

**THE UNDETERMINED FATE OF THE
GUANTANAMO BAY DETAINEES’
HABEAS CORPUS PETITIONS**

Tamara L. Huckert

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I. INTRODUCTION

Following the terrorist attacks of September 11, 2001, George W. Bush, President of the United States, declared a War on Terror. The United States invaded Afghanistan and sought out enemy forces responsible for the horrific acts. As part of the conflict, the United States military has captured and detained hundreds of alien prisoners, who are currently being held at the Guantanamo Bay Naval Base in Cuba.

It appears as though the president and the United States' legal counsel believed that by detaining the alien prisoners at Guantanamo Bay, the detainees would not have legal access to the United States federal courts. In June, 2004, the Supreme Court released its decision in *Rasul v. Bush*¹ and held that federal district courts have jurisdiction to hear petitions for habeas corpus filed by Guantanamo detainees. As a result of that decision, the United States District Court for the District of Columbia received an onslaught of habeas corpus petitions and has had to decide what substantive rights the detainees can pursue under their petitions. This article begins by discussing the power of a writ of habeas corpus and the judicial precedent of habeas corpus jurisdiction prior to 2004. Next, the aftermath of the September 11th attacks is considered with respect to the impacts it had on habeas corpus jurisprudence. Finally, the article concludes with an evaluation of the *Rasul* decision and an analysis of two subsequent District of Columbia district court decisions, *Khalid v. Bush*² and *In re Guantanamo Detainee Cases*.³

The decisions in *Khalid* and *In re Guantanamo Detainee Cases* are vastly different, even though they originated in the same court. In *Khalid*, the court held that detainees imprisoned at Guantanamo Bay did not present a viable legal theory upon which a petition for habeas corpus could be granted. Yet, in *In re Guantanamo Detainee Cases*, another District of Columbia district court judge found the Guantanamo detainees have a Fifth Amendment constitutional right to due process that the government is not satisfying, and the Taliban detainees are entitled to protections under the Third Geneva Convention. This raises the question of what fate the Guantanamo detainees face with regard to their habeas corpus petitions.

Ultimately, when this question is answered in future decisions, an appellate court or the Supreme Court will likely find that the Guantanamo detainees are entitled to Fifth Amendment constitutional protections because the United States Constitution is applicable to the Guantanamo Bay Naval

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

2. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

3. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), *reh'g denied*, 355 F. Supp. 2d 482 (D.D.C. 2005) and *Odah v. U.S.*, 355 F. Supp. 2d 482 (D.D.C. 2005).

Base. Additionally, future analyses will likely determine that the due process procedures currently in place for detained prisoners do not adequately comply with Fifth Amendment requirements, since these same requirements were found insufficient by the Supreme Court in a related decision. Finally, courts conducting further review will likely hold that Taliban detainees are covered by the Geneva Conventions and are entitled to prisoner of war status. These predictions are based on rationales gleaned from the *Rasul* decision and the thorough legal analysis set forth in *In re Guantanamo Detainee Cases*.

II. THE POWER OF A WRIT OF HABEAS CORPUS

The statutory power to grant a writ of habeas corpus is found in 28 U.S.C. § 2241, which states in pertinent part:

- (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
- (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
- (c) The writ of habeas corpus shall not extend to a prisoner unless –
 - (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
 - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
 - (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
 - (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
 - (5) It is necessary to bring him into court to testify or for trial[.]⁴

4. 28 U.S.C. § 2241 (2005).

The writ of habeas corpus has traditionally been referred to as “The Great Writ”⁵ and is used to champion the rights of prisoners unlawfully detained.⁶ The “grand purpose of the writ of habeas corpus is the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”⁷ The United States Constitution further guarantees that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁸

As the habeas corpus statute states, federal courts have jurisdiction over habeas corpus petitions and the petitions may be granted by district courts, circuit appellate courts, or the Supreme Court.⁹ District court or circuit court judges only have jurisdiction over petitions made by individuals physically present in their territorial jurisdiction, or by individuals whose custodians are physically present in their territorial jurisdiction.¹⁰ Therefore, the grant of a writ of habeas corpus or the availability of other American constitutional privileges is dependent on the alien’s physical presence in a district or sovereign territory of the United States, or the custodian’s presence in a district or sovereign territory of the United States.¹¹ Until recently, federal courts rarely granted petitions for writs of habeas corpus made by non-resident alien detainees.¹²

In order for the petition to be properly filed, the alien must file the petition in the “district court that has jurisdiction over his custodian” and name the “custodian as respondent,” or the court receiving the petition does not have jurisdiction to entertain the petition.¹³ Additionally, the appropriate respondent is the person in immediate control of the alien.¹⁴ In most situations, it is the individual with daily supervision of the alien, since

5. Scaggs v. Larsen, 396 U.S. 1206, 1208 (1969).

6. John W. Broomes, Note, *Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba*, 42 WASHBURN L.J. 107, 131-32 (2002).

7. Coalition of Clergy, Lawyers and Professors v. Bush, 189 F. Supp. 2d 1036, 1039 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963) (internal quotations omitted)).

8. U.S. Const., art. I, § 9 cl. 2.

9. 28 U.S.C. § 2241(a) (2005).

10. 39 AM. JUR. 2d *Habeas Corpus* § 103 (2005).

11. Jill M. Marks, Annotation, *Jurisdiction of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning Alien Detainees Held Outside the United States*, 192 A.L.R. Fed. 595 (2004-05).

12. Broomes, *supra* note 6, at 132 (citing Johnson v. Eisentrager, 339 U.S. 763, 780 (1950); Hirota v. MacArthur, 338 U.S. 197, 198 (1948); Application of Yamashita, 327 U.S. 1, 26 (1946); Ex parte Quirin, 317 U.S. 1 (1942)).

13. *Id.* at 132.

14. *Id.*

that is the only person who has the ability to physically produce the petitioner to the court.¹⁵

According to section 2241, one of the situations in which federal courts may grant writs of habeas corpus is when the individual is detained under circumstances that violate the “Constitution or laws or treaties of the United States.”¹⁶ In these circumstances, the custodian bears the burden of proof and must show that the petitioner is in lawful custody.¹⁷

III. LEGAL STATUS OF HABEAS CORPUS PETITIONS BY NON-RESIDENT ALIENS PRIOR TO 2004

Prior to the 2004 Supreme Court decision in *Rasul v. Bush*, the controlling legal precedent for granting a habeas corpus petition to a non-resident alien was *Johnson v. Eisentrager*.¹⁸ In *Eisentrager*, a group of twenty-seven German citizens were captured by the American military in China during World War II.¹⁹ They were charged with violating the laws of war by gathering and providing information to the Japanese military with respect to the American armed forces.²⁰ The prisoners were tried before an American Military Commission in China, where twenty-one were convicted and six were acquitted.²¹ The twenty-one prisoners who were convicted were repatriated to Germany to complete their sentences at Landsberg Prison.²² Following their convictions, the German prisoners petitioned the district court in the District of Columbia for a writ of habeas corpus to review the lawfulness of their detention.²³

The Supreme Court held that these prisoners’ petitions for writs of habeas corpus must be denied, even though aliens residing in the United States or its sovereign territories were allowed to seek redress in the American courts.²⁴ The Court had previously allowed the privilege of litigation to resident aliens because their mere presence in the country amounted to implied constitutional protections.²⁵ Yet, the Court found the *Eisentrager* petitioners were “at no relevant time. . . within any territory over which the United States is sovereign, and the scene of their offense, their capture, their trial and their punishment were all beyond the territorial

15. *Id.*

16. 28 U.S.C. § 2241(c)(3) (2005).

17. *Id.*

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

19. *Id.* at 765-66.

20. *Id.* at 766.

21. *Id.*

22. *Id.*

23. *Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950).

24. *Id.* at 777-78.

