

ARTICLES

THE WAR ON TERRORISM AND “THE WATER’S EDGE”: SOVEREIGNTY, “TERRITORIAL JURISDICTION,” AND THE REACH OF THE U.S. CONSTITUTION IN THE GUANTÁNAMO DETAINEE LITIGATION

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INTRODUCTION

In June of 2004, shortly after the Abu Ghraib prison crisis, the Supreme Court held that the district courts of the United States had jurisdiction to hear habeas petitions filed by alien detainees being held in Guantánamo Bay, Cuba challenging the legality of their detentions. *Rasul v. Bush*,¹ and its companion cases *Hamdi v. Rumsfeld*² and *Rumsfeld v. Padilla*,³ addressed the fate of more than 600 detainees being held in what has been called a legal “black hole,” as the Government asserted that neither the U.S. Constitution nor the Geneva Conventions applied to alleged members of Al Qaeda that were apprehended during the war on terrorism.⁴ Although these decisions

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¹ 124 S. Ct. 2686 (2004) (holding that U.S. district courts have the power to hear habeas corpus challenges filed by alien detainees held at Guantánamo Bay, Cuba).

² 124 S. Ct. 2633 (2004) (asserting that the citizen-detainee, who desires to challenge his classification as an enemy combatant, is entitled to notice of the reasons for his classification and an opportunity to dispute the Government’s factual assertions in front of a neutral decision maker).

³ 124 S. Ct. 2711 (2004) (holding that habeas corpus jurisdiction was limited to the district in which the detainee was confined).

⁴ Although the Attorney General and the Department of Justice advised that the President had the authority to suspend the Geneva Conventions between the United States and Afghanistan, he declined to do so as a matter of policy. He did, however, maintain that Taliban members were unlawful combatants and that Article 3 of the Geneva Conventions did not apply. See

were hailed as a victory for the American legal system and the rule of law, they have not led to the swift demise of the Government's post-9/11 experiment in Guantánamo Bay: its creation of an unregulated offshore penal colony. With the cases on remand to the lower courts, the Government re-filed its motion to dismiss, obstructed counsel's initial attempts to communicate with their clients, and in essence acted as if the Supreme Court had not addressed the issue. As of this writing, not a single detainee has been released as a result of judicial review.

A key issue on remand has been whether the detainees possess substantive constitutional rights that have been violated by their detention. The Government apparently chose Guantánamo Bay as an indefinite detention center for alleged "enemy combatants" in the belief that the writ of habeas corpus would not be available to aliens detained there.⁵ In deciding that federal courts indeed have habeas jurisdiction, as conferred by statute, to decide the lawfulness of detainees' custody, *Rasul* remanded the cases for further proceedings on the merits but only implicitly addressed the question of detainees' constitutional status. The *Rasul* (now *Al Odah*)⁶ remand litigation has focused in large measure on the question of whether the U.S. Constitution applies to protect aliens detained in military custody outside of U.S. sovereign territory. In so doing, this litigation has confronted

White House Memorandum for the Vice President, the Sec'y of State, the Attorney Gen., the Chief of Staff to the President, the Dir. of Cent. Intelligence, the Assistant to the President for Nat'l Sec. Affairs, and the Chairman of the Joint Chiefs of Staff (Feb. 7, 2002) (on file with the editors) (regarding the "Humane Treatment of Al Qaeda and Taliban Detainees").

⁵ Cf. Memorandum for William J. Haynes, II, Gen. Counsel, Dept. of Def., from Patrick F. Philbin, Deputy Assistant Attorney Gen., and John C. Yoo, Deputy Assistant Attorney Gen. (Dec. 28, 2001) (on file with author), available at <http://texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf> (regarding "Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba" and concluding that "a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay, Cuba," but noting that the issue had not been definitively resolved by the Court); see also *Rasul*, 124 S. Ct. at 2706 (Scalia, J., dissenting) ("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."). The Supreme Court has never ruled definitively, and lower courts have disagreed, on the legal status of Guantánamo Bay. The Bush Administration's choice of Guantánamo Bay as the long-term detention site for individuals suspected of supporting Osama bin Laden or the Taliban is largely owing to a set of Eleventh Circuit cases litigated during the Haitian refugee crisis of the 1990s that held that refugees detained at Guantánamo Bay have no constitutional rights. See *Cuban-Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (denying that aliens' constitutional rights exist); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992) (holding that aliens, who were interdicted on the high seas and had not yet entered the U.S. borders, had no right to judicial review of administrative decisions regarding repatriation). But see *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (upholding the rights of the Haitian refugees), vacated as moot, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

⁶ Shafiq Rasul was released in March of 2004. Due to his release, the *Rasul* litigation on remand now bears the name of another litigant, *Al Odah*.

the more general question of the Constitution's extraterritorial scope.

The Government's position has been a simple one: the Constitution does not reach aliens detained outside of the United States. According to the Government, *Rasul* decided the question of jurisdiction only and did not address the question of whether detainees have any substantive rights that may be vindicated; and because petitioners are outside of U.S. territorial sovereignty, they are, as aliens without significant voluntary connections with the United States, without constitutional rights. Based on *Johnson v. Eisentrager*⁷ and *United States v. Verdugo-Urquidez*,⁸ two key Supreme Court precedents that seemingly foreclose the application of the Constitution to aliens abroad, the Government argues that the petitions must be dismissed, or judgment as a matter of law must be granted in the Government's favor.⁹ Petitioners argue conversely that the Supreme Court could not have intended this absurd result (i.e., that the district courts would take jurisdiction only to summarily dismiss the petitions)¹⁰ and that a careful reading of *Rasul* and its precedents make clear that petitioners are not "strangers to the Constitution,"¹¹ despite the historical reluctance

⁷ 339 U.S. 763 (1950).

⁸ 494 U.S. 259 (1990).

⁹ The Government argues that:

[*Rasul v. Bush*] did not overturn settled precedent that our Constitution affords no rights to aliens held abroad, or that the treaty and convention provisions relied upon by petitioners are somehow actionable in court; indeed, the Court expressly declined to address "whether and what further proceedings" would be appropriate after remand of the cases to the district court.

Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law & Memorandum in Support at 1, *Hicks v. Bush*, No. 02-CV-0299(CKK) (D.D.C. Oct. 4, 2004); *Al Odah v. United States*, No. 02-CV-0828(CKK) (D.D.C. Oct. 4, 2004); *Habib v. Bush*, No. 02-CV-1130(CKK) (D.D.C. Oct. 4, 2004); *Kurnaz v. Bush*, No. 04-CV-1135(ESH) (D.D.C. Oct. 4, 2004); *O.K. v. Bush*, No. 04-CV-1136(JDB) (D.D.C. Oct. 4, 2004); *Begg v. Bush*, No. 04-CV-1137(RMC) (D.D.C. Oct. 4, 2004); *Khalid v. Bush*, No. 04-CV-1142(RJL) (D.D.C. Oct. 4, 2004); *El-Banna v. Bush*, No. 04-CV-1144(RWR) (D.D.C. Oct. 4, 2004); *Gherebi v. Bush*, No. 04-CV-1164(RBW) (D.D.C. Oct. 4, 2004); *Boumediene v. Bush*, No. 04-CV-1166(RJL) (D.D.C. Oct. 4, 2004); *Anam v. Bush*, No. 04-CV-1194(HHK) (D.D.C. Oct. 4, 2004); *Almurbati v. Bush*, No. 04-CV-1227(RBW) (D.D.C. Oct. 4, 2004); *Abdah v. Bush*, No. 04-CV-1254(HHK) (D.D.C. Oct. 4, 2004), *consolidated sub nom. In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) [hereinafter Gov't Response Brief].

¹⁰ See Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss at 11, *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (Nos. 02-CV-0299(CKK), 02-CV-0828(CKK), 02-CV-1130(CKK), 04-CV-1135(ESH), 04-CV-1136(JDB), 04-CV-1137(RMC), 04-CV-1142(RJL), 04-CV-1144(RWR), 04-CV-1164(RBW), 04-CV-1166(RJL), 04-CV-1194(HHK), 04-CV-1227(RBW), 04-CV-1254(HHK), 04-CV-1519(JR)), *reh'g denied*, 355 F. Supp. 2d 482 (D.D.C. 2005) [hereinafter Pet. Joint Opposition Brief] (arguing that Guantánamo prisoners have constitutional rights to judicial relief).

¹¹ This phrase is borrowed from Gerald L. Neuman, on whose work much of the argument in this Article builds. See generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (discussing Guantánamo Bay and its relationship with the Constitution) [hereinafter NEUMAN, STRANGERS TO THE CONSTITUTION];

of U.S. courts to interfere with executive decisions involving military detention.

Two lower court judges have now weighed in on the question and issued separate and diametrically opposed opinions. On January 19, 2005, Judge Leon granted the Government's motion to dismiss in the two cases before him.¹² Twelve days later, Judge Green denied in part, and granted in part, the same motion in the other pending cases.¹³ Both decisions were appealed to the D.C. Circuit, and the cases were consolidated. Oral argument was heard on September 3, 2005. The appeal is pending.

Jurisprudence on the extraterritorial application of the Constitution has, for most of United States history, been dominated by a "strict territorial" approach that defines the reach of the U.S. Constitution as extending to "the water's edge" of U.S. sovereign territory, but not beyond. This approach derives from the "territoriality principle" at the foundation of the nation-state-based regime of international law: "[A] state occupies a definite part of the surface of the earth, within which it normally exercises . . . jurisdiction over persons and things to the exclusion of the jurisdiction of other states."¹⁴ In-

Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 *LOY. L. REV.* 1 (2004) (discussing issues of United States constitutional law and federal jurisdiction as it relates to the detention of foreign aliens in Guantánamo Bay) [hereinafter Neuman, *Closing the Guantánamo Loophole*].

¹² *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (refusing to grant a writ of habeas corpus to petitioners).

¹³ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 443 (D.D.C. 2005) (memorandum opinion). These decisions do not have equal weight, as Judge Green's ruling has effect in eleven of the originally pending cases and eight subsequently filed cases, while Judge Leon's only binds the two cases specifically before him. *See id.* (indicating that Judge Green's memorandum opinion applies to the following 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. 04-CV-1137RMV, CIV.A. 04-CV-1144RWR, CIV.A. 04-CV-1164RBW, CIV.A. 04-CV-1194HHK, CIV.A. 04-CV-1227RWB, CIV.A. 04-CV-1254HHK); *Khalid*, 355 F. Supp. 2d at 311 (indicating that Judge Leon's opinion applies to the following cases: Nos. CIV.1:04-1142(RJL), CIV.1:04-1166(RJL)). When the *Rasul v. Bush* decision remanded the originally filed previous petitions for reconsideration on the merits, they were re-filed in the District Court of the District of Columbia, along with new cases filed after the decision in June. By the end of July, more than sixty detainees' petitions were pending before eight judges. When the original petitions were re-filed, along with new petitions, the Government moved to consolidate the cases. *See Motion to Consolidate Cases & Memorandum in Support by George Walker Bush, Terry Carrico, Michael Lehnert, Donald Rumsfeld, Rasul v. Bush*, 124 S. Ct. 2686 (D.D.C. 2004) (Nos. 02-CV-00299-CKK; 02-CV-00828-CKK) (requesting that the cases be consolidated in the District Court). Despite the initial objections of petitioners, the motion to consolidate was granted, and the Calendar and Case Management Committee designated retired Judge Joyce Hens Green to manage and coordinate the proceedings, stating that she could rule on procedural and substantive issues that were common to the cases, if necessary. Any judge who did not agree with her substantive resolution could rule independently, but Judge Leon was the only one who elected to do so.

¹⁴ J. L. BRIERLY, *THE LAW OF NATIONS* 162 (Humphrey Waldock ed., 6th ed. 1963); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1986) ("[A] state has jurisdiction to prescribe law with respect to (1)(a) conduct that, wholly or in substantial part, takes place

ternational law also recognizes that states may exercise authority over their nationals beyond their territories, though U.S. law did not reflect this principle until 1957, with the seminal case of *Reid v. Covert*.¹⁵

Though, prior to *Rasul*, it had never been held that U.S. courts had jurisdiction to hear the *merits* of a habeas petition filed by an alien held outside the United States in military custody,¹⁶ *Rasul* instructed lower courts to do just that and seemed to recognize, in its tantalizing Footnote 15, at least the possibility that detainees possess constitutional rights. In Footnote 15, the Court stated that "petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" and then cited Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*.¹⁷ The majority opinion in *Verdugo-Urquidez* strongly affirmed a "strict territorial" analysis as to *aliens* outside the United States, while the concurring opinion laid out an alternative standard holding that the question of the Constitution's application to aliens abroad must be decided on a case-by-case basis taking into account the "conditions and considerations" that would make adherence to a particular constitutional provision "impracticable and anomalous."¹⁸ The standard put forward in Justice Kennedy's concurrence and affirmed in Footnote 15 draws on the rationale of the *Insular Cases* line of jurisprudence, a group of cases deciding that fundamental constitutional rights always apply in territories governed by the United States.¹⁹ Justice Kennedy's standard examines three factors: (i) the

within its territory; (b) the status of persons, or interests in things, present within its territory . . .").

¹⁵ 354 U.S. 1 (1957).

¹⁶ See, e.g., *In re Yamashita*, 327 U.S. 1 (1946) (reviewing the authority of a military tribunal); *Ex parte Quirin*, 317 U.S. 1 (1942) (reviewing the applicability of a presidential proclamation regarding military tribunals to particular individuals).

