# DUE PROCESS AND WAR: A CRITIQUE OF *RASUL V. BUSH* AND RELATED ACADEMIC COMMENTARY

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## I. Introduction: The Present Conflict and the Courts

After the fourth anniversary of September 11, American forces remain in Afghanistan and Iraq. The conflicts there and in the larger War on Terror have produced a growing number of prisoners, confined, in part, at Guantanamo Bay, Cuba. There is great concern, nationally and internationally, about the conditions and legal rights of the detainees. The concern was, of course, exacerbated by the scandal at Abu Ghraib prison. Recently, there have been calls by some American politicians for the closing of the Guantanamo facility.

The issue of detention in connection with the War on Terror found its way to the nation's high court. On June 28, 2004, the Supreme Court rendered three decisions bearing on this matter. One of them, *Rumsfeld v. Padilla*,[1] was a habeas petition that the Court dismissed on procedural grounds. Padilla, an American citizen alleged to be an al-Qaeda operative, brought his petition in the Southern District of New York after he had been transferred (as an "enemy combatant") to a Navy brig in Charleston. The Court ruled that he had filed in the wrong federal district. A second opinion, *Hamdi v. Rumsfeld*,[2] also involved an American classified as an "enemy combatant." The decision said that American citizens detained as enemy combatants are entitled to notice of the reasons for detention and a hearing, though not necessarily to an ordinary judicial proceeding with the government bearing the burden of proof. The third decision handed down on that date was *Rasul v. Bush*.[3]

The *Rasul* opinion appears to be the most significant and far-reaching of the trilogy. It is the one dealing with alien detainees. *Rasul* upholds the right of alien detainees at Guantanamo Bay to bring habeas petitions in federal court challenging the basis of their confinement. The decision is more predicated upon the habeas corpus statute[4] than the Constitution. Some language in the opinion seems to suggest that so long as the custodian holding a prisoner (the custodian here being the U.S. government) is within the jurisdiction of a district court, the prisoner may sue for his freedom. If this is what the Court means, then anyone, alien or citizen, held by American forces anywhere in the world may avail himself of the federal bench. The matter is rendered ambiguous by the majority's determined argument that the lease with Cuba makes Guantanamo Bay and its inmates subject to American jurisdiction. In either case, the *Rasul* decision has the potential to affect the prosecution of the War on Terror, including the conflicts in Iraq and Afghanistan.[5] Since Abu Ghraib, there has been a drumbeat of criticism directed at the military's treatment of detainees. The pressure to abandon not only torture but all coercive techniques of interrogation has been great.[6] The decisions of the Court on detention were cited by Senator Lindsey Graham as necessitating a legislated code of prisoner rights and procedures, before such matters were further determined by judicial decree.[7] This, of course, gave way to the recent resolution against torture and all inhumane methods of interrogation, passed in Congress with the leadership of Senator John McCain.

One issue presented by the *Rasul* and other detention cases is the extent to which judicially imposed due process is consistent with the Executive's prosecution of a war. More precisely, the question is what is the role of due process in so irregular a war as the one now being waged, a conflict against a clandestine terrorist enemy who maintains no fixed military formations that can be observed by ordinary reconnaissance? Certainly, *Rasul* has been praised as a blow for civil liberties by those opposed to the Iraq War itself, except that they doubt whether it went far enough.[8] But is it possible to conduct any military conflict, while allowing the courts to control the detention of battlefield prisoners.

## II. *Rasul*: the Majority Opinion

The majority opinion in *Rasul* contains several distinct lines of reasoning. Justice Stevens must first distinguish the 1950 case of *Eisentrager v. Johnson*,[9] upon which the government relies. *Eisentrager* dealt with the petitions of German prisoners held at Landsberg Prison after World War II. They had been convicted of continuing belligerent activities in China despite the German surrender. The *Eisentrager* Court rendered its decision easy to distinguish by listing a number of specific factors that mandated its decision, without making clear whether each of these factors was crucial to the result. The factors mentioned in *Eisentrager* were the petitioners' identities as enemy aliens who had never resided in the United States, the fact that they were captured outside American territory and held in military custody as prisoners of war, that they had been tried and convicted by a military commission outside of the United States for offenses under the laws of war, also committed outside of the United States, and that they had been at all relevant times imprisoned abroad.[10]

The Court in *Rasul* notes:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They 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; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[11]

Justice Stevens also observes that the *Eisentrager* decision was based primarily upon the constitutional issue of habeas relief for military prisoners. The *Rasul* decision, by contrast, seems to be based more upon the interpretation of the statute. This, of course, makes the result in *Rasul* subject to congressional amendment. It is an interpretation of the applicable U.S. Code section rather than of the Article I Suspension or Fifth Amendment Due Process Clauses.