25. *Id.* at 778.

jurisdiction of any court of the United States.”²⁶ The Court stated that if it were to find the district court had jurisdiction to issue the writ, it would have to find that:

a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against the laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.²⁷

In response, the Court concluded that neither the United States Constitution nor any statutes provided such a right²⁸ and essentially closed the courtroom doors to habeas corpus petitions made by non-resident aliens who were incarcerated abroad by United States armed forces.²⁹

IV. AFTERMATH OF THE SEPTEMBER 11, 2001 TERRORIST ATTACKS

On September 11, 2001, four commercial airplanes were hijacked by al Qaeda terrorists.³⁰ Two of the airplanes, along with their passengers and crews, crashed into the World Trade Center, one crashed into the Pentagon, and another crashed into a Pennsylvania field.³¹ The attacks resulted in the deaths of over 3,000 people; significant property damage, including the complete destruction of both towers of the World Trade Center, adjacent buildings, four commercial airplanes, and substantial damage to the United States Pentagon; and severe impacts on the United States economy.³² Insurance companies have approximated the economic losses caused by the attacks at over \$40 billion.³³ The September 11, 2001, terrorist attacks constituted the largest attacks to ever occur on American soil.

On September 18, 2001, Congress declared, by Joint Resolution, that the president is authorized “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks...in order to prevent any

26. *Id.*

27. *Id.* at 777.

28. *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

29. Broomes, *supra* note 6, at 137.

30. *See* Edward T. Pound et al., *Under Siege*, U.S. NEWS & WORLD REP., Sept. 24, 2001, at 6.

31. *Id.*

32. *See id.*

33. *See For the Record*, BUS. INS., June 24, 2002, at 23.

future acts of intentional terrorism against the United States.”³⁴ The United States then began a military campaign in Afghanistan, designed to capture or kill al Qaeda members and overthrow the Taliban dictators who aided Osama bin Laden, the leader of al Qaeda.³⁵ Moreover, in an effort to carry out the purpose of the Joint Resolution, the president issued a Presidential Order delineating instructions for the Secretary of Defense with respect to the detainment and trial of suspected terrorists.³⁶ According to the Presidential Order, the Secretary of Defense was authorized “to take all necessary measures to ensure that any individual subject to this order is detained”³⁷ and “[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission.”³⁸

Pursuant to the Presidential Order and the military campaign in Afghanistan, the United States captured and detained enemy forces in Afghanistan. After a fatal prison uprising at Mazar-e Sharif, in which a CIA agent became the first American casualty in the War on Terror,³⁹ the United States military began transferring detainees to Guantanamo Bay, Cuba.⁴⁰ The initial group of twenty detainees was transported from Afghanistan to Guantanamo Bay on January 11, 2002, followed a couple days later by another thirty detainees.⁴¹ The number of detainees held at Guantanamo continued to grow until there were over six hundred prisoners held there.⁴²

V. THE GENEVA CONVENTION AND THE BUSH ADMINISTRATION’S VIEWPOINT ON ITS APPLICABILITY TO GUANTANAMO DETAINEES

One of the claims the Guantanamo detainees are alleging as a legal basis for their habeas corpus petitions is that the United States is violating the Geneva Conventions, specifically the Third Geneva Convention. According to the detainees, the United States is violating the Third Geneva

34. Authorization for the Use of Military Force, 115 Stat. 224.

35. See Dan Balz, *U.S., Britain Launch Airstrikes Against Targets in Afghanistan; ‘We Will Not Falter and We Will Not Fail,’ Bush Pledges*, WASH. POST, Oct. 8, 2001, at A1.

36. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (November 13, 2001).

37. *Id.* at 2(b).

38. *Id.* at 4(a).

39. Vernon Loeb and Josh White, *CIA Reports Officer Killed in Prison Uprising*, WASH. POST, Nov. 29, 2001, at A27.

40. *A Second Group of Detainees Arrives at the Base*, N.Y. TIMES, Jan. 14, 2002, at A8.

41. *Id.*

42. K. Elizabeth Dahlstrom, Note, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Humanitarian Law: The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT’L L. 662, 674 (2003).

Convention by not providing them with prisoner of war status. Despite the Convention's long-standing authority regarding wartime standards during armed conflicts, the Bush Administration has adamantly denied its applicability to the detainees held at Guantanamo Bay.

The Geneva Convention Relative to the Treatment of Prisoners of War (POWs), also known as the Third Geneva Convention, was finalized on August 12, 1949.⁴³ It was ratified by the Senate and became American law on July 6, 1955.⁴⁴ According to Article 2 of the Third Geneva Convention, the terms of the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . [and] to all cases of partial or total occupation of the territory of a High Contracting Party, even if [there is] no armed resistance."⁴⁵

Article 4 of the Third Geneva Convention sets forth the requirements for POW status.⁴⁶ It specifies that the following persons are considered POWs:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.⁴⁷

Once a prisoner is designated as a POW, Articles 13-16 delineate the rights of the POW.⁴⁸ The detaining authority must recognize specific rights bestowed on the prisoner, including humane treatment,⁴⁹ protection,⁵⁰ and

43. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention].

44. 101 Cong. Rec. S8537 (daily ed. July 6, 1955).

45. Third Geneva Convention, *supra* note 44, at art. 2, 6 U.S.T. at 3318.

46. *Id.* at art. 4, 6 U.S.T. at 3320.

47. *Id.* at art. 4(A)(1)-(2), 6 U.S.T. at 3320.

48. *Id.* at art. 13-16, 6 U.S.T. at 3328.

49. *Id.* at art. 13, 6 U.S.T. at 3328.

50. Third Geneva Convention, *supra* note 44, at art. 13, 6 U.S.T. at 3328.

respect for their honor.⁵¹ Any mistreatment by the detaining authority that causes physical harm or death to the POW is considered a “serious breach of the . . . Convention.”⁵²

The Bush Administration has taken the position that none of the detainees held at Guantanamo Bay meet the criteria for POW status, and instead, termed them enemy combatants.⁵³ In a legal memorandum to White House Counsel Alberto Gonzales, Assistant Attorney General Jay Bybee stated that “Geneva III does not apply to the al Qaeda terrorist organization.”⁵⁴ The administration said that al Qaeda detainees are not entitled to POW status because the al Qaeda group was not a high contracting party to the Geneva Convention, the al Qaeda members did not satisfy the criteria for POWs in the Third Geneva Convention, and since the conflict is of an international nature, the Geneva Convention is not applicable.⁵⁵ Specifically, the al Qaeda members do not meet the four requirements for militia member POW status because “they were not under the command of responsible individuals, did not wear insignia, did not carry arms openly, and did not obey the laws of war.”⁵⁶

Further, although the Bush Administration has agreed the Geneva Convention is applicable with respect to the Taliban detainees, it has clarified that the Taliban detainees do not meet the qualifications for POW status.⁵⁷ The basis for the administration’s position is that even though Afghanistan is a high contracting party to the Geneva convention, the Taliban was never considered “the legitimate Afghan government,” so the detainees are not entitled to POW status.⁵⁸ Additionally, the administration stated that the Taliban detainees, like the al Qaeda detainees, were not entitled to POW status under Article 4, paragraph 2 because again the detainees did not satisfy the criteria for POWs, including “wear uniforms;

51. *Id.* at art. 14, 6 U.S.T. at 3328.

52. *Id.* at art. 13, 6 U.S.T. at 3328.

53. Charles Lane, *Court to Hear Challenges to Wartime Powers*, PITTSBURGH POST-GAZETTE, Apr. 19, 2004, at A1.

54. Memorandum from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto R. Gonzales and Dep’t of Defense General Counsel William J. Haynes II, at 9 (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

55. *Id.* at 9; see also, Fact Sheet, *Status of Detainees at Guantanamo*, White House Office of the Press Secretary, (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> [hereinafter White House Fact Sheet].

56. *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT’L L. 820, 821 (2004).

