

***RASUL v. BUSH* AND THE INTRA-TERRITORIAL CONSTITUTION**

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INTRODUCTION

This article addresses the applicability of the United States Constitution in Guantánamo Bay, Cuba or, more precisely, the enforceability of certain constitutional rights by foreign nationals detained by the U.S. military at the Guantánamo Naval Base. The article evolves from a panel discussion on the “Extraterritorial Application of the Constitution,” which was part of a broader symposium organized by the NYU Annual Survey of American Law, addressing the constitutional implications of the “war on terror.” While pleased to contribute to this important discussion, a central dilemma I face—an authorial conflict of interest of sorts—is that if my argument is convincing, I will have effectively written myself off of this panel and out of the Symposium journal issue in which this article is intended to appear. That is because my central contention is that the application of the Constitution to Guantánamo would not in any meaningful sense be “extraterritorial”; this is because Guantánamo’s unique historical, political and instrumental status renders it, in constitutionally dispositive respects, United States territory. In other words, for the purposes of evaluating the applicability of certain fundamental constitutional rights, Guantánamo Bay is little different from Kansas.

In one important sense, the Constitution clearly “applies” to actions taken by government officials in Guantánamo as it would elsewhere across the globe. Principles of separation of powers would presumptively constrain certain executive actions taken in Washington, D.C. that might have an effect in Guantánamo or in other countries. Thus, for example, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that the President cannot create, by executive order, military commission procedures that depart substantially

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from those procedures already enacted by Congress as part of the Uniform Code of Military Justice.¹ The more precise question presented here, therefore, is whether the U.S. Constitution affords foreign nationals detained in Guantánamo any individual rights—i.e., whether they enjoy any substantive or procedural protections grounded in the Fifth Amendment of the Constitution that might allow them to challenge the factual or legal basis for their detention by the U.S. military.

Even after the Supreme Court's decision in *Rasul v. Bush*,² the Bush Administration has emphatically and repeatedly claimed that the answer to that question is “no,” arguing that *Rasul* was nothing more than a narrow jurisdictional holding—a position very recently accepted by the Court of Appeals for the D.C. Circuit in a decision dismissing consolidated habeas actions pursuant to the jurisdiction-stripping provisions of the Military Commissions Act of 2006.³ As a result, the Administration continues to claim that it has unlimited authority to detain foreign nationals in Guantánamo indefinitely (or for as long as the “global war on terror” continues) based on nothing more than the President's unilateral and untestable determination that those persons are “enemy combatants.”⁴

1. See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2791-92 (2006). It is also in this obvious sense that the Constitution constrains—though deferentially—executive foreign relations powers, exercised in the U.S., but that would necessarily have consequences abroad. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (requiring advice and consent and two-thirds vote of Senate to ratify treaties); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-87 (1952) (holding that President Truman had neither statutory nor constitutional authority to seize U.S. steel plants in order to assist with military campaign in Korea); see also *Dames & Moore v. Regan*, 453 U.S. 654, 655, 662 (1981) (upholding President's authority to nullify orders of attachment and suspend legal claims against Iranian interests based in part on broad congressional delegation of power to act against foreign governments during times of national emergency, but acknowledging the constitutional tension at play); War Powers Act of 1973, P.L. 93-148 (attempting to limit circumstances in which President can undertake military action).

2. 542 U.S. 466 (2004).

3. See, e.g., *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (describing government's interpretation of *Rasul*, in context of a motion to dismiss post-*Rasul* petitions, as one in which district courts have jurisdiction to accept habeas petitions, but must immediately dismiss the petitions because foreign nationals detained in Guantánamo enjoy no substantive rights whatsoever); see also *Boumediene v. Bush*, No. 05-5062, slip op. at 18 (D.C. Cir. Feb. 20, 2007) (ruling that “[p]recedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States”).

4. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 465; see also *infra* text accompanying notes 12-20 (describing breadth of Administration's enemy combatant category). The Administration has argued, in the alternative, that should con-

The Administration's position is wrong. The Supreme Court in *Rasul* concluded, albeit in dictum, that, in light of the particular circumstances surrounding their imprisonment, the Guantánamo detainees are entitled to fundamental constitutional rights.⁵ The Court did so for demonstrably good precedential and policy reasons. If this question were presented again squarely for disposition by the Court,⁶ the majority would undoubtedly so hold, directly and conclusively. Proof of this contention and this prediction must begin with an understanding of the special status of Guantánamo Bay; it culminates at the intersection of the Supreme Court's companion opinions in *Rasul* and *Hamdi v. Rumsfeld*.⁷ Where *Rasul* demonstrates an entitlement to challenge the bases for an executive detention in the peculiar place of Guantánamo, the Court's opinion in *Hamdi* identifies those fundamental constitutional rights that are minimally necessary to meaningfully challenge such detentions.

Part I of this article describes the peculiar place of Guantánamo Bay. This description begins with its functional and strategic purpose for the military, explains the Administration's legal defense of Guantánamo's purported extra-jurisdictional status and then demonstrates the weaknesses of that defense. Part II of the

stitutional rights apply to the Guantánamo detentions, the detainees have, following the *Rasul* decision, been afforded hearings and procedures, called Combatant Status Review Tribunals, which assertedly satisfy any constitutional requirements of due process. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 467-80 (holding that these Tribunals fall far short of minimal due process requirements).

5. See *Rasul*, 542 U.S. at 483 n.15 (noting that if petitioners are in fact innocent and are being held indefinitely without charge, trial or access to counsel, such detentions would be unconstitutional). See also *infra* text accompanying notes 137-206.

6. In *In re Guantánamo Detainee Cases*, the district court concluded that *Rasul* itself held that fundamental constitutional rights apply to Guantánamo detainees as part of a ruling denying the government's motion to dismiss fifty-five consolidated petitions filed following *Rasul*. In *Khalid v. Bush*, another district court judge held that the detainees had no enforceable constitutional, statutory or treaty rights and otherwise could advance no "viable legal theory" that would entitle seven petitioners under consideration to challenge their detention. 355 F. Supp. 2d 311, 330 (D.D.C. 2005). Those decisions were consolidated on appeal to the Court of Appeals for the District of Columbia. See *Boumediene v. Bush*, Nos. 05-5062, 05-5063 (D.C. Cir. 2005); see also *Al Odah v. United States*, Nos. 05-5064, 05-5095 to 05-5166 (D.C. Cir. 2005). The D.C. Circuit recently issued its opinion, dismissing the petitions on jurisdictional grounds and denying the detainees any substantive constitutional rights. At the time of publication, petitions of certiorari were filed in the Supreme Court seeking review of the decision this term on an expedited basis. Petition for Writ of Certiorari, *Boumediene v. Bush*, No. 06-1195 (Mar. 5, 2007); Petition for Writ of Certiorari, *Al Odah v. Bush*, No. 06-1196 (Mar. 5, 2007).

7. 542 U.S. 507 (2004).

article describes in detail the Court's holding in *Rasul*, explaining the implications of the Court's understanding of the territorial status of Guantánamo and dissecting the rationale and precedent for the Court's conclusion that detainees enjoy fundamental constitutional rights. Part III of the article explores some of the critical implications that flow from the conclusion about applicability of constitutional rights there. These include the kind of procedural guarantees that would be necessary in order to vindicate *Rasul*'s promise of a meaningful opportunity to challenge one's detention, as well as substantive limitations that would have to be placed on the otherwise unconstrained "enemy combatant" definition that the Administration has employed to detain many hundreds of men at Guantánamo Bay.

I. GUANTÁNAMO AND THE ADMINISTRATION'S DETENTION POLICY

Guantánamo occupies a peculiar physical and legal space. Guantánamo is shorthand for the Guantánamo Bay Naval Base, located on the Southeastern tip of Cuba and approximately 125 miles from Miami, Florida, as the crow flies.⁸ It covers an area of approximately forty-five square miles, including a large bay separating the Leeward side, which houses civilian support personnel, and now, lawyers on the base for client visits, from the Windward side, which houses all significant military personnel and operations, including the prisoner detention camps.⁹ Operated by a Joint Task Force of all the military branches, Guantánamo currently houses approximately 2000 military personnel and support staff, most of whom are directly or indirectly devoted to maintaining the military's detention and interrogation operations for foreign prisoners.¹⁰

The United States occupies the territory pursuant to a 1903 lease it obtained from the Cuban government, as a condition to ending U.S. occupation of the island following the Spanish-Ameri-

8. Because the U.S. has no formal diplomatic relations with the Cuban government and U.S. military and civilian aircraft are forbidden from entering Cuban airspace, flights must actually divert around a substantial Cuban land mass to reach the bottom southeastern tip of Cuba, where Guantánamo is located. See Tom Infield, *Rumsfeld: Detainees Aren't POWs; Defense Secretary Visits Guantánamo*, PITT. POST-GAZETTE, Jan. 28, 2002, at A4.

9. GlobalSecurity.org, Guantánamo Bay, <http://www.globalsecurity.org/military/facility/guantanamo-bay.htm> (last visited Oct. 3, 2006).

10. Julie Dawson, *The Least Worst Place*, <http://www.militarymoney.com/homefront/1109355311>.

can War. The lease entitles the U.S. to occupy the space in perpetuity and without interference from the Cuban government. As described more fully below, it is the distinctive terms of the lease itself—an arcane question of property law—that has produced controversy about Guantánamo’s broader legal and constitutional status. The lease provides that the “United States shall exercise complete jurisdiction and control over” Guantánamo Bay during the period of its occupation, but reserves “ultimate sovereignty” to the “Republic of Cuba.”¹¹

Guantánamo’s unique physical and legal status made it ideally suited for the Administration’s detention policy; and, one ultimately cannot understand the Administration’s legal position without appreciating the policy goals that drove it. Guantánamo was chosen for the Administration’s large-scale detention and interrogation operations in part because of its size and physical proximity to personnel and physical resources on the U.S. mainland. But equally important, its uncertain legal status—in particular, the reservation to Cuba of “ultimate sovereignty” over Guantánamo—permitted the Administration to contend successfully, at least until the Supreme Court’s decision in *Rasul*, that it enjoyed complete immunity from the jurisdiction of U.S. courts or other meaningful scrutiny of its practices there.

A. *Enemy Combatants in Guantánamo*

All persons detained in Guantánamo Bay are foreign nationals who have been designated “enemy combatants” by the President. Of the approximately 430 persons currently detained there, and the over 775 persons who have passed through its detention camps,¹² only 10 have been charged with a violation of the laws of war.¹³ Those charged were designated for trial before a three-judge military commission created by executive order in November 2001¹⁴ but ruled unlawful in *Hamdan*.¹⁵ Pursuant to the Military Commis-

11. See *infra* text accompanying notes 60-70.

12. According to the Department of Defense, as of publication, “approximately” 430 detainees are still in Guantánamo and 345 have been released, suggesting that a minimum total of 775 have been there since 2002. See Press Release No. 1177-06, U.S. Dep’t. of Defense, Detainee Release Announced (Nov. 17, 2006), <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10204>.

13. U.S. Dep’t of Defense, <http://www.defenselink.mil/news/commissions/archives.html> (last visited Nov. 30, 2006).

14. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834 (Nov. 13, 2001).

15. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2791-92 (2006).

sions Act of 2006, which purported to remedy some of the defects identified in *Hamdan* with the military commissions procedures set forth in the November executive order, a charged detainee would be entitled to military or civilian counsel, notice of the charges against him, access (via counsel) to the evidence used against him and a three judge panel of military lawyers;¹⁶ a convicted detainee is also to be sentenced to a finite term of imprisonment.¹⁷

By contrast, the remaining hundreds of detainees have not been charged with any crime. Rather, most continue their fifth year of detention at Guantánamo as a result of the President's claimed unilateral authority to classify them as "enemy combatants" and detain them indefinitely and perhaps for life (until the President himself determines the "global war on terrorism" has ended),¹⁸ without any of the procedural protections afforded those designated for trial before a military commission—which have themselves been subject to serious criticism for their continued, though congressionally-authorized, departure from the UCMJ.¹⁹ In so doing, the President has asserted the power arguably authorized

16. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

17. The old Commission guidelines under the November executive order authorized the sentence of death, as does the Military Commissions Act, though none of the ten detainees designated for military commission has been notified of a potential death sentence. U.S. Dep't of Defense, <http://www.defenselink.mil/news/commissionsarchives.html> (last visited Nov. 30, 2006).

18. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d, 443, 447-48 (D.D.C. 2005); see also Josh White & Ann Scott Tyson, *Rumsfeld Offers Strategies for Current War*, WASH. POST, Feb. 3, 2006, at A8 (describing administration's view of the war on terror as a multi-generational struggle akin to the Cold War).

19. See, e.g., Rob Devries, *Guantánamo lawyers decry military commission rules*, JURIST, Feb. 8, 2007, <http://jurist.law.pitt.edu/paperchase/2007/02/guantanamo-lawyers-decry-new-military.php> (describing criticisms of post-*Hamdan* military commissions procedures made by defense counsel). Following the Supreme Court's decision in *Rasul*, and approximately 30 months after detainees started arriving at Guantánamo, the military for the first time initiated proceedings purportedly designed to ascertain the detainees' status. Those so-called "Combatant Status Review Tribunals," described in greater detail below, are post hoc "non-adversarial" administrative hearings conducted by military officers on the base. Under these CSRTs, the detainees are given a short hearing in which they have the opportunity to disprove their enemy combatant status (which has "already been determined" by the military "through multiple levels of review"), although without the benefit of counsel, the ability to see the classified evidence against them that they must disprove or a realistic opportunity to present evidence of their own. See *infra* text accompanying notes 237-39. A district court judge has already determined that such procedures fall far short of the baseline procedural requirements that the Court concluded the Due Process Clause requires. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 468.

to him under the laws of war, namely, to detain captured belligerents in order to prevent their return to the battlefield. Leaving aside the separate question of how international law would limit the scope and duration of the battle purportedly authorizing detention, the President has eschewed the limitations that necessarily accompany that grant of power under international law.²⁰ In public pronouncements, the President and high ranking Administration officials justified this legal stance by asserting that the detentions are necessary to disable “al Qaeda,” “terrorists,” and “the worst of the worst” from returning to the battlefield²¹—conclusory characterizations that have been shown to be, at best, extreme exaggeration.²²

On December 27, 2001, Defense Secretary Donald Rumsfeld announced publicly for the first time the Administration’s plans to use the Guantánamo military base to house suspected al Qaeda and Taliban militants then being held in U.S. custody in Afghanistan.²³ Guantánamo, as a well-established military base a short flight or boat trip from U.S. mainland installations, would provide far superior operational capabilities to the improvised prison pens set up in the recently captured, distant and harsh Afghan terrain.²⁴ The operational advantages of the Guantánamo base would not be leveraged to try captured enemies for war crimes. Rather, the Administration would use Guantánamo as the largest piece in a broad detention policy that contemplated indefinite secret detention of suspected terrorists or sympathizers, all geared toward servicing a global interrogation operation.²⁵ For interrogations to be successful, the Administration believed, prisoners should be completely isolated, disoriented and hopeless about their prospects for

20. Those provisions would include having Prisoner of War status assessed by a competent tribunal contemporaneous with capture and freedom from cruel, inhuman or degrading treatment during detention. See generally JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006) (arguing that the distinctive feature of the Bush Administration’s detention policy is to arrogate to itself all the power under international and domestic law, but rejecting necessary limitations that ordinarily accompany it).

21. See *infra* note 265.

22. See *infra* text accompanying notes 258-63.

23. Katharine Q. Seelye, *A Nation Challenged: The Detention Camp; U.S. to Hold Taliban Detainees in ‘the Least Worst Place’*, N.Y. TIMES, Dec. 28, 2001, at B6.

24. Initially, detainees ultimately sent to Guantánamo were held for periods of months in makeshift detention camps on military bases in Bagram and Kandahar, Afghanistan.

25. MARGULIES, *supra* note 20 (arguing that prolonged, preventive detention, coercive interrogations and secrecy are hallmarks of the Administration detention policy, commencing immediately after 9/11 and carrying through to Abu Ghraib).

human contact or release, all in order to make them dependent upon their captors and most compliant with interrogators' questioning.²⁶ This system depended necessarily on secrecy and unfettered discretion of military officials to experiment, over the long term, with a variety of interrogation techniques until desired results were achieved.²⁷

In support of these instrumental policy goals, the Administration developed two complementary legal positions. First, it announced that the Geneva Conventions would apply neither to persons captured in Afghanistan nor as part of the broader war on terror.²⁸ Accordingly, the Administration's actions in Guantánamo would not be constrained by procedural mandates requiring, among other things, Article 5 battlefield determinations to distinguish civilians from combatants,²⁹ nor would it be constrained by substantive Geneva Convention prohibitions on torture or cruel, inhuman or degrading treatment.³⁰

26. See generally *id.*; see also *infra* note 27.

27. Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 63 (reporting official acknowledgement that psychologists and psychiatrists working in "Behavioral Science Consultation Teams" have sought to "reverse engineer" torture and interrogation techniques that the military trains U.S. forces to withstand, in order to create the "radical uncertainty" necessary to "break" the detainees).

28. Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, and Robert J. Delabunty, Special Counsel, U.S. Dep't of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) [hereinafter *Torture Papers*]; Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Defense (Jan. 22, 2002), in *Torture Papers*, *supra*, at 81 (taking the position that the Geneva Conventions do not and should not apply to Taliban and al Qaeda suspects).

29. See Third Geneva Convention, Article 5; see also U.S. Army Reg. 109-8 (Oct. 1, 1997) (incorporating provisions of Third Geneva Convention and regulating treatment of all detainees captured by the U.S. military).

30. See Third Geneva Convention, Article 13 (protecting prisoners of war, particularly from "acts of . . . intimidation"); Article 17 (protecting prisoners of war from "physical or mental torture [or] any other form of coercion" during interrogations); Article 99 (prohibiting use of "moral or physical coercion" on prisoner of war in order to induce a statement of guilt). The D.C. Circuit effectively endorsed this result by concluding that Common Article III does not apply to al Qaeda and is not privately enforceable through a habeas petition, see *Hamdan v. Rumsfeld*, 415 F.3d 33, 40-42 (D.C. Cir. 2005); the Supreme Court reversed this ruling in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2793-98 (2006) (plurality opinion). After much resistance, including a veto threat, see Terry M. Neal, *A Dangerous Veto Threat*, WASH. POST, Nov. 15, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111500489.html>, last visited (Nov. 26, 2006), the

Second, the Administration's lawyers crafted a tactical position designed to forestall legal challenges to the Guantánamo detentions. In a December 28, 2001 memorandum, lawyers from the Office of Legal Counsel, including John Yoo, argued not that the Administration's detention and interrogation policies were substantively legal under U.S. or international law, but rather that the courts would not have jurisdiction to entertain any legal challenges to any aspects of the detentions undertaken in Guantánamo.³¹ Eliminating court jurisdiction over the detentions was necessary to support the secretive operations in Guantánamo and would deny access to lawyers that would inevitably undermine the interrogation processes and expose the military's edgier interrogation techniques. Court oversight could, in the words of the Yoo memorandum, destroy "the system that has been developed."³² Predictably, after the Supreme Court in *Rasul* rejected the Administration position and held that federal courts do have jurisdiction to entertain habeas petitions on behalf of detainees in Guantánamo who wish to challenge their detentions,³³ the Administration effectively ceased transferring prisoners to Guantánamo,³⁴ preferring to exploit ei-

President finally acceded in 2005 to the so-called McCain Amendment, which prohibited use of "cruel inhuman and degrading" treatment against prisoners in U.S. military custody. That Amendment became part of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005), which also purported to strip the federal courts of habeas jurisdiction over petitions brought by detainees in Guantánamo Bay. *Id.* § 1005(e), 119 Stat. 2742. After the DTA's habeas stripping provisions were ruled inapplicable to pending cases in *Hamdan*, 126 S. Ct. at 2764-69 & n.15, Congress attempted again to strip the courts of jurisdiction over pending habeas petitions through Section 7(b) of the Military Commissions Act. The court of appeals very recently concluded that the jurisdiction stripping provisions of the Military Commissions Act unambiguously applied to pending cases. *Boumediene v. Bush*, No. 05-5062, slip op. at 11 (D.C. Cir. Feb. 20, 2007).

31. Memorandum from Patrick F. Philbin & John Yoo, Office of Legal Counsel, to William J. Haynes, II, General Counsel, Dep't of Defense 1 (Dec. 28, 2001), in *Torture Papers* at 29.

32. *Torture Papers* at 36. See also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 142-43 (2006) (explaining that while "[n]o location was perfect," Guantánamo seemed "to fit the bill," in order to allow military interrogations without worrying about their lawfulness).

33. *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

34. Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at 1.1 (reporting that Administration officials "effectively halted the movement of new detainees into Guantánamo" in a September 2004 meeting); Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005 at A1 (reporting on intentions of "senior administration officials" to transfer up to half the current Guantánamo detainees to prisons in Saudi Arabia, Afghanistan and Yemen as a result of recent "adverse court rulings" regarding the Administration's power in Guantánamo).

ther secret “black sites”³⁵ or military bases currently considered beyond the jurisdiction of U.S. courts.³⁶

It is this second aspect of the Administration’s position that requires exposition in order to understand properly why Guantánamo is subject not only to a federal court’s habeas jurisdiction, but also to substantive constitutional limitations.

B. The Purported Legal Premise: Johnson v. Eisentrager

The keystone of the Administration’s 2001 position that courts have no jurisdiction over Guantánamo, as well as its current position that no constitutional rights apply there in spite of *Rasul*’s holding, is the 1950 case, *Johnson v. Eisentrager*.³⁷ In *Eisentrager*, German nationals had been captured by U.S. forces in China after Germany’s defeat in World War II and were accused of assisting the still-engaged Japanese military, in violation of their government’s terms of surrender.³⁸ With the permission of the Chinese government, the Germans were tried for war crimes, convicted and sentenced to imprisonment pursuant to a military commission duly authorized by Congress,³⁹ which afforded procedural guarantees such as the assistance of free counsel, and the rights to examine evidence against them, cross examine witnesses and present opening and closing statements.⁴⁰ The convicted prisoners were transferred to a U.S. military base in occupied Landsberg, Germany to serve out their sentences.

Eisentrager and a number of the prisoners filed petitions for writs of habeas corpus against their military custodians, challenging the legality of their trial and imprisonment under Article I of the

35. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (describing series of secret detention facilities operated by the CIA in various countries, designed to hold and interrogate high level terror suspects).

36. Golden & Schmitt, *supra* note 34 (reporting that U.S. military is operating a makeshift prison facility in Bagram, Afghanistan, where it holds approximately 400 prisoners as “enemy combatants” captured in recent battles in Afghanistan).

37. 339 U.S. 763 (1950). This position was recently accepted by the D.C. Circuit. See *Boumediene v. Bush*, No. 05-5062, slip op. at 18 (D.C. Cir. Feb. 20, 2007).

38. *Eisentrager*, 339 U.S. at 765-66.

39. See Articles of War, 10 U.S.C. §§ 1471-1593; *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (“Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”).

40. Joint Appendix at 155-56, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343 (including “Regulations Governing the Trial of War Criminals in the China Theater”). After trials lasting months, six of the 27 prisoners were acquitted. *Eisentrager*, 339 U.S. at 766.

Constitution, the Fifth Amendment and the Geneva Convention governing the treatment of prisoners of war. Justice Jackson's majority opinion has two important and ultimately interrelated parts relevant to the Guantánamo litigation: a procedural part related to the jurisdiction of U.S. courts and a substantive part related to the applicability of the Fifth Amendment to the prisoners.⁴¹

First, the Court held that "enemy aliens" whose offenses, capture, trial and imprisonment occur outside the territorial jurisdiction of the United States do not have a legal entitlement to access U.S. courts to challenge their detentions.⁴² The Court suggested that U.S. law recognized a descending scale of legal entitlements afforded to citizens and various categories of aliens.⁴³ Aliens lawfully present in the United States typically enjoy constitutional rights and can access U.S. courts,⁴⁴ but the rights of aliens diminish significantly if they are outside the United States and come to a vanishing point if those aliens are "enemies"—citizens of sovereign governments at war with the U.S.⁴⁵ Jackson repeatedly emphasized, with reference to ancient common law, laws and traditions of war and the logic of his "sliding scale of rights" theory, that persons fighting for or loyal to enemy governments cannot claim the privilege of litigation in U.S. courts.⁴⁶ Indeed, he asserted that there

41. More broadly, Jackson announced that the "ultimate question" in the case involved the "jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas." *Eisenstrager*, 339 U.S. at 765.

42. *Id.* at 777-78.

43. Citizens enjoy the greatest legal status in the United States, triggering high obligation of the U.S. government to protect them, even when outside the borders of the country. *See id.* at 769-70 ("Because the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance, Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad."). The government's obligation toward aliens, however, turns upon the extent of his connections to the country. *Id.* at 770 ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

44. *Id.* at 771 (noting that the judiciary has power to act to enforce constitutional rights of aliens only if they are within the "territorial jurisdiction" of the country) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

45. *See id.* at 771-72.

46. *See id.* at 771 ("The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when [the alien's] nation takes up arms against us."); *id.* at 772 (citing Chancellor Kent's conclusion that at common law, "in war, the subjects of each country were enemies to each other, and bound to treat each other as such"); *id.* at 772 (citing early nineteenth century Supreme Court conclusions that "every individual of the one nation must acknowledge every individual of the other nation as his own enemy—

existed no authority to the contrary. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."⁴⁷

About the *Eisentrager* petitioners before the Court, there "is no fiction about their enmity." They were "actual enemies, active in the hostile service of an enemy power."⁴⁸ Thus, the Court held that the *Eisentrager* petitioners did not enjoy the "privilege of litigation" in U.S. courts:

[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.⁴⁹

In addition to this jurisdictional holding, the *Eisentrager* Court also ruled that the petitioners enjoyed no substantive rights under the Fifth Amendment because the Constitution does not provide an "extraterritorial application to embrace our enemies in arms."⁵⁰ The court of appeals had concluded that the Fifth Amendment entitled the petitioners to challenge the sufficiency of their military commission proceeding, via a habeas petition, because the Fifth Amendment expressly applies to "any person" without geographical limitation and because the Constitution constrains government agents acting under its authority in any circumstance or place.⁵¹

The Supreme Court dismissed these arguments as proving far too much. First, the court of appeals' theory would suggest that all provisions of the Fifth Amendment, not only core due process guarantees, would apply to enemies, as would any and all provisions of the Constitution.⁵² A proposition so categorically broad that the Constitution "confers rights upon all persons, whatever their na-

because the enemy of his country"); *id.* at 772 (concluding that "the alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States assuming him to be faithful to his allegiance, regards him as part of the enemy resources").

47. *Id.* at 768.

48. *Id.* at 778.

49. *Id.*

50. *Id.* at 785.

51. *See id.* at 781.

52. *Id.* at 784 (noting that the court of appeals' broad reading would mean that "irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' could require the American judiciary to assure them freedoms of speech, press and assembly as in the First Amendment, the right to bear arms as in the Second, security

tionality, wherever they are located and whatever their offenses” has no precedent.⁵³ This theory would also produce anomalous results, such as a Sixth Amendment obligation to afford to any “accused” person an impartial jury of the State or district where the crime had been committed. Such a result is not only impossible in this context, but also would de-legitimize military commissions so frequently—and lawfully—used to judge war crimes.⁵⁴ Second, such a reading, which would effectively undo the military commission process, would “invest[] enemy aliens in unlawful hostile action against us with immunity from military trial . . . put[ting] them in a more protected position than our own soldiers,” who are subject to military proceedings that do not guarantee all of the rights and procedures contained in the Fifth Amendment.⁵⁵

*C. The Distinctive Status of Guantánamo Bay and the Purported
Territoriality-Sovereignty Distinction*

In selecting Guantánamo Bay as the base for its detention and interrogation operations, the Administration relied confidently on *Eisentrager*, concluding that in all relevant legal respects, Guantánamo is no different than Landsberg and that the prisoners held in each place are equally alienated from our laws. This conclusion—one reiterated in much of the briefing in the *Rasul* case—turns equally on ambiguities in the Lease Agreement governing Guantánamo and on a certain aspect of Jackson’s *Eisentrager* decision.

As noted, Justice Jackson stated that the *Eisentrager* petitioners were not entitled to sue in U.S. courts because they had never been held in a “territory over which the United States is *sovereign*” and because their offense, capture, trial and imprisonment were “all beyond the *territorial jurisdiction* of any court of the United States.”⁵⁶ Justice Jackson does not elaborate upon any supposed distinction between “sovereignty” and “territorial jurisdiction,” though he clearly emphasizes the latter;⁵⁷ nor can one assume from a full read-

against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments”).

53. *Id.* at 783.

54. *Id.* at 782.

55. *Id.* at 783.

56. *Id.* at 778 (emphasis added).

57. In his opinion for the majority, Justice Jackson emphasized no less than four times, that the petitioners there were outside the “territorial jurisdiction” of the United States, while noting only once that petitioners were outside the “sovereign territory;” Justice Black’s dissent characterizes territoriality, not sovereignty, as critical to the Court’s opinion. See *Eisentrager*, 339 U.S. at 768 (“We are cited to no instance where a court, in this or any other country where the writ is known, has

ing of his opinion that he consciously meant to develop any meaningful distinction between the two concepts. Nevertheless, government lawyers formalistically paired that purported distinction with a distinction found in the Guantánamo Lease between the “exclusive jurisdiction and control” ceded to the United States and the “ultimate sovereignty” reserved to the Cuban government. Under the government’s reasoning, the critical legal feature of *Eisentrager* is this country’s lack of sovereignty in Germany, so that a parallel lack of “ultimate sovereignty” over Cuban land even within our “jurisdiction and control” makes Guantánamo similarly out of reach by U.S. courts.⁵⁸

Whatever strategic advantages this reliance on *Eisentrager* gave the Administration,⁵⁹ its shallowness as legal precedent should have been apparent. The status of Guantánamo and the status of the respective prisoners are fundamentally different.

issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity has been within its territorial jurisdiction.”); *id.* at 771 (“[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary the power to act.”); *id.* at 777 (writ should not extend to enemy alien detained “outside of our territory and there held in military custody as a prisoner of war”); *id.* at 781 (criticizing court of appeals for dispensing with “all requirement of territorial jurisdiction based on place of residence, captivity, trial, offense, or confinement” and for giving the Constitution an “extraterritorial application”); *id.* at 795 (Black, J., dissenting) (arguing that Court grounds opinion on the fact that petitioners “were captured, tried and imprisoned outside our territory”). This ratio strongly suggests that it is territorial control, not abstract notions of “sovereignty,” that is critical to the Court’s conclusion.

58. See Brief for Respondents at 15, *Rasul v. Bush*, 542 U.S. 466 (2004) (arguing that, because the “jurisdictional rule” supposedly established by *Eisentrager*, “is based on sovereignty,” and “the Guantánamo detainees are being held outside the sovereign territory of the United States” courts have no jurisdiction); see also Respondent’s Motion to Dismiss Petitioners’ First Amended Petition for Writ of Habeas Corpus at 13, *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (No. 02-0299) (“In *Eisentrager*, the Supreme Court ruled emphatically that the courts of the United States lack jurisdiction to entertain habeas corpus petitions filed on behalf of aliens who are held outside the sovereign territory of the United States. These detainees are aliens, and Guantánamo lies outside the sovereign territory of the United States. *Eisentrager* thus forecloses jurisdiction with respect to claims made by the detainees in this or any other United States court.”).

59. The Administration’s position was upheld in the District Court in the District of Columbia and the D.C. Circuit. See *infra* text accompanying notes 108-11. Thus, until the Supreme Court held in *Rasul* in June 2004 that U.S. courts do indeed have jurisdiction over detainee challenges to their detentions, the U.S. military ran Guantánamo for two and a half years under precisely the conditions they hoped for—entirely free from scrutiny by courts or lawyers.

1. The Unique Status of Guantánamo Bay

The military base in Guantánamo differs radically from the one that existed in Landsberg, Germany in a number of important respects. The same 1903 Lease that reserves to Cuba “ultimate sovereignty” over Guantánamo’s forty-five square mile land and water mass also grants the United States “complete jurisdiction and control” over the area.⁶⁰ The United States is entitled to maintain such exclusive territorial control over Guantánamo in perpetuity, as the Lease cannot be broken unilaterally.⁶¹ The Lease was not the product of diplomatic or economic *quid pro quo* among equal nations. The Lease was instead a product of the Platt Amendment—a statute that conditioned both withdrawal of the American forces that had occupied Cuba since the Spanish-American War and recognition of its independence on the acceptance of certain terms, including the installation of a permanent U.S. military base.⁶² This peculiar agreement was actually a common feature of colonial era arrangements, where colonial powers indulged in a fiction of the occupied territory’s independence, pursuant to which such territory might actually engage in a meaningful surrender of its rights.

[Under this system,] a world power acquired a piece of territory in a strategic area essentially by the use of force, though

60. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. I, III, Feb. 16-23, 1903, 6 Bevans 1113. Article III of the original lease agreement provides:

While on the one hand the United States recognizes the continuance of ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

61. In 1934, a treaty continued the lease “[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations. . . .” Treaty Between the United States of America and Cuba Defining their Relations, May 29, 1934, art. 3, T.S. No. 866, 48 Stat. 1682 (1934). The U.S. Administrations have successively taken the position that these lease agreements require mutual assent for cancellation. See Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantánamo Bay Problem*, 50 Ky. L.J. 459, 468-69 (1962).

