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Habeas Corpus - Aliens Detained at the United States Naval Base in Guantanamo Bay, Cuba, May Petition Federal Courts for Writs of Habeas Corpus - Rasul v. Bush, 124 S. CT. 2686 (2004)

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**HABEAS CORPUS – ALIENS DETAINED AT THE
UNITED STATES NAVAL BASE IN GUANTANAMO BAY,
CUBA, MAY PETITION FEDERAL COURTS FOR WRITS
OF HABEAS CORPUS – *RASUL v. BUSH*, 124 S. CT. 2686
(2004)**

Although the United States Constitution grants prisoners the right to challenge the lawfulness of their confinement by filing a petition for a writ of habeas corpus, the federal habeas statute limits the judiciary's power to grant the writ "within their respective jurisdictions."¹ Recently, in *Rasul v. Bush*,² the United States Supreme Court attempted to define an alien's statutory right to petition for a writ of habeas corpus, as distinguished from his or her constitutional right. In 1950, the Court held that to preserve wartime security, an enemy alien captured, detained and convicted for war crimes outside the sovereign territory of the United States does not have a constitutional right to petition for a writ of habeas corpus.³ While the Court in *Rasul* was mindful of the President's war powers when it considered an overseas alien's statutory right to petition for habeas relief, it held that the federal habeas statute does not bar an alien's constitutionally proper habeas petition so long as the alien is detained within a "territory over which the United States exercises exclusive jurisdiction and control."⁴

Prior to the *Rasul* petitioners' capture, Congress passed the Authorization for Use of Military Force ("AUMF"), a joint resolution in response to the September 11, 2001, terrorist attacks on U.S. soil, granting President Bush authority to use "all necessary and appropriate force against

¹ See U.S. CONST. art. I, § 9, cl. 2 (stating constitutional right to petition for writ of habeas corpus may not be denied "unless when in cases of Rebellion or Invasion the public Safety may require it."); 28 U.S.C. § 2241 (1948) (setting forth scope of judicial review for petitions for writs of habeas corpus). The federal habeas statute states:

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complaint of is had.

28 U.S.C. § 2241(a) (emphasis added).

² 124 S. Ct. 2686 (2004).

³ See *Johnson v. Eisentrager*, 339 U.S. 763, 774, 777 (1950) (denying constitutional right to petition for writs of habeas corpus to German nationals captured, detained and convicted for World War II crimes in Germany).

⁴ *Rasul*, 124 S. Ct. at 2693; see also *id.* at 2698 (holding district courts may review overseas aliens' petitions for writs of habeas corpus under § 2241).

those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks.”⁵ The *Rasul* petitioners (hereinafter the Rasuls) and the *Al Odah* petitioners (hereinafter the Al Odahs) filed two separate claims in the United States District Court for the District of Columbia.⁶ The Rasuls petitioned for writs of habeas corpus challenging their detention at Guantanamo Bay while the Al Odahs alleged deprivations of their rights under the Fifth Amendment, the Alien Tort Claims Act and the Administrative Procedure Act.⁷ The government moved to dismiss both actions under the federal habeas statute for lack of subject matter jurisdiction.⁸ The district court consolidated the actions because both raised the same legal issue: “whether aliens held outside the sovereign territory of the United States can use the courts of the United States to pursue claims brought under the United States Constitution.”⁹

The district court dismissed both cases with prejudice because the Al Odah’s complaint actually constituted a petition for a writ of habeas corpus challenging their imprisonment, and because the terms of the federal habeas statute indicated that aliens detained outside a sovereign territory of the United States did not have a constitutional right to challenge their confinement.¹⁰ On appeal, the United States Court of Appeals for the District of Columbia affirmed the dismissals because, pursuant to *Johnson v. Eisentrager*,¹¹ the petitioners’ lack of property or physical presence in

⁵ See Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001) (granting Executive authority to detain aliens at Cuban naval base).