57. *Id.*

58. *Id.*

do not deliberately target civilians; and otherwise fight in accordance with the laws and customs of war.”⁵⁹

Even though the Bush Administration refused to recognize the Taliban and al Qaeda detainees as POWs, it treated them humanely and in accordance with the Geneva Convention by providing them with many of the privileges generally afforded to POWs.⁶⁰ White House Press Secretary Ari Fleischer stated:

In all cases, the President will reflect a policy that is a given with America’s traditions of treating military detainees well, treating them humanely, giving them full rations of food, three meals a day, medical treatment...because that’s a reflection of the values of the United States and the way our military treats people.⁶¹

VI. NON-RESIDENT ALIEN DETAINEES PETITION FOR WRITS OF HABEAS CORPUS IN FEDERAL DISTRICT COURTS

After years of imprisonment at Guantanamo Bay, Cuba, without access to counsel, legal tribunals, or outside communications, detainees and their “next friends” began petitioning the United States federal district courts for writs of habeas corpus to challenge the legality of their indefinite detentions. In two key decisions, *Coalition of Clergy, Lawyers and Professors v. Bush*⁶² and *Al Odah v. United States*,⁶³ both the Ninth Circuit and the District of Columbia Circuit dismissed the habeas corpus petitions. Although the dismissals were for different reasons, both courts referenced and relied upon the Supreme Court precedent of *Eisentrager* as an obstacle to granting the habeas petitions.

A. *Coalition of Clergy v. Bush*

The petitioners in *Coalition of Clergy, Lawyers and Professors v. Bush* were a group of clergy, lawyers, professors, and journalists seeking a writ of

59. Fact Sheet, *Guantanamo Detainees*, Department of Defense (Mar. 16, 2004), available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=March&x=20040316162613maduobba0.2819483&t=livefeeds/wf-latest.html>.

60. White House Fact Sheet, *supra* note 56.

61. *Press Briefing by Ari Fleischer*, White House Press Secretary, (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html#4>.

62. *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1156 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

63. *Al Odah v. United States*, 321 F.3d 1134, 1135 (D.C. Cir. 2003), *cert. granted*, *Rasul v. Bush*, 540 U.S. 1003 (2003), and *cert. granted in part*, *Al Odah v. U.S.*, 540 U.S. 1003 (2003).

habeas corpus for individuals detained at Guantanamo Bay, Cuba.⁶⁴ In dismissing the petition, the district court held that “1. Petitioners do not have standing to assert claims on behalf of the detainees. 2. Even if petitioners did have standing, this court lacks jurisdiction. . .[.] 3. No federal court would have jurisdiction over petitioners’ claims.”⁶⁵ The court found that the petitioners did not have standing to bring the petition because they were not “next friends” of the detainees since they did not have a “‘significant relationship’ with the detainees, . . .[or] any relationship.”⁶⁶ Additionally, the court found that it lacked jurisdiction to hear the claim because none of the named respondents were in the territorial jurisdiction of the Central District of California.⁶⁷

Finally, the court decided that it could not transfer the case to another district court because no federal district court would have jurisdiction to hear the claims.⁶⁸ In determining that no federal court would have jurisdiction, the court relied on the Supreme Court precedent of *Johnson v. Eisentrager*.⁶⁹ The court found the situation of the Guantanamo detainees was similar to the *Eisentrager* claimants in that:

[t]hey are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in an American civilian court.⁷⁰

Moreover, the court held that Guantanamo Bay is outside the sovereign territory of the United States.⁷¹ The court determined that the sovereignty of Guantanamo Bay is controlled by a lease agreement between the United States and Cuba.⁷² The countries initially signed the lease agreement in 1903, and later extended it in 1934.⁷³ In pertinent part, the lease agreement states that “the United States recognizes the . . .ultimate sovereignty of the

64. Coalition of Clergy, Lawyers, and Professors v. Bush, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

65. *Id.* at 1039.

66. *Id.* at 1044.

67. *Id.* at 1045.

68. *Id.* at 1039.

69. Coalition of Clergy, Lawyers, and Professors v. Bush, 189 F. Supp. 2d 1036, 1046 (C.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

70. *Id.* at 1048.

71. *Id.* at 1049.

72. *Id.*

73. *Id.* at 1049.

Republic of Cuba over the above described areas...[and] during the period of occupation...the United States shall exercise complete jurisdiction and control over and within said areas.”⁷⁴ The court stated “sovereignty” and “jurisdiction and control” are not the same things, and the lease agreement clearly states that Cuba retains sovereignty.⁷⁵ Since a writ of habeas corpus can only be issued by a federal court when the detainee or custodian is within its territorial jurisdiction,⁷⁶ and Cuba is outside the sovereign territory of the United States,⁷⁷ all federal courts will lack jurisdiction to hear the petitioners’ claims.⁷⁸ As a result, the court found that any attempt to transfer the case to another district court would be futile.⁷⁹

On appeal, the Ninth Circuit affirmed the part of the district court’s decision that found the petitioners lacked standing to bring the petition.⁸⁰ The court reversed and vacated the part of the district court’s decision that held that it, or any federal court, lacked jurisdiction to hear the claims.⁸¹ The appellate court stated that since the petitioners lacked standing to bring the claims and the rightful claimants were not represented in court,⁸² it was outside the discretion of the district court to “adjudicate the rights of the detainees or persons on their behalf to petition before other United States courts.”⁸³ Specifically, the Ninth Circuit declined to address whether the precedent of *Eisentrager* was controlling, although it noted in a footnote that “the holding in *Eisentrager* represents a formidable obstacle to the rights of the detainees at Camp X-Ray to the writ of habeas corpus; it is impossible to ignore, as the case well matches the extraordinary circumstances here.”⁸⁴

B. *Al Odah v. United States*

In another circuit, other detainees held at Guantanamo Bay also petitioned for writs of habeas corpus to challenge the lawfulness of their

74. Coalition of Clergy, Lawyers, and Professors v. Bush, 189 F. Supp. 2d 1036, 1049 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

75. *Id.*

76. *Id.* at 1044.

77. *Id.* at 1049.

78. *Id.* at 1046.

79. Coalition of Clergy, Lawyers, and Professors v. Bush, 189 F. Supp. 2d 1036, 1050 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

80. Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1156 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003).

81. *Id.*

82. *Id.* at 1164.

83. *Id.* at 1156.

84. *Id.* at 1164 n.4.

imprisonment.⁸⁵ This time, the District of Columbia Circuit, in *Al Odah v. United States*, denied the detainees' petitions for writs of habeas corpus.⁸⁶ The opinion was the consolidation of three cases made by next friends of the detainees.⁸⁷ Again relying on *Eisentrager*, the court found that, although the detainees represent "enemy aliens" as the term was used in *Eisentrager*, the detainees were similarly situated to the German prisoners.⁸⁸ The court said "[t]hey too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States."⁸⁹ Consequently, the *Eisentrager* decision prevented the court from granting the detainees' petitions.⁹⁰

The *Al Odah* court also found that no United States federal court would have jurisdiction to entertain a habeas corpus petition by the Guantanamo detainees.⁹¹ The D.C. Circuit again determined that Cuba has sovereignty over Guantanamo Bay, not the United States.⁹² The court clarified that "territorial jurisdiction" means "territorial jurisdiction of the United States courts[;]" whereas, "[s]overeignty...means...supreme dominion exercised by a nation."⁹³ As such, the United States has sovereignty over the actual land of the States and over insular possessions, but it does not have sovereignty over Guantanamo Bay.⁹⁴ The court quoted the *Eisentrager* case for the holding 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."⁹⁵ Therefore, the *Eisentrager* court held that the "privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection."⁹⁶ Since Cuba has

85. *Al Odah v. United States*, 321 F.3d 1134, 1135 (D.C. Cir. 2003), *cert. granted*, *Rasul v. Bush*, 540 U.S. 1003 (2003), and *cert. granted in part*, *Al Odah v. U.S.*, 540 U.S. 1003 (2003).

86. *Id.* at 1140.

87. *Id.* at 1135.

88. *Id.* at 1140.

89. *Id.*

90. *Al Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003), *cert. granted*, *Rasul v. Bush*, 540 U.S. 1003 (2003), and *cert. granted in part*, *Al Odah v. U.S.*, 540 U.S. 1003 (2003).

91. *Id.* at 1141.

92. *Id.* at 1143.

93. *Id.*

94. *Id.*

95. *Al Odah v. United States*, 321 F.3d 1134, 1135 (D.C. Cir. 2003), *cert. granted*, *Rasul v. Bush*, 540 U.S. 1003 (2003), and *cert. granted in part*, *Al Odah v. U.S.*, 540 U.S. 1003 (2003).

