

COMMENT

Aid and Comfort¹: *Rasul v. Bush* and the Separation of Powers Doctrine in Wartime

INTRODUCTION

Imagine this. The United States has once again suffered a savage attack at the hands of terrorists, this time with chemical or biological weapons. Thousands lie dead. Fear and panic grip the nation. Congress meets and grimly passes a resolution authorizing the President to take action against the perpetrators and their sponsors. An attack is readied, but before the first laser-guided bomb is dropped, a small group of dissenting congressmen brings a lawsuit in federal court challenging the constitutionality of the resolution and the President's power granted by the document.

The petitioners find a sympathetic judge who grants them an injunction barring the President from taking action until the case may be heard. While clerks research cases and lawyers draft their briefs, Navy warships float impotently and Air Force bombers are grounded. The world watches its lone superpower descend into paralysis, trapped in the amber of judicial bureaucracy. The Supreme Court hears arguments and affirms the lower court's decision, rejecting the Solicitor General's argument that war powers are specifically delegated to the legislative and executive branches and that their exercise is a nonjusticiable political question.

The President, already facing the difficult decision to send United States' troops into harm's way, is now presented with another dilemma, namely whether to obey the Court's order and back down, a move that could lower the stature of the President as Commander-in-Chief; or to defy the Court and proceed with the attack, consequently lowering the stature of the Court and exposing its lack an enforcement

1. *Johnson v. Eisentrager*, 339 U.S. 763, 778-79 (1950) (“[T]rials [in U.S. courts for foreign fighters captured in war] would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.”).

mechanism. Worse, America's enemies watch her leaders fumble clumsily with the instruments of power, and her friends nervously wonder exactly who is in charge.

This scenario, while certainly not imminent, is not as unlikely as it used to be, thanks to *Rasul v. Bush*.² *Rasul*, a case decided by the United States Supreme Court in the summer of 2004, held that foreign fighters captured by United States' forces in the Global War on Terror and held outside the United States may petition U.S. District Courts for review of their imprisonment in habeas corpus actions.³

By failing to recognize the challenges facing political and military leaders in the wake of the September 11, 2001 attacks, in reversing fifty-four years of precedent relied upon by the executive branch, and in failing to consider the political question doctrine, the Supreme Court in *Rasul* charted a dangerous constitutional course that could lead to greater judicial involvement in war-making powers and greater levels of conflict among the three branches. These trends will ultimately threaten the nation's ability to fight and win future wars. The decision is ill-advised, ill-timed, and invites unintended consequences.

To address these issues, I will first begin with the origins of the *Rasul* controversy, followed by a discussion of the Court's disregard of *stare decisis*, its failure to consider the political question doctrine, and an examination of *Rasul's* implications in light of established executive limitations on wartime powers. I will then conclude with a consideration of the short and long-term implications of the Court's intrusion into the spheres of the political branches.

I. THE ORIGINS OF *RASUL*

Isolating war prisoners at the Guantanamo Bay Naval Station and depriving them of contact with the outside world, as well as denying them judicial review of their imprisonment, was undoubtedly an extreme position for the Bush Administration, but such a decision must be considered under the long shadow of the September 11, 2001, terrorist attacks.⁴ The cataclysmic events did more than shock,

2. 124 S. Ct. 2686 (2004).

3. *Id.* at 2699; see 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 1 (2004) ("The purpose of the writ of habeas corpus . . . is not to determine the guilt or innocence of a prisoner; the primary, if not the only, object of the writ is to determine the legality of the restraint under which a person is held. It has been stated, in this regard, that the writ of habeas corpus is the most fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.").

4. E.g., N.R. Kleinfeld, *U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon In Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1.

frighten, and anger Americans. They also changed America's defense posture and global strategy almost overnight, forcing policymakers and analysts to rethink many of their post-Cold War assumptions, particularly the ability of the West to manage shadowy terrorist organizations and the rogue states supporting them.⁵ The United States discounted the Cold War doctrines of deterrence and détente and embraced the doctrines of confrontation and pre-emption.⁶

America had suffered terrorist attacks at the hands of Islamic militants before, such as the first World Trade Center bombing in 1993⁷ and the 2000 attack on the U.S.S. Cole as it floated in the waters of Yemen.⁸ And there would be more atrocities to come, including the kidnapping and videotaped beheadings of Americans in Pakistan,⁹ Saudi Arabia,¹⁰ and Iraq.¹¹

But it is the September 11 attacks that history will remember most vividly, with their terrifying images: New York City's two tallest buildings crumbling into the street; office workers leaping to their deaths from the upper reaches of the Twin Towers; smoke rising from the collapsed western wall of the Pentagon; terrified people running for their lives and vanishing into a roiling cloud; the North Tower on fire, burning like a matchstick; a passenger jet smashing through the middle of the South Tower and emerging as a fireball through the other side; rescuers digging tirelessly through sixteen acres of burning steel; thousands of flyers with pictures of missing people posted on Lower Manhattan streets by desperate and sobbing relatives; thousands of funerals, many proceeding with no remains of the deceased found; families burying mementos in place of their loved ones.¹²

5. See THE 9/11 COMM'N REPORT: FINAL REPORT OF THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES 364-83 (2004) [hereinafter 9/11 COMM'N REPORT].

