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OFFSHORE DETAINEES AND THE ROLE OF COURTS AFTER *RASUL V. BUSH*: THE UNDERAPPRECIATED VIRTUES OF DEFERENTIAL REVIEW

DAVID A. MARTIN*

Abstract: In *Rasul v. Bush*, the Supreme Court held that federal courts have jurisdiction over habeas corpus petitions filed by detainees at the U.S. naval base at Guantanamo, but was silent on the standards and procedures to be applied to the petitions, and on whether habeas jurisdiction covers detainees at other foreign locations. To foster application of habeas at other military sites for longer-term detainees but maintain military effectiveness against terrorism, this Article sketches a regime for considering detention challenges that builds on a structure emerging in the wake of *Rasul* and its companion case, *Hamdi v. Rumsfeld*. Such claims would be heard by military tribunals, subject to narrow and deferential federal habeas review. Having military tribunals conduct the primary factfinding honors key military needs while affording procedural safeguards. Although such deference might disappoint some advocates, this approach carries several underappreciated advantages, because of the real-world dynamics of such review, principally to stimulate better internal checks and balances. Though deferring to military factfinding, courts would retain authority to consider de novo the validity of tribunal procedures, and would remain the ultimate arbiters of the substantive standards governing “enemy combatant” classifications.

INTRODUCTION

The Supreme Court struck an important blow for civil liberties and human rights in its trilogy of enemy combatant decisions announced on June 28, 2004.¹ It rejected the Administration’s remarkably sweeping claims to a unilateral power to detain anyone the execu-

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¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

tive branch pronounced an enemy combatant in the war on terrorism, a power assertedly beyond the effective review of any court. Nor did the Court stop with the protection of U.S. citizens who are detained on such grounds. It held squarely that the hundreds of foreign nationals imprisoned at the U.S. Naval Base at Guantanamo Bay, Cuba, are entitled to test the validity of their detention in federal court, on a petition for the Great Writ of habeas corpus.²

By design, the Guantanamo case, *Rasul v. Bush*, answered only a narrow question: whether a district court has jurisdiction over a habeas petition filed by a detainee at that particular military facility. Jurisdiction exists.³ But now what? What precisely will be the standards for evaluating the validity of the detention? And importantly, will this decision apply to detainees at dozens of other foreign sites apparently used by our government for detention—and for interrogation—in the battle against Al Qaeda? Our nation's traditional suspicion of unchecked executive detention authority, reflected in the June 28 cases and bolstered by both Anglo-American legal history dating to Magna Carta and international human rights developments,⁴ argues for finding habeas corpus applicable in those other detention sites. But arguing against such an application are concerns about real-world military needs in what will doubtless be a lengthy struggle against dangerous terrorist foes willing to violate the most elementary humanitarian norms in an effort to kill Americans—or Spaniards, Iraqis, foreign workers in Iraq, or even Russian school-children. Will judicial review in a wider range of military detainee cases unduly hinder successful defense of the United States and of U.S. values?

² *Rasul*, 124 S. Ct. at 2695–97.

³ *Id.* at 2692–93.

⁴ On the Anglo-American tradition, see DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* (1966); Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952) (describing the right to habeas corpus protected by U.S. CONST., art. 1, § 9, cl. 2); *Hamdi*, 124 S. Ct. at 2650–52; *Rasul*, 124 S. Ct. at 2696–97. Equivalent rights are protected in many major international human rights treaties. See, e.g., International Covenant on Civil and Political Rights, *adopted by the General Assembly* Dec. 19, 1966, art. 9(4), 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(4), Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5; American Convention on Human Rights, arts. 7(6), 25, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970). In a 1987 advisory opinion, the Inter-American Court of Human Rights emphasized the central importance of habeas corpus protection and ruled that it may not be suspended in times of emergency. Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, paras. 33–40, Jan. 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).

