# DETAINEES UNDER REVIEW: STRIKING THE RIGHT CONSTITUTIONAL BALANCE BETWEEN THE EXECUTIVE'S WAR POWERS AND JUDICIAL REVIEW

## I. INTRODUCTION

On June 28, 2004, the U.S. Supreme Court held that United States federal courts have jurisdiction to hear the claims of foreign nationals challenging the legality of their detention at the U.S. Naval Station in Guantanamo Bay.[1] In *Rasul v. Bush* and a companion case, *Al Odah v. United States*, two Australian citizens and twelve Kuwaiti citizens challenged the legal basis for their detention at Guantanamo by bringing federal habeas corpus[2] petitions.[3] In both of these cases, the Supreme Court addressed a threshold question for judicial review that has evolved since the attacks of September 11, 2001 and the executive's indefinite detention of captured "enemy combatants" at Guantanamo: whether U.S. civil courts have jurisdiction to consider a non-citizen detainee's challenge to the legality of his detention.[4] Although the Supreme Court ruled that U.S. courts do have jurisdiction over foreign nationals at Guantanamo Bay, it did not actually review the merits of the petitioner's habeas claims, and neither the opinion's dicta nor holding gave courts below clear guidance on how to handle such claims.[5] Consequently, the decision opened the door to independent judicial review for foreign nationals wishing to challenge their detention, but it remains to be seen what answer lies beyond that open door.[6]

The ambiguity of how non-citizen detainee challenges will be treated is illustrated by the assertion of power over the detainee process by all three branches of government. In the year following the *Rasul* decision, not only have the judiciary and executive branches each respectively addressed the merits of the detainees' habeas claims and the formal detainee review proceedings, but the legislative branch has also interjected itself into the issue of how detainee claims ought to be handled.

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1. Rasul v. Bush, 542 U.S. 466, 484 (2004).
2. 28 U.S.C. § 2241 (2000); BLACK'S LAW DICTIONARY 728 (8th ed. 2004) (defining "habeas corpus" as "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal").
3. *Rasul*, 542 U.S. at 471-72; Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, *Rasul*, 542 U.S. 466.
4. *Rasul*, 542 U.S. at 470-71.
5. *Id.* at 471-88.
6. *See id.* at 477-48.

On December 30, 2005, Congress passed the Detainee Treatment Act of 2005.[7] The Act significantly changes the habeas corpus landscape for non-citizen detainees at Guantanamo Bay.[8] Consequently, the effect of the Act on the detainee review process warrants analysis alongside the habeas discussion. Section 1005(e)(1) of the Detainee Treatment Act modifies the habeas corpus statute to specifically deny habeas relief to non-citizen detainees held at Guantanamo Bay as enemy combatants—effectively repealing the Supreme Court's holding in *Rasul v. Bush*.[9] Nevertheless, the path behind the door left open by the *Rasul* decision and the path laid out by Detainee Treatment Act both lead to the same uncharted territory: the application of the Constitution to non-citizen detainees at Guantanamo Bay. Accordingly, this Comment addresses the tools required for navigating that uncharted legal ground.

Since September 11, 2001, the executive branch has been authorized to conduct military operations and use "all necessary and appropriate force against those nations, organizations, or persons [who] . . . planned, authorized, committed, or aided the terrorist attacks."[10] In conducting the "war on terrorism," the executive branch has detained individuals at the U.S. Naval Base in Guantanamo Bay, Cuba.[11] Some of those detainees, through relatives or next friends, have challenged their detention in U.S. courts.[12] While there are other individuals designated as "enemy combatants" who have challenged their detention besides the petitioners in *Rasul* and *Al-Odah*, those other claimants are either U.S. citizens or detained within the United States.[13] Further, because there is an "ascending scale of rights" afforded to individuals by U.S. laws depending on one's citizenship status or claim of status and one's presence within or outside our borders,[14] not all of the detainees petitioning for relief in U.S. courts will be treated equally under the law. Non-citizens outside our borders are afforded the least amount of constitutional rights, such as the detainees at Guantanamo Bay.[15] Determining exactly what constitutional rights exist at the lowest end of the scale requires a balance between the executive's power to conduct the war on terror and the judiciary's responsibility to interpret the application of the Constitution to enemy combatants.

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7. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.
8. *Id.* § 1005(e)(1).
9. 151 CONG. REC. S12753-55 (daily ed. Nov. 14, 2005).
10. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).
11. Jim Garamone, U.S. Dep't of Defense, *Joint Task Force Set Up in Cuba to Oversee Al Qaeda Detainees*, AM. FORCES PRESS SERVICE, Jan. 11, 2002, *available at* http://www.defenselink.mil/news/Jan2002/n01112002_200201111.html.
12. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, *Rasul*, 542 U.S. 466; Gherebi v. Bush, 338 F. Supp. 2d 91 (D.D.C. 2004).
13. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Padilla v. Rumsfeld, 542 U.S. 426 (2004); Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004).
14. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).
15. *See id.* at 770-71.

### *A. Balancing the Powers*

Because the Supreme Court decided that U.S. courts do have jurisdiction to hear the habeas corpus claims of non-citizen detainees at Guantanamo but left unclear the proper standard of review in those cases, the issue is no longer whether the courts have jurisdiction. Rather, the issue now is how the courts should strike the right constitutional balance between the executive's war power responsibilities and the judiciary's right of review.[16] Similarly, although the Detainee Treatment Act forecloses statutory habeas jurisdiction for non-citizen detainees outside of the United States, it will still require the courts to determine whether the military's detainee review processes are constitutional.[17]

The Detainee Treatment Act, among other things, proposes two significant changes to the way detainee legal challenges are addressed: (1) it severely limits an enemy combatant's access to the federal courts by removing the availability of habeas corpus relief to those individuals, and (2) it creates a direct avenue for limited judicial review of Combatant Status Review Tribunals and Military Commissions.[18] In the prescribed scope of judicial review, the Act requires the reviewing court to determine whether the tribunal and commission proceedings, which determine an enemy combatant's status or criminal liability, are "consistent with the Constitution and laws of the United States," and the Act prescribes the appropriate due process in those proceedings.[19] Consequently, similar to the habeas litigation, the Act requires courts to determine the extent of a non-citizen detainee's constitutional rights, and it requires courts to balance the due process concerns of both the government and the detainees. Thus, both of the paths behind the Detainee Treatment Act and the *Rasul* decision lead to the same point: *the issue of striking the right constitutional balance.*

Attempting to resolve this issue, however, is akin to opening a Pandora's box of legal problems. Because the government is not just detaining enemy combatants at Guantanamo Bay, but also, among other things, trying some of them in military commissions, there are many avenues upon which legal attacks can be mounted. For example, detainees have challenged whether the President is authorized to designate a military commission to try enemy combatants, whether the Geneva Convention is self-executing and thus enforceable in U.S. civil courts, and whether the commission's proceedings are in violation of the Geneva Convention.[20] Thus, it is clear that attempting to strike the right balance here could quickly devolve into

16. *See Hamdi*, 542 U.S. at 532 ("Striking the proper constitutional balance . . . is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear . . . .").

17. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2742-44.

18. *Id.*

19. *Id.* § 1005(e)(2)(C)(ii), (e)(3)(D)(ii).

20. *See, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005).

listing a confusing array of interconnected, yet independent, legal issues.[21] In order to conduct a thorough analysis of the issues involved with balancing the constitutional responsibilities of two co-equal branches of government, it is important to develop a narrow focus on a single, relevant issue. Accordingly, this Comment will focus its analysis on the nature and scope of litigation arising from non-citizen enemy combatant detentions at Guantanamo Bay, and the steps that the government should take to ensure that the Constitution itself does not become a casualty in the war on terrorism.

In approaching this issue, it is important to keep in mind that the question raised here is not whether it is legal to detain those who wish to do this country harm. Rather, the object is to find the checks that balance the independent powers apportioned to the executive and judicial branches. It is repugnant to the fundamental concepts of American liberty to allow the executive branch to act without allowing the judiciary to determine whether those actions are a constitutional exercise of executive power.[22] This is true even when the executive is acting under the auspices of its powers as Commander-in-Chief.[23] As a result, the context of this Comment is the tension between executive and judicial constitutional responsibilities.

That context of executive versus judicial powers is set in a unique place: the United States Naval Station at Guantanamo Bay, Cuba. As an indefinite leasehold of the United States under the ultimate sovereignty of Cuba, but one where the United States exercises "complete jurisdiction and control,"[24] Guantanamo Bay presents unique issues regarding the extraterritoriality of the Constitution and U.S. laws, and questions of whether the application of U.S. laws depends on citizenship status.[25] This has given rise to the substantive basis for tension between the executive and judicial branch; Guantanamo Bay is not technically a part of the United States, but neither is it in any real sense a part of any other sovereign nation because it functions "in every practical respect [as] a United States territory."[26] Thus, Guantanamo Bay introduces a unique place to examine the extent to which both the judicial and executive branches can exercise authority.

Part II of this Comment analyzes the nature and scope of the constitutional rights of detainees once jurisdiction has been established (whether it

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21. For instance, if the military commissions are legitimate, does the defendant-detainee have to first admit his status as an enemy combatant in order to come within its jurisdiction? Does it matter that a detainee denies taking up arms against the United States? What process does the government have to follow in order to classify a person an "enemy combatant" and what protections does that process have to afford the detainee? Does the executive have the sole power to designate a detainee as an "enemy combatant," thus bringing the detainee exclusively within the control of the executive? Is that designation subject to review by another branch of the government?

22. *See, e.g.*, CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 255 (1989).

23. *Id.*

24. Lease of Lands for Coaling and Naval Stations, U.S.—Cuba, Art. III, T.S. No. 418, Feb. 23, 1903, TS No. 418.

25. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2018-19 (2005).

26. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

is through a habeas corpus claim post-*Rasul* or through the Detainee Treatment Act). Part III looks at the procedural due process required by the Constitution, and it considers the current Combatant Status Review Tribunal as an example of the government's first attempt to comply with the Supreme Court's decision in *Rasul v. Bush*. Next, while temporarily ignoring the Detainee Treatment Act, Part IV presupposes statutory habeas jurisdiction after *Rasul*, and examines both the judiciary's traditional deference to the executive branch and a court's flexibility in balancing competing interests as positive traits that should give the executive branch confidence in creating a fair and reliable hearing process for the detainees. Finally, Part V concludes that, considering the judiciary's traditional deference to the executive's wartime actions and unique ability to balance the competing interests of constitutional fairness and wartime necessity, the executive's interests will be best served by creating as transparent and fair of a detainee review process as possible, and in doing so, it will strike the appropriate balance between this nation's desire for security and its love of freedom.

## II. A NON-CITIZEN DETAINEE'S CONSTITUTIONAL RIGHTS AFTER JURISDICTION HAS BEEN ESTABLISHED

Although the Supreme Court has already held that the federal courts have jurisdiction over non-citizen detainees at Guantanamo Bay,[27] what may follow in the courts is yet unresolved. Following the recent Supreme Court decisions in *Rasul* and *Hamdi v. Rumsfel*,[28] and pursuant to established habeas procedures with respect to the lawfulness and validity of a detention process, a district court, considering detainee habeas cases, will look at the executive's detainee review process to determine whether an "enemy combatant" is lawfully detained.[29] In order to determine whether the disputed detention is lawful, a court must conduct a two-part analysis. First, the court must establish what constitutional rights the allegedly unlawful detention violates.[30] Second, the court must determine whether those rights have been violated by that detention.[31] A court's analysis under statutory language like that in the Detainee Treatment Act would logically be similar because it would require a court to determine whether the executive's process for detaining enemy combatants is "consistent with the Constitution and laws of the United States."[32]

In *Rasul*, the Supreme Court only decided the narrow issue of whether the federal courts have jurisdiction to hear claims from non-citizen detain-

27. *Id.* at 485.
28. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).
29. *See infra* text accompanying notes 85-88.
30. LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 144-45 (2003).
31. *Id.* at 234.
32. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C)(ii), (e)(3)(D)(ii), 119 Stat. 2680, 2742-44; 151 CONG. REC. S12753 (daily ed. Nov. 14, 2005).

ees held outside our borders.[33] The Court specifically left unanswered the question of what rights those detainees may now assert in the courts through habeas corpus petitions.[34] Consequently, ensuing litigation has initially focused on the precise nature of a detainee's rights.[35] This is where the courts would be required to conduct the same analysis even under the Detainee Treatment Act because it would require a reviewing court to determine whether the detainee review procedures were in accordance with the Constitution.[36] Naturally, in order to determine whether a petitioner has been unlawfully imprisoned, a court must first determine what rights that petitioner is entitled to before it can determine whether those rights have been violated. Two recent cases in the District of Columbia District Court, *Khalid v. Bush* and *In re Guantanamo Detainee Cases*,[37] serve as useful examples of the lower courts examining "in the first instance the merits of petitioners' claims."[38] In both of these cases, for example, the petitioner/detainees pick up where *Rasul* left off and seek relief from their detention through habeas corpus, asserting that their detentions are in violation of their rights under the Fifth Amendment right to due process of law.[39] That is, the detainees assert that they have specific rights under the Constitution that the courts must look to in determining whether their detention violates those rights. Moreover, because the language in the Detainee Treatment Act similarly requires the reviewing court to determine whether the standards and procedures used for determining an enemy combatant's status are constitutional, it is helpful to look at the arguments presented in these cases regarding a detainee's constitutional rights.

On the one hand, the government argues that, according to *Rasul*, although federal courts have jurisdiction to hear detainee claims, the detainees do not have any underlying substantive rights that they may allege have been violated.[40] In other words, the government argues that "although *Rasul* clarified that a detainee has every right to file . . . [a habeas petition in the courts], the [c]ourt must not permit the case to proceed beyond a declaration that no underlying substantive rights exist."[41] On the other hand, however, the petitioners argue that the detainees at Guantanamo actually do have rights under the Constitution.[42] Specifically, they assert a right to due proc-

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

34. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 453-54 (D.D.C. 2005); Khalid v. Bush, 355 F. Supp. 2d 311, 323 (D.D.C. 2005).

35. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454; *Khalid*, 355 F. Supp. 2d at 324.

36. Detainee Treatment Act § 1005.

37. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 453-54; *Khalid*, 355 F. Supp. 2d at 323.

38. *Rasul*, 542 U.S. at 485 (holding that the Court was only addressing the jurisdictional issue of the detainee's habeas petitions and not the merits of their claims).

39. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 451-53; *Khalid*, 355 F. Supp. 2d at 321.

40. Press Release, Dep't of Justice, Statement of the Justice Department Regarding Today's Ruling in the Guantanamo Detainee Cases (Jan. 31, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/January/05_opa_040.htm; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 453-54.

41. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454.

42. *Id.* at 451-53.

ess under the Fifth Amendment as well as rights under other various federal laws and treaties.[43]

In *Khalid v. Bush*, Judge Leon held that the petitioner/detainees do not have any cognizable constitutional rights that they may assert, and therefore, they "have no viable constitutional basis to seek a writ of habeas corpus."[44] Because the detainees are non-U.S. citizens located outside sovereign U.S. territory, Judge Leon relied on *Johnson v. Eisentrager*[45] to hold that aliens outside of this country cannot avail themselves of our constitutional protections.[46] In *Eisentrager*, twenty-one German nationals were detained by the U.S. military in China because they were spying for Japan against the allied forces after Germany had surrendered.[47] They were convicted of war crimes by a military commission and denied habeas corpus relief by the Supreme Court because they were nonresident, enemy aliens detained outside of the United States, and consequently, did not enjoy a constitutional right to petition the courts for relief.[48] Narrowly interpreting the Supreme Court's decision in *Rasul*, Judge Leon distinguished that case from the Court's decision in *Eisentrager*. He did so by noting that the Supreme Court's decision to extend the *statutory* right of habeas to aliens at Guantanamo Bay in *Rasul* was different from its decision in *Eisentrager* because that case denied *constitutional* rights to aliens outside of the United States.[49] In other words, reasoning that the Supreme Court in *Eisentrager* tied *constitutional* rights to an alien's presence within the United States, Judge Leon distinguished the Supreme Court's *Rasul* analysis because that case focused instead on an alien's *statutory* rights.[50] Accordingly, because the Court in *Rasul* focused on whether the habeas *statute* extends to aliens, Judge Leon found that "[n]othing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny."[51] Consequently, according to Judge Leon, *Rasul* did not overturn the principle that non-citizens held outside the United States are not entitled to our constitutional protections.[52]

Unfortunately, Judge Leon's reasoning in *Khalid* precariously stands on the determination that the petitioner/detainees are outside the territorial jurisdiction of the United States.[53] In his opinion, Judge Leon cites *Eisentrager* and a subsequent line of cases for the proposition that the key to whether an alien has any rights under our Constitution is his contact or pres-

43. *Id.* (claiming that detention at Guantánamo Bay has violated their right due process, and *inter alia* that detention violates the Alien Tort Claims Act, the Administrative Procedure Act, and the Geneva Convention).
44. *Khalid*, 355 F. Supp. 2d at 321.
45. 339 U.S. 763 (1950).
46. *Khalid*, 355 F. Supp. 2d at 321-22.
47. *Eisentrager*, 339 U.S. at 765-66.
48. *Id.* at 777-78.
49. *Khalid*, 355 F. Supp. 2d at 321-22.
50. *Id.*
51. *Id.* (citing Zadvydas v. Davis, 533 U.S. 678 (2001); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).
52. *Id.*
53. *Id.*

ence within our borders.[54] However, that proposition is weakened when one considers the Supreme Court's decision in *Rasul*. In that case, the Supreme Court held that the federal courts have jurisdiction to hear a detainee's habeas petition precisely because they are located in a place where "the United States exercises *complete jurisdiction and control*."[55] Moreover, it seems counterintuitive that the Supreme Court would recognize a right to petition the federal civil courts for habeas relief but not recognize any underlying rights that may be asserted in a habeas petition.

In contrast to Judge Leon's decision in *Khalid v. Bush*, Judge Green's decision in *In re Guantanamo Detainee Cases* persuasively established that detainees do have underlying constitutional rights that they may assert in their habeas claims.[56] As an initial matter, her opinion quickly discredited the government's claim that the Supreme Court's decision in *Rasul* only overturned the circuit court's holding on the detainee's *jurisdictional* claim in the underlying case,[57] while retaining the portion of that decision that denied any *constitutional* rights to the detainees.[58] That argument failed to persuade Judge Green because the circuit court's decision "directly tied" *constitutional rights* to *jurisdiction*.[59] Consequently, when the Supreme Court in *Rasul* held that civil courts do have *jurisdiction* over detainees, the circuit court's rationale for denying *constitutional* rights to detainees also failed.[60]

Next, Judge Green rejected any reliance on *Eisentrager* because the Supreme Court had distinguished the detainee's situation at Guantanamo Bay from the German prisoner's situation in China.[61] In *Rasul*, the Supreme Court distinguished the Guantanamo detainees from the prisoners in *Eisentrager* on the grounds that the Guantanamo detainees were not citizens of a country at war with the United States, they denied any acts of aggression against the United States, and the detainees have never been charged with a crime or tried in any forum.[62] Moreover, the Supreme Court's decision in *Eisentrager* that the German detainees were not entitled to constitutional rights was not applicable to the Guantanamo detainees because they, unlike the Germans, "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."[63] Therefore, Judge

54. *Id.*
55. Rasul v. Bush, 542 U.S. 466, 467 (2004) (emphasis added). *Accord* Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, TS No. 418.
56. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 453-54 (D.D.C. 2005).
57. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, Rasul v. Bush, 542 U.S. 466 (2004).
58. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 461-62.
59. *Id.*
60. *Id.*; *see also Rasul*, 542 U.S. at 483.
61. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 461-62.
62. *Rasul*, 542 U.S. at 475-76.
63. *Id.* at 476.