6. E.g., Patrick Smyth, *Pre-emptive Action Becomes New Strategic Doctrine*, IRISH TIMES, June 22, 2002, at 12.

7. E.g., John Hanchette, *Why the World Trade Center? Should We Have Known?*, GANNETT NEWS SERVICE, Sept. 20, 2001, available at LEXIS, News File.

8. E.g., Pamela Hess, *Explosion Kills Four U.S. Sailors In Yemen*, UNITED PRESS INT'L, Oct. 12, 2000, available at LEXIS, News File.

9. Tamer ed-Ghobashy & Bill Hutchinson, *Pearl Slaying Showing Up On Web*, N.Y. DAILY NEWS, May 16, 2002, available at LEXIS, News File.

10. E.g., David Stout, *Striking and Striking Back*, N.Y. TIMES, June 20, 2004, at 2.

11. E.g., Douglas Jehl, *C.I.A. Says Berg's Killer Was Probably Zarqawi*, N.Y. TIMES, May 14, 2004, at 12.

12. I write these descriptions from firsthand memories of the events of September 11, 2001. Then working as a reporter in New York City's financial district, I witnessed the attacks and their subsequent horrors from three blocks south of the World Trade Center.

Shaken and angered, the nation united and vowed a ferocious but just response. Congressional leaders gathered on the steps of the Capitol to sing "God Bless America," then voted to authorize President George W. Bush to rain destruction on the perpetrators of the carnage.¹³ President Bush, in a speech before a joint session of Congress,¹⁴ vowed a broad campaign targeting all global terrorist organizations and their state sponsors. First on the list was al Qaeda, blamed for the 9/11 attacks, and its Taliban sponsors in Afghanistan.¹⁵

In one of history's most decisive shows of force, the United States smashed the Taliban and the foreign fighters of al Qaeda.¹⁶ In a few short weeks, America conquered the rugged Afghan plains and mountains that had once been the graveyard of British and Russian invaders. Al Qaeda camps were destroyed and the Taliban crushed.¹⁷ Thousands of prisoners were taken as well. The worst of them, approximately 640 accused terrorists, were hooded and chained and taken to the U.S. Naval Station at Guantanamo Bay, Cuba, where they were caged behind razor wire and guarded by Marine sharpshooters.¹⁸ The Bush Administration, citing wartime powers and the President's role as commander in chief, claimed broad powers of detention and trial, including military tribunals operating independently of the U.S. justice system, a practice previously sanctioned by the Court during World War II.¹⁹ The Bush Administration also refused to classify the detainees as prisoners of war deserving of Geneva Convention protections²⁰ on the grounds their conduct had disqualified them from such protections.²¹ Specifically, the Geneva Convention protections apply only to prisoners who have met certain qualifications, such as wearing identi-

13. Authorization for Use of Military Force Against Sept. 11 Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (2001).

14. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).

15. *Id.* ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.").

16. *See, e.g.*, 9/11 COMM'N REPORT, *supra* note 5, at 369.

17. *See, e.g., id.*

18. *See, e.g.*, *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

19. *Ex Parte Quirin*, 317 U.S. 1 (1942) (allowing military tribunals for Nazi saboteurs captured after landing on the eastern U.S. seaboard).

20. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

21. Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002) ("The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees. Al-

fyng military insignia visible at a distance, carrying arms openly, and observing the rules and customs of warfare.²² The government concluded these prisoners, mostly suspected al Qaeda terrorists, did not meet such qualifications and were thus not prisoners of war subject to the protections of international law.²³ The Geneva Convention bestows upon prisoners a wide range of guarantees, including payment of wages as well as certain due process rights. However, the detaining power maintains broad powers of detention during the conflict.²⁴

While America was readying the military assault that would crush the Taliban and scatter al Qaeda, a British citizen named Shafiq Rasul traveled to his native land of Pakistan, purportedly to continue his studies and explore his culture.²⁵ Rasul found his way to the battlefield, where he, along with thousands of other suspected terrorists, was taken prisoner by U.S. forces in the course of Operation Enduring Freedom.²⁶

Rasul, like many of the other petitioners in this case, pleaded that he was a victim of misunderstanding. He claimed to have been kidnapped after leaving Lahore, Pakistan, and pressed into service for the Taliban and al Qaeda fighters desperately trying to hold off the American war machine.²⁷ The United States military claimed otherwise, declaring Rasul an enemy combatant and transporting him to Guantanamo Bay.²⁸ Along with other detainees, Rasul challenged his detention with a writ of habeas corpus. But before his case was heard, Rasul, along with another British citizen, was released and sent back back to Britain.²⁹ Meanwhile, the more than 600 prisoners remaining at Guantanamo hoped for relief from the U.S. Supreme Court in the case still bearing Rasul's name.³⁰

Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.”).

22. Geneva Convention, *supra* note 20.

23. Office of the White House Press Secretary, *supra* note 21.

24. Geneva Convention, *supra* note 20.

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

26. Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004).

27. Rasul, 215 F. Supp. 2d at 57, 59.

28. *Id.* at 57.

29. Rasul, 124 S. Ct. at 2691.

30. *Id.* at 2706.

