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RASUL V. BUSH: VICTORY FOR ENEMY ALIENS AS EXECUTIVE EMERGENCY POWER IS SEIZED

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INTRODUCTION

The United States Constitution does not contain emergency provisions.[1] There is not an emergency system of government, nor any formal acceptance of exceptions to the normal governmental structure set forth in the Constitution. As a result, the extent of executive authority during times of crisis has been questioned throughout much of our nation's history. This uncertainty has been subject to a diverse range of interpretation by scholars, Presidents, and various Supreme Court Justices. Now that the United States has been thrust into an indefinite period of emergency due to the September 11th attacks, the topic is again one of current significance.[2]

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1 *See* Michael R. Belknap, Historical Observation: *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 77 (1983) (mentioning United States' lack of emergency constitution); *see also* Saikrishna Prakash, Symposium: *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1301 (2004) (explaining Constitution lacks "constitution-wide rule of necessity" because although some provisions of the Constitution contain emergency exemptions, others expressly do not).

2 *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 726–31 (2004) (explaining "war on terror" defies traditional analysis because it cannot reach a formal conclusion and distinction between combatants and non-combatants has become blurred); Jules Lobel, *Rounding Up Unusual Suspects: Human Rights in the Wake of 9/11: Preventive Detention: Prisoners, Suspected Terrorists, and Permanent Emergency*, 25 T. JEFFERSON L. REV. 389, 410–11 (2003) (arguing that ambiguous nature of United States'

The Supreme Court recently addressed the issue of the scope of executive power during times of emergency in *Rasul v. Bush*.[3] In that case, detainees who were being held at the United States Naval Base in Guantanamo Bay, Cuba argued that they had rights to a habeas corpus proceeding in the United States federal courts.[4] They sought access to attorneys and courts, knowledge of the charges against them, and other related rights.[5] The Bush Administration maintained, based on *Johnson v. Eisentrager*, [6] a case from the era of the Second World War, it had the right to hold detainees at Guantanamo Bay without an opportunity to petition for habeas corpus.[7] The government asserted that foreign nationals detained outside of the United States' sovereign territory may not petition for habeas corpus because it is outside of federal jurisdiction.[8] The Supreme Court's holding granted detainees the right to petition the legality of their imprisonment through a habeas corpus hearing in United States federal court.[9] Some have viewed this decision as a rebuke to the expanded powers of the presidency during this period of emergency,[10] while

opponent in "war on terror" and "indefinite confinement of enemy combatants" establish permanent de facto state of emergency).

3 542 U.S. 466 (2004).

4 *See id.* at 471 (noting actions were filed in U.S. district court through relatives and friends of detainees); *see also* Michael Greenberger, *A Third Magna Carta*, NAT'L L.J., Aug. 2, 2004, at S7 (stating petitioners' cases alleged that executive branch improperly detained them as terrorists and deprived them of access to their families, counsel, and courts); *Habeus Corpus*, INT'L L. UPDATE, July 2004, at 7 (stating that detainees' relatives filed various actions in U.S. District Court for District of Colombia that were construed as habeas corpus petitions).

5 *Rasul*, 542 U.S. at 471–72.

6 339 U.S. 763 (1950).

7 *See id.* at 777–78 (explaining that petitioners could not sue for writs of habeas corpus as they were enemy aliens who never resided in the United States and their offenses, detention, trial and punishment all took place outside of U.S. jurisdiction); *see also Rasul*, 542 U.S. at 475 (explaining respondents believed *Eisentrager* was precedent for circumstances before Court).

8 *Rasul v. Bush*, 542 U.S. 466, 471–72 (2004) (citing holding of district court).

9 *Id.* at 482.

10 *See* Peter Irons, *"The Constitution is Just a Scrap of Paper:" Empire versus Democracy*, 73 U. CIN. L. REV. 1081, 1091 (2005) (suggesting that memo by Justice Department advocating narrow interpretation of "torture" in context of interrogations motivated Supreme Court to limit Executive Branch's "inherent" powers); Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 650–51 (2005) (arguing Executive Branch's authorization of interrogation techniques approaching torture and assertion of exclusive control over declarations of war illustrates that current administration has exceeded its Constitutional authority).

other commentators believe that it served to impede the President from effectively responding to a non-traditional war.[11]

I. HISTORICAL VIEWS OF THE SUPREME COURT ON EXECUTIVE WARTIME POWERS

The issue of presidential power during times of emergency first arose during the Lincoln Administration with the case *Ex Parte Merryman*.[12] In that case, an armed officer arrived at a man's private home in the middle of the night, claiming that he was acting under military orders, although he had no warrant for arrest. The man was imprisoned for alleged treason and rebellion, without any proof against him. The officer who arrested him claimed he was authorized by the president to suspend the writ of habeas corpus. The 1861 Supreme Court held that the Civil War did not give the President authority to suspend a private citizen's right to file a writ of habeas corpus.[13] Although the Constitution provides that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,"[14] this clause is in Article I, designating Congressional powers.[15] The Court expressly stated that a threat to national security is insufficient to justify the expansion of Executive power into an area that had been deliberately delegated to Congress by the Constitution.[16] Therefore, the Supreme Court, in deciding *Ex Parte Merryman*, concluded that the Constitution is to be strictly

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11 *See* John S. Baker, Jr., *Competing Paradigms of Constitutional Power in "The War on Terrorism,"* 19 ND J.L. ETHICS & PUB. POL'Y 5, 9 (2005) (arguing that *Rasul* "constitutionalized the constraints" on President's authority, hampering "war on terror"); Gregory Dolin, *The Great Writ of Incoherence: An Analysis of the Supreme Court's Rulings on "Enemy Combatants,"* 36 GEO. J. INT'L L. 623, 640–42 (2005) (arguing that *Rasul* holding could have detrimental impact on interrogation and intelligence gathering by military operations).

12 17 F. Cas. 144 (1861).

13 *See id.* at 149 (asserting that by taking on legislative power of suspending writ of habeas corpus, President is not fulfilling his constitutional duty of faithfully executing laws).

14 U.S. CONST. art I, §9, cl.2.

15 *Merryman*, 14 F. Cas. at 148 (stating Article I does not have even slight reference to executive powers).

16 *Id.* at 149 (emphasizing critical value of separation of powers in United States government).

interpreted at all times, whether peaceful or tumultuous for the nation.

The next challenge of presidential action during a national crisis occurred in *Ex Parte Milligan* in 1866.[17] President Lincoln had again suspended the writ of habeas corpus of a private citizen, with congressional authorization through the emergency provision of the 1863 Habeas Corpus Act.[18] The President sought to hold a military tribunal instead of proceeding in an Article III court, on the grounds that it was within the "laws and usages of war,"[19] a position the Court declined to endorse.[20] It was held that the emergency provision of the Habeas Corpus Act did not contemplate a military tribunal for a private citizen when Article III courts remained open.[21] Perhaps most importantly, the Court stated that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances," rejecting the notion of broader Executive authority during a military national emergency.[22]

World War II raised more questions about emergency authority to a Court that appeared more willing to defer to the executive during national crises. *Ex Parte Quirin*[23] concerned a presidential appointment of a Military Commission, which was ordered to try any citizen, subject, or resident of a nation at war with the United States who was charged with committing or attempting to commit wrongs against this nation, subject to the law of war.[24] President Roosevelt claimed to have acted under his Article II power as Commander in Chief of the armed forces to create the commission, and that such wrongdoers should be denied access to the courts because of their status as "enemy belligerents."[25] The petitioners argued that Roosevelt lacked the

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17 71 U.S. 2 (1866).

18 *Id.* at 109 (listing provisions of Act).

19 *Id.* at 121.

20 *Id.* at 121–22 (explaining that times of war do not justify military tribunal for private citizen).

21 *See id.* at 127 (listing certain situations in which martial rule is appropriate).

22 *Id.* at 120–21.

23 317 U.S. 1 (1942).

24 *Id.* at 22 (quoting presidential proclamation of July 2, 1942).

25 *Id.* at 24–25. The executive attempted to validate this assertion by stating that such "enemy belligerents" were a part of the class of people denied access by the proclamation and were enemy aliens, foreclosing a hearing in any American court. *Id.*

constitutional authority to deny a trial by the jury in the civil courts, a right they were entitled to under the Fifth and Sixth Amendments.[26] The Court recognized that the Constitution contains safeguards to protect all who are charged with offenses, and those safeguards are not be disposed of to inflict punishment on some who are guilty.[27] Under the circumstances of World War Two, the Court interpreted these safeguards as requiring a "clear conviction" that the declaration is inconsistent with the Constitution or congressional legislation.[28] The President in this matter was acting in accordance with congressional legislation and his authority as Commander in Chief during times of war. As a result, the issue of the Executive's authority to establish military tribunals for private citizens was neither addressed nor necessary.[29] Nevertheless, the Court expressed that those presidential actions that might at first glance seem unconstitutional will be given more scrutiny during times of crisis, to determine whether they can be upheld.

Ex Parte Quirin is distinguishable from *Ex Parte Milligan* on the basis that *Quirin* involved members of enemy armed forces, while *Milligan* concerned a private United States citizen. The Court appears to favor the preservation of the rights and interests of American citizens over those of foreign citizens classified as "enemies." Surprisingly, other cases from World War Two, such as *Korematsu v. United States*, [30] which involved United States citizens of Japanese ancestry, and later cases such as *Rasul*, demonstrate that this particular factor is not relevant to the Court's decision making.