62. The Platt Amendment stated in part: “[T]o enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.” An Act Making Appropriation for the Support of the Army for the Fiscal Year Ending June 13, 1902, ch. 803, ¶ VII, 31 Stat. 895, 898 (1901).

this was often done in the form of a symbolic lease or similar legal formula other than outright cession. It then built its Gibraltar or Singapore (or Guantánamo or Panama Canal) while occupying the territory and administering it as its own.⁶³

Upon execution of the Lease, the U.S. Attorney General concluded that Guantánamo was “practically . . . a part of the Government of the United States,”⁶⁴ and U.S. military and civilian officials, as well as courts, have been treating it that way ever since, even over the vehement objections of the host nation.⁶⁵ A 1961 report by Rear Admiral Robert D. Powers, Jr., then Deputy and Assistant Judge Advocate General of the Navy, concluded that the reservation of “ultimate sovereignty” to Cuba was functionally insignificant.⁶⁶ Unlike all other military bases, which “have been leased for a finite term with fixed provisions as to use and jurisdiction,” the “bases at Guantánamo Bay in Cuba and the Canal Zone in Panama are unique in their grants of jurisdiction and their indefinite terms of occupancy.”⁶⁷ He continued:

I[t may be] said that the words used regarding sovereignty in the two treaties [concerning Guantánamo and the Panama Canal Zone] grant to the United States the complete right in each case to act as the sovereign, with titular or residual sovereignty in the grantor nation. . . . *If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States.*⁶⁸

William Howard Taft, as Secretary of War, likewise characterized Cuba’s rights under the lease as little more than “a possibility

63. GEORGE STAMBUK, *AMERICAN MILITARY FORCES ABROAD* 8 (1963).

64. 25 Op. Att’y Gen. 157, 158 (1906). Theodore Olson, who was Solicitor General at the time the Guantánamo litigation was working its way to the Supreme Court, had opined twenty years earlier that the base is part of the “territorial jurisdiction” and under “exclusive United States jurisdiction.” 6 Op. Off. Legal Counsel 236, 237-38, 242 (1982) (opinion of Asst. Attorney General Olson).

65. See Brief of Retired Military Officers as Amici Curiae Supporting Petitioners at 14-15, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334) (“To our knowledge, Guantánamo is the only military base located in another country that the United States is legally entitled to keep in perpetuity. Every other American base overseas is leased for a specific term, and when that term expires, either the base must be closed or the agreement renegotiated—a process in which the host countries may seek a variety of diplomatic, political and economic concessions in exchange for continued American use of the base.”).

66. Robert D. Powers, *Caribbean Leased Bases Jurisdiction*, 15 JAG J. 161, 161 (1961).

67. *Id.*

68. *Id.* at 163; see also *id.* at 166 (describing Cuba’s rights as “at most a ‘titular’ sovereignty”).

of reversionary or residual jurisdiction” should the United States itself choose to abandon the base.⁶⁹ Therefore, the United States is “entitled to treat the territory as subject to such laws and administration as it may make applicable.”⁷⁰

Consistent with this historical understanding, United States law currently governs the actions of anyone on the base, whether a citizen or a foreign alien, and violations of criminal statutes are prosecuted in the federal government’s name.⁷¹ Federal labor laws apply to workers in Guantánamo,⁷² and U.S. courts take jurisdiction over cases arising out of the base, including cases that measure the government’s actions against constitutional requirements.⁷³ The Base is entirely self-sufficient; indeed, it treats its “host” government—

69. *Id.* at 163. This understanding of “reversionary” rights is reflected throughout military legal opinions. According to Rear Admiral Marion E. Murphy, who was Commander of Guantánamo in the 1950s, “‘Ultimate,’ meaning final or eventual, is a key word here. *It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy*, since we exercise complete jurisdiction and control, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba.” MARION E. MURPHY, THE HISTORY OF GUANTÁNAMO BAY 6 (1953), available at <http://www.nsgtmo.navy.mil/history/gtmohistorymurphyvol1ch3.htm> (emphasis added). He also concluded that “[u]nless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like.” *Id.* at 7-8.

70. Powers, *supra* note 66, at 166.

71. *See, e.g.*, United States v. Lee, 906 F.2d 117 (4th Cir. 1990) (*per curiam*) (United States prosecuting criminal offense). *But see* Al Odah v. United States, 321 F.3d 1134, 1143 (D.C. Cir. 2003) (specifically declining to find *Lee* as recognizing United States sovereignty, in a detainee habeas case). As Justice Stevens observed during the oral argument in *Rasul*, iguanas in Guantánamo are protected by U.S. environmental laws applicable on the island, but human beings—i.e. the detainees—are given no protection under federal law. Transcript of Oral Argument at 52, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334 and 03-343). *But see* Cuban American Bar Ass’n Inc. v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that the “district court here erred in concluding that Guantánamo Bay was a ‘United States territory.’ We disagree that ‘control and jurisdiction’ is equivalent to sovereignty. . . . [W]e again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are ‘functional[ly] equivalent’ to being land borders or ports of entry of the United States or otherwise within the United States.”) (internal citations omitted).

72. *Vermilya Brown Co., Inc. v. Connell*, 335 U.S. 377, 390 (1948) (“Where [the statute’s] purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power. . . .”).

73. *See, e.g.*, *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) (finding Taking Clause violation by Navy); *Burt v. Schick*, 23 M.J. 140, 142-43 (C.M.A. 1986) (holding that court martial proceeding in Guantánamo would constitute double jeopardy, in violation of 10 U.S.C. § 844(a)).

Cuba—as an enemy. The land perimeter of Guantánamo is mined and, after Fidel Castro cut off water to the base in 1964, the U.S. military built a desalinization plant⁷⁴ and has otherwise developed independent educational, transportation and entertainment facilities to make operations there entirely self-sufficient.⁷⁵

Critically, Cuban laws have no force or effect on Guantánamo; in its isolated physical space, the only legal authority is American. Indeed, far from obtaining consent or permission from Cuba to maintain or to control access to the Base, the U.S. relies on its effectively unilateral authority to revoke its leasehold rights in order to ignore the Castro government's protests.⁷⁶ In stark contrast, during the *Eisentrager* proceedings, the U.S. government recognized it could not convene a military commission in China, i.e., a proceeding implementing U.S. law, without first obtaining permission from the host Chinese government.⁷⁷ Similarly, our occupation over Germany was expressly temporary,⁷⁸ and jurisdiction over detentions there was shared with British and French allies.⁷⁹

Also, Guantánamo is in no sense like a traditional United States military base that exists abroad, where Status of Forces Agreements typically allocate “civil and criminal jurisdiction over military

74. Martin J. Scheina, *The U.S. Presence in Guantánamo*, 4 STRATEGIC REV. 81, 84-85 (Spring 1976).

75. The Base Commander describes Guantánamo as “small-town America.” See Carol Rosenberg, *New Chief Brings Guantánamo Up to Date*, MIAMI HERALD, Oct. 25, 2003, at 15A; see also Nancy Gibbs, *Inside “the Wire,”* TIME, Dec. 8, 2003, at 40 (“In addition to McDonald’s, there are now Pizza Hut, Subway and KFC [restaurants].”).

76. The Cuban government has long complained that the U.S. presence in Cuba is “illegal,” see *Bird v. United States*, 923 F. Supp. 338, 341 n.6 (D. Conn. 1996) (noting that Castro refused to cash the annual rent payment of \$4,085 the U.S. government tenders to his government), and has specifically protested the detentions in Guantánamo, see *What’s News*, WALL ST. J., Jan. 20, 2005, at A1; *Cuba Demands U.S. Stop Alleged Abuses at “Illegally Occupied” Guantánamo Base*, L’AGENCE FRANCE PRESSE, Jan. 19, 2005; Anita Snow, *Cuba Rants About Use of U.S. Navy Base*, FORT WORTH STAR-TELEGRAM, Dec. 27, 2003, at 14. In spite of having ceded “ultimate sovereignty,” the U.S. government ignores Cuba’s objections. See *Bird*, 923 F. Supp. at 341 (citing U.S. Dep’t of State, *Treaties in Force* (1995)).

77. Joint Appendix at 167, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) (including Message of 6 July 1946 to Wedemeyer from Joint Chiefs of Staff).

78. See *Eisentrager*, 339 U.S. at 797 (Black, J., dissenting) (China and Germany were “temporarily occupied countries.”).

79. See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, T.I.A.S. 2066, at 7-8, reprinted in DOCUMENTS ON GERMANY, 1944-70, COMM. ON FOREIGN RELATIONS, 92D CONG., (Comm. Print 1970), at 150-51.

and [civilian] personnel on a base.”⁸⁰ Such an agreement makes sense for military bases that emerge outside the colonial context. Under this modern system, “the leases, if that form is still retained, are real: there is a *quid pro quo*, and there is no cessation of sovereignty.”⁸¹

[U.S. forces] do not own the bases (not even as a real-estate owner, much less in the sense of sovereign rights), though they may build them and use them in the common defense effort. In essence, their status is the same anywhere in the territory of the host state Conversely, the host state’s sovereignty remains formally in effect inside and outside the military installations.⁸²

A careful reading of Jackson’s *Eisentrager* opinion reveals that, contrary to the Administration’s view, the Court’s objection to hearing the habeas petitions at issue did not turn on the fact that Landsberg lies outside the “sovereignty” of the United States.⁸³ Jackson uses the term “sovereign territory” once, without any meaningful explication.⁸⁴ Instead, his central concern was that the petitions were being filed by enemy aliens, during a time of war, in a place outside United States territory or its “territorial jurisdiction.”⁸⁵ Jackson’s emphasis on territorial location, rather than abstract notions of political sovereignty makes sense in light of an overriding concern about the practical burdens of permitting litigation of the sort requested by the German petitioners. In *Eisentrager*, providing access to U.S. courts might require transport of prisoners thousands of miles for a hearing and divert an actual field commander from operations on the battlefield to answer legal challenges at home.⁸⁶

By contrast, neighboring Guantánamo, functionally a permanent part of United States territory, fully self-sufficient and exclusively staffed with large numbers of U.S. military and support

80. Gerald L. Neumann, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 39 (2004).

81. *Id.* at 36 (quoting STAMBUK, *supra* note 63, at 8).

82. STAMBUK, *supra* note 63, at 8.

83. See *supra* note 58 (discussing Administration’s interpretation of *Eisentrager*, asserted through briefing in the Supreme Court, that the case prohibits jurisdiction over claims by aliens outside the “sovereign territory” of the United States).

84. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) (“[T]hese prisoners at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial and their punishment were all beyond the *territorial jurisdiction* of any court of the United States.” (emphasis added)).

85. See *supra* text accompanying note 46 and 57.

86. *Eisentrager*, 339 U.S. at 778-79.

personnel to carry out large scale detention and interrogation operations, does not raise the same serious practical considerations. And, because Guantánamo is 8000 miles from the battlefield and approximately 100 miles from the U.S. mainland, permitting challenges to detentions could not be said to directly or materially hamper military operations as it would in *Eisentrager*, which took place within “a zone of active military operations or under martial law.”⁸⁷ Therefore, the Administration’s attempted equation of the status and place of Guantánamo with the status and place of Landsberg, as considered in *Eisentrager*, rests on demonstrably superficial ground.

2. The Unique Status of the Guantánamo Detainees

The Administration’s attempt to equate the status of detainees held in Guantánamo with that of those held in *Eisentrager* is equally flawed. The Administration repeatedly asserted that Guantánamo detainees could not access U.S. courts because they were “foreign nationals” held “abroad.” Having already demonstrated that Guantánamo is in no meaningful sense “abroad” or outside the “territorial jurisdiction” of the United States, it should be equally plain that the petitioners’ status as aliens was not dispositive in *Eisentrager*; it was their status as *enemy* aliens that was critical. The *Eisentrager* petitioners, concededly citizens of a country against which we were formally at war, “were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity.”⁸⁸ The disabilities imposed on aliens, the Court repeatedly and expressly stated, are imposed “temporarily as an incident of war and not as an incident of alienage.”⁸⁹ Under such long standing principles, one can infer an alien citizen of an enemy government is also himself an enemy.⁹⁰

Such an inference is not permissible in Guantánamo, where the detainees are citizens of up to forty-four different countries, with only one of which we were at war, and the great majority of which were considered friendly, allies or even part of the coalition forces in Afghanistan.⁹¹ A number of them were arrested thousands of miles from the battlefield in Afghanistan, in places

87. *Id.* at 780.

88. 339 U.S. at 778.

89. *Id.* at 772.

90. See *supra* text accompanying note 46.

91. Countries included Bahrain, Kuwait, Saudi Arabia, Turkey, France, the United Kingdom, Sweden, Germany, Bosnia, Canada, Afghanistan and Pakistan.

like Bosnia, Gambia, Zambia and Thailand.⁹² These facts relate to another manifestly critical distinction between the status of the prisoners in *Eisentrager* and those in Guantánamo. In Guantánamo, habeas petitioners claimed themselves innocent of wrongdoing at a time when the military itself had recognized that many persons in Guantánamo did not belong there;⁹³ yet, they received no process by which to challenge their detention. They were designated “enemy combatants” based on the unilateral authority of the President and, absent protections of U.S. domestic or international law, could remain detained forever. By contrast, of course, the petitioners at Landsberg had already been formally adjudicated enemies who had violated the laws of war by a duly constituted military commission, one that contained fundamental guarantees of due process and had even acquitted six Germans.⁹⁴ To a large extent, the Court in *Eisentrager* appears to wish to deny access to habeas for collateral attacks on the prisoners’ sentences because such second-guessing, based on a robust reading of constitutional guarantees, could lead to the end of the military commission process itself—a process that the court deemed necessary and fair.⁹⁵ That is certainly not possible where the detainees in Guantánamo are asking for court review of their detentions, not collaterally, but in the first instance.

In addition, the *Eisentrager* court actually engaged in a substantive review of the petitioners’ detentions. First, the Court undertook “the same preliminary hearing as to the sufficiency of the application” that had been done in *Quirin* and *Ex Parte Yamashita*, which permitted the Court to conclude that the prisoners “are really enemy aliens”⁹⁶ who were “active in the hostile service of an enemy power.”⁹⁷ Second, the Court considered—but rejected—the prisoners’ challenge to the jurisdiction of the military commissions.⁹⁸ Finally, the Court adjudicated and again rejected the merits of the

92. *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 446 (D.D.C. 2005).

93. *See infra* text accompanying notes 220-24.

94. *See supra* text accompanying note 40 (discussing procedural guarantees afforded to group of Germans tried in China for violations of laws of war, which ultimately resulted in six acquittals).

95. *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950) (cautioning that application of panoply of constitutional rights to these prisoners would grant them “immunity from military trial”).

96. *Id.* at 784.

97. *Id.* at 781.

98. *Id.* at 785-88; *see also id.* at 790 (“We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities . . .”).

prisoners' claims under the Fifth Amendment and the 1929 Geneva Convention.⁹⁹

Thus, the Court's review of the claims brought by "enemy aliens" and the procedural posture in which those particular claims were reviewed supported *Eisentrager*'s interpretation that no courts have authority to adjudicate habeas petitions filed by aliens detained abroad. *Eisentrager* itself, however, does not broadly stand for the proposition that a prisoner has no recourse to law whatsoever, merely because of an alien status and placement in territory outside contiguous U.S. borders. *Eisentrager* could not support the Administration's attempt to create a prison beyond the law.

II.

RASUL AND APPLICATION OF FUNDAMENTAL DUE PROCESS RIGHTS AT GUANTÁNAMO

A. *The Rasul Litigation*

In February 2002, relatives of one Australian and two British nationals detained at Guantanamo Bay filed petitions for habeas corpus, pursuant to the federal habeas corpus statute, 28 U.S.C. § 2241, in federal district court in Washington, D.C. as the detainees' "next friends."¹⁰⁰ The petitions named President Bush and Secretary of Defense Rumsfeld, as well as the Commander of the Naval Base, as respondents and sought as initial relief an order permitting meetings with counsel, a cessation of interrogations and the right to be informed of charges against the detainees; ultimately, the petitions sought release from detention. The petitions asserted that the detentions violated due process under the Fifth Amendment, the Sixth, Eighth and Fourteenth Amendments to the U.S.

99. *Id.* at 785 (no Fifth Amendment right "of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States"); *id.* at 788-90 (dismissing claims under Geneva Conventions).

100. See Respondent's Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus, *supra* note 58, at 6. Because the detainees were being held incommunicado at the Guantánamo Naval Base, not permitted to consult with counsel or with family, they could not themselves authorize the filing of petitions on their behalf. Hence, the petitions had to be filed by "next friends" with whom they share a significant relationship, after they learned of their relatives' detentions from their home governments. See 28 U.S.C. § 2242 (2000) (authorizing petitions to be brought "by the person for whose relief it is intended or by someone acting in his behalf"); see also *Whitmore v. Arkansas*, 495 U.S. 149, 161-64 (1990). Indeed, they did not know about petitions filed on their behalf until two and a half years later, after the *Rasul* decision, when they were permitted to meet with their counsel for the first time.

Constitution, as well as international treaties and customary international law. Also, they asserted that the detentions exceeded the lawful authority of the President and were an unconstitutional suspension of the Great Writ.¹⁰¹ Less than three months later, “next friend” habeas petitions were filed on behalf of twelve Kuwaiti nationals by their fathers and brothers, naming similar respondents, asserting similar substantive claims and requesting similar relief.¹⁰² Recognizing critical distinguishing features of the *Eisentrager* decision described above, the petitioners all claimed, first, that they were nationals of governments—i.e. Kuwait, Britain, Australia—with whom the United States was not at war nor whom we considered enemies; and second, that they never fought against nor committed any hostile acts against the United States—that is, that they were innocent of wrongdoing—and third, that they had received no judicial process to establish their status.¹⁰³

After the cases were consolidated, the government filed a motion to dismiss the two sets of petitions, relying heavily on *Eisentrager* as holding that courts have no jurisdiction over alien detainees held outside sovereign territory of the United States.¹⁰⁴ The district court agreed with the government’s reading of *Eisentrager* and dismissed the petitions.¹⁰⁵ It concluded that *Eisentrager* barred claims of aliens attempting to enforce rights in federal courts via habeas if the alien is outside the sovereign territory of the United States.¹⁰⁶ The court held that it lacked “jurisdiction to consider the constitutional claims that are presented to the Court for resolution.”¹⁰⁷

101. See Respondent’s Motion to Dismiss Petitioners’ First Amended Petition for Writ of Habeas Corpus, *supra* note 58, at 7.

