longer necessary, according to Justice Stevens, because the "statutory predicate" for the analysis is no longer valid.¹⁰⁹

⁹⁸ *Id.* at 779.

⁹⁹ As Justice Scalia noted in his dissent, during World War II, the United States held about 2 million prisoners of war. *Rasul*, 124 S. Ct. at 2706 (Scalia, J., dissenting).

¹⁰⁰ *Id.* at 2693.

¹⁰¹ 345 U.S. 206 (1953).

¹⁰² *See id.* at 223 (Jackson, J., dissenting) ("I should suppose one personally at war with our institutions might be confined, even though his state is not at war with us.").

¹⁰³ 335 U.S. 188 (1948).

¹⁰⁴ 339 U.S. 763 (1950).

¹⁰⁵ 410 U.S. 484 (1973).

¹⁰⁶ *Ahrens*, 335 U.S. 188.

¹⁰⁷ *Braden*, 410 U.S. 484.

¹⁰⁸ *Eisentrager*, 339 U.S. 763.

¹⁰⁹ *Rasul*, 124 S. Ct. at 2695.

If Justice Stevens's premise that *Braden* overruled *Ahrens* is correct, then his distinguishing of *Eisentrager* is not unreasonable. For if *Eisentrager* stands for the propositions that (1) no district court had jurisdiction under the habeas statute, as interpreted in 1950, to hear petitions brought by aliens imprisoned outside the United States and (2) such statutory interpretation presented no constitutional problems, then a subsequent decision that overrules the first point is functionally the same as if Congress had amended the habeas statute in response to *Ahrens*. While Congress may not constitutionally be required to extend the habeas privilege to nonresident aliens detained outside the country, it arguably has the power to do so.

However, as Justice Scalia persuasively demonstrated in his dissent, Justice Stevens's reading of *Braden* was broader than warranted given the logical reasoning of that case.¹¹⁰ *Braden* correctly pointed out that the writ of habeas corpus, if issued, directed the custodian to (literally) produce the petitioner.¹¹¹ Thus, in *Braden*, the fact that the petitioner was being detained in Alabama had no bearing on the proper district in which to file his habeas petition, given that the "custody" that Braden complained of was the lodging of a detainee in a state court in Kentucky to preserve the right to prosecute Braden after he was released from the Alabama prison.¹¹² All that *Braden* need stand for is that in the unusual circumstance where the petitioner and custodian are in different federal districts, the proper district in which to file the habeas petition is the one where the latter can be located.¹¹³ Such a reading would overrule *Ahrens*, but it would not disturb *Eisentrager* because the custodian of the prisoners (the commandant of Landsberg Prison in Germany) was not within the territorial jurisdiction of any U.S. district court.

Next, Justice Stevens addressed the government's argument that, in light of the presumption against extraterritorial application of federal statutes, the habeas statute should not be interpreted to extend to petitions brought by persons outside the United States. Justice Stevens responded that the presumption against extraterritorial application of federal statutes did not apply because the United States, pursuant to the 1903 Lease and the 1934 Treaty,¹¹⁴ exercised exclusive jurisdiction over Guantanamo Bay, suggesting that extension of the federal habeas statute to detainees being held there was not extraterritorial.¹¹⁵

¹¹⁰ *Id.* at 2704.

¹¹¹ *Braden*, 410 U.S. at 500.

¹¹² Braden complained that the Kentucky court was violating his right to a speedy trial by simply lodging the detainee without taking any action. *Id.* at 485.

¹¹³ *Rasul*, 124 S. Ct. at 2704 (Scalia, J., dissenting); see also *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2719–20 (2004).

¹¹⁴ See *supra* notes 1–3 and accompanying text.

¹¹⁵ *Rasul*, 124 S. Ct. at 2696.

Finally, Justice Stevens summarized the Court's holding:

Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.¹¹⁶

This paragraph represents the entire discussion of territorial jurisdiction over the Guantanamo detainees' custodian. This is a surprisingly truncated discussion, in light of the Court's decision in *Padilla*, in which the Court dismissed Jose Padilla's habeas petition on the ground that it should have been filed in the District of South Carolina, not the Southern District of New York, because his *immediate* custodian was Commander Melanie Marr, the commander of the navy brig at Charleston, South Carolina.¹¹⁷ *Rasul*, on the other hand, turned on the fact that district courts could exercise jurisdiction over the Secretary of Defense, Donald Rumsfeld, who presumably could order that the Guantanamo detainees be produced in court. In *Rasul*, however, the Court never grappled with the fact that Secretary Rumsfeld presumably could order Commander Marr to produce Padilla as well. Indeed, one wonders why it was necessary for Justice Stevens to discuss the "territorial jurisdiction" that the United States exercises over Guantanamo Bay: if Secretary Rumsfeld is a proper respondent for habeas petitions brought by Guantanamo detainees, then there is no extraterritorial application of the habeas statute at all; the writ, if issued, would be directed within the United States to Secretary Rumsfeld.¹¹⁸

A further problem with this superficial discussion of territorial jurisdiction is that Justice Stevens made no effort to specify whether any particular district court should be construed to have jurisdiction over Secretary Rumsfeld. In *Demjanjuk v. Meese*,¹¹⁹ Judge Bork held that an alien held in an unknown location was entitled to challenge his deportation with a habeas petition, and that in the limited and special circumstances, the Attorney General would be treated as the custodian, with jurisdiction in the D.C. district court.¹²⁰ In other instances, however, district courts have

¹¹⁶ *Id.* at 2698 (citations omitted).

¹¹⁷ *Padilla*, 124 S. Ct. at 2721–22.

¹¹⁸ In fact, if this aspect of *Rasul* is to be taken seriously, then a federal court could arguably entertain a habeas petition brought by any person detained anywhere by the United States.

¹¹⁹ 784 F.2d 1114 (D.C. Cir. 1986).

¹²⁰ *Id.* at 1116 (citing *Ex parte Hayes*, 414 U.S. 1327 (1973)); see also *Gherebi v. Bush*, 374 F.3d 727, 739, (9th Cir. 2004) (transferring habeas petition to the D.C. district court).

not been so restrained,¹²¹ thus raising venue concerns. In *Braden*, the Western District of Kentucky was not only the district in which the appropriate custodian was located, but also the most convenient forum.¹²² Similarly, the District of South Carolina is the most convenient forum for access to relevant witnesses (including the petitioner) and documents for any factual disputes that may arise in connection with Jose Padilla's habeas petition. No such district court exists with regard to the Guantanamo detainees, though presumably the Southern District of Florida would be the closest district to the relevant witnesses and documents. The District of Columbia might also be a logical district given that it is the seat of the federal government.¹²³ Instead, *Rasul* seems open to the spectacle of the government having to respond to habeas petitions all across the country. This would not only burden the government, but also lead to the possibility of detainees in adjacent cells at Camp Delta having habeas petitions reviewed under significantly different legal rules.¹²⁴ While the Court could eventually unify the resulting caselaw, it would be more efficient to have the unification done at the appeals court level, which would have been possible had Justice Stevens provided more of an explanation of territorial jurisdiction.

Moreover, Judge Bork's reasoning in *Demjanjuk* does not translate well to the Guantanamo detainees' situation. In *Demjanjuk*, there was no question that *some* U.S. district was the proper one for bringing the habeas petition; however, due to the government's actions in concealing the petitioner's actual location, neither the petitioner's lawyer nor the court knew which district that was.¹²⁵ The detainees, by contrast, are in a known location that simply happens not to be within any U.S. district. This is not to say that a judicially created rule analogous to that in *Demjanjuk* could not be justified under some reasonable principle, thereby also retroactively explaining how the Court had jurisdiction in *Burns v. Wilson*.¹²⁶ That explanation should, however, go beyond asserting that there must be *some* district in which a habeas petition can be brought. *Eisentrager* specifically rejects the proposition that enemy aliens detained outside the United States have a constitutional claim to access the federal courts.¹²⁷ Any such right must therefore be

¹²¹ Cf. *So v. Reno*, 251 F. Supp. 2d 1112 (E.D.N.Y. 2003) (claiming jurisdiction over the Attorney General); *Walters v. Ashcroft*, 291 F. Supp. 2d 237 (S.D.N.Y. 2003) (same claim).

¹²² *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 499 (1973).

¹²³ See *Demjanjuk*, 784 F.2d at 1116.

¹²⁴ Though it is not related to the merits of the habeas petitions, simply consider that the D.C. Circuit and the Ninth Circuit reached diametrically opposite conclusions about the availability of habeas relief. Compare *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, 124 S. Ct. 2686 (2004), with *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *amended*, 374 F.3d 727 (9th Cir. 2004).

¹²⁵ *Demjanjuk*, 784 F.2d at 1115–16.

¹²⁶ 346 U.S. 844 (1953).

¹²⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

statutory in nature, conferred by Congress. While interpreting the habeas statute to extend beyond the United States' territorial limits is not implausible, there should be some positive reason given for that interpretation. For example, the Court could have concluded that the phrase "within their respective jurisdiction" was ambiguous and that it would therefore interpret the statute expansively, leaving it to Congress to clarify the statute if Congress truly did not intend for the habeas statute to extend to the detainees. This position might make sense if the Court believed Congress to be institutionally incapable of taking positive action in favor of the detainees; yet, it would allow a simple majority of Congress to undo the decision.

Justice Kennedy concurred in the result of *Rasul*, but disagreed substantially with Justice Stevens's analysis, particularly with regard to the reading of *Ahrens* and *Braden*.¹²⁸ In Justice Kennedy's view, *Eisentrager* provided the appropriate framework for deciding this case;¹²⁹ however, he would not have applied its strict bar here because Guantanamo Bay was essentially U.S. territory, as well as far from the battlefield, and because the detainees were facing indefinite detention with no legal proceedings to determine their combatant status.¹³⁰ This approach would provide a more narrow resolution to the case by permitting the Guantanamo detainees to challenge their custody while not opening the door to challenges by detainees held elsewhere (unless, of course, "elsewhere" happens to be foreign territory over which the United States exercises exclusive jurisdiction). However, one wonders about Justice Kennedy's assertion that the detainees face indefinite detention with no legal proceedings to determine their combatant status. Like Justice Stevens, Justice Kennedy appears to have conflated the distinct issues of continuing to imprison convicted war criminals after a conflict has ended with detaining lawful combatants during a continuing conflict. For example, a German soldier captured as a prisoner of war in mid-1942 might have thought that he too faced indefinite detention with no legal proceedings to determine his combatant status. Yet, it does not seem consistent with *Eisentrager*'s logic to suggest that the potentially long and uncertain detention that this soldier faces should necessarily be a basis to challenge his continuing detention in U.S. courts.¹³¹

¹²⁸ *Rasul*, 124 S. Ct. at 2699 (Kennedy, J., concurring).

¹²⁹ *Id.* at 2700.

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 prisoner's claims.

Id.

¹³⁰ *Id.*

¹³¹ *See id.*

Also worth considering is the other aspect of Justice Kennedy's opinion, in which he argued that, because the terms of the treaty and lease between the United States and Cuba are "indefinite and at the discretion of the United States. . . . From a practical perspective, the indefinite lease . . . has produced a place that belongs to the United States" ¹³² From a "practical perspective," Justice Kennedy may be correct, but this is nevertheless a startling conclusion. A few Article III judges are willing to conclude that the military base has become U.S. territory despite the fact that the executive branch of the United States and Cuba both reject the notion that the United States has annexed Guantanamo Bay. ¹³³ While that conclusion is not implausible, it is doubtful that federal courts are the appropriate bodies to draw that conclusion, especially when this contradicts the executive branch. ¹³⁴ In an oft-quoted passage from *United States v. Curtiss-Wright Export Corp.*, ¹³⁵ the Court stated in dictum that when it came to foreign affairs, "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." ¹³⁶ *Curtiss-Wright* is consistent with the political question doctrine, under which certain legal issues are deemed non-justiciable. One category of such nonjusticiable matters are those that have "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." ¹³⁷ Here, we have conflicting assertions by the judicial and executive branches regarding sovereignty over Guantanamo Bay. What are foreign leaders to make of these conflicting pronouncements? This would seem to be the prime example of the sort of judicial decision that the political question doctrine is intended to prevent.

A more analytically rigorous approach yielding the same result can be found in *Gherebi v. Bush*, ¹³⁸ in which Judge Reinhardt seized upon *Eisentrager's* use of both "sovereignty" and "territorial jurisdiction." ¹³⁹ This allowed him to read *Eisentrager*

¹³² *Id.*

¹³³ *Gherebi v. Bush*, 352 F.3d 1278, 1312 (9th Cir. 2003) (Graber, J., dissenting).

¹³⁴ *See Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges."); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) ("And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department?"). It may well be that Justice Kennedy was simply sloppy here, using "belongs to" when he meant "exercises territorial jurisdiction over." *Rasul*, 124 S. Ct. at 2700.

¹³⁵ 299 U.S. 304 (1936).

¹³⁶ *Id.* at 319.

¹³⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹³⁸ 352 F.3d 1278 (9th Cir. 2003).

¹³⁹ *Id.* at 1284–86.

as holding that the latter was the key issue involved in *Gherebi*,¹⁴⁰ and to conclude that “territorial jurisdiction is enough.”¹⁴¹

But does the United States exercise territorial jurisdiction over Guantanamo Bay? Here, Judge Reinhardt focused on the vast degree of autonomy that the United States appeared to exercise over the military base on Guantanamo Bay, ranging from the “complete” jurisdiction ceded by the Lease to the “exclusive criminal jurisdiction over all persons, citizens and aliens alike, who commit criminal offenses at the Base.”¹⁴² Unlike Landsberg Prison, where the United States temporarily shared limited authority with Germany, the United States had “potentially permanent exercise of complete jurisdiction and control over Guantanamo, including the right of eminent domain.”¹⁴³

The long-term downside of this approach is that arguments over whether the United States exercises “territorial jurisdiction” or de facto “sovereignty” over Guantanamo Bay risk distracting attention from larger legal questions. A ruling in favor of the Camp Delta detainees simply eliminates Camp Delta from consideration as a detention camp for future captured fighters. Rather than transport such captures from Pakistan, Saudi Arabia, Iraq, or wherever else, the executive branch will simply detain them in those foreign countries. In fact, this is exactly the approach that the Bush administration has taken with a number of high-level Al Qaeda captives such as Ramzi Binalshibh, Khalid Sheikh Mohammed, and Abu Zubaydah, all of whom have been held in undisclosed locations (but presumed to be somewhere in Pakistan or Afghanistan).¹⁴⁴ There are also reports that the United States is detaining over three hundred persons in Afghanistan.¹⁴⁵

To be sure, the government had reasons for transporting captured fighters fifteen thousand miles from Afghanistan and Pakistan to Guantanamo Bay, just ninety miles away from the United States. Escaping from Camp Delta would be considerably more difficult than escaping from a detention facility in Pakistan or

¹⁴⁰ *Id.* at 1287–88.

¹⁴¹ *Id.* at 1288. Judge Reinhardt went on to conclude that even if sovereignty were the requirement, the United States had, through the terms of the Lease and subsequent conduct, acquired sovereignty over Guantanamo Bay through a sort of international adverse possession. *Id.* at 1290–96. The dissent criticized this conclusion, noting that “both parties to the Guantanamo Lease and its associated treaties — Cuba and the United States (through the executive branch) — maintain that Guantanamo is part of *Cuba*.” *Id.* at 1312 (Graber, J., dissenting).

¹⁴² *Id.* at 1289 (describing the 1903 Agreement, *supra* note 1, at art. III; 1903 Lease, *supra* note 1, at art. IV).

¹⁴³ *Id.* at 1287.

¹⁴⁴ See, e.g., Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 53.

¹⁴⁵ See DEBORAH PEARLSTEIN, HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS 9 & nn.32–34 (2004), http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf.

Afghanistan because Camp Delta is far away from the current theater of military conflict and any escape or rescue attempt would have to overcome or approach by water.¹⁴⁶ While the government could choose some other secure island facilities, such as the British military base on Diego Garcia, this would require agreement with the British government.¹⁴⁷ Thus, denying the government the use of Guantanamo Bay as a “lawless” enclave does force the government to choose between the security that the island base offers and the freedom from legal scrutiny that a foreign base offers. But it does not ensure that federal courts can avoid the question of habeas jurisdiction over nonresident aliens detained elsewhere.