96. *Id.*

sovereign power over Guantanamo Bay, the detainees are not within the territorial jurisdiction of the United States courts, and their petitions must be dismissed for lack of jurisdiction.⁹⁷

Finally, the *Al Odah* court said that the D.C. Circuit has consistently held “a ‘foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.’”⁹⁸ In *Eisentrager*, the Court refused to agree that:

[t]he Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses....If the Fifth Amendment confers its rights on the world. . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly, . . . right to bear arms, . . . security against ‘unreasonable’ searches and seizures, . . . as well as right to jury trial.⁹⁹

Later, the Supreme Court held that the Fourth Amendment protection against unreasonable searches and seizures does not extend to non-resident aliens located beyond the sovereign territory of the United States.¹⁰⁰ Once again, in 2001, the Court held 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.’”¹⁰¹ Consequently, the district court overwhelmingly found that the Guantanamo detainees would not be able to avail themselves of the constitutional protections of the United States and dismissed their habeas corpus petitions.¹⁰²

VII. THE SUPREME COURT TURNS THE TIDE AND FINDS FEDERAL COURTS HAVE JURISDICTION TO HEAR GUANTANAMO DETAINEES’ HEBEAS CORPUS CLAIMS

In June, 2004, the United States Supreme Court decided *Rasul* and held that United States district courts do have jurisdiction to hear the habeas

97. *Id.* at 1145.

98. *Id.* at 1141 (quoting *People’s Mojahedin Org. v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also* *32 County Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002)).

99. *Id.* at 1140 (quoting *Eisentrager*, 339 U.S. at 783-84) (internal quotations omitted).

100. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *cert. granted*, *Rasul v. Bush*, 540 U.S. 1003 (2003), and *cert. granted in part*, *Al Odah v. U.S.*, 540 U.S. 1003 (2003) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990)).

101. *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

102. *Id.*

corpus petitions of Guantanamo Bay detainees.¹⁰³ The Court narrowly tailored the question to “whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”¹⁰⁴ By fashioning the question in this manner, the Court alleviated the necessity of describing what claims the detainees may bring, and what extent of due process is required.¹⁰⁵

A. *The Majority*

The majority opinion, which reversed the decision of the District of Columbia Circuit Court of Appeals, was written by Justice Stevens and joined by four other members of the Court.¹⁰⁶ Justice Kennedy wrote a concurring opinion, and Justice Scalia wrote a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Thomas.¹⁰⁷ The majority’s decision was based on a few key points: the Guantanamo detainees were distinguishable from the German prisoners in *Eisentrager*,¹⁰⁸ federal courts have jurisdiction to hear the claims because they have jurisdiction over the detainees’ custodians,¹⁰⁹ the detainees are within the territorial jurisdiction of the United States since the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base,¹¹⁰ and habeas statutory requirements are satisfied since the detainees’ custodians are within the territorial jurisdiction of the federal courts.¹¹¹

First, the majority distinguished the *Eisentrager* prisoners from the present Guantanamo detainees.¹¹² Unlike the German prisoners in *Eisentrager*, the Court stated that the detainees:

[a]re 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; and for more than two years they have been

103. Rasul v. Bush, 542 U.S. 466, 485 (2004).

104. *Id.* at 470.

105. Captain Christopher M. Schumann, Note, *Bring It On: The Supreme Court Opens the Floodgates with Rasul v. Bush*, 55 A.F.L. REV. 349, 367 (2004).

106. Rasul, 542 U.S. at 468.

107. *Id.*

108. *Id.* at 475.

109. *Id.* at 478-479.

110. *Id.* at 480.

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

112. *Id.* at 475-476.

imprisoned in territory over which the United States exercises exclusive jurisdiction and control.¹¹³

The majority stated that the six facts critical to the *Eisentrager* decision were only germane to the constitutional claim of habeas corpus, not a statutory claim of habeas corpus.¹¹⁴ Consequently, the Court was not bound by stare decisis to follow the precedent of *Eisentrager*, nor was that decision overruled.

Second, since *Eisentrager* did not address the statutory basis for a habeas corpus petition, the Court was free to declare, based on the statute, that as long as the custodian is within the court's jurisdiction, the court can hear the petitioner's habeas corpus claim.¹¹⁵ In doing so, the Court interpreted section 2241 in a way that includes territorial jurisdiction over the custodians and stated "because 'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in . . . unlawful custody,' a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be [served].'"¹¹⁶ The Court held that the historical context of the habeas corpus statute justified its decision that federal courts have jurisdiction over habeas claims by alien detainees at Guantanamo Bay.¹¹⁷ The majority simply explained in its decision that the detainees "contend. . . they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians . . . [.] [T]herefore, . . . § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges."¹¹⁸

Finally, the majority found that Guantanamo Bay, Cuba, is within the territorial jurisdiction of American federal courts due to the long-term lease agreement between the United States and Cuba.¹¹⁹ The Court noted that, by the terms of the lease agreement, the "United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."¹²⁰ Accordingly, the Court found that Guantanamo was within the territorial

113. *Id.*

114. *Id.*

115. *Id.* at 478-479.

116. *Rasul v. Bush*, 542 U.S. 466, 478-479 (2004) (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-95 (1973) where the Court found that a Kentucky court had jurisdiction to hear a habeas claim filed by a petitioner incarcerated in Alabama "because 'the writ of habeas corpus does not act upon the prisoner. . . but upon the person who holds him'").

117. *Id.* at 483-484.

118. *Id.*

119. *Id.* at 480-481.

120. *Id.*

jurisdiction of the federal courts, not because it was a sovereign territory of the United States, but because the United States exercises “complete jurisdiction and control” over the base.¹²¹ Additionally, the Court said that respondents admitted that federal courts would have jurisdiction over the habeas claims of American citizens at Guantanamo Bay.¹²² Therefore, since the habeas statute does not delineate a distinction between aliens and citizens, the detainees’ alien statuses do not create a barrier to their habeas corpus petitions; “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”¹²³ Likewise, the Court stated that the longstanding presumption that American legislation does not carry extraterritorial effect unless that intent is specifically stated is irrelevant since Guantanamo is within the territorial jurisdiction of the United States courts.¹²⁴

B. *The Dissent*

The dissenting opinion by Justice Scalia emphatically opposed the decision reached by the majority. Early in his opinion, Justice Scalia stated that the majority’s opinion is “an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.”¹²⁵ The dissent’s opinion disagreed with the majority on several important aspects. The dissent thought the majority incorrectly interpreted section 2241 to include non-resident aliens,¹²⁶ it mistakenly determined that territorial jurisdiction over the custodian satisfied the statutory requirements of section 2241,¹²⁷ it erroneously found that Guantanamo Bay is within the territorial jurisdiction of federal courts,¹²⁸ and it unfoundedly established a historical basis for extending the scope of the habeas corpus statute to non-resident aliens.¹²⁹

Initially, Justice Scalia took aim at the majority’s interpretation of section 2241 and said that “[e]ven a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee.”¹³⁰ The statute says that “[w]rits of habeas corpus may be granted. . . within their respective jurisdictions. . . [t]he order of the circuit judge shall be entered in the records of...the district wherein the restraint

121. Rasul v. Bush, 542 U.S. 466, 480 (2004).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 488-489 (Scalia, J., dissenting).

126. Rasul v. Bush, 542 U.S. 466, 488-489 (2004) (Scalia, J., dissenting).

127. *Id.* at 500 (Scalia, J., dissenting).

128. *Id.* at 500-502 (Scalia, J., dissenting).