¹⁷ *Rasul v. Bush*, 124 S. Ct. 2686, 2698 n.15 (2004) (quoting 28 U.S.C. § 2241(c)(3) and noting support from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)).

¹⁸ *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

¹⁹ *Downes v. Bidwell* (The *Insular Cases*), 182 U.S. 244, 287 (1901). *The Insular Cases* is the collective epithet given to a line of cases decided after the conclusion of the Spanish-American War in 1898, when the United States began to acquire far-flung territories, such as Puerto Rico, Guam, and the Philippines which were seen as alien to U.S. culture (and perhaps "unfit" for statehood). With the *Insular Cases*, it became generally accepted that full constitutional rights would only apply in incorporated territories. In the unincorporated territories, by contrast, only "fundamental" constitutional rights would apply of their own force and courts would determine on an objective basis what relationship Congress had created with the territory. *Id.* at 268. The distinction between incorporated and unincorporated territories was coined by Justice White in his important concurrence in the first of the *Insular Cases*. *Id.* at 311-12 (White, J., concurring). The distinction turns on whether a territory is destined for statehood. Unincorporated territories are not recognized "as an integral part of the United States." *Id.* at 312. Since Alaska and Hawaii became states, the United States has held no incorporated territories.

nature of the government action, (ii) the nature of the relationship between the United States and the territory at issue, and (iii) the nature of the particular right at issue, all taken in light of the specific facts and circumstances of the case.²⁰

What does Footnote 15 really mean? Does it mean that petitioners must first prove that they are entitled to the protection of the Constitution, laws, or treaties of the United States in order to prevail? Or, does it mean that, if petitioners prove their factual allegations, they are entitled to prevail? Footnote 15 troubles the Government's argument that *Rasul* decided the question of jurisdiction only. However, since it does not provide a completely clear statement on the merits, petitioners have hesitated to rely on Footnote 15 solely and have argued in the alternative that Guantánamo detainees have common law rights that inhere in the habeas statute.²¹

The two lower courts have taken quite different views of Footnote 15. Judge Leon interpreted it as stating only that petitioners had met the pleading requirements for habeas and affirmed the doctrine of strict territoriality: "In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains 'the alien's presence within its territorial jurisdiction.'"²² In contrast, though noting that she would have "welcomed a clearer declaration in the *Rasul* opinion,"²³ Judge Green concluded that Footnote 15 shifted the center of precedential gravity from the majority opinion in *Verdugo-Urquidez* to Justice Kennedy's concurrence.²⁴ Drawing out the implication of that shift, Judge Green found in *Rasul* "an implicit, if not express, mandate to uphold the existence of fundamental rights" in Guantánamo Bay.²⁵ She thus rejected, in no un-

The Insular Cases thus established a doctrine according to which the applicability of the Constitution in U.S. sovereign territories not destined for statehood was decided on a case-by-case basis, taking into account the particular provision at issue and the nature of the relationship that Congress had established with the particular territory. Nonetheless, "fundamental rights" always applied. *The Insular Cases* are themselves still good law, even though their scope and meaning is debated.

²⁰ *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

²¹ Cf. 28 U.S.C. § 2241(c)(1) (2000) ("(c) The writ of habeas corpus shall not extend to a prisoner unless—(1) He is in custody under or by color of the authority of the United States . . .").

²² *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) (memorandum opinion and order) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950)).

²³ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (memorandum opinion).

²⁴ *Id.* at 463 ("This Court therefore interprets that portion of the opinion [(Kennedy's concurrence)] to require consideration of that precedent in the determination of the underlying rights of the detainees.")

²⁵ *Id.* at 461. In this analysis, Judge Green largely adopted the reasoning of the *Boumediene* petitioners, the appellants in the case decided by Judge Leon, who filed a supplemental brief before Judge Green. See *Boumediene & El-Banna Petitioners' Amended Supplemental Reply & Opposition to the Government's "Response to Petitions for Writ of Habeas Corpus & Motion to*

certain terms, the Government's contention that the Guantánamo detainees may be held at the sole discretion of the Executive and, following the rationale of the *Insular Cases*, recognized that alien detainees have fundamental constitutional rights under the Due Process Clause of the Fifth Amendment.²⁶

Through the lens of the Leon and Green opinions in the remand litigation, this Article examines the significance of *Rasul v. Bush* for jurisprudence on the extraterritorial reach of the United States Constitution, focusing particularly on *Rasul's* citation to Justice Kennedy's concurrence in *Verdugo-Urquidez* in Footnote 15. I argue that, while the *Rasul* court stopped just shy of deciding that detainees in Guantánamo Bay are entitled to the protection of the U.S. Constitution, that conclusion is implicit in the decision and follows necessarily from holding that Guantánamo Bay is within the "territorial jurisdiction" of the United States federal courts. Judge Green's opinion is thus the better-reasoned opinion because she correctly interprets the *Rasul* decision as suggesting a more expansive notion of constitutional extraterritoriality, through its acknowledgement of Justice Kennedy's *Verdugo-Urquidez* concurrence and through its adoption, throughout the decision, of an analytical framework consistent with Justice Kennedy's approach. Though not directly deciding the question, *Rasul* has general implications for jurisprudence on the extraterritorial reach of the Constitution because it analytically disaggregates "sovereignty" and "control" as the trigger of attachment of constitutional rights.

Part I examines the alternative holdings in *Verdugo-Urquidez* in more detail and explains their collective bearing on *Rasul*. Part II argues that the choice between the majority or concurring opinions in *Verdugo-Urquidez* represents a choice between two different theoretical rationales for extraterritorial effect—membership versus mutuality-of-obligation—one of which more easily encompasses the Guantánamo detainees. Part III situates the *Verdugo-Urquidez* alternatives in the history of the evolving doctrine on the Constitution's extraterritorial effect. This Part shows that Justice Kennedy's approach continues a trend developed in the lower courts of applying *Insular Cases*-type reasoning to situations like the Canal Zone, where the United States exerts near complete control and jurisdiction but is not technically sov-

Dismiss or for Judgment as a Matter of Law" at 31–36, *Khalid*, 355 F. Supp. 2d 311 (Nos. 04-CV-1166 (RJL), 04-1144(RJR)) (stating that under the *Rasul* and *Verdugo-Urquidez* reasoning, the petitioners are entitled to fundamental constitutional protections).

²⁶ *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463–64. Judge Green also found that the procedures implemented by the government to confirm "enemy combatant" status violated petitioners' rights to due process, and that at least some detainees had stated valid claims under the Third Geneva Convention. She dismissed petitioners' remaining constitutional and statutory claims. *Id.*

ereign.²⁷ Part IV examines *Rasul v. Bush* in light of Judge Green's and Judge Leon's opinions and argues that Judge Green offers a reading that better takes account of the explicit pronouncements in *Rasul* on the territorial status of Guantánamo Bay. Part V briefly outlines an alternative rationale for Justice Kennedy's approach in light of the new realities of the global war on terrorism, as defined by the Government in the *Rasul* remand litigation.²⁸ In addition to considering, as Justice Kennedy does, the balancing question of what "process" is "due" in a given situation, courts considering the extraterritorial effect of the Constitution should factor into their due-process balancing the extent to which the Executive is acting in conformity with applicable international law.

I. FOOTNOTE 15 AND THE VERDUGO-URQUIDEZ KNOT

In a holding mainly concerned with the threshold question of jurisdiction, the *Rasul* majority made a remark in Footnote 15 that appeared to go to the merits of petitioners' claims. In citing to the concurring, rather than majority, opinion in *United States v. Verdugo-Urquidez* "and cases cited therein,"²⁹ the Court wrote:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *Cf. United*

²⁷ See *Downes v. Bidwell* (The Insular Cases), 182 U.S. 244 (1901) (holding that Puerto Rico became a territory of the United States, but not a part of the United States as considered under the Revenue Clauses of the Constitution); *Armstrong v. United States*, 182 U.S. 243 (1901) (holding that Puerto Rico was a foreign country while occupied by the United States military before its succession to the United States); *Goetze v. United States*, 182 U.S. 221 (1901) (holding that Puerto Rico and the Hawaiian islands were not foreign countries within the meaning of a tariff law); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that Puerto Rico was no longer considered a "foreign country" within the meaning of tariff laws after it was acquired by the United States by treaty with Spain).

²⁸ A note in light of the oral argument: It now appears possible that the appeal may be decided without reaching the constitutional issue, as the Court appeared open to the common law argument advanced by the *Al Odah* team. Petitioner's argument in the alternative is that, even if the U.S. Constitution does not apply in Guantánamo Bay, detainees have common law rights that inhere in habeas. See generally Transcript of Oral Argument at 3–21, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03–334, 03–343) (discussing the statutory interpretation of the habeas statute and other questions posed by the Court). This argument turns on § 2241(c)(1) of the habeas statute and is independent of the constitutional question. However, in the event that the Government loses in the appeals court, it will almost certainly appeal to the Supreme Court and likely will raise the constitutional issue there.

²⁹ *Rasul*, 124 S. Ct. at 2698 n.15.

States v. Verdugo-Urquidez, 494 U.S. 259, 277–278 (1990) (Kennedy, J., concurring), and cases cited therein.³⁰

In her subtle analysis, which I will discuss in more detail later, Judge Green pointed to this language as “the strongest basis for recognizing that the detainees have [a] fundamental right[] to due process.”³¹ She noted that it “stands in sharp contrast to the declaration in *Verdugo-Urquidez* relied upon by the D.C. Circuit in *Al Odah* that the Supreme Court’s ‘rejection of extraterritorial application of the Fifth Amendment [has been] emphatic.’”³² The “declaration” referred to here by Judge Green occurred in the *Verdugo-Urquidez* majority opinion, where Justice Rehnquist, while discussing the World War II-era case *Johnson v. Eisentrager*,³³ stated, “our rejection of extraterritorial application of the Fifth Amendment was emphatic.”³⁴ Justice Rehnquist then quoted, in full, this passage from *Eisentrager*:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view . . . None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.³⁵

Eisentrager was a key case in the pre-*Rasul* Guantánamo litigation, providing petitioners with an especially difficult hurdle to overcome. Lower courts initially dismissed petitioners’ claims, interpreting *Eisentrager* to stand for the proposition that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’”³⁶ The *Verdugo-Urquidez* majority’s apparent endorsement of *Eisentrager*’s strong language—and its own even stronger gloss—apparently seems to have led the Government to believe that Guantánamo Bay would be beyond judicial scrutiny.³⁷ Consequently, the *Rasul* majority’s decision to cite to the concurrence in *Verdugo-Urquidez*, rather than the majority, must have come as an unpleasant surprise to the Government’s lawyers.

³⁰ *Id.*

³¹ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. 443, 463 (D.D.C. 2005).

³² *Id.* (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)).

³³ 339 U.S. 763 (1950).

³⁴ *Verdugo-Urquidez*, 494 U.S. at 269.

³⁵ *Eisentrager*, 339 U.S. at 784–85.

³⁶ *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003) (quoting *Eisentrager*, 339 U.S. at 777–78). The current litigation on the question of detainees in Guantánamo Bay began in 2002 with two lawsuits filed on behalf of a mixed group of British and Australian citizens (*Rasul v. Bush*, No. 02-CV-0299) and a group of Kuwaiti citizens (*Al Odah v. Bush*, No. 02-CV-0828).

³⁷ Cf. Memorandum for William J. Haynes, II, *supra* note 5 (relying, inter alia, on *Verdugo-Urquidez* and *Eisentrager*).

Judge Green's interpretation of *Rasul*, finding that petitioners do have protectable constitutional rights, requires the kind of close reading usually reserved for literary texts; but she is nonetheless correct. To understand why, we have to begin by reviewing the holdings in *Verdugo-Urquidez*.

A. *The Verdugo-Urquidez Opinions*

In *Verdugo-Urquidez*, the Court considered the case of Rene Martin Verdugo-Urquidez, a Mexican citizen, who was seized in Mexico by Mexican authorities and transported to the United States for narcotics-related offenses.³⁸ After his arrest, an agent of the U.S. Drug Enforcement Agency ("DEA") arranged to search Verdugo-Urquidez's Mexican residence for evidence implicating him in narcotics trafficking, and also in the torture and murder of a DEA Special Agent.³⁹ Though the DEA received the cooperation of the Mexican Federal Judicial Police, it did not have an American warrant authorizing the searches, and Verdugo-Urquidez sought to suppress the evidence as an illegal search and seizure under the Fourth Amendment.⁴⁰

1. *The Majority Opinion: Reaffirming Eisentrager*

Reasoning that any violation of the Fourth Amendment would have occurred at the time of the illegal search in Mexico, Justice Rehnquist's majority opinion categorically denied Verdugo-Urquidez's Fourth Amendment claims, interpreting the Fourth Amendment's reference to "the people" as embracing only the "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."⁴¹ Justice Rehnquist then invoked the *Insular Cases* to stand for the proposition that "not every constitutional provision applies to governmental activity even where the United States has sovereign power."⁴² He then tacitly invoked the no-

³⁸ *Verdugo-Urquidez*, 494 U.S. at 262.

³⁹ *Id.*

⁴⁰ *Id.* at 262–63.

⁴¹ *Verdugo-Urquidez*, 494 U.S. at 265 ("Excludable alien is not entitled to First Amendment rights, because '[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law'" (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (alteration in original))). In support of this reading, the majority noted that the Fourth Amendment uses the term "the people," whereas the Fifth and Sixth Amendments refer to "person" and "accused" respectively. *Verdugo-Urquidez*, 494 U.S. at 265–66.