Finally, Justice Scalia dissented in *Rasul* and was joined by Chief Justice Rehnquist and Justice Thomas.¹⁴⁸ He pointed out that the actual text of the federal habeas statute implied that the custodian must be in some federal district,¹⁴⁹ thus explaining *Braden* as a special situation where the custodian and petitioner were located in different districts.¹⁵⁰ However, the strict textualist approach fails to explain cases such as *Burns v. Wilson*,¹⁵¹ in which American citizens detained outside the United States (and thus detained by a custodian outside any federal district) were nevertheless permitted to file habeas petitions, and Justice Scalia was forced to explain those cases away as an “atextual extension.”¹⁵² He closed his dissent with an appeal to legislative prerogative:

Congress is in session. If it wished to change federal judges’ habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, instead of by today’s clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees.¹⁵³

¹⁴⁶ See, e.g., Tania Branigan & Vikram Dodd, *The Bitterest Betrayal*, THE GUARDIAN, July 19, 2003, at 25 (“Guantanamo Bay, located on the south-eastern tip of Cuba, is reachable only by a US military flight: its remoteness adds to its security.”); Scott Higham et al., *A Holding Cell In War on Terror: Guantanamo Bay Prison Represents a Problem That’s Tough To Get Out Of*, WASH. POST, May 2, 2004, at A1 (noting that Guantanamo Bay was more attractive than detention facilities in Asia, which were deemed vulnerable).

¹⁴⁷ See Higham et al., *supra* note 146.

¹⁴⁸ *Rasul*, 124 S. Ct. at 2701 (Scalia, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* notes 111–13 and accompanying text.

¹⁵¹ 346 U.S. 844 (1953).

¹⁵² *Rasul*, 124 S. Ct. at 2706 (Scalia, J., dissenting).

¹⁵³ *Id.* at 2711 (citation omitted). By that, Justice Scalia meant that a Guantanamo detainee can file his habeas petition in any district, whereas Jose Padilla, a U.S. citizen detained inside the United States, has to file his petition in the District of South Carolina, in which his immediate custodian can be found.

It is important to keep in mind the limited nature of the *Rasul* Court's holding. By resting on an interpretation of the federal habeas statute, the Court avoided having to decide whether nonresident aliens detained outside the United States pursuant to military combat authorized by Congress have constitutional rights. In addition, the Court's holding — that the detainees have a statutory right to petition for a writ of habeas corpus — should not be viewed as more monumental than it really is. As discussed in Part II below, the right to file a petition for habeas corpus guarantees a detainee only that a federal court will ultimately decide whether that detainee is being held in violation of federal law, the Constitution, or a treaty; it does not guarantee that the detainee is entitled to have a federal court determine that he is not a combatant. Furthermore, by resting on statutory interpretation, the Court implicitly leaves Congress the final say on whether nonresident aliens can petition for writs of habeas corpus.

II. PREDICTING THE FUTURE ROLE OF ARTICLE III COURTS IN THE WAR ON TERRORISM

Regardless of whether one believes that the Court should have reached a different result in *Rasul*, each Guantanamo detainee now has a right to file a petition for a writ of habeas corpus in federal court, seeking to show that he is being held in violation of federal law, the Constitution, or treaty.¹⁵⁴ This legal victory may well be less significant than is apparent. This section analyzes the most likely claims to predict the future role of federal courts in the war on terrorism and concludes that, in light of the planned hearing boards to view each detainee's combatant status, habeas relief is unlikely to result in release from Camp Delta.

This section relies largely, though not exclusively, on the habeas corpus doctrine as developed in review of state court convictions. It is a fair question whether these precedents are applicable to the situation of review of the executive branch's detentions of suspected combatants. The habeas decisions involving state prisoners rest crucially on specific notions of federalism and comity. Paul M. Bator's article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,¹⁵⁵ laid out his central thesis: so long as state courts are competent to find facts and decide legal issues (including matters of federal law) — and in Bator's view, they are — the scope of habeas review should be narrow because there is no reason to believe that expansive relitigation would lead to more accurate results.¹⁵⁶ Defenders of an expansive scope of habeas review challenge this assumption of parity, arguing that

¹⁵⁴ *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004).

¹⁵⁵ Bator, *supra* note 55.

¹⁵⁶ *Id.* at 451.

state courts are inferior at adjudicating federal claims.¹⁵⁷ The debate is fascinating but ultimately inconclusive, and it is easy to lose sight of some pragmatic points. As Ann Althouse points out, the real issue is not whether state courts are better or worse than federal courts at adjudicating federal issues, but rather, whether state courts are “good enough.”¹⁵⁸ Current habeas corpus doctrine, with respect to petitions brought by prisoners convicted in state courts, assumes that state courts are “good enough.” This assumption explains the deference owed to state court findings of fact provided the petitioner had a full and fair opportunity to litigate those factual disputes.

However, the Court has held that the federalism and comity concerns in federal-state relations also apply to military court proceedings.¹⁵⁹ In part, this holding rests on an analogy between the exhaustion requirements in both habeas review of state court decisions as well as federal court review of decisions by administrative agencies. In both instances, the body whose decision is being reviewed by the federal court is presumed to have competent fact-finding ability, if not expertise.¹⁶⁰ The Court concluded that this analogy also applied to court-martial proceedings: “implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task.”¹⁶¹ The Court also noted that the military is its own society, entitled to an appropriate level of deference and comity.¹⁶²

While we are not concerned here with courts-martial, which are used to prosecute U.S. military personnel for violations of the Uniform Code of Military Justice, much of the reasoning underlying federal court-military court comity is applicable to the treatment of suspected Al Qaeda and Taliban fighters detained at Guantanamo Bay. It is true that there is no congressional scheme in place, only an executive branch order, and thus no explicit congressional judgment as to the adequacy of the process in place. This difference might warrant greater scrutiny as

¹⁵⁷ See, e.g., LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 161–62 (1994); William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 946 (1964); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 677–85 (1982).

¹⁵⁸ Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 961 (1991).

But as long as the state courts are good enough, even if they fall short of parity, the interest in enforcing rights supports allocating some federal questions to state court in order to relieve federal courts of the burden of unnecessarily duplicative cases and to take advantage of the plentiful state courts, training them to handle rights claims routinely, as they arise in context.

Id.

¹⁵⁹ See *Schlesinger v. Councilman*, 420 U.S. 738, 756–58 (1975).

¹⁶⁰ *Id.* at 756.

¹⁶¹ *Id.* at 758.

¹⁶² *Id.*

to the fact-finding competence of the hearing boards. For example, if the President had ordered that inexperienced, low-ranking soldiers were to adjudicate complex questions of military law, a habeas court might reasonably conclude that prior habeas decisions involving state prisoners — and in particular, the deference that such decisions afford state court decisions — should not be applied. The hearing boards, however, are comprised of officers, one of whom is a member of the Judge Advocate General, and they are tasked with a matter that is at the core of the military: determining who is the enemy.¹⁶³ Just as the discipline and punishment of military personnel is deemed a matter entitling military courts to comity, so too should determinations by the military about who is the enemy.

A. Actual Innocence Claims

Preliminarily, based on analogy to habeas cases involving state prisoners, we can be fairly certain that *Rasul* does not open the door for federal courts to determine the combatant status of each detainee. As the Court has emphasized, habeas corpus does not exist to correct errors of fact,¹⁶⁴ and thus a detainee cannot simply allege that he was wrongly classified as a combatant. Rather, the detainee must allege custody in violation of federal law, the Constitution, or a treaty. When commentators say that the detainees “can now have their day in court,”¹⁶⁵ one should be aware that the phrase “day in court” can have quite different meanings.

The federal habeas statute contemplates that the federal district court may conduct *some* fact finding, as there is a provision for testimony and deposition.¹⁶⁶ With leave of the court, a habeas petitioner can even invoke discovery processes under the Federal Rules of Civil Procedure.¹⁶⁷ However, the habeas statute also presumes the correctness of facts found in state courts, leaving it to the petitioner to rebut that presumption by clear and convincing evidence.¹⁶⁸ The ability of the habeas petitioner to attempt to rebut the presumption of correctness of factual findings does not mean, however, that the petitioner gets to retry the entire issue of his guilt so long as he can prove his innocence by clear and convincing evidence.

¹⁶³ See *infra* notes 335–42 and accompanying text.

¹⁶⁴ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.”); *In re Terry*, 128 U.S. 289, 305 (1888) (“[T]he writ of *habeas corpus* does not perform the office of a writ of error or an appeal.”).

¹⁶⁵ David G. Savage, *High Court Says Detainees Have Right to Hearing*, L.A. TIMES, June 29, 2004, at A1 (quoting James Fellner of Human Rights Watch).

¹⁶⁶ See 28 U.S.C. § 2246 (2000) (“On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit.”).

¹⁶⁷ See Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. § 2254 (2000).

¹⁶⁸ 28 U.S.C. § 2254(e)(1) (2000).

Consider *Townsend v. Sain*,¹⁶⁹ which established that “a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.”¹⁷⁰ *Townsend*, in fact, had received a hearing in state court on his unsuccessful objection to the admission of his confession, which he argued had been obtained involuntarily.¹⁷¹ In applying its new rule, the Court (per Chief Justice Warren) concluded that it was impossible to tell whether the state court had applied appropriate federal standards for determining the voluntariness of the confession,¹⁷² and more significantly, whether the court had been presented with evidence that the petitioner had been given a “truth serum.”¹⁷³ The Court remanded for an evidentiary hearing, but the scope of the hearing was not to litigate the ultimate issue of *Townsend*’s guilt; rather, it was to resolve the voluntariness of his confession.¹⁷⁴ If the result of the hearing was that the confession was found to be not voluntary, then *Townsend* would be released unless the State gave him a new trial (in which it would not be able to use the confession). On the other hand, if the result of the hearing was that the confession was found to be voluntary, then *Townsend* would remain in prison. In no event, however, would the hearing determine *Townsend*’s guilt or innocence. Thus, a detainee might be entitled to an evidentiary hearing in federal court on a habeas petition, but only to resolve disputed facts relevant to a constitutional claim.¹⁷⁵

¹⁶⁹ 372 U.S. 293 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

¹⁷⁰ *Id.* at 312–13 (citation omitted). *Townsend* set forth six situations in which a federal hearing was required:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313. Congress later essentially codified this aspect of *Townsend*’s holding, albeit with a presumption of correctness. Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104 (codified as amended at 28 U.S.C. § 2254(d) (1994)). The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, subsequently amended § 2254 to its current form, and *Keeney* overruled *Townsend* to hold that a state prisoner who failed to present a factual dispute for determination in state court was required to show cause and prejudice for such failure to obtain a federal court hearing. *See Keeney*, 504 U.S. at 11.

¹⁷¹ *Townsend*, 372 U.S. at 295–96.

¹⁷² *Id.* at 320.

¹⁷³ *Id.* at 321–22.

¹⁷⁴ *Id.* at 322 (“[T]he petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the *disputed issues*.”) (emphasis added).

¹⁷⁵ For example, a detainee might allege that he was detained without being afforded due process, and a factual dispute might arise as to the actual procedures used.

Moreover, state prisoner cases suggest that a detainee would not be entitled to a writ of habeas corpus based on a freestanding allegation of not being a combatant. While an allegation of innocence can play a role in the Court's traditional habeas corpus jurisprudence, it is generally viewed as a "gateway" through which otherwise barred legal claims can be revived.¹⁷⁶ The Court has not, however, viewed innocence itself as a ground for relief.¹⁷⁷

The innocence "gateway" involves claims that have been procedurally defaulted — that is, claims that could have been, but were not, raised in an earlier forum (usually, but not necessarily in state courts). A typical example might be the failure to object to evidence at trial, only to argue later in a habeas petition that the admission of the evidence rendered the trial unconstitutional. In *Wainwright v. Sykes*,¹⁷⁸ the Court held that procedurally defaulted claims would be barred on habeas unless the prisoners could show "cause" and "prejudice" for the default.¹⁷⁹ In *Murray v. Carrier*,¹⁸⁰ the Court created an exception to the cause and prejudice rule: a prisoner who could not show cause and prejudice, but who could demonstrate actual innocence could nevertheless have his or her defaulted claims heard on the merits.¹⁸¹

This means that a habeas court proceeding under the *Murray v. Carrier* actual innocence exception does not relitigate the factual issue of the petitioner's guilt; it considers the defaulted claims of constitutional error, which might result in a new trial or outright release. If the writ is issued, it does so not from a determination of

¹⁷⁶ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

¹⁷⁷ This is a controversial conclusion, and some academic commentators have criticized the Court severely for reaching it. See, e.g., Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 502 (1996) ("[T]he judicial system should not participate in the execution of innocent people. When a doctrine permits a result so far removed from our collective sense of justice, it is time to re-examine that doctrine."); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 378–79 (1993).

[I]t is "scarcely logical" that an inmate who makes a sufficient showing of innocence to overcome a procedural bar should remain in jail for life because his constitutional claim ultimately proves unsuccessful. The notion that a colorable showing of innocence is merely a "threshold" for further review is plainly indefensible.

Id. at 378.

¹⁷⁸ 433 U.S. 72 (1977).

¹⁷⁹ Generally speaking, "cause" means some external reason for the habeas petitioner's failure to have raised the claim; and prejudice means some showing that the error complained of had some substantial injurious impact on the jury's verdict. See, e.g., Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 231–32 (1998).

¹⁸⁰ 477 U.S. 478 (1986).

¹⁸¹ *Id.* at 496.

the petitioner's innocence, but rather from adjudication of legal claims that would otherwise have been dismissed as procedurally defaulted.

For example, in the middle of the last century, the D.C. Circuit struggled with the scope of cognizable habeas claims involving persons detained at mental hospitals who claimed to have been restored to mental health. In *De Marcos v. Overholser*,¹⁸² the court held that habeas corpus *was* the appropriate vehicle for challenging continued confinement in a mental facility and even suggested that the court should determine the detainee's mental health. However, two years later, the same court overruled itself in *Dorsey v. Gill*,¹⁸³ holding that "[h]abeas corpus is available, not for the purpose of determining a petitioner's mental condition, but, instead, as a method of *initiating* an appropriate procedure for that purpose."¹⁸⁴ Similarly, in the World War II selective service cases, *Falbo v. United States*¹⁸⁵ and *Estep v. United States*,¹⁸⁶ the Court upheld a statutory scheme that required draft inductees to challenge their induction classification before the local induction board; Falbo failed to report for his assignment and when he was prosecuted, he was barred from defending his failure to report by challenging his classification in a federal court. Estep also challenged his classification status in front of the local board; after losing his challenge, he reported for induction but refused to be inducted, after which he too was convicted of failing to report and submit to induction. The Court held that Estep was entitled to raise as a defense to prosecution the local board's lack of jurisdiction:

If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. . . . In all such cases its action would be lawless and beyond its jurisdiction.¹⁸⁷

This holding did not, however, give the federal courts the authority to relitigate the factual issues inherent in the classification.¹⁸⁸

The ultimate statement of this principle is *Herrera v. Collins*,¹⁸⁹ in which the Court denied relief to a death row inmate who presented a freestanding claim of innocence as a ground for habeas relief. Herrera conceded that his double murder

¹⁸² 137 F.2d 698 (D.C. Cir. 1943).

¹⁸³ 148 F.2d 857 (D.C. Cir. 1945).

¹⁸⁴ *Id.* at 864–65.

¹⁸⁵ 320 U.S. 549 (1944).

¹⁸⁶ 327 U.S. 114 (1946).

¹⁸⁷ *Id.* at 121.

¹⁸⁸ *Id.* at 122 ("The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.").

¹⁸⁹ 506 U.S. 390 (1993).

trial had been free of error; however, his habeas petition presented “newly” discovered evidence in the form of a deathbed confession by his brother that purportedly proved his innocence.¹⁹⁰ In rejecting Herrera’s petition, Chief Justice Rehnquist explained that claims of innocence based on newly discovered evidence have never been cognizable on habeas corpus review, because “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.”¹⁹¹ Applied to the Guantanamo detainees, *Herrera* reinforces the conclusion that the availability of habeas corpus review does not mean that federal courts will be deciding the underlying factual matters relating to combatant status.

