

# Executive and Judicial Overreaction in the Guantanamo Cases

*Neal K. Katyal*

## I. Introduction

The U.S. Supreme Court in *Rasul v. Bush*<sup>1</sup> and *Al-Odah v. United States*<sup>2</sup> held that detainees at Guantanamo Bay may challenge their detentions via writs of habeas corpus. Justice Stevens' majority opinion held that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."<sup>3</sup> This holding is potentially unbounded, perhaps enabling someone detained at Kandahar or even Diego Garcia to challenge his detention via the great writ. It appears to be a striking break from the 1950 *Johnson v. Eisentrager*<sup>4</sup> decision, which strongly intimated that no such lawsuits were possible. How did we go from a constitutional regime where no alien outside of the United States could challenge his detention to one in which virtually anyone may be able to do so?

One answer may be that the executive branch overplayed its hand in these cases. By asserting that it had the ability to build an offshore facility to evade judicial review, do what it wanted at that facility to detainees under the auspices of the commander-in-chief power, and keep the entire process (including its legal opinions) secret, the executive branch appears to have provoked a judicial backlash. The president is far more fettered now than he has ever been. The country, according to the administration's own argument, is now weaker than before June 28, 2004, because generalist courts will be interjecting themselves into military operations.

<sup>1</sup>Rasul v. Bush, 124 S. Ct. 2686 (2004).

<sup>2</sup>Al-Odah v. United States, 124 S. Ct. 2686 (2004).

<sup>3</sup>Rasul, 124 S. Ct. at 2699.

<sup>4</sup>339 U.S. 763 (1950).

This jurisprudential backlash is not something unknown to recent presidencies. In the most dramatic contemporary example, President Clinton's ungrounded claims of executive privilege in the Lewinsky investigation had a similar effect, spurring the creation of precedent that was hostile to the concept of executive privilege.<sup>5</sup> President Clinton's arguments about the solemnity of executive secrecy and the lofty principle at stake for all presidents boomeranged—leading future presidents to inherit a world with less executive privilege.<sup>6</sup>

The Bush administration took the sporadically undisciplined constitutional claims of President Clinton and elevated them into an entire legal strategy built on executive supremacy and relentless secrecy. In the process, the administration obscured some of the good arguments it actually had against the position taken by the detainees in the *Rasul* and *Al-Odah* cases. This essay will begin by outlining what those arguments were, and will then discuss implications of the Guantanamo decisions for the future.

## II. The Detention Cases

### A. *The Astonishing Breadth of Rasul*

*Rasul* and *Al-Odah* centered around the question of whether federal courts have jurisdiction to review challenges by "foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."<sup>7</sup> In finding that such jurisdiction exists, Justice Stevens' opinion for the Court distinguished away the leading case on the subject, *Johnson v. Eisentrager*.<sup>8</sup> In *Eisentrager*, the Court's rather confused holding suggested that federal courts lacked jurisdiction to review habeas petitions by "21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany."<sup>9</sup> *Rasul* eviscerates that holding, leading Justice

<sup>5</sup>See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998), *aff'd* in part, *rev'd* in part sub nom. *In Re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

<sup>6</sup>Neal Katyal, *The Public and Private Lives of Presidents*, 8 *Wm. & Mary Bill Rts. J.* 677 (2000) (making this argument).

<sup>7</sup>*Rasul*, 124 S. Ct. at 2690.

<sup>8</sup>339 U.S. 763 (1950).

<sup>9</sup>*Rasul*, 124 S. Ct. at 2693 (discussing *Eisentrager*).

Scalia in his dissent to lament that “[t]oday’s opinion, and today’s opinion alone, overrules *Eisentrager*; today’s opinion, and today’s opinion alone, extends the habeas statute.”<sup>10</sup>

To understand just how broad the *Rasul* holding is, it is worth reflecting back on the arguments made on behalf of the Guantanamo detainees. The detainees’ lawyers did not emphasize that *Eisentrager* was overruled by subsequent cases, or contend that it should be overruled by this Supreme Court. Instead, they justified the *Eisentrager* result<sup>11</sup>: “[I]t is apparent that the Court *sensibly* concluded in *Johnson [v. Eisentrager]* that war criminals tried, convicted, and sentenced by a lawful commission, whose procedural protections were not the subject of a complaint, were not ‘due’ any additional process in a civilian court; certainly they could not claim a fifth amendment right to be free from military trial.”<sup>12</sup> In effect, they argued that *Eisentrager* only barred habeas relief of detainees who received process in a military tribunal, and that it did not bar such relief when asserted by a detainee who has had no process at all.