⁶ See *Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002) (introducing both petitioners’ claims in single opinion). The Rasuls are two Australian citizens and twelve Kuwaiti citizens captured in Afghanistan during the War on Terror and detained at the U.S. Naval Base in Guantanamo Bay, Cuba. See *Rasul*, 124 S. Ct. at 2690 (outlining facts leading to Rasul’s capture). The Al Odahs are twelve Kuwaiti citizens who were volunteering for humanitarian organizations when they were captured in Afghanistan and Pakistan during the War on Terror and transported to Guantanamo Bay. See *Rasul*, 215 F. Supp. 2d at 60-61 (describing Al Odah’s capture).

⁷ See *Rasul*, 215 F. Supp. 2d at 58-61 (detailing all petitioners’ factual allegations); see also U.S. CONST. amend. V (declaring federal government shall not deny individuals due process of law); Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706 (1966) (granting federal district courts authority to use statutory and constitutional law to determine legality of executive agency actions); Alien Tort Claims Act, 28 U.S.C. § 1350 (1948) (granting federal district courts original jurisdiction over alien tort claims alleging violations of federal law).

⁸ See *Rasul*, 215 F. Supp. 2d at 61 (citing government’s grounds for dismissal as lack of subject matter jurisdiction because petitioners detained outside district court’s territorial jurisdiction).

⁹ See *id.* (recognizing both petitions raised same legal issue).

¹⁰ See *id.* at 62-63 (reasoning any challenge to confinement shall be construed as request for habeas relief); see also *id.* at 71 (holding Guantanamo Bay Naval Base not sovereign U.S. territory because the United States does not seek to grant rights to Cubans).

¹¹ 339 U.S. 763, 777 (1950) (holding aliens captured, detained and convicted during

the United States barred their constitutional claims.¹² The Court of Appeals further held that even if the petitioners could distinguish themselves from *Johnson*, federal courts lack habeas power over aliens at Guantanamo Bay because it is not a sovereign territory contemplated under § 2241.¹³ The United States Supreme Court granted certiorari on November 10, 2003, to clarify the distinctions between an alien's constitutional right to petition for a writ of habeas corpus and the judiciary's statutory authority to consider the petition.¹⁴

To avoid judicial infringement on the Executive's war powers and foreign legal systems the Court is reluctant to extend constitutional rights to aliens and citizens detained extraterritorially.¹⁵ In *Balzac v. People of Porto Rico*,¹⁶ the Court summarized its policy regarding the extraterritorial application of constitutional rights as being the "locality that is determinative of the application of the Constitution . . . and not the status of people who live in it."¹⁷ Congress echoed the Court's extraterritorial concerns in 1948 when it enacted the federal habeas statute authorizing circuit and

war time of war crimes not entitled to petition federal courts for writs of habeas corpus because never within federal court's territorial jurisdiction).

¹² See *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (noting prior case law denying Fifth Amendment due process rights to all aliens detained outside the United States); see also *id.* at 1137 (incorporating Australian petitioner's claim to be released from Guantanamo Bay).

¹³ See *Al Odah*, 321 F.3d at 1139-40 (finding present claims analogous to *Johnson* because they "are aliens . . . captured during military operations . . . in a foreign country when captured . . . are now abroad . . . in the custody of the American military . . . and they have never had any presence in the United States."); see also *id.* at 1142-45 (articulating Guantanamo Bay not sovereign territory because the United States does not exert "supreme dominion" in Cuba).

¹⁴ *Rasul v. Bush*, 540 U.S. 1003 (2003).

¹⁵ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (plurality opinion) (holding Mexican citizen does not have constitutional right to challenge U.S. government search in Mexican home); *Dorr v. United States*, 195 U.S. 138, 148 (1904) (denying right to trial by jury to alien defendant convicted in Philippines because Congress may not impose legal system on other countries); *Downes v. Bidwell*, 182 U.S. 244, 280 (1901) (holding Constitution ineffective in Puerto Rico to preserve comity); *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (declaring Constitution does not apply to U.S. citizen located in Japan); see also *Ex parte Quirin*, 317 U.S. 1, 9 (1942) (holding foreign military prisoners in the United States facing military trial do not have right to habeas relief because Executive authorized to discipline violations of laws of war); *Gov't of Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (declining U.S. citizen's appeal for conviction in Panama because not detained in the United States).

¹⁶ 258 U.S. 298, 309 (1922) (holding Constitution does not extend to citizens or aliens beyond U.S. borders).