⁴² *Id.* at 268.

tion of a scale⁴³ of constitutional rights, and concluded that non-resident aliens must be one step removed from the territories in constitutional status.⁴⁴ If not every constitutional provision applies, even with respect to territories "ultimately governed by Congress,"⁴⁵ the claim that the Fourth Amendment protects aliens abroad is "even weaker."⁴⁶

Justice Rehnquist's majority does not just reaffirm the holding in *Johnson v. Eisentrager*, but as Judge Green noted in her opinion, it also draws heavily on its reasoning.⁴⁷ For both of these reasons, *Eisentrager* and *Verdugo-Urquidez* are intertwined cases.

The facts and holding of *Eisentrager* may be briefly summarized. In *Eisentrager*, "[t]wenty-one German nationals petitioned the District Court of the District of Columbia for writs of *habeas corpus*."⁴⁸ Whether they were in the service of civilian or military agencies of the German government was disputed; nonetheless they were "convicted of violating the laws of war" by "collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces" after the surrender of the German High Command.⁴⁹ After their conviction, the Germans were repatriated to Landsberg Prison, from which they made their appeal.

Writing for the majority, Justice Jackson began by distinguishing between citizens and aliens and between enemy aliens and alien friends.⁵⁰ He invoked "the citizen" only "to take measure of the dif-

⁴³ *Id.* at 269 (noting the *Eisentrager* opinion's acknowledgment that "[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society" (quoting *Eisentrager*, 339 U.S. at 770)).

⁴⁴ *Verdugo-Urquidez*, 494 U.S. at 270-71.

⁴⁵ *Id.* at 268.

⁴⁶ *Id.*

⁴⁷ See *infra* Parts II.B-III (discussing *Verdugo-Urquidez* which refers extensively to the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

⁴⁸ *Eisentrager*, 339 U.S. at 765.

⁴⁹ *Id.* at 766. *Eisentrager* petitioners were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theatre, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government and involved no international authorities. *Id.*

⁵⁰ The Court defined the terms as follows: "In the primary meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States." *Id.* at 769 n.2. Justice Jackson made a clear distinction between the citizen and "all categories of aliens," *id.* at 769, but at the same time noted that "[i]t is war that exposes the relative vulnerability of the alien's status [D]isabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage." *Id.* at 771-72. Justice Jackson cited Judge Cardozo on this distinction: "Much of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects." *Id.* at 772 (quoting *Techt v. Hughes*, 128 N.E. 185, 189 (N.Y. 1920)).

ference between his status and that of all categories of aliens.”⁵¹ Justice Jackson argued that rights are predicated on citizenship status, as there is a “generous and ascending scale of rights” available to the alien “as he increases his identity with our society,” from “[m]ere lawful presence in the country” to a stated “intention to become a citizen” to “full citizenship upon naturalization.”⁵² On this scale of rights, Justice Jackson located non-resident “enemy aliens” between resident enemy aliens, who were subject to the recently affirmed Enemy Alien Act, and members of the American military, who, by virtue of their service, were not entitled to the same due process protections as other citizens.⁵³ Since the resident enemy alien could constitutionally be subject to arrest, internment, and deportation whenever a “declared war” exists, courts ought to review his “plea for freedom from Executive custody” only so far as to determine whether a state of war exists and whether he is *in fact* an enemy alien.⁵⁴ But, in noting that courts have afforded resident enemy aliens this “privilege of access to our courts,”⁵⁵ Justice Jackson was careful to observe that “the Court has been at pains to point out that it was the alien’s *presence within its territorial jurisdiction* that gave the Judiciary power to act.”⁵⁶

Because non-resident aliens have only this “qualified” right of access to courts, it followed according to the sliding scale that *non-resident* aliens must have even *fewer* rights than resident aliens.⁵⁷ Justice Rehnquist’s majority opinion in *Verdugo-Urquidez* recasts *Eisen-trager*’s scale as the requirement that an alien (even one brought inside U.S. sovereign territory for criminal prosecution) must have a

⁵¹ *Eisen-trager*, 339 U.S. at 769. Justice Jackson further notes that “[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen’s claims upon his government for protection.” *Id.*

⁵² *Id.* at 770.

⁵³ *Id.* at 775–76.

⁵⁴ *Id.* at 775. The Court added that, “[o]nce these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.” *Id.* (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948)). The statute affirmed in *Ludecke*—the Alien Enemy Act of 1798—imposes a guilt-by-association on all those who are citizens of nations with whom the United States is at war. See generally 50 U.S.C. § 21 (2000) (authorizing the President to classify or take action against alien enemies during a time of war or time of invasion).

⁵⁵ *Eisen-trager*, 339 U.S. at 776.

⁵⁶ *Id.* at 771 (emphasis added). For example, in *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment: “These provisions are universal in their application, to *all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality” *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

⁵⁷ *Eisen-trager*, 339 U.S. at 776. As for military personnel, Jackson noted that those defending the country from enemy aliens are not protected by the Fifth Amendment, and reasoned by comparison: “It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies.” *Id.* at 783.

"significant voluntary connection" with the United States before the U.S. Constitution might apply abroad in his favor.⁵⁸

2. Justice Kennedy's Concurrence: Contextual Due Process

In his concurrence, Justice Kennedy agreed that the search of Verdugo-Urquidez's Mexican residence did not violate the Fourth Amendment, but he set out a very different rationale for his decision by outlining a contextual, nuanced framework in contrast to the majority's bright line rule.⁵⁹ Like the majority, Justice Kennedy found the reasoning of the *Insular Cases* relevant. However, unlike the majority, he found *Reid v. Covert*, a case that adapted the case-by-case reasoning of the *Insular Cases* to the situation of citizens abroad, to be relevant as well. In *Reid v. Covert*, six Justices agreed that civilian dependents of military personnel abroad were not subject to courts-martial jurisdiction in times of peace for capital offenses, but two distinct rationales were advanced. The plurality opinion sought to extend the protections and limitations of the Constitution to all situations in which the U.S. government acted on citizens, whether at home or abroad.⁶⁰ Justice Harlan, in a separate concurrence, argued that, although the Constitution was always and everywhere applicable, not all provisions applied under all circumstances.⁶¹ Though the *Verdugo-Urquidez* majority said that, as an alien, Verdugo-Urquidez could "derive no comfort from the *Reid* holding,"⁶² Justice Kennedy signaled his readiness to extend *Reid's* analytical framework (which itself extended the logic of the *Insular Cases*) to encompass situations dealing with aliens abroad.⁶³

Justice Kennedy began his analysis with the *Reid* plurality's assertion⁶⁴ that the government cannot act other than as the Constitution

⁵⁸ United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

⁵⁹ See generally *id.* at 275–78 (Kennedy, J., concurring) (providing a general framework for the distinction between citizens and aliens and the application of constitutional rights).

⁶⁰ *Reid v. Covert*, 354 U.S. 1, 5–6 (1957).

⁶¹ See *Reid*, 354 U.S. at 70–77 (Harlan, J., concurring) (discussing examples of limited applicability). Justice Frankfurter also wrote a separate concurrence, in which he noted that to the extent that *In re Ross* expressed a notion that the Constitution is not operative outside of the United States (defined as "all lands over which the United States flag flew," *Reid*, 354 U.S. at 56 (Frankfurter, J., concurring)), "it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution—for example, proceedings before American military tribunals, whether in Great Britain or in the United States, are subject to the applicable restrictions of the Constitution." *Id.* at 56 (citing *Burns v. Wilson*, 346 U.S. 137 (1953)).

⁶² *Verdugo-Urquidez*, 494 U.S. at 270.

⁶³ *Id.* at 276 (Kennedy, J., concurring).

⁶⁴ Given that Kennedy begins with an assumption from the plurality opinion in *Reid*, it should be noted that the opinion is devoted in large measure to a discussion of the relationship between military power and civilian authority. Much of the plurality's decision is concerned

authorizes.⁶⁵ He then fused that proposition with the view of the concurrences in *Reid* that the application of the Constitution to U.S. citizens abroad should be decided on a case-by-case basis⁶⁶ and arrived at a brief, though sweeping, reinterpretation of the *Insular Cases*, *Reid v. Covert*, and two other cases, *In re Ross*⁶⁷ and *United States v. Curtiss-Wright Export Corp.*,⁶⁸ in which he concluded that they all “stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”⁶⁹ Justice Kennedy quoted, in its entirety, the following language from Justice Harlan’s *Reid* concurrence:

I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would

with the appropriateness of military justice for civilians. Noting that “military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts,” *Reid*, 354 U.S. at 39 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)), the Court found that military trial of civilians could only be justified “in the field,” defined as “an area of actual fighting,” pursuant to Article 2(10) of the Uniform Code of Military Justice. *Reid*, 354 U.S. at 34 n.61. The plurality rejected the Government’s “war powers” argument that “present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way.” *Id.* at 35. The plurality regarded the question as implicating the separation of powers and challenging “this nation’s tradition of keeping military power subservient to civilian authority,” *Id.* at 40.

If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

Id. at 38–39.

⁶⁵ See *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (stating that the U.S. government may only act in accordance with the Constitution either domestically or in the foreign realm).

⁶⁶ *Id.* at 277–78 (citing *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

⁶⁷ 140 U.S. 453 (1891).

⁶⁸ 299 U.S. 304 (1936).

⁶⁹ *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

make adherence to a specific guarantee altogether impracticable and anomalous.⁷⁰

In applying Harlan's standard that specific "conditions and considerations" should not make "adherence" to any particular constitutional guarantee altogether "impracticable and anomalous,"⁷¹ Justice Kennedy did not categorically conclude that Verdugo-Urquidez, as an alien, generally had no constitutional rights, but rather looked to the specifics of the instant situation:

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.⁷²

B. *The Verdugo-Urquidez Dissents*

The two dissents in *Verdugo-Urquidez*, one authored by Justice Brennan and the other by Justice Blackmun, have acquired persuasive authority among commentators and are relevant by contrast. Their common denominator revolves around the idea that the Constitution limits U.S. actions when the United States is attempting to enforce its domestic criminal laws—even with respect to aliens abroad without "voluntary contacts."⁷³ Justice Brennan's view goes even further. He would have adopted the view that was expressed in

⁷⁰ *Id.* at 277–78 (citing *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

⁷¹ *Id.* at 278.

⁷² *Id.* In deciding the issue in the negative, Justice Kennedy did not elaborate on the three considerations implicit in his conclusion. In mentioning first, "[t]he absence of local judges or magistrates available to issue warrants," *id.*, his concern is unclear since what was at issue was an *American* warrant. Such a warrant would have had no legal effect, as the lower court noted, but "it would [have] reflect[ed] a magistrate's determination that there existed probable cause to search and would [have] define[d] the scope of the search." *Id.* at 263–64 (majority opinion) (citing *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1230 (9th Cir. 1988)). The second consideration Justice Kennedy mentions is the "differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad," *id.* at 278 (Kennedy, J., concurring), which might be more broadly glossed as cultural difference. The suggestion seems to be that where local cultural notions of privacy differ from dominant U.S. standards (either being greater, lesser, or perhaps different altogether), the standards for issuing a warrant would presumably differ correspondingly. Justice Kennedy, however, offered no discussion of Mexican standards of privacy. His description of these conceptions of reasonableness and privacy as "perhaps unascertainable," *id.*, suggests that, at least in certain circumstances, a court would be forgiven for not trying too hard to take them into account. The third consideration Justice Kennedy mentions is "the need to cooperate with foreign officials," which he states without further elaboration. *Id.*

⁷³ *Id.* at 282 n.5 (Brennan, J., dissenting) (citing *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) (Brennan, J., dissenting)); *Id.* at 297 (Blackmun, J., dissenting) (stating that when a foreign national is held accountable for violations of U.S. law, he ought to receive Fourth Amendment protections).

Reid's plurality decision: the Constitution limits *all* actions of the federal government abroad, even when acting upon aliens.⁷⁴

C. A Plurality Opinion?

What makes *Verdugo-Urquidez* such a knot of a decision is the fact that Justice Kennedy wrote a separate opinion on one hand, yet maintained that he did not “believe . . . [that his views] depart[ed] in fundamental respects from the opinion of the Court.”⁷⁵ Had Justice Kennedy not joined the majority in this regard, *Verdugo-Urquidez* would have instead been a plurality opinion and Justice Kennedy’s concurrence would have been the holding under the rule of *Marks v. United States*.⁷⁶ Although *Verdugo-Urquidez* is not technically a plurality opinion, it has sometimes been regarded as one because Justice Kennedy’s concurrence articulates an alternative rationale for the holding that is nearly irreconcilable with the majority’s rationale. Because of the unusual distribution of judgments in *Verdugo-Urquidez*, commentators have not agreed on its precise significance.⁷⁷

⁷⁴ *Id.* at 285–86 (Brennan, J., dissenting) (arguing that since we exhort other nations to follow our example in granting constitutional protections against unlawful searches and seizures, we ought to follow these ideals ourselves).

⁷⁵ *Id.* at 275 (Kennedy, J., concurring).

⁷⁶ In a plurality decision, the general interpretive rule is that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). See generally Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL’Y 261 (2000) (describing the “narrowest grounds test” as articulated in *Marks*). While Justice Kennedy’s opinion could be said to be narrower than the plurality’s opinion, since his analysis only holds that the Fourth Amendment right against unwarranted search and seizure does not apply to aliens in *Mexico*, it could also be said to be broader because it extends the reach of the Constitution further than the majority opinion. *Verdugo-Urquidez*, 494 U.S. at 275–78 (Kennedy, J., concurring). The D.C. Circuit has criticized the *Marks v. United States* plurality rule for being unclear:

Marks is workable—one opinion can be meaningfully regarded as “narrower” than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.