The detainees’ lawyers also distinguished *Eisentrager* in a second way, arguing that the decision only applied outside of U. S. territory. The detainees told the Supreme Court that Guantanamo was different from other areas of the globe because it is U.S. soil: “As the United States Navy declares on its internet site, Guantanamo ‘for all practical purposes, is American territory.’ Although Cuba retains

<sup>10</sup>*Id.* at 2706 (Scalia, J., dissenting).

<sup>11</sup>See, e.g., Petition for Writ of Certiorari at 10, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) (“It is one thing to hold that war criminals . . . cannot seek further review in a civilian court. It is quite another to extend that holding to people who have never been charged or afforded any process.”); *id.* at 14 (“Unlike Petitioners, the prisoners seeking habeas relief in *Johnson [v. Eisentrager]* were convicted war criminals.”); Petitioners’ Brief on the Merits at 26, *Al-Odah v. United States*, 124 S. Ct. 2686 (2004) (No. 03-343) (“The Court in *Eisentrager* did not adjudicate—nor is there any reason to suppose it intended to pass upon—the rights of nonresident aliens who are nationals of countries friendly to the United States and who have never been charged, let alone convicted by a court or military tribunal.”); Petitioners’ Brief on the Merits at 40, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) (“Just as the habeas statute gave the Court the power to act in *Johnson*, the statute provides the power to act in this case; but the very factors that called for restraint in *Johnson* are notable here for their absence, and now call for the opposite result.”).

<sup>12</sup>Petition for Certiorari at 17, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) (emphasis added).

'ultimate' sovereignty, it has no current sovereignty over Guantánamo. Its laws do not apply and its courts have no jurisdiction."<sup>13</sup>

But the Supreme Court pointedly refused to accept these two distinctions. It first declined to ground its holding in the arguments of *Rasul* and *al-Odah* that they were differently situated than the petitioners in *Eisentrager* because they had received no military process. The outset of the Court's opinion genuflected to the fact that petitioners "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."<sup>14</sup> But, having made that factual observation, the Court carefully made sure that this was not the basis for its holding, finding instead that:

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. . . .

. . . .

. . . Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager's* resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal court no longer need rely on the Constitution as the source of their right to federal habeas review.<sup>15</sup>

<sup>13</sup>Petitioners' Brief on the Merits at 34, *Al-Odah v. United States*, 124 S. Ct. 2686 (2004) (No. 03-343); see also Petitioners' Brief on the Merits at 45, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) ("Cuba's laws are wholly ineffectual in Guantanamo. United States governance, now entering its second century, is potentially permanent and in no way dependent on the wishes or consent of the Cuban government.").

<sup>14</sup>*Rasul*, 124 S. Ct. at 2693.

<sup>15</sup>*Id.* at 2693, 2695 (citations omitted).

The Court went on to point out that *Braden v. 30th Judicial Circuit Court of Kentucky*<sup>16</sup> explicitly held that, as a statutory matter, habeas corpus writs can be issued even when there is no federal district court in the immediate area, as long as “the custodian can be reached by service of process.”<sup>17</sup>

Justice Stevens’ opinion for the Court also did not confine its holding by claiming that Guantanamo is U.S. soil. To the contrary, the holding of *Rasul*, as set out in the first paragraph of this essay, is not restricted by geography or specific to Guantanamo in some other way. Again, Part IV of the Court’s opinion starts the discussion by looking like it will announce such restrictions (stating that Guantanamo is an area in which “the United States exercises ‘complete jurisdiction and control’”),<sup>18</sup> but the Court then proceeds to do little with that point. (Indeed, that fact alone would not distinguish Guantanamo Bay from conquered Kandahar or other battlefield locales.) Once more, Justice Scalia is prompted to write:

Part IV of the Court’s opinion dealing with the status of Guantanamo Bay is a puzzlement. The Court might have made an effort (a vain one, as I shall discuss) to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg Prison in Germany and Guantanamo Bay Naval Base. But Part III flatly rejected such an approach . . . . Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here.<sup>19</sup>

The breadth of the majority’s opinion takes on additional meaning not only by its comparison to the relatively restrained arguments of the detainees, but also by assessing it alongside the opinion concurring in the judgment filed by Justice Kennedy. Speaking only for himself, Justice Kennedy stated that he would reach the same result as the majority by accepting the two distinctions of the petitioners, that Guantanamo is different from other areas around the globe and that the detainees, unlike those in *Eisentrager*, had no resort to military process:

<sup>16</sup>410 U.S. 484 (1973).

<sup>17</sup>*Id.* at 495.

<sup>18</sup>*Rasul*, 124 S. Ct. at 2696.

<sup>19</sup>*Id.* at 2707 (Scalia, J., dissenting).