Korematsu is one of the most controversial cases decided by the Supreme Court in the twentieth century.[31] This decision upheld

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26 *Id.* at 24 (arguing that Military Commission's authority to try defendants violated Articles of War adopted by Congress).

27 *Id.* at 25 (citing Ex Parte Milligan, 71 U.S. 2, 119, 132 (1866)).

28 *Id.* (stating that United States is in "grave danger" as consequence of the war).

29 *Id.* at 28 (declaring that President was acting under authority expressly given to him by Congress, in addition to his own Article II powers).

30 323 U.S. 214 (1944).

31 *See, e.g.*, Jerry Kang, *Denying Prejudice: Internment, Redress and Denial*, 51 UCLA L. REV. 933, 949–55 (2004) (suggesting that majority's focus on petitioner's violation of exclusion order, as opposed to constitutionality of en masse internment of Japanese Americans along West Coast, was mere expedient employed by Court to allow it to defer to precedent and national security fears); Ashutosh Bhagwat, *Hard Cases and the*

an executive order signed by President Roosevelt that permitted curfews, reporting requirements, and the removal of individuals of Japanese ancestry from the West Coast to camps further inland.[32] The Court's rationale for this holding was the fact that the nation was at war with the Japanese Empire, and that military authorities feared an attack on the West Coast.[33] The Court deferred to the executive's order based on the level of apprehension and the urgency of the situation.[34] While this decision hasn't formally been overruled,[35] the Court has long since abandoned it "in the court of history"[36] based on its deplorable discrimination against United States citizens based on their ancestry. However, the reason for the abandonment of the case is unrelated to the Court's treatment of wartime executive authority. It remains a valid example of the great deference the Supreme Court has given to the president during times of crises.

In *Rasul*, the government relied on *Johnson v. Eisentrager*[37]as controlling precedent. *Eisentrager* dated back to World War Two, and involved twenty-one German nationals who were captured by the United States Army in China, after Germany had surrendered.[38] They were convicted in a military tribunal for violating the laws of war by engaging in, ordering, or permitting continued military activity against the United States.[39] Detained

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(D)Evolution of Constitutional Doctrine, 30 CONN. L. REV. 961, 987–88 (1988) (purporting that *Korematsu* court overlooked ostensible violations of Due Process Clause in favor ad hoc analysis tailored to meet demands of era).

32 *Korematsu*, 323 U.S. at 223–24 (opining that characterization of relocation centers for Japanese during wartime as concentration camps was unfounded).

33 *Id.* at 223.

34 *Id. See generally* Hirabayashi v. United States, 320 U.S. 81, 93–94 (1943) (exemplifying prior World War II era case where exigencies of war effort and Court's unwillingness to disrupt settled judgment of coordinate branches of federal government Court's led to deferential reading of War Powers clause and, consequently, to upholding of an American citizen of Japanese ancestry's conviction for violating curfew order imposed by military on citizens of Japanese descent in designated area).

35 *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (rendering writ of coram nobis setting aside Korematsu's conviction based on unearthed evidence withheld during the original prosecution, but noting that "the Supreme Court's decision stands as the law of this case and for whatever precedential value it still may have"); *see also* Alfred C. Yen, *Praising With Faint Damnation – The Troubling Rehabilitation of* Korematsu, 40 B.C. L. REV. 1, 2 (1998) (reminding those who deem *Korematsu* as long disavowed that Supreme Court has never overruled the decision).

36 Emilie Kraft Bindon, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247, 283 n.208 (2004) (internal quotations and citations omitted).

37 339 U.S. 763 (1950).

38 *Id.* at 766 (explaining activities of German nationals in China).

39 *Id.* at 766 (noting that American military tribunal was conducted in China).

in a German prison, they protested their detention and petitioned the District Court in the District of Columbia for habeas corpus.[40] The Supreme Court addressed this case as a jurisdictional issue, similar to the one presented in *Rasul*, and explained that it is the presence of an alien within a jurisdiction that gives the courts the ability to act.[41] Since the aliens in *Eisentrager* were being held in a German prison, even though they were captured by the United States armed forces, it was determined that they did not have access to the federal courts. The Court simply stated that non-resident enemy aliens, especially those who are in the service of the adversary and are being held outside United States jurisdiction, may not petition for habeas relief.[42]

During some emergencies, presidents claim authority over particular aspects of government that would otherwise not be within their Article II powers. Courts have often approached this as a separation of powers issue. In *Youngstown Sheet & Tube Co. v. Sawyer*,[43] President Truman issued an executive order to have the Secretary of Commerce seize possession of most of the steel mills in the nation.[44] The President claimed that this action was necessary in order to prevent a national crisis that would result from an impending strike of the mills.[45] At the time, the United States was involved in armed conflict in Korea, and the president believed that a steel mill strike would jeopardize national defense.[46] Truman asserted that the constitutional basis for such action was within his Article II powers as Commander in Chief of the armed forces, among others.[47] The Court immediately

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40 *Id.* at 765 (expanding on circumstances of petitioners' imprisonment).

41 *Id.* at 771 (discussing extent of Constitution's jurisdiction in light of *Yick Wo v. Hopkins*, 118 U.S. 35 (1886)).

42 *Id.* at 776 (discussing origins of rule as deriving from 1813 New York case).

43 343 U.S. 579 (1952).

44 *Id.* at 582 (addressing facts behind executive order).

45 *Id.* at 582–83. This strike would have resulted from a labor dispute between steel companies and labor unions that remained unresolved despite settlement efforts. *Id.* The President argued that if steel production was halted, the war effort would be hampered by scarcity of an "indispensable . . . component of . . . all weapons and other war materials." *Id.*

46 *Id.* at 589–92 (citing language of executive order at issue).

47 *See* id. at 587 (listing Article II powers on which government relied to argue permissibility of seizures); *see also* Ken-Rad Tube & Lamp Corp. v. Badeau, 55 F. Supp. 193, 194–95 (W.D. Ky. 1944) (concluding that executive order to seize manufacturing

rejected this argument, noting that the executive taking possession of private property, even with the nation's involvement in a war overseas, was not permissible.[48] In addition, the Court categorized such an exercise of authority an infringement on the legislature, as this was more of a lawmaking activity than one for the military.[49]

One of the rationales used by the Court in determining that seizing the steel mills for national protection was not within executive military power was the failure of Congress to pass a provision of the Taft-Hartley Act in 1947. That provision would have provided for executive authority to be expanded during times of emergency to authorize Federal seizures of private property similar to the one at issue in *Youngstown*.[50] The congressional rejection of the proposed provision demonstrates a hesitation of Congress to officially provide for emergency authority which might blur constitutional lines.

In his concurrence, Justice Jackson introduced a "functionalist" approach to interpreting the Constitution when determining the relative breadth of the branches of Federal government.[51] He argued that, notwithstanding emergencies, a president has three levels of authority. The first level is where executive authority is broadest, and that is where there is action pursuant to express or implied authorization from Congress.[52] The intermediate level

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plant during labor dispute in order to continue production was valid use of authority during time of emergency or war).

48 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (explaining Commander in Chief's authority does not extend to allow seizure of private property to encourage labor disputes); *see also* Alpirn v. Huffman, 49 F. Supp. 337, 340 (D. Neb. 1943) (emphasizing limited circumstances that permit seizure of private property and clarifying that such power is not solely reserved for "Commander in Chief of the armed forces").

49 *See Youngstown*, 343 U.S. at 587 (stating that power to seize private property is province of legislative branch); *see also* Buckley v. Valeo, 424 U.S. 1, 124 (1976) (commenting on Framers' intention to ensure separation of powers within Constitution by delegating Federal power among three branches in Article I, II, and III); *Alpirn*, 49 F. Supp. at 339–40 (explaining power of Congress afforded by the Constitution to maintain U.S. armed forces).

50 *See Youngstown*, 343 U.S. at 586 (discussing fear that allowance of seizure would be interference with collective bargaining); *see also* 29 U.S.C.S. § 141 (2005) (explaining that purpose of Labor Management Relations Act is to discourage interference of either labor or management in legitimate interests of its opposite number).

51 *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (proposing "tripartite analysis" of presidential authority); *see also* Am. Int'l Group Inc., v. Islamic Republic of Iran, 657 F.2d 430, 443 (D.D.C 1981) (discussing Court's willingness to make compromises between "the separation of powers" and "exigencies of governance" in situations where the executive branch has acted and Congress remained silent).

52 *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring).

was referred to as the "zone of twilight,"[53] meaning, executive power may exist simultaneously with congressional power in a certain area if Congress has been silent.[54] Finally, the third level includes situations in which the executive acts against the express or implied wishes of Congress, and the President is limited to the powers delegated to the Executive Branch in the Constitution.[55]

Based on Jackson's framework of Executive power, President Bush's executive detention of enemy aliens without granting them the right to petition for habeas corpus falls within the first category, as Congress has granted authority through the Authorization for Use of Military Force (AUMF). However, a historical overview of the Supreme Court's decisions on the subject reveals that during the twentieth century, the judiciary has created a federal common law that grants the executive exceptional authority to deal with national crises.

II. SEPTEMBER 11, 2001: ATTACK ON THE UNITED STATES

On February 26, 1993, citizens of the United States were faced with the unfortunate realization that terrorist attacks could take place on our own soil. On that day occurred the first World Trade Center bombing, in which six people died and more than one thousand were injured.[56] After that attack, there were multiple plots to commit acts of terrorism within the United States, including a plan later that year to simultaneously destroy the United Nations, the George Washington Bridge, and the Lincoln and Holland Tunnels, which connected New York City to New Jersey.[57]

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53 *Id.* at 637.