102. *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).

103. See, e.g., *Rasul v. Bush*, Petition for Habeas Corpus, No. 02-CV-0299 (D.D.C.) (“The detained prisoners are not, and have never been, members of Al Qaida or any other terrorist group. Prior to their detention, they did not commit any violent act against any American person, nor espouse any violent act against any American person or property. On information and belief, they had no involvement, direct or indirect, in either the terrorist attacks on the United States on September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group.”); Motion to Compel Responsive Pleading and Return Forthwith, at 3, *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. Aug. 27, 2004) (No. 02-CV-0828) (alleging that petitioners were humanitarian volunteers in Afghanistan and Pakistan who were seized by locals in exchange for American-financed bounties).

104. *Rasul v. Bush*, 215 F. Supp. 2d 55, 59 (D.D.C. 2002).

105. *Id.* at 72-73.

106. *Id.* at 68.

107. *Id.* at 73. While the motions were pending, a third case on behalf of another Australian citizen, *Habib v. Bush*, was filed and consolidated with *Rasul* and

The D.C. Circuit Court of Appeals affirmed in an opinion captioned *Al Odah v. United States*.¹⁰⁸ Although the court conceded that it had to accept as true the petitioners' allegations that they were not "enemy aliens," which was a dominant factor in *Eisentrager*'s analysis, it nevertheless concluded that *Eisentrager* was controlling. Apparently, the court believed that, like the *Eisentrager* prisoners, the Guantánamo detainees "are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States."¹⁰⁹ The court, however, appeared to abandon consideration of these factors, leaving their significance or purported connection to *Eisentrager*'s analysis uncertain. Instead, the court affirmed the grant of the motion to dismiss by coupling the question of jurisdiction with the question regarding the existence of substantive constitutional rights.

The *Al Odah* court concluded, "[i]f the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions"¹¹⁰ The court further quoted *Eisentrager* for the propositions that the "Judiciary [has the] power to act" to vindicate an alien's constitutional rights only if he is within the country's "territorial jurisdiction," and that the "privilege of litigation" extends to aliens only where their presence "implied protection" for them.¹¹¹ The court concluded there is no jurisdiction here because the detainees, as aliens held outside the United States, enjoy no constitutional rights.

In support of this holding, *Al Odah* cited *Eisentrager*. But *Eisentrager* never held that constitutional rights could not apply abroad in the categorical manner the court of appeals suggested; rather, *Eisentrager* rejected an overbroad reading of the Fifth Amendment that would make it apply in all contexts and benefit all persons.¹¹²

Al Odah. That case was similarly dismissed and all three cases were consolidated for appeal to the D.C. Circuit.

108. 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 542 U.S. 466 (2004).

109. *Id.* at 1140.

110. *Id.* at 1141.

111. *Id.*

112. Johnson v. Eisentrager, 339 U.S. 763, 781 (1950) (rejecting proposition that "the Fifth Amendment confers rights upon *all* persons, *whatever* their nationality, *wherever* they are located and *whatever* their offenses" or an interpretation that would confer "its rights on all the world") (emphasis added).

As described, the problem *Eisentrager* identified with such a reading, beyond the lack of any limiting principle, is that it would disable the entire military commission process duly authorized by Congress, previously upheld by the courts and deemed essential to the prosecution of war criminals on or near the battlefield.¹¹³ Therefore, *Eisentrager* alone does not foreclose the application of the Constitution to aliens in all cases, such as cases for where no military commission process has yet occurred.

Second, the *Al Odah* court suggests that subsequent Supreme Court cases have read *Eisentrager* to prohibit categorically the application of the Constitution to aliens. For example, in *United States v. Verdugo-Urquidez*,¹¹⁴ the Court relied in part on *Eisentrager* in rejecting the applicability of the Fifth Amendment abroad, and cited it for the proposition that *Eisentrager*'s "rejection of the extraterritorial application of the Fifth Amendment was emphatic."¹¹⁵ Finally, *Al Odah* explained that the D.C. Circuit has followed the *Verdugo-Urquidez* statement regarding the Fifth Amendment, even though that statement is dictum. According to *Al Odah*, "[t]he law of the circuit now is that a 'foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise.'"¹¹⁶

The *Al Odah* court, like the government, conflated territoriality with sovereignty. Although it concluded that the Constitution can never apply to aliens outside the territory of the United States, the court did not directly address the petitioners' claims that Guantánamo is effectively United States territory. Rather, in discussing the peculiar status of Guantánamo, the *Al Odah* court emphasized the U.S. government's lack of *sovereignty* over the Base.¹¹⁷ Because *Al Odah* relies on prior holdings denying applicability of constitutional rights to aliens outside the territory of the United States, it is unclear why the court felt the need to address—though not to ex-

113. See *supra* note 46.

114. 494 U.S. 259 (1990).

115. *Al Odah*, 321 F.3d at 1141 (citing *Verdugo-Urquidez*, 494 U.S. at 269). See also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Eisentrager* for the proposition that it is "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

116. *Al Odah*, 321 F.3d at 1141 (quoting *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

117. See *id.* at 1142 ("We have thus far assumed that the detainees are not 'within any territory over which the United States is sovereign.'") (quoting *Eisentrager*, 339 U.S. at 778); see also *id.* at 1143 ("The text of the leases . . . shows that Cuba—not the United States—has sovereignty over Guantánamo Bay.").

plain—the more complicated question of sovereignty, which would create a higher burden. In any case, regardless of the formalistic terminology or putative distinction between territoriality and sovereignty, the *Al Odah* court believed Guantánamo to be the functional equivalent of Landsberg. The Supreme Court similarly sidestepped the distinction because it is ultimately irrelevant to dispose of the question of the status of the detainees, the habeas statute and the application of fundamental constitutional rights there.

B. *The Rasul Holding*

In *Rasul*, the Supreme Court reversed the court of appeals. It held that U.S. courts could entertain petitions for habeas corpus under the habeas corpus statute, 28 U.S.C. § 2241—as well as federal claims under 28 U.S.C. § 1331 and claims under the Alien Tort Statute, 28 U.S.C. § 1350—brought by detainees at Guantánamo Bay to challenge the legality of their detention. In so holding, *Rasul* promises much more than a narrow jurisdictional interpretation of the habeas corpus statute, which was never the ultimate issue in the case. *Rasul* represents a thorough rejection of the government's claim that it could maintain at Guantánamo a prison and interrogation camp without judicial scrutiny—a claim that it could operate in an enclave subject only to executive will and discretion, completely outside the constraints of law. In reversing the *Al Odah* ruling, the Supreme Court rejected application of the *Eisentrager* framework to the detainee cases in Guantánamo. The Supreme Court thereby reaffirmed habeas corpus as a substantive source of rights and specifically held that fundamental constitutional rights apply to the U.S. territory in Guantánamo.

1. Guantánamo As U.S. Territory

In *Rasul*, the Supreme Court did hold that certain fundamental rights apply within Guantánamo after it set aside the putative (although heretofore unexplained) distinctions between sovereignty and territoriality that the government pressed in the Lease Agreement. Initially, the Court diminished *Eisentrager*'s precedential value. In explaining that the petitioners “in these cases differ from the *Eisentrager* detainees in important respects,” the Court recognized the distinctive space Guantánamo occupies. Unlike the prisoners held in Landsberg, the Guantánamo detainees have been for two years “imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”¹¹⁸ Justice Kennedy

118. *Rasul v. Bush*, 542 U.S. 466, 476 (2004).

concurred in the judgment and emphasized the reality of the Guantánamo space, which is in “every practical respect a United States territory.”¹¹⁹ According to Kennedy, “[w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantánamo Bay. From a practical perspective, the indefinite lease of Guantánamo Bay has produced a place that belongs to the United States.”¹²⁰

The Court and Justice Kennedy similarly distinguished the status of the detainees in *Eisentrager* as compared to those in Guantánamo. According to the Court, the Guantánamo detainees “are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing.”¹²¹ For Kennedy, it was critical that, unlike the prisoners in *Eisentrager*, who were “tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms,” the Guantánamo detainees are “being held indefinitely, and without benefit of any legal proceeding to determine their status.”¹²² Justice Kennedy believed that the procedures afforded to the *Eisentrager* detainees to establish “their status” as enemy aliens justified closing off the courts to their claims; by contrast, he would allow the Guantánamo detainees access to the courts to “show that they were ‘of friendly disposition’ and not enemy aliens.”¹²³

A final, important distinguishing feature of these detentions from those in *Eisentrager* is their comparative lack of proximity to any actual conflict. The Court’s holding reflects a sound rejection of the government’s repeated exhortations that exercising jurisdiction over Guantánamo detainees’ challenges would “directly interfere with the Executive conduct of the military campaign against Al Qaeda and its supporters.”¹²⁴ Justice Kennedy stressed that Guantá-

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

120. *Id.*

121. *Id.* at 476 (majority opinion).

122. *Id.* at 487-88 (Kennedy, J., concurring).

123. *Id.* at 488 (quoting *Johnson v. Eisentrager*, 339 U.S. 769, 778 (1950)). *Id.* (further noting that “[i]ndefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention”).

124. Brief for Respondents, *Rasul v. Bush*, S. Ct. No. 03-334 and 03-343, at 42. See *Rasul*, 542 U.S. at 474 (“recognizing the federal courts’ power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“[H]abeas corpus allows the Judicial Branch to play a

namo is “far removed from any hostilities” and that *indefinite* detention outside a zone of military conflict “suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus.”¹²⁵

The Supreme Court’s reversal of the D.C. Circuit on the question of Guantánamo’s status also required a reversal on the D.C. Circuit’s holding that the Constitution could not apply in Guantánamo. In *Al Odah*, the court of appeals predicated the “subsidiary procedural right” to habeas jurisdiction on the availability of substantive constitutional rights,¹²⁶ and quoted *Eisenrager* for the proposition that “in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”¹²⁷ The *Al Odah* court then concluded that the courts have no jurisdiction because petitioners, as aliens held in Guantánamo, which is, alternatively, beyond the “territorial jurisdiction” of United States, the “sovereign territory” of the United States or simply “without . . . presence in” the United States, enjoy no constitutional rights.¹²⁸ In reaching this conclusion, the court rejected the argument that the “exclusive jurisdiction and control” over Guantánamo transformed it into U.S. territory, where concededly, constitutional rights would apply.¹²⁹ The Supreme Court reversed this very point, rejecting the argument that the habeas statute does not apply “extraterritorially” to Guantánamo: “Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within ‘the territorial jurisdiction’ of the United States.”¹³⁰ Guantánamo is within the “territorial jurisdiction” of the United States, as

necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”).

125. *Rasul*, 542 U.S. at 487-88.

126. *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003), *rev’d sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004) (“If the Constitution does not entitle the detainees to due process . . . they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisenrager* itself directly tied jurisdiction to the extension of constitutional provisions . . .”).

127. *Id.* at 1141 (quoting *Eisenrager*, 339 U.S. at 771).

128. *Id.*

129. *Id.* at 1144.

130. *Rasul*, 542 U.S. at 480 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). *Rasul* appears also to have adopted the Court of Appeals’ view of the close nexus between habeas rights and habeas jurisdiction; however, it rejected the relevance of the alien status of the individual. It held that “[a]liens held at the

described, because the “United States exercises ‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”¹³¹ *Rasul* used the very language the court of appeals relied upon from *Eisentrager* to define the scope of the geographical application of the Constitution: “in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its *territorial jurisdiction* that gave the judiciary power to act.”¹³² *Rasul* thus rejected the premise of the court of appeals that Guantánamo is “extraterritorial” and therefore beyond the reach of either the habeas statute or the Constitution.¹³³

Rasul is, therefore, perfectly in line with *Eisentrager*, which criticized the lower court in that case because it gave the Constitution “extraterritorial application” and dispensed with all “requirement of territorial jurisdiction” for application of the Constitution.¹³⁴ Based on this critical language, Justice Jackson could not have protested a finding that Guantánamo is not extraterritorial and that

base, no less than American citizens, are entitled to invoke the federal court’s authority under § 2241.” *Id.* at 481.

131. *Id.* at 480 (quoting 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III).

132. *Eisentrager*, 339 U.S. at 771.

133. *Rasul*, 542 U.S. at 480-81. Remarkably, the court of appeals appears to have rejected the Supreme Court’s reasoning in its recent split decision in *Boumediene* (authored by Judge Raymond Randolph, the author of the opinions reversed by the Supreme Court in *Rasul* and *Hamdan*). First, the court held that the detainees enjoy no constitutional rights as aliens held outside sovereign territory of the U.S. and that, despite the *Rasul* court’s analysis, any differences between Guantánamo and the prison at Landsberg, where the *Eisentrager* petitioners were held, are “immaterial to the application of the Suspension Clause.” *Boumediene v. Bush*, No. 05-5062, slip op. at 20 (D.C. Cir. Feb. 20, 2007). Second, the court held that, because the writ would not have extended to a place like Guantánamo in 1789—outside U.S. sovereign territory—the revocation of the writ contained in the Military Commissions Act did not run afoul of the Suspension Clause. *Id.* at 14. In *Rasul*, however, the Court had recognized that, at common law, “the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.” *Rasul*, 542 U.S. at 482 (internal quotations omitted). Over a strong dissent by Judge Rogers, the panel majority openly rejected the Court’s analysis and instead agreed with the *Rasul* dissent that, because the cases relied upon by *Rasul* did not expressly involve “aliens held outside the territory of the sovereign,” there was no evidence that persons in the petitioners’ position would have benefited from the writ in 1789. *Boumediene*, slip op. at 18 (quoting *Rasul*, 542 U.S. at 502-05 & n.5 (Scalia, J., dissenting)); cf. *Rasul*, 542 U.S. at 482 n.14 (rejecting the claim made by Justice Scalia’s dissent but later adopted by the *Boumediene* majority, that “habeas corpus has been categorically unavailable to aliens held outside sovereign territory.”)

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

therefore, constitutional rights may apply. Justice Kennedy's concurrence reinforces this point.¹³⁵

2. The Applicability of Fundamental Constitutional Rights to the Guantánamo Detainees

Most importantly, the *Rasul* Court *expressly* ruled that the Guantánamo detainees enjoy constitutional rights that can be vindicated by the habeas statute. The Court stated:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”¹³⁶

This critical passage comes in a footnote—footnote 15—to text explaining the detainees' contention that they are being held in custody “in violation of the laws of the United States.”¹³⁷ In this context, the passage makes clear that, if detainees held in the “long-term, exclusive jurisdiction and control” of the U.S. ultimately prove their central allegations to be true, they would have demonstrated a violation of the Constitution. As such, they would demonstrate that their custody was illegal; this would consequently authorize their release pursuant to a provision of the habeas statute, 2241(c)(3).¹³⁸ The detainees thus enjoy the protection of the Constitution.

135. In his concurrence, Kennedy stresses that Guantánamo “belongs to the United States,” and, invoking language from *Eisentrager*, suggests that this would extend the “implied protection” of the U.S. to Guantánamo. *Rasul*, 542 U.S. at 487. The implied protection, it is clear, includes the majority's “privilege of litigation” in U.S. courts. *Id.* at 485.

136. *Rasul*, 542 U.S. at 483 n.15 (citing 28 U.S.C. § 2241(c)(3)). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) and cases cited therein.

137. *Rasul*, 542 U.S. at 483 n.15.