[T]he Court's approach is not a plausible reading of *Braden* or *Johnson v. Eisentrager*. In my view, the correct course is to follow the framework of *Eisentrager*. . . . The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission . . . .

. . . .

. . . In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager*.<sup>20</sup>

But the majority opinion never confined itself in any of these ways, despite being urged to do so not only by their colleagues, but also by the detainees themselves. For the coup de grâce is this remarkable footnote from the *Rasul* majority:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring), and cases cited therein.<sup>21</sup>

Without briefing or oral argument, the Court may have cut back on an argument the executive branch has held in its back pocket for

<sup>20</sup> *Id.* at 2699, 2700, 2701 (Kennedy, J., concurring).

<sup>21</sup> *Id.* at 2698 n.15.

many years: Even if someone has the power to ask for a writ of habeas corpus, they do not have a substantive claim because the Constitution does not apply extraterritorially.<sup>22</sup> The sharp reference to Justice Kennedy's *Verdugo* concurrence underscores the point—that certain fundamental rights may apply abroad. In recent days, the government has advanced a novel theory that this *Rasul* footnote is about “treaties” or “laws,” but the problem with that interpretation is that the Court cited not an opinion about the extraterritoriality of statutes or treaties, but rather Justice Kennedy's seminal opinion on the extraterritoriality of the *Constitution*.

In sum, the Court issued an unconfined holding that extends the rights of habeas corpus far beyond even what the detainees had requested. The majority refused to cabin its holding to nonmilitary tribunal detainees or to those only at Guantanamo. And the justices may have tipped their hands about a pivotal issue, the extraterritorial application of the Constitution to the detainees. But is any of this surprising, when the administration stood before the Court asking for their blessing in turning Guantanamo Bay into a legal black hole, where no law applied and no court would review what they were doing to the detainees at any moment, even if the government decided to trump up capital offenses and summarily execute them? Against this backdrop, it is worth asking whether, had the administration pressed a more narrow claim, it would have left itself and future presidents in a far better position.

### *B. The More Plausible Argument Against the Detainees*

Instead of pushing forth its unbridled claim for executive supremacy, the administration could have made a far more plausible case by distinguishing between types of detainees. One can side with the administration's broad proposition, that the Commander-in-Chief Clause<sup>23</sup> gives it the power to detain people who are threats to the peace, but nevertheless believe that when the president takes the

<sup>22</sup>See, e.g., Brief for the Respondents in Opposition to Petition for Writ of Certiorari at 13, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) (“This Court has repeatedly cited *Eisentrager* as a seminal decision defining the application of the Constitution to *all* aliens abroad, not simply *enemy* aliens . . . . In *Zadvydas*, the Court—again pointing to *Eisentrager*—stated that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”).

<sup>23</sup>U.S. Const. art. II, § 2, cl. 1.

further step to actually try people for violations, civil process exists to review the circumstances under which those trials will take place. The case for civilian jurisdiction should be at its apogee once the president decides to cross the threshold from detention and seeks an adjudication of guilt and innocence in a calculated and deliberate fashion. Had the administration acknowledged that the case for jurisdiction for those facing tribunals stands on a different, and stronger, footing than the *Rasul* and *al-Odah* detainees, it may not have provoked the broad holding it got.

In the Declaration of Independence, our Founders penned, among their charges against King George, that “[h]e has affected to render the Military independent of and superior to the Civil Power”; “depriv[ed] us, in many Cases, of the benefits of trial by jury”; “made Judges dependent on his Will alone”; and “transport[ed] us beyond Seas to be tried for pretended Offences.”<sup>24</sup>

There was a way to maintain fidelity to these bedrock constitutional principles without forcing all detentions to be managed by the federal courts. For in the theatre of war, the president does not need congressional permission to decide how and when, within the laws of war, to take custody of enemy combatants upon their capture or surrender for the purpose of detention until the war ends and repatriation is possible. That is implicit in the commander-in-chief function itself. The moment the president ventures beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment, however, he really has moved outside the perimeter of his role as commander-in-chief. The fact that the president wears military garb cannot obscure the fact that he is now pursuing a different goal—assessing guilt and meting out retrospective justice rather than waging war.

This type of limited argument also would have explained why the Supreme Court has required civilian courts to exercise jurisdiction over military commissions. There are any number of examples, drawn from cases involving American civilians, American servicemen, and enemy belligerents. In the case of American civilians, the Court has expansive jurisdiction not only to question the legal authority and power of military tribunals, but also to hear Bill of

<sup>24</sup>The Declaration of Independence para. 11, 20, 21 (U.S. 1776).