54 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

55 *Id.* at 637–38.

56 *News In Brief*, N.Y.L. J., Oct. 7, 2003 at 1 (explaining sequence of events that led to bombing of World Trade Center); *see* Alison Mitchell, *Trade Center Bombing; 2 More Arrests Give Some Shape to the Puzzle*, N.Y. TIMES, March 28, 1993, at 2 (detailing early Federal investigation into first World Trade Center bombing).

57 Deborah Pines, *Terrorism Trial Will Use Questionnaires, Consultants for Jury*, N.Y.L.J, Nov. 9, 1994, at 1 (describing allegations against conspirators as outlined by U.S. Attorney's Office).

Recent terrorist attacks on Americans outside of the United States included the 1998 bombings of our embassies in Tanzania and Kenya, in which more than two hundred people were killed, and the October 2000 bombing on the U.S.S. Cole in Yemen, in which seventeen American sailors lost their lives. It was strongly believed that both attacks had been conducted by Al Qaeda operatives.[58]

The Islamic extremists who make up the Al Qaeda organization and were behind the various plots against America are citizens of a range of nations from the Middle East to the United States. Some of the non-American citizens have entered the nation illegally by using fraudulent documents, while others have entered legally through use of visas and have remained here after their expiration.[59] Terrorist leaders, mainly Osama Bin Laden and the Al Qaeda organization, have declared "jihad"[60] on America because they consider western governments to be the tools of the unfaithful since they do not act like, or share the beliefs of, the Islamic extremists.[61] Al Qaeda opposed American involvement in the 1991 Persian Gulf War, and generally does not approve of the United States' Mid-East policies. It was especially infuriated when American troops, which they referred to as "Satan's U.S. troops," were stationed in

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58 *See* Judge Mukasey, *Padilla v. Bush*, N.Y.L.J., Dec.10, 2002 at 25 (discussing international terrorist network that forms Al Qaeda); *see also* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002) (describing series of terrorist attacks allegedly conducted by Al Qaeda between first and second World Trade Center bombings); *Embassy Bombers Sentenced to Life Without Parole*, ON-LINE NEWS HOUR ¶ 5-6 (Oct. 18, 2001), http://www.pbs.org/newshour/updates/october01/embassy_10-18.html (describing Kenya and Tanzania bombings on August 7, 1998).

59 *See* U.S. v. Yousef, 327 F.3d 56, 78 (3d Cir. 2003), *remanded by* U.S. v. Yousef, 395 F.3d 76 (2d Cir. 2005) (describing Yousef's entrance into United States via John F. Kennedy International Airport with passport from Iraq); *Second Circuit Upholds Convictions of Alleged Mastermind of 1993 World Trade Center Bombing Over Arguments that the U.S. Court Lacked Extraterritorial Jurisdiction Over His Alleged Offenses Committed Outside the U.S.*, INT'L L. UPDATE, Apr. 2003, at 4 (noting organizer of 1993 World Trade Center bombing entered United States using Iraqi passport and claimed political asylum).

60 *See* United States v. Bin Laden, 92 F. Supp. 2d 225, 229–30 (S.D.N.Y. 2000) (noting Bin Laden endorsed a fatwa characterizing United States Army as enemies of Islam and declared a jihad against United States and its followers); *see also* Jacob J. Akol, *Sudan: Peace in Our Time?* NEW AFRICAN, Jan. 1, 2004, at 28 (defining "jihad" as holy war).

61 *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L. 237, 239 (2002) (quoting 1996 declaration of jihad by Osama Bin Laden against United States and Israel); *see also The Case Against Osama Bin Laden; Full Text of the Summary of Evidence, Released by the British Government*, PITTSBURGH POST GAZETTE, Oct. 5, 2001, at A-13 (stating that Al-Qaeda is "dedicated to opposing 'un-Islamic' governments in Muslim countries with force and violence").

Saudi Arabia, home of Muslim holy sites.[62] In 1998, Bin Laden made a declaration that Americans must be punished for their actions. His "fatwa"[63] to the Muslim people was published on February 23, 1998 in a Palestinian newspaper, Al-Quds al'-Arabi, which stated:

> The ruling to kill the Americans and their allies—civilians and military — is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, "and fight the pagans all together as they fight you all together," and "fight them until there is no more tumult or oppression, and there prevail justice and faith in God."[64]

The result of this, among other declarations against the United States, was the horrific day of September 11, 2001. Over three thousand innocent American civilians lost their lives to the attack driven by Al Qaeda's Islamic extremists.[65] The suicide terrorists hijacked four American commercial flights and used them as missiles, crashing one into the Pentagon, one into the ground in Pennsylvania, and one into each of the World Trade Center towers.[66]

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62 *See* Murphy, *supra* note 61, at 239–40 (quoting Bin Laden's fatwa in which he decried American presence at Islamic holy sites); *see also Al-Qaeda's War Comes Full-Circle – to Saudi Arabia*, THE STRAITS TIMES, Jan. 12, 2005 (pointing out that Osama Bin Laden resented presence of American troops in Saudi Arabia following Gulf War of 1991).

63 *See* Mark Hamblett, *U.S. Prosecutor Explains Delay in Charging Stewart*, THE RECORDER, July 24, 2004, at 2 (defining "fatwa" as religious edict); *see also* Chibli Mallat, *From Islamic to Middle Eastern Law A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209, 240–41 (2004) (explaining that fatwa under ordinary circumstances is mufti's (i.e. a legal scholar's) binding response to inquiry about specific point of law, usually asked by layperson).

64 Text of Fatwah Urging Jihad Against Americans, February 23, 1998 at http://www.ict.org.il/articles/fatwah.htm.

65 *See* Michael A. Goldberg, Note, *Mirage of Defense: Reexamining Article Five of the North Atlantic Treaty after the Terrorist Attacks on the United States*, 26 B.C. INT'L COMP. L. REV. 77, 82 (2003) (reciting events of attacks); *see also* Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1036 (2004) (recalling that over 3,000 individuals died as result of events of September 11, 2001).

66 *See* Proulx, *supra* note 65, at 1036 (referring to September 11, 201 attacks as "universal knowledge"); *see also* Goldberg, *supra* note 65, at 81–82 (recounting hijacking

The day after the attack, it was reported that United States officials had strong evidence that Al Qaeda was responsible for the devastation.[67] Congress immediately responded with the passage of the Authorization for Use of Military Force (AUMF)[68] on September 18, 2001. Through this legislation, Congress granted the President express authority to use military force against combatants who are engaged in armed conflict with the United States.[69] More specifically, it permits the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks," or "harbored such organizations or persons."[70]

The specific language used by Congress in the AUMF is, in and of itself, evidence that this nation's legislature was in favor of a "functionalist" constitutional approach to presidential power during national crises.[71] The authorization is for the President

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of four airliners, two that targeted World Trade Center, one that targeted Pentagon in Washington, D.C., and one that crashed in Pennsylvania). *See generally* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 1-14, 285–311 (2004) (describing sequence of events that led to terrorist attacks).

67 *See* Dan Eggen & Vernon Loeb, *U.S. Intelligence Points to Bin Laden Network*, THE WASHINGTON POST, Sept. 12, 2001 at A1 (stating that officials cited probability of Bin Laden's link to attack in high 90's, while others said evidence "strongly suggested" his involvement); Ed Hayward & Tom Farmer, *Attack on America; Terrorists Strike N.Y., D.C.*, THE BOSTON HERALD, Sept. 12, 2001, at 002 (quoting high ranking federal law enforcement official as stating that although no one had been ruled out, "[Bin Laden] is top of our list at this point"); *see also* David Johnston & James Risen, *A Day of Terror; Intelligence Agencies; Officials Say They Saw Signs of Increased Terrorist Activity*, N.Y. TIMES, Sept. 12, 2001 at A21 (stating that electronic eavesdropping intercepts indicated that attacks of September 11th were planned and executed by Al Qaeda).

68 107 P.L. 40 (2001) (hereinafter AUMF) (authorizing military action against those responsible for September 11, 2001 attacks). *See generally* Charles M. Madigan & Tribute News Services, *Bush Boosts Police Powers; Legal Immigrants Could Be Subject to Long Detentions*, CHI. TRIBUNE, Sept. 19, 2001, at 1 (reporting that Bush signed Congressional resolution "authorizing him to use military force against those responsibl[e]").

69 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) (explaining that congressional authorization to use force applied to any individuals, nations or organizations who aided or took part in terrorist attacks, or harbored such organizations or persons); *see also* Bruce Zagaris, *U.S. Supreme Court Requires Rights for Counter-terrorism Detainee*, 20 INT'L ENFORCEMENT L. REP. 385, 388 (2004) (discussing Court's rationale for holding in *Hamdi*).

70 *See* AUMF, *supra* note 28 (outlining authority granted to President); David D. Coron & Jenny S. Martinez, *International Decision: Availability of U.S. Courts to Review Decision to Hold U.S. Citizens as Enemy Combatants – Executive Power in War on Terror*, 98 A.J.I.L. 782, 788 n.18 (citing language of AUMF).