The distinctions between the facts of *Eisentrager* and *Rasul* are perhaps even more extensive than the majority suggests. The present War on Terror is being waged against a non-governmental network of illegal combatants, hailing from a number of countries. Of these countries, only Taliban Afghanistan and Saddam Hussein's Iraq (both defunct) were wartime antagonists. Furthermore, at the time of *Eisentrager*, the war was over. The petitioners were not incarcerated as part of the war effort, but had been prosecuted and convicted as war criminals. *Rasul* was decided with the conflict still raging and the petitioners being held as enemy combatants (though not as lawful prisoners of war). No nation is likely to subject to indictment and trial every prisoner it takes on the battlefield. The obligations that nations have with regard to the treatment of prisoners are, of course, a different matter.

The Court predicates its decision upon a review of the statutory history of habeas corpus in the United States and its role in the common law, going back to Magna Carta. Lest anyone suppose that the Court is simply applying a peacetime procedural device indiscriminately to a wartime situation, it recalls the writ's use in *Ex Parte Milligan*,[12] *Ex Parte Quirin*,[13] and *In Re Yamashita.*[14] *Milligan*, of course, was the case of a southern sympathizer sentenced to death for seditious activities on behalf of the Confederacy during the Civil War. It was again a decision rendered after the conclusion of hostilities. *Quirin* was indeed decided during the Second World War, but involved spies, sentenced to death and awaiting execution, not battlefield combatants held for the war's duration. *Yamashita*, finally, was another war crimes trial held after the enemy's surrender.[15]

The *Rasul* opinion also asserts that *Eisentrager* was based upon an earlier decision requiring the petitioner's presence in the federal judicial district where he sued. According to Justice Stevens, this earlier decision, *Ahrens v. Clark*,[16] and *Eisentrager* were effectively overruled by a later case: *Braden v. 30th Judicial Circuit District of KY.*[17] *Ahrens* involved a habeas petition by a number of Germans being detained at Ellis Island, New York for deportation. The Court there interpreted the habeas statute to require that the petition be brought in the judicial district of the petitioner's confinement.[18] It accordingly dismissed the petition brought in the District of Columbia by petitioners detained in the state of New York. The *Eisentrager* Court relied upon *Ahrens*. The *Rasul* majority concludes that the decision in *Ahrens*, and therefore that in *Eisentrager*, was overturned in *Braden*. *Braden* did not concern foreign nationals held outside of the United States, but an American being prosecuted by Kentucky who found himself locked up in Alabama. The Court held that since it was really Kentucky's detainer that was holding him, and Alabama was acting as Kentucky's agent, he could bring his petition in Kentucky. Justice Stevens, nonetheless, cites the language from the *Braden* opinion, stating that "the prisoner's presence within the territorial jurisdictions of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute."[19] The new doctrine which the *Rasul* Court finds to have been handed down in *Braden* is that any district has habeas jurisdiction in favor of any petitioner provided that "'the custodian can be reached by service of process.'"[20] The *Rasul* majority summarizes its holding as follows:

> In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. . .Section 2241, by its terms, requires no more.[21]

Although the aspects of the *Rasul* holding discussed thus far would seem to render the territorial status of Guantanamo Bay irrelevant, the Court in the final portion of its majority opinion takes the trouble to argue that Guantanamo is for all practical purposes part of the United States. The Court addresses the issue of "extraterritoriality," observing:

> 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 in "the territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay naval base, and may continue to exercise such control permanently if it so chooses. . . . Respondents themselves concede that the habeas statute would create federal court jurisdiction over the claims of an American citizen held at the base. . . . Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal court's authority under Section 2241.[22]

The Court is certainly correct that aliens on U.S. soil are entitled to the benefit of the habeas statute and the rest of due process.[23] Even an illegal alien, confined in the United States upon conviction of murder and robbery, can obtain review of his conviction and sentence. But does *Rasul* say that aliens held by the United States on foreign territory may bring habeas petitions in U.S District Court or not?