II. *JOHNSON V. EISENTRAGER* AND THE COURT'S
DISREGARD OF STARE DECISIS

When President George W. Bush and Defense Secretary Donald Rumsfeld chose to detain terrorist suspects at the Guantanamo Bay Naval Station, they did so upon the advice of lawyers who mistakenly, but reasonably, relied on the Court's 1950 holding in *Johnson v. Eisentrager*.³¹ In *Eisentrager*, the Court held enemy aliens detained by the U.S. military on foreign soil had no access to American courts.³² That case involved enemy aliens captured in China, tried there, and then imprisoned in Landsberg Prison, located in an American-occupied part of Germany.³³ Central to the Court's holding was the fact that the prisoners were confined beyond the territorial borders of the United States.³⁴ Had the prisoners been captured within American territorial borders or imprisoned there, they likely could have claimed the protections found in the Fourteenth Amendment's Equal Protection Clause or any other constitutional protections.³⁵

Bush administration and military lawyers, familiar with these holdings, rationally chose to house their prisoners at the Guantanamo Bay Naval Station to avail the government of *Eisentrager*'s protections. In short, they would argue in *Rasul* that the naval station is a part of sovereign Cuba and is thus beyond the territorial jurisdiction of the United States.³⁶ This was a reasonable stance, given that *Eisentrager* had clearly stated a detainee's presence in sovereign United States ter-

31. 339 U.S. 763 (1950).

32. *Id.* at 774 ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.").

33. *Id.* at 765-66.

34. *Id.* at 771.

35. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says, 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, and of nationality." (citation omitted)).

36. Brief for the Respondents at 11, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) ("[T]he Guantanamo detainees, like the detainees in *Eisentrager*, are being held by the U.S. military outside the sovereign territory of the United States. It is 'undisputed' that Guantanamo is not part of the sovereign United States . . . and that conclusion is compelled by the express terms of the Lease Agreements between the United States and Cuba and the Executive Branch's definitive construction of those agreements. Accordingly, U.S. courts lack jurisdiction to consider claims filed on behalf of aliens held at Guantanamo.").

ritory was the key to his access to the nation's courts.³⁷ The administration's lawyers in their brief leaned heavily on *Eisentrager*, arguing that its terms were controlling.

The Supreme Court responded with an opinion almost entirely devoid of analysis on the broad separation of powers issue. The Court seemed to reject respondent's argument that the Guantanamo Bay Naval Station was in sovereign Cuba and not within the territorial jurisdiction of the United States.³⁸ The Court reasoned that while Cuba maintains "ultimate sovereignty"³⁹ over Guantanamo, the United States exercises "plenary and exclusive" sovereignty⁴⁰ under the terms of the 1903 lease agreement between the United States and Cuba.⁴¹

The Court justified its decision by distinguishing *Eisentrager* from *Rasul* in that *Eisentrager* looked to the *constitutional* right to habeas corpus while *Rasul* dealt with the *statutory* habeas corpus provision, found in § 2241 of the United States Code.⁴² A presumption exists that federal statutes do not apply beyond United States territory, but by declaring Guantanamo Bay a pocket of American sovereignty the Court avoided concluding that the federal habeas statute should not reach the prisoners housed there.⁴³ "Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the objection of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States," Justice Stevens wrote in the majority opinion.⁴⁴

While it appears that enemy non-citizen detainees held beyond American soil have no constitutional rights, the Court determined they do have statutory rights to petition for habeas corpus if they are detained by an agent of the executive branch under the jurisdiction of a federal court:

[T]he prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because

37. *Johnson v. Eisentrager*, 339 U.S. 763, 780 (1950).

38. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).

39. *Id.*

40. *Id.*

41. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, art. III, T.S. 418 (recognizing Cuba's ultimate sovereignty over the lands in question but ceding to the United States "complete jurisdiction and control" of the site during the term of the lease).

42. 28 U.S.C. § 2241 (2000) (allowing habeas corpus for a person in custody "under or by color of the authority of the United States").

43. *Rasul*, 124 S. Ct. at 2696.

44. *Id.* at 2696 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

“the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody” a district court acts “within its respective jurisdiction” within the meaning of § 2241 as long as “the custodian can be reached by service of process.”⁴⁵

The Court thus looked to the jailer and not the territory in which the prisoner is confined to determine whether the statutory habeas right exists. This is a restatement of the rule announced in *Braden v. 30th Judicial Circuit Court of Kentucky*.⁴⁶ However, that case involved an Alabama prisoner seeking a writ in a Kentucky court and never contemplated intervention in military affairs or prisoners housed at a foreign naval base. In fact, nothing in the Court’s jurisprudence foreshadowed such an audacious expansion of *Braden* as to police the Executive’s prosecution of a foreign war.

Justice Scalia argued that the *Eisentrager* Court previously rejected the idea that the habeas statute should apply to enemy aliens captured and held abroad and contended the *Rasul* Court effectively overruled this interpretation of federal statutory law despite an almost categorical prohibition against such an action.⁴⁷ As evidence, he pointed to the statement by the *Eisentrager* Court explaining that nothing in the Constitution or statutes of the United States allowed detainees held in Germany to petition for habeas corpus in the United States.⁴⁸ Justice Scalia rightly noted the majority had two avenues for explaining its actions in *Rasul*: either *Braden* overruled *Eisentrager* or *Rasul* overrules *Eisentrager*. The first course “would not pass the laugh test,” Scalia argued, as *Braden* dealt with a U.S. citizen incarcerated in Alabama and never mentioned *Eisentrager*.⁴⁹ The Court denied it was engaging in the second course and searched for middle ground, ruling that *Braden* overruled the statutory predicate for *Eisentrager*, a conclusion Scalia rightly found convenient and attenuated.⁵⁰

The immediate implications of the Court’s interpretation become clear when considering the breadth of its rule. Under *Rasul*, any enemy soldier or terrorist detained by American forces or agents may petition for habeas corpus in an American federal district court, as any military commander will ultimately be accountable to federal court

45. *Id.* at 2695 (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973)).