¹⁷ *Id.*; see also John F. Kasbar, Case Comment, *Aliens: Reaffirming the Territorial Distinction as the Means of Determining Constitutional Status – Kadvydas v. Davis*, 533 U.S. 678 (2001), 54 FLA. L. REV. 979, 985 (2002) (positing judiciary places great weight on alien's physicality to grant constitutional rights).

district courts to grant writs of habeas corpus to detainees “within their respective jurisdictions.”¹⁸

An alien’s physical presence becomes a concern when the judiciary considers its authority to grant an overseas alien’s petition for a writ of habeas corpus.¹⁹ The Supreme Court held in *Ahrens v. Clark*²⁰ that, under the federal habeas statute, district courts may only issue a writ of habeas corpus to a petitioner imprisoned within the court’s physical jurisdiction.²¹ The Court extended this rationale in *Johnson v. Eisentrager*²² when it held that enemy aliens who have never entered the United States did not have a constitutional right to challenge legitimate Executive detention because an alien’s constitutional rights increase only “as he increases his identity with our society.”²³

¹⁸ See 28 U.S.C. § 2241(a) (1948) (authorizing federal courts to grant writs of habeas corpus); 28 U.S.C. § 2242 (1948) (setting out procedure for party seeking writ of habeas corpus).

¹⁹ See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2724 (2004) (holding § 2241 requires habeas petition filed against prison warden in district of imprisonment); *Ahrens v. Clark*, 335 U.S. 188, 190 (1948) (holding district courts may not consider prisoners’ habeas petitions when detained outside court’s territorial jurisdiction); *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998) (holding federal courts may grant writs of habeas corpus to aliens under § 2241 if “in custody in violation of the Constitution or laws or treaties of the United States”) (internal citations omitted). *But see* *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 42 (D.D.C. 2004) (ruling citizen’s detention in Saudi Arabia does not preclude statutory habeas authority in district court).

²⁰ 335 U.S. at 189 (explaining one hundred twenty Germans detained in New York petitioned for habeas relief in the United States District Court for the District of Columbia).

²¹ See *id.* at 192 (holding habeas petitioners must be within district court’s territorial jurisdiction because Congress did not intend prisoners to be transported across territorial boundaries). *But see id.* at 194, 196 (Rutledge, J., dissenting) (arguing bright line geography test ignores courts’ lack of authority even if jailer falls within territorial jurisdiction). The *Ahrens* Court, however, did not explicitly address the issue of a petitioner imprisoned in a territory not under the authority of any district court. See *id.* at 193 n.4 (declining to address issue not presented).

²² 339 U.S. 763, 784-85 (1950) (holding Constitution does not protect enemy alien’s rights abroad).

²³ See *id.* at 770 (holding alien’s constitutional rights increase as he approaches naturalization because such rights are proportional to American allegiance); see also *Landon v. Plascencia*, 459 U.S. 21, 33 (1982) (holding Mexican arrested and detained in Mexico after living in the United States for five years established sufficient American allegiance to petition for habeas corpus); *Khalid v. Bush*, No. CIV.1:04-1166, 2005 WL 100924, at *6 (D.D.C. Jan. 19, 2005) (declaring non-resident aliens detained at Guantanamo Bay under AUMF, Congress’ joint resolution passed after September 11, 2001, do not have constitutional right to habeas relief); Jill M. Marks, J.D., Annotation, *Jurisdiction of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning alien Detainees Held Outside the United States*, 192 A.L.R. FED. 595 (2004) (explaining irrationality of giving greater constitutional rights to enemy aliens than citizens subject to military tribunals). *But see* *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953) (concluding Romanian who previously lived in the United States for twenty five years returning from international trip not entitled to habeas relief because entering alien has fewer constitutional

The *Johnson* Court further remarked that unacceptable consequences would follow if enemy aliens detained overseas possessed constitutional rights as the judiciary could hinder war efforts and enemy nations might not give the same rights to U.S. prisoners.²⁴ The Court articulated six determinative factors to determine whether alien executive detainees outside a district court's territorial jurisdiction and classified as enemy combatants may petition the courts for a writ of habeas corpus.²⁵ Specifically this court looked to whether the Petitioner:

- (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war

entitled to habeas relief because entering alien has fewer constitutional rights than residing alien); *In re Guantanamo Detainee Cases*, Nos. CIV.A.02-CV-0299CKK, CIV.A.02-CV-0828CKK, CIV.A.02-CV-1130CKK, CIV.A.04-CV-1135ESH, CIV.A.04-CV-1136JDB, CIV.A.1144RWR, CIV.A.04-CV-1164RBW, CIV.A.04-CV-1194HHK, 2005 WL 195356, at *17 (D.D.C. Jan. 31, 2005) (recognizing alien detainees have same due process rights to petition for writs of habeas corpus whether detained in United States or Guantanamo Bay). See generally *Khalid*, 2005 WL 100924, at *2 n.2 (defining enemy combatant as citizen or alien who helps "enemy armed forces") (internal citations omitted); Marks, *supra* note 23 (defining enemy alien as citizen of nation "at war with the United States").

²⁴ See *Johnson*, 339 U.S. at 779 (reasoning Court must consider future implications to granting constitutional rights to aliens detained overseas); see also *Burns v. Wilson*, 346 U.S. 137, 142-44 (1953) (upholding narrow review of servicemen's petitions for habeas relief in Guam to avoid judicial encroachment on valid military proceedings); *Ex parte Quirin*, 317 U.S. 1, 9 (1942) (upholding executive power to establish military tribunals to punish war criminals); Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 978-81, 1004-05 (2003) (positing enemy alien habeas petitions negatively impact war effort because United States will lose international standing and risk national security); Captain Christopher M. Schumann, Note, *Bring It On: The Supreme Court Opens the Floodgates With Rasul v. Bush*, 55 A.F.L. REV. 349, 367-70 (2004) (contending enemy alien habeas petitions increase litigation, burden military, hinder military intelligence and increase likelihood of detainees' release). But see *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding citizen enemy combatant entitled to challenge enemy combatant status before federal courts); *Application of Yamashita*, 327 U.S. 1, 17 (1946) (upholding Japanese general's right to petition for habeas relief in U.S. territory, but denying petition because military tribunal legitimately tried and charged him); *United States v. Tiede*, 86 F.R.D. 227 (1979) (declaring the Executive may not violate Constitution when acting overseas); Michael I. Greenberger, *Three Strikes and You're Outside the Constitution*, 37 MD. B.J. 14, 16 (2004) (questioning military commission's ability to try Guantanamo Bay detainees without judicial review); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 982 (1998) (explaining judges better equipped than military tribunals to evaluate executive detention because judges are detached and better able to consider Executive denials of individual liberty).

²⁵ See *Johnson*, 339 U.S. at 775-76 (affirming courts will consider whether state of war exists when reviewing enemy alien habeas petitions). But see Marks, *supra* note 23 (maintaining alien detainee's enemy combatant status, formal charges, military conviction and state of war do not bear on constitutional right to petition for habeas relief).

committed outside the United States; (f) and is at all times imprisoned outside the United States.²⁶

Because the *Johnson* petitioners satisfied all six factors, the Court refused to consider the aliens' habeas petitions because doing so would amount to an unconstitutional judicial invasion of the Executive's authority to discipline war criminals.²⁷

The Court relaxed its extraterritorial constitutional rights policy after *Johnson*.²⁸ In the plurality decision *Reid v. Covert*,²⁹ Justice Harlan articulated that the extraterritorial reach of each constitutional right should be considered in light of individual facts and circumstances and be denied when it "would be impractical and anomalous."³⁰ The Court also reconsidered § 2241 in *Braden v. 30th Judicial Circuit Court*³¹ and held that

²⁶ *Johnson*, 339 U.S. at 781; see also Swanson, *supra* note 24, at 962 (stating alien's country of origin, where captured and detained, whether alien charged with war crimes and whether the United States is at war with alien's native country are factors to determine court's authority over enemy alien's petition for writ of habeas corpus).