There is a growing body of academic literature suggesting that "territoriality" should not be a limit on legal jurisdiction.[24] As expressed by one author, "If we do cherish constitutional freedoms, if we do think that constitutional rights are in some normative sense *right*, it is surprising that the accident of geography should control the ability to invoke them." For, "[w]hy should governmental action repugnant to our deepest values become anodyne merely because it occurs outside our borders?"[25] It is further argued that the activities of nations outside of their borders should not occur in a legal "black hole." Human rights standards, in other words, should apply to anything a nation does overseas, no matter to whom it does it.[26] But surely a distinction needs to be made between human rights standards imposed by international conventions and treaties, and the strictures of American statutory law.[27] No one doubted that the Geneva Convention applied to Axis prisoners captured in World War II (despite the utter indifference to its provisions on the part of the Japanese), but that didn't mean that they could bring habeas petitions in American courts. American law, in general, only extends over America, or over Americans. No one denies that American citizens abroad retain their constitutional rights against the United States—that much was conceded by the Government in *Rasul* and by Justice Scalia in dissent. But extending the protection of the U.S. Constitution to alien enemy combatants would appear to be something else. That is where *Rasul* takes us.

The *Rasul* majority completely rejects the idea that the status of habeas petitioners as aliens in military custody should pose any barrier to their seeking relief in American courts. They observe, "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."[28] The Court cites in support of this proposition a case dealing with the right of alien citizens in time of peace to bring law suits in American courts,[29] as well as the U.S. Code section allowing actions for torts "committed in violation of the law of nations or a Treaty of the United States."[30] Justice Stevens concludes by stating, "the fact that the petitioners in these cases are being held in military custody is immaterial to the question of the district court's jurisdiction of their nonhabeas statutory claims."[31] The implication seems to be that their status is not material to their habeas statutory claims. If this is truly the holding in *Rasul*, then any prisoner held by American soldiers in a makeshift stockade anywhere abroad may, subject to the mechanical details of obtaining counsel and serving a writ, sue for his freedom in an American federal court.

**III. Justice Kennedy's Concurrence**

Justice Kennedy agrees with the dissent and disagrees with the majority about *Braden* having overruled *Eisentrager* and *Ahrens*. He believes that *Eisentrager* indeed governs this case and has not been modified by subsequent decisions. He distinguishes *Eisentrager* from *Rasul* in much the same way as does the majority, however. Guantanamo Bay, unlike Landsberg Prison, is American territory. Furthermore, the petitioners in *Eisentrager* had been tried, convicted, and sentenced to a fixed term of years, while the *Rasul* petitioners were being held "indefinitely." Kennedy attaches particular importance to the circumstance of detention without trial:

> Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and a much greater alignment with the traditional function of habeas corpus. Perhaps where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.[32]

Justice Kennedy seems to regard the length of time of confinement as critical, no matter what the progress of the conflict in which the prisoners were taken. Doesn't "the case for continued detention to meet military exigencies" depend to some extent on how things are going on the battlefield? The possibility that prisoners captured in war will return to being enemy combatants and will have to be captured again or killed generally means that they are held throughout the duration of the conflict. Certainly, there was no limitation upon the time for which American prisoners of war were held in North Vietnam. Justice Kennedy almost seems to have in mind the example of 1941-45. Under this historical model you go through a brief initial period of danger, win some crucial victories, see the tide turn, and emerge triumphant in less than four years. But the outcome of the Second World War was not a foregone conclusion in 1941, and there was no thought of releasing German, Japanese, and Italian prisoners of war until peace was concluded. Thousands of them were, in fact, held in prisoner of war camps within the continental United States, without the slightest possibility of suing for their release. To repeat, they were not like the petitioners in *Eisentrager*, who were tried as criminals after the War. The detainees at Guantanamo Bay, whether they are viewed as prisoners of war, subject to the protections of the Geneva Convention, or as illegal combatants, not subject to those protections, were captured as participants in the battlefield conflict. That conflict is still very much active and the significance of affording them judicial means to achieve release is obviously far greater than it would be if the conflict were over. This is, in large measure, the substance of Justice Scalia's dissent.