There are two reasons one might think that *Herrera* is inapplicable to the Guantanamo detainees. First, *Herrera* involved a defendant who had been convicted of murder after an admittedly fair trial. Justice O’Connor, joined by Justice Kennedy, concurred in the majority opinion, but wrote separately to emphasize that Herrera was a “legally guilty” person “who, refusing to accept the jury’s verdict, demands a hearing in which to have his culpability determined once again.”¹⁹² Justice Scalia, joined by Justice Thomas, also placed significance on the fact that Herrera had been convicted “after a full and fair trial.”¹⁹³ The Guantanamo detainees, on the other hand, have not been convicted of anything and are not “legally guilty” in any sense.

Second, at least six Justices were willing to accept that the Constitution would forbid the execution of a factually innocent person upon a truly persuasive showing of innocence.¹⁹⁴ From a vote-counting perspective, therefore, *Herrera*

¹⁹⁰ *Id.* at 393.

¹⁹¹ *Id.* at 400. *But see* Steiker, *supra* note 177, at 385–88 (arguing that federal habeas jurisprudence does in fact recognize bare innocence claims where “state courts have refused to entertain a claim . . . based on newly discovered evidence”).

¹⁹² *Herrera*, 506 U.S. at 419–20 (O’Connor, J., concurring).

¹⁹³ *Id.* at 427 (Scalia, J., concurring).

¹⁹⁴ *See id.* at 419 (O’Connor, J., concurring) (“I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.”); *id.* at 429 (White, J., concurring) (“I assume that a persuasive showing of ‘actual innocence’ made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.”); *id.* at 430 (Blackmun, J., dissenting) (“Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent.”) (citations omitted); *see also id.* at 417.

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.

Id.

leaves open the possibility of an actual innocence claim — just not on Herrera's pathetic showing.

But the first point — Herrera's fair trial as a basis for distinguishing *Herrera* from the detainees' situation — is based on too restrictive a reading of *Herrera*. The proposition of law that *Herrera* stands for (to the extent these concurrences should be understood as part of the holding) is that when there is no dispute that a person has received the process due to him or her under the circumstances, then the relevant status of that person has been established, and the federal courts, on habeas review, do not sit to revisit that status. With regard to criminal procedure, the process that is due is set forth in the Bill of Rights,¹⁹⁵ including the requirement that every element of the crime be proven beyond a reasonable doubt.¹⁹⁶ The Texas court that convicted Herrera met its constitutional obligations by providing him with a trial free from any constitutional error. In other words, the fact that Herrera was convicted in a procedurally fair trial is relevant as establishing a standard the government had to meet only because the Constitution required that those standards be met. Because the Guantanamo detainees are not being imprisoned as convicted criminals, they need not have been given a full-blown trial resulting in a judicial declaration of guilt beyond a reasonable doubt to apply *Herrera*'s reasoning. Rather, if we assume that the detainees received the appropriate due process, whether through the initial screening process described by Secretary Rumsfeld or through the formal hearings ordered by Deputy Defense Secretary Paul Wolfowitz,¹⁹⁷ then *Herrera* would apply because the detainees would have been determined to be combatants through a procedurally fair process.

On the second point — the theoretical possibility of a showing of actual innocence — no court since *Herrera* has recognized an instance of a freestanding claim of innocence, and it seems unlikely that a Guantanamo detainee would be able to meet the standard required to make such a showing. Justice White's concurrence suggested that, at a minimum, a petitioner would have to show that no rational trier of fact could have found him guilty.¹⁹⁸ That standard, derived from *Jackson v. Virginia*,¹⁹⁹ governs sufficiency of evidence review in criminal appeals. Because the government has the burden of proving guilt beyond a reasonable doubt in criminal cases,²⁰⁰ a habeas petitioner arguably could have to meet an even higher standard to prevail on an actual innocence claim in a setting where the government does not have the burden of proof beyond a reasonable doubt. This is true because the burden of proof distributes the risk of erroneous convictions and erroneous

¹⁹⁵ See *Medina v. California*, 505 U.S. 437, 443–44 (1992).

¹⁹⁶ See *In re Winship*, 397 U.S. 358, 364 (1970).

¹⁹⁷ See *infra* Part II.B.

¹⁹⁸ *Herrera*, 506 U.S. at 429 (White, J., concurring).

¹⁹⁹ 443 U.S. 307, 324 (1979).

²⁰⁰ See *In re Winship*, 397 U.S. 358.

acquittals: the higher the burden of proof, the less risk of erroneous conviction but the greater risk of erroneous acquittal.²⁰¹ Even in a setting where society has deemed an erroneous conviction far worse than an erroneous acquittal,²⁰² a petitioner seeking relief based on a freestanding claim of innocence has a high threshold to meet before the Court will even consider hearing the claim. Assuming that the government has *some* basis for concluding that the detainee was a combatant, any evidence that the detainee could present to illustrate his non-combatant status would tend only to contradict the government's evidence, in which case it could hardly be said that no rational person could have concluded that the government's classification was erroneous.

One other aspect of *Herrera* is worth considering. *Herrera* did not merely seek to relitigate the issue of his innocence; rather, he wanted to have newly discovered evidence of his innocence considered in a new forum.²⁰³ In rejecting *Herrera*'s argument that he was entitled to a new trial based on his showing of actual innocence, the Court relied on the fact that the overwhelming majority of states did have procedures for seeking new trials based on newly discovered evidence.²⁰⁴ While some of those states, including Texas, imposed stringent time limits on such motions,²⁰⁵ the Court was persuaded that the existence of such procedures — along with the possibility of executive clemency — provided sufficient safeguards so as not to offend “fundamental fairness.”²⁰⁶ Yet, the combatant status hearings more than satisfy this reasoning. Because the hearings are to be held annually,²⁰⁷ detainees will always have an opportunity to present newly discovered evidence of their noncombatant status to the review board. Indeed, the detainees are in a more favorable position than state court defendants in this regard because the state court defendants must move successfully for a new trial, whereas the detainees get a new hearing every year.

B. Due Process Claims

The most obvious claim for the detainees to raise on habeas review would be that their continued detention violates their right to due process, as guaranteed by

²⁰¹ See, e.g., Tung Yin, *The Probative Values and Pitfalls of Drug Courier Profiles as Probabilistic Evidence*, 5 TEX. F. ON C.L. & C.R. 141, 163–64 (2000).

²⁰² Hence, the aphorism that “[i]t is better to let ten guilty persons go free than to convict one innocent person.” *Id.* at 164 (citation omitted).

²⁰³ *Herrera*, 506 U.S. at 396.

²⁰⁴ *Id.* at 411 & n.11.

²⁰⁵ Texas, for example, required that such motions be brought within thirty days of judgment. *Id.* at 400.

²⁰⁶ *Id.* at 411.

²⁰⁷ See, e.g., *No Day in Court for Some Detainees?*, L.A. TIMES, July 2, 2004, at A20.

the Fifth Amendment.²⁰⁸ Such a claim would require the resolution of two issues: whether the detainees have any due process rights, and if so, the substance of those due process rights.

1. Do Nonresident Aliens Have Any Constitutional Rights?

One of the heavy questions that the Court avoided in *Rasul* was whether nonresident aliens have any constitutional rights. The petitioners pushed this point in their petitions for certiorari, framing the third question presented:

Does the Due Process clause of the Fifth Amendment permit the United States to detain foreign nationals indefinitely, in solitary confinement, without charges and without recourse to any legal process, so long as they are held outside the “ultimate sovereignty” of the United States, even when they are held in territory over which the United States has exclusive jurisdiction and control?²⁰⁹

²⁰⁸ Other potential claims to be raised include ones based on the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention], and on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984).

However, federal courts have consistently held that the Geneva Convention is not self-executing because it relies upon diplomacy and international negotiation to resolve disputes over its application. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *overruled on other grounds*, 124 S. Ct. 2633 (2004); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972); *see also Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (holding that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War was not self-executing).

Similarly, courts have held that the Torture Convention is not self-executing. *See David P. Stewart, The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 467 (1991). The United States did enact a criminal statute, 18 U.S.C. §§ 2340–2340B (2000), to give force to the Torture Convention; however, that statute itself states that it is not to “be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.” 18 U.S.C. § 2340B (2000). Thus, under U.S. law, the Torture Convention is implemented as a criminal law.

Finally, to the extent that detainees want to litigate issues such as alleged torture or other mistreatment, such claims are most likely cognizable not as habeas claims, but rather constitutional torts under the *Bivens* doctrine. *See Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *See generally* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979).

²⁰⁹ Petition for a Writ of Certiorari at i–ii, *Rasul* (No. 03–334).

In support of that question presented, the petitioners relied upon *Asahi Metal Industry Co. v. Superior Court*,²¹⁰ in which the Court had held that a foreign company with no minimum contacts to California could not be haled into a California court to defend itself in a lawsuit brought by another foreign company involving events outside the United States.²¹¹

Ordinarily, in an exercise of judicial restraint, the Court will interpret an ambiguous statute to avoid a constitutional question if possible, at times to the point of adopting an unnaturally strained reading of the statute.²¹² In this instance, however, by interpreting the habeas statute to confer jurisdiction over habeas petitions brought by the detainees, the Court has actually set up a constitutional question, because now the court reviewing the habeas petition will have to determine whether nonresident aliens have any due process rights before moving on to determine whether those rights were violated.

The argument in favor of extraterritorial application of the Bill of Rights is summed up by Louis Henkin, who writes, “If constitutional provisions apply to both aliens and citizens at home, why not to both aliens and citizens abroad?”²¹³ However, as a matter of doctrine, not all constitutional rights apply extraterritorially, at least with regard to aliens. In *United States v. Verdugo-Urquidez*,²¹⁴ the Court held that a Mexican national who had been tried in the United States could not raise a Fourth Amendment challenge to a search of his home in Mexico because the Fourth Amendment’s protection of “the people” from unreasonable searches and seizures did not apply to foreign nationals outside the country.²¹⁵ The Court noted that the Constitution used the term “the people” at various points, such as the Preamble and the First, Second, Fourth, Ninth, and Tenth Amendments — but not the Fifth and Sixth Amendments, which use the terms “person” or “accused”²¹⁶ — suggesting that “the people” denotes, roughly speaking, the American public.²¹⁷

The best that can be said is that the Court has been unclear about whether the Due Process Clause of the Constitution applies outside the United States. The

²¹⁰ 480 U.S. 102, 113 (1987).

²¹¹ See Petition for a Writ of Certiorari at 24, *Rasul* (No. 03-334).

²¹² See, e.g., *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 did not eliminate judicial review via habeas corpus of deportation matters despite an amendment entitled “Elimination of Custody Review by Habeas Corpus”).

²¹³ Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 24 (1985); see also *Reid v. Covert*, 354 U.S. 1, 6 (1957).

²¹⁴ 494 U.S. 259 (1990).

²¹⁵ *Id.* at 274–75.

²¹⁶ *Id.* at 266.

²¹⁷ *Id.* at 265.

Insular Cases,²¹⁸ for example, stand for the proposition that only “fundamental” constitutional rights, not every provision of the Constitution, applies to territory acquired through conquest. Thus, unincorporated territories did not have to abide by the requirements of trial by jury or indictment by a grand jury. Similarly, *Johnson v. Eisentrager*,²¹⁹ while cited for the proposition that nonresident enemy aliens have no Fifth Amendment rights outside the United States,²²⁰ actually can be read more narrowly to state only that the trial rights secured by the Fifth and Sixth Amendments would not be extended in such circumstances because the aliens have no legal vehicle to press such claims.²²¹ These cases need not foreclose the possibility that the Due Process Clause applies outside the U.S. territorial limits.²²²

The distinction between “rights” and “limitations” may aid in understanding *Eisentrager* and the *Insular Cases* on the one hand, and *Rasul* on the other, with respect to the Due Process Clause. The Framers thought that no Bill of Rights was necessary because the Constitution established a national government of limited powers.²²³ But what the Bill of Rights has established are judicially enforceable rights for those who can claim them. Thus, the “people” (meaning, as *Verdugo-Urquidez* suggests, the American community, a group broader than citizens) can enforce the right to be free from unreasonable searches and seizures by pointing to the Fourth Amendment, even though, if Alexander Hamilton and company were right, no such amendment was necessary to keep the federal government from having the power to conduct searches or seizures at any time.²²⁴

But sometimes the government is still bound by limitations despite the absence of anyone to enforce that limitation. For example, the Constitution requires

²¹⁸ *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

²¹⁹ 339 U.S. 763 (1950).

²²⁰ *See, e.g., Verdugo-Urquidez*, 494 U.S. at 269.

²²¹ *See Johnson v. Eisentrager*, 339 U.S. 763, 782–83 (1950). Similarly, in *In re Ross*, 140 U.S. 453 (1891), the Court upheld a so-called “consular trial” of an American citizen for murdering a ship’s officer while in Japanese waters. The Court held that the “Constitution can have no operation in another country.” *Id.*

²²² *Cf. Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (“None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause.”); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (“The [D]ue [P]rocess [C]lause . . . was found . . . as a limitation upon the executive, legislative and judicial powers of the Federal Government.”); *see also* Ronald Dworkin, *What the Court Really Said*, N.Y. REV. OF BOOKS, Aug. 12, 2004, available at <http://www.nybook.com/article/17293> (“The historical core of due process, and its most fundamental point, is the right of individuals not to be arbitrarily and indefinitely imprisoned; if noncitizens across the world have any due process protection against our government at all, they have that right.”).

²²³ THE FEDERALIST NO. 84 (Alexander Hamilton).

²²⁴ *Id.* at 513–14 (Clinton Rossiter ed., 1961).

Congress to publish “a regular Statement and Account of the Receipts and Expenditures of all public Money.”²²⁵ Yet, in *United States v. Richardson*,²²⁶ the Court held that a federal taxpayer had no standing to litigate the CIA’s failure to provide a public accounting; and indeed, the opinion strongly suggests that no one would have standing to bring such a claim.²²⁷ Of course, there are some significant differences between a lack of statutory jurisdiction (the situation in *Eisenrager*) and a lack of standing (the basis for *Richardson*); however, the key similarity is that in both situations, there is an arguable obligation on the part of the government that is not subject to judicial enforcement.

As another example, suppose that the President ordered the military to launch an unprovoked nuclear strike against France. Does the President have the constitutional authority to attack an allied nation without a congressional declaration of war?²²⁸ If the answer is that he does not, is that because the citizens and the government of France have a “right” not to be attacked absent a congressional declaration of war?²²⁹

²²⁵ U.S. CONST. art. I, § 9, cl. 7.

²²⁶ 418 U.S. 166 (1974).

²²⁷ See *id.* at 178–80.

²²⁸ The exact nature of the President’s unilateral war-making power is somewhat murky, with some scholars such as John Yoo arguing that the Framers intended for the President to take the initiative, checked by Congress through the twin powers of funding and impeachment, see, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996), while others take the more conventional view that, subject to the very narrow exception of repelling an actual attack, see *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), the President must wait for Congress to authorize war, see, e.g., LOUIS FISHER, *PRESIDENTIAL WAR POWER* 11 (1995) (“The authority to initiate war lay with Congress. The President could act unilaterally only in one area: to repel sudden attacks.”). Of course, the President might be able to offer some rationale triggering the “repel doctrine” — perhaps the President believes that a group of anti-American military officers are about to stage a coup, with plans to use nuclear weapons against the United States. But such rationale is sufficiently far-fetched that we need not tarry with it here.

²²⁹ Cf. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 307 n.** (2d ed. 1996) (“Surely, someone in Vietnam, in Panama, or in the Persian Gulf could not object that the President of the United States had no constitutional authority to wage war there.”). Incidentally, this rights/limitations distinction also demonstrates the flaw in the detainees’ reliance on *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), to support their claim for due process rights. Although the Court spoke in that case of due process rights, the underlying theory of personal jurisdiction upon which *Asahi Metal* relies is that all courts (federal and state) have inherent limitations placed upon them by the Due Process Clause. We need not conclude that *Asahi Metal* had any constitutional rights to decide that California state courts could not exercise personal jurisdiction over it because “[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant.” *Id.* at 108. The difference between *Asahi Metal* and the nuclear strike on France hypothetical is that in the former, the Court was

We can call these “rights” that cannot be enforced, or we can call them “limitations on government,” but once we say that “rights” and “limitations on government” are, in some sense, opposite sides of the same coin — but with one important difference having to do with judicial enforceability — then *Rasul*’s impact becomes clear. Absent access to the federal courts, the question of what due process is owed is committed functionally to the President. By interpreting the habeas statute as covering claims by the Guantanamo detainees, *Rasul*, in effect, extends to such aliens the right to litigate the scope of that limitation in court.