²⁷ See *Johnson*, 339 U.S. at 774, 786 (declaring Executive's power to hold military tribunals during and after hostilities is "essential to war-time security [and] . . . long established"); see also *id.* at 771 (affirming U.S. security requires aliens of nations at war with the United States to have fewer constitutional rights than other aliens); *Shaughnessy*, 345 U.S. at 212 (declaring court will not review Executive's political decisions); *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (refusing to review non-resident aliens' habeas petitions because detainees tried and convicted in military tribunal); *Khalid*, 2005 WL 100924, at *5 (concluding judiciary should broadly construe President's authority under AUMF to avoid impeding war powers); Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473, 485-86 (2004) (distinguishing between President's foreign affairs and domestic powers to determine right to petition for habeas relief). But see *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (explaining habeas review most effective when evaluating Executive detention); *United States v. Mousaoui*, 382 F.3d 453, 468-69 (4th Cir. 2004) (explaining judiciary assesses legitimacy of Executive conduct when constitutional interest outweighs Executive prerogatives); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 62 (D.D.C. 2004) (reasoning Executive's war powers never completely consume citizens' due process rights).

²⁸ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (granting writ of habeas corpus to U.S. citizen captured in Afghanistan because citizen entitled to challenge enemy combatant classification under due process clause); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (granting U.S. citizens habeas petitions after military convictions in England and Japan because citizen retains constitutional rights abroad); see also *Ralpho v. Bell*, 569 F.2d 607, 618 (D.C. Cir. 1977) (holding alien in Micronesia may sue the United States for due process violations). But see *supra* note 15 and accompanying text.

²⁹ 354 U.S. at 5-6 (plurality opinion) (granting U.S. citizens habeas petitions after military convictions in England and Japan because citizen retains constitutional rights abroad)

³⁰ See *id.* at 75 (Harlan, J., concurring) (limiting grant of extraterritorial constitutional rights to specific circumstances involving location, crimes and other options); see also *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (finding alien petitioner's right to petition for habeas relief confers right to counsel).

³¹ 410 U.S. 484, 485 (1973) (explaining Kentucky grand jury indicted prisoner in

where an American citizen is detained outside of the court's territorial jurisdiction, § 2241 only requires that the prisoner's "custodian can be reached by service of process."³² The *Braden* Court distinguished *Ahrens* because the practical and financial complications involved in transporting alien prisoners great distances was not present in a citizen's domestic habeas petition.³³ The Court granted certiorari in *Rasul* to determine if § 2241 precluded extraterritorial judicial review of Guantanamo alien detainee petitions for habeas relief.³⁴

In *Rasul v. Bush*,³⁵ the Supreme Court considered whether an alien prisoner detained outside the territory of a United States District Court may petition the courts for a writ of habeas corpus under the federal habeas statute.³⁶ The *Rasul* Court held that alien prisoners who are detained, without additional Executive action, at the United States Naval Base in Guantanamo Bay, Cuba are constitutionally entitled to petition the District Court for the District of Columbia for writs of habeas corpus and that the district court has statutory authority under § 2241 to consider such petitions so long as the detainees' custodians are within the court's territorial jurisdiction.³⁷ The Court distinguished *Johnson* because the *Rasul* petitioners did not satisfy the six determinative factors that constitutionally bar a habeas petition.³⁸ Furthermore, lack of physical presence within a sovereign U.S. territory is a question of statutory authority and does not per se nullify an alien's constitutional claims.³⁹ Accordingly, the Court held that the petitioners' claims are not disqualified under § 2241 because, pursuant to *Braden*, their custodian is within the District Court for the District of Columbia's territorial jurisdiction and the Naval Base at Guantanamo Bay is a "territory over which the United States exercises exclusive jurisdiction and control."⁴⁰

Alabama who then filed petition for writ of habeas corpus in Kentucky district court).

³² See *id.* at 494-95 (reasoning federal habeas statute applies to petitioner's custodian because writ of habeas corpus compels the petitioner's custodian to act).

³³ See *id.* at 495-97 (distinguishing concerns in *Ahrens* from present case).

³⁴ *Rasul v. Bush*, 540 U.S. 1003 (2003).

³⁵ 124 S. Ct. 2686 (2004).

³⁶ See *id.* at 2690 (articulating necessity for Court to consider federal courts' subject matter jurisdiction over aliens detained at Guantanamo Bay).

³⁷ See *id.* at 2692, 2698 (reasoning judicial trend to expand scope of habeas review and need to evaluate Executive imprisonment supports holding that § 2241 requires only custodian's presence within court's territorial jurisdiction).