46. 410 U.S. 484 (1973).

47. *Rasul*, 124 S. Ct. at 2703-04 (Scalia, J., dissenting).

48. *Id.*

49. *Id.*

50. *Id.* at 2704 (Scalia, J., dissenting).

jurisdiction. Saddam Hussein could have demanded a flight to Washington, D.C. Osama bin Laden, if he is apprehended, could demand a free trip to New York to take a first hand look at the sixteen-acre hole in the ground he put there. This is because both would be in the custody of an American agent who would be answerable to a U.S. District Court. And as Justice Scalia notes in his *Rasul* dissent, war detainees held outside the jurisdiction of a specific U.S. District Court will be able to challenge their detention in any of the nation's ninety-four federal judicial districts.⁵¹

Most troubling is that the same logic presumably could be used in interpreting the Constitution's habeas provision, thus bestowing American constitutional rights on wartime enemies captured in foreign lands. Terrorists in Fallujah could be treated like purse-snatchers in Cincinnati. Army privates could even end up having to read Miranda warnings to every prisoner taken, in every imaginable language and dialect. And of course, the consequent disincentive for military leaders to take large numbers of prisoners could lead to battlefield massacres.

The government's lawyers were entitled to rely on the language of *Eisentrager*. By altering, if not overruling *Eisentrager's* analysis, the Court disregarded the importance of stare decisis and gave no thought to the consequences of its decision on military strategy, crafted in reliance on the Court's past rulings.⁵²

The *Rasul* Court attempted to distinguish the detainees before it from those turned away by the *Eisentrager* Court.⁵³ Specifically, the Court noted: the Guantanamo detainees were not citizens of nations at war with the United States; the detainees denied engaging in or plotting acts of aggression against the United States; they had never been given access to a judicial tribunal or been charged with any crime; and they had been held for more than two years in an area over which the United States exercises exclusive jurisdiction and control.⁵⁴ The distinctions cited by the Court, while not trivial or without merit, reveal a

51. *Id.* at 2710-11 (Scalia, J., dissenting).

52. *Id.* at 2706 (Scalia, J., dissenting) (“[T]oday’s opinion, and today’s opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgement of its consequences made. . . . Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”).

53. *Id.* at 2693.

54. *Id.*

majority utterly and dangerously failing to grasp the nature of terrorist actors and organizations, as well as the new and unique challenges faced by military planners in the ongoing Global War on Terror. The war is largely a war on terrorist organizations composed of citizens of myriad nations, including nations friendly to the United States.

Affording suspected al Qaeda agents more due process than Nazi spies on the ground that these terrorists are from countries not at war with the United States actually affords al Qaeda a legal benefit from the organization's status as a lawless global terror network. This is an astonishing and unacceptable result. In addition, al Qaeda's members have greater access to federal courts than would soldiers of civilized nations held for legitimate acts of war. Further, al Qaeda agents held at Guantanamo have greater access to federal courts than do American citizens held as terrorist suspects on American soil, given that prisoners on American soil can only bring habeas corpus petitions in the court of the district of their detention.⁵⁵

Rasul's most glaring flaw is the inability or unwillingness of the Court to recognize the new and unique character of modern terrorism. Thus Justice Stevens in his majority opinion offered an extended discussion of the history of the writ of habeas corpus⁵⁶ while devoting not a single paragraph to analysis of the effect of the Court's holding on America's ability to fight and win a new and unfamiliar kind of war.⁵⁷ After all, the September 11, 2001, hijackers were citizens of Saudi Arabia and Egypt, both of which are considered American allies. They were not from nations at war with the United States, yet in a single morning they incinerated 3,000 innocent people in two major American cities.

Only Justice Kennedy, in his concurrence with the majority decision, offered a serious analysis of the larger separation of powers issue, arguing the *Eisentrager* analysis was correct and more complete than the Court's *Rasul* analysis in that *Eisentrager* looked beyond statutory authority. "The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter," Justice Kennedy wrote.⁵⁸ "The existence of this realm

55. See, e.g., *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (holding a defendant labeled an "enemy combatant" by the U.S. military and held on American soil may only challenge his detention in a federal district court exercising jurisdiction over the territory in which he is held); *Ahrens v. Clark*, 335 U.S. 188 (1948).

56. *Rasul*, 124 S. Ct. at 2696.

57. See *id.* at 2706 (Scalia, J., dissenting) ("No reasons are given for this result; no acknowledgment of its consequences made.").