Rights challenges.<sup>25</sup> In the case of American servicemen, moreover, the Court has long held that, on habeas, the lawful power of tribunals can be challenged.<sup>26</sup> Habeas is permissible to examine whether the tribunal: (1) is legally constituted; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged.<sup>27</sup>

In the case of enemy belligerents, *Ex parte Quirin*<sup>28</sup> held that “neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”<sup>29</sup> *Quirin* in fact declined to hold that enemy aliens lacked the ability to file habeas petitions, even though Attorney General Biddle opened his argument with that claim.<sup>30</sup> Moreover, the *Quirin* Court never held, contrary to the administration’s claims, that the basis for jurisdiction was that the saboteurs decided to directly threaten the United States by landing on its shores instead of remaining abroad. To do so would have meant *rewarding* with special rights those who had infiltrated American soil. As enemy belligerents, they were not entitled to Fifth and Sixth Amendment rights.<sup>31</sup> Rather, *Quirin* offered the saboteurs the same habeas rights that had been historically extended to American servicemen.<sup>32</sup>

Similarly, in *In re Yamashita*,<sup>33</sup> the Court permitted a convicted enemy belligerent, a Japanese army general, to file a habeas petition:

<sup>25</sup>See *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>26</sup>See *In re Grimley*, 137 U.S. 147, 150 (1890) (“It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and . . . may discharge him from the sentence.”). *Hamdi* embraces a similar standard for review. See text accompanying footnote 57 *infra*.

<sup>27</sup>*Hiatt v. Brown*, 339 U.S. 103, 111 (1950).

<sup>28</sup>317 U.S. 1 (1942).

<sup>29</sup>*Id.* at 25.

<sup>30</sup>See *id.* at 11 (reprinting argument).

<sup>31</sup>*Id.* at 45.

<sup>32</sup>See *id.* at 48 (concluding that the president’s “Order convening the Commission was a lawful order and that the Commission was lawfully constituted” and that “Charge I . . . alleged an offense which the President is authorized to order tried by military commission.”).

<sup>33</sup>327 U.S. 1 (1946) (citations omitted).

[W]e held in *Ex parte Quirin*, as we hold now, that Congress . . . has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive . . . could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.<sup>34</sup>

Today, some of those who face military commissions at Guantanamo Bay may stand in the same procedural position as General Yamashita, in that they may be labeled “enemy aliens” who contend that the “Constitution or laws” “withhold authority to proceed” with their trials. The Court’s consideration of the petitioners’ claims in *Quirin* and *Yamashita* stemmed not from any right gained by sneaking into America or from the fact that Yamashita was in territory that was subsequently regained by the United States. Rather, jurisdiction stemmed from the fundamental principle recognized in cases from *Grimley* to *Milligan* and *Yamashita* to *Quirin*: We are a nation bound by law and claim no power to punish except that permitted by law.

To be sure, there was language in the subsequent *Eisentrager* decision that appeared to cut back on these rights of habeas corpus for enemy aliens. While *Quirin* and *Yamashita* recognized that belligerents had the same right to challenge the lawfulness of a tribunal as American service members, *Eisentrager* appeared to decline to extend the Bill of Rights to extraterritorial enemy aliens. As Part III of *Eisentrager* explained, if the Fifth Amendment denied the military tribunal personal jurisdiction over the petitioners, then the Sixth Amendment would deny it to district courts, leaving the petitioners completely unpunished.<sup>35</sup>

<sup>34</sup>*Id.* at 9. See also *id.* at 30 (Murphy, J., dissenting) (“This Court fortunately has taken the first and most important step toward insuring the supremacy of law . . . . Jurisdiction properly has been asserted to inquire ‘into the cause of restraint of liberty’ of such a person. 28 U.S.C. § 452. Thus the obnoxious doctrine asserted by the government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.”).

<sup>35</sup>*Johnson v. Eisentrager*, 339 U.S. 763, 782-83 (1950).

And so the U.S. government got seduced into over-reading *Eisen-trager*. After all, *Eisen-trager* did not end at Part III. In Part IV the Court reached the merits of the military commission's legality. In so doing, it quoted *Yamashita's* key language, that "[w]e consider here only the lawful power of the commission to try the petitioner for the offense charged."<sup>36</sup> This distinction between "lawful power" and Bill-of-Rights challenges undergirds the Court's heavy focus in Part II on the fact that *Yamashita's* case was brought from American territory.<sup>37</sup> In Parts II and III, the Court concerned itself with individual rights, in particular the Fifth and Sixth Amendments.<sup>38</sup> But the Court in Part IV at no point invoked this discussion to justify rejection of the structural and jurisdictional challenges to the tribunals themselves. To the contrary, it quoted the foundational language from *Yamashita* where the Court held that it must consider such claims on habeas.