138. 28 U.S.C. § 2241(c)(3) authorizes issuance of the writ if a petitioner demonstrates that his executive detention is “in custody in violation of the Constitution or laws or treaties of the United States.” This is by no means the exclusive vehicle to obtain habeas relief. 28 U.S.C. § 2241(c)(1), which is the direct descendant of the original habeas corpus statute passed as Section 14 of the 1789 Judiciary Act, authorizes the release of a prisoner held “in custody under, or by color of authority of the United States.” The Court's citation of subsection (c)(3) of the habeas statute in footnote 15 demonstrates its judgment that certain allegations would demonstrate a violation of the Constitution, necessarily applicable in a terri-

The Court thereafter remanded to the district court where the government would be required to “make their response” to the petitions and where the court must “consider in the first instance the merits of petitioners’ claims.”¹³⁹ Those claims, as the *Rasul* Court stressed repeatedly in a variety of phrasings, are that the petitioners are “wholly innocent of wrongdoing.”¹⁴⁰

C. A Substantive Understanding of *Rasul*

Soon after the Supreme Court’s decision in *Rasul*, the government undertook a number of steps that demonstrated a remarkably cramped and inaccurate reading of the Court’s judgment. First, on July 7, 2004, nine days after *Rasul*’s issuance, Deputy Secretary of Defense Paul Wolfowitz issued an order creating ad hoc military proceedings in Guantánamo purporting to review the “enemy combatant” status of the detainees.¹⁴¹ These Combatant Status Review Tribunals, or CSRTs, were actually to *confirm* the detainees’ existing status as “enemy combatants,” determined through what the Order

tory where the U.S. exercises “long-term, exclusive jurisdiction and control.” Nevertheless, § 2241(c)(1), also invoked by the detainees, embodies the common law habeas corpus power of a detainee to challenge the authority of his custodian to detain him, *regardless* of whether the detention violates a specific constitutional or statutory provision. *See INS v. ST. CYR*, 533 U.S. 289, 305 (2001) (“The writ of habeas corpus has always been available to review the legality of Executive detention. Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789”) (citations omitted); 17A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 4261 n.18 (2d ed. 1988); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1420 n.31 (1997) (discussing history of § 2241); *see also* *Strait v. Laird*, 406 U.S. 341, 353 (1972) (Rehnquist, J., dissenting) (explaining that generally, “[a] district court has the power to grant a writ of habeas corpus only where a prisoner ‘is in custody in violation of the Constitution or laws or treaties of the United States’ [quoting 28 U.S.C. § 2241(c)(3)] or ‘is in custody under or by color of the authority of the United States’ [quoting 28 U.S.C. § 2241(c)(1)]” (emphasis added)); *McCall v. Swain*, 510 F.2d 167, 183 (D.C. Cir. 1975) (“Under 28 U.S.C. § 2241, federal District Courts are empowered to issue writs of habeas corpus when, inter alia, a prisoner ‘is in custody under or by color of the authority of the United States, § 2241(c)(1), or ‘is in custody . . . in pursuance of . . . an order, process, judgment or decree of a court or judge of the United States, § 2241(c)(2)’” (emphasis added)); *Eisel v. Sec’y of the Army*, 477 F.2d 1251, 1262 n.33 (D.C. Cir. 1973) (noting difference between §§ 2241(c)(1) and (c)(3)).

139. *Rasul*, 542 U.S. at 485.

140. *Id.*

141. *See* Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2003), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. [hereinafter Wolfowitz Order].

itself states had been “multiple levels of review by officers of the Department of Defense.”¹⁴² Continuing its pre-*Rasul* resistance, the government intended to keep the district courts from hearing the merits of petitioners’ claims and instead offered the “hearings” done by the CSRTs—with all of their fundamental procedural failings¹⁴³—as a substitute for the Great Writ. Second, the government argued that, despite *Rasul*’s ruling entitling detainees to file petitions in court, the detainees enjoyed neither right to counsel nor an attendant attorney-client privilege. Construing the clear import of *Rasul*, a district court rejected this argument and the government’s corollary position that it could conduct real-time monitoring of attorney-client communications.¹⁴⁴ Finally, and most central to this article, the government moved to dismiss a number of habeas petitions filed on behalf of other detainees and consolidated in the months following *Rasul* on grounds pressed already in litigation leading up to *Rasul*: that detainees enjoy no constitutional rights as aliens held outside U.S. sovereign territory.¹⁴⁵ A description of the government’s position—recently implicitly accepted by the court of appeals in *Boumediene*—and a response, follow.

1. The Government’s Resuscitation of *Eisentrager*

Throughout the post-*Rasul* litigation, in motions to dismiss filed in two consolidated cases and in appeals to the D.C. Circuit reviewing conflicting district court rulings on the motions,¹⁴⁶ the government contended that *Rasul* represents nothing more than a narrow jurisdictional ruling, authorizing only the filing of petitions alleging illegal conduct. It claimed that *Rasul* is otherwise entirely silent on the issue of whether the detainees actually possess any sub-

142. *Id.*

143. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005) (holding that “the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government’s evidence supporting the determination that he is an ‘enemy combatant’” and that it possibly permitted evidence obtained by torture).

144. *Al Odah v. United States*, 346 F. Supp. 2d 1, 8, 15 (D.D.C. 2004).

145. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d. at 448 (describing government’s post-*Rasul* position). As described, the court of appeals in *Boumediene* implicitly accepted the government’s post-*Rasul* petition. See *supra* note 133. The following analysis, therefore, in which I attempt to demonstrate that the Supreme Court would squarely hold that Guantánamo detainees enjoy fundamental constitutional rights, is as much a response to the *Boumediene* analysis as the government’s.

146. See *id.* at 481 (denying government’s motion to dismiss); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (granting government’s motion to dismiss).

stantive rights under the Constitution or treaties.¹⁴⁷ The government maintains that the detainees possess no Fifth Amendment due process rights entitling them to a hearing in federal court of the kind required in *Hamdi v. Rumsfeld*. The government explained that, prior to *Rasul*, the law categorically demonstrated that aliens held abroad are entitled to no constitutional rights, and therefore, footnote 15 could not have meant to overrule *sub silentio* that supposedly long-held understanding. Both this premise and the conclusion the government drew from it—that *Rasul* did nothing to alter this previous understanding—are false.

First, as described, *Eisentrager* did not broadly hold that the Constitution could never apply to aliens held by the United States overseas.¹⁴⁸ Rather it criticized the lower court for broadly holding the opposite: that the Fifth Amendment would confer rights “upon all persons, *whatever* their nationality, *wherever* they are located and *whatever* their offenses” was untenable.¹⁴⁹ Further, in the Court’s view, a reading of the Fifth Amendment conferring “its rights on all the world” would logically require extension to enemies of all the protections of the Bill of Rights in ways that would be, in the case of the Second Amendment, for example, nonsensical.¹⁵⁰ It is only “such” a broad reading of the “extraterritorial application” of the Constitution that the Court found without precedent.¹⁵¹ In the particular case before the Court, *Eisentrager* held that the Fifth Amendment did not apply to an “alien enemy engaged in the hostile service of a government at war with the United States” where that person had already received a full military trial.¹⁵² *Rasul*, of course, does not propose the same broad, categorical rule that *Eisentrager* rejected. Moreover, as described, the location and status of the Guantánamo detainees is materially distinguishable from that of the enemy aliens detained at Landsberg, which mandated a rejection of the *Eisentrager* plaintiffs’ constitutional claims.¹⁵³ Thus,

147. See, e.g., Brief of Appellees, *Boumediene v. Bush*, 05-5062, 5063 (D.C. Cir. 2005); Brief of Appellants, *Al Odah v. United States*, Nos. 05-5064, 05-5095 to -5166 (D.C. Cir. 2005).

148. See *supra* text accompanying notes 51-55.

149. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

150. *Id.*

151. *Id.*

152. *Id.* at 785.

153. See *supra* text accompanying notes 60-95. But see *Boumediene v. Bush*, No. 05-5062, slip op. at 20 (D.C. Cir. Feb. 20, 2007) (asserting that any differences between Landsberg and Guantánamo are “immaterial” to the question of whether fundamental constitutional rights apply in Guantánamo).

Eisentrager does not foreclose the plain reading compelled by footnote 15: these detainees enjoy fundamental constitutional rights.

Second, the government has at times characterized *Eisentrager*'s Fifth Amendment holding as one turning on "sovereignty" rather than "extraterritoriality."¹⁵⁴ Specifically, in an attempt to avoid *Rasul*'s recognition of Guantánamo's functionally territorial status, the government has suggested that Guantánamo still remains outside the "sovereign territory" of the United States by virtue of the 1903 Lease Agreement reservation of "ultimate sovereignty" to Cuba;¹⁵⁵ as such, it contends that constitutional rights cannot apply there. In support of this view, the government—and the court in *Boumediene*—relies on Chief Justice Rehnquist's opinion in *United States v. Verdugo-Urquidez*, which at one point characterized *Eisentrager* as rejecting the application of the Constitution to aliens "outside the sovereign territory" of the United States, but on the same page characterized that rejection as one based on an "extraterritorial" application.¹⁵⁶ Rehnquist's opinion also held that the Mexican defendant in that case could not invoke the protections of the Fourth Amendment to exclude the fruits of a warrantless search of his Mexican property, because he was an alien who had no "voluntary connection" to the United States.¹⁵⁷

The D.C. Circuit has interpreted *Verdugo-Urquidez* generally to hold that aliens without "property or presence in this country" en-

154. The *Boumediene* court also stresses the lack of formal sovereignty—and rejects *Rasul*'s emphasis on de facto sovereignty—in concluding that the Constitution does not apply to Guantánamo. *Boumediene*, slip op. at 20. Even this view could not be supported by *Eisentrager* itself. First, *Eisentrager* is a decision that turns on Landsberg prison's extraterritorial status—a geographical fact the court stresses repeatedly. Second, the only place *Eisentrager* mentions sovereignty specifically is in the discussion about the applicability of the habeas statute, not the Constitution. Because they are outside territory "over which the United States is sovereign," the Court says the *Eisentrager* prisoners do not enjoy the "privilege of litigation" in U.S. courts. Of course, *Rasul* specifically says that the habeas statute applies to Guantánamo and that, independently, nonresident aliens have traditionally enjoyed the "privilege of litigation" in U.S. courts. *Rasul v. Bush*, 542 U.S. 466, 505 (2004). Thus, even to the extent *Eisentrager* believed sovereignty was relevant, *Rasul* rejected its significance in mandating district courts to extend the privilege of litigation to Guantánamo detainees.

155. As previously described, to the extent that Cuban laws are a null set in Guantánamo Bay and that the U.S. feels free to ignore Cuban demands that detainees are treated humanely on their soil, it is plain that the U.S. government in practice has not recognized Cuban sovereignty over Guantánamo. See *supra* text accompanying notes 71-73.

156. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

157. *Id.* at 273.

joy no due process rights under the Fifth Amendment.¹⁵⁸ Thus, one plausible theoretical foundation for the government's purported distinction between sovereignty and territorial control is a view that the Constitution should apply only to persons who are members of the political community, i.e., who are constituted by the founding document. Under such a constitutional compact, persons are entitled to enjoy the fruits of constitutional liberty if they have voluntarily submitted themselves to constitutional constraints.¹⁵⁹

2. The Irrelevance of the Sovereignty-Territoriality Distinction

There are substantial problems with this perspective. As an initial matter, this theoretical model raises the question of what it takes to become a sufficiently connected member of the political community to obtain constitutional protection. The model is also not reflected in any consistent way in the law. Aliens in the United States enjoy due process protections,¹⁶⁰ as do aliens outside the United States sued as defendants in U.S. courts,¹⁶¹ and residents of U.S. territories enjoy either all constitutional rights or merely fundamental constitutional rights, depending upon the status of the territory.¹⁶² As Professor Neuman has explained, the extension of constitutional rights in these cases “represents a restriction on judi-

158. See *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004) (quoting *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

159. See Neuman, *supra* note 80, at 6-7 (classifying this theory as a “membership approach” which “treats certain individuals or locales as participating in a privileged relationship with the constitutional project, and therefore entitled to the benefit of constitutional provisions.” (emphasis added)).

160. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (provisions of the Fourteenth Amendment “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .”).

161. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (“The courts of the United States have traditionally been open to nonresident aliens.”); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 114-16 (1987) (applying due process limitations on assertion of personal jurisdiction over foreign companies and holding that the absence of voluntary connections creates due process protections); *Fairfax's Devisee v. Hunters' Lessee*, 11 U.S. (7 Cranch) 603 (1812) (allowing nonresident devisee to sue to defend land claim).

162. In the *Dred Scott* decision, both the Taney opinion and dissenting opinions agree that the Fifth Amendment applies to U.S. territories. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857); *id.* at 544 (McLean, J., dissenting); *id.* at 614 (Curtis, J., dissenting). In the *Insular Cases*, the Court generally held that the Constitution did not apply wholesale to unincorporated territories, but that at least certain fundamental rights applied. See *infra* text accompanying notes 179-184.

cial power not as a matter of sovereignty, but as a matter of individual liberty,'"¹⁶³ and therefore contradicts "the suggestion in *Verdugo-Urquidez* that aliens may require 'significant voluntary connection with the United States' to gain constitutional rights."¹⁶⁴

It would be nearly impossible to draw a principled distinction between sovereignty and territoriality in the way the government suggests—in large part because there are so few constructs like Guantánamo Bay.¹⁶⁵ It is critical to recognize, nevertheless, that lower courts have repeatedly held that constitutional rights apply to non-sovereign U.S. territories quite similar to Guantánamo. For example, in *Ralpho v. Bell*,¹⁶⁶ the D.C. Circuit considered a constitutional challenge brought against government actions in Micronesia, a U.N. designated "Trust Territory" over which the U.S. acted as administrator but was not technically sovereign.¹⁶⁷ Specifically, a property owner challenged a valuation of his property made in order to compensate him for its destruction, on the grounds that he was unable to rebut or view the evidence that formed the valuation. After acknowledging "some controversy" that existed about the scope of foreign reach of the Constitution, the court nevertheless held that at a minimum, certain "fundamental" rights such as due process must apply (even in the context of property disputes), stating that "it is settled that 'there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law.'"¹⁶⁸ The court therefore required that the plaintiff have access to the evidence upon which the governmental authority's decision relied. As Professor Neuman's exhaustive research has unveiled, in a number of non-sovereign territories subject to U.S. governance, such as the Panama Canal Zone, the Trust Territory of the Pacific Islands and the American Sector of Berlin, courts have applied fundamental constitutional rights to protect aliens residing there.¹⁶⁹

163. Neuman, *supra* note 80, at 49 (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

164. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

165. Indeed, one must remain skeptical that the distinction is pressed based upon principle, rather than yet another attempt to stall meaningful adjudication in U.S. courts, as mandated by *Rasul*.

166. 569 F.2d 607 (D.C. Cir. 1977).

167. *Id.* at 619 n.71.

168. *Id.* at 618-19 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974)).

169. Neuman, *supra* note 80, at 15, 20, 23, 33-34.

Certainly, the *Rasul* Court recognized ambiguity and controversy in the case law but saw no need to provide a broad theoretical framework to distinguish meaningfully places over which the United States exercises control and jurisdiction but not ultimate sovereignty. Indeed, in considering the detentions in Guantánamo Bay, the Court made plain that such a distinction—and the lack of “ultimate sovereignty” over the island—is meaningless. As described, the Court held that Guantánamo is functionally U.S. territory that our government controls and, as such, the federal courts are authorized to grant relief under the habeas statute and the underlying constitutional and common law rights it protects. Thus, it held that if the detainees prove their claims that they are innocent, or have not received a fair determination of their status, yet nevertheless face indefinite detention, they will have proven a violation of the Constitution ultimately authorizing their release under the habeas statute.¹⁷⁰

The government thus appears to have contrived a distinction between territoriality and sovereignty that was rejected in *Rasul* in order to avoid the decision’s clear import. To some extent, it has been successful in pressing these arguments to maximum delay in the district courts and D.C. Circuit for many months following the issuance of *Rasul*.¹⁷¹ Such a contrivance must ultimately come to an end. Were the Court more squarely presented with the question

170. *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004).

171. The government filed motions to dismiss habeas petitions filed in response to *Rasul*, arguing that petitioners had no substantive constitutional rights. In January 2005, two district courts reached opposite judgments on this question. Compare *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005) (holding that there is “no viable legal theory” upon which the detainees can assert a right to substantively challenge their detentions) with *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (holding that fundamental constitutional due process rights apply at Guantánamo and that the CSRTs procedures used to adjudicate detainee status fall short of constitutional minimums). The government sought and was immediately granted a stay of the decisions pending appeal. After hearing arguments on appeal in September 2005, the D.C. Circuit took almost two years to rule because it has had to consider, after additional briefing: (i) the effect of the intervening passage of the Detainee Treatment Act, which the government has argued operates to strip all courts of jurisdiction over pending habeas cases and transfers existing cases to the D.C. Circuit for extremely limited judicial review of CSRT determinations; (ii) the effect of the Court’s decision in *Hamdan*, which held that the jurisdiction-stripping provisions of the DTA did not apply to cases pending upon enactment and that certain provisions of the Geneva Conventions were enforceable through U.S. law; and (iii) the effect of the most recent passage of the Military Commissions Act which, among other things, again attempts to strip the courts of jurisdiction over detainee habeas petitions. See *Boumediene v. Bush*, No. 05-5062, slip op. at 6-9 (D.C. Cir. Feb. 20, 2007).

of whether the Fifth Amendment applied to these detainees challenging their detentions, it would undoubtedly re-affirm the judgment in *Rasul* and elaborate on the clear statement of law contained in footnote 15 of the opinion. Justice Kennedy, an anchor for the Court's constitutional holding in *Rasul*, would be in the best position to explain such re-affirmance.

*D. Fundamental Rights at Guantánamo: Neither Impractical
Nor Anomalous*

One need not be a radical realist to concede that the creation of constitutional rules depends not only on abstract theoretical principles but also on the more quotidian counting of the Court's votes. Even with the departure of Justice O'Connor, who authored the plurality opinion in *Hamdi* and signed on to the majority opinion in *Rasul*, including its footnote 15, one can confidently predict that the Supreme Court would squarely hold that constitutional rights apply to the alien detainees at Guantánamo. Justice Kennedy would likely represent the key vote and his analysis would be the most reliable and persuasive. *Rasul* itself makes that clear.