King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). *Verdugo-Urquidez* would seem to fit this category: a case in which one opinion cannot meaningfully be regarded as narrower than another. Moreover, the Supreme Court itself does not always follow *Marks*. See, e.g., Hochschild, *supra*, at 282 (noting “that the Court has not applied the *Marks* rule in all appropriate circumstances”). In *Nichols v. United States*, the Court noted the confusion in the lower courts on applying *Marks* and said it would “not [be] useful” to apply the *Marks* test to “the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.” *Nichols v. United States*, 511 U.S. 738, 745–46 (1994); see also Hochschild, *supra*, at 280 (describing “the [Supreme] Court[’s] [having] . . . conceded the *Marks* test’s limited applicability to plurality decisions” in *Nichols*).

⁷⁷ Compare LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 307 (2d ed. 1996) (concluding that “after *Verdugo*, foreign nationals abroad may not succeed even with some con-

stitutional claims that lower courts had previously recognized"), with 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.1(i) (3d ed. 1999) ("But, because the three dissenters [in *Verdugo-Urquidez*] agreed that the Fourth Amendment applies whenever 'a foreign national is held accountable for purported violations of the U.S. criminal laws,' while two concurring Justices placed great emphasis upon the inapplicability of the Fourth Amendment's warrant clause to the search in the instant case, the application of *Verdugo-Urquidez* to a foreign search of an alien's property made even without probable cause is less than clear." (quoting *Verdugo-Urquidez*, 494 U.S. at 297)). See generally Neuman, *Closing the Guantanamo Loophole*, *supra* note 11, at 46–47 (discussing the different analyses and narrow holding of the majority opinion in *Verdugo-Urquidez*).

Some circuits have interpreted *Verdugo-Urquidez* very narrowly, while others, including the D.C. Circuit, have interpreted it as a broad prohibition against the extraterritorial reach of the Constitution to aliens abroad. The Second and the Third Circuits have recognized the limited nature of the *Verdugo-Urquidez* holding. See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342–43 (2d Cir. 1992) (holding that the Fifth Amendment is applicable to non-enemy aliens who were brought to, and detained in, Guantánamo Bay); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991) (stating that *Verdugo-Urquidez* does not apply to Fifth Amendment rights). Other circuits have recognized *Verdugo-Urquidez* as standing for the more sweeping proposition that non-resident aliens are categorically never entitled to Fourth (or Fifth) Amendment rights. In *Harbury v. Deutch*, the D.C. Circuit applied the harsh rule of *Verdugo-Urquidez* strictly and held that the Fifth Amendment does not protect foreign nationals who are tortured outside the United States by informants hired by the CIA. *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002). In *Harbury*, the court recognized that the Supreme Court's remarks about *Eisenstrager* in *Verdugo-Urquidez* constitute dictum, but nevertheless held that "it is firm and considered dicta that binds this court." 233 F.3d at 604 (relying on *United States v. Oakar* for the proposition that "[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative" (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997))); see also *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (holding that a foreign agency without property or presence in this country has no constitutional rights); *People's Mojahedin Org. of Iran v. U.S. Dep't. of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("[F]oreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) ("[N]on-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States."). In the recent D.C. Circuit cases about the Guantánamo detainees, petitioners and respondents briefed the question of whether *Verdugo-Urquidez* is a plurality opinion, but this technical question figured little in the opinions. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 322 (D.D.C. 2005) (failing to discuss whether or not *Verdugo-Urquidez* is a plurality opinion); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005) (relying on the citation of Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring), by the majority opinion in *Rasul v. Bush*, 124 S. Ct. 2686, 2698 n.15 (2004), as a basis for recognizing that detainees have fundamental due process rights).

It is unclear whether the majority opinion in *Verdugo-Urquidez* would have five votes from the current Court. The five Justices supporting the majority opinion in *Rasul* implicitly endorsed Justice Kennedy's concurrence. *Id.* at 2698 n.15 (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 277–78, to support petitioner's allegation that he was being held prisoner outside the United States in violation of the Constitution). Also, Justice Kennedy himself wrote a separate concurrence in *Rasul* in which he seemed to apply his own framework to reach the same conclusion through different reasoning. *Id.* at 2699. His subtle discussion of *Eisenstrager* suggests that he does not see it as standing for the strict principle articulated in the *Verdugo-Urquidez* majority that the Fifth Amendment can never apply to aliens extraterritorially. See *supra* Part I.A.2 (discussing Justice Kennedy's theory on extraterritorial application of the Con-

II. THEORETICAL ALTERNATIVES

Because the *Verdugo-Urquidez* majority opinion and Justice Kennedy's concurrence differ sharply on the theoretical rationale underlying the *Verdugo-Urquidez* holding, the choice between the two opinions has profound consequences for jurisprudence on the reach of the Constitution. They represent variants on two fundamental approaches that have shaped the evolving doctrine on extraterritoriality. These approaches have been termed the "membership" and "mutuality of obligation" approaches,⁷⁸ and they involve the conceptual means by which the Constitution is thought to attach to a given individual, whether citizen or alien, either by giving him or her substantive rights or by limiting the actions that the Government may take in acting upon him or her. The "membership" approach looks for indicia of belonging, such as citizenship and sovereignty, whereas the "mutuality of obligation" approach sees "control" or "jurisdiction" as a trigger of rights necessary to temper authority within the rule of law.

These competing approaches reflect different *rationales* for legal conclusions, about which there has been a consensus for most of U.S. history. At the conclusion of the nineteenth century, the question of the extraterritorial application of the Constitution was governed by the prevailing doctrine of strict territoriality, which defined the reach of the Constitution as extending to "the water's edge" of U.S. sovereign territory, but not beyond.⁷⁹ Though this interpretation is not inscribed in the Constitution,⁸⁰ it was generally thought that neither citizens nor aliens could invoke the protections of the Constitution

stitution). Even if Justice Alito and Justice Roberts side with the conservatives, there may be five votes favoring Justice Kennedy's *Verdugo-Urquidez* concurrence.

⁷⁸ This useful distinction is borrowed from the work of Gerald L. Neuman. For further discussion about the membership and mutuality of obligation approaches, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 917–18 (1991) [hereinafter Neuman, *Whose Constitution?*].

⁷⁹ See *In re Ross*, 140 U.S. 453, 464 (1891) ("The Constitution can have no operation in another country.").

⁸⁰ Nowhere in the Constitution is it explicitly written that when the United States acts abroad, it may do so unhindered by constitutional limitations. Constitutional scholar Alexander Bickel wrote that "the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen." Alexander M. Bickel, *Citizen or Person? What Is Not Granted Cannot Be Taken Away*, in THE MORALITY OF CONSENT 31, 36 (1975). In fact, the scope of the Constitution is not clear from its plain text. Some provisions refer only to the several states, such as the Privileges and Immunities Clause, and Full Faith and Credit Clause. U.S. CONST. art. IV, §§ 1, 2. Some provisions, like the Uniformity Clause, refer to the "United States." U.S. CONST. art. 1, § 8, cl. 4. Most provisions of the Bill of Rights refer, more generally, to "the people," or to persons. For example, the Tenth Amendment reserves nondelegated powers to "the people." U.S. CONST. amend. X.

outside of U.S. *sovereign* territory.⁸¹ In the case of aliens living in the United States (who are protected by the Constitution because of their presence in the United States and compliance with its laws) and of the insular territories (which are protected by the Constitution because the United States is sovereign over them and because the United States exerts unlimited power over them), these two approaches have been analytically overlapping because they have been applied only in cases where U.S. sovereign territory is at issue.

Although these two approaches have been analytically overlapping, they are not necessarily so. Nothing in the "mutuality of obligation" approach restricts its application to U.S. sovereign territories, since the predicate of the analysis is control. The insular territories are not *part* of the United States for constitutional purposes, even though they are locations to which sovereign control has been ceded to the United States; Justice Kennedy is correct in seeing the *Insular Cases* as belonging to the body of extraterritorial jurisprudence and standing for the proposition that the U.S. Constitution extends, on a provision-by-provision basis, to territories over which the United States exercises exclusive jurisdiction and control.⁸²

A. *Two Approaches*

1. *The "Membership" Approach*

In the "membership" view, the reach of the Constitution is limited by the scope of the social contract: the act of social consensus that leads to the formation of the government, as represented by the written Constitution. Constitutional rights flow from this original act on the part of "We the People of the United States."⁸³ This approach regards some individuals or locations as having a "privileged relationship with the constitutional project,"⁸⁴ by virtue of status or territorial relation, and therefore as being entitled to the Constitution's benefits.

This approach lends itself to a "bright line" analysis, in which certain individuals (citizens) or locations (territorial United States and incorporated territories) are accorded the full protection of the Con-

⁸¹ International law recognizes the right of states to exercise domestic law over their own nationals, but the question of whether the U.S. Constitution limits the state in exercising its law is purely a domestic law question.

⁸² The Constitution does not extend of its own force to the territories, but depends on the relation established by Congress. See *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (noting that Congress does not need to subject power exercised overseas to the Constitution).

⁸³ U.S. CONST. pmbl.

⁸⁴ Neuman, *Closing the Guantánamo Loophole*, *supra* note 11, at 6.

stitution. The “membership” view is ambivalent about whether status or location is the determining factor; thus, strict territoriality is, in one sense, a “membership” view, because it restricts the Constitution’s applicability to a privileged location. But status is also central—the Government is a government for *citizens*—so the “membership” approach also means that the protections of the Constitution may follow citizens as they travel abroad (when acted on by the U.S. government).⁸⁵

This approach conceives of the Constitution as a “club” that some people belong to and others do not, or as a magic circle that throws its protection over all those individuals who step inside it. Proponents of this perspective focus on “sovereignty” as a matter of ownership and citizenship as a matter of the privilege: Does this territory belong within the magic circle? Is this individual in the club? Because in every generation since the revolutionary period, the social contract is a legal fiction (because no citizen actually assented to its formation), sovereignty and citizenship have become the surrogates for the legitimacy that the social contract is supposed to provide for governmental authority.

2. The “Mutuality of Obligation” Approach

Because the United States is explicitly founded on the idea of the social contract, the “membership” view has tended to dominate discussions of the Constitution’s reach whenever citizens are involved. But when it comes to the question of whether aliens within the United States should be protected by the Constitution, or whether the government’s action should be limited when it acts in territories not yet part of the United States or not intended to become part of the United States, then the analysis frequently focuses on “mutuality of obligation.”

In the “mutuality of obligation” approach, rights flow to individuals as the necessary correlates of the government’s exercise of political or legal power over them.⁸⁶ This approach regards constitutional rights and limitations as necessary to justify the exercise of governing power and therefore extends those rights and limitations to persons or places that become subject to the governing power of the United States. In the first of the *Insular Cases*, the Supreme Court acknowledged “a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation, in which the natural rights of territories, or their inhabitants, may be engulfed in a

⁸⁵ *Reid*, 354 U.S. at 12 (noting that the Constitution applies to citizens abroad).

⁸⁶ See Neuman, *Closing the Guantánamo Loophole*, *supra* note 11, at 7 (describing the mutuality of obligation approach).

centralized despotism,"⁸⁷ and noted that the Constitution prevented such despotic rule by guaranteeing inhabitants of unincorporated territories fundamental rights.⁸⁸

While susceptible to another sort of bright line approach, in which the full complement of constitutional protections is in effect wherever the United States exercises its power and authority ("the Constitution follows the flag"⁸⁹), the "mutuality of obligation" approach has more often lent itself to the case-by-case balancing found in the *Insular Cases*, where the status of the territory and the particular power being applied are both considered in evaluating which *particular* constitutional rights may apply in *particular* circumstances.⁹⁰ By the logic of this approach, *both* aliens and citizens living in unincorporated territories are entitled to the same (reduced) constitutional protection. The "mutuality of obligation" is also evident in the line of cases recognizing that aliens living lawfully in the United States are entitled to the Constitution's protection.⁹¹ Though traditional nation-state boundaries have tended to define the scope of the "mutuality of obligation" approach, as well as the scope of the "membership" approach, the former approach places more emphasis on control or jurisdiction, rather than notions of technical sovereignty. As is evident in *Downes v. Bidwell*, the attachment of rights ensures that non-citizens who come willingly or unwillingly under the control of the

⁸⁷ *Downes v. Bidwell*, 182 U.S. 244, 280 (1901). *Downes* was a plurality opinion, but Justice White seems to have achieved a majority for his approach. See *id.* at 286–87 (presenting an argument by Justice Brown that is mimicked by Justice White in his concurrence); *id.* at 287 (White, J., concurring) (stating that Justice Shiras and Justice McKenna concur in Justice White's concurrence); *id.* at 345 (Gray, J., concurring) ("in substance agreeing with the opinion of Mr. Justice White").

⁸⁸ *Id.* at 291. There is some uncertainty in the *Insular Cases* as to whether fundamental rights derive from the Constitution or from natural law. *Id.* In any event, fundamental rights represent a baseline constraint on governmental action. See Neuman, *Whose Constitution?*, *supra* note 78, at 964 (attributing limited rights that derive from the Constitution to unincorporated territories); Jon M. Van Dyke, *The Evolving Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 511 (1992) (describing Congress's ability to determine which territories are incorporated and thus protected by constitutional rights).