2. What Kind of Process Is Due?

Assuming that nonresident aliens such as the Guantanamo detainees are entitled to *some* due process, the question that will be presented on a habeas petition alleging detention in violation of the Fifth Amendment is whether the petitioner received the process he was due.

In this context, due process refers to the “constraints on governmental decisions which deprive individuals of ‘liberty’ . . . interests within the meaning of the Due Process Clause of the Fifth . . . Amendment.”²³⁰ The constraints consist of procedures that the government must follow, generally before taking the action, and include “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”²³¹ A detainee claiming that his or her detention violates due process will have to show that he or she was deprived of his or her liberty by being classified as an enemy combatant, and hence detained, without adequate due process. But due process is a flexible concept that is highly context-dependent.²³² Under *Mathews v. Eldridge*,²³³ in assessing whether a claimant has been deprived of due process

being asked to take some action against nonresident aliens that it lacked the power to do, whereas in the latter, the Court is being asked to prevent another branch of government from taking some action that the other branch lacks the power to take. Nonresident aliens may lack “minimum contacts” with this country, which is why they cannot be haled into court, but it may also be why they may not have freestanding constitutional rights even though the Due Process Clause limits government power.

²³⁰ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A detainee might also raise a substantive due process claim, but such a claim is unlikely to succeed separate from a procedural due process claim. To prevail, a detainee would have to show that his detention as an enemy combatant “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952). Because wartime detention of enemy combatants is an accepted practice of war, *see, e.g., Geneva Convention, supra* note 208, it is difficult to see how such detention can shock the conscience.

²³¹ *Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²³² *See id.* at 348; *see also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320–21 (1985); *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

²³³ 424 U.S. 319 (1976).

based on the failure to use a particular procedure, the Court applies a balancing test, weighing three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²³⁴

Essentially, *Eldridge* calls for a utilitarian assessment of the efficacy of additional procedures weighed against the cost of those procedures, all in the context of the interest at stake.²³⁵ Thus, in *Eldridge*, the Court held that due process did not entitle a disability benefits recipient to an evidentiary hearing before the termination of those benefits. The cost of an erroneous deprivation was likely to be significant, though less so than the termination of welfare payments,²³⁶ for which the Court had previously held that evidentiary hearings were required.²³⁷ With the disability benefits, however, the Court concluded that pre-termination evidentiary hearings would be of limited value because the bulk of the cases would be decided on "routine, standard, and unbiased medical reports" for which an evidentiary hearing would typically be unnecessary.²³⁸ Finally, the burden on the government of having to hold pre-termination hearings would be considerable because disability benefit recipients would have the incentive to demand such hearings, thereby continuing to draw their full benefits.²³⁹

Applying the *Eldridge* test here, the first factor — the private interest involved — obviously weighs strongly in favor of the detainees, as it is their personal liberty at stake.²⁴⁰ The second and third factors depend on the particular procedures used and

²³⁴ *Id.* at 335.

²³⁵ Jerry Mashaw has criticized this focus on cost-benefit analysis as ignoring other values, such as human dignity, that are also vindicated by providing appropriate due process. See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

²³⁶ *Eldridge*, 424 U.S. at 341.

²³⁷ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

²³⁸ *Eldridge*, 424 U.S. at 344 (quoting *Richardson v. Perales*, 402 U.S. 389, 404 (1971)).

²³⁹ *Id.* at 347. The Court, however, made clear that fiscal cost was not the only kind of burden to be considered. *Id.* at 348.

²⁴⁰ See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 556–58 (1974). It may seem somewhat incongruous to use a test devised in a disability benefits case in this vastly different context of wartime detention. However, since *Eldridge*, the Court has consistently emphasized that due process is flexible and has used the *Eldridge* test. See, e.g., *Connecticut v. Doeher*, 501 U.S. 1, 2 (1991); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991).

those to be considered to replace or supplement the actual procedures. The methodology I will use is to consider the various elements of a fair hearing, as outlined by Judge Friendly: (1) lack of bias by the judging party, (2) notice, (3) opportunity to challenge, (4) right to present witnesses, (5) right to confront the evidence, (6) right to have the decision based only on the evidence presented, (7) counsel, (8) making of a record, (9) statement of reasons behind the ultimate decision, (10) public attendance, and (11) judicial review.²⁴¹ To be clear, Judge Friendly did not assert that every element needed to be provided in every hearing; to the contrary, he suggested “that the elements of a fair hearing should not be considered separately; if an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another.”²⁴²

a. Initial detention and classification in Afghanistan

Perhaps the most frustrating aspect of the complete lack of guidance given by Justice Stevens’s majority opinion in *Rasul* is whether the federal courts would have to entertain habeas petitions filed on behalf of prisoners shortly after their capture that argue that they were entitled to some form of due process prior to being captured. Of course, the actual likelihood of such immediate filings is exceedingly low, due in part to the fog of war and the difficulty of obtaining real-time information about the results of military encounters. Still, *Rasul* leaves open the theoretical possibility of Article III courts being called upon to dictate procedures that must be followed before persons suspected of being enemy combatants can be detained, and the absence of a satisfactory answer may reveal an analytic flaw in *Rasul*, even though the flaw is unlikely to be exploited.

As it turns out, modern administrative law comes to the rescue. The Court has consistently upheld the ability of federal agencies to act first and hold hearings later in a variety of situations where an emergency threatens public safety.²⁴³ Thus, the Secretary of the Interior was able to issue an immediate cessation order to mining companies before holding a hearing, where continued mining posed a risk of a mining disaster that threatened public safety.²⁴⁴ The local department of motor vehicles was able to revoke drivers’ licenses before holding a hearing, where the drivers posed risks to society.²⁴⁵ School officials, who ordinarily must provide students facing discipline with notice of charges and an opportunity to explain, were

²⁴¹ Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1279–95 (1975).

²⁴² *Id.* at 1279.

²⁴³ See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 299–300 (1981) (“The Court has often acknowledged, however, that summary administrative action may be justified in emergency situations.”).

²⁴⁴ *Id.* at 300–01.

²⁴⁵ *Dixon v. Love*, 431 U.S. 105, 115 (1977).

nevertheless able to immediately remove, without notice or hearing, "[s]tudents whose presence pose[d] a continuing danger to persons or property or an ongoing threat of disrupting the academic process."²⁴⁶

While many of these situations predate the *Mathews v. Eldridge* balancing test²⁴⁷ and appear to consider only the potential harm to the public in delaying action to address the perceived emergency, they are in fact consistent with *Eldridge*. The essence of *Eldridge* is that because due process is flexible, the circumstances dictate the timing and substance of hearings. The emergency cases represent determinations that, under the circumstances, no pre-deprivation hearing is necessary.

Notice, however, that the Court has construed "emergency" and "public safety" generously. An order directing a gasoline station to abate the nuisance of gas fumes spewing from a leaky gas storage tank presented a clear instance of government action to protect a large segment of the public from some imminent harm, such as a gas explosion.²⁴⁸ Other instances are less clear. For example, in an oft-criticized decision, the Court held that emergency situations include the "need of the government promptly to secure its revenues," thus justifying summary action to collect tax payments.²⁴⁹ A bank president indicted, but not yet convicted, for making false statements also could be suspended from running the FDIC-insured bank because Congress had determined that "prompt suspension of indicted bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions."²⁵⁰ The Court has even stated (with all apparent seriousness) that a racing horse that tested positive for an illegal drug posed such a grave threat to public safety as to warrant emergency suspension of the horse trainer.²⁵¹

Given such precedents, there should be little doubt that a battlefield situation constitutes an emergency situation that warrants the loss of liberty inherent in capture without resort to a prior hearing. The pervasive threat of violence has often justified the delaying or deferring of due process to such time when the threat no longer exists, even when the population in danger is relatively discrete and confined,

²⁴⁶ *Goss v. Lopez*, 419 U.S. 565, 582 (1975); *see also* *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (upholding pre-hearing seizure of misbranded supplements); *Adams v. City of Milwaukee*, 228 U.S. 572 (1913) (upholding pre-hearing interdiction of milk obtained not in conformity with ordinance requiring tuberculin testing); *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (upholding pre-hearing seizure of contaminated food).

²⁴⁷ *Eldridge*, 424 U.S. at 335.

²⁴⁸ *See City of Newburgh v. Park Filling Station, Inc.*, 82 N.E.2d 39 (N.Y. 1948).

²⁴⁹ *Phillips v. Comm'r*, 283 U.S. 589, 596 (1931); *see also* *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977) (reaffirming *Phillips* because "the very existence of government depends upon the prompt collection of the revenues").

²⁵⁰ *FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988).

²⁵¹ *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979).

such as prison inmates.²⁵² The danger posed to American soldiers on an active battlefield should fit comfortably within the emergency exception to pre-detention due process.²⁵³

However, the emergency situation cases do require that a hearing be given as soon as practical after the emergency action has been taken,²⁵⁴ and therefore, at some point after being taken off the battlefield, the detainees would be entitled to some due process (and it may be a two- or three-stage process). Let us consider the procedures used to classify them at that initial stage. According to Secretary Rumsfeld, approximately 10,000 prisoners were initially detained in Afghanistan.²⁵⁵ Only ten percent were brought to Guantanamo Bay,²⁵⁶ based preliminarily on individual interviews conducted “by a team of people, three or four or five people — sometimes Department of Justice, sometimes Army, mixture of Army, sometimes CIA, sometimes whatever.”²⁵⁷ In some cases, “when doubt [was] raised about [a detainee’s status] — a process then [was] a more elaborate one,” involving additional interviews.²⁵⁸

As far as due process goes, there was not very much. The detainees selected to be sent to Guantanamo Bay had no legal counsel, no apparent right to contest the evidence against them, and no apparent right to call witnesses or present evidence. The persons making the decision to send an individual to Guantanamo Bay may have been involved in the capture itself.²⁵⁹ Yet, in the context of the circumstances, this process might have been adequate. The Court has upheld minimal, preliminary

²⁵² See *LaBatt v. Twomey*, 513 F.2d 641, 645 (7th Cir. 1975) (upholding emergency segregation of prisoners to preserve the safety and integrity of the institution); *Hodges v. Klein*, 421 F. Supp. 1224, 1232 (D.N.J. 1976) (upholding emergency segregation of prison inmates during tense confrontation), *aff’d*, 562 F.2d 276 (3d Cir. 1977); see also *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1125–26 (D. Haw. 1976) (upholding, in part, emergency detention of mentally ill persons prone to violence).

²⁵³ *Fuentes v. Shevin*, 407 U.S. 67, 91–92 (1972) (holding the fact of war itself has justified pre-hearing seizures of property “to meet the needs of a national war effort” (citations omitted)).

²⁵⁴ See, e.g., *Dixon v. Love*, 431 U.S. 105, 112 (1977).

²⁵⁵ See *Defense Secretary Rumsfeld Speaks to Miami Chamber of Commerce*, CNN Transcripts, at <http://premium.asia.cnn.com/TRANSCRIPTS/0402/13/se.02.html> (Feb. 13, 2004).

²⁵⁶ *Id.*

²⁵⁷ See Transcript of Rumsfeld, Myers Pentagon Briefing, U.S. Department of Defense, at <http://usinfo.state.gov/regional/nea/sasia/afghan/text/0208dod.htm> (Feb. 8, 2002) [hereinafter Rumsfeld Pentagon Briefing]; see also Ruth Wedgwood, *War Comes to Court*, WALL ST. J., Apr. 20, 2004, at A20 (op-ed noting that these decisions occurred following “an intricate multilevel review process involving lawyers, intelligence officers and field commanders”).

²⁵⁸ Rumsfeld Pentagon Briefing, *supra* note 257.

²⁵⁹ Prior participation in the subject matter of the hearing can constitute bias. See *Arnett v. Kennedy*, 416 U.S. 134, 155 & n.21 (1974); *id.* at 196 (White, J., dissenting).

procedures that were followed by subsequent, more rigorous procedures;²⁶⁰ thus, the due process claim will turn on the procedures used to justify the continuing detention.

b. Continuing detention

For those detained at Camps X-Ray and Delta, more than two years passed before the government announced additional procedures for further evaluating their combatant status. Prior to the Court's decision in *Rasul*,²⁶¹ Secretary Rumsfeld announced plans for a review process, to take place at least annually, through which Guantanamo detainees could seek release from Camp Delta.²⁶² The hearings would not take place in the federal courts, but rather would be conducted by a board comprised of military officers, with the final decision to be made by the Naval Secretary.²⁶³ On July 7, 2004, a little more than a week after the Court issued its decision in *Rasul*, the Defense Department issued an order that established the hearings.²⁶⁴ The key provisions include (a) the provision of an assigned military officer as "personal representative for the purpose of assisting the detainee in connection with the review process";²⁶⁵ (b) "three neutral commissioned officers" as the tribunal;²⁶⁶ (c) the right to call "reasonably available" witnesses;²⁶⁷ (d) the inapplicability of the rules of evidence;²⁶⁸ and (e) the right to testify and the right not to be forced to testify.²⁶⁹ If the tribunal determines that a detainee should not be classified an enemy combatant, the tribunal will prepare a written report to be sent to the Secretary of Defense, who will coordinate the detainee's release with the Secretary of State.²⁷⁰

How do these hearings measure up against Judge Friendly's list, and would they pass muster under the *Mathews v. Eldridge* balancing test? To begin with, the hearings clearly satisfy the elements of opportunity to present reasons against the

²⁶⁰ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 96–97 (1972); *Bell v. Burson*, 402 U.S. 535, 540 (1971).

²⁶¹ Also prior to oral argument in *Rasul*, which took place on April 20, 2004.

²⁶² See Jess Bravin, *U.S. To Unveil Review System for Guantanamo Detainees*, WALL. ST. J., June 21, 2004, at B1.

²⁶³ *Id.*

²⁶⁴ See Order Establishing Combatant Status Review Tribunal, Memorandum for the Secretary of the Navy, July 7, 2004 (on file with author) [hereinafter Tribunal Order].

²⁶⁵ *Id.* at para. c.

²⁶⁶ *Id.* at para. e.

²⁶⁷ *Id.* at para. g(8). The Tribunal Order provides that witnesses who are U.S. military personnel will be deemed not reasonably available if their commanders determine that "their presence at a hearing would affect combat or support operations"; written statements may be used in such circumstances. *Id.*

²⁶⁸ *Id.* at para. g(9).

²⁶⁹ *Id.* at para. g(10), (11).

²⁷⁰ *Id.* at para. i.

classification (#3),²⁷¹ right to have a decision based on the evidence (#6), the making of a record (#8),²⁷² the statement of reasons (#9),²⁷³ and judicial review (#11).²⁷⁴ That leaves five major elements to examine. Even though conventional wisdom is that the government suffered a major defeat in *Rasul*, the Court's past due process cases suggest that these hearings may well pass constitutional muster.

Unbiased tribunal (#1): The most important concern one might have about the hearing boards is whether the board members will be biased against the detainees. A biased decision maker violates due process.²⁷⁵ Bias can take the form of a personal interest (financial or otherwise) in the matter,²⁷⁶ personal bias and prejudice,²⁷⁷ or prior involvement in the matter.²⁷⁸ Because the order establishing the hearing boards specifies that the decision makers are to be "neutral commissioned officers" who were not involved in the capture of the detainee, interrogation, or initial decision to classify the detainee as a combatant, there is no issue of prior involvement in the matter.²⁷⁹

Because the order specifies that the board members are to be "neutral," the due process question of bias should be answered, at least facially. The Court has at various times used "neutral" to describe decision makers in a way that suggests it to be synonymous with "unbiased" or "impartial."²⁸⁰ If the order is followed, there

²⁷¹ *Id.* at para. g(10).