58. *Id.* at 2700 (Kennedy, J., concurring).

acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs.”⁵⁹ Despite these concerns, Justice Kennedy distinguished *Rasul* from *Eisentrager* on several grounds, although he urged the Court to uphold the broad principles it articulated in *Eisentrager*.⁶⁰

Justice Breyer may have summed up the majority’s reasoning best during oral arguments on April 20, 2004: “[I]t seems rather contrary to an idea of a Constitution with three branches that the Executive would be free to do whatever they want, whatever they want without a check.”⁶¹ This of course ignores the check provided by Congress’ role in approving wars and appropriating funds for any war effort prosecuted by the Executive.⁶² It also implicitly assumes judicial review is always necessary to prevent executive or legislative abuses. But some actions by the political branches, such as impeachment, are clearly not subject to judicial review, and the Court itself has recognized this fact.⁶³

III. THE POLITICAL QUESTION DOCTRINE

The Court should not have reached the merits of *Rasul* because the case presented a nonjusticiable political question.⁶⁴ In fact, the Court erred in not rejecting *Eisentrager* on such grounds as well. The *Eisentrager* decision set the stage for the Court to ultimately intrude into political wartime matters in *Rasul*. This in turn could serve as justification for future expansions of judicial review over war powers.

The political question doctrine arises from separation of powers concerns and allows the Court to decline to exercise judicial review if its decision would intrude into the spheres of the political branches or be judicially unenforceable.⁶⁵ This doctrine holds generally that a

59. *Id.* at 2700.

60. *Id.* at 2700-01.

61. Transcript of Oral Argument at 36, *Rasul*, 124 S. Ct. 2686 (2004) (No. 03-334).

62. U.S. CONST. art. I, § 8.

63. *E.g.*, *Nixon v. United States*, 506 U.S. 224 (1993) (holding that because impeachment is textually committed to the legislative branch, judicial review is inappropriate.).

64. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962).

65. *Dep’t of Commerce v. Montana*, 503 U.S. 442, 457-58 (1992) (“In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution. That determination is a decision on the merits that reflects the *exercise* of judicial review, rather than the *abstention* from judicial review that would be appropriate in the case of a true political question.”).

controversy, though ripe and of great public interest and debate, may nonetheless be nonjusticiable if judicial review would result in the usurpation of power from either of the other coordinate branches.⁶⁶ Although this doctrine was not central to the Court's analysis in *Rasul*, it is worth examining the case in its light. In particular, the doctrine illustrates the prudential concerns the Court has raised when deciding whether to rule on particular cases raising separation of powers issues.

The Court tends to evaluate six factors when deciding whether a particular controversy is a nonjusticiable political question. These factors are laid out generally in *Baker v. Carr*:

- 1) Whether an issue is textually committed to a coordinate branch;
- 2) Whether the Court lacks judicially discoverable and manageable methods for resolving the issue;
- 3) Whether resolution is possible without the Court making an initial policy decision that is clearly for non-judicial discretion;
- 4) Whether a decision may be made without showing a lack of respect due to coordinate branches;
- 5) Whether a decision would require unquestioning adherence to a political decision already made;
- 6) Whether multifarious pronouncements from different departments will cause embarrassment to the nation on the world stage.⁶⁷

If the answer to one or more of these questions indicates the controversy is within the purview of the political branches, the Court may refuse to review the case.⁶⁸ Of course, as Justice Holmes once noted, the division of constitutional powers is not always clear,⁶⁹ and for that reason, the political question doctrine has always been more than a textual rule.⁷⁰ It is a rule of judicial prudence and restraint, and was recently applied in the case of *El-Shifa Pharmaceutical Industries Co. v. United States*.⁷¹ In that case, the Federal Circuit Court of Appeals

66. *Baker*, 369 U.S. at 217.

67. *Id.*

68. *Id.*

69. *Springer v. Gov't of Fil.*, 277 U.S. 189, 209-10 (1928) (Holmes, J., dissenting) ("The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.").

70. *See, e.g., Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring) ("[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government.").

71. 378 F.3d 1346 (2004).

affirmed the dismissal of a claim under the Constitution's Takings Clause by petitioners whose property was destroyed in a military strike on a Sudanese plant ordered by President Bill Clinton in 1998.⁷² The court correctly cited the President's constitutional war powers as commander in chief and rejected the suit as a nonjusticiable political question.⁷³ The court considered the six-factor *Baker* test and concluded that if even one of its concerns was implicated, the court should show restraint.⁷⁴

Under the *Baker/El-Shifa* test, it is difficult to conclude that *Rasul* is not complicated by the political question doctrine. War-making powers are textually committed by the Constitution to the President⁷⁵ and Congress,⁷⁶ not the courts,⁷⁷ which are bound to accept legislative declarations that the nation is at war.⁷⁸

Given the sensitive nature of intelligence gathering and the need to conceal much of it from the public eye, the branch waging war, the executive branch, is much better positioned to evaluate who is and is not a continuing threat to the United States. As such, the courts will likely lack discoverable and manageable judicial methods to evaluate any claims brought by war detainees, especially if the executive branch feels compelled to withhold certain evidence on the grounds of national security.

It is equally unclear that the Court could decide a case such as *Rasul* without showing a lack of respect due coordinate branches, since a decision on the merits of *Rasul* would inevitably second guess the prosecution of a foreign war by the Executive. Multifarious pronouncements from the executive and judicial branches regarding war-time prisoners will certainly confuse allies and embolden enemies, as

72. *Id.* at 1349.

73. *Id.* at 1361.

74. *Id.* at 1362.

75. U.S. CONST. art II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.]").

76. U.S. CONST. art I, § 8 (giving Congress the power to declare war and regulate the army and navy, with control over military spending).

77. E.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – 'the political' – Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugo.*, 218 F.3d 152, 160 (2d Cir. 2000).

78. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2679 (2004) (Thomas, J., dissenting); *Ludecke v. Watkins*, 335 U.S. 160, 167-68 (1948).

was feared by the Court in *Eisentrager*.⁷⁹ In that opinion, Justice Jackson foresaw the danger of the Court intruding into the Executive's war-time detention of enemy aliens:

It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his effort and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to [the] enemies of the United States.⁸⁰

With *Rasul*, Justice Jackson's fears grew into reality.⁸¹

These arguments are not meant to suggest that the President has absolute power in times of war, so long as he is careful to justify his actions in terms of military necessity. Judicial review does have a place in wartime matters, and has often served the nation well by curbing executive abuses. For instance, President Truman's attempts to seize the nation's steel mills to prevent a strike that might have threatened armament production during the Korean War were rightly rejected by the Court in *Youngstown Sheet & Tube Co. v. Sawyer*.⁸² However, that case is easily distinguishable from *Rasul* in that the former involved a President acting in the absence of express congressional approval, while the latter involved a President acting with the express approval of Congress.⁸³ In Justice Jackson's famous "zone of twilight" concurring opinion in *Youngstown*, he stressed that a President acting pursuant to congressional authority acts with his authority at its zenith and should be afforded the "strongest of presumptions and the widest latitude of judicial interpretation."⁸⁴ Presidents have often taken extreme actions and justified those actions by citing national security concerns. President Lincoln famously suspended the writ of habeas corpus during the Civil War and ignored the judiciary's admonitions in doing so.⁸⁵ During World War II, President

79. *Eisentrager*, 339 U.S. at 778-79 ("Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.").

80. *Id.* at 779.

81. *Rasul v. Bush*, 124 S. Ct. 2686, 2706 (2004) (Scalia, J., dissenting) ("In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth.").

82. 343 U.S. 579 (1952).

83. *Rasul*, 124 S. Ct. at 2690.

84. *Youngstown*, 343 U.S. at 637. See also *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

85. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

Roosevelt ordered the detention of more than 100,000 Japanese-Americans in internment camps, along with other actions depriving these American citizens of basic constitutional guarantees.⁸⁶ In the infamous case of *Korematsu v. United States*, the Court upheld a Japanese-American's conviction for ignoring an order excluding him from the west coast of the United States based on his Japanese ancestry.⁸⁷

Hamdi v. Rumsfeld, decided the same day as *Rasul*, is another example of executive overreach.⁸⁸ In *Hamdi*, President Bush and Secretary Rumsfeld improperly detained an American citizen accused of being a terrorist while attempting to deny him access to American courts.⁸⁹ In his dissent, Justice Scalia sharply rejected the President's argument that he could detain American citizens on American soil without charges or a right to habeas corpus:

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.⁹⁰

Justice O'Connor, writing for the plurality, also concluded the government's position that it was empowered to indefinitely detain the petitioner without allowing him to challenge the factual basis of his detention was untenable.⁹¹

But as Justice Scalia recognized, the prisoners in *Rasul* differed from the one in *Hamdi* in at least two critical and determinative respects — they do not hold U.S. citizenship, which forms a basis for habeas corpus jurisdiction, and they are not held on U.S. soil.⁹² The court in *Hamdi* recognized that the military may nonetheless detain

86. *Korematsu v. United States*, 323 U.S. 214, 241-42 (1944) (Murphy, J., dissenting).

87. *Id.* at 233 (Murphy, J., dissenting).

88. 124 S. Ct. 2633 (2004).

89. *Id.* at 2644.

90. *Id.* at 2674 (Scalia, J., dissenting).

91. *Id.* at 2635. However, O'Connor concluded that the executive could nevertheless detain a citizen captured on a foreign battlefield as an enemy combatant until the cessation of hostilities.

92. *Id.* at 2660 (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."); *cf.* *Rasul v. Bush*, 124 S. Ct. 2686, 2701 (2004) (Scalia, J., dissenting) (arguing that the federal habeas corpus statute covers prisoners detained on American soil but not prisoners detained beyond the nation's territorial jurisdiction).

enemy combatants for the duration of hostilities.⁹³ However, the Court indicated that such detention is limited to hostilities in a given theater and indefinite detention justified by open-ended war on terror will not be allowed.⁹⁴

All of these cases, ranging from *Korematsu* to *Hamdi*, can be distinguished in broad terms from *Rasul* in that each involved the rights of American citizens or military detentions within the territorial United States. So, it can be said judicial review is appropriate when the actions of the military affect the rights of Americans or involve acts committed within American borders. Such a rule is reasonable and just, a proper balance in weighing justice and national security. However, this is not currently the law. The law now appears to be that military actions in foreign theaters will be increasingly scrutinized by the courts.

IV. IMPLICATIONS FOR THE FUTURE

The implications of *Rasul* will be significant for political leaders and military strategists as the United States presses ahead with the Global War on Terror. Because the Court's reasoning revolves in part around "complete jurisdiction and control"⁹⁵ of the Guantanamo Naval Base by U.S. forces, no distinction appears to be made between territories acquired by lease, such as Guantanamo Bay, or those taken by military force, such as American-occupied Afghanistan and Iraq. Thus, as Justice Scalia noted in his *Rasul* dissent, the Court's holding could bring detainees captured and held in Afghanistan or Iraq under the jurisdiction of federal courts.⁹⁶ As Justice Scalia noted, the Landsberg Prison housing the *Eisentrager* defendants would have also qualified under the test articulated by the Court in *Rasul*.⁹⁷ Therefore, the law on imprisoned enemy combatants is unclear, a fact certain to unnecessarily complicate war planning efforts. Even worse, the Court could use *Rasul* to justify further intrusions into the affairs of the political branches because *Rasul* stands for the proposition that judicial review is appropriate for war detainees. It is not much of a stretch to imagine future courts seizing on this beachhead and declaring other legal protections for detainees, including possibly substantive and even constitutional rights.