**IV. The Dissent**

Justice Scalia notes that the Constitution does not confer jurisdiction in this case and that the supposed basis for the majority ruling is the habeas statute itself. Scalia cites the applicable language from it,[33] pointing out that it seems to require the petitioner's detention within the territorial jurisdiction of some district court. Scalia notes:

> No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that some federal court have territorial jurisdiction over the detainee. Here, as the Court allows. . .the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of this case.[34]

Scalia traces the jurisprudence on this matter from *Ahrens* to *Eisentrager* to *Braden*. In short, Scalia points out that *Ahrens* involved detainees held within one jurisdiction (Ellis Island, New York), who decided to bring their petition in another jurisdiction (the District of Columbia). They were unsuccessful, but the *Ahrens* Court reserved the question of what rights a petitioner would have who was not confined within the jurisdiction of any federal court. Then came *Eisentrager*, which Scalia contends settled that question once and for all. The Court of Appeals in *Eisentrager* held that the habeas statute should be interpreted as conferring a right upon the absent petitioners, in order to preserve the statute's constitutionality. The Supreme Court, reversing the Court of Appeals, ruled on the federal statute as much as on the Constitution, Scalia argues:

> A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment that rested upon a statutorily conferred right. An absence of a right to a writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "nothing in the text of the Constitution extends such a right, nor does anything in our statutes." 339 U.S. at 768 (emphasis added). "[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 . . . .(original emphasis).[35]

Scalia rejects the argument that *Braden* overruled *Ahrens* and thereby *Eisentrager*. His essential point is that *Braden* involved a petitioner confined within the jurisdiction of a federal district court within the United States. The petitioner in *Braden* was being prosecuted in Kentucky and had been captured in Alabama. The Court held that the custodial state, Alabama, was effectively acting as an agent for Kentucky and that the habeas petition could be brought properly in Kentucky, the state with which Braden really had his dispute. This, Scalia argues, hardly justifies allowing petitioners confined within the jurisdiction of no federal district court, petitioners who never were in such a jurisdiction, simply to choose at will any federal district in the United States and bring a habeas petition challenging their confinement. The *Braden* decision, which (Scalia maintains) overruled neither *Ahrens* nor *Eisentrager*, is predicated upon the inconvenience of transporting all of the court records and witnesses from the state in which the petitioner is being prosecuted to the state in which he is actually confined. The most that *Braden* and the litigants in *Rasul* acknowledge is the right to habeas relief extending to United States citizens abroad. This, Scalia says, is not justified by the habeas statute but is perhaps justified as a matter of constitutional right.[36]

The majority holding, according to Scalia, represents the most inconvenient and indeed reckless impairment of the war effort. Scalia observes that "in abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth." He bases this upon the majority's assertion, made more than once, that the critical factor in determining the availability of habeas relief is the presence of the *custodian* within a federal district court's jurisdiction. Since the custodian in the case of any military detention is the government of the United States of America, habeas relief presumably would be available to any military prisoner held by American forces anywhere in the world. Scalia contrasts the attitude of "today's carefree Court" with the "dire warning of a more circumspect Court in *Eisentrager*." He quotes a salient paragraph from the *Eisentrager* opinion in which the Court notes the grave threat to the Executive's prosecution of a war that the availability of habeas relief to military prisoners would pose.[37]

Scalia's reply to the majority's point that Guantanamo Bay is part of the United States is, first of all, to observe that the issue is irrelevant. That is, it is irrelevant assuming the majority means what it says when it finds the presence of the petitioners' custodian within the jurisdiction of a federal court to be the controlling factor. Scalia, in any case, argues that the Court's view of Guantanamo Bay makes no sense. To say that Guantanamo Bay is part of the United States for all legal purposes would be to say that the inmates could sue their captors for damages caused by illegal search and seizure pursuant to the celebrated Supreme Court decision conferring such a right.[38] Scalia also points out that the lease agreement with Cuba preserved that country's "ultimate sovereignty" over Guantanamo. Consequently, the United States retains "complete jurisdiction and control," but not sovereignty, and therefore Guantanamo is no different in jurisdictional status from areas of Iraq and Afghanistan occupied by American forces or than Landsburg Prison in Germany.[39] Scalia then goes through the other authorities cited by the majority, many of them predicated upon English decisions, to show that, in reality, they involved the application of the writ in areas over which the monarch was

deemed to be sovereign and in which the petitioners were subjects (*i.e.*, citizens).[40] Where the Court lacks territorial jurisdiction over the detained petitioners, citizenship, Scalia contends, is the indispensable substitute.