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

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

complained of is had.”¹³¹ Further, section 2242 states “the district court of the district in which the applicant is held.”¹³² On this basis, Justice Scalia concluded that in order for a writ to be issued, a federal court must have territorial jurisdiction over the detainee, and not the custodian.¹³³ Justice Scalia further stated that this should have been the end of the case; however, it was not.¹³⁴

Next, Justice Scalia refuted the majority’s holding that when the federal court has jurisdiction over the detainees’ custodian, the jurisdiction for a habeas corpus claim is satisfied.¹³⁵ The majority claimed to be distinguishing the German prisoners in *Eisentrager*, yet the factual situation faced by that Court was strikingly similar to the situation of the Guantanamo detainees.¹³⁶ By abandoning the sound decision of *Eisentrager*, the Court gave the United States’ habeas corpus statute unlimited boundaries.¹³⁷ Justice Scalia pointed out that the American military has detained millions of alien prisoners over the last century.¹³⁸ In fact, at the end of World War II, the United States held approximately two million prisoners.¹³⁹ There is no question that a great many of those prisoners would have criticized their capture and detention.¹⁴⁰ At the time the *Rasul* decision was announced, the United States held over 600 detainees at Camp X-Ray in Guantanamo.¹⁴¹ The dissent stated that the effects of this decision allow those detainees to inundate the American federal courts with claims of injustice, as has never before been allowed.¹⁴² Moreover, Justice Scalia underscored the gravity of the majority’s decision when he said “[t]oday’s carefree Court disregards, without a word of acknowledgement, the dire warning of a more circumspect Court in *Eisentrager*.”¹⁴³

Additionally, the dissent argued that the majority was applying section 2241 domestically, based on the territorial jurisdiction of the custodians, so the presumption of no extraterritorial effect for congressional legislation is

131. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (Scalia, J., dissenting) (quoting 28 U.S.C. § 2241(a) (2005) (emphasis in original)).

132. *Id.* at 490 (Scalia, J., dissenting) (quoting 28 U.S.C. § 2242) (emphasis in original).

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

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

135. *Id.* at 500 (Scalia, J., dissenting).

136. *Rasul v. Bush*, 542 U.S. 466, 500 (2004) (Scalia, J., dissenting).

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

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

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

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

141. *Rasul v. Bush*, 542 U.S. 466, 498 (2004) (Scalia, J., dissenting).

142. *Id.* 497-498 (Scalia, J., dissenting).

143. *Id.* at 499 (Scalia, J., dissenting).

inapplicable.¹⁴⁴ Yet, the majority sufficiently addressed the extraterritorial effect in its opinion, and concluded that it did not apply to Guantanamo.¹⁴⁵ Justice Scalia pointed out that, if the majority's reasoning were correct, then "not only § 2241 but presumably *all* United States law applies there – including . . . the federal cause of action . . . which would allow prisoners to sue their captors for damages."¹⁴⁶ Justice Scalia bluntly stated "[f]ortunately, however, the Court's irrelevant discussion also happens to be wrong" and elaborated on two reasons why the majority's conclusions were incorrect.¹⁴⁷

First, although the majority found that the lease terms state the United States has "complete jurisdiction and control . . . and may continue to exercise such control permanently if it so chooses[.]" it did not mean that Guantanamo Bay becomes the sovereign territory of the United States.¹⁴⁸ In fact, the lease terms specifically state that Cuba retains ultimate sovereignty over the Naval Base.¹⁴⁹ The dissent pointed out that the majority did not "explain how 'complete jurisdiction and control' without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws."¹⁵⁰ The dissent continued by stating that "[s]ince 'jurisdiction and control' obtained through a lease is no different in effect from 'jurisdiction and control' acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws."¹⁵¹ Overall, the dissent stated that the majority's holding regarding the lease agreement between the United States and Cuba, which is potentially perpetual in duration, does not automatically extend the American laws to Guantanamo Bay.

The second reason for the majority's holding that Guantanamo is within the territorial jurisdiction of American federal courts was a result of the respondent's admission that an American in Guantanamo would be able to invoke the habeas corpus statute.¹⁵² As stated previously, the majority found this concession important, especially since the statute does not elaborate a difference between American citizens and aliens held in military custody.¹⁵³ However, the dissent drew another conclusion from the

144. *Id.* at 500 (Scalia, J., dissenting).

145. *Id.* at 499 (Scalia, J., dissenting).

146. *Rasul v. Bush*, 542 U.S. 466, 500 (2004) (Scalia, J., dissenting).

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

148. *Id.* 500-501 (Scalia, J., dissenting).

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

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

151. *Rasul v. Bush*, 542 U.S. 466, 501 (2004) (Scalia, J., dissenting).

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

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

respondent's answer during oral argument.¹⁵⁴ The dissent clarified that "the reason the Solicitor General conceded there would be jurisdiction over a detainee who was a United States citizen had *nothing to do* with the special status of Guantanamo Bay."¹⁵⁵ The respondent had stated "[o]ur answer to that question . . . is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute. . . [.]"¹⁵⁶ Therefore, "that position – the position that United States citizens throughout the world may be entitled to habeas corpus rights – is precisely the position that this Court adopted in *Eisentrager*, even while holding that aliens abroad *did not have* habeas corpus rights."¹⁵⁷

Finally, the dissent examined the majority's theory that applying the writ of habeas corpus to non-resident aliens was historically founded.¹⁵⁸ Justice Scalia analyzed the case law the majority relied on for its proposition and concluded that "[n]one of the authorities it cites comes close to supporting that claim."¹⁵⁹ The majority relied on cases that examined aliens detained on domestic territory or in "exempt jurisdictions."¹⁶⁰ Yet, those cases were irrelevant to the current analysis, and *Eisentrager* was the controlling authority.¹⁶¹ Overall, the dissent surmised that "the Court's treatment of Guantanamo Bay, like its treatment of section 2241, was a wrenching departure from precedent."¹⁶²

Justice Scalia finished by stating that the president and other military commanders had no reason to expect the detainment of enemy aliens at Guantanamo Bay would allow them access to the American courts.¹⁶³ "For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort."¹⁶⁴

One commentator declared that the Supreme Court has created a number of problems due to its decision in *Rasul*.¹⁶⁵ He said the decision "open[ed] the doors of the courthouse to potentially countless detainees and prisoners of war from around the world, both present and future, who wish

154. *Id.* at 501-502 (Scalia, J., dissenting).

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

156. *Rasul v. Bush*, 542 U.S. 466, 501-502 (2004) (Scalia, J., dissenting).

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

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

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

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

161. *Rasul v. Bush*, 542 U.S. 466, 503-504 (2004) (Scalia, J., dissenting).

162. *Id.* at 505 (Scalia, J., dissenting).

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

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

165. Schumann, *supra* note 105, at 367.

to challenge their detention by U.S. forces.”¹⁶⁶ Additionally, the U.S. military will need to defend their actions in court, when they should be focusing their efforts on protecting the American public.¹⁶⁷ The Court’s decision will limit the military’s information gathering efforts because the rigors of litigation will overburden the continued detention of prisoners, and the potential disclosure of classified information may necessitate release.¹⁶⁸

In addition, our military is facing a new type of enemy.¹⁶⁹ It is said that:

[Today’s enemy] does not wear the uniform of one specific country[,] . . . hides among the civilian populace[,] . . . uses places like mosques and hospitals as places of refuge for both combatants as well as the tools of war[,] . . . masks his true identity and counts on torture and beheadings among his weapons of choice[,] . . . hide[s] in the shadows while detonating roadside bombs that kill and maim soldier and civilian alike[, and] . . . conduct[s] their murderous aggression not just on the streets of Baghdad but on the streets of New York and Los Angeles.¹⁷⁰

Therefore, the seriousness of the Court’s decision cannot be overemphasized, and the far-reaching effects are yet to be realized.¹⁷¹

VIII. THE NEXT ROUND OF LITIGATION: WHAT CLAIMS CAN GUANTANAMO DETAINEES BRING IN HABEAS CORPUS PETITIONS?

Although the Supreme Court held in *Rasul* that federal district courts have jurisdiction to entertain Guantanamo detainees’ petitions for habeas corpus, it failed to set forth the basis for a legitimate claim or the requisite level of due process. Since the *Rasul* decision, the federal district court for the District of Columbia has received numerous petitions for writs of habeas corpus by Guantanamo detainees. At the end of July, 2004, there were thirteen cases, involving more than sixty prisoners pending in front of eight Judges in the District of Columbia.¹⁷² Two district court decisions that

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Schumann, *supra* note 105, at 368-69.