71 *See* Curtis Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047, 2082 (2005) (noting that describing, rather than naming, enemies outlined in Act can be interpreted as giving President broad power to determine identity of targeted groups or individuals); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STANFORD L. REV. 793, 820–21 (2005) (arguing that AUMF

to use appropriate force against those "he determines" to be involved in the attacks.[72] However, to prevent an unconstitutional delegation of powers from the legislature to the executive other, the AUMF does not actually authorize the President to decide whether an entity falls within the class of "enemy terrorists" as specified in the legislation.[73] Nonetheless, through the language giving the president authority to use "necessary and appropriate force" the AUMF consented to executive power to legally detain such individuals for the duration of the hostilities between our nation and Al Qaeda.[74]

III. CHALLENGE OF EXECUTIVE AUTHORITY DURING NATIONAL CRISIS: *RASUL V. BUSH*

After the enactment of the AUMF, President Bush acted pursuant to his newly granted authority, and ordered the American military to enter Afghanistan on a mission to destroy Al Qaeda and the government providing it refuge, the Taliban.[75] During the hostilities that occurred in Afghanistan, the United States troops captured numerous enemy combatants. These prisoners have been held by the military at the United States naval base in Guantanamo Bay, Cuba since early 2002.[76]

While it seemed to have been long established by the Supreme Court that enemy aliens who are being detained outside of the United States were not entitled to challenge their imprisonment

represented rejection by Congress of more deliberate decision making process in identification of targets because of unconventional nature of conflict).

72 *See* AUMF, *supra* note 68.

73 AUMF, *supra* note 68; *see* Thomas Geraghty, Case Comment, *The Criminal-Enemy Distinction: Prosecuting a Limited War Against Terrorism Following the September 11, 2001 Attacks*, 33 MCGEORGE L. REV. 551, 574 (2002) (explaining AUMF has not given President unrestrained power to declare war on any person he regards as enemy).

74 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (stating government estimates that there are approximately six hundred and forty enemy combatants detained in Guantanamo Bay); *see also* Lt. Col. (S) Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. Rev. 1, 1 (2004) (noting detainees hail from over forty nations).

75 *See* Rasul v. Bush, 542 U.S. 466, 470 (2004); *see also* Hamdi v. Rumsfeld; *Secretary of Defense; New Jersey Supreme Court; CRIMINAL PRACTICE – Habeas Corpus – Military Law*, N.J.L.J., July 4, 2004 (discussing Supreme Court decision in *Hamdi v. Rumsfeld*).

76 *See Rasul*, 542 U.S. at 470 (stating government estimate of about six-hundred and forty enemy combatants detained at Guantanamo).

and seek habeas corpus,[77] the issue again arose with the 2004 case of *Rasul v. Bush*. Fourteen of the approximate six-hundred and forty detainees brought an action against the United States government that challenged the legality of their imprisonment.[78] Two of the petitioners who appealed the case to the Supreme Court are Australian citizens, while twelve of them are citizens of Kuwait.[79] Each was captured in Afghanistan during the conflict between the United States and the Taliban.[80]

The detainees filed a claim seeking to be informed of the charges against them, to be allowed to meet with counsel, to be granted access to courts or some other impartial tribunal, and claimed that denial of these rights was unconstitutional and in violation of international law and United States treaties.[81]

The district court viewed the case as an action for writs of habeas corpus, and held that courts are not capable of extending the writ of habeas corpus beyond the sovereign territory of the United States.[82] The court specified that those aliens who are captured abroad during hostilities do not even have qualified access to courts, as opposed to the permissible access of aliens with lawful residence within this country.[83] The Court of Appeals affirmed the lower court's holding, and the Supreme Court granted certiorari and reversed.[84] It concluded that the habeas statute gives a right to judicial review of the legality of the Executive detention of aliens in a territory over which the United States does not have ultimate sovereignty, but only plenary and exclusive jurisdiction.[85] Many commentators have suggested that this holding was a direct rebuke to the Bush Administration's

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77 *See* Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (noting essence of habeas corpus is attack by a person in custody upon legality of that custody, and that traditional function of writ is to secure release from illegal custody).

78 *See Rasul*, 542 U.S. at 470–71 (explaining that petitioners filed their actions through relatives acting as their next friends).

79 Rasul v. Bush, 542 U.S. 466, 470 (2004).

80 *Id.*

81 *Id.* at 471.

82 Rasul v. Bush, 215 F. Supp. 2d 55, 65 (2004).

83 *See id.* at 66 (explaining nonresident enemy alien has no claim in courts of United States and that use of courts might help enemy (citing Johnson v. Eisentrager, 339 U.S. 763, 766 (1950))); *see also Eisenstrager*, 339 U.S. at 766 (tracing principle back to 1813).

84 Rasul v. Bush, 542 U.S. 466, 471–72 (2004) (outlining procedural history of case).

85 *Id.* at 484 (outlining holding).

'imperialist' foreign policy, but others argue that it was an impediment to the current conflict.[86]

Based on the evidence collected by United States intelligence indicating that terrorist organizations, including Al Qaeda, plan to further destabilize the United States, as well as the attacks on September 11, 2001, it could be argued that the judiciary should consequently narrowly interpret the rights of those captured overseas. Instead, the judiciary engaged in activism by using arbitrary bases to reduce the authority that had been granted to the Executive by the AUMF, in contravention of Congress' determination.[87]

The government, the respondents in this case, contended that the issue of habeas relief for enemy detainees was controlled by *Johnson v. Eisentrager*,[88] in which it was held that a federal court did not have the authority to grant the writ of habeas corpus to German citizens who were captured by the United States military in China, and detained in a German prison.[89] In *Eisenstrager*, the prisoners were enemy aliens that had never been in the United States, and were captured, tried, and convicted by a military commission outside of American borders.[90] Using all of those factors, the Court determined that the prisoners were not entitled to a writ of habeas corpus.[91] The *Rasul* Court distinguished the case from *Eisentrager* by relying

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86 *See, e.g.*, Christopher M. Schumann, Note, *Bring It On: The Supreme Court Opens the Floodgates with* Rasul v. Bush, 55 A.F. L. REV. 349, 367 (2004) (claiming that Court's decision will undermine President's efforts to combat terrorism); Jed Babbin, *Habeas Corpus?*, AMERICAN SPECTATOR ONLINE, Mar. 21, 2005 (calling *Rasul* an "absurd decision" because it extends rights to enemies); Andrew C. McCarthy, *Gonzales & the War*, NAT'L REVIEW ONLINE, July 8, 2005 (suggesting that decision will allow enemies to use American courts against citizens as weapons).

87 *See Rasul*, 542 U.S. at 506 (Scalia, J., dissenting) (rebuking Court for interfering and departing from precedent when proper course would have been to allow Congress to change law, if it so desired); Schumann, *supra* note 86, at 367 (claiming it was role of Congress, not Court, to change rule).

88 339 U.S. 763 (1950).

89 *See* Rasul v. Bush, 542 U.S. 466, 475 (2004) (stating basis of government's argument); *see also Eisentrager*, 339 U.S. at 766 (listing facts of case).

90 *See Rasul*, 542 U.S. at 475 (citing Johnson v. Eisentrager, 339 U.S. 763, 777 (1950).

91 *See id.* (concluding that list of factors in *Eisentrager* controlled holding in that case (citing *Eisenstrager*, 339 U.S. at 781)); *see also* David A. Martin, *Offshore Detainees and the Role of Courts After* Rasul v. Bush*: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125, 129 (2005) (reviewing concerns of *Eisentrager* court that led to denial of writ).

heavily on the absence of some of those factors. It noted that the petitioners differed from those in *Eisentrager* for the following reasons: they were not nationals of countries at war with the United States, they denied having engaged in or plotting acts of aggression against the United States, they had never been heard before a tribunal or convicted of wrongdoing, and they have been imprisoned in a territory over which the United States exercises exclusive jurisdiction.[92] In addition, the Court declined to apply *Eisentrager* to an interpretation of the habeas statute.[93]

The *Rasul* majority reasoned that the *Eisentrager* Court failed to analyze the habeas statute based on the decision in *Ahrens v. Clark*.[94] In that case, detainee petitioners were one-hundred and twenty Germans who were being detained at Ellis Island, New York before being deported back to Germany.[95] They had filed petitions under the habeas statute in the U.S District Court in the District of Columbia, but the Court interpreted the term "within their respective jurisdictions," as written in the statute as a requirement that the petitioners be present within the territorial jurisdiction of the district court.[96] However, the *Rasul* Court relied on yet another case, *Braden v. 30th Judicial Circuit Court of Kentucky*,[97] in which the Supreme Court held that "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."[98] Therefore, it was determined that, based on the language of the habeas statute, a district court is acting within its respective jurisdiction as long as the custodian of the detainee can be reached by service of process.[99] The *Rasul*

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92 *See* Martin, *supra* note 91, at 129 (listing distinguishing factors between petitioners in *Eisentrager* and those in *Rasul*); *see also Habeas Corpus*, 118 HARV. L. REV. 396, 398 (2004) (noting Court's distinction between factors present in *Rasul* and *Eisentrager*).

93 *See Rasul*, 542 U.S. at 475 (relating *Eisentrager* factors solely to constitutional rights); *see also Habeus Corpus*, *supra* note 91, at 398 (positing that court has interpreted *Eisentrager* factors as constitutionally based).

94 335 U.S. 188 (1948).

95 *See id.* at 189 (explaining deportation was ordered because Attorney General found them to be dangerous to safety of this country); *see also Rasul*, 542 U.S. 466, 476–77 (2004) (referring to historical context in which *Eisentrager* was decided).

96 *See Ahrens*, 335 U.S. at 190 (asserting that it is not sufficient that custodian or jailer be within jurisdiction); *see also Rasul*, 542 U.S. at 476–77 (noting that *Ahrens* was decided two months after petitioners filed habeas petition).