²⁷² *Id.* at para. g(3).

²⁷³ *Id.* at para. b.

²⁷⁴ The Defense Department order specifically directs the military to inform the detainees of the right to petition for a writ of habeas corpus. *Id.* at para. b.

²⁷⁵ *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

²⁷⁶ *In re Murchison*, 349 U.S. 133, 136–37 (1955) (“[N]o man can be a judge in his own case.”); *Tumey v. Ohio*, 273 U.S. 510 (1927) (finding a violation of due process where a mayor shared in traffic fines issued by mayor’s court); *see also* 28 U.S.C. § 455(b)(4) (2000) (requiring federal judges to disqualify themselves where they or close relatives have a financial or other interest “that could be substantially affected by the outcome of the proceeding”).

²⁷⁷ *See, e.g., United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989) (holding that remarks by judge that Colombians “only killed 32 Chief Judges in that nation. Their regard for the judicial system, the men who run their laws, I’m glad I’m in America” demonstrated extrajudicial bias); *see also* 28 U.S.C. § 455(b)(1) (2000).

²⁷⁸ *See* 28 U.S.C. § 455(b)(2)–(3) (2000).

²⁷⁹ Tribunal Order, *supra* note 266 and accompanying text.

²⁸⁰ *See, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding that American citizen detained as enemy combatant had to have “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”); *Demore v. Kim*, 538 U.S. 510, 549 (2003) (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987), for the proposition that pre-trial detention without bail required a hearing before a “neutral decisionmaker”); *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 775 (2002) (describing maritime agency hearing process as “involv[ing] a neutral decisionmaker”); *Florida v. White*, 526 U.S. 559, 572 (1999) (equating “neutral decisionmaker” with one who has no pecuniary interest in the outcome of the matter) (Stevens, J., dissenting).

will be no due process concern about the impartiality of the decision makers. If a detainee could show that a board member was biased, the detainee would be entitled on habeas to challenge the board decision on the ground that the board violated the terms of the order.²⁸¹ Of course, if the government interprets “neutral” in some way other than “unbiased” or “impartial,” then the hearing boards would almost certainly fail to provide due process.²⁸²

Thus, the due process problem relating to potential bias is practical. In the event that a board member had a bias, would the detainee be in a position to discover this bias and to acquire evidence to prove it? Comparison to the Uniform Code of Military Justice is instructive. Prosecution of military personnel for violations of the Uniform Code takes place in courts-martial in front of military judges who do not have life tenure. These military judges are themselves soldiers who are accountable to superior officers.

The Uniform Code of Military Justice strictly prohibits unlawful command influence: “No person subject to [the Uniform Code of Military Justice] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof.”²⁸³ This prohibition, however, is functionally equivalent to the Tribunal Order’s declaration that the hearing board shall be comprised of “neutral” officers. There is no mechanism for ensuring that the prohibition will be observed and, in fact, the reported cases of unlawful command influence tend to be instances where high ranking officers made public statements.²⁸⁴

Thus, from a practical perspective, one significant concern in military proceedings will be the degree of insulation that the hearing board officers have from command pressure.²⁸⁵ For example, in *Patton v. Yount*,²⁸⁶ Justices Stevens and Brennan argued, in dissent, that due process required an “independent review in a case that arouses the passions of the local community in which an elected judge is required to preside. Unlike an appointed federal judge with life tenure, an elected judge has reason to be concerned about the community’s reaction to his disposition of highly publicized cases.”²⁸⁷ While military officers need not worry about re-

²⁸¹ Cf. *Estep v. United States*, 327 U.S. 114, 120–21 (1946) (allowing such a challenge to an administrative determination in a subsequent criminal prosecution).

²⁸² See William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 617 (1971) (“The ultimate question raised by either a bias or an interest challenge is whether the adjudicating official or tribunal will (or did) reach a decision free of improper influences and on the basis of the facts presented and arguments made at the hearing.”).

²⁸³ 10 U.S.C. § 837 (2000).

²⁸⁴ See, e.g., *United States v. Zagar*, 18 C.M.R. 34, 40 (C.M.A. 1955).

²⁸⁵ See *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (“Command influence is the mortal enemy of military justice.”).

²⁸⁶ 467 U.S. 1025 (1984).

²⁸⁷ *Id.* at 1052–53 (Stevens, J., dissenting).

election, they may labor under command pressure, either direct or indirect: will the officers feel capable of declaring a particular detainee to be a noncombatant if they feel that is the proper classification?

What alternative would improve the accuracy of the fact-finding process by reducing the likelihood of such hidden bias, yet not unduly burden the government's interest? The concern here is not with the facial neutrality of the board members, for that is provided for by the order, but rather the practical ability to determine whether the order has been met with compliance. One alternative is to have decision makers with fixed terms of office (or even life tenure), though in *Weiss v. United States*,²⁸⁸ the Court rejected a due process challenge to the composition of courts-martial. The Court concluded that, despite a lack of even fixed terms, "the applicable provisions of the [Uniform Code of Military Justice], and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."²⁸⁹ In particular, the military judges are overseen by the Judge Advocates General, "who have no interest in the outcome of a particular court-martial," and there are rules against unlawful command influence.²⁹⁰ Moreover, from a normative perspective, such an alternative would be grossly inflexible because the government might not need the services of the board members for the entire fixed term of office.²⁹¹ If the term of office were kept short to alleviate the inflexibility problem, it would not address the concern of undue influence because then the administration would be able to replace quickly those decision makers with whose decisions it disagreed.

A second alternative procedure would be to have the hearings chaired by civilians, not military personnel, on the theory that civilians would be less subject to influence and pressure.²⁹² The general argument against having civilian judges in military proceedings is that non-military personnel will generally be unfamiliar "with 'extremely technical provisions of the Uniform Code [of Military Justice]

²⁸⁸ 510 U.S. 163 (1994).

²⁸⁹ *Id.* at 179.

²⁹⁰ *Id.* at 180 (citing Articles 26 and 37 of the Uniform Code of Military Justice, 10 U.S.C. §§ 826, 827 (2000)).

²⁹¹ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 118 (1982) (White, J., dissenting). Justice White argued that Congress could constitutionally create non-Article III bankruptcy courts because "Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life tenure would have severely limited Congress' future options." *Id.*

²⁹² See *Reid v. Covert*, 354 U.S. 1, 36 (1956) ("Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial . . . do not and cannot have the independence of . . . civilian judges.").

which have no analogs in civilian jurisprudence.”²⁹³ While the hearings involve neither substantive charges nor procedures set forth in the Uniform Code of Military Justice, they do involve questions for which an expertise in combat is required.²⁹⁴ Whether a particular person is a combatant based upon a given set of facts is something that military personnel are trained to determine during the heat of combat. This is not to say that civilians could not be trained to make the same determinations, but military personnel enjoy a decided advantage.

Notice (#2) and Knowing the Evidence Against Oneself (#5): These two elements are naturally considered together. Adequate notice of the charges — in this instance, the classification as an enemy combatant — along with the evidence against the detainee will enable the detainee to assert a meaningful defense.

The Tribunal Order states that the detainee will be provided advance “notice of the unclassified factual basis for the detainee’s designation as an enemy combatant.”²⁹⁵ In other words, the detainee will be provided with a summary of the evidence against him, rather than the evidence itself. Moreover, the summary will not refer to any classified information. While the detainee’s personal representative will have access to relevant classified material, the personal representative cannot share that information with the detainee.²⁹⁶

Here we can see some areas in which the Tribunal Order could be clarified, and other areas in which the order is problematic. First, how far in advance of the hearing is the notice and summary of evidence provided? Whether the amount of advance notice is reasonable may end up depending on the individual circumstances of a detainee’s case. If a detainee opts not to participate in the hearing, then even a day or two of advance notice should suffice. If, on the other hand, a detainee intends to present evidence, including witnesses who must be brought to Guantanamo Bay, a day or two of advance notice may be insufficient, especially if it will take longer than that to procure the witnesses.

Second, in any detainee’s case where the combatant determination rests in part on classified information, the detainee naturally will be disadvantaged in presenting

²⁹³ *Parisi v. Davidson*, 405 U.S. 34, 51 (1972) (Douglas, J., concurring) (quoting *Noyd v. Bond*, 395 U.S. 683, 696 (1969)). A second concern identified in *Parisi* was “the effect of judicial intervention on morale and military discipline.” *Id.* However, that concern focused on the effect of review of courts-martial by civilian courts, not the use of civilian judges. Indeed, the Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), which hears some appeals of courts-martial, consists entirely of civilians appointed by the President. 10 U.S.C. § 942(b)(1) (2000).

²⁹⁴ *Cf. infra* notes 336–42 (discussing how the personal representative assigned to each detainee can offset the absence of counsel due to the assumption that military officers will be conversant with the subject of combatant status).

²⁹⁵ Tribunal Order, *supra* note 264, at para. g(1).

²⁹⁶ *Id.* at para. c.

his case for not being a combatant.²⁹⁷ The general right to know the evidence against oneself and to refute that evidence is a staple of due process, even where there are national security secrets at stake. In federal criminal cases, for example, the Classified Information Procedures Act (CIPA) sets forth procedures for protecting classified material in cases where classified material might be relevant and probative to the defendant's case.²⁹⁸ Specifically, depending on the nature of the classified material, a court can order that the United States be allowed to substitute "a summary of the specific classified information."²⁹⁹ Classified information may be classified not just because of the material's substance, but also the means by which the information was gathered,³⁰⁰ which might provide a reason for keeping even a summary of the classified information from the detainee. However, at least in civilian cases, the balance struck allows defendants some access to classified information (or substitutions) upon a showing that it "is at least 'helpful to the defense of [the] accused.'"³⁰¹

A detainee might well be entitled to some kind of procedure analogous to CIPA. Whereas criminal defendants litigating CIPA issues are sometimes hampered by having to show that the classified material would be "helpful" without knowing what is in the classified material, here the government is already willing to allow the detainee's personal representative access to relevant classified material. Thus, the value to the detainee of knowing at least a summary of classified material, where that material is relevant to his classification as a combatant, probably significantly outweighs the incremental burden to the government of providing a detainee with that summary.

CIPA is not, however, free of controversy. The substitution provision, in particular, has been criticized for "chang[ing] admissible evidence into a different form, without consent of the defendant, for reasons unrelated to criminal justice concerns."³⁰² Because CIPA allows the government, in certain circumstances, to seek approval of substitutions *ex parte*, courts are put in the position of either deferring to the government's assessment of the adequacy of the substitution or

²⁹⁷ See *In re Guantanamo Detainee Cases*, Nos. CIV.A. 02-VC-0299 CKK et al., 2005 WL 195356 (D.D.C. Jan. 31, 2005) (holding that combatant status review hearings failed to provide due process by not providing access to classified information to detainees).

²⁹⁸ Pub. L. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. App. 3 §§ 1-16 (2000)).

²⁹⁹ 18 U.S.C. App. 3 § 6(c)(1)(B) (2000).

³⁰⁰ See *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) ("[T]he government's security interest in the conversation lies not so much in the contents of the conversations, as in the time, place, and nature of the government's ability to intercept the conversations at all.").

³⁰¹ *Id.* (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)).

³⁰² Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 306 (1985).

having to determine for themselves the adequacy without necessarily being as well informed about the issues as the parties.³⁰³ While those concerns would also be present if the combatant hearings were to include a CIPA-like provision to give the detainee a summary of classified material, the detainee would obviously be better off with the summary of the evidence than with nothing.

It is important to keep in mind that this assessment of the adequacy of the notice given and of the basis for the combatant classification is dependent on current facts. The government's interest in protecting secret intelligence sources and methods remains regardless of how many detainees there are to process, but the proposed CIPA-like provision could become significantly more burdensome as the number of prisoners increases. One can imagine that if there were 500,000 detainees challenging their combatant classification, the government might be hard-pressed to prepare a summary for each detainee, especially if the summaries required individual tailoring. In those circumstances, due process might well *not* require that the government provide any summaries, including summaries of unclassified information. Where, as here, there are fewer than 600 detainees, however, not providing such summaries is difficult to justify.

To call witnesses (#4): The detainees have the right to call witnesses, but that right is circumscribed by the requirement that the witnesses be "reasonably available,"³⁰⁴ with military commanders as the final arbiters of reasonable availability in the case of witnesses who are members of the armed forces.³⁰⁵ Where witnesses are not available, written statements can be used in lieu of live testimony.³⁰⁶ Thus, the question is whether the use of written statements rather than live witnesses violates due process.

Having witnesses appear before the hearing would unquestionably lead to more accurate results than reliance upon written statements. This is one reason appellate courts defer to factual findings based on credibility determinations; as the Court noted, "[f]ace to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded."³⁰⁷ Where a tribunal must rely upon a written statement, it is unable to assess the witness's

³⁰³ *Id.* at 314–15.

³⁰⁴ *See supra* note 267.

³⁰⁵ Of course, the Sixth Amendment guarantees various rights related to witnesses, notably compulsory process and confrontation, but those guarantees apply only in criminal trials. The Guantanamo detainees are being held not pursuant to criminal charges, but to the President's Commander-in-Chief power as battlefield captures.

³⁰⁶ *See, e.g.,* Patricia M. Wald, *Note From the Field: Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE H.R. & DEV. L.J. 217, 227 (2002).

³⁰⁷ *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 339 (1952) (quoting *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930)).

demeanor and credibility.³⁰⁸ Yet, problematically, credibility may be an issue in the detainee hearings. Consider former detainee Shafiq Rasul. Had he not been released, and instead had his case been heard by the hearing board, he presumably would have testified (as alleged in the petitioners' brief) that he was abducted by the Northern Alliance while in Pakistan to visit his aunt, explore his culture, and continue his computer studies.³⁰⁹ The U.S. government would have presented evidence (in person or written) that Rasul was a member of either Al Qaeda or the Taliban. Perhaps this factual dispute could be resolved based solely on Rasul's credibility.³¹⁰ But surely the result of the proceeding would be more accurate with live witnesses who could be cross-examined; written statements cannot be cross-examined. In some circumstances, the Court has held that where an agency "decision[] turn[s] on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."³¹¹ Yet, other courts, such as the United States Claims Court in *Peters v. United States*,³¹² have concluded that hearsay evidence, though not tested by cross-examination, nevertheless can be relied upon in agency hearings "so long as the evidence upon which the decision is ultimately based is substantial and has probative value."³¹³ Thus, the court upheld an agency's termination of a military supply clerk for bribery despite the fact that crucial evidence of bribery consisted of affidavits by four of the persons who had allegedly offered bribes. The court noted that the affidavits were signed and were against the interests of the affiants, and that the affiants had no motive to accuse Peters.³¹⁴

On the other hand, the burden on the government, requiring live witnesses, can be significant. Some members of the armed forces involved in the capture of detainees may have been killed in action, either in Afghanistan or Iraq.³¹⁵ Others may still be overseas fighting the war on terrorism. To force the government to call such soldiers away from military duty would, as Justice Jackson put it, harm morale

³⁰⁸ See, e.g., *California v. Green*, 399 U.S. 149, 198 (1970) (Brennan, J., dissenting); see also *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (noting that factual findings by district judges are entitled to deference even when not based on credibility determinations, but even greater deference when they are based on credibility determinations).

³⁰⁹ See *Al Odah v. United States*, 321 F.3d 1134, 1137 (2003).

³¹⁰ Note that such an approach would essentially force the detainee to testify, in contravention of the Order.

³¹¹ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); see also *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 276 (1987) (Stevens, J., dissenting) (noting "the critical role that cross-examination plays in accurate factfinding").

³¹² 408 F.2d 719 (Cl. Ct. 1969).

³¹³ See *id.* at 722 (quoting *Morelli v. United States*, 177 Ct. Cl. 848, 853-54 (1966)); cf. FED. R. EVID. 804(b)(2), (b)(3) (allowing hearsay in instances where the witness is "unavailable" and has made a statement "under belief of impending death" or "against interest").

³¹⁴ *Peters*, 408 F.2d at 724.