171. *Id.*

172. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 451 (D.D.C. 2005), *reh’g denied*, 355 F. Supp. 2d 482 (D.D.C. 2005) and *Odah v. U.S.*, 355 F. Supp. 2d 482 (D.D.C. 2005).

reach differing results, *Khalid v. Bush*¹⁷³ and *In re Guantanamo Detainees Cases*,¹⁷⁴ will be discussed.

A. *Khalid v. Bush*

The first federal district court decision discussed here is the decision of District Judge Leon in *Khalid v. Bush*.¹⁷⁵ In *Khalid*, the petitioners were seven aliens who were captured by United States military forces and held at the Guantanamo Bay Naval Base.¹⁷⁶ Pursuant to the grant of jurisdiction in *Rasul*, these detainees filed a petition for a writ of habeas corpus to challenge the legality of their detention in Guantanamo Bay.¹⁷⁷ The detainees claimed they were being imprisoned in “violation of the United States Constitution, certain federal laws and United States treaties, and certain international laws.”¹⁷⁸ Specifically, they alleged that their detention “violate[d]: (1) each non-resident alien’s rights under the United States Constitution; (2) certain federal laws; (3) certain treaties to which the United States is a signatory State; and (4) certain customary international law provisions that have been incorporated into this country’s common law.”¹⁷⁹ In response, the United States asked the court to dismiss the claims on the grounds that there was no legal theory upon which the writ could be issued.¹⁸⁰ The United States based its argument on the theory that “(1) non-resident aliens detained under these circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances.”¹⁸¹

In dismissing the petition, the district court agreed with the respondent and held there was no viable legal theory upon which to grant the writ.¹⁸² The court reached this decision based on its findings that the President was acting pursuant to congressional authorization when he ordered the capture and imprisonment of enemy aliens,¹⁸³ the non-resident alien detainees possessed no rights under the United States Constitution because they were captured and held beyond the United States borders,¹⁸⁴ and they failed to

173. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

174. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 443.

175. *Khalid*, 355 F. Supp. 2d 311.

176. *Id.* at 314.

177. *Id.*

178. *Id.*

179. *Id.* at 317.

180. *Khalid*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005).

181. *Id.*

182. *Id.*

183. *Id.* at 317.

184. *Id.* at 320.

specify a United States law, an international treaty,¹⁸⁵ or an international law upon which the petition could be granted.¹⁸⁶

First, the court found that the President's executive order to capture and detain the enemy combatants was issued pursuant to an act of Congress.¹⁸⁷ As stated earlier, Congress, by Joint Resolution, authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of intentional terrorism against the United States."¹⁸⁸ The Constitution provides that Congress has the authority "[t]o declare War"¹⁸⁹ and the President has the authority to "tak[e] Care that the Laws [are] faithfully executed."¹⁹⁰ Moreover, the court stated that in *Ex parte Quirin*, the Supreme Court delineated the responsibilities of the President and Congress with respect to armed conflict when it held that "[t]he Constitution...invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war."¹⁹¹ Additionally, the President's authority during an armed conflict must be broadly interpreted¹⁹² and the "war power *must* include the power to capture and detain our enemies."¹⁹³ Furthermore, the court found that based on *Hamdi v. Rumsfeld*, the Supreme Court had interpreted the President's authority to include detention of enemies until the end of the current conflict.¹⁹⁴ Therefore, the court concluded that the President's executive order was congressionally authorized and constitutionally lawful.¹⁹⁵

Next, the district court held that the non-resident alien detainees possessed no rights under the United States Constitution.¹⁹⁶ The court said that since the detainees were foreign national citizens detained beyond the borders of the United States, they were not entitled to enjoy any rights under the United States Constitution.¹⁹⁷ The court relied upon the precedent of *Eisenstrager* and numerous later Supreme Court cases that specifically held

185. Khalid v. Bush, 355 F. Supp. 2d 311, 324 (D.D.C. 2005).

186. *Id.* at 327.

187. *Id.* at 320.

188. *Id.* at 318-19; see Authorization for the Use of Military Force, 115 Stat. 224.

189. *Id.* at 318 (quoting U.S. Const. art. I, § 8, cl. 1) (internal quotations omitted).

190. Khalid v. Bush, 355 F. Supp. 2d 311, 318 (D.D.C. 2005) (quoting U.S. Const. art. II, § 3) (internal quotations omitted).

191. *Id.* at 318 (quoting *Ex parte Quirin*, 317 U.S. 1, 26 (1942)).

192. *Id.*

193. *Id.* at 319.

194. *Id.* (citing *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2641 (2004) (plurality opinion)).

195. Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005).

196. *Id.* at 320.

197. *Id.* at 321.

that aliens outside the geographic borders of the United States were not entitled to constitutional protections or rights.¹⁹⁸ With regard to *Rasul*, the court stated that the Supreme Court's decision was narrowly tailored to decide whether federal district courts had jurisdiction to entertain the detainees' petitions for habeas corpus.¹⁹⁹ The district court emphasized that *Eisentrager* was not overruled and specified that the *Rasul* decision did not address whether the detainees had any independent constitutional rights.²⁰⁰ The Court's decision in *Rasul* "only answer[ed] the question of jurisdiction, and not the question of whether these . . . individuals possess any substantive rights on the merits of their claims."²⁰¹ Therefore, the court held that the Guantanamo detainees had no legal constitutional theory upon which to base their habeas corpus petitions.²⁰²

Additionally, the court decided that petitioners did not state a United States law or treaty that would provide a sufficient basis for their habeas corpus petition.²⁰³ The petitioners merely stated they were being detained without outside communication, were being interrogated without formal charges, and were subjected to minimal accommodations.²⁰⁴ The court pointed out that these were not allegations in violation of United States law, especially considering Congress' specific authorization for the President's use of force.²⁰⁵ The petitioners also based their claims on statutes that do not provide a private right of action; so again, they did not present a viable legal theory for their petitions.²⁰⁶

Likewise, the district court determined that the petitioners did not present an international treaty upon which to base their petition.²⁰⁷ Initially, the petitioners claimed the Geneva Convention was applicable; however, during oral argument, they admitted that the Convention was inapplicable because "these petitioners were not captured in the 'zone of hostilities . . . in and around Afghanistan.'"²⁰⁸ Thus, the petitioners tried to argue that other

198. *Id.* at 321-22 (citing and quoting *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("Mere lawful presence in the country gives [the alien] certain rights."); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) ("Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases [conferring constitutional rights on aliens] avail him not.")).

199. *Id.* at 323.

200. *Khalid v. Bush*, 355 F. Supp. 2d 311, 322 (D.D.C. 2005).

201. *Id.* at 323.

202. *Id.*

203. *Id.* at 324.

204. *Id.*

205. *Khalid v. Bush*, 355 F. Supp. 2d 311, 324 (D.D.C. 2005).

206. *Id.* at 325.

207. *Id.* at 326.

208. *Id.*

United States treaties were violated, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights.²⁰⁹ However, as a general rule, the fact that the United States is a signatory to a treaty does not create enforceable rights.²¹⁰ In order for a treaty to create a private right of action, it must either be self-executing or Congress must pass enabling legislation.²¹¹ In this case, neither treaty relied upon by the petitioners was self-executing, and Congress has not enacted legislation that provides a private right of action.²¹² As a result, the petitioners did not allege a treaty violation that provided a basis for the habeas petition.²¹³

Finally, the district court found that the petitioners' writs of habeas corpus were not based on a viable international law.²¹⁴ International law, according to the Supreme Court, is part of American jurisprudence.²¹⁵ Yet, once again, the petitioners failed to set forth an international law or international legal norm that respondents violated by capturing and detaining the prisoners at Guantanamo Bay.²¹⁶ The petitioners contended that their continued detention violated international legal practice; however, they were unable to specify any case that supported this allegation, and their argument again failed.²¹⁷ Consequently, the district court granted the respondent's motion to dismiss for failure to identify a viable legal theory as the basis for the habeas corpus petitions.²¹⁸

B. *In Re Guantanamo Detainee Cases*

The second District of Columbia district court case to be discussed here is *In re Guantanamo Detainee Cases*, decided by District Judge Green.²¹⁹ This case was the consolidation of eleven habeas petitions pending before the District of Columbia district court.²²⁰ The petitioners claimed their detention at Guantanamo violated a number of laws, although not all petitioners raised the same claims.²²¹ All petitions alleged violations of the Fifth Amendment, and multiple petitions raised violations of the Alien Tort

209. *Id.*
210. *Khalid v. Bush*, 355 F. Supp. 2d 311, 327 (D.D.C. 2005).
211. *Id.* at 327.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Khalid v. Bush*, 355 F. Supp. 2d 311, 327-28 (D.D.C. 2005).
216. *Id.* at 328.
217. *Id.*
218. *Id.* at 330.
219. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 443 (D.D.C. 2005).
220. *Id.* at 451-52.
221. *Id.* at 452.