97 410 U.S. 484 (1973).

98 *Id.* at 494 (citing Wales v. Whitney, 114 U.S. 564, 574 (1985)).

99 *See id.* at 495; *see also Rasul*, 542 U.S. at 478–79.

majority interpreted *Braden* as having implicitly overruled the statutory condition that *Ahrens* imposed on the *Eisentrager* Court. Therefore, based on this aspect of its reasoning, the *Rasul* Court found a loophole allowing it to overlook the *Eisentrager* precedent in favor of permitting the exercise of statutory jurisdiction over the detainees' claim.[100]

The government asserted that it is a well established precedent in American law that unless intentions are otherwise clear, there is a presumption that congressional legislation does not apply in an extraterritorial context.[101] The Court quickly rejected this argument.[102] Relying on *Foley Brothers, Inc. v Filardo*,[103] the majority noted that presumptions against extraterritoriality in other contexts are not applicable regarding the function of the habeas statute when detainees are being held within "the territorial jurisdiction" of the United States.[104] Drawing from a 1903 naval agreement between the United States and Cuba, the Court interpreted territorial jurisdiction to mean one nation exercising "complete jurisdiction and control"[105] over a territory, specifically over the Guantanamo Bay Naval Base in Cuba.[106] The Court found the possession of ultimate sovereignty over the land to be irrelevant.

The majority additionally asserted that the habeas statute does not distinguish between Americans and aliens held in federal custody. As a result, the Court held that there was no reason to assume that the legislature intended for the statute's

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100 *See Rasul*, 542 U.S. at 2493 (Scalia, J., dissenting) (arguing Court took "oblique course" to maneuver around precedent set by *Eisentrager*); *see also* Martin, *supra* note 91 at 132–33 (stating that once Court found way to overlook *Eisentrager* precedent, statute clearly allowed jurisdiction).

101 Rasul v. Bush, 542 U.S. 466, 480 (2004) (citing Equal Employment Opportunity Comm'n v. Arabian American Oil Co., 499 U.S. 244 (1991)); *cf. Rasul*, 542 U.S. at 499 (Scalia, J., dissenting) (recognizing argument, but dismissing it as irrelevant).

102 *Rasul*, 542 U.S. at 480 (stating there is little reason to think Congress intended geographical coverage of statute to vary depending on detainee's citizenship).

103 336 U.S. 281 (1949).

104 *Rasul*, 542 U.S. at 480.

105 *See* Lease of Coaling or Naval Stations, Agreement Between the United States and Cuba, Art. III, February 1903 (available at www.nsgtmo.navy.mil/gazette/History_98064/hisapxd.htm) (granting United States jurisdiction over described areas); *see also* Gherebi v. Bush, 374 F.3d 727, 734 (9th Cir. 2004) (explaining United States was granted exclusive right to try individuals for crimes committed on base in supplemental agreement with Cuba).

106 Rasul v. Bush, 542 U.S. 466, 480 (2004).

geographic coverage to change depending on the detainee's citizenship.[107] Historical references to old English common law[108] reiterated the Court's adherence to the theory that a federal court has jurisdiction over a claim of a detainee whose custodian is reachable by service of process.[109]

In the final words of its decision, the majority addressed the petitioners' claim that they had the right to be heard under the federal question statute[110] and the Alien Tort Statute.[111] The Court again rejected the lower courts' determination that aliens lack the right to litigate in United States courts.[112] In fact, the Court held that the Alien Tort Statute explicitly grants to aliens the right to bring suit for an actionable tort in the United States. It was further held that the status of petitioners as military detainees is irrelevant to the question of federal jurisdiction over non-habeas statutory claims.[113]

A. Rasul v. Bush*: The Dissenting Opinion*

In the dissent by Justice Scalia, the majority's decision was referred to as "contradicting a half-century-old precedent."[114] In Justice Scalia's view, that precedent was based on logical reasoning and can be read as a warning to future justices about

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107 *Id.* at 480 (mentioning fact that government conceded that habeas statute would give federal jurisdiction over claims by American citizen held at Guantanamo).

108 *See id.* at 482. Such historical references included citations to Lord Mansfield's 1759 writing in which he maintained that "even if a territory was 'no part of the realm', there was 'no doubt' as to the courts' power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 2697 (citing King v. Cowle, 2 Burr. 834, 854–55 (1759)).

109 *See id.* at 482 (positing that precedent has confirmed that reach of writ, both historically and in modern era, does not depend on formal notions of territorial sovereignty but rather on actual extent of jurisdiction exercised).

110 28 U.S.C.S. §1331.

111 28 U.S.C.S. §1350. *See generally Rasul,* 542 U.S. at 484 (citing both statutes).

112 Rasul v. Bush, 542 U.S. 466, 483 (2004) (holding *Eisentrager* did not bar exercise of federal court jurisdiction over habeas corpus claims asserted by petitioners and similarly does not exclude aliens detained in military custody outside United States from litigating claims in United States courts).

113 *Id.* at 485 (stating Alien Tort Statute explicitly grants ability to sue for actionable torts committed in violation of law of nations or of treaty of United States and that petitioners' status was immaterial to question of jurisdiction).

114 *Id.* at 488–89 (Scalia, J., dissenting) (referring to Johnson v. Eisenstrager, 339 U.S. 763 (1950), in which Court held that habeas statute did not extend to aliens detained by United States military overseas, outside sovereign borders of United States and beyond territorial jurisdictions of all its courts).

the dangers inherent in failing to appreciate its result.[115] The *Eisentrager* opinion stated:

> To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[116]

These essential words of the Court were cited by Justice Scalia's dissent, and they are indispensable in assessing the potential consequences of the *Rasul* decision.[117]

Justice Scalia first addresses the majority's interpretation of the habeas statute, and asserts that its reading is contradictory to the plain meaning of the statute's language. He argues that regardless of whether the writ is directed to a custodian or detainee, the statute clearly requires that a federal district court

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115 *See id.* at 499 (Scalia, J., dissenting) (arguing majority too swiftly disregarded warnings voiced by *Eisentrager* Court and that decision could have injurious consequences).

116 *Eisentrager*, 339 U.S. at 736, 778–79.

117 *See* Rasul v. Bush, 542 U.S. 466, 499 (2004) (Scalia, J., dissenting) (arguing that Court has disregarded warning offered by *Eisentrager* court without statutory basis and based on inadequate case law); *see also* Robert Hardaway, *The Role of the Media, Law, and National Resolve in the War on Terror*, 33 DENVER J. INT'L L. & POL'Y 104, 126 (2004) (noting that during World War II, United States had approximately two million foreign soldiers in its custody, many of whom could have challenged detainment in American courts absent *Eisentrager* decision).

have territorial jurisdiction over the detainee.[118] In addition, he pointed to *Eisentrager* as holding that there was no wording in the habeas statute granting a right to the writ.[119] He argued that the statute's obvious language precluded the Court from discussing what should have been a clear statutory result.[120]

Turning to the majority's declaration that *Braden* overruled *Ahrens*, Justice Scalia simply rejects this reading of the latter decision by explaining that Braden is distinguishable from the general rule of *Ahrens*.[121] He pointed to the circumstances in *Braden*, in which a habeas petitioner was detained in Alabama and filed for a writ of habeas corpus in Kentucky. Under these particular facts, the *Braden* Court held that when a petitioner is confined by multiple jurisdictions within the United States, he is permitted to seek habeas relief to his legal confinement in the jurisdiction in which he is legally confined.[122] That rule was reiterated in the recent case of *Rumsfeld v. Padilla*,[123] in which the Court explained that identification of the legally controlling

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118 *See Rasul*, 542 U.S. at 489 (Scalia, J., dissenting) (noting that habeus statute mandates that "the order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had" (quoting 28 U.S.C.S. §2241(a))); *see also* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495 (1973) (highlighting limitation of § 2241(a), which states that "the court issuing the writ ha[s] jurisdiction over the custodian").

119 *See Rasul*, 542 U.S. at 493 (Scalia, J., dissenting) (reasoning "nothing in the text of the Constitution extends such a right, nor does anything in our statutes" (citing Johnson v. Eisenstrager, 339 U.S. 763, 768 (1950))); *see also* Schumann, *supra* note 86, at 362 (2004) (recognizing *Eisentrager*'s holding that no right to habeas existed under statute).

120 *Rasul*, 542 U.S. at 492–93 (Scalia, J., dissenting). Scalia believes that the *Eisentrager* Court's treatment of the statute indicates that they believed it to be obvious that the "statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States." *Id.* Scalia argues that this makes the majority's holding problematic. *See* Schumann, *supra* note 86, at 362. Scalia believes that the *Eisentrager* Court spent little time analyzing this issue because the statute clearly declined to extend jurisdiction to this alien. *Rasul*, 542 U.S. at 493 (Scalia, J., dissenting).

121 *See id.* at 493–494 (Scalia, J., dissenting) (arguing *Braden* Court was careful to distinguish facts of the case from *Ahrens*); *see also* Schumann, *supra* note 86, at 362–63 (noting that Justice Scalia believed that majority improperly relied on *Braden* in *Rasul*).

122 *See* Rasul v. Bush, 542 U.S. 466, 494 (2004) (Scalia, J., dissenting) (disagreeing with majority's treatment of *Braden* on grounds that *Braden* did not question general rule established in *Ahrens*); *see also Braden*, 410 U.S. at 499–500 (holding that *Ahrens* could not be interpreted as creating an inflexible jurisdictional rule in light of class of cases not foreseeable at time of decision).