*Eisen-trager's* approach in Part IV mirrored the system of military justice at the time, where despite the uncertainty about what Fifth and Sixth Amendment rights existed, habeas review was always present to examine whether the tribunals had "lawful power," meaning whether they were properly constituted and had personal and subject-matter jurisdiction.<sup>39</sup> Ever since *Milligan's* warning,<sup>40</sup> those latter inquiries have been the foundational questions that every Court has reached. This reading of *Eisen-trager* also accords with the way the Court treated other claims by enemy aliens at the time.<sup>41</sup>

<sup>36</sup>*Id.* at 787 (quoting *In re Yamashita*, 327 U.S. 1, 8 (1950)).

<sup>37</sup>*Eisen-trager*, 339 U.S. at 780.

<sup>38</sup>See, e.g., *id.* at 782-85.

<sup>39</sup>See *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *In re Grimley*, 137 U.S. 147, 150 (1890); *Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911).

<sup>40</sup>See *Ex parte Milligan*, 71 U.S. 2, 124-25 (1866) (criticizing the view that a military commander can "punish all persons, as he thinks right and proper, without fixed or certain rules" because "if true, republican government is a failure, and there is an end of liberty regulated by law" and because the principle "destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power.") (internal quotation omitted).

<sup>41</sup>For example, in *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court exercised jurisdiction over a claim made by an alien enemy "war bride" whom the attorney general detained at Ellis Island without a hearing. Despite the fact that the detainee was born in Germany and labeled a security threat by the attorney general, and despite the fact that she had not been admitted into the United States, the Court found jurisdiction to examine, on the merits, her claim that the president lacked the constitutional power to summarily exclude her. *Id.* at 542-44.

It is by no means impossible to read *Eisentrager* to stand for more than this, but, as we pointed out in our amicus curiae (friend-of-the-court) brief,<sup>42</sup> such a reading would be in considerable tension with the Court's unbroken treatment of challenges to the jurisdiction and composition of military tribunals. A contrary interpretation of the decision, moreover, would also be in tension with *Eisentrager's* recognition that those claiming citizenship were entitled to habeas review to "assure fair hearing of [their] claims to citizenship."<sup>43</sup> If person A is entitled to habeas to decide whether she is a citizen (because being a citizen is so jurisdictionally important), then, so too, should person B receive a habeas hearing to decide whether she is an enemy belligerent (since that status is of equivalent jurisdictional importance.)

Such a reading of *Eisentrager* also squares with the unusual choice by Eisentrager's counsel—a choice that went unmentioned by the parties in *Rasul* and *Al-Odah*—to assert only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein . . . in custody for an act done or omitted under any alleged . . . order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations."<sup>44</sup> Lothar Eisentrager thus stood in a different position from Tomoyuki Yamashita, for Yamashita asserted that his trial violated the Constitution or laws of the United States under 28 U.S.C. § 2241(c)(3).<sup>45</sup>

As such, Eisentrager could not benefit from, and the Court did not confront the possible tension with, *Yamashita's* foundational claim. *Yamashita* built on the bedrock of *Ex parte McCardle*,<sup>46</sup> where the Supreme Court observed that the habeas corpus statute "is of the most comprehensive character. It brings within the habeas corpus

<sup>42</sup>Brief of Amicus Curiae Military Attorneys Assigned to the Defense in the Office of Military Commissions, *Al-Odah v. United States*, 124 S. Ct. 2686 (2004) (No. 03-343) available at <http://www.law.georgetown.edu/faculty/nkk/publications.html#Chapters>.

<sup>43</sup>*Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950).

<sup>44</sup>28 U.S.C. § 2241 (c)(4). See also Brief for Respondent at 2, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306) (reprinting statute involved and only reprinting subsections (a) and (c)(4)); *id.* at 24–26 (making argument based solely on subsection (c)(4)).

<sup>45</sup>See *supra* note 34 and accompanying text.

<sup>46</sup>73 U.S. (6 Wall.) 318, 325–26 (1867).

jurisdiction of every court and of every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties, or law. It is impossible to widen this jurisdiction."<sup>47</sup> Mr. Eisen-trager's decision to assert only jurisdiction predicated on "the law of nations" led the Supreme Court to analogize his claim to the private-law disputes the New York courts rejected during the war of 1812.<sup>48</sup> But that jurisdictional mistake cannot preclude individuals who face military commissions from asserting the (c)(3) claim that Yamashita and others used based on the Constitution or laws of the United States.