³¹⁵ Cf. FED. R. EVID. 804(a)(4) (defining declarant as unavailable if dead for purposes of hearsay exceptions).

by “allow[ing] the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”³¹⁶ The administrative burden on the government of arranging transportation for the active-duty soldiers while either suffering a loss of combat strength overseas or having to arrange for temporary replacements is also significant.³¹⁷ Where the military witness is not on active duty, however, the burden on the government is reduced largely to transporting the witness to Guantanamo Bay and other associated costs, and probably would swing the balance in favor of the detainee.

From a normative perspective, allowing the battlefield commanders to determine if military personnel are reasonably available is consistent with the general deference afforded the executive branch in national security matters. Deference need not mean complete abdication. If, for example, there was a suspicion that the military was keeping a particular witness overseas purposely, so as to shield him from cross-examination, a habeas court should hold an evidentiary hearing to determine for itself whether the witness’s unavailability is due to the government’s bad faith.³¹⁸

Counsel (#7): Under the Order, each detainee will be provided a military officer as a “personal representative” for assistance. The order does not state whether the officer will be a lawyer, but there are reports that the officer will not be.³¹⁹ The due process issue here is whether the detainee should be allowed to be represented by an attorney at either his own cost or the attorney’s expense (i.e., pro bono representation). Note that we are not talking about the appointment of counsel at government expense; the only situation in which the Court has held that the government must provide counsel to an indigent person is when the government prosecutes the individual for criminal violations.³²⁰

³¹⁶ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950); *see also Rasul v. Bush*, 124 S. Ct. 2686, 2707 (2004) (Scalia, J., dissenting) (quoting same passage).

³¹⁷ Note that the detainee’s inability to call a witness deemed not “reasonably available” is mitigated by the fact that the combatant status hearings are to be convened every year. Thus, if a given military witness is not available the first year the detainee has his hearing, the witness may be available the next year. Of course, that year of detention is quite significant to the particular detainee, so it would be preferable to delay a particular detainee’s annual hearing if a military witness is known to be coming off active duty in the near future.

³¹⁸ *Cf. Buie v. Sullivan*, 923 F.2d 10, 11–12 (2d Cir. 1990) (requiring a showing of bad faith on the part of the prosecution in influencing defense witnesses to justify habeas relief); *United States ex rel. Banks v. McGinnis*, 563 F. Supp. 819, 823 (N.D. Ill. 1983), *cert. denied*, 469 U.S. 1194 (1985) (suggesting that bad faith concealment of witness by the prosecution could be a constitutional violation).

³¹⁹ *See, e.g., Janice Tibbetts, U.S. Treatment of Khadr “Illegal,” Lawyer Argues*, NAT’L POST, July 9, 2004, at A11.

³²⁰ *See Gideon v. Wainwright*, 372 U.S. 335, 340–41 (1963) (state cases); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (federal cases); *cf. Goldberg v. Kelly*, 397 U.S. 254, 270

In *Powell v. Alabama*,³²¹ the Court stated that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”³²² *Powell* was a death penalty case, reinforced by the Sixth Amendment right to counsel, but in *Goldberg v. Kelly*,³²³ the Court cited *Powell* to hold that a person facing the loss of welfare was constitutionally entitled to have counsel present at the pre-deprivation hearing.³²⁴

There is little doubt that an attorney, trained as an advocate, would prove useful in helping a detainee make the case that he is not an enemy combatant. For example, if the detainee opts to testify, a lawyer would be able to guide the detainee through direct examination to present his story clearly and concisely.³²⁵ And a lawyer will be better able to cross-examine military witnesses and to challenge the government’s presentation of evidence. Perhaps most importantly, a lawyer *advocates* for the client. The value of having an advocate who is familiar with the system and who is on your side cannot be overestimated.

Yet, it is also clear that counsel is not always constitutionally required, even where the individual interest at stake is the loss of liberty. For example, in *Wolff v. McDonnell*,³²⁶ the Court held that prison inmates facing disciplinary proceedings were not entitled to legal counsel at the hearing.³²⁷ The reasoning in that case, however, is not entirely on point, as the Court was concerned that allowing counsel into such proceedings “would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals.”³²⁸ In addition, *Wolff* was decided at a time when rehabilitation was still considered a viable correctional goal. Legal counsel might have retarded that goal by inhibiting the truth-seeking process if doing so would be in the client’s interest,³²⁹ and thus the Court concluded that, for a non-adversarial process such as the disciplinary proceeding, counsel was not necessary.³³⁰

(1970) (declining to hold that welfare recipients were entitled to appointed counsel in welfare benefits termination hearings).

³²¹ 287 U.S. 45 (1932).

³²² *Id.* at 68–69.

³²³ 397 U.S. 254.

³²⁴ *Id.* at 270.

³²⁵ See JAMES W. MCELHANEY, MCELHANEY’S TRIAL NOTEBOOK 343–45 (3d ed. 1994) (discussing the challenges of preparing proper organization, pacing, and flow of direct examination).

³²⁶ 418 U.S. 539 (1974).

³²⁷ *Id.* at 570.

³²⁸ *Id.*

³²⁹ See Friendly, *supra* note 241, at 1288.

³³⁰ See also *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (refusing, over Justice Brennan’s dissent, to reach the issue of whether a parolee facing parole revocation hearing was entitled to have the assistance of counsel).

One crucial factor in determining the necessity, as opposed to the luxury, of counsel is the nature of the inquiry being conducted. In the case of determining eligibility for social security disability benefits, for example, the inquiry to be conducted is not limited to the factual question of whether the claimant suffers from a medical disability, but rather involves a mixed question of law and fact as to what amount (if any) of disability benefits to which the particular claimant is entitled.³³¹ In the case of the Guantanamo detainees, however, the hearings do not face such a complex question. The single issue to be determined in each detainee's case is whether that detainee fought against the United States.

It cannot be emphasized enough that this is a question distinct from whether the detainee is an unlawful combatant who was never entitled to prisoner of war protection or forfeited such protection. As Justice O'Connor noted in *Hamdi v. Rumsfeld*,³³² there is debate about the scope and definition of the term "enemy combatant" as used by the administration.³³³ In fact, the government's use of the term "enemy combatant" has no doubt caused confusion about the legal issues involved.³³⁴ It would be preferable to use the term "unlawful combatant" to describe those detained at Camp Delta whom the government has decided not to accord prisoner-of-war status (realizing that this decision is controversial and questionable as a matter of international law), and to reserve the term "enemy combatant" for those who simply have engaged in armed conflict against the United States. Used in this sense, "enemy combatants" would be entitled to prisoner of war status, but they would also be subject to detention for the duration of the war. "Unlawful combatants," on the other hand, would not be entitled to prisoner of war status and could be prosecuted in military tribunals for violating the laws of war.³³⁵ Whether a given detainee is an unlawful combatant, as opposed to an enemy combatant, presents a more difficult mixed question of law and fact, as it requires a determination of not just the historical facts, but also of the legal issues surrounding whether particular conduct constitutes a violation of the laws of war.

Understood in these terms, any combat soldier — especially an officer — should be able to help a detainee address allegations of being an enemy combatant. American soldiers receive training on rules of engagement, which are "a condensed

³³¹ See Mashaw, *supra* note 235, at 42 (explaining that disability benefits claimant was concerned "not necessarily with the 'veracity' of the medical evidence but rather with the capacity of a disability adjudicator to make a decision about his disability without seeing him and his response to his medical problem"); see also Buss, *supra* note 282, at 609 (arguing that schoolchildren facing disciplinary hearings should be allowed to bring counsel because "the student is likely to be charged under the authority of a generally-worded statute or rule").

³³² 124 S. Ct. 2633, 2639 (2004).

³³³ *Id.*

³³⁴ See *id.*

³³⁵ *Ex parte Quirin*, 317 U.S. 1 (1942).

version of the laws of war.”³³⁶ In the easiest case, uniformed members of regular armed forces subject to an internal disciplinary system are combatants,³³⁷ though the term is not limited to such persons. Participants in a “levee en masse” — that is, spontaneous defense from an invasion — are also considered combatants.³³⁸ Civilians, or non-combatants, on the other hand, are persons who are not part of the armed forces, who do not take part in a levee en masse,³³⁹ and who do not otherwise take part in the armed conflict.³⁴⁰ The reason soldiers must be able to distinguish combatants from civilians is that, under the laws of war, the latter are not lawful targets.³⁴¹ In fact, this obligation to distinguish has been described as “one of the foundations of humanitarian law.”³⁴²

Of course, drawing that crucial distinction is not always easy. For example, consider “the town also harbouring, besides the civilian inhabitants, units of armed forces, or the stream of civilian refugees intermingled with an army retreating in disorder.”³⁴³ It is easy to see how soldiers may have trouble distinguishing civilians from combatants in those situations. But that is true because of the fog of war and incomplete information available to the soldier at the time he is deciding whether to shoot. If the soldier knew which persons in the town were shooting at him, he would know who the combatants were. Similarly, if the soldier knew which retreating persons were in uniform and/or carrying weapons, he would know who the combatants were. The problem identified in these scenarios is a lack of precise, real-time information, not a lack of ability to draw appropriate distinctions if given that information.

Given the limited nature of the factual inquiry to be resolved by the tribunals, the presence of legal counsel to assist the detainee might not be deemed necessary. For substantially similar reasons, the Court in *Wolff* held that inmates facing disciplinary proceedings were not entitled to have counsel present, though in cases where the inmate is illiterate or the issues are complex, the inmate should be free to seek help from another inmate or “adequate substitute aid in the form of help from the staff.”³⁴⁴ Similarly, in *Walters v. National Ass’n of Radiation Survivors*,³⁴⁵ in

³³⁶ See Paul Maliszewski & Hadley Ross, *We Happy Few: The U.S. Soldier’s Laws of War, in Principle and in Practice*, HARPER’S MAG., May 2003, at 56.

³³⁷ See, e.g., FRANCOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 50 (Laura Brav ed. & trans., 2002); FREDERIC DE MULINEN, *HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES* 12 (1987).

³³⁸ DE MULINEN, *supra* note 337, at 12.

³³⁹ *Id.* at 13.

³⁴⁰ LAW OF WAR WORKSHOP DESKBOOK 128 (CDR Brian J. Bill ed., 2000).

³⁴¹ See Geneva Convention, *supra* note 208.

³⁴² BOUCHET-SAULNIER, *supra* note 337, at 45.

³⁴³ FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 99 (2001).

³⁴⁴ *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). Of course, many criminal trials also may reduce to fairly simple questions of fact; yet, indigent criminal defendants cannot be

upholding a federal statute limiting attorneys fees in veterans death or disability benefits proceedings, the Court noted that “[s]imple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.”³⁴⁶ Indeed, *Powell v. Alabama*³⁴⁷ suggests that the need for counsel arises acutely (though certainly not solely) from the technical aspects of litigation, criminal law, and the rules of evidence.³⁴⁸ Again, this is not to deny that lawyers would be able to help the detainees present more effective cases. However, it does suggest that the marginal gain in accuracy from having lawyers present is measured from a different baseline than in the criminal cases: there are not complex rules of litigation to contend with, the issue to be resolved is relatively simple and factual, and to the extent there are complexities in the definition of “combatant,” the personal representative should have the training to assist the detainee.

Still, the reasons for prohibiting lawyers in this context seem less plausible than in *Walters* and *Wolff*. In *Walters*, the stated concern was ensuring that veterans not lose too much of their benefits to lawyers; this concern was addressed by imposing a \$10 limit on attorneys’ fees in benefit recovery cases.³⁴⁹ If the result of the fee limit was that no lawyers would take those cases, Congress could still have rationally concluded that the gain to a veteran of keeping his entire benefits recovery (rather than two-thirds) outweighed the loss of not having an attorney represent him, even if that meant a slightly lower chance of recovery. No such desire to protect an interest of a Guantanamo detainee is plausibly present here.

deprived of the right to counsel even in such cases. But that is because the Sixth Amendment, in effect, sets a floor for procedural due process in criminal cases, guaranteeing the right to counsel (including appointment of counsel for the indigent).

³⁴⁵ 473 U.S. 305 (1985).

³⁴⁶ *Id.* at 330.

³⁴⁷ 287 U.S. 45 (1932).

³⁴⁸ *Id.* at 69.

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Id.; see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 139 (1997) (noting that criminal counsel are useful for understanding how to file pre-trial habeas petitions, how to interpret the “technical jargon” of the indictment, and how to understand the rules of evidence).

³⁴⁹ *Walters*, 473 U.S. at 307.

Wolff is a better analogy because, in that case, the argument against lawyers rested on the characterization of disciplinary hearings as “non-adversarial.”³⁵⁰ While, of course, the inmate would desire not to be disciplined, his interests were not in conflict with the interests of the prison authorities because the purpose of the discipline was to assist in his rehabilitation.³⁵¹ Having lawyers present would retard that rehabilitation by turning the hearings into the inmate versus the prison. Here, by contrast, the combatant status review hearings cannot lay claim to the same purpose of rehabilitation — indeed, the very purpose of the hearings is to justify continued detention of the detainee on the basis that he is an enemy of the United States.

When we turn to the burdens on the government of allowing representation by counsel, the obvious government concerns are logistics and security. Because the detainees are being kept at a military base located on an island owned by a hostile country, the government would have to arrange for transportation of attorneys from the United States to Guantanamo Bay. In addition, if counsel do not already possess sufficient security clearance to receive classified material,³⁵² then the government will have to go through the effort of performing background checks on the attorney, or else the attorney may be denied access to classified material.³⁵³ One court has noted an estimate of two months for the Department of Justice to conduct a background check for a defense attorney’s security clearances.³⁵⁴ Finally, the government has argued in other contexts that allowing lawyers to meet with enemy combatants will interfere with ongoing interrogations of those detainees.³⁵⁵

However, these burdens do not appear significant under current conditions, for the government is now “accepting applications for security clearances to allow attorneys who have pending court challenges to see their clients.”³⁵⁶ Because the government has already indicated an ability and willingness to solve the logistical and security issues, there seems to be little basis for keeping attorneys from representing the detainees at the hearings. Furthermore, the interest in effective interrogations of detainees not only wanes with the passage of time (as whatever information of value a detainee may have becomes stale), but it is also completely belied, again, by the government’s willingness to allow selected attorneys to meet

³⁵⁰ *Wolff v. McDonnell*, 418 U.S. 539, 567–69 (1974).

³⁵¹ *Id.* at 563.

³⁵² *Cf.* Tribunal Order, *supra* note 266, at para. c (specifying that detainee’s personal representative shall have proper security clearance so as to be able to access all relevant information, which may be shared with the detainee save classified material).

³⁵³ *See id.*

³⁵⁴ *See United States v. Bin Laden*, 58 F. Supp. 2d 113, 122 (S.D.N.Y. 1999).

³⁵⁵ *See, e.g., Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49–52 (S.D.N.Y. 2003), *rev’d*, 124 S. Ct. 2711 (2004); E.A. Torriero, *Guantanamo Braces for Change*, CHI. TRIB., July 12, 2004, at 1.

³⁵⁶ Ian James, *Journalists Allowed in Selected Tribunals*, ASSOCIATED PRESS ONLINE, Aug. 5, 2004, Westlaw, Allnewsplus Database.

with detainees regarding court proceedings. The government might, theoretically, be able to justify exclusion of attorneys — for example, if the number of detainees were much higher than the current number of fewer than 600, and due to other circumstances, there simply was no feasible way of conducting background checks and processing security clearances fast enough. However, that theoretical justification does not appear to stand here.

3. Summary

The Tribunal Order issued by Deputy Defense Secretary Wolfowitz provides a framework for a hearing that, under the circumstances, can satisfy the requirements of due process with appropriate modifications: providing summaries of classified information that forms part of the basis for the initial classification of the detainee as a combatant, and allowing voluntary counsel to appear on behalf of the detainee. Of course, reasonable minds can disagree about the application of the *Eldridge* balancing test, and habeas courts could conclude that the process is sufficient, or that more significant modifications are necessary.