Green held that *Eisentrager* could not serve as precedent to prohibit the Guantanamo detainees from "asserting substantive constitutional rights."[64]

Although the apparent weakness of the government's reliance on *Al Odah* and *Eisentrager* could reasonably support a conclusion that the Guantanamo detainees do enjoy at least some basic constitutional rights, Judge Green nevertheless pointed to an even stronger indication that the detainees should have a "fundamental right to due process."[65] Looking to footnote fifteen at the conclusion of the majority's opinion in *Rasul*, Judge Green interpreted that note to imply a mandate from the Court to "uphold the existence of fundamental rights through application of precedent from the Insular Cases."[66] In her decision that the Guantanamo detainees have a right to due process under the Constitution, Judge Green quoted that footnote and used it as a signal from the Supreme Court that future detainee cases should apply the logic of Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez* and the Insular Cases.[67] The footnote is significant because in that note the Supreme Court cited Justice Kennedy's concurring opinion in *Verdugo-Urquidez* rather than the majority opinion in that case and, by extension, relied on his logic rather than the majority's.[68] In part, the Supreme Court's footnote fifteen characterized the nature of the detainee cases and noted that, while those particular detainees deny any participation in terrorist acts,

> [Being] 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[s] "custody in violation of the Constitution or laws or treaties of the United States."[69]

Because the majority's footnote cites Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*[70] rather than the majority opinion in that case, and because it cites by extension the Insular Cases in Justice Kennedy's concurring opinion, Judge Green interpreted the *Rasul* majority to "require consideration of that precedent in the determination of the underlying rights of the detainees."[71]

In *Verdugo-Uquidez*, the Supreme Court considered the defendant's claim that U.S. government agents were required to obtain a search warrant before searching a Mexican citizen's residence in Mexico in order to obtain

64. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 461-62.
65. *Id.* at 462-63.
66. *Id.* at 461-62.
67. *Id.* at 463-64.
68. *Rasul*, 542 U.S. at 484 n.15.
69. *Id.* (quoting 28 U.S.C. § 2241(c)(3) (2000)).
70. 494 U.S. 259 (1990).
71. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463-64.

evidence for prosecution in U.S. courts.[72] The majority of the Court in that case decided that a search of a non-citizen outside the United States did not require a warrant under the Fourth Amendment based on the fact that the defendant had no contacts or presence within our borders.[73] Justice Kennedy's concurring opinion, however, while agreeing that the Mexican citizen was not entitled to assert rights under the Fourth Amendment, rejected the majority's reasoning that constitutional guarantees only extend as far as our borders.[74] In particular, footnote fifteen in *Rasul* cited the portion of Justice Kennedy's concurring opinion in *Verdugo-Uquidez* that relied upon the notion that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."[75] Justice Kennedy also posited that there is "no rigid and abstract rule" that the full Constitution must apply automatically to all people everywhere; rather, it should apply unless "impracticable and anomalous" for the government.[76] Consequently, determining whether and to what extent the protections of the Constitution extend beyond our borders requires "a contextual due process analysis," which in turn requires a case-by-case judicial determination of what constitutional rights apply, rather than an "'emphatic' inapplicability of the Fifth Amendment to aliens outside U.S. territory."[77]

As a foundation for his concurring opinion, Justice Kennedy relied on the Insular Cases.[78] The Insular Cases were a series of Supreme Court cases at the turn of the century that facilitated colonial expansion by differentiating between "incorporated" and "unincorporated" territories in order to determine whether "fundamental" constitutional rights extended beyond our borders.[79] Although the history of the Insular Cases doctrine has been turbulent, it has always stood for the idea that the extension of at least certain fundamental constitutional provisions, such as due process, depends on "the relation of the particular territory to the United States."[80] Considering that *Rasul*'s footnote fifteen pointed to Justice Kennedy's reliance on the Insular Cases, Judge Green similarly relied on the reasoning of the Insular Cases to find that there is no strict rule denying constitutional guarantees to aliens overseas and that the "fundamental" right to due process of law should extend to even non-citizen detainees at Guantanamo Bay because "for all sig-

72. *Verdugo-Urquidez*, 494 U.S. 259.
73. *Id.* at 275.
74. *Id.* at 276 (Kennedy, J., concurring).
75. *Id.* at 277 (citing Reid v. Covert, 354 U.S. 1, 6 (1957)).
76. *Id.* at 277-78 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).
77. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 459, 463-64 (D.D.C. 2005).
78. *Verdugo-Urquidez*, 494 U.S. at 278.
79. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 10-12 (2004).
80. *Id.* at 15 (quoting Dorr v. United States, 195 U.S. 138, 142 (1904)). "Against this background, it becomes apparent that Guantánamo is also a territory where, though the United States is not sovereign, fundamental constitutional rights apply to citizens and aliens under the rationale of the Insular Cases." *Id.* at 34.

nificant purposes, [Guantanamo Bay is] the equivalent of sovereign U.S. territory."[81]

Instead of relying on *Eisentrager* and a subsequent line of cases for the proposition that the right to due process does not extend to aliens outside the United States, Judge Green found that it would not be "impracticable and anomalous" for the government to recognize a fundamental right to due process for the detainees at Guantanamo Bay.[82] Based on the Insular Cases precedent that the *Rasul* majority cited, Judge Green held that the Fifth Amendment right to due process is a fundamental constitutional right that must apply to the detainees at Guantanamo because the Supreme Court made clear in *Rasul* "that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply."[83] Accordingly, the petitioner/detainees have a strong argument supporting the proposition that they have a legitimate claim to due process rights while incarcerated under U.S. control at Guantanamo. And in that case, the detainees would have at least one underlying right they could assert in a habeas claim or in appealing the decision of a military tribunal or commission under the procedures established by the Detainee Treatment Act. Notably, it is the right to procedural due process that the Detainee Treatment Act seeks to maintain for even non-citizen detainees.[84]

## III. ANALYSIS OF WHETHER DETENTION HAS VIOLATED DUE PROCESS

After a court determines that the petitioner is entitled to claim protection under the Constitution, such as the right to due process of law, the court will then look to the merits of the claim.[85] Just as the object of a habeas corpus claim is to obtain the release of detained persons who are restrained illegally, the statutory language of the Detainee Treatment Act would similarly require a court to ensure that a non-citizen, enemy combatant is detained in accordance with the Constitution.[86] Accordingly, both types of determinations would necessarily focus on whether the detainee is in fact lawfully restrained. The scope of a court's habeas inquiry is generally limited to the validity of the detention process and the jurisdiction of the court

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81. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 462-63.

82. *Id.* at 463.

83. *Id.* at 464.

84. For example, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2680, 2742-44, states that a reviewing court's jurisdiction is limited to the consideration of whether a tribunal's enemy combatant status determination was

> consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> . . . whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

*Id.*

85. YACKLE, *supra* note 30, at 234.

86. Detainee Treatment Act § 1005(e)(2)(C)(ii), (e)(3)(D)(ii).

that imposed detention.[87] Accordingly, it is logical that a court reviewing a Guantanamo detainee's habeas claim will look at the process by which the government designates a person as an "enemy combatant" and then subsequently detains him at Guantanamo Bay. The Detainee Treatment Act requires the same analysis, albeit from a different perspective, because it limits the civil courts' jurisdiction to determining whether the detention process complies with Defense Department guidelines and whether those guidelines are "consistent with the Constitution."[88]

When the *Rasul* petitioners filed their habeas claim,[89] the executive branch did not have a formalized process to determine whether an "enemy combatant" was properly detained at Guantanamo Bay.[90] Although the Department of Defense was developing a "Detainee Review" policy while the Court was deciding *Rasul*,[91] it did not announce a formal review process until after the *Rasul* decision was rendered.[92] However, even if there had there been a process in place before the *Rasul* petitioners filed for certiorari, the Court's decision would likely have remained because the only issue under consideration in that case was whether federal courts have habeas jurisdiction over non-citizen detainees at Guantanamo.[93] Nevertheless, creating a formal review process is an important development because it very well could affect how the federal courts treat *Rasul* on remand as well as any future "enemy combatant" case. This is especially so because the Detainee Treatment Act creates a separate statutory process for reviewing detainee challenges.[94]

In holding that federal courts do have jurisdiction over non-citizen detainees at Guantanamo, Justice Stevens, writing for the Court in *Rasul*, specifically left it to the lower courts to determine "what further proceedings

87. *See, e.g.*, Eagles v. United States, 329 U.S. 304, 311-12 (1946) ("The function of habeas corpus is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary.") (citation omitted).