The government in the detention cases also ignored other limitations in *Eisentrager*, such as the Court's emphasis on the fact that the petitioners had been "captured outside of our territory and there held in military custody as a prisoner of war."<sup>49</sup> Strong justification exists for this holding, as the president's hands should not be tied on the battlefield, particularly when the territory is under the control of many nations. It would have been entirely reasonable for the government to defend this position, pointing out, for example, that an international tribunal for former president Saddam Hussein in Iraq would not be a matter that the American courts could review. The administration could have defended this principle had they put it forth in a circumscribed way, acknowledging that the situation shifts when justice is administered off the battlefield, particularly in those places where no other nation offers legal remedies.<sup>50</sup> In those areas, the fear of interfering with battlefield operations is at its nadir. The likelihood that the decisions are being made on the spur of the moment in the midst of crisis drops precipitously, while the

<sup>47</sup>*Id.* at 326–27.

<sup>48</sup>See *Johnson v. Eisentrager*, 339 U.S. 763, 776–77 (1950) (citing authorities).

<sup>49</sup>*Id.* at 777.

<sup>50</sup>Unlike *Eisentrager*, where the government claimed "enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and . . . like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," Brief of United States at 67, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306), there appears to be no inclination whatsoever to let Cuban law apply to those facing military tribunals. Deference to local practices (as in Puerto Rico or the Philippines, see *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904)) is not compatible with American policy.

likelihood that the key decisions are being made in the continental United States increases.<sup>51</sup>

The government's argument in the detention cases, for all those held at Guantanamo, had no logical stopping point. If there were no right to civilian review, the government would be free to conduct sham trials and condemn to death those who do nothing more than pray to Allah.<sup>52</sup> The president's claim was for the absence of any legal restraint whatsoever on the actions of the executive branch at Guantanamo, commensurate with absolute duties and subjugation for those held there.

In this sense, the government's reading of *Eisentrager* was both under- and over-inclusive. Its reading would have extended habeas rights to those, such as the Nazi saboteurs in *Quirin*, who lacked any connection to this country beyond a surreptitious entrance, but denied habeas to those who have done far less (and perhaps no) damage to American interests. The upshot of *Rasul* is to say that the Constitution cannot be contorted into this senseless position without doing grave damage to the rule of law.

In sum, the executive branch in the detention cases missed an opportunity to craft a limited argument for review. Instead of emphasizing the legal black hole, they could have said that the law, and civilian review, apply to trials that take place at Guantanamo Bay. This claim conceivably may have been in tension with some loose language in *Eisentrager*, but it was a far more plausible reading of civil/military court relationships than the wallop the administration put forth. The result of the administration's legal extremism is a counter-wallop from the justices, and one that binds future presidents in precisely the one area where they should not be easily shackled—when they believe that detentions are necessary to keep the peace.

<sup>51</sup> See Brief of United States at 23, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306) (distinguishing cases where courts found habeas jurisdiction over extraterritorial prisons in Lorton and Occoquan, Virginia, by stating that "these institutions were controlled and staffed by District officials").

<sup>52</sup> Were *Eisentrager's* conception of "sovereignty" converted into the wholesale deprivation of liberty that the government asserted, it would directly conflict with U.S. Const. amend. XIII, which reaches not simply "the United States," but also "any place subject to their jurisdiction."

### III. The Future

*Rasul* and *al-Odah* will probably force the government to change a number of things about the way it has handled the treatment of individuals at Guantanamo Bay. But the changes may be resisted by the same forces that pushed for an extremist view of the president's commander-in-chief power. And that resistance will grow as it becomes clearer just how much the Court's decisions left unresolved. Consider, to take just a handful of examples, the timing of judicial review, the proper forum for bringing such lawsuits, the application of the Classified Information Procedures Act<sup>53</sup> and other rules governing sensitive information in the courtroom, the right to counsel, the extraterritorial application of the Constitution, and the applicability of the Geneva Conventions. If the administration continues its boldly aggressive constitutional and legal strategy to exploit every unresolved issue in a contorted way, one can predict with some confidence further defeats in the courtroom. This section will analyze two areas for reform, the annualized detainee review process and the military commissions.

#### A. *Detainee Review*

The specter of judicial review has already forced a number of procedures to be altered, the first of which occurred even before the *Rasul* decision came down, namely, the Pentagon's decision to review detentions annually. This procedure was announced in early March of 2004 on the very day the government's brief in the detention cases was due at the Supreme Court.<sup>54</sup> Perhaps unwittingly, the government wound up making the best case for judicial review—the only process the detainees ever received was when the administration started to fear judicial review.

In the week before June 28, the date the detention cases were decided, the administration offered more details about the procedures for annualized detention review.<sup>55</sup> Having adopted the procedures to try to reassure the Court that some process existed on Guantanamo Bay, the administration then appeared ready to gut

<sup>53</sup>18 U.S.C.A. App. 3 §§ 1–16 (West 2000 & Supp. 2003).