Footnote 15 states a proposition of law that six justices endorsed: if the detainees prove true their allegations of indefinite executive detention, lack of access to counsel and innocence, they will have proven a violation of the Constitution.¹⁷² In addition, the justices added a citation to Justice Kennedy's concurring opinion in *Verdugo-Urquidez* and the cases he cited "therein."¹⁷³ A full understanding of this significant citation signals both what the Court meant in footnote 15 and where the justices will likely end up if presented with a similar question again.

The citation to Kennedy's concurring opinion in *Verdugo-Urquidez*—rather than Rehnquist's majority opinion—demonstrates this Court's agreement with Kennedy's judgment that there is no categorical bar to the application of the Constitution abroad.¹⁷⁴ The cases cited for his judgment are critical to understanding the *Rasul* Court's endorsement of his opinion.

172. *Rasul*, 542 U.S. at 483 n.15.

173. *Id.* ("Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein.").

174. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection.").

First, Kennedy cited to the so-called *Insular Cases*.¹⁷⁵ Those cases arose following the acquisition of island territories following victory in the Spanish-American War, as part of America's effort to join European countries as a great colonial power.¹⁷⁶ Not coincidentally, these efforts occurred on the same model and at the same time that the United States secured its control over Guantánamo as a condition for ending its occupation of Cuba.¹⁷⁷ Traditional discussions of the *Insular Cases* have been critical, arguing that the decisions were constructed primarily in order to ease colonial governance over the territories and facilitate American expansionism, and that they reflect a prevailing racism about the inability of native islanders to appreciate any constitutional rights that might be extended to them.¹⁷⁸ Nevertheless, they do establish a basic proposition that certain "fundamental rights" could not be denied to aliens inhabiting territories subject to the control of the United States government, even where the United States is not technically sovereign.

For example, in one of the earliest of the *Insular Cases*, *Downes v. Bidwell*,¹⁷⁹ decided in 1901, the Court considered whether the imposition of a duty on the recently acquired territory of Puerto Rico would violate the Constitution's Uniformity Clause,¹⁸⁰ in the way such an imposition upon a state clearly would. Justice Brown's plurality opinion concluded that the Constitution does not apply to unincorporated territories except insofar as Congress specifically provides.¹⁸¹ In the Court's view, unincorporated territories, unlike incorporated territories in the contiguous United States, could not

175. See *Verdugo-Urquidez*, 494 U.S. at 277 (citing *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922)).

176. See Neuman, *supra* note 80, at 8-9; see also Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005) ("At the beginning of the twentieth century the United States laid claim to an overseas empire, consolidating its victory in the Spanish-American war by adopting novel structures of colonial rule over a brace of newly acquired island territories. A set of Supreme Court decisions known collectively as the *Insular Cases* established the legal authorization for this undertaking.").

177. See *supra* text accompanying notes 60-70.

178. According to Professor Burnett, the traditional view (with which she disagrees) is that "unfettered, an ambitiously imperial nation could attend to the business of governing *outré-mer* peoples and places without undue attention to the republican niceties that obtained on native soil." Burnett, *supra* note 176, at 797.

179. 182 U.S. 244 (1901).

180. U.S. CONST. art. I, §8, cl.1. ("all duties, imposts, and excises shall be uniform throughout the United States").

181. *Downes*, 182 U.S. at 278-79.

be considered candidates for eventual statehood and absorption in the federal union and were thus not entitled to full constitutional protections. The *Downes* plurality, however, cautioned that such a result might invite “an unrestrained possession of power on the part of Congress [that] may lead to unjust and oppressive legislation, in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism.”¹⁸² In order to quell such fears, the Court suggested that congressional legislation could not deny inhabitants certain “fundamental” rights including “the right to personal liberty . . . ; to free access to courts of justice” and to “due process of law.”¹⁸³ Justice White’s concurring opinion—which eventually became doctrine—affirmed a distinction between incorporated and unincorporated territories and stressed that, even in unincorporated territories, congressional power was limited by “inherent, although unexpressed, principles which are the basis of all free government . . . restrictions of so fundamental a nature that they cannot be transgressed.”¹⁸⁴

Downes did not define precisely what rights would be “fundamental,” and subsequent cases certainly did not suggest that those rights would be expansive. For example, in *Dorr v. United States*, the Court held that an alien criminal defendant in the unincorporated Philippines territories did not have a constitutional right to a jury trial.¹⁸⁵ Notably, the court concluded that such a right was not “fundamental” after recognizing that the legal system that prosecuted him contained other basic procedural guarantees, such as right to counsel, right to confront witnesses, right to fact-finding by judges, right of due process and right to appeal.¹⁸⁶

In 1922, in *Balzac v. People of Porto Rico*, the Court reaffirmed *Dorr*’s conclusion that a right to trial by jury in a criminal case tried in unincorporated territory is not fundamental.¹⁸⁷ In *Downes*, Jus-

182. *Id.* at 280.

183. *Id.* at 282; *see also id.* at 282-83 (concluding that “certain natural rights, enforced in the Constitution” would apply to aliens in unincorporated territories who are “entitled under the principles of the Constitution to be protected in life, liberty, and property.”).

184. *Id.* at 291 (White, J., concurring in judgment). Justice Harlan dissented, arguing that constitutional limitations applied to all government actors regardless of their location. *See id.* at 378 (“The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States.”) (Harlan, J., dissenting).

185. 195 U.S. 138 (1904).

186. *Id.* at 145. Indeed, one might think the Court believed itself doing the defendant a favor, lest they permit local “savages” to serve on juries. *Id.* at 148.

187. 258 U.S. 298, 304-05 (1922).

tice White had focused not on the alien status of a claimant, but on the nature of the U.S. government's relationship with the territory under its control when deciding whether a fundamental right should apply.¹⁸⁸ *Balzac* reaffirmed this principle concretely, as the criminal defendant invoking the right to a jury was in fact a U.S. citizen residing in Puerto Rico. The Court explained that, "[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."¹⁸⁹ *Downes* (and the *Insular Cases* generally) thus establish that only certain fundamental rights apply in areas such as unincorporated territories where the U.S. government exercises control.¹⁹⁰ Indeed, prefacing his citation to a number of the *Insular Cases*, Justice Kennedy wrote in *Verdugo-Urquidez* that "the question before us then becomes what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations."¹⁹¹

The second important case Kennedy relied upon in his *Verdugo-Urquidez* concurrence is *Reid v. Covert*.¹⁹² The case was decided in 1957, during a period in which the reach of United States power and regulation abroad had been increasing substantially.¹⁹³ *Reid* involved habeas petitions brought by two women convicted for the murders of their husbands—servicemen posted on military bases abroad—by courts martial pursuant to military law. The women argued that, as civilians, they were entitled to a civilian trial, with all the procedural guarantees of the Fifth and Sixth Amendments. The Court agreed but did not issue a majority opinion. Black's plurality opinion was highly critical of the conclusion of the *Insular Cases* (most specifically articulated in *Balzac*) that even citizens abroad are entitled to the enjoyment of fundamental rights only. Black contended that,

188. *Downes*, 182 U.S. at 293 (White, J., concurring in judgment) ("And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.").

189. *Balzac*, 258 U.S. at 309.

190. See Neuman, *supra* note 80, at 10. See also Burnett, *supra* note 176 at 808 (noting scholarly consensus that the *Insular Cases* stand for proposition that "the Constitution applied in full within the boundaries of the United States proper, including the incorporated territories, while only its fundamental provisions applied in the unincorporated territories.").

191. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

192. 354 U.S. 1 (1957).

193. See Neuman, *supra* note 80, at 11.

While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.¹⁹⁴

Black's view is thus consistent with the "total incorporation" approach that he advocated in applying the provisions of the Bill of Rights wholesale to the states through the Fourteenth Amendment.¹⁹⁵ When dealing with citizens abroad, the *Reid* plurality believed the government was constrained in totality by the Constitution.¹⁹⁶

Justice Harlan and Justice Frankfurter—both proponents of "selective incorporation" of fundamental rights to the states—separately concurred, refusing to join Black's vigorous critique of the *Insular Cases*.¹⁹⁷ In his *Verdugo-Urquidez* concurrence, Justice Kennedy relied heavily on and excerpted substantially from Harlan's concurrence in *Reid*. Harlan wrote that, "I cannot agree with the suggestion that every provision of the Constitution must always be

194. *Reid*, 354 U.S. at 8-9.

195. See *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

196. *Reid*, 354 U.S. at 5-6 ("At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.").

197. *Id.* at 53 (Frankfurter, J., concurring); *id.* at 75 (Harlan, J., concurring). The debate over what fundamental rights should apply within U.S. insular territories is thus very similar to the debate about which rights are so fundamental that they should be deemed incorporated to the states through the due process clause of the Fourteenth Amendment. Under this framework, there is little doubt that Justices who subscribe to the "selective incorporation approach" which included Frankfurter, Harlan and Cardozo, would regard the right to a fair trial to adjudicate criminal guilt as so fundamental that "neither liberty nor justice would exist if they were sacrificed." According to Cardozo, writing for the majority in *Palko v. Connecticut*, "[f]undamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial . . . The hearing, moreover, must be a real one, not a sham or a pretense." 302 U.S. 319, 327 (1937) (citations omitted); see also *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) ("The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of [law].").

deemed automatically applicable to American citizens in every part of the world.”¹⁹⁸

This proposition, of course, is entirely consistent with *Eisen-trager*’s rejection of a categorical, extraterritorial application of the Constitution in all circumstances. For Harlan and Kennedy (and for Jackson in *Eisen-trager* for that matter), context is critical. Kennedy continues to quote Harlan:

[T]he *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words . . . there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether *impracticable and anomalous*.¹⁹⁹

Employing Harlan’s methodology, Justice Kennedy thus concluded in *Verdugo-Urquidez* that it would be “impractical and anomalous” to apply the Fourth Amendment’s warrant requirement to searches and seizures conducted in Mexico, where “wholly dissimilar traditions and institutions” prevail.²⁰⁰ Because it would be hard to find local magistrates in Mexico and perhaps because of different norms in Mexico regarding reasonableness or privacy, it would be too difficult to apply the Fourth Amendment in Mexico in the same manner it is applied here.²⁰¹ Kennedy, however, continued to stress, consistent with Harlan’s functional methodology, that aliens abroad may in some cases be entitled to constitutional protection. Quoting Harlan again, Kennedy stated “the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”²⁰²

Kennedy’s functional, context-specific view in *Verdugo-Urquidez* regarding the extraterritorial application of the Constitution is also entirely consonant with *Rasul*’s functional, context-specific perspec-

198. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

199. *Id.* (second emphasis added).

200. *Id.* at 278.

201. *Id.*

202. *Id.*

tive regarding the consequences of the peculiar location and status of the detainees in Guantánamo. The opinions are self-reinforcing, particularly to the extent Kennedy's methodology is expressly incorporated into the Court's judgment regarding the application of constitutional rights in Guantánamo.

Therefore, under Kennedy's analysis, there would certainly be nothing "impracticable or anomalous" about extending fundamental rights to the detainees at Guantánamo. As described, Guantánamo is in every practical respect and, according to *Rasul*, in significant legal respects, a U.S. territory; it is populated solely by U.S. personnel and governed exclusively by U.S. laws.²⁰³ Thus, applying due process protections to detainees in Guantánamo would be unlike obtaining warrants to satisfy the Fourth Amendment in a sovereign country like Mexico, which operates a completely different legal system and may have different conceptions of "reasonableness" or norms regarding privacy.²⁰⁴ Similarly, the extension of basic constitutional rights to Guantánamo would be entirely consistent with the *Insular Cases*. There, inhabitants of Puerto Rico and the Philippines were denied Sixth Amendment rights to jury trial and jury indictment, primarily because those territories had large native populations with pre-existing legal customs and because the criminal defendants already received numerous due process protections during their trials.²⁰⁵ Applying basic due process rights to detainees in Guantánamo, by contrast, would be no less straightforward than if the detainees were imprisoned in Key West, Florida, particularly since the detainees were afforded no legal process to begin with. As Kennedy himself explained, Guantánamo is "far removed from any hostilities" that would make application of constitutional rights there anomalous, and that, "from a practical perspective," Guantánamo is a "place that belongs to the United States, extending the 'implied protection' of the United States to it."²⁰⁶

III.

WHAT FUNDAMENTAL RIGHTS?

As a proper reading of *Rasul* demonstrates that aliens held indefinitely in Guantánamo are entitled to fundamental due process

203. See *supra* text accompanying notes 60-87.

204. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

205. See *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922)); *Dorr v. United States*, 195 U.S. 138, 145-48 (1904).

206. *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

rights to challenge the legality of their detentions, so a proper reading of *Hamdi*, decided on the same day, demonstrates what those basic rights should include. The *Hamdi* plurality held that the executive had authority under the September 15, 2001 congressional Authorization for the Use of Military Force (AUMF) to detain persons indefinitely and outside the criminal process, as “enemy combatants,” but could do so subject to two basic constraints. First, the enemy combatant category cannot be limitless; the legal power to hold an enemy combatant depends upon a definition of that legal category that must be appropriately constrained by historical understandings and the laws of war.²⁰⁷ Second, the judiciary is not obligated merely to accept the executive’s independent conclusion that a designee is, in fact, an enemy combatant; rather, any citizen alleged to be an enemy combatant must have a meaningful opportunity pursuant to the Due Process Clause to contest the factual basis of that designation.²⁰⁸

A. Adopting the *Hamdi* Framework

The Court analyzed the scope of due process protections required in this context under the flexible framework of *Mathews v. Eldridge*.²⁰⁹ Under that framework, a court must balance the “private interest that will be affected by the official action” against the government’s competing interest, which can include the financial and administrative burdens the government would face in increasing procedural safeguards; it also must weigh the “risk of an erroneous deprivation” of the private interest under existing procedures against the projected value of additional safeguards.²¹⁰ *Hamdi* of course, concerned an American citizen; but, once we conclude that the Fifth Amendment applies to the Guantánamo detainees, citizenship status becomes legally insignificant and *Hamdi*’s analysis is equally applicable.²¹¹

207. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality opinion) (finding government’s definition of an enemy combatant as a person who “was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there” acceptable under the laws of war, the Geneva Conventions, and Supreme Court precedent (emphasis added) (internal quotation marks omitted)).

208. *Id.* at 524 (“Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.”).

209. 424 U.S. 319 (1976).

210. *Id.* at 335.

211. Indeed, it is hard to imagine why the *Mathews* calculus—once it is deemed applicable—would change when a non-citizen detention is at issue. A

The *Hamdi* Court considered the private interest at stake paramount, describing it as “the most elemental of liberty interests—the interest in being free from physical detention by one’s own government.”²¹² Because the private interest criterion should be evaluated from the perspective of the individual, there can be no meaningful legal distinction between indefinite detention at the hands of one’s home government or a foreign government. The administration has claimed the power to imprison the Guantánamo detainees indefinitely or until the executive himself concludes that the war on terrorism has concluded. Former Secretary of Defense Rumsfeld has suggested that this war could last as long as the Cold War,²¹³ thereby subjecting the Guantánamo detainees to potential life imprisonment thousands of miles from their homes, under brutal conditions that have repeatedly been described as torture.²¹⁴ The private interest of the detainees in Guantánamo to avoid potentially permanent detention is therefore paramount.

The government’s interest in preventing an enemy’s return to the battlefield where he could do harm to American military forces is certainly high.²¹⁵ Of course, that interest is implicated only if the government is detaining someone who is, in fact, an enemy—effectively guilty of the charge of fighting against the U.S. Likewise, an individual’s personal interest in avoiding detention is strongest if he is, in fact, *not* an enemy—effectively innocent of the charge of fight-

“private interest” in avoiding indefinite detention is equally strong, from the individual’s perspective, regardless of one’s alienage. See Jonathan L. Hafetz, *The Supreme Court’s “Enemy Combatant” Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 423-24 (2005) (“While *Hamdi* involved a United States citizen, the analysis itself did not turn on that fact. Rather, the broader principles expressed in *Hamdi* about the role of federal courts in imposing constraints on executive power, viewed alongside the Court’s decision in *Rasul*, suggest why the ‘essential’ guarantees of due process also extend to non-citizens detained as ‘enemy combatants’ in Guantánamo and beyond.”) Similarly, as the government itself has conceded in attempting to detain U.S. citizens such as Yasser Hamdi and Jose Padilla, if a person is an enemy combatant or alleged member of al Qaeda, the government interest in detaining him is as strong as it would be if he were an alien. In fact, the government has conceded that if constitutional rights were applied to detainees—a contingency it vigorously resists—*Hamdi*’s due process framework would be appropriate. See Brief of Respondents, *Al Odah v. United States*, Nos. 05-5064, 05-5095 to -5116 (D.C. Cir. 2004).

212. *Hamdi*, 542 U.S. at 529 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”).

213. Josh White & Ann Scott Tyson, *Rumsfeld Offers Strategies for Current War*, WASH. POST, Feb. 3, 2006, at A8.

214. See *infra* note 233.

215. *Hamdi*, 542 U.S. at 531.

ing against the U.S. The important consideration under *Mathews*, therefore, must be to weigh the risk of erroneous deprivation of liberty under current procedures against the burden on the government to administer additional safeguards. Framed this way, the need for fundamental procedural mechanisms to ensure against erroneous detentions is desperately plain.