88. Detainee Treatment Act § 1005(e)(2)(C)(ii), (e)(3)(D)(ii); 151 CONG. REC. S12753 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

89. *See* Reply Brief for Petitioners app., Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334), *available at* 2004 WL 782376, app. at *1a (noting that the Department of Defense did not announce a Combatant Status Review Tribunal until February 13, 2004, more than three months after the Supreme Court granted certiorari in this case).

90. Sec'y of Def. Donald H. Rumsfeld, Speech to the Greater Miami Chamber of Commerce (Feb. 13, 2004), *available at* http://www.defenselink.mil/speeches/2004/sp20040213-secdef0883.html (announcing annual detainee review process).

91. Press Release, Dep't of Def., DOD Announces Draft Detainee Review Policy (Mar. 3, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040303-0403.html.

92. Dep't of Def., Defense Department Background Briefing on Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html (announcing formal detainee review procedures as a result of the Supreme Court's decisions in *Rasul v. Bush* and *Hamdi v. Rumsfeld*).

93. *See supra* text accompanying note 4.

94. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2742-44.

may become necessary."[95] However, in another case, *Hamdi v. Rumsfeld*, decided on the same day as *Rasul* and examining the similar issue of whether detention of a United States citizen as an enemy combatant violates his due process rights, the Supreme Court did suggest some possible approaches to "strike[] the proper constitutional balance."[96] On the one hand, two justices of the *Hamdi* plurality dissented in part and would have decided that no proceedings other than those prescribed in the laws of war are appropriate (i.e., Prisoner of War Hearings in accordance with the Geneva Convention).[97] On the other hand, the plurality opinion in *Hamdi* did speculate as to what may constitute satisfactory proceedings when it noted that, "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[98]

In fact, writing for the plurality, Justice O'Connor said that it likely would still be constitutional to allow hearsay evidence and give the government a rebuttable presumption that the detainees are properly detained.[99] This type of hearing would "tailor" the proceedings in deference to the executive but still give the detainee a fair opportunity to prove military error.[100] Notably, in drafting the Detainee Treatment Act, the Senate incorporated that very language from the Court.[101] In addition to prescribing the scope of judicial review of a decision by a tribunal or commission, the Act also requires that the executive's formal Combatant Status Review Tribunal process have a "preponderance of the evidence" standard of proof, and it creates a rebuttable presumption in favor of the government.[102]

Despite the Supreme Court's acknowledgement that a detainee's hearing could observe a lessened due process standard, the executive's formal detainee review process may still miss the mark. After Judge Green concluded that Guantanamo detainees are entitled to at least the fundamental right of due process in *In re Guantanamo Detainee Cases*, she reviewed the Pentagon's current Combatant Status Review Tribunal (CSRT) process,[103] which is the same process contemplated by the Detainee Treatment Act.[104] In that formal review process, a designated civilian official of the executive branch conducts a "formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant."[105] However, Judge Green found that the CSRT proce-

95. Rasul v. Bush, 542 U.S. 466, 485 (2004).
96. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).
97. *Id.* at 548-52.
98. *Id.* at 533.
99. *Id.* at 533-34.
100. *Id.* at 534.
101. 151 CONG. REC. S12753 (daily ed. Nov. 14, 2005).
102. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C)(i), 119 Stat. 2680, 2742-44.
103. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 468-69 (D.D.C. 2005).
104. Detainee Treatment Act § 1005; 151 CONG. REC. S12753 (daily ed. Nov. 14, 2005).
105. DEP'T OF DEF., GUANTANAMO DETAINEE PROCESSES (2005), *available at* http://www.defenselink.mil/news/Jan2005/d20050131process.pdf. The report describes the purpose of Combatant Status Review Tribunals and defines an "enemy combatant" as an individual who was a part of, or associated

dures were still constitutionally flawed.[106] The major flaws were the "CSRT's failure to provide the detainees with access to material evidence upon which the tribunal affirmed their 'enemy combatant' status and the failure to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees."[107]

In order to show the "inherent lack of fairness," that is the lack of minimal due process, Judge Green included an excerpt from a CSRT proceeding.[108] That proceeding announced the charge against the detainee: "While living in Bosnia, the Detainee associated with a known Al Qaida operative."[109] In response to the charges, the detainee asked the Tribunal President to give him the name of the man with whom he had allegedly associated.[110] However, the Tribunal President said that he did not know the man's name.[111] Next, the CSRT asked the detainee to respond to charges that he was involved in a plan to attack a U.S. embassy.[112] To this, the detainee again asked for any evidence that he planned such an attack so that he could respond to that specific evidence, but the tribunal refused to show him any.[113] Frustrated, the detainee complained to the tribunal that he could not answer any accusations if they refused to even tell him whom he allegedly associated with or why they think he planned an embassy attack.[114]

A hearing such as this, where the accused cannot challenge the credibility of any of the evidence against him, led Judge Green to conclude that the current CSRT process is fundamentally unfair.[115] In addition, although the government understandably denies a detainee access to classified information, Judge Green found the CSRT review process to be fundamentally unfair since not even the detainee's counsel can challenge the classified evidence.[116] Because the CSRT procedures deny both the detainee and his counsel the right to review the classified evidence against him, and because that classified evidence can form the entire basis for detaining a person as an "enemy combatant," Judge Green concluded that under the current CSRT process the detainee is denied sufficient notice of the charges against him and a fair opportunity to challenge those charges.[117] Consequently, Judge Green found that the current CSRT regulations "do not properly balance the

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with, Taliban, Al Qaeda, or similar forces engaged in hostilities against the United States or its allies. This definition includes someone who has committed or supported hostile acts in aid of enemy forces.

106. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468-69.

107. *Id.* at 468.

108. *Id.*

109. *Id.* at 469 (quoting Respondent's Factual Return to Petition for Writ of Habeas Corpus at 13, Boumediene v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (No. Civ.1:04-1166 (RJL)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 470.