⁸⁹ *In re Yamashita*, 327 U.S. 1, 47 (1946).

⁹⁰ *Downes*, 182 U.S. at 279 (discussing the case-by-case balancing analysis).

⁹¹ Because resident aliens have willingly taken on obligations and have willingly subjected themselves to our legal system, they are thought to have "earned" the protection of the Constitution. For an early version of the reasoning underlying this argument, see James Madison, *Report on the Virginia Resolutions*, in 4 DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Company, 2d ed. 1891), stating

But a more direct reply is, that it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

Id.

United States are not subject to untrammelled power.⁹² Thus, though historically applied by the Supreme Court only with respect to U.S. sovereign territories, the logic of the “mutuality of obligation” approach lends itself to extraterritorial application, as can be seen in the *Verdugo-Urquidez* dissents.⁹³

B. *The Verdugo-Urquidez Alternatives*

Verdugo-Urquidez throws these theoretical alternatives into sharp relief. With its reliance on the language of the Fourth Amendment, the majority opinion in *Verdugo-Urquidez* elaborates a strong “membership” approach, while Justice Kennedy strongly rejected such an approach to extraterritorial analysis. Indeed, Justice Kennedy went even further and rejected the social contract as an interpretive heuristic, quoting Justice Story to the effect that the “difficulty” in describing the Constitution as a “compact between the people of each state, and all the people of the other states is, that the constitution itself contains no such expression, and no such designation of parties.”⁹⁴ For Justice Kennedy, the limitations that the Constitution imposes on U.S. actions abroad “depend, as a consequence, on *general principles of interpretation*, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of ‘the people.’”⁹⁵ Consequently, Justice Kennedy rejected the “weight” placed by the majority on the language of the Fourth Amendment (“the People” versus “Persons”),⁹⁶ and looked to “the history of our Nation’s concern over warrantless and unreasonable searches.”⁹⁷ Justice Kennedy is not as explicit about the “mutuality of

⁹² See *Downes*, 182 U.S. at 244 (examining the ability of the government to recover back duties, paid under protest, upon importations from Puerto Rico under the Foraker Act).

⁹³ Justice Brennan argued: “Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (emphasis added). Justice Blackmun argued: “Although the Government’s exercise of power abroad does not ordinarily implicate the Fourth Amendment, the enforcement of domestic criminal law seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey.” *Id.* at 297 (Blackmun, J., dissenting) (emphasis added).

⁹⁴ *Id.* at 276 (Kennedy, J., concurring) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 365, at 335 (Cambridge, Brown, Shattuck & Co. 1833)).

⁹⁵ *Id.* (emphasis added).

⁹⁶ In general, Justice Kennedy accepts a distinction between citizens and aliens for the purposes of deciding constitutional status, but he states that presence within U.S. territory is not the trigger for rights to attach. “The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory.” *Id.* at 275.

⁹⁷ *Id.* at 276 (“[The] Fourth Amendment . . . may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.”).

obligation" as the *Verdugo-Urquidez* dissents, but it seems implicit in his final quotation from Justice Harlan that "the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case."⁹⁸ Justice Kennedy's approach may therefore be considered a qualified "mutuality of obligation" approach.

The debate about the constitutional rights of detainees transpiring in the Guantánamo litigation thus engages these *theoretical* approaches in answering the question of the Constitution's reach. The Government has consistently argued in favor of a bright line "membership" approach that categorically excludes detainees from the Constitution's protection because detainees are located outside of U.S. sovereign territory. The Government argues that "[b]ecause overseas aliens are not a part of the contract that created the United States, they are not beneficiaries of its protections."⁹⁹ The Government has sought to maintain the close analytic connection between "sovereignty" and constitutional rights by arguing that it is "sovereignty" alone that causes the attachment of constitutional rights, not mere control. "Sovereignty" and "control" are different, the Government argues; this distinction between the two terms "flows directly from the historical origin of the Constitution as a compact between the people of the country and the government."¹⁰⁰

Before *Rasul v. Bush*, the United States Supreme Court had never considered the question of the application of the Constitution to a location outside of U.S. sovereign territory, where the United States exerted a degree of control tantamount to sovereignty. The question on which the Supreme Court granted certiorari in *Rasul*, "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty,'"¹⁰¹ conceptually severed "sovereignty" from "control." In answering the question in the affirmative, the Supreme Court implicitly recognized the applicability of a "mutuality of obligation" ap-

⁹⁸ *Id.* at 278 (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)). However, Justice Kennedy's concurrence may be distinguished from Brennan's dissent in *Verdugo-Urquidez*, in particular, because Kennedy would not automatically extend the full protections of the Constitution as the "unavoidable correlative" of exertions of American power abroad. *Verdugo-Urquidez*, 494 U.S. at 282.

⁹⁹ Gov't Response Brief, *supra* note 9, at 21 (citing *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1233 (9th Cir. 1988)); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (outlining the scope of the federal government's powers of external sovereignty).

¹⁰⁰ Gov't Response Brief, *supra* note 9, at 21 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹⁰¹ *Rasul v. Bush*, 124 S. Ct. 2686, 2693 (2004).

proach to locations outside of U.S. sovereign territory where the United States exercises exclusive jurisdiction and control. Its citation to Justice Kennedy's concurrence in Footnote 15 suggests the Court's willingness to consider control as the dispositive factor in deciding the Constitution's extraterritorial scope.¹⁰²

III. *VERDUGO-URQUIDEZ* IN HISTORICAL CONTEXT

The question of whether the *Verdugo-Urquidez* majority opinion or Justice Kennedy's concurrence controls is crucial given the key place that *Verdugo-Urquidez* occupies in the evolution of jurisprudence on extraterritoriality. As we have seen, the post-World War II case of *Reid v. Covert* abrogated the doctrine of strict territoriality with respect to citizens, with its plurality holding that U.S. citizens being tried by the U.S. government outside U.S. sovereign territory are guaranteed the protections of the Constitution.¹⁰³ But because *Reid* dealt with a U.S. citizen, it did not definitively resolve the question of whether and how the Constitution protects aliens abroad when subject to action by the U.S. government. After *Reid*, and in the wake of the "constitutional revolution" that expanded the interpretation of the Due Process Clause, some lower courts held that constitutional rights protected aliens outside of U.S. sovereign territory.¹⁰⁴ In the 1960s and 1970s, *Insular Cases*-like reasoning was used to justify applying the Constitution in places where the United States was not ultimately sovereign, but where it exerted near-exclusive power and control, such as the Panama Canal Zone, the Pacific Trust Islands, and the American Sector in Berlin.¹⁰⁵ The post-*Reid* phase of expansion in the extra-

¹⁰² *Id.* at 2698 n.15.

¹⁰³ *Reid*, 354 U.S. at 77-78.

¹⁰⁴ In *United States v. Toscanino*, the Second Circuit Court of Appeals quoted from one of the *Insular Cases*, *Balzac v. Porto Rico*, in support of its holding that the Fourth Amendment protects aliens abroad. *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) ("The Constitution of the United States is in force . . . whenever and wherever the sovereign power of that government is exerted." (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922))); see also *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) (explaining that when the Coast Guard is in search of a vessel in international waters, "[o]nce aliens become subject to liability under United States law, they also have the right to benefit from its protection"); *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 760, 764 (2003) (explaining that though the Fifth Amendment Takings Clause extends to "takings" of foreign property held by aliens, it does not apply to destruction of purported enemy war-making instrumentality through American military action).

¹⁰⁵ The unusual case of *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) decided the constitutional status of the American sector of occupied Berlin. Two German citizens had hijacked a Polish airplane in order to try to escape to the West. Recently passed anti-terrorism treaties compelled the prosecution, and the West Germans preferred that the United States undertake the prosecution, for which it needed to resuscitate the United States Court for Berlin. A former United States district judge, Herbert Stern, was presented with an argument from the prosecution that is similar to the argument reflected in the Government's Motion to Dismiss in

territorial application of the Constitution seemed to come to an end with the majority holding in *United States v. Verdugo-Urquidez*. Any affirmance of Justice Kennedy's concurrence in *Verdugo-Urquidez* gives these post-*Reid* cases new life, since, like these post-*Reid* cases, Justice Kennedy's concurrence applied *Reid's* case-by-case reasoning to cases involving aliens.

A brief overview of the key cases is helpful to understanding what is at stake in the *Rasul* majority's reference to Justice Kennedy's concurrence, especially since *Rasul* cites not only to Justice Kennedy's *Verdugo-Urquidez* concurrence but to "cases cited therein."¹⁰⁶ This overview is not intended to be comprehensive, but to sketch the main evolution of the doctrine on extraterritoriality and the relation of that overview to the theoretical alternatives outlined in Part II.

The evolution of the doctrine on the extraterritorial reach of the Constitution can be imagined as a sequence of expanding concentric circles. At different times in history, the boundaries between what is and what is not beyond the reach of the Constitution have been pushed outward, from one concentric circle to the next.

The smallest and innermost circle represents citizens living within the states comprising the United States of America. Individuals within this circle receive the highest degree of constitutional protection, though the case-by-case logic found in extraterritorial jurispru-

Gherebi v. Bush (one of the *Guantanamo Detainee Cases*)—namely, that it lacked jurisdiction to make a ruling "contrary to the foreign policy interests of the United States." *Tiede*, 86 F.R.D. at 239. The American prosecutor in Berlin argued that whether a trial by jury is appropriate for a particular occupied territory is "quintessentially a political question, to be determined by the officers responsible for the United States conduct of this occupation, and not by this Court." *Id.* at 241 (quoting from the Prosecution's Memorandum in Opposition to Defendant's Motion Regarding the Application of the Constitution of the United States to these Proceedings at 32, *Tiede*, 86 F.R.D. 227 (Nos. 78-001, 78-001A), but later declining to follow it in this decision). The Court rejected the prosecution's argument and, following the plurality opinion in *Reid*, noted that

[e]ven in the long-discredited case of *In re Ross* . . . the Court made its decision under the Constitution—not in total disregard of it. The distinction is subtle but real: the applicability of any provision of the Constitution is itself a point of constitutional law, to be decided in the last instance by the judiciary, not by the Executive Branch.

Tiede, 86 F.R.D. at 242. Judge Stern followed the prosecution's logic to a conclusion he deemed unacceptable:

If there are no constitutional protections . . . [t]he American authorities, if the Secretary of State so decreed, would have the power, in time of peace and with respect to German and American citizens alike, to arrest any person without cause, to hold a person incommunicado, to deny an accused the benefit of counsel, to try a person summarily and to impose sentence—all as a part of the unreviewable exercise of foreign policy.

Id. at 243.

¹⁰⁶ *Rasul*, 124 S. Ct. at 2698 n.15.

dence has an origin and analogue in the incorporation of the Bill of Rights to states.¹⁰⁷

The next circle, still representing the territory of the United States, encompasses aliens living within the United States. The constitutional status of aliens within the United States was a focus of the great debate about the Alien and Sedition Acts, in which aliens were made liable to summary deportation on mere suspicion.¹⁰⁸ Though the Acts expired without being formally adjudicated, it was finally held in *Yick Wo v. Hopkins*¹⁰⁹ that constitutional rights extend to all persons within the “territorial jurisdiction” of the United States.¹¹⁰

In the late nineteenth century, the boundary between what is and what is not beyond the reach of the Constitution fell at the edge of the United States and the incorporated territories. The touchstone case expressing the strict territorial view as to citizens is *Ross v. McIntyre*, or *In re Ross*.¹¹¹ *Ross* dealt with a habeas petition by a British citizen who, while serving as a seaman on an American ship, murdered a senior officer. Pursuant to a treaty with Japan providing that Americans committing offenses “in Japan” could be tried by the American consul there, Ross was convicted of murder without an indictment by a grand jury or a trial by jury. Even though the Court held that Ross, by virtue of his service on the American ship, could be treated as a “temporary subject” of the United States, the Supreme Court upheld the power of the consul to try him without the full protections of the Constitution, because he was located outside of the United States and thus had lost his “membership.”

By the Constitution a government is ordained and established “for the United States of America,” and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary

¹⁰⁷ See NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 11, at 87 (discussing the Court’s refusal to grant grand jury and petit jury rights to inhabitants of Hawaii due to the fact that rights under the Bill of Rights are inapplicable to actions of the states).

¹⁰⁸ The Alien and Sedition Acts were in fact four acts passed in 1798 in response to a perceived threat in the form of revolutionary ideas allegedly being spread by “French agents, Irish immigrants, and Jeffersonian Republicans.” Neuman, *Whose Constitution?*, *supra* note 78, at 927. These four acts were The Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800); The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–23 (2000)); The Naturalization Act, ch. 54, 1 Stat. 566 (1798), *repealed by* Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 (1802); The Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801). See Neuman, *Whose Constitution?*, *supra* note 78, at 927 n.94.

¹⁰⁹ 118 U.S. 356 (1886).

¹¹⁰ See *id.* at 369 (holding that the Fourteenth Amendment refers to “persons” and “is not confined to the protection of citizens”).