<sup>54</sup>See <http://www.defenselink.mil/news/Mar2004/d20040303ar.pdf> (draft review procedures).

<sup>55</sup>See Department of Defense Press Release, available at <http://www.defenselink.mil/releases/2004/nr20040623-0932.html>.

most of the substance from them. They were ramshackle creatures, with no rights to lawyers. Instead, the detainee was expected to plead his case in front of three military officers, with the only support being that of an assistant who was not a lawyer and not trained in the nuances of interrogation statements or the proper examination of such statements for reliability. There was no guarantee that the detainee would have access to complete statements, either the ones he made or those made by others. There was little in the way of specified procedures for these panels. Perhaps most damaging, the Pentagon rules never explained who bore the burden of proof, or for what. What standard would be used for a detainee to be released? Could the government simply say that anyone held in confinement at Guantanamo for two years was likely to be hostile to the United States and preclude everyone from release on that projected hostility? There was absolutely no guidance, making it impossible even for an experienced legal advocate to defend a detainee, let alone someone who lacks such training.

The list of problems extended far beyond even those grave matters. The Pentagon rules permitted the judges to be handpicked by the secretary of the navy, giving rise to the inference that political appointees would be exercising control over the quasi-judicial process. The rules not only permitted, but required, one member of the three-judge panel to be an intelligence officer, despite the pervasive belief that intelligence officers always prefer to keep people detained on the theory that they might one day have useful information. And there was no guarantee that the press could see the proceedings and exercise an independent check on the process. The strong impression left by the procedures was that they were crafted not to do justice, but to whitewash the lack of it.

As of this writing, the administration has not said whether it will alter the pre-June 28 annualized review process. They should. While such a regime might have been thinkable before Abu Ghraib's horrors were broadcast for the world to see (and after the Defense Department kept *that* problem hidden), it has no place in the United States of America today, regardless of whether judicial review exists. At a minimum, a new regime has to specify a set of procedures and burdens of proof. It must, in order to be meaningful at all, permit access to counsel who are trained to understand the problems with translated interrogation statements. If civilian counsel posed logistical and security difficulties, military counsel could be used. With

600 detainees, being staggered over a year, fifty cases would be heard each month, which would translate into a need for about ten judge advocate general officers. Without those ten individuals, or some other group of ten attorneys, the process will look suspect from the get-go.

Furthermore, the actual rules for the review process must be crafted more carefully. Prior statements of the detainee must be provided in full (the so-called "Rule of Completeness") instead of being given piecemeal to the detainee. The background of any detainee statement, including the name and contact information of the translator, must be given to the detainee as well. Cautionary instructions should be given to the panel in cases in which the only evidence offered by the government in favor of continued detention is the interrogation statement of the detainee himself. (It bears noting that the "Tipton Three"—three individuals held at Guantanamo—confessed to being in league with Mohamed Atta. They would still be confined today had it not been for an MI5 record showing that the individuals had never left the country to meet Atta.)<sup>56</sup>

In addition, the Pentagon should use standing court-martial panels to select members of the review boards. Without some sort of randomized process for appointing judges, the members of the board will look like a bunch of handpicked rubber-stampers. The requirement that an intelligence officer be a voting member of the board should be scrapped, and replaced with an intelligence officer who is a nonvoting member. In addition, a psychologist or psychiatrist should be a nonvoting board member on every panel because so much of what these cases will turn on is the behavioral projections of the detainee. The model here is something like a "family advocacy panel," in the military justice system, whereby a security official

<sup>56</sup>See David Rose, *Revealed: The Full Story of the Guantanamo Britons*, *The Observer* (London), March 14, 2004:

[The Tipton three] endured three months of solitary confinement in Camp Delta's isolation block last summer after they were wrongly identified by the Americans as having been pictured in a video tape of a meeting in Afghanistan between Osama bin Laden and the leader of the 11 September hijackers Mohamed Atta. Ignoring their protests that they were in Britain at the time, the Americans interrogated them so relentlessly that eventually all three falsely confessed. They were finally saved—at least on this occasion—by MI5, which came up with documentary evidence to show they had not left the UK.

*Id.* at 1.

and a psychiatrist are placed on a board when difficult family-law issues arise. The system I am suggesting would have a security officer (the intelligence official) and a mental health expert integrally involved in the process.

With these types of changes, the detainee review process would appear far more vibrant. Again, my view is that these procedures are not constitutionally compelled, but the Supreme Court appears to disagree. In any event, regardless of judicial oversight, these (or steps like them) are necessary if we want to create a meaningful review process.