³⁸ See *id.* at 2693 (affirming *Rasul* petitioners may constitutionally petition for habeas relief). Specifically, the *Rasul* petitioners deny any wrongdoing, are not enemy aliens, are not being tried by any tribunal, are not charged or convicted of a war crime and are detained in a prison in a territory "over which the United States exercises exclusive jurisdiction and control." *Id.*

³⁹ See *Rasul*, 124 S. Ct. at 2695 (holding absence from district court's territorial jurisdiction does not preclude constitutional right to petition).

⁴⁰ See *id.* at 2697-99 (emphasizing pragmatic approach rather than strict theoretical

Although Justice Kennedy agreed that the district court has subject matter jurisdiction to consider these prisoners' petitions for writs of habeas corpus, he opposes applying *Braden's* holding to all enemy aliens detained at Guantanamo Bay.⁴¹ Rather, Justice Kennedy posited that judicial review of such petitions depends upon the facts and circumstances of each case because "there is a realm of political authority over military affairs where the judicial power may not enter."⁴² Nevertheless, Justice Kennedy concluded that the President's prerogative to exercise military powers lessens, and the need for judicial intervention increases, when prisoners are detained indefinitely within a United States territory.⁴³

In *Rasul v. Bush*, the Court increased the likelihood of inconsistent findings in the lower courts because it allowed an alien detained at Guantanamo Bay to petition for habeas relief, but provided little guidance as to what extent the judiciary can expand aliens' constitutional rights.⁴⁴ For example, Judge Green, while presiding on the United States District Court for the District of Columbia, found that Guantanamo detainees properly alleged that their confinement violates due process under the Fifth

approach to determine whether territory under United States control). Cuba is a sovereign nation and the agreement between the United States and Cuba confers "complete jurisdiction and control" over the Guantanamo Bay Naval Base to the United States. See *id.* at 2696 (quoting Lease of Lands for Coaling and Naval Station, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418).

⁴¹ See *Rasul*, 124 S. Ct. at 2701 (Kennedy, J., concurring) (explaining majority confers statutory authority on district courts for overseas aliens' petitions for habeas relief).

⁴² See *id.* at 2699-700 (explaining Court must consider petitioner's nationality, location, enemy combatant status and whether granting writ would negatively impact military goals).

⁴³ See *id.* (explaining United States exerts "unchallenged and indefinite control" over Naval Base at Guantanamo Bay and petitioners detained for two years without trial); *id.* (noting Executive's broad war powers do not insulate military affairs from judicial review). But see *Ex parte Quirin*, 317 U.S. 1, 9 (1942) (denying U.S. citizen right to habeas relief because declared enemy combatant).

⁴⁴ See *In re Guantanamo Detainee Cases*, Nos. CIV.A.02-CV-0299CKK, CIV.A.02-CV-0828CKK, CIV.A.02-CV-1130CKK, CIV.A.04-CV-1135ESH, CIV.A.04-CV-1136JDB, CIV.A.1144RWR, CIV.A.04-CV-1164RBW, CIV.A.04-CV-1194HHK, 2005 WL 195356, at *14 (D.D.C. Jan. 31, 2005) (inferring Supreme Court intended Guantanamo detainees have substantive constitutional rights because they can petition for habeas relief); *Khalid v. Bush*, No. CIV.1:04-1166, 2005 WL 100924, at *7-8 (D.D.C. Jan. 19, 2005) (ruling statutory right to file for habeas relief does not automatically confer constitutional right to habeas relief); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 39-40 (D.D.C. 2004) (articulating statutory authority to consider citizen's petition for release from Saudi Arabian jail independent of constitutional inquiry); see also *Al Odah v. United States*, 346 F. Supp. 2d 1, 5 (D.D.C. 2004) (allowing Guantanamo habeas petitioners right to counsel in habeas proceedings). But see *Rasul*, 124 S. Ct. at 2698 n.15 (stating, "petitioners' allegations . . . unquestionably describe custody in violation of the Constitution or laws or treaties of the United States") (internal citations omitted).