¹¹¹ 140 U.S. 453 (1891).

sojourners abroad The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.¹¹²

Another slightly larger concentric circle was thrown out after the Spanish-American War when the United States began to acquire far-flung territories. As we have seen, the *Insular Cases* advanced a case-by-case reasoning in which the application of particular provisions of the Constitution is decided according to an objective analysis into the nature of the territorial relationship created by Congress.¹¹³ The *Insular Cases* jurisprudence has established a baseline of protection through the doctrine of fundamental rights. Even though there are no "express or implied limitation[s] on Congress in exercising its power to create" territorial governments, "it does not follow," according to Justice White in *Downes v. Bidwell*, "that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended."¹¹⁴ The right to due process has been seen as the paradigmatic fundamental right. Rights to jury trials and indictment by grand jury, which are possibly elements of due process, are the rights that have been most frequently found to be not fundamental.¹¹⁵

¹¹² *Id.* at 464 (internal citations omitted).

¹¹³ See *supra* Part II.A.2.

¹¹⁴ *Downes v. Bidwell*, 182 U.S. 244, 291 (1901). Justice White was careful to say that "this does not suggest that every express limitation of the Constitution which is applicable has not force," but only that even where there is no provision of the Constitution that directly applies, "there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution." *Id.*

¹¹⁵ The right to jury trial in criminal and civil cases, as well as indictments by grand jury, have been held as not applying in unincorporated territories. See *Puerto Rico v. Shell Oil Co.*, 302 U.S. 253 (1937) (holding that the Seventh Amendment right to a jury trial in common law cases does not apply to Puerto Rico); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding that the Sixth Amendment right to a jury trial does not apply in Puerto Rico); *Porto Rico v. Tapia*, 245 U.S. 639 (1918) (holding that the Sixth Amendment right to a jury trial does not apply in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (holding that the Fifth Amendment right to indictment by a grand jury does not apply to the Philippine Islands); *Dowdell v. United States*, 221 U.S. 325 (1911) (holding that the Sixth Amendment right to confront adverse witnesses does not apply in the Philippine Islands); *Dorr v. United States*, 195 U.S. 138 (1904) (holding that the Sixth Amendment right to a jury trial does not apply in the Philippine Islands, which at the time had been ceded to the United States pursuant to a treaty with Spain); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that the Fifth and Sixth Amendments did not apply to the Hawaiian Islands prior to their annexation by the United States); *Downes*, 182 U.S. 244 (holding that Puerto Rico is not subject to the Uniformity Clause). In *Rayphand v. Sablan*, a three-judge district court held that the one-person-one vote rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), was not a fundamental right, and therefore did not invalidate the disproportionate representation of smaller islands in one house of the Northern Mariana Islands legislature. *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1138 (D. N. Mar. I. 1999), *aff'd mem. sub nom.* Torres v. Sablan, 528 U.S. 1110 (2000).

As the boundary between what is and what is not beyond the reach of the Constitution began to be pushed further outward, away from the physical boundaries of the United States to the boundaries of U.S. sovereign territory, the Supreme Court reiterated the "strict territorial" view in *United States v. Curtiss-Wright Export Corp.*,¹¹⁶ a case that laid the foundation for the expansion in the powers of the Executive with respect to foreign affairs in the twentieth century.¹¹⁷ In *Curtiss-Wright*, the Supreme Court held that the enumerated powers-limited government view of the Constitution reflected in *McCulloch v. Maryland* "is categorically true only in respect of our internal affairs":¹¹⁸ "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . ."¹¹⁹ Thus, as the reach of the American imperium began to expand globally, so too did the scope of executive power operating in that extraterritorial sphere. In light of the *Insular Cases*, however, the broad scope of unreviewable action granted by *Curtiss-Wright* did not mean that the Executive could act without limitation in circumstances where a territory was under the complete control of U.S. authority.

After World War II, the boundary of constitutional applicability was pushed even further outward in *Reid v. Covert*, where the Supreme Court drew a larger concentric circle that encompassed citizens in foreign territories when they are acted against by the U.S. government.¹²⁰ While technically only abrogating strict territoriality with respect to citizens, *Reid* has been understood as destroying the rationale of the *Insular Cases*, if not overruling it, because it extended the reach of the Constitution to non-sovereign territory,¹²¹ and pronounced that *In re Ross* "should be left as a relic from a different era."¹²² Though it made a radical break with traditional doctrine, in another sense, *Reid* merely extended the framework of analysis devel-

¹¹⁶ 299 U.S. 304 (1936).

¹¹⁷ See generally Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1 (2000) (analyzing the *Curtiss-Wright* decision and defining its significance as the lodestar for Executive preeminence advocates in national security issues).

¹¹⁸ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316 (referencing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 353 (1819)).

¹¹⁹ *Id.* at 318 (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)). It is less often noted that the assumption that the Constitution's reach is limited to the internal workings of the government has as its corollary the assumption that the extraterritorial actions of the United States are limited by the "treaties, international understandings and compacts, and the principles of international law." *Id.*

¹²⁰ See *Reid v. Covert*, 354 U.S. 1, 18–19 (1957) (holding that the Constitution applied to court-martialed dependents of military personnel stationed overseas).

¹²¹ See *Ashkir v. United States*, 46 Fed. Cl. 438, 440–41 (2000) (asserting that the view that the Constitution ended at the water's edge "was largely repudiated in *Reid v. Covert*").

¹²² *Reid*, 354 U.S. at 12.

oped in the *Insular Cases* to cases involving the extraterritorial application of constitutional rights to citizens.

The last concentric circle is a dotted one, because it represents a doctrinal development that was not formally adopted by the Supreme Court. After *Reid v. Covert*, the Supreme Court decided several other cases involving citizens under military jurisdiction,¹²³ but the Court did not turn its attention to aliens abroad again until 1990 in *Verdugo-Urquidez*. In the intervening years, lower courts took guidance from *Reid* and looked to the concept of control, rather than sovereignty, as the trigger of constitutional rights. In this phase of expansion in the extraterritorial application of the Constitution, the Constitution was extended to territories over which the United States was not technically sovereign, but exercised significant control and authority.

Thus, in *Ralpho v. Bell*,¹²⁴ the Court of Appeals for the District of Columbia considered claims by inhabitants of Micronesia, at the time not within U.S. sovereignty,¹²⁵ for compensation for World War II-era losses against a congressionally created Micronesian Claims Commission. The court concluded that the Due Process Clause bound the Micronesian Claims Commission because Micronesia, as much as any unincorporated territory, is under the authority of the U.S. government and "it is settled that 'there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law . . .'"¹²⁶ Citing the various holdings in *Reid*, and noting that "the extent to which [Congress's Article IV] power may be used to deny constitutional safeguards to those not within the United States but under its dominion is a matter of some controversy,"¹²⁷ the court noted that even under "the most restrictive standard"—i.e., fundamental rights—the Due Process Clause was applicable.¹²⁸ The D.C. Circuit thus recognized that control and authority,

¹²³ Two other cases had majority endorsement for related propositions. Both *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), and *Grisham v. Hagan*, 361 U.S. 278 (1960), extended the holding of *Reid* to non-capital cases and to civilian employees of the armed forces, respectively.

¹²⁴ 569 F.2d 607 (D.C. Cir. 1977).

¹²⁵ Micronesia was part of the Trust Territory of the Pacific Islands, over which, at the time, the United States exerted strategic control but did not exercise sovereignty. After World War II, the United Nations declared Micronesia a "Trust Territory" and the United States as its administrator. In 1986, the United States and Micronesia signed the final version of the Compact of Free Association, giving Micronesia full sovereignty but agreeing that the United States would have entire responsibility for its defense. See U.S. DEP'T OF THE INTERIOR, FEDERATED STATES OF MICRONESIA, <http://www.doi.gov/oia/Islandpages/fsmain.htm> (last visited Oct. 29, 2005).

¹²⁶ *Ralpho*, 569 F.2d at 618–19 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974) (internal citations omitted)).

¹²⁷ *Id.* at 618.

¹²⁸ *Id.* at 618–19.

and not ultimate sovereignty, determine the territorial status of U.S. holdings.¹²⁹

Similarly, in *Canal Zone v. Scott*,¹³⁰ the Fifth Circuit treated the Canal Zone, for analytic purposes, as if it were an unincorporated territory of the United States even though the United States did not exercise sovereignty over it.¹³¹

With the *Verdugo-Urquidez* majority opinion, the dotted line was erased, and the boundary between what is and what is not beyond the reach of the Constitution seemed to fall back to where it had been at the time of *Reid v. Covert*, or so it seemed until the *Rasul* majority invoked Justice Kennedy's concurrence.

The effect of this invocation is to reveal an underlying continuity in the history of constitutional extraterritoriality. Justice Kennedy grouped together the rather disparate holdings of *In re Ross*, *Curtiss-Wright*, and the *Insular Cases* and glossed them all as standing for the proposition that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."¹³² This interpretation synchronically looked at the corpus of extraterritorial holdings and took account of its accretive and case-specific nature. More importantly, it implicitly characterized the *Insular Cases* as cases about extraterritoriality¹³³—about the outside as opposed to the inside of the magic circle—thus bringing the "mutuality of obligation" aspects of those cases to the fore and making the decision about Guantánamo Bay an unproblematic extension of their logic. Viewed in light of this syncretic approach, *Verdugo-Urquidez* (and thus *Eisenstrager*) may be distinguished.

¹²⁹ The Court noted that the United States did not "hold the Trust Territory in fee simple, as it were, but rather as a trustee," but said this distinction was "irrelevant." *Id.* at 619. The court added in a footnote:

Cf. the remarks of the United States Representative to the United Nations Security Council Meeting considering the award of the trusteeship to the United States: "My government feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign territory."

Id. at 619 n.72 (citation omitted).

¹³⁰ 502 F.2d 566, 568 (5th Cir. 1974) (finding that a U.S. citizen living in the Canal Zone was not entitled to the non-fundamental right of a grand jury indictment, nor to a jury that potentially might include military personnel).

¹³¹ The court held: "[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive." *Id.* Since the Fifth Circuit assumed, rather than decided, the Canal Zone's status, the case contains little discussion of this point.

¹³² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

¹³³ *Cf. Reid v. Covert*, 354 U.S. 1, 12 (1957) ("The *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases." (internal citations omitted)).

The Government argues that Petitioners interpret *Rasul* as overruling (in a footnote) *Eisentrager* and *Verdugo-Urquidez*, but this is incorrect. Petitioners distinguish *Verdugo-Urquidez* and *Eisentrager*. The *Guantanamo* petitioners concede that they are not in the United States, but, they argue, they are not in a foreign country either. Guantánamo Bay is more like the Canal Zone or the Northern Mariana Islands than it is like Germany or Mexico, thus, they are "within the 'territorial jurisdiction' of the United States."¹⁵⁴

IV. READING RASUL

The citation to Justice Kennedy's *Verdugo-Urquidez* concurrence in Footnote 15 is not the only reason for concluding that *Rasul* implicitly acknowledges it as the applicable authority. Though not explicitly deciding the constitutional issue in favor of the Petitioners, the *Rasul* majority opinion is entirely suffused with the logic of Justice Kennedy's *Verdugo-Urquidez* approach, notwithstanding Justice Kennedy's own separate concurrence in *Rasul*. The rightness or wrongness of the recent opinions in the remand litigation depends, at least in part, on the extent to which they recognize that the *Rasul* majority implicitly adopted Justice Kennedy's approach.

The Government has argued:

Nothing in the Supreme Court's opinion in *Rasul* undermines . . . the conclusion that invariably flows from *Eisentrager* and its progeny [*Verdugo-Urquidez*, *inter alia*]*—*that aliens, such as petitioners, who are outside the sovereign territory of the United States and lack a sufficient connection to the United States may not assert rights under the Constitution.¹⁵⁵

Judge Leon agreed and said that Petitioners "cling to an expansive interpretation" of *Rasul* as authority for "th[e] novel proposition" that individuals in the detainees' situation have constitutional rights.¹⁵⁶

In contrast, the Petitioners have argued, and Judge Green concluded, that *Rasul v. Bush* implies more than Judge Leon's interpretation allows because *Rasul* analytically disaggregates "sovereignty" from "control."

¹⁵⁴ Pet. Joint Opposition Brief, *supra* note 10, at 1 (quoting *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004), *reh'g denied sub nom.* Al Odah v. United States, 355 F. Supp. 2d 482 (D.D.C. 2005), *reh'g denied sub nom.* *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 482 (D.D.C. 2005)).

¹⁵⁵ Gov't Response Brief, *supra* note 9, at 26.

¹⁵⁶ *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) (memorandum opinion).

A. Why Judge Leon Is Wrong

The Government has attempted to defuse the impact of Footnote 15 by calling it dictum.¹³⁷ Judge Leon set Footnote 15 aside by noting that “[t]he paragraph in which it is included specifically focuses on the ‘question presented’ in the case,”¹³⁸ i.e., jurisdiction, and reiterated the Government’s argument that, in *Rasul*, the Supreme Court severed the question of jurisdiction from the question of the merits.¹³⁹ Yet in doing so Judge Leon offered no alternative explanation for what Footnote 15 means or why it is in the decision,¹⁴⁰ saying “[n]othing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny”¹⁴¹ (i.e., *Verdugo-Urquidez*), and calling *Eisentrager* still “instructive on” the question of extraterritorial application of the Constitution.¹⁴² Like most proponents of the membership approach, Judge Leon drew a bright line and located detainees outside the magic circle: “The petitioners in this case are neither United States citizens nor aliens located within sovereign United States territory.”¹⁴³

The conclusion that *Eisentrager*’s relevance is undisturbed by *Rasul* is fundamentally flawed. The *Rasul* majority disposed of *Eisentrager* in no fewer than three ways and repeatedly emphasized that control, not sovereignty, was the determinative factor.