Furthermore, we should be mindful of Judge Friendly's admonition that the various elements of a fair hearing not be considered separately.³⁵⁷ Thus, it may be if the government allows a lawyer to represent a detainee at the hearing, there is less need for the government to provide summaries of the classified information, because the lawyer will be able to probe the weakness of the government's unclassified presentation.³⁵⁸

As currently constructed, the Tribunal Order may raise some due process problems, but remedying such problems would be fairly straightforward: the government would have to hold a new hearing with those procedures. In the state prisoner cases, for example, when a federal habeas court concludes that a state prisoner's trial was constitutionally defective, the usual remedy is a conditional release order that gives the state an opportunity to retry the defendant.³⁵⁹ There are a few instances in which habeas corpus results in an order for unconditional release, but those instances occur "when a court concludes that the fact of the prosecution and not simply the manner in which the prosecution occurred violates

³⁵⁷ Friendly, *supra* note 241, at 1279.

³⁵⁸ See Buss, *supra* note 282, at 610 (noting that in the school discipline context, where the right to cross-examination is denied, "participation by a lawyer becomes even more imperative to reveal weaknesses in hostile testimony and to identify weaknesses in the testimony that cross-examination might have exposed").

³⁵⁹ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 403 (1993) ("The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner . . ."); *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("[T]his Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.").

the Constitution.”³⁶⁰ Examples include prosecutions in violation of the protection against double jeopardy, *ex post facto*, and vindictive prosecution.³⁶¹ However, none of those examples applies to the government’s detention of suspected combatants. There is, for example, no serious argument to be made that the President could not constitutionally detain properly classified combatants pursuant to his war-making powers, augmented here by Congress’s authorization of the use of military force.³⁶²

III. REFLECTIONS ON *RASUL*

As discussed earlier, the Court’s reasoning in *Rasul* is generally unpersuasive, consisting of a strained interpretation of both the habeas statute itself as well as the Court’s past decisions in *Ahrens*, *Eisentrager*, and *Braden*.³⁶³ The opinion leaves the reader unsure as to whether this really is a case about extraterritorial application of the habeas statute, or an expansion of the definition of custodian (which would conflict with *Padilla*). Moreover, the extension of the privilege of habeas corpus to the Guantanamo detainees may well result in little more than the combatant status review hearings.³⁶⁴ Yet, despite the analytic flaws of the opinion, and despite the potentially limited nature of relief to be afforded to the detainees, *Rasul* actually achieves a workable balance between judicial abdication and judicial intrusiveness in the war on terrorism.

A. *Political Inertia*

First, we should consider whether it was appropriate for the Court to step into the matter of the Guantanamo detainees by interpreting the habeas statute the way

³⁶⁰ 2 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 33.2 (4th ed. 2001).

³⁶¹ 2 *id.* at 1500–02.

³⁶² See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1924)); *id.* at 2674 (Thomas, J., dissenting).

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.

Id.

³⁶³ See *supra* Part I.B.

³⁶⁴ As discussed earlier, the combatant status hearings may well satisfy due process, and any claims purportedly brought under the Geneva Convention must overcome the hurdle of lack of self-execution of that treaty.

that it did, as opposed to leaving it to the political branches to act first. Recall that Justice Scalia suggested that the plight of the detainees should be a matter for Congress to address.³⁶⁵ Justice Scalia is surely correct that Congress could have amended 28 U.S.C. § 2241 to include a provision addressing extraterritorial habeas petitions. For example, § 2241 could be supplemented by a new subsection (e), which would read: “For the purposes of this section, the ‘respective jurisdiction’ of the District Court for the District of Columbia shall include any location where a person is being detained under the authority of the United States; and in such cases, the custodian shall be deemed the Attorney General or other such appropriate federal official.”³⁶⁶

There are significant pragmatic and structural arguments in favor of having Congress address the problem in the face of concerns about the flooding of federal courts with habeas petitions by enemy aliens.³⁶⁷ Congress has the power, within certain limits,³⁶⁸ to alter the subject-matter jurisdiction of the federal courts. Subject-matter jurisdiction consists of those heads of jurisdiction set forth in Article III, section 2, including but not limited to cases “arising under” federal law and cases involving diversity of citizenship. Article III, section 2 represents a universe of possible cases that federal courts can hear; however, it is up to Congress to vest that jurisdiction by statute.³⁶⁹ As early as 1799, the Court explained that “the disposal of the judicial power, (except in a few specified instances) belongs to congress. . . . [C]ongress is not bound . . . to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the Constitution might warrant.”³⁷⁰ In fact, Congress has, from the start, refused to vest federal courts with the whole of the judicial power: general federal question jurisdiction did not exist until 1875,³⁷¹ and even then, for the next 105 years, was subject to an amount-in-controversy requirement.³⁷² Similarly, diversity of citizenship cases have been subject to a

³⁶⁵ *Rasul v. Bush*, 124 S. Ct. 2686, 2711 (2004) (Scalia, J., dissenting).

³⁶⁶ *See, e.g., Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986); *Ex parte Hayes*, 414 U.S. 1327, 1327 (1974) (transferring habeas petition by American soldier overseas to the U.S. District Court for the District of Columbia).

³⁶⁷ *See Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

³⁶⁸ The actual limits remain fascinating to academics, who continue to debate such matters as whether Congress can withdraw subject-matter jurisdiction of “disfavored” rights such as those protected by the Establishment Clause or equal protection, or abortion. The classic treatment is exemplified in Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). Periodically, Congress has attempted to pass jurisdiction-stripping statutes to undo controversial Supreme Court decisions, but these bills have generally not been enacted. *See also* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 47–65 (1985).

³⁶⁹ U.S. CONST. art. III, § 2.

³⁷⁰ *Turner v. Bank of N.-Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799).

³⁷¹ Act of March 3, 1875, ch. 137 § 1, 18 Stat. 470.

³⁷² *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 1, 94 Stat. 2369.

consistently increasing amount-in-controversy requirement.³⁷³ While the amount-in-controversy requirement increases cannot be explained solely by reference to case load reduction pressure,³⁷⁴ it is apparent that one purpose of the increases was to reduce the number of diversity of citizenship cases filed in federal courts.³⁷⁵

Thus, in a full-scale traditional war between the United States and other nation-states involving thousands (or tens of thousands) of captured foreign combatants, Congress could simply refuse to allow habeas jurisdiction for such persons. In a situation where the number of detainees is much more manageable, however, Congress could provide habeas jurisdiction, provide review in an Article I court such as the United States Court of Appeals for the Armed Forces, or create a new forum to hear detainee cases on original jurisdiction.³⁷⁶ The point is that Congress, given its constitutional power to alter the subject-matter jurisdiction of the courts, may be in a superior institutional position to determine whether opening our federal courts to suspected enemy aliens is desirable. If we are talking about 595 detainees, the federal courts can probably handle the petitions; if we are talking about 500,000 prisoners of war, then perhaps not.

Additionally, leaving it to Congress to devise the appropriate forum for testing the combatant status avoids a potential Suspension Clause problem that is caused by extending the habeas statute. The exact scope of the Suspension Clause has been subject to vigorous debate: one view is that the clause protects the scope of the writ as it existed at the time of the ratification of the Constitution.³⁷⁷ Another view is that the clause does not protect any minimum guarantee of habeas, but rather protects against suspension of whatever habeas right that Congress enacts.³⁷⁸ To date,

³⁷³ Since 1789, when the amount-in-controversy requirement was set initially at \$500, *see* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78, Congress has raised the requirement five times (1887, 1911, 1958, 1988, 1996) to its present amount of \$75,000. *See* 28 U.S.C. § 1332(a) (2000).

³⁷⁴ *See* Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 317 (1984).

³⁷⁵ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 93 (1996). As Judge Posner reports, the number of diversity-of-citizenship cases brought in federal courts dropped by thirty-three percent and twenty-eight percent following the 1958 and 1988 increases in the amount-in-controversy requirements.

³⁷⁶ *See, e.g.,* Peter H. Schuck, *Terrorism Cases Demand New Hybrid Courts*, L.A. TIMES, July 9, 2004, at B13.

³⁷⁷ *See, e.g.,* *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996).

³⁷⁸ *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (noting that the First Congress passed legislation authorizing federal courts to issue writs of habeas corpus, “for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted”); *see also* *INS v. St. Cyr*, 533 U.S. 289, 339–40 (2001) (Scalia, J., dissenting).

however, the Court has refused to decide which interpretation is correct.³⁷⁹ Under the first view, Congress would be free to amend 28 U.S.C. § 2241 to override *Rasul*'s interpretation of the statute without running afoul of the Suspension Clause. Indeed, Congress could do so with respect to pending cases.³⁸⁰ However, if the second view prevails — in effect, that the Suspension Clause acts as a one-way ratchet on the scope of federal habeas corpus — then Congress might not be able to amend § 2241 to override *Rasul*.

But can Congress be expected to amend statutes to eliminate jurisdictional gaps? One example is the Military Extraterritorial Jurisdiction Act of 2000,³⁸¹ which remedied the problem whereby American civilians accompanying U.S. military forces overseas were de facto immune from prosecution for crimes committed on U.S. bases. Prior to the Act, such civilians could not be court-martialed because they were not members of the armed forces,³⁸² and they could not be prosecuted under federal criminal law because no Article III court could claim jurisdiction or venue to try them.³⁸³ The Act fixed this gap by providing, in relevant part, that a person “employed by or accompanying the Armed Forces outside the United States” who commits a crime outside the United States that would be a crime punishable by more than a year in prison if committed within the United States (including its special maritime jurisdiction) shall be punished “as provided for that offense.”³⁸⁴

Admittedly, the pressure to enact this Act came largely from the Department of Defense.³⁸⁵ The inability to prosecute American civilians who committed crimes on military bases in foreign countries proved embarrassing³⁸⁶ and demoralizing.³⁸⁷

³⁷⁹ See *St. Cyr*, 533 U.S. at 301 n.13 (“The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.”).

³⁸⁰ See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

³⁸¹ 18 U.S.C. § 3261 (2000).

³⁸² See, e.g., *Reid v. Covert*, 354 U.S. 1, 3 (1957).

³⁸³ See, e.g., *United States v. Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000). *But see* *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that jurisdiction existed with 18 U.S.C. § 7(3)'s special maritime and territorial jurisdiction), *cert. denied*, 534 U.S. 887 (2001); *United States v. Erdos*, 474 F.2d 157 (4th Cir.) (same), *cert. denied*, 414 U.S. 876 (1973).

³⁸⁴ Section 804 of the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), later added subsection (9) to 18 U.S.C. § 7, which expanded the definition of the “special maritime jurisdiction” of the United States to include military bases in foreign countries — thus including Camp Delta.

³⁸⁵ See Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446, 446–47 (2001).

³⁸⁶ See, e.g., *Gatlin*, 216 F.3d at 210 (denying jurisdiction in case where civilian was accused of sexually assaulting a minor on a U.S. military base in Germany).

³⁸⁷ See Yost & Anderson, *supra* note 385, at 448 (describing testimony of a U.S. General

The Act further helped the Department of Defense in negotiating Status of Forces Agreements (SOFAs) between the United States and foreign nations that set forth the priority of prosecution involving U.S. forces based overseas. As two commentators note, “The position of a U.S. delegation negotiating provisions of a SOFA on foreign criminal jurisdiction is strengthened by assuring the receiving state that, if it declines to prosecute, the United States has both jurisdiction and the will to prosecute Americans accused of committing crimes within that state’s territory.”³⁸⁸

The arguments in favor of leaving to Congress the decision to extend the habeas statute to places outside the United States are not trivial. Congress has the tools to fill jurisdictional gaps and on occasion has done so. On the other hand, the arguments against Congress having the final say are strong. Unlike federal judges, whose life tenure and protection from salary diminution are presumed to provide a measure of independence, the members of Congress are answerable to the electorate. Nonresident aliens detained as suspected terrorists obviously are not constituents to whom representatives or senators would feel obligations to help. Nor are they likely to be viewed as sympathetic victims of government oppression. Thus, David Cole argues that, “precisely because noncitizens do not enjoy the franchise, and therefore cannot rely on the political process for their protection, it is all the more critical that they be accorded basic human rights enforceable in court.”³⁸⁹ In other circumstances, the Court has recognized that judicial review is necessary to counteract the tendency of legislatures to discriminate in favor of constituents at the expense of outside non-constituents. Indeed, the insight that political restraints cannot be counted on in all instances to restrain legislatures is one of the primary justifications for the Court’s dormant commerce clause jurisprudence: to guard against this sort of exploitation of outsiders.³⁹⁰ Thus, the Court stepped in to strike down state laws that provide tax credits for ethanol produced in-state but not out-of-state,³⁹¹ that charge higher surcharges for disposal of out-of-state waste than in-state waste,³⁹² that allow

of the frustrating case where the civilian husband severely beat his military wife, and could be punished only by “put[ting] him on an airplane and send[ing] him home”).

³⁸⁸ *Id.* at 447.

³⁸⁹ David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002); *cf.* *Graham v. Richardson*, 403 U.S. 365, 367 (1971) (applying strict scrutiny to evaluate state laws prohibiting or limiting noncitizens from receiving public assistance).

³⁹⁰ *See, e.g., S. Pac. Co. v. Arizona*, 325 U.S. 761, 767–68 n.2 (1945) (“[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”); *see also* Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 227–28 (discussing the possibility of states’ exploiting natural advantages or geographic positioning to lower tax burdens of in-state residents).

³⁹¹ *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

³⁹² *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality*, 511 U.S. 93 (1994).

longer tolling of the statute of limitations when out-of-staters are sued,³⁹³ that prevent out-of-state (but not in-state) generated waste from being dumped into landfills,³⁹⁴ and a whole host of other discriminatory state laws. In fact, when it comes to state laws that discriminate facially against outsiders, the Court presumes invalidity.³⁹⁵

A related concern explains the Court's famous footnote four in *United States v. Carolene Products Co.*,³⁹⁶ in which the Court applied "rational basis" review to uphold a federal law prohibiting interstate shipment of "filled milk," but set aside the question of "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."³⁹⁷ John Hart Ely built upon the footnote four theory in *Democracy and Distrust* to argue that judicial review could be justified as a countermajoritarian instrument only as a "representation-reinforcing" device — that is, to correct failures of representation.³⁹⁸

The representation-reinforcing justification does not, by itself, translate into a doctrinal victory for enemy aliens. It may be that enemy aliens have no constitutional rights (though I am not making that argument here), and that therefore judicial review would have no impact on their individual situations. Instead, I am merely acknowledging that, as a normative matter, the very concerns giving rise to the dormant commerce clause jurisprudence, footnote four of *Carolene Products*, and the representation-reinforcing theory are present with full force in the case of nonresident aliens detained outside the United States.

Therefore, relying on Congress and/or the President to act may be problematic. Certainly, neither Congress nor the President gave much indication of an intent to do anything other than leave it to the executive branch to decide how long to continue detaining the suspected Al Qaeda and Taliban fighters at Guantanamo Bay. One might conclude that nothing would have changed but for the Court's decision.³⁹⁹

The institutional paralysis that appears to have afflicted Congress may be a sufficient ground for applauding the Court's decision to take the initiative and interpret the habeas statute the way it did. Before so concluding, however, we should acknowledge that the United States does not exist in a vacuum where the only players are the federal courts, Congress, the President, and the electorate. Even if

³⁹³ *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

³⁹⁴ *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

³⁹⁵ *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (holding that discriminatory laws require "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives").

³⁹⁶ 304 U.S. 144 (1938).

³⁹⁷ *Id.* at 152 n.4.

³⁹⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

³⁹⁹ Note, however, that Secretary Rumsfeld did announce plans for tribunals prior to the Court's decision in *Rasul*.

American voters may not be sufficiently swayed by the plight of the detainees at Camp Delta to motivate Congress or the President to act on their behalf, the international community has applied consistent pressure on the Bush administration to change its legal position regarding Camp Delta.⁴⁰⁰ For example, numerous detainees' home nations have engaged in diplomatic efforts on their behalf. *Eisentrager* implied that the recourse available to enemy aliens being detained outside United States territory was that available to a United States citizen being detained elsewhere by a foreign power: "When any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful, to use means not amounting to acts of war to effectuate his release."⁴⁰¹ Naturally, there is no guarantee that international pressure would cause the President or Congress to act. But diplomatic efforts by other nations have paid dividends in some instances; the United States has released a number of detainees to their home countries, in some instances even before the Court decided *Rasul*.⁴⁰²

In the end, the Court's decision to interpret the habeas statute the way it did is best justified by analogy to the dormant commerce clause cases. Just as Congress retains the ultimate power to overrule the Court's dormant commerce clause

⁴⁰⁰ See, e.g., *supra* note 8 (identifying criticisms of Camp Delta).