**V. The Progeny of *Rasul* thus Far**

*Rasul* has had an immediate and dramatic impact on the course of litigation by detainees.[41] There have been, first of all, a number of cases in which Guantanamo detainees seek to enjoin the government from moving them out of Guantanamo to other countries.[42] It seems that *Rasul* encouraged, though it certainly did not begin, the government's removal of prisoners to other countries (the practice known as "rendition"). There was also the decision of one D.C. District Court Judge holding not only that the Guantanamo detainees were entitled to due process but that the existing Combatant Status Review Tribunal, specifically set up to address judicial concerns about detention procedures, violates their rights.[43]

*Rasul*, together with the uproar over the treatment of prisoners at Abu Ghraib in Iraq, predictably will affect the scope of interrogation methods used in such detention facilities as Guantanamo Bay. To the extent that prisoners have access to U.S. district courts in order to challenge the very basis of their confinement, they presumably will also be able to challenge the methods of interrogation used against them. What impact this will have upon the prosecution of the War on Terror, in which intelligence obviously is at a premium, one can only imagine.

**VI. Due Process and War**

Political philosophy distinguishes the state of war from that of civil society, in which law applies. It wrestles with the question of how law can apply in a time of war when contending parties (sovereignties) are not governed by any common authority.[44]

> One commentator observes:
>
> In the Western tradition, the State has a duty to protect individual rights by virtue of a contract that the members of its community have entered . . . . One traditional basis on which the community has been understood is in terms of nationality. Contractual theories, by definition, do not address requirements of justice arising in the context of the interaction between the community (and its officials) and individuals who do not belong to it. When "belonging" is defined according to nationality, foreigners are left outside the frame. Thus Locke excludes foreigners from the social contract and the protection of citizenship rights: "foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration, as far forth as any denison; yet do not thereby come to be subjects or members of that common-wealth."[45]

This analysis, of course, portrays Lockean social contract theory as an exercise in xenophobia and chauvinism. In fact, Locke says merely that the alien, not having entered into the social contract, is not bound by its terms (the nation's laws) and may be punished or destroyed only by the Law of Nature which gives everyone the right to preserve himself against attackers.[46] The civil law, in this light, does not apply to wartime antagonists, but the right of self-preservation against attackers does.

The *Rasul* issue is, as stated above, also one of citizenship—its meaning and significance. The majority, in effect, says that in the context of military detention and habeas corpus, the alien detainee has as much right as the citizen. But Scalia argues that such authorities as Blackstone make citizenship (or the status of royal subject) a prerequisite to such relief. And Blackstone does maintain that alien enemies have no rights in time of war:

> When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges unless by the King's special favor, during the time of war.[47]

The Ciceronian maxim, "inter arma silent leges" (in time of war the laws are silent)[48] reflects the foregoing. That phrase, obviously, is nothing that an American court can or should adopt (although it is adduced by Churchill in justifying an Anglo-Soviet operation to eliminate a pro-fascist regime in Iran in 1941).[49] It does form the beginning of Kant's analysis of war, though he goes on to lay down standards for its civilized prosecution. It is indeed stipulated that in a just war, all that is necessary to prevail is allowed.[50]

The international norms of war, devised in the modern world undoubtedly in part as a result of Kant's influence, are intended to avoid recourse to Cicero's principle. Nations agree to limit their belligerent acts and to act humanely towards prisoners. They may even adhere to those agreements without reciprocity—clearly no antagonist of the United States in the present conflict will ever comply with the rules of war.[51] But that is altogether different from supposing that the standards and methodology of jurisprudence are the same as those of war. In simplest terms, criminal justice is backward looking—it seeks to determine what happened, and accordingly to condemn or to vindicate. War-making, including the taking of prisoners is of necessity forward looking—it seeks to bring about a result: victory.[52] Adjudicating the individual cases of battlefield prisoners is obstructive of that result, if prisoners are to be taken at all.