116. *Id.*

117. *Id.* at 472.

detainees' need for access to material evidence considered by the tribunal against the government's interest in protecting classified information."[118]

Based on this rationale, it is reasonable to argue that the current CSRT process misses the constitutional mark and falls below any acceptable modified due process standards. While the Supreme Court has clearly articulated a lessened due process standard for Guantanamo detainees, the CSRT process must still meet the fundamental due process guarantees of a fair and meaningful hearing.[119] In *Hamdi*, the Court upheld the applicability of the *Mathews v. Eldridge* balancing test when considering whether a detainee was afforded adequate due process of law.[120] In this regard, the *Mathews* due process balancing test requires a reviewing court to weigh the private interest in liberty against the government's interest in detention.[121] Additionally, the *Mathews* test requires a court to consider the risk the detainee procedures carry of wrongly depriving that private interest as well the probable value of additional procedures or safeguards.[122] Although the *Hamdi* Court considered whether a U.S. citizen's due process rights were violated by the detainee review process, the affirmation of the *Mathews* balancing test for due process cases is notable when one considers that the Detainee Treatment Act was drafted in light of the *Hamdi* decision, and that the Act requires a reviewing court to determine whether a tribunal's procedures for detaining a non-citizen enemy combatant violate the Constitution.[123] Thus, the *Hamdi* case and subsequent decisions considering the detainee review process, such as *In re Guantanamo Cases*, are instructive in considering whether the CSRT procedures as they currently stand pass constitutional muster in either a habeas case or under a court's review pursuant to the Detainee Treatment Act.

## IV. JUDICIAL DEFERENCE AND FLEXIBILITY TO BALANCE

### *A. Deference to Executive Actions*

In recognition of the executive's absolute duty to protect this country and its responsibilities to take all necessary military actions in defense of this country, the judiciary has historically exercised considerable deference to the executive, and it has limited the extent of any constitutional review of executive actions taken under the color of war.[124] However, exercising deference has not meant that the judiciary has, or should, totally abdicate its

118. *Id.* at 471.
119. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).
120. Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004).
121. *Id.* (citing *Mathews*, 424 U.S. at 335).
122. *Id.*
123. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2742-44; 151 CONG. REC. S12753 (daily ed. Nov. 14, 2005).
124. MAY, *supra* note 22, at 256-57; Shira A. Sheindlin & Matthew L. Schwartz, *With all Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795 (2004) (discussing the judiciary's role in checking the power of the political branches during times of war).

right of judicial review.[125] Nevertheless, in recent memory, the Supreme Court has generally presumed that the executive's actions were constitutional, especially when it considered executive actions taken during wartime or under authority of Congress.[126] Consider the following cases as examples of how the judiciary has historically deferred to the executive in matters of wartime necessity or national security.

While the executive branch fought wars in both the Pacific and Europe during World War II, President Roosevelt relocated thousands of Japanese-American citizens to detention camps on the arbitrary assumption that they posed a security risk.[127] When one of the Japanese-American citizens who resisted the internment order was criminally convicted, the Supreme Court considered the case on appeal in *Korematsu v. United States*.[128] Despite the detention program's obvious racial discrimination and lack of due process, the Supreme Court deferred to the executive branch and upheld the conviction.[129] In refusing to agree that the detainment was unconstitutional, the Court reasoned that although an action may be unlawful during peacetime, it is not necessarily unlawful during wartime because the executive has plenary authority to conduct this nation's affairs during war.[130] Although history has severely criticized the Court's decision since the end of World War II,[131] the Supreme Court has generally always been reluctant to examine the executive's actions during wartime through the same lens as it does during peacetime.

During the Korean War, in *Untied States v. Reynolds*, a military flight purportedly testing secret communications equipment crashed, and the family members of civilian passengers on that flight sued the government under the Federal Tort Claims Act for the deaths of their spouses.[132] Since they were suing the government for negligence, the family members sought the Air Force's accident report.[133] However, the government refused to produce the report, citing national security and secrecy concerns because of the nature of the communications equipment.[134] The Air Force filed a "Claim of Privilege" which objected to any effort or court order that demanded producing the report,[135] and ultimately the Air Force refused to disclose the report because doing so would "seriously hamper[] national security."[136] In response, the district court judge ordered that the issue of negligence be

125. *See* Sheindlin, *supra* note 124, at 802; John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003).
126. *See* Sheindlin, *supra* note 124, at 815.
127. *See, e.g.*, Steven R. Shapiro, *The Role of the Courts in the War Against Terrorism: A Preliminary Assessment*, 29 FLETCHER FORUM WORLD AFF. J. 103 (2005).
128. 323 U.S. 214 (1944).
129. *Id.*
130. *Id.* at 224-25.
131. *See, e.g.*, Sheindlin, *supra* note 124.
132. 345 U.S. 1 (1953).
133. *Id.* at 4.
134. *Id.* at 5.
135. *Id.* at 4.
136. *Id.* at 5.

presumed against the Air Force.[137] On appeal, the Supreme Court reversed and remanded the case, finding that once the privilege is invoked it must prevail unless the plaintiffs can make a sufficient showing of necessity.[138] In its decision, the Court noted that "even the most compelling necessity cannot overcome the claim of [executive] privilege if the court is ultimately satisfied that military secrets are at stake."[139] Thus, the Court placed a high value on the executive's claim of privilege within the context of its war powers and military necessity. The Court's deference even extended so far as to state that a district court judge reviewing a similar claim of privilege should not even conduct an *in camera* review of the privileged material if he or she is satisfied that the government's claim of privilege is appropriate.[140]

More recently, during the Cold War, the Court found it appropriate to defer to the executive's judgment when Congress specifically authorized executive action.[141] In *Dames and Moore v. Regan*, the petitioner sued the government of Iran for breach of contract.[142] Around the time that the claim was being adjudicated, however, President Carter was negotiating with the Iranian Government to resolve a hostage crisis.[143] Acting under the International Emergency Powers Act of 1976, the President issued orders blocking the removal or attachment of any Iranian asset.[144] These "blocking orders" effectively cut off any judgments or encumbrances on Iranian property, which the petitioner in *Dames and More* sought.[145] The power to preempt any civil judgment against Iran enabled the executive to agree in the hostage negotiations to terminate all litigation between the two governments and respective citizens.[146] The petitioner in *Dames and Moore* sought an injunction against the government to stop it from transferring Iranian property as a part of the eventual hostage negotiation agreement.[147] Ultimately, however, the Supreme Court refused to grant the injunction because it found that the

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137. *Id.*
138. *Id.* at 10.
139. *Id.* at 11.
140. *Id.* at 10. However, the executive branch's claim of privilege, which was based on the sensitive nature of the communications on board of the aircraft, lost credibility when it proved to be misleading. *See* Herring v. United States, 424 F.3d 384, 388-89 (3d Cir. 2005). After the accident report was declassified, the family members, who originally sought the report, discovered that the report indicated that the crash resulted from the pilot's negligence—exactly what the family members had alleged all along. *Id.* at 388-91. Although the accident report supported the family's negligence claim, the Third Circuit Court of Appeals refused to reopen the case because the assertion of privledge itself did not necessarily misrepresent the other arguably sensitive information contained in the report, that is, a B-29 bomber's mission criteria. *Id.* at 392.
141. Dames & Moore v. Regan, 453 U.S. 654 (1981).
142. *Id.* at 667. The petitioner sought damages because Iran had failed to pay under their contract. *Id.* at 664-65. However, after he had obtained a final judgment against the government of Iran, petitioner's claim was pre-empted by the executive's order to block all attachments to Iranian property within the United States. *Id.* at 666-67. President Carter used this "blocking order" as a bargaining chip in negotiating with Iran to resolve the Iranian hostage crisis. *Id.* at 673.
143. *Id.* at 664.
144. *Id.* at 663.
145. *Id.*
146. *Id.* at 665.
147. *Id.* at 667.