First, the majority distinguished *Eisentrager*, finding significant factual differences between the petitioners in *Rasul* and the petitioners in *Eisentrager*. Noting that the Court in *Eisentrager* found six facts relevant to the analysis, the *Rasul* Court concluded that the Guantánamo detainees

differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned *in territory over which the United States exercises exclusive jurisdiction and control*.¹⁴⁴

¹³⁷ See Gov’t Response Brief, *supra* note 9, at 28–30 (stating that Footnote 15 does not overrule the prior holdings of *Eisentrager* and other cases).

¹³⁸ *Khalid*, 355 F. Supp. 2d at 323.

¹³⁹ See Gov’t Response Brief, *supra* note 9, at 29 (noting that in *Rasul*, the Supreme Court declined to consider questions on the merits of the detainees’ claims).

¹⁴⁰ *Khalid*, 355 F. Supp. 2d at 321.

¹⁴¹ *Id.* at 322.

¹⁴² *Id.* at 321.

¹⁴³ *Id.*

¹⁴⁴ *Rasul v. Bush*, 124 S. Ct. 2686, 2688 (2004) (emphasis added).

This distinguishes *Eisentrager* and does not seem limited to the question of jurisdiction.¹⁴⁵

Second, in discussing the reach of the habeas statute § 2241, the Court noted that at the time *Eisentrager* was decided, the case governing the question of statutory habeas jurisdiction, *Ahrens v. Clark*,¹⁴⁶ required the *physical* presence of the petitioner within the district court's territorial jurisdiction in order for the court to have jurisdiction.¹⁴⁷ The *Rasul* majority noted that *Ahrens* had subsequently been overturned by *Braden v. 30th Judicial Circuit Court of Kentucky*,¹⁴⁸ which found that physical presence was not a prerequisite to habeas jurisdiction because "[t]he 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."¹⁴⁹ The *Rasul* court found that a district court acts "within [its] respective jurisdiction," within the meaning of § 2241, "if the custodian can be reached by service of process."¹⁵⁰ Thus, the presence of detainees outside of U.S. territorial sovereignty did not preclude jurisdiction so long as the custodian could be served with process. The Court did not reach the question of *Eisentrager*'s constitutional holding because it did not have to.

¹⁴⁵ In the wake of *Rasul*, the Government hastily promulgated the Combatant Status Review Tribunals ("CSRTs") perfunctory hearings ostensibly modeled on Army Reg. 190-8 tribunals. In the remand litigation, the Government's new argument is that, in light of the CSRTs, *Eisentrager* is no longer distinguishable. Gov't Response Brief, *supra* note 9, at 38 n.48. Petitioners argue in turn that the CSRTs are much less procedurally adequate than even the trial in *Eisentrager* and fail abysmally to provide due process. Pet. Joint Opposition Brief, *supra* note 10, at 35.

¹⁴⁶ 335 U.S. 188 (1948).

¹⁴⁷ *Rasul*, 124 S. Ct. at 2688.

¹⁴⁸ 410 U.S. 484 (1973).

¹⁴⁹ *Id.* at 494-95 (emphasis added).

¹⁵⁰ *Rasul*, 124 S. Ct. at 2688 (quoting *Braden v. 30th Judicial Circuit Ct.*, 410 U.S. 484, 494-95 (1973)). In his dissent, Justice Scalia excoriated the *Rasul* majority's holding, that habeas is available when a federal court has jurisdiction over the custodian, for "extend[ing] the scope of the habeas statute to the four corners of the earth." *Rasul*, 124 S. Ct. at 2706 (Scalia, J., dissenting). This "breathtaking" holding, Scalia wrote, "permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense," *id.*, thus "forcing the courts to oversee one aspect of the Executive's conduct of a foreign war." *Id.* at 2707. David Rudenstine has noted the uncertainty *Rasul* creates as to the reach of the habeas statute (as wide as "the four corners of the earth" or as limited as Guantánamo Bay) and suggested that the Court:

was trying to shape a doctrine that respected two important concerns. First, it wanted to preserve its capacity to review the possibility of indefinite confinement of aliens who are suspected of being enemy combatants or terrorists and who are imprisoned someplace other than Guantánamo. Second, the [C]ourt wanted to retain discretion in future cases so that it could respect the [C]ommander in [C]hief's need for unfettered authority over detainees imprisoned on the battlefield or nearby and for some period of time after capture.

David Rudenstine, *The Guantánamo Detainee Case*, CARDOZO LIFE, Fall 2004, at 34.

Third, drawing on common law and citing *Foley Bros., Inc. v. Filardo*,¹⁵¹ the majority also noted that “[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within ‘the territorial jurisdiction’ of the United States.”¹⁵² The majority then noted that, by the express terms of the treaty with Cuba, the United States exercises “‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base.”¹⁵³ Since the habeas statute makes no distinction between citizen and alien, the majority concluded that Congress did not intend the geographical coverage of the statute to vary by status.¹⁵⁴ The majority then segued to the history of English common law to show that the extraterritorial reach of the writ of habeas corpus was contemplated at common law and “depended not on formal notions of territorial sovereignty, but rather on the practical question of ‘the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.’”¹⁵⁵ Citing the “express terms”¹⁵⁶ of the treaty with Cuba, which gives the United States “complete jurisdiction and control”¹⁵⁷ over Guantánamo Bay, the Court found that “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”¹⁵⁸ Particularly in this portion of the decision, the reasoning of the *Rasul* majority amounts to a “mutuality of obligation” approach, since it suggests that the writ travels with exertions of executive control. Certainly, there is nothing in *Rasul* to suggest that membership, “citizenship,”¹⁵⁹ or “status”¹⁶⁰ should be the sole dispositive factor in deciding the legality of executive detention.¹⁶¹

¹⁵¹ 336 U.S. 281 (1949).

¹⁵² *Rasul*, 124 S. Ct. at 2696 (emphasis added) (citing *Foley Bros.*, 336 U.S. at 285).

¹⁵³ *Rasul*, 124 S. Ct. at 2696 (citation omitted).

¹⁵⁴ See *id.* at 2698 (“[N]othing . . . categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts.”).

¹⁵⁵ *Id.* at 2697 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.) (emphasis added)).

¹⁵⁶ *Id.* at 2696.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2697 n.11.

¹⁶¹ The distinction between sovereignty and control is central to the long, arcane discussion about the common law writ of habeas in *Rasul*. The majority and the dissent in *Rasul* disagreed at length about the import of English common law habeas cases. The majority cited numerous cases for the proposition that the writ of habeas corpus had at least occasionally broad scope, while Justice Scalia argued that none of the cases extend jurisdiction to petitioners in circumstances analogous to the detainees: either petitioners were British subjects or they were imprisoned in the “‘dominion of the crown’” even though it was “‘no part of the realm of England.’” *Id.* at 2709 (Scalia, J., dissenting) (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *102-*105). “The Court cites not a single case holding that aliens held outside the territory of the sovereign were within the reach of the writ.” *Id.* at 2710 n.5. The majority in turn cited *Ex parte Mwenya*,

The argument that the *Rasul* majority overturned the holding in *Eisentrager* and its progeny¹⁶² thus misunderstands what the Court did in *Rasul*. It is not that the Court said that the scope of the federal habeas statute extends *beyond* the territorial jurisdiction of the United States (thus making possible the inference that the Constitution does not). Rather, the Court simultaneously decided that the statute extends to territories where the United States has jurisdiction, though not technical sovereignty, *and* that Guantánamo Bay is such a place. To speak in terms of concentric circles, in *Rasul* the Court included Guantánamo Bay within a circle with other U.S. territories. Regardless of whether *Rasul* deals only with jurisdiction, once Guantánamo is understood as being within the "territorial jurisdiction"¹⁶³ of the United States, *Eisentrager* does not apply because its holding addresses the situation in which petitioners are located in military prisons in foreign countries.¹⁶⁴

in which it was held that jurisdiction ran to a territory described as a "foreign country within which [the Crown] ha[d] power and jurisdiction by treaty, grant, usage, sufferance, and other lawful means." *Id.* at 2697 n.14 (majority opinion) (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 265 (C.A.) (Lord Evershed, M.R.) (alterations in original)). Scalia complains that this case dealt with a British subject but the majority argued in turn that a case favored by Scalia, *In re Ning Yi-Ching*, (1939) 56 T.L.R. 3, relied on a decision in which two other members of the court took a different view, and in fact made clear that "the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person . . . detained' within reach of the writ." *Rasul*, 124 S. Ct. at 2698 n.14 (quoting *In re Ning Yi-Ching*, (1939) 56 T.L.R. 3, 5). This disagreement hinges on what it means to be part of the "dominion" of a state, *Rasul*, 124 S. Ct. at 2709 (Scalia, J., dissenting), and whether the definition of sovereignty under a monarchy is perfectly analogous to that of sovereignty under a modern democratic state that exerts power more through economic influence and military alliance than territorial conquest. It is interesting to note that for the purposes of the domestic torture statute, the Government has argued that Guantánamo Bay is within the "special maritime and territorial jurisdiction" as defined in 18 U.S.C. § 7 (2000) of the United States, which paradoxically places it within the United States *per se* but outside the reach of the torture statute, which does not apply domestically. See generally Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., Jun. 7, 2004, at A1 (stating that a March 6, 2003 draft report by the Pentagon argued that President Bush was not bound by laws prohibiting torture, specifically with regards to detainees held at Guantánamo Bay).

¹⁶² See *Khalid v. Bush*, 355 F. Supp. 2d 311, 325–26 (D.D.C. 2005) (memorandum opinion) (explaining that asserting claims under federal laws that do not provide a private right of action are not cognizable in habeas). In its briefs, the United States presented three arguments why *Eisentrager* is unaffected by *Rasul*: 1) *Eisentrager*'s constitutional holding remains intact; 2) footnote 15 does not overrule *Eisentrager*; 3) the Supreme Court did not revisit *Eisentrager*'s "specific rejection of an extraterritorial application of the Fifth Amendment in that case." Respondents' Motion to Dismiss or for Judgment as a Matter of Law & Memorandum of Points & Authorities in Support Thereof at 15, *Gherebi v. Bush*, 338 F. Supp. 2d 91 (D.D.C. 2005) (No. 04-CV-1164 RBW).

¹⁶³ *Rasul*, 124 S. Ct. at 2696.

¹⁶⁴ Although it could be argued that the terms "territorial jurisdiction" and "sovereignty" are used as synonyms in *Eisentrager*, they do not necessarily designate the same referent and *Eisentrager* does not explain why it uses territorial jurisdiction when it could simply say sovereignty. Black's Law Dictionary defines "territorial jurisdiction" without reference to sovereignty: "Jurisdiction over cases arising in or involving persons residing within a defined territory. 2. Territory

Though he did not explicitly say so, Justice Kennedy clearly applied his *Verdugo-Urquidez* framework in the separate concurrence he wrote in *Rasul*. His comments with respect to territorial location follow the line of Justice White's inquiry in *Downes v. Bidwell* "into the situation of the territory and its relations to the United States[:]"¹⁶⁵ "What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it."¹⁶⁶ In this *Insular Cases*-like approach, it is thus not a question of what constitutional status aliens outside the United States have *in general*, but what sort of location Guantánamo Bay is and what its relation is to the United States. Control, not sovereignty, is the dispositive factor: "Guantanamo Bay is in every practical respect a United States territory"¹⁶⁷

Though Justice Kennedy disagreed with the majority on the relevance of *Eisentrager* ("[T]he correct course is to follow the framework of *Eisentrager*"),¹⁶⁸ Justice Kennedy's *Eisentrager* is not the Government's *Eisentrager*.¹⁶⁹ Whereas the Government and the *Verdugo-Urquidez* majority found in *Eisentrager* a bright line rule excluding aliens in military custody from the jurisdiction of U.S. courts, Justice Kennedy found that *Eisentrager* stands for the kind of case-by-case analysis outlined in his *Verdugo-Urquidez* concurrence: "A faithful application of *Eisentrager*, then, requires an initial inquiry into the *general circumstances* of the detention to determine whether the Court has the authority to entertain the petition and to grant relief *after considering all of the facts presented*."¹⁷⁰ On this, Justice Kennedy and the major-

over which a government, one of its courts, or one of its subdivisions has jurisdiction." BLACK'S LAW DICTIONARY 871 (8th ed. 2004). What is most surprising is that the *Rasul* majority did not discuss the meaning of either term.

¹⁶⁵ *Downes v. Bidwell*, 182 U.S. 244, 293 (1901). While the U.S. technically leases Guantánamo Bay from Cuba, Kennedy notes that the lease is "no ordinary lease" because its terms are indefinite and wholly at the discretion of the United States. *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

¹⁶⁶ *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

¹⁶⁷ *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

¹⁶⁸ *Id.* at 2699. Following *Eisentrager* "would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States" *Id.* at 2701.

¹⁶⁹ Kennedy notes that although *Eisentrager* stands for the proposition that "there is a realm of political authority over military affairs where the judicial power may not enter A necessary corollary . . . is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." *Id.* at 2700.