Claims Act, the Administrative Procedure Act, and the Geneva Conventions.²²² Other petitioners based their claims on:

[t]he Sixth, Eighth, and Fourteenth Amendments; the War Powers Clause; the Suspension Clause; Army Regulation 109-8, entitled ‘Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees;’ the International Covenant on Civil and Political Rights; the American Declaration on the Rights and Duties of Man; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the International Labour Organization’s Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; and customary international law.²²³

In response, the United States filed a motion to dismiss or in the alternative a judgment as a matter of law.²²⁴ After reviewing the pleadings and briefs and listening to oral arguments, the court held that the detainees had stated valid claims for Fifth Amendment violations of due process, and some of the detainees raised valid claims under the Geneva Conventions. However, the court dismissed the petitioners’ remaining claims.²²⁵

In reaching its decision, the court found that the United States Constitution does have extraterritorial application to Guantanamo Bay,²²⁶ the United States is not satisfying the petitioner’s due process rights under the Fifth Amendment,²²⁷ and Taliban detainees are entitled to protection under the Third Geneva Convention,²²⁸ although al Qaeda detainees are not.²²⁹ Therefore, the court granted in part and denied in part the respondent’s motion to dismiss.²³⁰

To begin with, the court found that the detainees were entitled to due process constitutional protection under the Fifth Amendment to the United States Constitution.²³¹ The United States alleged that the *Rasul* decision only granted the federal courts jurisdiction to hear the detainees’ habeas corpus petitions; it did not hold that “the detainees actually possess any

222. *Id.* at 452-53.

223. *Id.* at 453.

224. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 453 (D.D.C. 2005).

225. *Id.* at 445.

226. *Id.* at 454.

227. *Id.* at 468.

228. *Id.* at 480.

229. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 479 (D.D.C. 2005).

230. *Id.* at 481.

231. *Id.* at 464.

underlying substantive rights.”²³² Moreover, the respondents maintained that Supreme Court precedent denied non-resident aliens substantive rights.²³³ The court rejected those positions, partly on the grounds that it was absurd to think that the Supreme Court would grant the filing of the petition, only to declare that the detainees had no rights upon which to base their claims.²³⁴ In contrast, the court stated that it “interprets *Rasul*, in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.”²³⁵

The district court found a statement by the *Rasul* majority very pertinent to its decision that detainees possessed constitutional protections. This statement, located in a footnote, said:

[p]etitioner’s 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.’²³⁶

Additionally, the court relied upon the *Rasul* majority’s analysis of the *Eisentrager* decision to the extent that the majority would not have stated the “petitions ‘unquestionably describe custody in violation of the Constitution or laws or treaties of the United States’ unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed.”²³⁷ Overall, the district court found that the Guantanamo detainees were invoking a fundamental right under the United States Constitution, the Fifth Amendment right of due process – “the right not to be deprived of liberty without due process of law.”²³⁸ Based on the *Rasul* decision, the court held that it was obvious that the Guantanamo Naval Base is equivalent to an American territory and subject to fundamental constitutional rights.²³⁹ Therefore, the respondents’ theory that the detainees do not possess constitutional rights was denied.²⁴⁰

232. *Id.* at 454.

233. *Id.*

234. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

235. *Id.*

236. *Id.* at 463 (quoting *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004)).

237. *Id.*

238. *Id.* at 464.

239. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

240. *Id.*

Next, the court addressed the specific process to which the detainees were entitled pursuant to the Fifth Amendment due process clause.²⁴¹ In formulating what procedure would satisfy Fifth Amendment requirements, the court looked to the Supreme Court's recent decision in *Hamdi*, where it evaluated what due process procedures were necessary for an American prisoner.²⁴² All of the material facts of *Hamdi* were identical to the Guantanamo detainees, with the exception that *Hamdi* was an American citizen whereas none of the current detainees are United States citizens.²⁴³

In *Hamdi*, the plurality stated that "an individual detained by the government on the ground that he is an 'enemy combatant' 'must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.'"²⁴⁴ The plurality further said that hearsay evidence could be considered and that the government was also allowed to utilize a presumption of "enemy combatant" status, as long as it was a rebuttable presumption and there was a fair opportunity for rebuttal.²⁴⁵ Finally, the plurality emphasized that the prisoner was entitled to the assistance of counsel.²⁴⁶

Following the Supreme Court's decision in *Rasul*, Deputy Secretary of Defense Paul Wolfowitz instituted the Combatant Status Review Tribunal ("CSRT") "to review the status of each detainee at Guantanamo Bay as an 'enemy combatant.'"²⁴⁷ Those tribunal hearings were modeled after Army Regulation 190-8, which was referred to in the *Hamdi* decision, and surpassed the specifications delineated by the *Hamdi* plurality.²⁴⁸ Pursuant to the CSRT guidelines:

[t]ribunal members must certify that they have not been involved in the 'apprehension, detention, interrogation, or previous determination of status of the detainee[s],' that detainees are provided a 'Personal Representative' to assist in the preparation of their cases, that the 'Recorder,'...the person who presents evidence in support of 'enemy combatant' status – must search for exculpatory evidence, that the detainee is entitled to an

241. *Id.* at 465.

242. *Id.*

243. *Id.*

244. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 467 (D.D.C. 2005) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion)).

245. *Id.* (quoting *Hamdi*, 542 U.S. at 533-534).

246. *Id.* (quoting *Hamdi*, 542 U.S. at 511).

247. *Id.* at 450.

248. *Id.* at 467-68.

unclassified summary of the evidence against him, and that the tribunal's decisions are reviewed by a higher authority.²⁴⁹

Despite those procedures, the district court concluded that the CSRT did not meet the requirements of constitutional due process.²⁵⁰

The district court identified two primary aspects by which the CSRT hearings failed to meet constitutional requirements.²⁵¹ First, the "CSRTs fail[] to provide the detainees with access to material evidence upon which the tribunal affirmed their 'enemy combatant' status and . . . fail[] to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees."²⁵² Second, with respect to certain detainees, the CSRT did not properly investigate allegations of torture or coercion and assertions that the 'enemy combatant' status was vague and overly broad.²⁵³

With respect to the first deficiency, the court said that the CSRT was permitted to review classified information in making the 'enemy combatant' determination, but the detainees were not allowed access to that classified information, nor were they given assistance of counsel with regard to that classified information.²⁵⁴ As a result, the CSRT did not satisfy the due process criteria set forth in *Hamdi*, which required the detainee be apprised of the factual basis of his detention and be provided a fair opportunity to refute those allegations.²⁵⁵ In order to meet the due process requirements of *Hamdi*, the court said the government must provide detainees counsel, who have the necessary security clearances, with access to the classified material.²⁵⁶ Additionally, the CSRT guidelines did not provide the detainees with the level of assistance necessary to adequately comply with due process requirements.²⁵⁷ Although the detainees were provided a Personal Representative who may examine the classified material, that individual is not an attorney or an advocate, so he cannot be considered effective assistance of counsel.²⁵⁸ Overall, the court concluded that the "CSRT's extensive reliance on classified information in its resolution of 'enemy combatant' status, the detainee's inability to review that information, and the prohibition of assistance by counsel...deprive the detainees of sufficient

249. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 468 (D.D.C. 2005).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 468 (D.D.C. 2005).