⁴⁰¹ *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). The Iran hostage crisis provides an apt example of efforts that the President took to free American detainees. On November 4, 1979, militant Iranian students stormed the U.S. embassy in Iran and held fifty Americans hostage, an action that the revolutionary government essentially ratified. During the 444 days that the hostages were held in violation of international law, President Carter took a variety of actions aimed at coercing the Iranian government into releasing the hostages. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 34 (May 24). He froze Iranian assets in the United States, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), filed a claim against Iran before the International Court of Justice, obtained two UN Security Council Resolutions calling for the release of the hostages, and pressured the foreign ministers of the European Economic Community to agree to impose economic sanctions on Iran if no real progress was made. NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 41–43 (1985). Of course, President Carter did not confine himself to "means not amounting to acts of war," as he also ordered a military rescue effort; unfortunately, the April 24, 1980 rescue attempt was aborted after two helicopters crashed into each other in the Iranian desert. *Id.* at 43–44. The point is not that other nations should respond to the detention of their citizens at Camp Delta by planning rescue missions, but rather that international diplomacy, not internal Iranian judicial processes, contributed to the release of the American hostages.

⁴⁰² See, e.g., John Daniszewski, *5 Britons Held at Guantanamo To Be Released*, L.A. TIMES, Feb. 20, 2004, at A3; *Former Guantanamo Detainee Out on Bail*, L.A. TIMES, July 14, 2004, at A17 (released to Spain); Kim Murphy, *Russia Releases 7 Men U.S. Held at Guantanamo*, L.A. TIMES, June 29, 2004, at A3 (released to Russia in February 2004); *U.S. Releases 15 More from Guantanamo*, L.A. TIMES, Apr. 3, 2004, at A16 (released to Afghanistan, Turkey, Tajikistan, Sudan, Iraq, Jordan, and Yemen).

decisions⁴⁰³ — and has done so on occasion⁴⁰⁴ — Congress arguably retains the ultimate power to override the Court by amending the habeas statute.

B. The Court as Nagging Conscience

If the arguments for and against the Court's intervention are both plausible, then it is worth considering the result of *Rasul* as a pragmatic matter. Comparison of the Court's ruling in *Rasul* with that in *Korematsu v. United States*,⁴⁰⁵ one of the most reviled decisions in Supreme Court history, is instructive.

During World War II, three months after Japan's devastating attack on Pearl Harbor, President Roosevelt issued Executive Order 9066, which authorized military commanders:

[T]o prescribe military areas in such places and of such extent as [they] may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions [they] may impose in his discretion.⁴⁰⁶

Pursuant to this executive order, General DeWitt, the Military Commander of the Western Defense Command, issued a series of orders applicable to citizens and aliens of Japanese descent across the West Coast that set curfews, excluded them from certain locations, and ultimately "relocated" them to internment camps.⁴⁰⁷ In *Korematsu*, an American citizen of Japanese descent was convicted of remaining in San Leandro, California, when Exclusion Order No. 34 required persons of Japanese ancestry, regardless of citizenship, to report to "assembly centers" — a prelude to relocation.⁴⁰⁸ Justice Black wrote the following passage:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from

⁴⁰³ See *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring).

⁴⁰⁴ See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); Jason E. Prince, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1607–08 (2004).

⁴⁰⁵ 323 U.S. 214 (1944).

⁴⁰⁶ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

⁴⁰⁷ See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁴⁰⁸ *Korematsu*, 323 U.S. at 214.

the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire⁴⁰⁹

And Justice Black upheld the constitutionality of Exclusion Order No. 34.⁴¹⁰

The three dissents in *Korematsu* highlighted different problems, and it is Justice Murphy's dissent — “universally lauded as ‘one of democracy’s great documents’”⁴¹¹ — that is relevant here.⁴¹² Justice Murphy's dissent is often characterized as complaining of overinclusiveness⁴¹³ — that is, while apparently conceding that the military had cause to take some kind of action to guard against sabotage and invasion,⁴¹⁴ he thought the exclusion order swept far and included too many innocent persons (“over 112,000 potential enemies”) within its ambit.⁴¹⁵ There is, however, a second dimension to the dissent: lack of procedural due process.⁴¹⁶ Considering that the various curfew orders, exclusion orders, and relocation orders were spread out over a matter of months, with the last being issued almost a year

⁴⁰⁹ *Id.* at 223.

⁴¹⁰ *Id.* at 219.

⁴¹¹ Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HAST. CONST. L.Q. 243, 245 (2000) (quoting Letter of Norman Thomas to Frank Murphy (Jan. 6, 1945), in SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 450 (1985), and J. WOODFORD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 337 (1968)); see also Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 803 (2000) (describing Justice Murphy's dissent as being “considered the strongest” of the three dissents in *Korematsu*).

⁴¹² Justice Roberts concluded that *Korematsu*'s conviction violated due process because *Korematsu* had been subjected to “two conflicting orders, one which commanded him to stay and the other which commanded him to go.” *Korematsu*, 323 U.S. at 232 (Roberts, J., dissenting). Justice Jackson concluded that the exclusion order was underinclusive in that it singled out those of Japanese ancestry, leaving free those of Italian or German ancestry. *Id.* at 243 (Jackson, J., dissenting).

⁴¹³ See Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2744 (2004); Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 U.C.L.A. L. REV. 447, 487 (1989).

⁴¹⁴ See *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting) (“No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land.”).

⁴¹⁵ *Id.* at 235.

[T]he exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshaled in support of such an assumption.

Id.

⁴¹⁶ *Id.* at 241–42.

after the Pearl Harbor attack, Justice Murphy thought it impossible that the military could not have held “loyalty hearings for the mere 112,000 persons involved — or at least for the 70,000 American citizens — especially when a large part of this number represented children and elderly men and women” and when Great Britain managed to hold a comparable number of hearings for enemy aliens in a similar time frame.⁴¹⁷ In other words, Justice Murphy decried the absolute lack of procedural due process afforded to the internees (at least, those who were American citizens) before they were excluded from the West Coast.

The lack of U.S. loyalty hearings prior to exclusion and internment of these individuals is even more striking when one considers that the government did in fact hold hearings *after* internment.⁴¹⁸ The internees were subjected to a lengthy series of questions that ultimately resulted in the release of some internees from the internment camps on temporary bases for education, work, or military enlistment.⁴¹⁹

While the overall paranoia and racism of the majority opinion in *Korematsu* would be difficult to defend as a moral principle even if Justice Murphy’s suggested loyalty hearings had been held,⁴²⁰ perhaps the decision could be justified as a matter of modern constitutional law. *Ex parte Endo*⁴²¹ almost suggests as much; in holding that Endo had to be released from the internment camp because she, an American citizen, had not been proven to be disloyal,⁴²² the subtext could easily be read as disgust with the government’s failure even to try to prove disloyalty. Put another way, suppose that the government had excluded and interned all persons of Japanese, German, and Italian descent (alien and citizen), thus eliminating the racial

⁴¹⁷ *Id.* at 242 & n.16.

⁴¹⁸ See ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 197 (2001). This is not to defend the questionnaire, which had severe wording problems sometimes leading to even harsher treatment for those who answered certain questions the wrong way. *Id.* at 216.

⁴¹⁹ *Id.* at 197.

⁴²⁰ For example, why single out those of Japanese descent for loyalty hearings, and not those of German descent? The common response is that, in the wake of Pearl Harbor, there was great concern that the Japanese would invade the West Coast, and that those of Japanese descent here would somehow aid Japan. Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903 (2004). Yet, by mid-1942, the Japanese Imperial Navy had suffered the crippling loss of four aircraft carriers at the Battle of Midway, such that a land invasion was considerably unlikely. Stephen Paul Coolbough, Comment, *Raiders of the Lost . . . Sub? The Potential for Private Claims of Ownership to Military Shipwrecks in International Waters: The Case of Japanese Submarine I-52*, 49 BUFF. L. REV. 929, 1005–06 (2001). Moreover, by that same time, eight German saboteurs had not only sneaked into the United States, they were in fact assisted by American citizens (primarily, relatives of a few of the saboteurs). See *Ex parte Quirin*, 317 U.S. 1 (1942). One would think that such facts would, in light of the paranoia reflected in Justice Black’s opinion, be more than sufficient to justify scrutiny of German-Americans.

⁴²¹ 323 U.S. 283 (1944).

⁴²² *Id.* at 297.

discrimination aspect of *Korematsu*. The resulting government action would still strike us today as unreasonable and probably unconstitutional for the reasons identified by Justice Murphy.

But for Justice Murphy, the fact that a hearing had taken place would matter more than the minutia of the hearing details.⁴²³ He did not specify in any detail the nature of the hearings that he felt could have been held, but given the sheer number of hearings that would have had to have been held, it is extremely doubtful that he had in mind judicial proceedings. Indeed, the British hearings that Justice Murphy cited approvingly, while described contemporaneously as “fair and just,”⁴²⁴ resemble the Guantanamo detainee hearings more than judicial proceedings: the hearings were chaired by a King’s Counselor (an elite lawyer, not a judge) but the aliens were prohibited from bringing lawyers.⁴²⁵ The aliens were, however, allowed to bring “an English friend . . . who will vouch for his sentiments and good faith towards Great Britain.”⁴²⁶

Rasul can best be defended as a shot across the bows of Congress and the President, warning the political branches that if they do not clean up their own mess, the Court will. Unfortunately, the only weapon in the Court’s arsenal is its statutory power to entertain habeas petitions — a blunt weapon for this purpose. Under such an interpretation, the Court was quite successful; a little more than a week after the issuance of its decisions, the Department of Defense issued an order establishing hearings for detainees to challenge their combatant status.⁴²⁷ Indeed, from a long-term constitutional perspective, the cases may, as Eric Muller argues, serve as a repudiation of Chief Justice Rehnquist’s thesis, set forth in *All the Laws but One*, that “in times of crisis . . . judges do not and should not interfere with wartime actions of the Commander-in-Chief.”⁴²⁸

However, this does not call for de novo review of detainee combatant classifications. All the *Rasul* decision stands for, in light of its interpretation of the habeas statute, is that the federal courts are to determine whether due process has been met.⁴²⁹ In making that determination, the courts may defer to the executive branch’s determination of the magnitude of the burden to comply with any

⁴²³ *Id.* at 240–42.

⁴²⁴ See Robert M.W. Kempner, *The Enemy Alien Problem in the Present War*, 34 AM. J. INT’L L. 443, 445 (1940).

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ Kathleen T. Rhem, *DoD To Review Status of All Guantanamo Detainees*, American Forces Information Service, http://www.defense.gov/news/Jul2004/n07082004_2004-070801.html (July 8, 2004).

⁴²⁸ See Eric Muller, *Supreme Court Sends Rehnquist to the Remainder Bin, Is That Legal?*, at http://www.isthatlegal.org/archives/2004_07_11_isthatlegal_archive.html (July 13, 2004).

⁴²⁹ Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

hypothesized alternate procedures, given the general principle of judicial deference in the arena of national security.⁴³⁰

Administration critics take a different view of the hearings, contending that the combatant status review hearings are intended to undermine, or even outright defy the Court's *Rasul* decision.⁴³¹ These criticisms tend to take the form of comparing all the ways in which the hearings do not measure up to trial-type proceedings, particularly on the fact that the decision makers are military officers. Certainly there would be a lower likelihood of hidden biases creeping into the decisions if the decision makers had fixed terms, like federal judges, or were civilians rather than military officers who might be worried about their future careers.⁴³² However, due process is not about ensuring that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error."⁴³³ While critics of the administration's detention policy have complained that the hearings will be inherently unfair,⁴³⁴ such charges seem, at best, premature. The concerns about the independence and impartiality of the military officers are based on speculation, and while it is not unreasonable to wonder about these officers' ability to determine a detainee's combatant status free from influence, we might not want to require the government to institute procedures aimed at stamping

⁴³⁰ See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992); *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988); cf. *Sandin v. Conner*, 515 U.S. 472, 482–83 (1995) (noting the need for "appropriate deference and flexibility to state officials trying to manage a volatile environment").

⁴³¹ See, e.g., Elise Ackerman, *Detainee Notification Falls Short, Critics Say*, MIAMI HERALD, July 13, 2004, at 5 (quoting Barbara Olshansky of the Center for Constitutional Rights as saying that the government was "flouting the words of the Supreme Court"); Mary Fitzgerald, *Detainees Seeking To End Hearings Without Counsel*, WASH. POST, Aug. 3, 2004, at A13 (quoting Jeff Fogel of the Center for Constitutional Rights) ("[The hearings] are a sham. The detainees are given no access to counsel, have no right to meaningfully contest any classified evidence against them and no meaningful way to call any witnesses in their favor."); Charlie Savage, *Detainees Fail To Win Over Hearings: Four Found To Be Enemy Combatants*, BOSTON GLOBE, Aug. 14, 2004, at A2 ("[H]uman rights activists have ridiculed the reviews as a sham, noting that the detainees are not represented by lawyers and that the final decision remains within the military chain of command."); *id.* (quoting Wendy Patten of Human Rights Watch) ("These [reviews] were not set up to be impartial."); Charlie Savage, *Tribunals To Weigh Detainees' Status: Set Up Is Response to Supreme Court's Ruling on Rights*, BOSTON GLOBE, July 8, 2004, at A3 (quoting Rachel Meeropol of the Center for Constitutional Rights) ("The review procedures . . . are inadequate and illegal, and thus fail to satisfy the court's ruling.").

⁴³² Though, of course, the independence of civilian judges might be questioned if they too are appointed by the President.

⁴³³ *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

⁴³⁴ See Neil A. Lewis, *Fate of Guantanamo Detainees is Debated in Federal Court*, N.Y. TIMES, Dec. 2, 2004, at A36; Neil A. Lewis, *Guantanamo Prisoners Getting Their Day But Hardly in Court*, N.Y. TIMES, Nov. 8, 2004, at A1.

out all potential problems in the absence of evidence that existing protections are inadequate. This is not to say that federal habeas courts should refrain from acting if there are indications of actual bias. In such instances, the court may well choose to hold an evidentiary hearing to resolve that specific factual issue; and if a court were to conclude that the combatant status review hearing was in fact biased, relief would be proper.

Addressing specific and identified defects in the hearing process is an altogether different matter from levying a facial attack on the process. It is simply untenable to read *Rasul* as a call for *federal courts* — or indeed, any court — to determine whether the detainees were correctly classified as combatants because that is not the purpose of habeas corpus. Because the question regarding habeas is whether the government acted within its limited powers, here the limitations imposed by the Due Process Clause, the hearings are not an effort to undermine *Rasul*; they are the administration's effort to comply with the *Rasul* decision. If that compliance is unsuccessful, then the administration will have to provide hearings that do comply. But this would not mean that the government's initial failure to comply was an effort to undermine, defy, or obstruct the Court, only that the government mistakenly assumed that certain procedures would be sufficient to comply with due process.

CONCLUSION

Although the executive branch, no doubt, views *Rasul* as a lost battle, that is not necessarily the case. It would be a different matter if the Court were to waken from a long slumber (during which it has essentially acquiesced to the President in virtually all foreign affairs)⁴³⁵ and intend for Article III courts to assert themselves aggressively in policing the government's waging of the war on terrorism. However, the narrow scope of habeas review, combined with the Court's repeated pronouncement of the flexible nature of due process and the Court's traditional deference to the executive branch's assessment of the value of national security, suggest that *Rasul* was a reminder to the political branches to provide *some* process, the form of which would be less significant than the fact that it was provided.

Thus, the sloppiness of the *Rasul* majority opinion, while perhaps intellectually bothersome, need not signal the opening of the floodgates. To answer a common criticism of extending habeas privileges to nonresident enemy aliens, what if 500,000 German soldiers during World War II had filed petitions for habeas corpus? If such an event were to occur, the answer is easy: the federal courts would entertain the petitions and they would conclude that under the circumstances of a full-scale world war, the prisoners were entitled to no more due process than whatever they received.

⁴³⁵ This is the central thesis of HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).