If concern about military imperatives causes the Court to pull up short on the reach of habeas once we move beyond the unique circumstances of Guantanamo—where, the Court stated, the United States exercises “plenary and exclusive jurisdiction,”⁵ though it lacks formal sovereignty—then the *Rasul* case may prove to be of minor significance. The Defense Department could simply assign future long-term military detainees to other facilities, under basing agreements that cede a far more limited jurisdiction than did our 1903 treaty with Cuba.⁶ I hope to avoid such an artificial curtailment of the promise of *Rasul*, but I also want our military to be wholly effective in stopping al Qaeda attacks and disrupting terrorist networks. This essay represents an effort to bolster an emerging and workable middle ground, so that meaningful checks and balances will attach for longer-term U.S. detainees anywhere, but will take a form that adequately accounts for the realities of a difficult military struggle.⁷

I. *EISENTRAGER*

We have encountered a debate of this kind before, one in which liberty claims were pitted against asserted military necessity. It culminated in a 1950 Supreme Court precedent that occupied center stage in the *Rasul* litigation, *Johnson v. Eisentrager*.⁸ That case, which resulted in a broad ruling against the habeas petitioners, arose against the following background.⁹ During and immediately after World War II, U.S. courts had often received habeas corpus petitions filed by military detainees. A few of these cases ultimately reached the Supreme Court. In the currently much-discussed case of *Ex parte Quirin*, eight Nazi

⁵ 124 S. Ct. at 2693.

⁶ Agreement Between Cuba and U.S. for Lease of Lands for Coaling Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 [hereinafter Agreement Between Cuba and U.S.].

⁷ I deal here only with the question of adequate checks and balances before people are subjected to lengthy preventive detention, of the kind the Bush administration apparently contemplates for many or most “enemy combatants.” I do not address the use of military commissions under President Bush’s order of November 13, 2001, to hear criminal charges against a minority of such detainees, principally for alleged breaches of the laws of war, and to impose punishments, including capital punishment. Exec. Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Exec. Order]. I also do not address the courts’ role in reviewing conditions of confinement, including the validity of interrogation techniques. Some of my discussion, however, would be relevant in assessing a court’s role in either setting.

⁸ 339 U.S. 763 (1950); see *Rasul*, 124 S. Ct. at 2693–99.

⁹ See *Eisentrager*, 339 U.S. at 776–81.

saboteurs who came ashore in the United States in 1942 were allowed to pursue habeas challenges to the unique proceedings before a military commission that was trying them for capital offenses against the law of war.¹⁰ Similarly, General Tomoyuki Yamashita obtained Supreme Court review in 1946 of his conviction by a military commission for failure to control the Japanese troops under his command who committed extensive atrocities in the occupied Philippines.¹¹ In both instances, the Supreme Court, applying a deferential standard of review, approved the proceedings and allowed the petitioners to be executed¹²—and in both, the quality of the Court’s rulings has drawn lingering criticism.¹³ But they are best understood, despite some obscure wording, as rulings on the merits. Habeas corpus petitions were the vehicles that brought the challenges before Article III courts.

Then came *Eisenstrager*, decided in 1950. Twenty-one German nationals had been convicted in Nanking of war crimes for continuing military activities in China (in support of Japan) after Germany’s unconditional surrender. They were allowed to serve their sentences in U.S.-occupied Germany, and from there they filed petitions for habeas corpus in federal district court in Washington, D.C., challenging the legality of the detention.¹⁴ The Supreme Court’s ruling is conventionally understood as holding that habeas jurisdiction did not lie for enemy aliens in these circumstances.¹⁵

The Court, per Justice Jackson, began by noting that nationals of countries at war with the United States have been allowed access to our courts in a great many instances.¹⁶ Even the Alien Enemies Act of 1798 allowed—and still allows, for it remains on the books—limited court review of executive internment, which the statute expressly authorizes for persons who are nationals of a country with which we are at war.¹⁷ Any internee who claims that he or she is not in fact a na-

¹⁰ 317 U.S. 1, 24–25 (1942). See generally LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003).

¹¹ *In re Yamashita*, 327 U.S. 1, 25–26 (1946).

¹² *Id.* at 23–26; *Ex parte Quirin*, 317 U.S. at 47–48.

¹³ See, e.g., FISHER, *supra* note 11, at 127–44, 171–75 (critiquing *Quirin*); Waldemar A. Solf, *A Response to Telford Taylor’s “Nuremberg and Vietnam: An American Tragedy”*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW: THE CONCLUDING PHASE 421, 439–46 (Richard A. Falk ed., 1976) (critiquing *Yamashita*).

¹⁴ See 339 U.S. at 765–67.

¹⁵ See *id.* at 776–81.

¹⁶ *Id.* at 770–71.