executive acted lawfully, and it found that when the executive acts with either express or implied congressional authorization, it acts not only with executive powers, but also with delegated congressional powers.[148] Accordingly, in such a case, the executive's action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[149] Thus, once again, the Court showed that it is reluctant to scrutinize executive judgment or action, especially if it is done pursuant to the executive's enumerated constitutional powers or congressionally delegated powers.[150]

### *B. Flexibility and Exhaustion of the Remedies*

Despite the historic judicial deference to the executive branch involving its exclusive constitutional powers, such as those taken pursuant to wartime necessity, there is a more substantive argument to be made in support of allowing judicial review. Since, by its very nature, the judicial branch may only review the case before it, courts are always trying to balance competing legitimate interests.[151] One example is balancing the competing interest between public safety and individual rights.[152] Attempting to strike the right balance between two legitimate claims is the primary function of the courts. Therefore, one can argue that given the judiciary's ability to adapt the law to specific circumstances, it may be the most suitable branch to weave its way through the competing constitutional interests of executive war power and judicial review. This may have been exactly what Justice O'Connor had in mind when, writing for the Court in *Hamdi v. Rumsfeld*, she said that "[s]triking the proper constitutional balance here is of great importance . . . .

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148. *Id.* at 668.

149. *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

150. Even so, when the executive branch acts under color of its express powers, it is arguable that the judiciary's preference for granting the executive wide latitude may suffer when the ends do not seem to justify the means. A case in point is *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

In *Padilla*, the Fourth Circuit Court of Appeals had acknowledged the President's independent authority to designate an individual as an enemy combatant and to detain that person in military custody indefinitely. *Id.* at 391. But, after being designated as an enemy combatant and placed in solitary confinement without access to an attorney for more than three years, Jose Padilla was instead charged with crimes supported by different facts than those alleged to support his indefinite military detention. *See* Press Release, Dep't of Justice, Jose Padilla Charged with Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists (Nov. 22, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/November/05_crm_624.html. The change prompted the Fourth Circuit to consider vacating its earlier ruling in light of "'the different facts that were alleged . . . to warrant Padilla's military detention' . . . [and] 'the alleged facts on which Padilla has now been indicted.'" Jerry Markon, *Appeals Court Balks at Approving Padilla Plan*, WASH. POST, Dec. 1, 2005, at A2; *see also* Padilla v. Hanft, No. 05-6396 (4th Cir. Dec. 21, 2005) (order denying government's request for authorization to transfer Jose Padilla from military custody to civilian law enforcement custody). Consequently, at least the Fourth Circuit Court of Appeals appears reluctant to let the executive branch benefit from its earlier ruling supporting broad executive authority when the charges levied against Padilla seem unsupportive of such deference.

151. Sheindlin, *supra* note 124, at 800.

152. *Id.*

[because] it is . . . vital that our calculus not give short shrift to the values that this country holds dear."[153] In fact, the Court's decision in *Hamdi* set out some general parameters for lower courts to consider given the "exigencies of the circumstances," and it noted that judicial proceedings in "enemy combatant" cases may "be tailored to alleviate their uncommon potential to burden the Executive."[154] Thus, the federal courts are not only able to adapt judicial review to specific circumstances and cases, but they seem to have already begun to do so.

In accordance with the well-established "exhaustion of the remedies" doctrine, the court would likely examine whether a detainee has pursued all other remedies available to him, and whether it is appropriate that the detainee should in fact pursue those other options before seeking habeas corpus relief.[155] Although it is primarily a doctrine that deals with alternative remedies in state courts, federal statutes and caselaw utilize it as an essential part of habeas corpus jurisprudence.[156] After a court determines that it has jurisdiction in the matter, hearing a habeas claim generally requires a petitioner to exhaust all other available remedies before filing his or her claim.[157] In some cases, exhaustion of all available remedies may be statutorily required, such as in the cases of state prisoners seeking relief in federal court.[158] In other cases, the "exhaustion of the remedies" doctrine requires that the petitioner pursue all available administrative remedies before seeking habeas relief, such as is the case with federal criminal prisoners or aliens in federal custody.[159] When exhaustion of the remedies is not required by statute, however, then it is a prudential matter for the court considering the petition.[160]

In one recent case, *Acevedo-Carranza v. Ashcroft*, an alien facing deportation proceedings filed a writ of habeas corpus.[161] In that case, the Ninth Circuit Court of Appeals upheld the district court's dismissal of the habeas claim because the alien had failed to exhaust all of the other remedies available to him in his case. In comparison, a prisoner in a Second Circuit case, *Smalls v. Batista*, who had exhausted all available state remedies, was granted habeas corpus relief.[162] In that case, a state prisoner sued the state

153. Hamdi v. Rumsfeld, 542 U.S. 507, 532-33 (2004).
154. *Id.* at 533.
155. YACKLE, *supra* note 30, at 152.
156. *Id.* at 160, 165.
157. *See, e.g.*, Acevedo-Carranza v. Ashcroft, 371 F.3d 539, 541 (9th Cir. 2004) (noting the "exhaustion of the remedies" doctrine); *see also* 28 U.S.C. § 2254 (2000).
158. § 2254(b).
159. *See* Castro-Cortez v. I.N.S., 239 F.3d 1037, 1047 (9th Cir. 2001) (noting that aliens seeking habeas corpus relief "as a prudential matter, . . . [are required to] exhaust available judicial and administrative remedies before seeking relief under § 2241"); Jackson v. Carlson, 707 F.2d 943, 949 (7th Cir. 1983) (holding that federal prisoners must exhaust available administrative remedies before seeking habeas relief).
160. *Acevedo-Carranza*, 371 F.3d at 541; *see also Castro-Cortez*, 239 F.3d at 1047.
161. *Id.* at 541.
162. 191 F.3d 272 (2d Cir. 1999).

for depriving him of his constitutional rights.[163] At every turn in his case, the prisoner presented his constitutional claims and, on appeal, the state even admitted that the prisoner had in fact exhausted all available remedies.[164] Noting the importance of the "exhaustion of the remedies" doctrine, the Second Circuit Court of Appeals said that the general requirement to first exhaust all available remedies is "grounded in principles of federal-state comity . . . and concern for harmonious relations between the two adjudicatory institutions."[165]

Perhaps even more analogous to the Guantanamo detainee's situation is the treatment of habeas corpus petitions by persons in military custody. In *Parisi v. Davidson,* the Supreme Court held that a person in military custody, even a non-criminal, must exhaust all available remedies in the military courts before pursuing a habeas claim in the federal civil courts.[166] In *Parisi*, a soldier claimed that he was unlawfully held in military custody because he should never have been drafted into the military based on his "conscientious objector" claim.[167] The Court ruled that the petitioner in that case could file a habeas claim because he had already exhausted all available administrative remedies in an attempt to correct his situation.[168] Considering that the courts apply the "exhaustion of the remedies" not only to state prisoner cases, but also to federal prisoners, aliens in federal custody and persons in military custody, it is arguable that courts in the future will require an "enemy combatant" detainee to exhaust all of his available remedies with the military before seeking habeas relief in the civil courts. This is even more likely considering the fact that the Detainee Treatment Act now requires as much.