93. *Hamdi*, 124 S. Ct. at 2640.

94. *Id.* at 2641-42.

95. *Rasul*, 124 S. Ct. at 2696.

96. *Id.* at 2708.

97. *Id.* at 2708.

So far, there have been signs that lower courts may exercise restraint in post-*Rasul* cases. In *Khalid v. Bush*, the District Court for the District of Columbia dismissed the habeas corpus petitions of Guantanamo detainees.⁹⁸ However, it did so on questionable grounds, ruling that the right to petition for habeas corpus and the substantive right to review were severable.⁹⁹ The Court determined it could not consider the merits of the claims because to do so would be to second-guess the President's prosecution of the war.¹⁰⁰ But as satisfying an outcome as that may be, such an approach is illogical. The text of § 2241 does not appear to separate the right to petition and the substantive right to review.¹⁰¹ A right to petition without a right to be heard would be meaningless if not unconstitutional.

Some scholars have looked at *Rasul* and its progeny and declared them utterly harmless. Tung Yin, associate professor of law at Iowa College of Law, recently argued *Rasul* was simply a mild reminder to the political branches that the courts have some role in war powers.¹⁰² Professor Yin notes that the federal habeas statute does not allow courts to entertain claims of actual innocence but simply provides a mechanism to ensure due process.¹⁰³ Due process is a flexible concept, and the courts may offer great deference to the political branches on whether the process they provide detainees is sufficient, Yin argues.¹⁰⁴ While it is difficult to accurately predict *Rasul*'s long-term consequences, it is worth considering what the holding would have meant if applied to past wars. A look at prisoner of war numbers from America's past struggles powerfully illustrates the impracticality of the Court's *Rasul* approach. Roughly 150,000 prisoners were captured and detained by the Union Army during the Civil War, with more than 50,000 of those remaining in custody at the time of the Confederate surrender in 1865.¹⁰⁵ American forces held approximately two mil-

98. 355 F. Supp. 2d 311 (2005).

99. *Id.* at 323.

100. *Id.* at 329-30.

101. 28 U.S.C. § 2241 (2000) (describing how the writ should be issued and who it should cover; nothing in the text clearly severs the procedural right to bring a writ from the substantive right to review).

102. Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL OF RIGHT J. 1035, 1039 (2005). Tung Yin is an associate professor at the Iowa College of Law. His biography is available on the Internet at <http://www.law.uiowa.edu/faculty/tung-yin.php>.

103. *Id.*

104. *Id.* at 1101.

105. GEORGE LEWIS & JOHN MEWHA, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213 (1955).

lion prisoners of war during World War II, many of whom were not repatriated until several years after hostilities ended.¹⁰⁶ If Justice Scalia is correct that the *Rasul* holding could apply to territories held by force of American arms,¹⁰⁷ it stands to reason that, if guided by *Rasul*, courts in 1863 or 1943 would have been overrun with habeas corpus petitions. With every wartime detainee having access to counsel and judicial relief, intelligence-gathering efforts would be severely compromised¹⁰⁸ and the military's resources needlessly taxed.¹⁰⁹ In any major war effort, such procedures would inevitably detract from fighting efforts and thus weaken the nation, both in terms of actual might and international standing.¹¹⁰ The effect will not be any different in the current war.¹¹¹ Professor Yin discounts concerns *Rasul* will open the litigation floodgates, placing his faith in the reasonableness of the judiciary:

To answer a common criticism of extending habeas privileges to non-resident enemy aliens, what if 500,000 German soldiers during World War II had filed petitions for habeas corpus? If such an event were to occur, the answer is easy: the federal courts would entertain the petitions and they would conclude that under the circumstances of a full-scale world war, the prisoners were entitled to no more due process than whatever they received.¹¹²

Other scholars are not so optimistic. Eugene Volokh, professor of law at the University of California at Los Angeles, has expressed concern that the Court's *Rasul* ruling may have given America's enemies a new tactic.¹¹³ "If I were the other side's general, I'd actually teach my soldiers how to file habeas petitions (not everyone would have to know how to do that—there'd just have to end up being some soldiers in every prison camp who can write the petition on their comrades' behalf)," Professor Volokh wrote.¹¹⁴ "This would be a very substantial burden, and one to my knowledge we've never had to labor under."¹¹⁵

Of course, the executive and legislative branches are not powerless against this judicial encroachment into the political sphere. Because

106. *Id.*

107. *Rasul v. Bush*, 124 S. Ct. 2686, 2708 (2004).