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**Footnotes**

[1] 542 U.S. 426 (2004).

[2] 542 U.S. 507 (2004).

[3] 542 U.S. 466 (2004). Since the published U.S. Reports have not reached this volume, page citations will be given from the Supreme Court Reporter.

[4] 28 U.S.C. 2241. It reads, in part,

> 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 a district court of a district wherein the restraint complained of is had.

[5] As argued in Christopher M. Schumann, *Bring it On: the Supreme Court Opens the Floodgates with* Rasul v. Bush, 55 A. F. L. Rev. 349 (2004). *See also* Thomas M. Franck, *Editorial Comment: Criminals, Combatants, or What?*, 98 Am. J. Int'l. L. 686 (2004), in which the author supports the decision, but acknowledges the problem of applying law to terrorism.

Opponents of the Iraq War in the United States and Europe, of course, dispute that it is any part of the War on Terror. Perhaps they would concede, at least, that the enemy there includes terrorists.

[6] *See e.g.*, Torture, A Collection, 111, 145, 270 (Sanford Levenson, ed., Oxford University Press, 2004). *See also*, Diane Marie Amann, *Symposium: Current debates in the Conflict of Laws: Application of the Constitution to Guantanamo Bay: Abu Ghraib*, 153 U. Pa L. Rev. 2085 (2005), in which the questions of habeas review and torture are linked; *Torture and Liberal Democracy*, by the present author in 30 Rev. Jour. Phil.& Soc. Science 79 (2005).

[7] In his press release of July 25, 2005, Senator Graham announced his intention to offer an amendment to the Defense Authorization Bill "strengthening the legal hand of the Bush Administration and future administrations to hold enemy combatants at Guantanamo Bay, Cuba (Gitmo)." Graham's amendment would have enacted as a statute the military's Combatant Status Review Tribunal (CSRT) and Annual Review Board (ARB). These tribunals, established by the President, respectively determine whether a prisoner is an unlawful enemy combatant and review that determination, as well as the detainee's intelligence value and the danger he presents. The amendment also would have afforded each detainee a military attorney to represent him before the ARB, instead of the present military representative. The Senator said that this legislation was necessary to forestall the removal of the President's authority over Guantanamo by the courts. He did not mention *Rasul* specifically in the press release, although he has verbally during hearings. Why, precisely, Senator Graham was confident that the courts would not find his legislation unconstitutional is unclear. Of course, one other form of legislation that might strengthen the President's hand would be a bill restricting the courts' jurisdiction to review the detention of aliens held prisoner by the U.S. military, pursuant to Article III, sec. 2.

[8] *E.g.*, Ronald Dworkin, *What the Court Really Said*, New York Review of Books, 51:13:Aug. 12, 2004. *See also* David A. Martin, *Immigration Law and Human Rights*, 25 B.C. Third World L.J. 125, 135-36 (2005). Martin considers the *Rasul, Hamdi, Padilla* trilogy "an important blow for civil liberties and human rights," but worries about the matters left unresolved in *Rasul*. He notes that *Rasul* does not specify the "substantive standards" that courts must use "when they review overseas military detentions."

[9] 339 U.S. 763 (1950).

[10] 124 S.Ct. at 2693, citing 339 U.S. at 777.

[11] 124 S.Ct. at 2686.

[12] 4 Wall 2 (1866).

[13] 317 U.S. 1 (1942).

[14] 327 U.S. 1 (1946).

[15] In support of due process for Guantanamo detainees, Senator McCain recently observed that even Adolph Eichmann got a trial. Eichmann also was hardly a wartime prisoner when he was tried.

[16] 335 U.S. 188 (1948).

[17] 410 U.S. 484 (1973).

[18] *See* n. 4, *supra*.

[19] 124 S.Ct. at 2695, citing 410 U.S. at 494-95.

[20] *Id.*

[21] 124 S.Ct. at 2698.