123 Rumsfeld v. Padilla, 542 U.S. 426 (2004). Mr. Padilla, a military detainee, was transferred from federal to military custody by an order of the President to the Secretary of Defense. *Id.* The detainee sought habeas relief in the original district of his detention. *Id.* The Court held that habeas jurisdiction was limited to the district in which the detainee was confined, and the commander of that individuals' military confinement facility was the proper custodian for relief. *Id.*

party is only necessary when there is no immediate physical custodian with respect to the challenged detainment.[124]

The *Braden* holding was based on the principle that a State detaining an individual acts as a general agent for the demanding State, and it is presumably indifferent to the resolution of the prisoner's attack on the detainer state.[125] Under these particular circumstances, the *Braden* Court determined that application of the *Ahrens* rule was unnecessary.[126] As a result, Justice Scalia argued that the *Braden* decision cannot be read as overruling the *Ahrens* rule in other circumstances, and that *Eisentrager* controls Rasul because the issue is physical custody.[127] The dissent concludes that the *Rasul* opinion independently overrules *Eisentrager* and for the first time extends the habeas statute to aliens detained beyond the sovereign territory of the United States and beyond the territorial jurisdiction of the federal courts.[128]

Furthermore, Justice Scalia addressed the Court's reasoning concerning the "presumption against extraterritorial effect."[129] He rejects the "complete jurisdiction" argument based on the fact that the lease agreement unequivocally reserved the ultimate sovereignty over the territory to Cuba.[130] He was also disturbed by the Court's lack of explanation about how "complete

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124 *See* Wellington Gu, Note, Rumsfeld v. Padilla, 542 U.S. 426 (2004), 11 WASH. & LEE RACE & ETHNIC ANC. L. J. 251, 256 (2004). There was no immediate physical custodian in *Braden*; thus, the immediate custodian rule was inapplicable to the case. *See id.* The *Padilla* majority reasoned that the immediate custodian rule did not apply to *Braden* because of the lack of an immediate custodian germane to the case. *Padilla*, 542 U.S. at 438–39.

125 *Rasul*, 542 U.S. at 494 (Scalia, J., dissenting) (outlining reasoning of *Braden*); *Braden*, 410 U.S. 484, 498 (1974) (noting petitioner's legal dispute was with Commonwealth of Kentucky).

126 *Braden*, 410 U.S. at 499 (noting that application of *Ahrens* rule under these circumstances would require action be brought in Alabama); *Cf. Rasul*, 542 U.S. at 494 (Scalia, J., dissenting) (using this analysis to illustrate that *Ahrens* was not applied to *Braden* because it was inapplicable).

127 *See* Rasul v. Bush, 542 U.S. 466, 494–95 (2004) (Scalia, J., dissenting) (arguing *Ahrens* rule remained applicable and provided no obstacle to application of *Eisentrager*); *see also* Tacho Lim, *supra* note 124, at 246 (2004) (noting *Ahrens* could still apply to other situations).

128 *Rasul*, 542 U.S. at 496 (Scalia, J., dissenting) (arguing that *Rasul* overruled *Eisentrager* without reasoning or acknowledging result).

129 *Id.* at 500–01 (Scalia, J., dissenting) (attacking Court for inadequacy of presumption).

130 *Id.*

jurisdiction and control" without ultimate sovereignty results in a territory being reachable by United States domestic laws.[131] If, as the Court held, there is no real difference between jurisdiction and control acquired through a lease and that obtained by lawful armed force, Justice Scalia argues that Afghanistan and Iraq would be considered subject to domestic laws.[132]

The majority's second justification for their ruling, the government's concession that American citizens on the naval base are subject to habeas jurisdiction, was also the subject of Justice Scalia's criticism. He argued that United States citizens have greater rights under the habeas statute because of their constitutional privileges.[133] He noted that the *Eisentrager* Court maintained that United States citizens are entitled to inalienable habeas rights no matter where in the world they are located, while holding that foreign nationals outside of the country did not possess such rights.[134]

B. Consequences of the Decision

While the Court maintains that *Eisentrager* has not been overruled, the effects of the *Rasul* decision are inapposite. The President is now faced with a narrowing of the authority granted by Congress in the AUMF. The legislation enabled the Administration to detain those it categorized as enemy combatants, without permitting the detainees to seek traditional relief.[135] Now that the Court has entitled enemy aliens who are held in Guantanamo Bay to petition for habeas in any of the ninety-four federal districts, executive authority has been undermined, and the efforts in the war on terror could be hindered.

The *Rasul* majority opposed what it perceived as a delegation of excessive authority to the Executive Branch. The majority evaded the principle of stare decisis and "plain meaning" statutory construction to reach their holding. The Court failed to

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131 *Id.*
132 Rasul v. Bush, 542 U.S. 466, 494–95 (2004) (Scalia, J., dissenting)
133 *Id.*
134 *Id.*
135 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517–18 (2004).

expressly overrule *Eisentrager*, because the Court would have had to contradict its earlier reasoning.[136]

The earliest cases that the Court addressed concerning Executive powers at wartime narrowly construed Executive authority under Article II of the Constitution.[137] It did not interpret the Executive War Power to grant a President any exceptional authority during times of war.[138] These cases emphasized that the Constitution applied equally to rulers and citizens, in times of war and peace, in all circumstances.[139] The Court developed a new perspective in the 20th century, deferring to the Executive branch in times of crisis.[140] That was the trend until 2004, when the *Rasul* decision illustrated the Court's apparent desire to reinforce the separation of powers and revoke any presidential authority it deemed an overly broad interpretation of Article II.

Similarly, cases challenging congressional power under the Commerce Clause[141] have followed an analogous pattern. The earlier cases imposed a more strict interpretation of Congress' authority, such as in *United States v. E. C. Knight Co.*[142] The Court distinguished between manufacture and commerce, stating that manufacture is a transformation of raw materials into a form for use, while commerce included buying, selling and transportation of items.[143] The Court also emphasized that the solely internal commerce of a state is considered to be reserved

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136 *See* Hardaway, *supra* note 117, at 126; *Rasul*, 542 U.S. at 494.

137 *See supra* notes 12–55.

138 *See e.g.*, Ex Parte Merryman, 17 F. Cas. 144, 153 (1861) (concluding that President cannot suspend habeas corpus rights without any Congressional authorization); Ex Parte Milligan 71 U.S. 2, 131 (1866) (holding that President cannot prevent American citizen held on grounds of Congressional suspension of habeas corpus from access to Article III court if court is open).

139 *Ex Parte Milligan*, 71 U.S. at 120–21.

140 J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 702 (2001) (arguing that pattern of deference accelerated during Vietnam War era); Major Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 183 (1998) (suggesting doctrinal change reflects shift in predominance of Executive Branch as United States "emerged . . . as a world power").

141 U.S. CONST. ART. I, §8, cl.3 ("The Congress shall have Power To . . . regulate Commerce . . . among the several States").

142 156 U.S. 1 (1895) (holding manufacture is not commerce, and a monopoly was not subject to Congressional regulation).

143 *Id.*

for the state governments to control.[144] After the New Deal, the Court began to diminish the limits on the commerce power in order to ensure the success of the President's recovery plan.[145] Most recently however, the Court again began to impose stricter limits on Congress' Commerce Power, a shift from the interpretation it applied during the time period between 1937 and 1995. With *United States v. Lopez*,[146] the Court implemented a more rigid test to determine whether an activity was within the reach of congressional commerce power.[147]

Lopez's retraction of the broad deference the Court had been giving to the legislature mirrors the limits imposed on the Bush Administration in *Rasul*. The pattern of granting the executive deference in times of military emergency parallel the Court's various interpretations of the commerce power over the last sixty years. The Rehnquist Court was wary of the lack of limits on the discretion of Congress under the deferential standard of review used before *Lopez*.[148] The necessity of broader congressional power during the New Deal, and the need for a large Congressional role in the civil rights movement were also compelling justifications for a change.[149] However, the crisis

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144 Gibbons v. Ogden, 22 U.S. 1, 70 (1824).

145 *See* Michael Comiskey, *Can a President Pack – or Draft – The Supreme Court? FDR and the Court in the Great Depression and World War Two*, 57 ALB. L. REV. 1043, 1055 (1994) (noting Roosevelt-era Court interpreted Interstate Commerce Clause in expansive fashion); *see also* Donald Ziegler, *The New Activist Court*, 45 AM. U.L. REV. 1367, 1391 (1996) (arguing Court's restrictive interpretation of Commerce Clause limited effectiveness of economic recover programs until it adopted broader view of clause). *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (exemplifying Court's more expansive reading of Commerce Clause).

146 514 U.S. 549 (1995).

147 *Id.* at 558–60 (listing three areas in which Congress has power to regulate through commerce clause authority, including channels of interstate commerce, instrumentalities of interstate commerce, and that which substantially affect interstate commerce); Jeanine A. Scalero, Case Note: *The Endangered Species Act's Application to Isolated Species: A Substantial Affect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 349 (2000) (applying test to regulation of isolated species).

148 *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett: Restoring the Lost Constitution: The Presumption of Liberty*, 103 MICH. L. REV. 1081, 1091 (2005) (arguing since *Lopez*, Court has "aggressively reviewed Congressional decisions"); *see also* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1771 (2005) (explaining strict policing of federalism in interest of promoting State sovereignty has been "revived" by the Supreme Court's modern commerce clause jurisprudence).