Amendment.⁴⁵ Judge Leon, presiding at the same court, found that Guantanamo detainees do not have any due process rights.⁴⁶

Additionally, the Court's conclusion significantly affects the separation of powers doctrine.⁴⁷ Federal courts, in light of the Executive's war powers, must now analyze overseas aliens' substantive constitutional rights, such as due process, right to counsel, compulsory process to obtain witnesses and attorney-client privilege.⁴⁸ These analyses are "impractical and anomalous" because they will likely result in compelling the military to transport aliens detained overseas for district court hearings, hindering military investigations with premature habeas litigation and releasing enemy aliens because the Department of Defense will not be able to reveal classified war information.⁴⁹ The *Rasul* holding also undermines executive intelligence used to capture enemy combatants because classified evidence must be produced in the courts to show cause for confinement.⁵⁰

In *Rasul v. Bush*, the Court attempted to clarify the jurisdictional issues surrounding an alien's right to petition the courts for a writ of habeas

⁴⁵ See *In re Guantanamo Detainee Cases*, 2005 WL 195356, at *34 (finding Guantanamo detainees alleged proper constitutional violations under Fifth Amendment).

⁴⁶ See *Khalid*, 2005 WL 100924 at *6 (finding no grounds for Guantanamo detainees constitutional claims).

⁴⁷ See *Rasul*, 124 S. Ct. at 2699-01 (Kennedy, J., concurring) (positing Court strayed from *Johnson's* deference to Executive war powers to confine enemies); see *id.* at 2707 (Scalia, J., dissenting) (arguing Court's holding wrongfully imposes new found judicial review on Executive's war actions); *Khalid*, 2005 WL 100924, at *4 (maintaining AUMF should be broadly interpreted to avoid infringing Executive's war powers); Swanson, *supra* note 24, at 981 (maintaining separation of powers doctrine allocates power to detain enemy combatants to Executive because judicial oversight could free terrorists or restrict Executive's negotiation powers). *But see* *United States v. Moussaoui*, 382 F.3d 453, 463-65 (4th Cir. 2004) (rejecting argument that compelling production of witnesses in military custody during war time violates separation of powers).

⁴⁸ See *Moussaoui*, 382 F.3d at 466-73 (examining witness immunity, separation of powers doctrine and government burdens to decide whether alien prisoner abroad can compel government to produce overseas enemy combatant witnesses); *In re Guantanamo Detainee Cases*, 2005 WL 195356, at *18-21 (analyzing alien's private interest, government's interests and consequences of denying due process to conclude Executive's Combatant Status Review Tribunals violate due process requirements); *Khalid*, 2005 WL 100924, at *7 (analyzing Court's extraterritorial jurisprudence to declare *Rasul* does not grant overseas aliens in military custody substantive constitutional rights); *Abu Ali*, 350 F. Supp. 2d at 51-57 (considering three *Rasul* opinions and Court's extraterritorial jurisprudence to find Executive may not deny citizen detained in Saudi Arabia due process).

⁴⁹ See 28 U.S.C. § 2241(a) (1948) (requiring that district courts consider habeas corpus petitions "within their respective jurisdictions"); *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950) (setting forth six determinative factors to determine whether military detainee has constitutional right to petition for habeas relief); *In re Guantanamo Detainee Cases*, 2005 WL 195356, at *8 (considering aliens' habeas petitions on its constitutional merits); *Khalid*, 2005 WL 100924, at *6-8 (same); *supra* notes 24, 26, 30 and accompanying text.

⁵⁰ See Schumann, *supra* note 24, at 368-69 (asserting greater importance for military intelligence to gather secret information because War on Terror enemy combatants are hidden); cases cited *supra* note 24.

corpus. Federal courts will now employ a bright line test that so long as a Guantanamo alien prisoner's custodian is in the district court's territorial jurisdiction, the federal habeas statute will not preclude alleging a constitutionally proper habeas petition.⁵¹ In its decision, the Court implicated the separation of powers doctrine and did not address the holding's practical applications. The Court should give greater deference to the Executive's need to exercise its war powers when it further addresses the substantive constitutional rights of aliens detained at Guantanamo Bay.

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⁵¹ See *Rasul*, 124 S. Ct. at 2695 (holding executive alien detainees overseas may petition courts for writs of habeas corpus if custodian within court's territorial jurisdiction).