[22] *Id*. at 2696. Kal Raustiala, in *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2538-42, analyzes the Court's interpretation of the U.S.-Cuba lease and suggests that the "ultimate sovereignty," retained by Cuba under the lease, merely refers to Cuba's reversionary interest in the land, to be enjoyed if the United States ever leaves. Raustiala concludes that since the detainees have no legal recourse under Cuban law, they must be governed by American law, just like the inhabitants of Puerto Rico.

[23] *See, e.g.*, Johnson v. Ascroft, 378 F.3rd 164 (2nd Cir. 2004); Kelly v. Farquharson, 256 F.Supp.2d 93 (D.Mass. 2003).

[24] Raustiala, *supra*; Ralph Wilde, *Legal 'Black Hole'? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 Mich. J. Int'l L. 739 (2005); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology after* Rasul v. Bush, 153 U. Pa L. Rev. 2073 (2005); Kermit Roosevelt, *Application of the Constitution to Guantanamo Bay*, 153 U. Pa L. Rev. 2017 (2005).

[25] Roosevelt, *supra*, at 2029-30.

[26] Wilde, *supra, passim*.

[27] A distinction discussed in Note: *A "Full and Fair Trial,"* 15 Duke J. Comp. & Int'l L. 387 (2005).

[28] 124 S.Ct. at 2698.

[29] Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908).

[30] 28 U.S.C. 1350.

[31] 124 S.Ct. at 2699.

[32] *Id*. at 2700.

[33] *See* note 4, *supra*.

[34] 124 S.Ct. at 2701.

[35] 124 S.Ct. at 2703.

[36] In dueling notes, Justice Stevens cites then-Justice Rehnquist's dissent and other authorities to show that *Braden* did overrule *Ahrens* (124 S.Ct. at 2686, n. 4) and Justice Scalia replies that it did not, in any case, overrule it with regard to the point relevant to *Eisentrager* (124 S.Ct. at 2686, n. 4). In the exchange, Scalia seems forced to backtrack from the confident statement that *Braden* merely distinguished *Ahrens*. He, however, reiterates that *Braden* was the case of an American petitioner held in one state and charged in another. It hardly applies to an alien detainee held outside any federal court's jurisdiction. The *Braden* exception to the statute, in other words, is not applicable to *Eisentrager* or *Rasul*.

[37] "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend the legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States." 124 S.Ct. at 2707, quoting 339 U.S. at 778-79.

[38] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[39] This is the point with which Raustiala takes issue (n. 22, *supra)*.

[40] Justices Scalia and Stevens lock horns over the significance of various English authorities, applying the writ outside the kingdom. Stevens emphasizes Lord Mansfield's opinion in *King v. Cowls*, 2 Burr. 834, 854-55, 97 Eng. Rep. 587, 598-99 (KB), in which the Lord Justice extends the writ to "'territories under the subjection of the Crown.'" 124 S.Ct. at 2697. Scalia rejoins that in this and all the English authorities offered by the majority, the petitioners were confined in "sovereign territory of the Crown; colonies, acquisitions and conquest, and so on," not on "installations merely leased for a particular use from another nation that still retained ultimate sovereignty." 124 S.Ct. at 2709. The second issue that Stevens and Scalia argue, involving especially *Ex Parte Mwenya*, 1 QB 241 (C.A. 1960) and *In Re* Ning Yi-Ching, 56 T.L.R. 3 (Vacation Ct. 1939), is the relevance of the petitioners' alien status. None of these decisions, Scalia points out, extend the writ to aliens on foreign soil. Scalia cites Blackstone (III, 31, 78-79 and I, 93-106), in particular, to demonstrate that all areas to which the writ was extended were "'dominions of the crown of Britain'" if not "'part of the Kingdom of England'" and that the persons affected were always subjects.

[41] *See*, Bradford A. Berenson, *The Uncertain Legacy of* Rasul v. Bush, 12 Tulsa J. Comp. & Int'l Law, 39 (2004), in which the potential battlefield costs of *Rasul* are examined; Note, n. 27, *supra*, at 398-99.