1. High Risk of Erroneous Deprivation of Liberty

In *Hamdi*, the Court stressed that the “risk of erroneous deprivation” of liberty through “mistaken military detentions” is “very real.”²¹⁶ In *Rasul*, the Court repeatedly stressed that the Guantánamo detainees claim to be “wholly innocent of wrongdoing,” which critically distinguishes them from the conceded enemy aliens held in *Eisentrager*.²¹⁷ Those concerns are surely reflective of a necessary judicial skepticism regarding the claim of guilt asserted by any jailer, which lies at the center of the American criminal justice system. But the risk of erroneous detention of Guantánamo detainees far exceeds some standard statistical threshold—it is, in fact, shocking. Contrary to the claims of the President that Guantánamo houses only the “worst of the worst,” evidence reveals that the majority of detainees likely do not belong there.

Since *Rasul* and *Hamdi*, United States military officials have repeatedly remarked that the majority of detainees in Guantánamo are not, in fact, proper enemy combatants, but rather civilians simply caught in the wrong place at the wrong time or sold for bounty or favor. For example, in October 2004, Brigadier General Martin Lucenti stated that “[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren’t

216. *Id.* at 530 (citing Brief for AmeriCares et al. as Amici Curiae Supporting Petitioners 13-22).

217. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (“Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” (citing 28 U.S.C. § 2241(c)(3))); *see also id.* at 476 (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), on the grounds that Guantánamo prisoners “are not nationals of countries at war with the United States . . . [who] deny that they have engaged in or plotted acts of aggression against the United States[,]” and “have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing”); *id.* at 485 (ordering district courts “to consider in the first instance the merits of petitioners’ claims” that they are “wholly innocent of wrongdoing”).

fighting. They were running.”²¹⁸ A 2002 CIA report, made public in 2004, concluded that “a substantial number of the detainees appeared to be either low-level militants . . . or simply innocents in the wrong place at the wrong time.”²¹⁹ Similarly, an active duty intelligence officer assigned to Guantánamo agreed that “the United States is holding dozens of prisoners at the U.S. Navy Base at Guantánamo who have no meaningful connection to al Qaeda or the Taliban and is denying them access to legal representation. . . . ‘There are a large number of people at Guantánamo who shouldn’t be there.’”²²⁰

To take just one of many now reported examples,²²¹ consider the case of Murat Kurnaz, a 24-year-old Turkish national born and raised in Germany, who was finally released in August 2006 after four and a half years of detention in Guantánamo, largely on the grounds that a friend of his “engaged in a suicide bombing.”²²² The alleged suicide bombing occurred in November 2003, *after* Kurnaz arrived in Guantánamo; not only is that claim factually preposterous because this friend is alive and well and under no suspicion by relevant authorities of any such involvement, but Kurnaz’s classified file conclusively demonstrates that the U.S. military itself

218. Mark Huband, *US Officer Predicts Guantánamo Releases*, FIN. TIMES, Oct. 4, 2004, available at <http://news.ft.com/cms/s/192851d2-163b-11d9-b835-00000e2511c8.html>; John Mintz, *Most at Guantánamo to Be Freed or Sent Home, Officer Says*, WASH. POST, Oct. 6, 2004, at A16.

219. Tim Golden & Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, Jun. 21, 2004, at A1 (also reporting that “[o]fficials of the Department of Defense now acknowledge that the military’s initial screening of the prisoners for possible shipment to Guantánamo was flawed.”).

220. Samara Kalk Derby, *How Expert Gets Detainees to Talk*, MADISON CAPITAL TIMES, Aug. 16, 2004, at 1A; *Frontline: Son of Al Qaeda* (PBS television broadcast Apr. 22, 2004), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html> (quoting CIA operative who spent a year undercover at Guantánamo as estimating that “only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don’t have anything to do with it, don’t even, don’t even understand what they’re doing here”).

221. See, e.g., Tim Golden, *Voices Baffled, Brash, and Irate in Guantánamo*, N.Y. TIMES, March 6, 2005, at A1 (describing testimony of a number of Guantánamo detainees recently made public in which they plead innocence); Andrew Selsky, *Varied Tales Emerge From Guantánamo Files*, ASSOCIATED PRESS, March 4, 2006, available at <http://www.globalsecurity.org/org/news/2006/060305-gitmo-tales.htm> (describing claims of innocence made by detainees to military tribunals, which nevertheless determined them to be “enemy combatants”) (last visited Nov. 30, 2006).

222. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 476 (D.D.C. 2005).

recognized that he had no connections with al Qaeda or any other terrorist organizations.²²³ In addition, a recent, comprehensive analysis of Defense Department documents reveals in stark statistical terms that a great number of detainees may be incarcerated unjustly at Guantánamo.²²⁴

2. Minimal Burden on the Government to Utilize Adequate Procedures

In contrast to this high risk of erroneous detention, the burden on the government to have adopted some adequate procedures to separate, for example, civilian from combatant, is comparatively slight. In effect, the U.S. government previously conceded that it has the ability to undertake basic procedural measures to protect against erroneous detentions, to the extent that it has ratified the Geneva Conventions and incorporated many of its protections into military regulations.²²⁵ Indeed, rather than so heavily relying on the self-interested representations of Pakistani officials, Northern Alliance members or local warlords in Afghanistan to determine who was a genuine enemy, the U.S. military could have followed its well-established guidelines, modeled on Article 5 of the Geneva Conventions,²²⁶ which require field hearings to be held promptly to determine the status of detainees if there is doubt. That regulation and its predecessors had been followed in every previous conflict since Vietnam. For example, during the Gulf War, the military held 1196 of such individualized hearings in or near the field of operations to determine the status of detainees and found in 886 cases that the detainees were not combatants but dis-

223. See Carol D. Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A1 (quoting once-classified statements in Kurnaz's classified file demonstrating that both the U.S. military and his home German government recognize he had no connections to terrorist groups); see also Richard Bernstein, *One Muslim's Odyssey to Guantánamo*, N.Y. TIMES, June 2, 2005, at 1.12 (describing conclusions of German officials that Kurnaz has no connections to terrorism or al Qaeda). To take another, paradigmatic example of mistaken identity, Detainee 581 was seized from his village in Pakistan, accused of being Abdur Rahman Zahid, the former Taliban deputy foreign minister accused of murdering Afghans and looting antiquities. The detainee protested that his name is Abdur *Sayed* Rahman, not Abdur *Rahman* Zahid, and that "I am only a chicken farmer in Pakistan."

224. Mark Denbeaux *et al.*, Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data (2006) (unpublished study, available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf).

225. Third Geneva Convention, Article 5; Army Regulation 190-8, chapter 1-5, ¶ A (Oct. 1, 1997).

226. U.S. Army Reg. 190-8, *supra* note 29, at 2.

placed civilians or refugees.²²⁷ Only 310, or about 25%, were found to be combatants, and all of those were determined to be “privileged” or legal combatants.²²⁸ The current administration has chosen to depart from prior executive practice and has eschewed the application of the Geneva Conventions to this population of prisoners. Had the administration chosen to apply those international law and military law protections long-followed by the United States, it seems likely that the need for habeas petitions—premised as they were on the complete absence of law at Guantánamo—would have been obviated.

3. Basic Procedural Requirements

In *Hamdi*, the plurality held that due process minimally requires that a “citizen-detainee” challenging his enemy combatant designation “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”²²⁹ Conceding that in some circumstances such procedures might be burdensome to an executive during “ongoing military conflict,” the plurality suggested that a habeas court may grant the government’s evidence a favorable presumption, “so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided;”²³⁰ it also recognized that such procedures could be met by an “appro-

227. See Department of Defense, *Report on the Conduct of the Persian Gulf War, Final Report to Congress* (April 1992), cited in DAVID COLE, ENEMY ALIENS, DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 42 n.69 (2003).

228. *Id.*

229. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion). For support for the right to be heard, the Court quoted at length from *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 (1972) (internal citations and quotation marks omitted):

For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’

Hamdi, 542 U.S. at 533. For support for the requirement of a neutral decisionmaker, the Court cited *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993), which held that “due process requires a ‘neutral and detached judge in the first instance.’” *Hamdi*, 542 U.S. at 533.

230. *Id.* at 533-34. Justice Souter, joined by Justice Ginsburg, declined to accept such an accommodation to the government, which would effectively shift the burden of proof to the accused detainee. See *id.* at 553-54 (Souter, J., concurring in part and dissenting in part) (“I do not mean to imply agreement that the Gov-

privately authorized and properly constituted military tribunal.”²³¹ The plurality, however, stressed that an accused enemy combatant “unquestionably has the right to access to counsel” in a proceeding to challenge his status.²³²

In *Hamdi*, the Court was not presented with evidence in the record regarding a possibility of evidence obtained by torture, nor was the Court likely aware of the now legions of stories regarding evidence, confessions, implications and general interrogation techniques that amount to torture.²³³ Nevertheless, one would have to add to *Hamdi*’s outline of basic constitutional process a prohibition on confession or evidence obtained from others subject to torture or other interrogation techniques deemed illegal under U.S. law. The prohibition is an independent requirement of fundamental due process²³⁴ and would be recognized by *Mathews* as essential to

ernment could claim an evidentiary presumption casting the burden of rebuttal on [a detainee].”).

231. *Id.* at 538 (plurality opinion) (explaining that “military regulations already provide for . . . tribunals . . . to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention”) (citing Headquarters Dep’ts of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, § 1-6 (1997)).

232. *Id.* at 539.

233. See Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (“investigators had found a system devised to break the will of the prisoners at Guantánamo . . . through ‘humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions’”); see also *Charges of Guantánamo Detainee Torture Unfounded, General Says*, State Dep’t Press Releases & Documents, July 14, 2005, available at <http://usinfo.state.gov/dhr/archive/2005/Jul/15-641403.html> (reporting that Defense Department investigation into torture at the Base was “a result of more than two-dozen e-mails from FBI personnel alleging mistreatment of detainees at Guantánamo in the second half of 2002”). UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, *Economic, Social and Cultural Rights Civil and Political Rights*, U.N.Doc.E/CN.4/2006/120 (Feb. 15, 2005), available at http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf (hereinafter *UN Report*) (The UN Special Rapporteur on Torture concluded that interrogation techniques used at Guantánamo, “in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days[,] and prolonged isolation were perceived as causing severe suffering . . . [and] that the simultaneous use of these techniques is even more likely to amount to torture.”); Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 63 (reporting that psychologists and psychiatrists working in “Behavioral Science Consultation Teams” have conducted a remarkable “experiment” at Guantánamo by seeking to “reverse-engineer” torture and interrogation techniques that the military trains U.S. forces to withstand, in order to create the “radical uncertainty” necessary to “break” the detainees).

234. See *Rochin v. California*, 342 U.S. 165, 173 (1951) (“Use of involuntary verbal confessions is . . . inadmissible under the Due Process Clause”); Brown

decrease the “risk of erroneous deprivation” of liberty. The Supreme Court has previously identified two reasons for this prohibition: first, “because of the probable unreliability of confessions that are obtained in a manner deemed coercive” and “because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.’”²³⁵

Thus, when the government *continues* to detain someone beyond the immediate exigencies of the battlefield, as this government is plainly doing with prisoners in their fourth or fifth year of detention in Guantánamo, the government must provide that detainee a meaningful opportunity to contest his detention. According to *Hamdi*, that must include: (1) notice of the factual reasons for his detention; (2) a meaningful opportunity to rebut those reasons before a neutral decisionmaker; and (3) the assistance of counsel; logically, based on the precedents just discussed, it also must include, (4) a prohibition on evidence obtained from torture or unreasonable coercion. None of those requirements has yet been afforded to the detainees at Guantánamo.

B. *Applying Fundamental due process at Guantánamo.*

Prior to *Rasul*, detainees were held in Guantánamo based purely on the executive’s say-so, without any procedures to confirm or deny the military’s mere suspicion that a person brought to their custody²³⁶ might be a combatant or member of al Qaeda. Follow-

v. Mississippi, 297 U.S. 278, 286 (1936) (holding that the use of confessions obtained through “revolting” methods was “a clear denial of due process”).

235. Jackson v. Denno, 378 U.S. 368, 386 (1964) (quoting Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960)); see also Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) (“Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person’s coerced confession at another’s trial violates his rights under the due process clause.”); *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 473 (D.D.C. 2005) (holding that, “at a minimum . . . due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture”); A v. Secretary of State for the Home Department [2005] UKHL 71, [2006] 2 A.C. 269 (appeal taken from England) (House of Lords ruling evidence obtained by torture inadmissible even where United Kingdom was not complicit because the “common law has regarded torture and its fruits with abhorrence for over 500 years” because it is not only “inherently unreliable” but also because “it degraded all those who lent themselves to the practice.”).

236. Virtually all the detainees ultimately brought to Guantánamo were first held in makeshift prisons in U.S. military bases in Bagram and Kandahar, Afghanistan, after which some determination was made to send persons to Guantánamo

ing *Rasul*, however, the administration put in place an ad hoc system in Guantánamo—over two years after detainees began arriving there—for evaluating the combatancy status of the detainees, which they would later argue in post-*Rasul* litigation fully satisfied the mandates of *Rasul* and *Hamdi*. A full evaluation of that system, which is still the subject of litigation that may well again wind up in the Supreme Court, is beyond the scope of this article.

Nevertheless, it is at least worth highlighting the two basic areas in which the applicability of the due process clause would significantly constrain the government's broad claim of detention authority in Guantánamo: the scope of the definition of enemy combatant and the minimum procedures necessary to ensure that a detainee is, in fact, an enemy combatant, no matter how that term is defined.

1. Post-*Rasul* Status Determinations: The Combatant Status Review Tribunals

On July 7, 2004, nine days after the Supreme Court's decision in *Rasul*, Deputy Secretary of Defense Paul Wolfowitz issued an order announcing the creation of "Combatant Status Review Tribunals" ("CSRTs") to take place at Guantánamo in order to review the "enemy combatant" status of each of the detainees held there.²³⁷ These military hearings are independent of the military tribunals established by executive order in November 2001, whereby detainees are charged with war crimes and tried before a three-judge military panel. In these hearings, the defendant has a right to notice of charges, assistance of counsel, presumption of innocence, counsel's entitlement to see exculpatory evidence and evidence to be used at trial and the right to call and cross examine witnesses and, if convicted, is sentenced to a fixed term of imprisonment.²³⁸ In sharp contrast with the government's own notions of due process where

for more intensive interrogations. Significantly, according to the Seton Hall Study of D.O.D. documents, the overwhelming majority—approximately 86 percent—of persons ultimately sent to Guantánamo were not captured by U.S. forces during combat, but were rather handed over to U.S. forces by the Northern Alliance or Pakistani military, at a time when the U.S. government was offering handsome bounties for alleged combatants and was pressuring the Pakistani government to cooperate aggressively in the fight against al Qaeda. See Denbeaux Study, *supra* note 224, at 2. Some reports suggest that *all* of the Arabs who wound up in the detention camps were sent to Guantánamo for further interrogation based on a supposition that Arabs from foreign countries would not be in Afghanistan or Pakistan without nefarious cause. See CHRIS MACKEY & GREG MILLER, *THE INTERROGATOR'S WAR* (2005).

237. See Wolfowitz Order, *supra* note 141, at 1.

238. See *supra* text accompanying notes 14-18.

war crimes are charged, the Wolfowitz Order envisions what is far from a genuine adjudication of contested facts. It states that the CSRTs are meant to review enemy combatant determinations that had *already* been made “through multiple levels of review by officers of the Department of Defense.”

The Order defines “enemy combatant”, broadly, as follows:

The term “enemy combatant” shall mean an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²³⁹

The procedures used in the CSRTs appear to be loosely based on procedures set forth in Article V of the Geneva Conventions and incorporated into military regulations that are used for battlefield determinations of combatancy status, and that anticipate the use of subsequent procedures and protections if a detainee is in fact determined to be a combatant;²⁴⁰ their reliability two years post-capture and their sufficiency for a potential life imprisonment are thus quite obviously different.

Nevertheless, the CSRT implementing regulations provide that detainees would, for the first time, have the right to hear only the *unclassified* factual basis for their detention, even if the classified basis was the primary reason for detaining them. Detainees have the right to testify in front of the panel of military officers and theoretically to present exculpatory evidence if the panel deems such evidence relevant and “reasonably available.” Detainees are *not* afforded counsel, but are assigned a military officer who acts as a “Personal Representative” to assist the detainee in presenting his case. The government’s enemy combatant determination is then entitled to a favorable presumption. This structure not only places the detainee in a position of disproving his guilt but also requires him to do so by rebutting charges based on much evidence he cannot himself see. Of the approximately 517 CSRT hearings completed in Guantánamo, only thirty-eight have been found to “no longer [be] enemy combatants”²⁴¹—a 93% confirmation rate.²⁴²

239. See Wolfowitz Order, *supra* note 141, at 1.

240. See Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 3 (July 7, 2002).

241. See Dep’t of Defense, Combatant Status Review Tribunal Summary, <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf>.