149 *See* John C. Eastman, *Judicial Review of Unenumerated Rights: Does* Marbury's *Holding Apply in a Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL'Y 713, 733 (2005) (arguing that expansive interpretation of Congressional power is based on practical policy determinations); Catherine Laughlin, *Expert Testimony: Bridging Bioethics and Evidence*

facing our nation today is as dangerous, if not more, than World War II, when the executive was granted more authority during wartime. Analogous to the necessity of broader commerce power during the New Deal and the greater deference to the executive throughout World War II, current circumstances genuinely warrant providing the executive with more discretionary authority to act in the interest of national security. According to Justice Jackson's "Tripartite Analysis," the Executive is acting with authorization from Congress.

In declaring that it was not going to rely on *Eisentrager* in deciding the present case, the Court listed a number of factors to distinguish the facts from those in the prior case.[150] The first factor listed is that the petitioners are not nationals of countries at war with the United States. However, this is not a relevant factor, as the war on terror is not a traditional war in that the United States is not fighting a nation, but a terrorist organization. Al Qaeda is an organization comprised of members who are citizens of numerous countries. Under these circumstances, it is inappropriate to apply a factor based on a traditional paradigm of combat to this conflict. Al Qaeda is not a state-sponsored terrorist organization, and nationality is of limited use in determining the rights of the petitioners.

The second factor mentioned by the Court as relevant to its decision is that the petitioners deny having engaged in or plotted any aggression against the United States.[151] This factor is of questionable relevance. It is highly doubtful that any detainee who petitions for habeas relief will in fact admit to wrongdoing, so it is surprising that the Court would give any weight to this assertion. While it may be argued that detainees have the right to have a court determine their guilt or innocence, allowing their claim of innocence to influence the Court's determination of whether habeas should extend to Guantanamo is simply illogical.

Law: Recent Developments in Health Law: U.S. Supreme Court Hears Oral Arguments in Ashcroft v. Raich *Background*, 33 J.L. MED. & ETHICS 396, 397 (2005) (explaining Congress used deference granted it by Supreme Court to enact civil rights, environmental protection, and minimum wage legislation on the basis of "substantial effect on commerce" doctrine).

150 Rasul v. Bush, 542 U.S. 466, 475 (2004) (distinguishing present facts from those in *Eisentrager*).

151 *Id.*

After extending habeas to those being held in Guantanamo, all who petition for relief will likely make the same claim of innocence. Consequently, the assertion of innocence by these particular detainees should be irrelevant to the issue of whether jurisdiction under the habeas statute extends to detainees in Guantanamo Bay.

The Court also noted that the detainees have been imprisoned for more than two years. It is submitted that these lengthy detention periods could serve as evidence that the government is not yet comfortable releasing these individuals. As reported only days after the *Rasul* decision, the government is aware of at least five out of the fifty-seven detainees who had been released from Guantanamo Bay and subsequently returned to the battlefield to fight against the United States in Afghanistan.[152] While the fact that these individuals were released is evidence that the government needs to check its intelligence extremely carefully before freeing any of the detainees, this justifies the government's policy of lengthy detention because extensive interrogation and background checks must be performed before release is possible. Some of the detainees have been well trained in counter-interrogation techniques, making it more difficult for the United States government to make these determinations.[153]

The majority heavily relies on its interpretation that *Ahrens* was overruled by *Braden*. This reading is a crucial rationale underlying the primary holding in *Rasul*. Based on the belief that *Ahrens* is no longer valid, the Court follows the *Braden* assertion that the presence of a detainee within the territorial jurisdiction of the district court is not a necessary prerequisite to the exercise of that court's jurisdiction under the habeas statute.[154] Instead, the majority applies the *Braden* rule that the writ does not act on the individual who seeks relief, but upon the detainer who holds him in the allegedly unlawful custody.[155]

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152 Shaun Waterman, *Released Detainees Return to Fighting U.S.*, THE WASHINGTON TIMES, July 6, 2004 (available at www.washingtontimes.com/upi-breaking/20040705-080713-4578r.htm).

153 *See id.* (noting that one detainee had thirteen aliases).

154 *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495 (1973) (explaining this was rule in *Ahrens*, but facts of present case call for different interpretation); *see also Rasul*, 542 U.S. at 478–79 (discussing why *Ahrens* rule was not applied).

155 *See Braden*, 410 U.S. at 494 (citing Wales v. Whitney, 114 U.S. 564 (1885)); *see also Rasul*, 542 U.S. at 477 (asserting that it is only necessary for custodian to be within reach of service of process).

The application of *Braden* to *Rasul* is flawed. While Justice Rehnquist's dissent in *Braden* stated "today the Court overrules *Ahrens*,"[156] this should be read in the same manner as Justice Scalia's dissenting statement that *Rasul* overruled *Eisentrager*.[157] It is not in actuality what occurred, but reflects the dissent's view of the potential consequences of the majority holding. In reality, the facts of *Braden* and *Ahrens* are distinguishable. The *Braden* Court sets aside the *Ahrens* rule because the facts of the case are diverse, and the application of *Ahrens* would not be in the best interests of the United States. While *Ahrens*, like *Rasul*, dealt with aliens who were found to be dangerous to the safety and peace of the United States,[158] the petitioner in *Braden* was a United States citizen who was being imprisoned in Alabama and seeking habeas relief in Kentucky.[159]

The *Braden* Court noted critical developments that had occurred since the *Ahrens* decision, which reduced any need to apply the *Ahrens* rule.[160] These developments included an expanded interpretation of the custody requirement in the habeas statute, which allowed a prisoner being held in one state to challenge a detainer lodged against him in another state.[161] The Court ruled that under those particular circumstances, application of the *Ahrens* rule would not be useful. This emphasizes the different circumstances in *Braden* and *Ahrens*. The *Braden* Court did not assert an overruling of *Ahrens*, but instead stated that the earlier decision was no longer considered an "inflexible jurisdictional rule."[162] As a result, a court assessing the rights of a petitioner in a situation similar to *Braden* should follow the case's holding. However, a case with facts similar to

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156 *Braden*, 410 U.S. at 502 (Rehnquist, J., dissenting).

157 Rasul v. Bush, 542 U.S. 466, 496 (2004) (Scalia, J., dissenting) (discussing reality of opinion being that *Eisentrager* no longer controls).

158 Ahrens v. Clark, 335 U.S. 188, 189 (1948) (giving background of case facts).

159 *Braden*, 410 U.S. at 485 (noting the circumstances of the petitioner).

160 *Id.* at 498–99 (explaining why *Ahrens* rule was not followed for these set of facts); *see Rasul*, 542 U.S at 494 (using *Braden* Court's language in furtherance of dissenting opinion).

161 *Braden*, 410 U.S. 484, 498 (1973) (asserting relevancy of expanded custody requirement).

162 *Id.* at 499–500.

Ahrens should be controlled by *Ahrens*, and ultimately *Eisentrager*. *Rasul* falls into the latter category.

The *Braden* majority clearly recognized that part of the rationale directing the *Ahrens* decision was Congress' major concern that extending the habeas statute to dangerous aliens would result in extreme risks involved in the "production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose."[163] Those risks are still an important aspect of granting habeas to individuals being held outside of the territorial jurisdiction of the district. The *Rasul* Court overlooked these concerns and interpreted the statute in its own complicated manner.

In relying on the *Braden* rule that the habeas statute only requires jurisdiction over the custodian, the *Rasul* Court has, as Justice Scalia stated, "boldly extend[ed] the scope of the habeas statute to the four corners of the world."[164] The potential results of this rule include the possibility of an enemy alien who is captured on a foreign battlefield to bring a habeas petition under the statute.[165] As long as it is an American who is the custodian and can be reached by the jurisdiction of federal courts, there may be no geographical limits on detainees bringing petitions. Enemy aliens could be tried in whatever tribunal has jurisdiction over the American custodian. While this may not have been the Court's intention, the language in the opinion is susceptible to this interpretation.

III. SOLUTION: AN EMERGENCY CONSTITUTION?

During the most recent emergency situations that have faced the United States, the Supreme Court has given deference to the Executive Branch. Alarmingly, we have now seen *Rasul* change that pattern. The Court has a legitimate interest in maintaining the tripartite separation of powers, and ensuring that the

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163 *Ahrens*, 335 U.S. at 191; *see Braden*, 410 U.S. at 496 (quoting *Ahrens*, 335 U.S. at 191).

164 Rasul v. Bush, 542 U.S. 466, 497–98 (2004) (Scalia, J., dissenting) (listing potential consequences of holding).

165 *Id.*

Executive Branch does not disrupt the balance of power by overly intruding on the interests of other branches. Granting the Executive slightly expanded powers during times of national crises, the Court would not be in jeopardy of obliterating the system of government that makes the United States worth protecting.

There is an ongoing debate between two conflicting views on executive powers during emergency situations: the "accommodation" view and the "strict enforcement" view.[166] The "accommodation" view is that the Constitution should be relaxed, or even suspended during an emergency because at such times powers must be concentrated in the federal government, particularly in the executive.[167] This would allow the executive to move more vigorously against the threat. Those who advocate this view believe that constitutional rights and powers that are appropriate for times of peace are not the same as those suitable for emergency situations because the national security benefits of granting an executive nearly unlimited power in times of crises justify any risks to civil liberties.[168]

The opposing view to "accommodation" is "strict enforcement." Proponents of "strict enforcement" believe that constitutional rules should not be at all relaxed during times of emergency.[169] They rely on the levels of scrutiny that the Court uses to analyze

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166 *See* Norman Dorsen, *Here and There: Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840, 845 (1989) (explaining how "strict enforcement" view ensures civil liberties will be judicially protected without resulting in negative impact on national security); *see also* Oren Gross, *Chaos and Rule: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1011, 1023 (2003) (arguing that in congruence with "accommodation" view, government officials should violate Constitution during emergencies). *See generally* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 606 (2003) (explaining differences between two sides).