### *B. The Military Commissions*

Military commissions differ from screening and annualized detainee review panels because they do not concern themselves with detention, but rather punishment (including the death penalty). Yet again, instead of adopting a balanced regime that was tailored to the post-September 11 world, the administration went overboard. Three factors explain why the current rules for the military commissions are so shoddy. First, the drafters of the commissions assumed the lack of judicial review: The government attempted to house the military commissions at Guantanamo in an attempt to evade civilian court oversight. Second, low visibility: By stationing the commission locale offshore, hoping to exclude the press, and only applying the commissions to aliens (unlike past commissions in World War II), the government also insulated itself from much political pressure about the commissions and their rules and procedures. And third, secrecy: The government has classified much of what it is doing at Guantanamo, as well as much about the commissions process itself. The mix of low visibility, secrecy, and the lack of judicial review is a recipe for poor decisionmaking, and that is exactly what has happened.

The Supreme Court has now made clear that judicial review applies at Guantanamo, and at least a plurality also appears to accept the proposition from our amicus brief that judicial review exists to ensure that a military tribunal is “appropriately authorized and properly constituted.”<sup>57</sup> These developments should force a tremendous rethinking of the way the commissions will operate. In my

<sup>57</sup>Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004).

view, the entire process for the commissions is flawed from start to finish, from their procedure to their substance to their adjudication. Instead of belaboring the point, I will provide one example from each of these three categories.

Procedurally, consider the rules of evidence. American military law excludes evidence obtained through torture as a prophylactic measure designed to discourage the abuse of prisoners. But the rules for the military commissions offer no such guarantee. Indeed, they may even permit evidence obtained by torture to be introduced into a proceeding without informing the defense counsel or even the commission's judges of the dubious provenance of such evidence.<sup>58</sup> This is a marked departure from American military and civilian law, and one that is particularly troublesome in light of recent disclosures at Abu Ghraib and elsewhere.

Substantively, consider the offenses that are triable by a military commission. While Congress has specifically made available a list of crimes that are triable by a military commission, the Pentagon was not satisfied. Instead, the Pentagon took it upon itself to write a twenty-plus page list of offenses, and purported to define the elements of those offenses as well.<sup>59</sup> This spectacular usurpation of the legislative function is bound to have predictable consequences: offenses are consistently defined in ways that benefit the prosecution. Indeed, the offenses are all defined after the fact, raising the concern that the offenses are defined to fit particular offenders, rather than being demarcated in a sober and evenhanded way.

With respect to adjudication, consider the composition of the commission itself, which is the body that is to function as judge and jury. In an ordinary military court-martial, the members of the panel are selected randomly, like civilian juries. In the military commission process, however, the commission's members and the review board

<sup>58</sup>See Letter from Lieutenant Colonel Sharon A. Shaffer, Lieutenant Commander Charles Swift, Lieutenant Commander Philip Sundel, Major Mark A. Bridges, Major Michael D. Mori, and Neal Katyal to the Honorable John Warner, the Honorable Orrin Hatch, the Honorable Carl Levin, and the Honorable Patrick Leahy, June 1, 2004, available at <http://www.law.georgetown.edu/faculty/nkk/publications.html#Chapters>.

<sup>59</sup>General Counsel, U.S. Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission (April 30, 2003), available at <http://www.dtic.mil/whs/directives/corres/mco/mci2.pdf>.

appear to have been handpicked by the leadership of the Pentagon. This creates at least the appearance, if not the reality, of bias within the commission itself. If we are going to hold up the military commissions to the world as an example, not only for their own citizens, but also for our servicemen and servicewomen who may face such trials, it would be a tremendously dangerous step if the commissions were to go forward with handpicked judges.

These are three of many different problems—problems so rampant that they would take a book to be catalogued and detailed in full. But they give a sense of the magnitude of the problem, and suggest that a major overhaul is necessary. Without such changes, the commissions will flatly violate the Constitution as well as American military law, and the federal courts will be compelled to nullify their judgments.

#### **IV. Conclusion**

The Guantanamo cases may be seen as a reaction, indeed an over-reaction, to the broad claims the administration put forth in the name of executive power. By asking for complete insulation from judicial review, the administration missed an opportunity to distinguish between types of detainees and put forth a more modest argument. The result is that the federal courts are now going to interject themselves into many different aspects of the detention process. Some of those interjections will be good for the country, such as those involving military commissions, where judicial review will probably be needed to fix a constitutionally dubious plan that has little in common with commissions from past wars. Others might prove to be more destabilizing, such as the possibility of judicial review for ordinary detentions—perhaps even near battlefields.

The Guantanamo cases thus serve as a sober reminder that those who seek to defend the broadest conception of presidential power in the name of national security may do damage to our security as a result. By seeking middle ground, and working within our constitutional tradition, future defenders of the presidency can be more successful in promoting the values and vision of our Founders, including the protection of both life and liberty.