242. Of those fortunate 38, the record does not disclose whether, by the time of the hearing, the military had “already” decided these men were “no longer”

In the months following *Rasul*, a number of additional habeas petitions were filed on behalf of detainees at Guantánamo, all of which claimed innocence. The District Court for the District of Columbia consolidated the sixty-three filed petitions before one judge to coordinate and manage the cases.²⁴³ In an effort to respond to the government's obligation under the habeas corpus statute to file a "factual return" to the petitions, the government submitted the records from the CSRT proceedings, including the classified portions of the CSRT record, under seal.²⁴⁴ The government soon after moved to dismiss the petitions summarily as a matter of law, arguing that the detainees had no substantive constitutional rights that could be enforced by habeas and, even if they did, that those rights were fully vindicated by the CSRT proceedings.²⁴⁵ Two of the district courts reached opposite decisions on the government's motion to dismiss. One court, considering seven petitions, concluded that petitioners presented no "viable legal" theory upon which they could proceed to challenge their detentions in court via habeas.²⁴⁶ The other court, considering the remaining fifty petitions, concluded that *Rasul* requires recognition that the detainees possess fundamental due process rights and that the procedures followed by the CSRTs fell far short of constitutional standards.²⁴⁷

2. The Vague and Overbroad Definition of Enemy Combatant

In *Hamdi* the plurality concluded that the September 2001 AUMF authorized the president to detain an American citizen cap-

enemy combatants or if it was the CSRT that changed the military's original determination. Thus, there is no evidence that the CSRT ever found *against* the Pentagon's conclusions. Indeed, a recent study of CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?*, at 37-39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

243. *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 451 (D.D.C. 2005) ("As of the end of July 2004, thirteen cases involving more than sixty detainees . . ." were consolidated to one judge "to coordinate and manage all proceedings . . . [and] rule on procedural and substantive issues common to the cases.").

244. *Id.* at 451.

245. *Id.*

246. *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005) (holding that there is "no viable legal theory" upon which the detainees can assert a right to make a substantive challenge to their detentions).

247. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 443 (holding that fundamental constitutional due process rights apply at Guantánamo and that the CSRTs procedures used to adjudicate detainee status fall short of constitutional minimums).

tured during the military conflict in Afghanistan as an “enemy combatant” if the government could in fact prove its allegations against him after providing him constitutionally minimum procedures to test those allegations.²⁴⁸ Without commenting broadly on the permissible scope of the “enemy combatant” definition,²⁴⁹ the plurality endorsed the government’s definition of “enemy combatant” in Hamdi’s case, because it was sufficiently tethered to the actual armed conflict in Afghanistan and was authorized by the laws of war.²⁵⁰ Thus, according to the plurality, the government could hold Hamdi as an “enemy combatant” for the duration of the conflict in Afghanistan, if it could demonstrate that he was “‘part of or supporting forces hostile to the United States or coalition partners’ [in Afghanistan] *and* ‘engaged in an armed conflict against the United States.’”²⁵¹

Under the definition of enemy combatant adopted for the CSRT proceedings,²⁵² the government claims the authority (either under the AUMF or inherent executive power) to detain persons who have *not* engaged in any belligerent act against U.S. or coalition forces or who have never “directly supported” hostilities against those forces.²⁵³ It also claims the power to detain persons picked up thousands of miles from the Afghanistan battlefield in places as far away as Gambia, Zambia, Bosnia and Thailand.²⁵⁴

248. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). Those procedures included counsel, and the right to see the basis of evidence against him.

249. A definition with no real precedent in American or international law.

250. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

251. *Id.* (quoting Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)) (emphasis added).

252. *See Wolfowitz Order*, *supra* note 141, at 1 (“The term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”).

253. In CSRT’s enemy combatant definition, the second sentence states that the definition “includes” the subset of persons who actually engage in hostilities or directly support hostile forces; that necessarily implies that the definition would more broadly include those who do not.

254. *See, e.g., El-Banna et al v. Bush*, 04-CV-1144 (D.D.C. filed July 6, 2004) (British petitioners separately arrested in Gambia and Zambia); *Boumediene v. Bush*, 04-CV-1166 (D.D.C. filed July 12, 2004) (six Algerian permanent residents of Bosnia arrested in Sarajevo, at the conclusion of trial exonerating them of charges of conspiring to bomb the U.S. embassy in Sarajevo—the very charges upon which

Under this definition, mere “support” for organizations hostile to the United States—without even materiality or scienter requirements—would be enough to detain someone indefinitely. Indeed, at the oral argument on the government’s motion to dismiss, the government conceded in response to a series of hypothetical questions that it would or could detain at Guantánamo as an enemy combatant: (1) “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities;” (2) a person who merely teaches English to the son of a Taliban member; and (3) a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.²⁵⁵ These assertions raise serious doubts about whether the president’s authority under the AUMF (or even some theory of inherent executive power) would authorize the detention of such non-combatants.

Detentions under the broad enemy combatant definition adopted for the Guantánamo detainees also raise substantial questions under the due process Clause. For example, my client, detainee Murat Kurnaz, was detained as an enemy combatant based on evidence that he was “associated with” and received “food and lodging” from a large Islamic missionary group that has been known to support organizations hostile to the United States and was close friends with a person in Germany who later allegedly “engaged in a suicide bombing.”²⁵⁶ The district court, assuming the truth of such evidence, nevertheless found it insufficient as a matter of law to detain Kurnaz. The court noted that, “without any evidence of his knowledge or participation in the alleged wrongdoing of the missionary group or his friend—knowledge and participation which he in fact vigorously denied in his CSRT hearing—his detention would violate due process.”²⁵⁷ The court concluded:

they are being held in Guantánamo); *Paracha v. Bush*, 04-CV-2022 (D.D.C. filed Nov. 17, 2004) (Pakistani citizen arrested in Thailand).

255. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 451 (D.D.C. 2005).

256. *Id.* at 476. The district court took as true the allegations against Kurnaz, in evaluating their legal sufficiency. But it bears reiterating that the allegations are themselves not true. First, the missionary group, Jama’at al Tablighi, is one of the largest (with millions of members) and most avowedly peaceful Islamic groups in Pakistan, whose connections to terrorist organizations are by no means formal or official and at worst, are extremely isolated and attenuated. Bernstein, *supra* note 223. Second, the friend of Kurnaz who allegedly engaged in a suicide bombing is in fact alive and well and under no formal suspicion of terrorist activities by German authorities. See Leonnig, *supra* note 223.

257. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 476.

Absent other evidence, it would appear that the government is indefinitely holding the detainee—possibly for life—solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process.²⁵⁸

Kurnaz's case is not isolated. According to a comprehensive study of the government's proofs contained in 517 CSRT records, an astounding 86% of detainees were arrested and placed in U.S. custody by Pakistan or the Northern Alliance after the United States offered large financial bounties for the capture of Arab terrorists.²⁵⁹ The government's own evidence reveals that a vast majority of detainees never participated in any "hostile act" against the United States or allies, but are detained because of a varyingly loose "association with" one of seventy-two groups the military has asserted have some unspecified connection to al Qaeda or other terrorist groups.²⁶⁰ According to the Defense Department, only eight percent of detainees are believed to be al Qaeda fighters;²⁶¹ others are detained simply because they wore Casio watches or olive drab clothing.²⁶² Such attenuated connections with actual combatancy or, in other words, indefinite detention based merely upon a remote association with a group that has at some point had some members who supported hostile acts against the United States would violate due process.²⁶³

3. Inadequate Procedures to Determine the Combatant Status of Detainees

The second area where recognition of fundamental constitutional rights for detainees is relevant is in arriving at a sufficiently fair process to test the asserted combatancy status of the detainees or, in *Rasul's* words, to ascertain if any of the detainees are, as they allege, "wholly innocent of wrongdoing."²⁶⁴ As described, *Hamdi* suggests three critical rights necessary to any fair trial: (1) impartial decision-maker; (2) assistance of counsel; (3) notice of charges and

258. *Id.*

259. Denbeaux Study, *supra* note 224, at 2-3.

260. *Id.* at 4, 17.

261. *Id.*

262. *Id.* at 20.

263. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 471-72.

264. *Rasul v. Bush*, 542 U.S. 466, 485 (2004); *id.* at 488 (Kennedy, J., concurring) (noting that "[i]ndefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention").

meaningful opportunity to rebut them. In addition, it should be plain that no civilized system of justice can rely for imprisonment on evidence obtained by torture. Although a full catalogue of CSRT failures are beyond the scope of this article, even a cursory examination demonstrates their profound deficiency as a fair tribunal.

a. No Impartial Decision-Maker

For over two years leading up to the creation of the CSRTs, the President's senior administration officials, including Secretary of Defense Rumsfeld and high-ranking military officers, have persistently and uniformly declared all detainees in Guantánamo "enemy combatants." Indeed, in a public relations effort, high level officials have publicly described the detainees as hardened terrorists or "the worst of the worst."²⁶⁵ As described, those classifications are largely false. But, of course, they raise the prospect that tribunals carried out by military officers—as opposed to an independent judicial officer—will be aware of their own position in the chain of command and feel pressure to ratify judgments already made. Indeed, the very Order creating the CSRTs—that is, the document instructing military officers to conduct ostensibly neutral hearings—itself has prejudged the detainees; it declares that each of them has already been adjudged enemy combatants "through multiple levels of review by officers of the Department of Defense."²⁶⁶ Without presuming any bad faith on the part of the military officers responsible for judging the status of a detainee, it would indeed seem difficult to imagine many would have the courage, or even the disinterest, to reject the policy decisions and factual determinations of their civilian and military commanders.

265. In 2002, Secretary of Defense Donald Rumsfeld labeled them "among the most dangerous, best trained, vicious killers on the face of the earth." Katharine Q. Seelye, *Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6. Vice President Cheney referred to them as "the worst of a very bad lot" and claimed "[t]hey are very dangerous. They are devoted to killing millions of Americans." Carol D. Leonnig and Julie Tate, *Some at Guantánamo Mark 5 Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A01. Joint Chiefs of Staff Chairman Richard Myers, claimed most of the detainees "would gnaw hydraulic lines in the back of a C-17 to bring it down." Katharine Q. Seelye, *First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. TIMES, Jan. 12, 2002, at A7.

266. See Wolfowitz Order, *supra* note 141.

b. No Right to Assistance of Counsel

The *Hamdi* plurality declared that the petitioner “unquestionably has the right to access to counsel in connection with the proceedings on remand.”²⁶⁷ To the extent the CSRTs are a response—i.e. in connection with the proceedings on remand—to the Court’s rulings in *Hamdi* and *Rasul*, detainees should have been afforded the assistance of counsel. The government’s argument that detainees, as foreign nationals, have less entitlement to counsel than citizens such as Hamdi (despite their identical statutory entitlement to challenge the basis of their detention) is utterly unpersuasive;²⁶⁸ it was, moreover, specifically rejected by a district court considering such arguments following *Rasul*.²⁶⁹

Instead of counsel, detainees were offered the assistance of “personal representatives” to answer detainees’ questions and ostensibly represent their interests in their hearings.²⁷⁰ The personal representatives were neither trained as lawyers nor obligated to any attorney-client confidences. Indeed, their obligation was to report any arguably incriminating information to military superiors. Evidence suggests that such representatives offered less than even the most limited advocacy one would expect from any lawyer.²⁷¹ For example, Murat Kurnaz’s personal representative failed to even mention to his client’s CSRT panel that there were multiple exculpatory conclusions in Kurnaz’s file (to which only the representative, but not Kurnaz, had access) that merited consideration by the panel.²⁷²

c. No Right to Notice or Meaningful Opportunity to See and Rebut Evidence Against Them

In measuring the adequacy of the CSRT proceedings against this requirement, the inquiry far more resembles literature than law. None of the detainees were permitted to see the classified ba-

267. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion).

268. Indeed, the government permitted the press to attend CSRT proceedings, but barred counsel. See Neil A. Lewis, *Scrutiny of Review Tribunals as War Crimes Trials Open*, N.Y. TIMES, Aug. 24, 2004, at A12.

269. *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (holding that detainees “are entitled to counsel” in their habeas proceedings, and that counsel representation is essential in order to “properly litigate the habeas petitions . . . and in the interest of justice”).

270. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 471-72 (2005).

271. See *id.*

272. *Id.* at 472.

sis for their enemy combatant designation, even where the classified evidence formed the primary basis for the detention. Thus, like Joseph K. in *The Trial*, many of the detainees were put in the position of attempting to prove themselves innocent of charges predicated on evidence they were not told of, let alone able to see. It is hard to imagine then, how someone in fact “wholly innocent of wrongdoing” could vindicate themselves against a standard so solicitous of secrecy, innuendo and inference.²⁷³ Even if there are national security considerations that might counsel in some cases against showing a detainee highly classified evidence, due process would require at a minimum that a detainee’s counsel have an opportunity to examine it and rebut its conclusions.²⁷⁴

d. Use of Evidence Obtained from Torture or Other Coercive Interrogation Methods

Stories regarding the harsh interrogation techniques and torture used at Guantánamo and on other terrorist suspects have been emerging at a disturbing rate since the Court’s decision in *Rasul*, and a full treatment of this issue is beyond the scope of this article. The CSRTs operate under no prohibition against the use of evidence obtained by torture. Indeed, the CSRTs are entitled to presume that evidence submitted on behalf of the military is correct, regardless of its source. Only recently—on the eve of oral argument before the Supreme Court in *Hamdan*—did the military reverse its policy and prohibit the use of evidence obtained by torture in the military commission process.²⁷⁵ And, following the passage of the Detainee Treatment Act, which incorporated the so-called McCain Amendment to prohibit the torture or degrading treatment of persons in U.S. custody, CSRTs conducted in the future are

273. The Supreme Court long ago held that one cannot suffer a serious deprivation of liberty based on secret evidence:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959). See also *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 468 (considering fatal to the CSRT process, “the inherent lack of fairness of the CSRT’s consideration of classified information not disclosed to the detainees”); see also *id.* at 468-71 (describing particularly absurd consequences as a result of detainees’ attempt to refute evidence they cannot at all observe).

274. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 471.

275. See Jess Bravin, *White House Will Reverse Policy, Ban Evidence Elicited by Torture*, WALL STREET JOURNAL, Mar. 22, 2006 at A3.

not to consider evidence obtained by torture.²⁷⁶ However, numerous detainees have alleged that the evidence against them was based either on confessions they made while under torture or by statements made by other detainees under coercive interrogation techniques. For example, the CSRT of now-released Australian detainee Mamdouh Habib, contained an enemy combatant determination based on “confessions” he asserts were made only following a brutal regime of interrogation following his rendition to Egypt.²⁷⁷ Similarly, Mohammed al-Qahtani, the so-called “Twentieth Hijacker” has reportedly implicated thirty other Guantánamo detainees as Osama bin Laden’s bodyguards,²⁷⁸ but only after he was subjected to extremely harsh and persistent interrogation techniques over a period of many months, as shown by recently released interrogation logs. Thus, thirty detainees remain at Guantánamo based on the statements of a person presumably willing to say anything to escape the torment of his brutal interrogations; unsurprisingly, al-Qahtani has since recanted that testimony as the product of torture.²⁷⁹

* * *

In sum, the CSRTs would, in the administration’s view, authorize a lifetime detention of an individual based only on statements made by another person under extreme coercion or torture and where the detainee has absolutely no opportunity to know even the identity of the incriminating witness or have the assistance of counsel in examining any evidence against him. Far from tolerating isolated defects, the CSRTs represent a “perfect storm” of procedural

276. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1003, 119 Stat. 2680, 2739-40 (2005) (“Prohibition On Cruel, Inhuman, Or Degrading Treatment Or Punishment Of Persons Under Custody Or Control Of The United States Government”).

277. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 473. According to Habib, in Egypt, he was routinely subject to being beaten to the point of unconsciousness, subject to the use of devices that electrocuted him, and was locked in a room gradually filled with water to a level just below his chin. *Id.* See also Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106 (describing alleged torture suffered by terrorist suspects following rendition to foreign countries, including Habib and Ibn al-Sheikh al-Libi, who “confessed” under torture to knowledge of a connection between al Qaeda and Saddam Hussein which was acknowledged to be false only after Secretary of State Colin Powell relied on his confession in a presentation to the United Nations).

278. See News Release, Dep’t Defense, *Guantánamo Provides Valuable Intelligence Information*, available at <http://www.defenselink.mil/releases/2005/nr20050612-3661.html>.

279. Adam Zagorin, ‘20th Hijacker’ Claims that Torture Made Him Lie, TIME, Mar. 3, 2006.

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inadequacy.²⁸⁰ An adjudication in name only, the CSRTs are little more than “a sham or a pretense,” which basic conceptions of due process could not legitimately countenance.²⁸¹

CONCLUSION

Guantánamo and the prisoners detained there are not immune from law. Fundamental requirements of the due process clause protect innocent detainees from indefinite, wrongful detention and constrain the executive from continued arbitrary action. An application of basic due process to test the detentions in Guantánamo would cause no greater apocalyptic damage to the military’s war on terror than the government predicted—incorrectly—would occur if the Supreme Court ruled against them in *Rasul* or *Hamdi*. To the contrary, such an application will finally bring the promise of *Rasul* and *Hamdi* to Guantánamo—a promise that a constitutional republic cannot countenance prisons completely outside the law.

280. *Rasul v. Bush*, Trans. of Motion to Dismiss before Judge J.H. Green (D.D.C. Dec. 1, 2004) at 89 (statement of Joe Margulies).

281. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

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