255. *Id.*

256. *Id.* at 471.

257. *Id.*

258. *Id.* at 472.

notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration.”²⁵⁹

The court also found that in order to satisfy the requirements of due process, allegations of torture and coercion must be investigated completely to ensure the “accuracy and reliability” of the information.²⁶⁰ Likewise, the court determined that some detainees may have a valid claim that the definition of ‘enemy combatant’ is overly broad and vague, since the government did not provide a definition of the term until July 7, 2004,²⁶¹ even though it began detaining individuals as ‘enemy combatants’ in 2001.²⁶² Due to those deficiencies, the court found that the government failed to satisfy the detainees’ Fifth Amendment due process rights and the respondents’ motion to dismiss was again denied.²⁶³

Lastly, the district court addressed claims by the detainees that the Third Geneva Convention was applicable, and the United States was violating the terms and conditions of that agreement.²⁶⁴ The respondents, on the other hand, argued that the detainees’ claims must be dismissed because Congress has passed separate laws providing a cause of action for violations of the Conventions and because the Conventions are not self-executing and do not themselves create actionable claims.²⁶⁵ Alternatively, the respondents argued that, if the Conventions were self-executing, they were inapplicable to al Qaeda members.²⁶⁶

The court stated that the Geneva Conventions did not in themselves provide a separate cause of action for violations; however, based on prior decisions in the District of Columbia, the court was persuaded that the Conventions were self-executing.²⁶⁷ As such, the court concluded that the Third Geneva Convention was applicable to the Taliban detainees, but al Qaeda detainees could not benefit from the Convention’s provisions.²⁶⁸ According to the court, al Qaeda was not a “High Contracting Party” to the Geneva Conventions, so the al Qaeda detainees at Guantanamo could not

259. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472 (D.D.C. 2005).

260. *Id.* at 473.

261. *Id.* at 450 (‘Enemy combatant’ status was officially defined in Deputy Secretary of Defense Wolfowitz’ July 7, 2004, Order as “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.”)

262. *Id.* at 474.

263. *Id.* at 477-78.

264. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478 (D.D.C. 2005).

265. *Id.*

266. *Id.*

267. *Id.* (relying on *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004)).

268. *Id.* at 479.

invoke its protections.²⁶⁹ However, since Afghanistan was a contracting party to the Geneva Conventions, Taliban detainees were entitled to the Convention's protections.²⁷⁰ The court additionally discredited the respondents' argument that the Taliban detainees may not invoke prisoner of war status because the President declared otherwise.²⁷¹ The court essentially balked at the proposition that the President could suspend the provisions of the Convention in such a manner.²⁷² In conclusion, the court denied the respondents' motion to dismiss with regard to the Taliban detainees, but granted it with respect to the al Qaeda detainees.²⁷³ With regard to the remaining claims put forth by the detainees, the court granted the respondents' motion to dismiss.²⁷⁴

IX. CONCLUSION: ANALYSIS OF DISTRICT COURT DECISIONS AND FUTURE PERSPECTIVES

Khalid and *In re Guantanamo Detainee Cases*, two District of Columbia district court decisions, starkly contrast and contradict each other. In *Khalid*, the court granted the United States' motion to dismiss all of the detainees' claims for failing to identify a viable legal basis for their claims. Whereas in *In re Guantanamo Detainee Cases*, the court held that the Guantanamo detainees possess Fifth Amendment constitutional rights of due process, which the United States failed to satisfy, and that the Taliban detainees have rights pursuant to the Geneva Conventions. Due to the potential impact of these decisions and the fact that they originate from the same circuit, the future state of the law is undetermined. Based on the Supreme Court's decision in *Rasul*, this author suggests the result will parallel the decision of *In re Guantanamo Detainee Cases*.

Although the dissent in *Rasul* identified valid holes in the majority's opinion, the majority is the majority, and consequently, the rule of law. Since the *In re Guantanamo Detainee Cases* opinion relies so heavily on the *Rasul* decision, it will most likely prevail on appellate review. As stated previously, the court in *In re Guantanamo Detainee Cases* specifically referenced key statements from *Rasul* and based its finding of constitutional protections for the detainees on the majority's statement that "Petitioners' allegations...unquestionably describe 'custody in violation of the Constitutions or laws or treaties of the United States.'"²⁷⁵ As such, future

269. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 479 (D.D.C. 2005).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 480.

274. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005).

275. *Id.* at 463.

reviews of this issue will likely reach a similar conclusion and find that the detainees, although they are non-resident aliens detained outside the geographic borders of the United States, are entitled to constitutional protections.

Additionally, the court in *In re Guantanamo Detainee Cases* again relied on Supreme Court precedent when it identified the type of procedures necessary to satisfy Fifth Amendment due process requirements. This will assuredly weigh in favor of success during future reviews. Although the Supreme Court decision upon which the district court relied involved an American citizen, the remaining facts were strikingly similar. Since the district court followed the guidelines established for due process requirements with respect to an American citizen, those guidelines surely satisfy any due process requirements for the alien detainees.

Finally, the district court in *In re Guantanamo Detainee Cases* found that the Geneva Conventions were applicable to the Taliban detainees but not to the al Qaeda detainees. Once again, this will likely become the controlling rule of law. Since Afghanistan was a contracting state to the Geneva Conventions, and the Taliban was the ruling power in Afghanistan at the beginning of the conflict, the Taliban detainees are entitled to prisoner of war status and other Convention protections. Likewise, since al Qaeda was not a contracting party to the Conventions, its detainees would not be entitled to the agreement's protections.

Overall, it appears as though the *In re Guantanamo Detainee Cases* decision will fair best in future decisions, since it was based on legal findings articulated in *Rasul*; however, it is unfortunate that the Supreme Court had to make such a drastic turnaround in *Rasul* and throw United States courts into the middle of the War on Terror. It is obvious that the President and the American military held the prisoners at Guantanamo Bay because they believed the U.S. federal courts would be beyond the detainees' reach. This theory was highlighted by the dissent in *Rasul*, when it emphasized that the majority's opinion departed from sound legal precedent. In numerous prior cases, the Supreme Court had held that non-resident aliens were not entitled to American constitutional protections simply because they were beyond the geographic borders of the United States.

Although it is possible, it is extremely unlikely that the Supreme Court will find the detainees do not have any substantive rights to form the basis of their habeas corpus petitions, when they recently ruled that federal courts have jurisdiction to hear the petitions. As stated by the court in *In re Guantanamo Detainee Cases*, it is unlikely that the Court would allow the federal courts to grant the petitions, but later rule there was no claim the detainees could bring. In any event, the Court's decision in *Rasul* placed the military and armed forces in an unexpected and untenable position, and

the United States government must continue to address an indeterminate number of issues related to detaining prisoners at Guantanamo Bay. Since the *Rasul* decision was the primary basis for the district court's ruling in *In re Guantanamo Detainee Cases*, and due to its thorough legal analysis, it will likely become the controlling authority upon appellate review.

The remaining questions become, how far will the expansion of American constitutional rights to non-resident aliens extend and what rights will be included? At the present time, American rights are extended to prisoners held in an area under the "complete jurisdiction and control" of the United States. Next time, will the rights be extended to prisoners held by American forces on the foreign soil of a country where the United States is not a party to a long-term lease agreement with that sovereignty? Or will American rights be available to prisoners detained by foreign individuals at the direction or request of American forces?

Furthermore, how many American constitutional protections are non-resident aliens entitled to? Is it just the Fifth Amendment right to due process, or will it also include the First Amendment right to free speech, the Fourth Amendment right to be free from unreasonable searches and seizures, the Sixth Amendment right to a speedy trial and assistance of counsel, or the Seventh Amendment right to a trial by jury? If the rights are not completely available and only granted with limitations, where will the line be drawn? The prior state of Supreme Court precedent made these questions more clear-cut because United States constitutional protections were not available to non-resident aliens. The Supreme Court has placed this country and our military in a position where we are faced with myriad possibilities that are inevitably destined for litigation in United States federal courts.