108. Brief for the Respondents, *Rasul*, 124 S. Ct. 2686 (No. 03-334).

109. *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

110. *Id.*

111. Brief for the Respondents, *supra* note 108 at 343.

112. Yin, *supra* note 102 at 1101.

113. Posting of Eugene Volokh to <http://volokh.com/posts/1088468085.shtml> (June 28, 2004, 20:14 PST).

114. *Id.*

115. *Id.*

the Court justified its claim of jurisdiction on a federal statute,¹¹⁶ Congress can and should reverse the decision by changing the statute, as Justice Scalia¹¹⁷ and some observers¹¹⁸ have urged. This, however, is not a panacea, as the Court may next find its justification in the penumbras emanating from the Constitution's habeas corpus provision,¹¹⁹ as it has elsewhere in the Constitution.¹²⁰ Although the petitioners in *Rasul* did not assert jurisdiction based on the Constitution alone,¹²¹ it is possible that the Court could expand its holding in *Rasul* given a properly-framed case. Such a move may be foreshadowed in its *Rasul* analysis.¹²² This, in fact, may be the next logical step, given that the Court emphasized that habeas corpus is aimed at the jurisdiction of the jailer and not the prisoner detained. The Court could next interpret the Constitution's habeas provision accordingly, and thus extend its protections to every corner of the earth. The ideal solution is judicial self-restraint and a retreat from the path laid down in *Rasul*, or at least a serious and sober appreciation of the dangers to our constitutional order springing from judicial involvement in military affairs.

The worst possibility is that the Court will use *Rasul* as a launching pad for further intrusion into political war powers just as *Griswold* was a launching pad to precipitous expansion in the arena of substantive due process rights.¹²³ Judicial review could be expanded beyond the detention of prisoners. It could conceivably reach military action itself, and the day that the Air Force is required to hold probable cause hearings before conducting bombing runs or the Army is forced to

116. 28 U.S.C. § 2241 (2004).

117. *Rasul v. Bush*, 124 S. Ct. 2686, 2701 (2004) (Scalia, J., dissenting).

118. Bruce Fein, *War by Queensbury Rules?*, WASH. TIMES, July 1, 2004 at A16 ("The alpha and omega of statutory construction is congressional intent. To believe, as Justice Stevens insisted, Congress intended the federal habeas corpus statute to benefit aliens captured in a foreign theater of active combat and detained under U.S. control is to believe nonsense. . . . To forestall such wartime foolishness, Congress should amend the habeas corpus statute accordingly. Time is of the essence.").

119. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

120. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

121. *Rasul*, 124 S. Ct. at 2701 (citing transcript of oral arguments in which petitioners confirm that their argument is confined to the habeas statute, not the Constitution's habeas provision).

122. *Id.* at 2692.

123. *Lawrence*, 539 U.S. at 562; *Roe*, 410 U.S. at 153.

seek search warrants before inspecting enemy caves, is a day in which America's ability to defend itself will be severely degraded and her enemies emboldened.

CONCLUSION

Rasul in the years to come will be seen in one of two ways. The decision will either usher in a new era of judicial involvement in war-making powers or will be remembered as an imprudent and short-lived experiment in policing the executive branch's prosecution of a foreign war. The Court was careful to avoid the broad implications of its judgment, justifying its action with a discussion of the fineries of statutory jurisdiction.¹²⁴ What the Court did not do was properly assess the case in light of the separation of powers doctrine. The Court was so immersed in the question of whether it could exercise jurisdiction that it never considered the question of whether it should. In doing so, it neglected its duty to exercise prudence and restraint when treading upon the territory of a coordinate branch. In declaring broad powers to oversee the Executive's prosecution of a war authorized by the Congress, the Court seized constitutionally-vested powers from the two branches of government most directly accountable to the people. This is unwise and unnecessary. Should Congress approve a foolish war or the Executive fight one on his own, remedies exist. They include the ballot box and impeachment.¹²⁵

War by its nature is extrajudicial, and in war some innocents tragically but inevitably suffer.¹²⁶ Innocent people died on Sherman's March, and many thousands of innocents perished in the fire-bombings of Germany and Japan during World War II. That some suspected terrorists may be improperly detained and inconvenienced, even if that detention lasts until cessation of the conflict, is unfortunate, but in the scope of history, is neither surprising nor unacceptable given the risk presented by modern terrorist actors. After all, nineteen men armed only with knives and box-cutters massacred 3,000 innocent people on one peaceful September morning.¹²⁷ Protecting citi-

124. *Rasul*, 124 S. Ct. at 2692-700.

125. U.S. CONST. art. I, § 2, cl. 5 (giving the House of Representatives sole power to impeach); U.S. CONST. art. I, § 3, cl. 6 (giving the Senate sole power to try all impeachment cases).

126. Volokh, *supra* note 113 ("In war, there is always the risk of injustice; innocents even unfortunately die, with no legal process for every bombing or attack to decrease that danger. It seems to me that people on the field of battle must run the risk of being erroneously detained as well as being erroneously killed.").

127. See, e.g., 9/11 COMM'N REPORT, *supra* note 5.

zens from slaughter by foreign enemies is the first obligation of this or any government.

Defending America's presence in the world and promoting its values can sometimes be an ugly business, and in these necessary pursuits, judicial review is not always appropriate. When faced with grave matters of national security and confronted with a choice between interpreting the allocation of war-making powers to an unelected panel of judges or the duly elected President and Congress, representing the will of every jurisdiction in the nation, the Court should err on the side of democracy and accountability. Such a course of action would be the safest and surest way to preserve justice while pursuing victory.

Ryan McKaig