[42] *E.g.* Al-Anazi v. Bush, 370 F.Supp.2d 188 (D.D.C. 2005); Almurbati v. Bush, 366 F.Supp.2d 72 (D.D.C. 2005); Khalid v Bush, 355 F.Supp. 2d 311 (D.D.C. 2005); Al-Marri v. Bush, ___F.Supp.2d____, 2005 U.S. Dist. Lexis 6259 (D.D.C. 2005); Al-Joudi v. Bush, ___F.Supp.2d____, 2005 U.S. Dist. Lexis 6265 (D.D.C. 2005); Abdah v. Bush, ___F.Supp.2d___, 2005 U.S. Dist. Lexis 4942 (D.D.C. 2005); John Doe 1-52 v. Bush, _____F.Supp.2d_____, 2005 U.S. Dist. Lexis 6417 (D.D.C. 2005); Abu Ali v. Ashcroft, 350 F.Supp.2d 28 (D.D.C. 2004).

[43] *In Re* Guantanamo Detainee Cases, 355 F.Supp.2d 443 (D.D.C. 2005).

[44] *See, e.g*., Kant, Metaphysics of Morals, 56-58 (1785); Locke, Second Treatise, Chapters III, XVI (1690).

[45] Wilde, *supra*, at 6.

[46] Second Treatise, sec. 9.

> I desire [doubters of the Law of Nature] to resolve me, by what Right any Prince or State can put to death, or punish an Alien, for any Crime he commits in their Country. . .And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can punish an Alien of another Country, since in reference to him, they can have no more power, than what every Man naturally may have over another. (original emphasis).

[47] Commentaries, I, 10, sec. 504.

[48] Marcus Tullius, Cicero Pro Milone, IV, 10 (n.d.).

[49] Winston Churchhill, The Grand Alliance 428 (Cassell, 1950).

[50] Hugo Grotius, The Rights of War and Peace, III, 1-3 (Liberty Fund 2005).

[51] The international treaties and conventions establishing rules for the treatment of prisoners are summarized by Andrew C. McCarthy in *Torture: Thinking About the Unthinkable*, Commentary, July-August 2004 at 17-24. These include the 1907 Hague Convention IV and the 1949 Geneva Conventions, the third of which concerns "Treatment of Prisoners of War." To these foundational documents was added the 1977 "Protocol I Additional," relating to the "Protection of Victims of International Armed Conflicts." The United States, while a signatory of the Hague and Geneva Conventions, declined to sign Protocol I. It did sign the 1984 "United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment," ratifying it in 1994. The Senate, however, in its act of ratification excluded capital punishment from the prohibited category of treatment and provided that the Convention would only exclude "inhumane" practices ("inhumane" but not constituting "torture") violative of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. But these amendments have been held to apply only to judicial proceedings,

and to punishment after conviction. *See* Ruth Wedgwood and R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, in Op/Ed for a somewhat broader interpretation of this treaty. The detainees at Guantanamo Bay are not "lawful" or "privileged" combatants, entitling them to protection as P.O.W.s under the Hague and Geneva Conventions. As summarized by McCarthy (pp. 19-20): "[T]hey are not part of a nation state, they are not signatories of the Geneva Conventions, they do not wear uniforms, they do not as a rule carry their weapons openly, they hide among (and thus gravely imperil) civilian population and infrastructure, and they intentionally target civilians for indiscriminate mass homicide in order to extort concessions from governments they oppose."

Although they do not enjoy the protection of P.O.W. status, and thus can be interrogated and induced to talk, they cannot be tortured. This is so both because of the U.N. Convention and in light of a U.S. statute prohibiting torture, 28 U.S.C. secs. 2340 and 2340A-B. So long as it could be argued that Guantanamo lay outside of the jurisdiction of the United States (an argument foreclosed by *Rasul*), it might be supposed that the federal statute did not apply. But the U.N. Convention, with the Senate's reservations and qualifications, applies everywhere. The official U.S. position, stated by the President, is to abjure torture, even though the adversary feels free to use it and any other violent treatment of captives.

[52] CF., ARISTOTLE, RHETORIC, I, iii, 4-6, Deliberative rhetoric, that of all public policy and legislation (including war policy) looks to the future, and discusses what is expedient or harmful. Forensic rhetoric, that of the courtroom, looks to the past and discusses the just and the unjust.