Since 1953, the Supreme Court has expanded a civil court's inquiry into military court proceedings beyond mere jurisdiction and alternative remedies when a habeas petitioner claimed unlawful detention by the military.[169] In addition to determining whether the military court has jurisdiction and whether a habeas petitioner has pursued all other available proceedings before seeking habeas relief, the Court has also looked at whether the underlying proceedings have given the petitioner's claims full and fair consideration.[170] Therefore, it would logically follow that the more fair and transparent the executive's detainee review process, the more likely it is that a federal court reviewing a detainee's habeas petition would deny it because the detainee would have an alternative remedy available.[171] Such a proposition is strengthened when one considers the stated court interest in comity and

163. *Id.*
164. *Id.* at 277.
165. *Id.*
166. Parisi v. Davidson, 405 U.S. 34 (1972).
167. *Id.*
168. *Id.* at 37.
169. Burns v. Wilson, 346 U.S. 137 (1953).
170. *Id.* at 144.
171. *See* Smalls v. Batista, 191 F.3d 272 (2d Cir. 1999).

harmonious relations,[172] and the judiciary's traditional deference to the executive in wartime matters.[173] Moreover, the petitioners in *Rasul* actually agreed with the Court that the appropriate forum to hear detainee cases would be through a special process established by the executive. In fact, they acknowledged that had there been a functional and adequate review process available when they brought their claim, they would have pursued it there.[174]

Nevertheless, if a court were to find that a detainee seeking habeas relief did need to be heard in federal court, that civil proceeding could be modified to accommodate both the executive's concern for national security[175] and a court's constitutional responsibilities. Certainly, a court would look to Justice O'Connor's general procedural guidance in *Hamdi*,[176] as well as traditional habeas procedure in order to accommodate the executive's security concerns. This has already happened to a certain extent. For example, a district court judge in Detroit traveled to CIA headquarters to interview a witness because the government had concerns about protecting classified information used in a terrorism investigation.[177] In another case, the Justice Department has proposed procedures to limit access to classified information and yet proceed with a terrorism trial by requiring defense counsel and clients to discuss their case and review prosecution material within a secure facility.[178] Examples such as these, and the Supreme Court's dicta prescribing acceptable reduced standards of habeas review in detainee cases, would make it difficult for a court to require unaltered and traditional civil proceedings. Consequently, it is arguable that even if a court found it necessary to conduct a habeas hearing and bypass an executive's detainee review procedure, or consider such a case on appeal (as with the Detainee Treatment Act), that court would be more likely to look at recent precedent and established habeas procedure, then exercise traditional due deference as well as judicial flexibility, in order to favorably balance the executive's interest against the judiciary's constitutional obligations.

## V. CONCLUSION

Establishing a detainee review process that is as transparent and fair as possible may be the best way to "strik[e] the proper constitutional bal-

172. *See supra* text accompanying note 165.
173. *See supra* text accompanying notes 124-50.
174. Transcript of Oral Argument at 8, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), *available at* 2004 WL 943637.
175. Brief for the Respondents at 12-13, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343), 2004 WL 425739.
176. *See supra* text accompanying notes 120-23.
177. David Shepardson, *Judge Questioned Terror Trial Evidence; Retired CIA Analyst Consulted Regarding Detroit Case Sketches*, DETROIT NEWS, Oct. 8, 2004, at D1.
178. John Caher, *U.S. Asks for Top Security in Albany Case; Defense Lawyers Balk at Government Plan to Require Monitor Present During Review of Papers, Client Talks*, N.Y.L.J., Oct. 21, 2004, at 1.

ance."[179] In considering the executive's concerns for national security and protection of classified information, the courts have shown an ability to be flexible and accommodate the special needs of the executive while preserving the fundamental precepts of the Constitution. That flexibility will likely come into play regardless of whether a court is reviewing a habeas petition or the final decision of a tribunal under a separate statutory scheme like that in the Detainee Treatment Act.

If a court is reviewing a non-citizen detainee's habeas claim, now that the Supreme Court has established in *Rasul* that federal courts do have jurisdiction over detainees at Guantanamo, the federal courts and habeas jurisprudence may actually prove beneficial for the executive. For instance, because a habeas court looks primarily to the authority and process of detention in a habeas case, this Comment argues that from a practical standpoint the more the executive branch establishes a solidly fair and judicial process for determining detainee status, the better it would be for the executive. Since the courts tend to deny habeas petitions when there is apparent authority and alternative remedies available to a habeas petitioner, it is logical that a full and fair process establishing those remedies for non-citizen detainees is in the executive's best interest. In other words, if the executive branch wants to preserve its independent control over detainees, then practically speaking it could rely on history and precedence as a model. The courts will defer to executive action, but only to a point. They will seek to preserve the authority of the Constitution, albeit in a restrained sense considering the unique nature of detaining enemy combatants in the "war on terror." Habeas corpus jurisprudence teaches that as long as there is a way for an independent judiciary to examine the lawfulness of executive detention, or at least ensure that the detainee has an appropriate alternative remedy available, then that detention will be upheld. Thus, ironically, the way for the executive to retain control over detainees is to create a full and fair tribunal process. Moreover, the traditional deference the judiciary pays to the executive branch when it is looking at executive wartime actions or judgments should also give the executive branch confidence that federal court jurisdiction over detainees at Guantanamo Bay is not going to hinder its execution of the "war on terror."

When it passed the Detainee Treatment Act, Congress intended to interject congressional oversight into the detainee review process by dictating the standard of evidence used, and it wanted to ensure that the procedures of the CSRT are in accordance with the Constitution.[180] The passage of the Act clearly shows that the executive should anticipate more, not less, assertion of authority over the detainee review process by the other branches of government. Although the consequences of the Act are unknown at this point in time, it is also fairly clear that however the courts consider the detainee re-

179. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).
180. 151 CONG. REC. S12753 (daily ed. Nov. 14, 2005).

view process—whether it is through habeas litigation or under another statutorily prescribed method like that of the Detainee Treatment Act—the analysis will be in terms of whether that process fundamentally complies with the Constitution. Thus, from just a pragmatic standpoint, it would be prudent for the executive branch to ensure that the detainee review procedures uphold the ideals of that great charter.

Consequently, creating a detainee review process as transparent and fair as possible is the best option for our government and this nation as it seeks to strike the right balance between executive war powers and judicial right of review.

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