¹⁷⁰ *Id.* (emphasis added). Though *Rasul* is a statutory holding, Kennedy's comments regarding *Eisentrager* suggest that he would use a similar analytical framework for the constitutional question.

ity seem in close agreement. Reading *Eisentrager* to imply a case-by-case analysis to situations outside of the territorial jurisdiction of the United States is the only way to make sense of this passage from the *Rasul* majority: "[N]othing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."¹⁷¹

B. Why Judge Green Is Right

Unlike Judge Leon, Judge Green understood the Supreme Court's pronouncements regarding the territorial status of Guantánamo Bay. Looking at the decision in *Rasul* as a whole, she concluded that "careful examination of the specific language used in *Rasul* reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases."¹⁷² While the D.C. Circuit had found the Landsberg prison in Germany, where the *Eisentrager* prisoners were held, an appropriate analogy for Guantánamo Bay, Judge Green noted correctly that "*Rasul* . . . unequivocally rejected the D.C. Circuit's analogy and made clear that Guantánamo Bay cannot be considered a typical overseas military base."¹⁷³

After summarizing the state of extraterritorial doctrine up to the lower court decisions in *Rasul*, Judge Green's analysis of the meaning of *Rasul* began with *Ralpho v. Bell*, a D.C. Circuit case, the relevance of which the Petitioners had argued.¹⁷⁴ *Ralpho*, we have seen, is one of the post-*Reid* lower court cases where control—rather than technical sovereignty—became the determinative factor in deciding whether the Constitution attached to an alien living in a foreign country (Micronesia) held in trust by the United States. Judge Green found the relevance of this case pointed out by Justice Kennedy's *Rasul* concurrence, where "he made a *Ralpho*-type conclusion that Guantánamo Bay was, for all significant purposes, the equivalent of sovereign U.S. territory."¹⁷⁵ Although Judge Green noted that "the majority opinion was not as explicit as Justice Kennedy's concurrence,"¹⁷⁶ she con-

¹⁷¹ *Rasul*, 124 S. Ct. at 2698 (quoting *Al Odah v. United States*, 321 F.3d 1134, 1139 (D.C. Cir. 2003)). This is not to say that *Rasul* overruled *Eisentrager*, although Justice Scalia argued that it did so in his dissent. "Today's opinion, and today's opinion alone, overrules *Eisentrager*." *Id.* at 2706 (Scalia, J., dissenting).

¹⁷² *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 461 (D.D.C. 2005) (memorandum opinion).

¹⁷³ *Id.* at 462.

¹⁷⁴ See generally *Ralpho v. Bell*, 569 F.2d 607 (1977) (granting a petitioner under the Micronesian Claims Act the right to appeal the Micronesian Claims Commission's decision about his case in United States courts).

¹⁷⁵ *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 462.

¹⁷⁶ *Id.*

cluded that the majority also “found significant the territorial nature of Guantanamo Bay and dismissed the D.C. Circuit’s characterization of Guantanamo Bay as nothing more than a foreign military prison.”¹⁷⁷ Judge Green quoted a passage from the majority that appeared to echo Justice Kennedy’s conclusions:

Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the ‘territorial jurisdiction’ of the United States By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.¹⁷⁸

She drew the reasonable inference from *Rasul* that, in accordance with the D.C. Circuit precedent of *Ralpho v. Bell*, she should consider Guantánamo Bay, for constitutional purposes, as the equivalent of an unincorporated territory.

Judge Green’s reading of prior precedents noted that *Downes v. Bidwell* first announced the doctrine of fundamental rights to mitigate the fear that, without safeguards, Congress might engage in “centralized despotism.”¹⁷⁹ Applying the logic of the “mutuality of obligation” reflected in the concern expressed in *Downes*, she noted “that the Constitution prevented Congress from denying inhabitants of unincorporated U.S. territories certain ‘fundamental’ rights, including ‘the right to personal liberty . . . ; to free access to courts of justice, [and] to due process of law.’”¹⁸⁰ Judge Green correctly reasoned that, though the Supreme Court did not “decide” the constitutional issue, the conclusion that detainees have, at least, fundamental rights to due process, which follows necessarily from what the Supreme Court did decide.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (quoting *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004), which cites *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Though *Foley* deals with statutory construction, it uses “territorial jurisdiction” in a wider sense than mere “sovereignty”: “The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. . . . There is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.” *Foley*, 336 U.S. at 285 (emphasis added).

¹⁷⁹ *Downes v. Bidwell*, 182 U.S. 244, 280 (1901).

¹⁸⁰ *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 455 (citing *Downes*, 182 U.S. at 282).

V. EXTRATERRITORIALITY IN THE ERA OF THE GLOBAL WAR ON TERRORISM

While it is beyond the scope of this Article to fully examine the "impracticable and anomalous" standard set out by Justice Kennedy in *Verdugo-Urquidez* in light of the global war on terrorism, I conclude by offering a few brief thoughts on how this standard may be best applied, given the new exigencies of the post-9/11 world and the need for a Constitution flexible enough to respond immediately to danger while still protecting civil liberties. Kennedy's case-by-case analysis, adapted from the *Insular Cases* via *Reid v. Covert*, outlines a flexible standard taking into account several factors, including the particular right at issue and the nature of government action, in light of the particular factual circumstances of the case. Among the factors that courts should consider in deciding whether a given constitutional provision applies when the U.S. government acts on aliens abroad, I would suggest, is the extent to which the Executive is acting in accordance with international law or global diplomatic consensus.

It will be remembered that among the "cases cited therein" found in Justice Kennedy's *Verdugo-Urquidez* concurrence is *United States v. Curtiss-Wright Export Corp.*, a case that may be misunderstood as giving the Executive unfettered power in foreign affairs because of its description of the President as the "sole organ of the nation in its external relations."¹⁸¹ A brief segue back to the theoretical alternatives is necessary at this point. A corollary of the "membership" approach has frequently been the idea that, when the government acts outside the magic circle delimited by sovereign territory or citizenship, it acts unconstrained by any constitutional limitations. If the Constitution represents a social contract, then the vision of government it outlines—a *limited* government possessing only specifically enumerated powers (and reasonably implied powers that are necessary and proper to them), with all other powers being reserved to the states (or the people)¹⁸²—is only a government for the specific constituency that formed the social contract in the first place.

¹⁸¹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (quoting Chief Justice Marshall in his Mar. 7, 1800 House of Representatives Speech); the Supreme Court has interpreted *Curtiss-Wright* broadly. See Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 417-19, 426 (1996) (citing *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937) for the proposition that the President has the implied authority to deal with foreign relations without the consent of the Senate).

¹⁸² See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that the power of the government to incorporate a bank is a constitutionally-sanctioned implied power, because it is an appropriate means to carry into effect its enumerated powers).

In the nineteenth century, the Supreme Court began to evolve jurisprudence giving the United States government unenumerated plenary powers over Indian affairs, immigration, and the territories. At the same time, the Supreme Court also expanded the scope of enumerated powers, such as the Executive's authority over war and foreign affairs.¹⁸³ Such "inherent powers" jurisprudence eventually wrought the much-criticized but much-cited *Curtiss-Wright* decision, in which the Supreme Court held that the enumerated powers-limited government view of the Constitution reflected in *McCulloch* "is categorically true only in respect of our internal affairs."¹⁸⁴ The *Curtiss-Wright* court went on to add that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."¹⁸⁵ Inherent powers jurisprudence gives the political branches of the government broad authority in the areas that they control; a perceived concomitant of such power is that it is largely unreviewable by the judiciary. But even the broad powers recognized by the *Curtiss-Wright* court are not entirely unmoored from the rule of law. Even if not constrained by the U.S. Constitution, the *Curtiss-Wright* Court held the Executive's actions abroad must be seen as constrained by the "treaties, international understandings and compacts, and the principles of international law, which govern the operations of the nation in [foreign] territory."¹⁸⁶

Since the commencement of the global war on terrorism, the Government has abrogated authority to itself to a historically unprecedented extent. In the past, when the judiciary has deferred to the Executive's decisions as Commander-in-Chief, it has been with the implicit understanding that the war would be conducted in accordance with the laws of war, such as the Geneva Conventions,

¹⁸³ The "inherent powers" doctrines evolved during the nineteenth century's age of colonialism to put the United States on an equal footing with other nations with imperialist designs. In general, these doctrines reflect principles of sovereignty that are proper to international law, rather than the constitutional design of our nation's founders. In the context of United States history, these doctrines have been said to "lie in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power." Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 14 (2002). Cleveland has argued:

It is precisely the convergence of these [inherent powers] doctrines that provides the legal basis for the George W. Bush Administration's current detention of alleged enemy aliens at the Guantanamo Naval Base in Cuba. The doctrines supporting the United States' plenary power over aliens and territories beyond its borders combine with *Curtiss-Wright* to render Guantanamo a "Constitution-free zone" in the eyes of the Administration.

Id. at 12.

¹⁸⁴ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316.

¹⁸⁵ *Id.* at 318.

¹⁸⁶ *Id.* at 318 (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)).

which this Administration has dismissed as "quaint."¹⁸⁷ By the logic of the Government's arguments advanced thus far in support of its post-9/11 experiment in Guantánamo Bay, the President has the authority, at his discretion, to suspend international law, order the torture of suspected terrorists, and regard the entire globe as a battlefield upon which the Commander-in-Chief may take unlimited quasi-police, quasi-military actions that may not be reviewed.

In applying the "impracticable and anomalous" standard, courts should consider whether or not, in the absence of limitations deriving from the United States Constitution, the Executive's actions will be in conformity with the rule of law, including international customary law and diplomatic consensus. The more the Executive acts unilaterally, in violation of international legal standards or in disregard of international diplomatic opinion, the less deferential the United States courts should be to the Government.

Courts considering the habeas petitions of Guantánamo detainees should recognize that the Government cannot have it both ways. Either the international laws of war apply and detainees are protected by the Geneva Conventions, or they do not apply and the United States Constitution supplies limitations on the actions of the United States government. Our system of checks and balances does not contemplate that the Executive Branch can act wholly unconstrained by any limitation on its power.

CONCLUSION

Proceeding in the litigation on remand as if *Rasul* changed little or nothing, the Government has argued that the President has inherent authority—pursuant to his Article II inherent power as Commander-in-Chief, the Authorization for Use of Military Force, and the Laws of War—to designate "enemy combatants" and detain them indefinitely,¹⁸⁸ and that these Executive actions are virtually unreviewable. In these pronouncements, the Government has relied on Supreme Court pronouncements that the Fifth Amendment does not apply to aliens outside of U.S. sovereign territory, notwithstanding the fact that the language of "[t]he Due Process Clause is phrased in

¹⁸⁷ See Memorandum from Alberto Gonzales, White House Counsel, to George W. Bush, President of the United States (Jan. 25, 2002), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek> (regarding "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," and Gonzales's conclusion that the Geneva Convention does not apply).

¹⁸⁸ Gov't Response Brief, *supra* note 9, at 1 ("Petitioners proceed as if the actions of the Military in zones of active hostilities, and in preventing aliens from returning to the battle with the means and intent to bring fresh harm to United States and coalition forces, are no less amenable to searching review by the courts than routine actions of administrative agencies.").

universal terms, protecting any 'person' rather than 'citizens' or members of 'the people,' as the Fourth Amendment does."¹⁸⁹

However, the decision in *Rasul* altered the analysis as to aliens in a crucial way. Judge Green is correct to conclude that the majority opinion in *Rasul* signaled, through its citation of Justice Kennedy's *Verdugo-Urquidez* concurrence, that Guantánamo Bay should be treated, for constitutional purposes, as if it is an unincorporated territory of the United States, and thus that detainees held there are guaranteed "fundamental rights." Acknowledging Justice Kennedy's concurrence as the holding in *Verdugo-Urquidez* reorganizes prior precedent, because (in contrast to the *Verdugo-Urquidez* majority's view) Justice Kennedy characterizes the *Insular Cases* as falling within the extraterritorial line of constitutional jurisprudence. Justice Kennedy also implicitly affirms the post-*Reid* lower court cases (such as *Ralpho v. Bell*) that make control, rather than technical sovereignty, the dispositive factor in deciding the Constitution's reach.

Shifting the center of precedential gravity from the majority to the concurrence in *Verdugo-Urquidez* is thus consistent with the historical trajectory of constitutional jurisprudence, which has imposed limitations on executive action in territories where the United States exercises control tantamount to sovereignty, even while, in the wake of *Curtiss-Wright*, giving the Executive broad scope to act among the community of nations. Justice Kennedy's concurrence adapts the case-by-case analysis of the *Insular Cases* for a time when American power influence abroad may take different forms, from the foreign policy decisions of the Executive to the acquisition of territories supporting a military presence outside of North America, or to the creation of "black" CIA detention sites in foreign countries. His framework acknowledges the underlying continuities in prior precedent and updates constitutional jurisprudence for an era when the projection of American power abroad is unprecedented and no longer predominantly takes the form of territorial acquisition. By leaving the door open for judicial review even when the President is acting pursuant to his War Powers, Justice Kennedy's approach permits the judiciary to place limits on the most egregious aspects of executive overreaching; yet, by giving the judiciary discretion not to interfere if interference would be "impracticable and anomalous," his approach accords with the traditional deference given to executive powers of the Commander-in-Chief. The flexibility of Justice Kennedy's concurrence makes the arbitrary line-drawing of the "membership" approach seem a formalistic "relic of an earlier age," to quote from *Reid v. Covert* on *In re Ross*.¹⁹⁰

¹⁸⁹ Pet. Joint Opposition Brief, *supra* note 10, at 15.

¹⁹⁰ *Reid v. Covert*, 354 U.S. 1, 12 (1957).

The acknowledgement of Justice Kennedy's *Verdugo-Urquidez* concurrence by the *Rasul* Court makes Judge Green's holding—that Guantánamo detainees are protected by fundamental constitutional rights—the correct implication to draw from *Rasul*.