167 *See* Posner & Vermeule, *supra* note 166, at 606 n.1 (explaining three variances of "accommodation" view, all of which suggest that Constitution be relaxed or suspended during period of emergency); *see also* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 49–50 (2004) (describing concept of "National Security Minimalism", which essentially describes the "accommodation view").

168 *See* Posner & Vermeule, *supra* note 166, at 607 (stating "[t]here is no reason to think that the constitutional rights and powers appropriate for an emergency are the same as those that prevail during times of normalcy"); *see also* Sunstein, *supra* note 167, at 49–50 (stating some favor expansion in authority of Executive Branch during crisis because "the President must be permitted to do what needs to be done to protect the countr[y]").

169 Posner & Vermeule, *supra* note 166, at 608 (suggesting that approach balances government interests and civil liberties).

governmental action, which change based on the amount of infringement on civil liberties, as making some constitutional exceptions during national crises.[170] Therefore, strict enforcement advocates believe that in applying strict scrutiny during emergencies, laws that would not be permitted in peacetime would be acceptable based on the government's "compelling interest."[171] Thus, "strict enforcement" would achieve a similar result to the "accommodation" approach, without abandoning constitutional constraints.

One of the more recent emerging views is that of enacting emergency provisions to the Constitution. Commentators and analysts have projected that the United States will be a target of terrorist attacks on its soil for the foreseeable future. Consequently, some have proposed that we need to amend the Constitution to deal with the protection of civil liberties while still granting the executive exceptional emergency powers.[172] The war on terror is considered an "imperfect" war, as it is a war not formally declared by Congress, and is limited to specific places, persons and things, not entire nations at battle.[173] As a result of its "imperfect" status, it is speculated that the war on terror will not come to an end the way wars between sovereign states do, and an emergency constitution will prevent an indefinite reign of expanded executive powers.[174]

As proposed, the emergency constitution would permit executive unilateral action for a minimal period of time after the occurrence of a crisis, such as one to two weeks.[175] The majority of the legislature would then have to approve the continuation of

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170 *See id.* (noting Constitution already provides that level of protection for civil liberties depends on interest of government).

171 *Id.* (suggesting approach balances government interests and civil liberties).

172 Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1029 (2004) (proposing emergency provisions that will prevent infringements on civil liberties while granting enough authority to ensure protection of our country); *see* Posner & Vermeule, *supra* note 166, at 605–06 (suggesting after September 11th, government has sought new legal authority to combat terrorism).

173 Bas v. Tingy, 4 U.S. 37, 40 (1800) (differentiating between wars that are considered "perfect" and "imperfect"); *see* Ackerman, *supra* note 172, at 1033 (explaining difference between war on terrorism and traditional wars between sovereign states).

174 *See* Ackerman, *supra* note 172, at 1033 (asserting that even if Al Qaeda disintegrates after Bin Laden is caught, other terrorist groups will likely emerge); *see also* Posner & Vermeule, *supra* note 166, at 606–07 (noting that Constitutional rights and powers appropriate for emergency are dissimilar to those in times of normalcy).

175 Ackerman, *supra* note 172, at 1047.

the state of emergency for about two to three months.[176] After this time period, it is asserted that continuation of the state of emergency must require an escalating flow of supermajorities: the next two months would require sixty percent, followed by seventy percent, then eighty percent.[177] Such a system would likely prevent a state of emergency with expanded executive authority from continuing for more than six months. Supporters of this approach believe that it provides a balance between giving the executive the authority necessary to address the threat powerfully and reassure a panicked public, and protecting civil liberties.[178]

Opponents of the proposed "emergency constitution" solution believe that it would sacrifice morality for public safety.[179] Detention of suspects without the usual protections of probable cause or reasonable suspicion was listed as one of the allowances under the emergency system, and this is an issue with which many have a problem.[180] While it is important to remember that such allowances under the emergency constitution would be for a very limited period of time, similar provisions in Germany's Weimar Constitution resulted in international disaster.[181] The Weimar Constitution of 1919 facilitated Hitler's seizure of power under the semblance of constitutional legitimacy.[182] The

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176 *Id.*

177 *Id.*

178 *See* Ackerman, *supra* note 172, at 1037 (outlining aim to design Constitutional framework for temporary state of emergency that enables government to discharge the reassurance function without doing long term damage to individual rights); *see also* Posner & Vermeule, *supra* note 166, at 606–07 (stating that strictly enforcing Constitution appropriately balances both civil liberties and government interests).

179 *See* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1758–59 (2004) (suggesting that incarcerating innocent individuals in order to reassure panicked public is normatively unacceptable, irregardless of any subsequent compensation); *see also* Posner & Vermeule, *supra* note 166, at 606 (noting that legality of emergency Constitution and issues it presents have been contested).

180 *See* Ackerman, *supra* note 172, at 1037; *see also* Cole, *supra* note 179, at 1759 (noting that detainment without suspicion to reassure panicked public violates basic commitments of moral society by treating these detainees as means to public relations end).

181 *See* Ackerman, *supra* note 172, at 1039 (referring generally to German Federal Constitution); *see also* Posner & Vermeule, *supra* note 166, at 643 (noting that Weimar Government failed before rise of Adolf Hitler).

182 *See* Ackerman, *supra* note 172, at 1039 (explaining catastrophic role broad emergency provisions in Weimar Constitution had in Nazi ascent); *see also* Posner &

international community has since learned from each others' mistakes. Therefore, a United States Constitution that in any way resembled the German document that permitted the rise of Hitler's totalitarian regime would be in violation of all of the Framers' intentions.

While the emergency constitution proposes many intelligent and functional approaches to granting the executive greater authority during national crises, it is not a likely solution. First, to implement such a system would require a constitutional amendment. This means that Congress would have to vote by a two-thirds majority in both the House and Senate to approve the addition of emergency provisions into the Constitution.[183] It is highly unlikely that two thirds of each house would be willing to abandon the constitutional structure that has well served this nation since its framing, in favor of a high risk system granting the executive essentially unlimited powers immediately after the occurrence of a crisis. In addition, unlimited executive power based on a sheer abandonment of the Constitution is not a sensible course of action for a nation with its foundation in the separation of powers. Expanded executive authority during national crises is different from, and more acceptable than, unlimited power.

The "accommodation" view of the Constitution during emergency situations, while not advocating emergency provisions, still requires relaxation or suspension. These are not principles on which the United States government should function. The necessary course of action for times of emergency is that suggested by those of the "strict enforcement" view. Throughout recent history, the Supreme Court has been granting more deference to the executive in times of crisis. This has been achieved constitutionally by following precedent and applying the strict scrutiny analysis: finding executive actions narrowly tailored to a compelling government interest. It may be more advisable for the judiciary to instead apply a rational basis test to executive acts in emergency situations, determining whether the actions taken are rationally related to a legitimate governmental interest. This would guarantee more of an

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Vermeule, *supra* note 166, at 607 (describing how Weimar Constitution's provisions granted virtual dictatorial powers to Executive in times of emergency).

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expansion of executive power when it is most required. Either way, it is important not to stray from the Constitution. A functionalist approach in accordance with the constitutional structure, allowing some expansion and intermingling of powers of the governmental branches, is most practical, and the wisest to protect the integrity of the nation.

The problem with the *Rasul* decision is that it abandoned the constitutional approach of deferring to the executive in times of emergency, which was followed by the Supreme Court for decades. This does not necessarily mean that there should be a change in the way government has always functioned during national crises, but instead it means that the Court's outcome was not in the best interests of this country.

CONCLUSION

As the Court warned in *Eisentrager*, granting the writ of habeas corpus to enemy aliens means that the United States will be faced will numerous unnecessary inconveniences that will lead to hindrances in the war on terror. The access to United States courts in order to petition for habeas relief that was granted in *Rasul* is in fact bringing comfort and assistance to the enemy.[184] When the case was decided, there were approximately six-hundred and forty detainees at Guantanamo, and that number may increase indefinitely. What the Court has essentially done is give each of these detainees permission to inundate our already crowded court system with their petitions. This will further slow down the court proceedings of American citizens who have legitimate claims, and to whom the Constitution should be applied with first preference. In addition, this will take members of the United States armed forces away from the battlefields and homeland security, where they are most needed in these tumultuous times, and instead place them as chaperones to transport detainees to their hearings and court dates within the United States.

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184 *See* Johnson v. Eisentrager, 339 U.S. 763, 778–79 (1950); *see also Rasul*, 542 U.S. 466, 500 (2004) (Scalia, J., dissenting).

The United States Constitution has guaranteed a form of government that prevents any one branch from asserting too much power. This structure should not be changed for times of emergency. The process of granting the executive broader powers to act during emergency situations does not infringe on the Constitution. President Bush's actions in fighting the war on terror and detaining those who are suspected to be involved with Al Qaeda were in accordance with the authority granted to him through the AUMF. As Justice Jackson stated in *Youngstown Sheet & Tube Co.*, a President acting with the implied or express authorization of Congress is within his height of power. Measures taken by the President pursuant to this power should not have been challenged by the Supreme Court.