¹⁷ *Eisenstrager*, 339 U.S. at 775. The Alien Enemies Act is the one component of the infamous Alien and Sedition Acts of 1798, enacted as part of President John Adams’ crack-down on foreign subversion as war with France loomed, that did not draw the condemna-

tional of a warring nation may have that claim heard in federal court on habeas.¹⁸ Resident enemy aliens, Justice Jackson noted, also retain qualified judicial access to pursue contract, debt and other normal actions, provided that the particular use of the courts does not hamper our war efforts.¹⁹ But nonresident aliens have had far fewer rights to use the judicial forum, especially in time of war.²⁰ Justice Jackson placed Eisentrager and his co-petitioners on that disfavored side of the line. Presence in the United States marks a crucial difference, and these petitioners never had it.²¹ *Quirin* is then understandable, because those petitioners obviously were on American soil at the time of review by the district court and the Supreme Court.²² *Yamashita* might have been a more difficult precedent to distinguish. But Justice Jackson emphasized a point not highlighted in *Yamashita*: the Philippines were a U.S. territory at the time of the trial.²³ *Yamashita* therefore enjoyed habeas access to the courts, including the Supreme Court on certiorari, as a result of congressional statutes governing the Philippines. “By reason of our sovereignty at that time over these insular possessions, *Yamashita* stood much as did *Quirin* before American courts.”²⁴ Occupied Germany, where the United States never claimed sovereignty, was different.

Jackson then enumerated what he regarded as serious practical problems that would ensue from allowing federal district courts to review detentions like Eisentrager’s, and concluded that military imperatives dictated the prohibition of habeas. For example, the writ of habeas corpus historically requires the custodian to produce the body of the petitioner before the court:

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 transpor-

tion of the Jeffersonians—nor of history. See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 110 n.164 (2002). The current version of the statute appears at 50 U.S.C. §§ 21–24 (2000).

¹⁸ On the availability of habeas to test only whether the detainee actually is a national of an enemy nation, see, for example, *United States ex rel. Hack v. Clark*, 159 F.2d 552, 554 (7th Cir. 1947); *Ex parte Gilroy*, 257 F. 110, 112–13 (S.D.N.Y. 1919).

¹⁹ See *Eisentrager*, 339 U.S. at 776.

²⁰ *Id.*

²¹ See *id.* at 780–81.

²² See *Quirin*, 317 U.S. at 45–46.

²³ *Eisentrager*, 339 U.S. at 780.

²⁴ See *id.*

tation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.²⁵

Such a procedure would also mean hauling a military commander into court, diminishing his prestige, “not only with enemies but with wavering neutrals.” If “the very enemies he is ordered to reduce to submission” can “call him to account in his own civil courts,” the suit would “divert his efforts and attention from the military offensive abroad to the legal defensive at home.”²⁶ Jackson also worried that “enemy litigiousness” would result in “a conflict between judicial and military opinion highly comforting to enemies of the United States.”²⁷ And in Jackson’s understanding, the Court could not limit a ruling sustaining habeas jurisdiction here to the “twilight between war and peace” that prevailed in 1950. It would also have to apply “during active hostilities,” since the writ is “a matter of right.”²⁸

According to the government lawyers litigating the Guantanamo detainee cases, the key phrase leading to *Eisentrager*’s rejection of habeas jurisdiction was this (and other kindred references): “these prisoners at no relevant time were within any territory over which the United States is sovereign.”²⁹ Sovereignty is determinative, those lawyers argued.³⁰ If so, no jurisdiction would obtain in the case of detention at Guantanamo, because the treaty with Cuba expressly recognizes the continuing “ultimate sovereignty” of Cuba over the territory occupied by the U.S. military facility—despite its grant to the United States of “complete jurisdiction and control” for so long as this country chooses to use the naval base.³¹

²⁵ *Id.* at 778–79.

²⁶ *Id.* at 779.

²⁷ *Id.*

²⁸ *Eisentrager*, 339 U.S. at 779.

²⁹ *Id.* at 778.

³⁰ *See Rasul*, 124 S. Ct. at 2693.

³¹ Agreement Between the United States and Cuba, *supra* note 6, art. III, T.S. No. 418 (recognizing “ultimate sovereignty” but granting the United States “complete jurisdiction and control” over the leased areas); Treaty of Relations, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866 (providing that the lease will remain effective so long as the United States does not abandon the base at Guantanamo).

II. *RASUL* V. *BUSH*

A. *The Ruling*

The D.C. Circuit in *Rasul* and its companion Guantanamo cases had agreed with the government, dismissing the habeas petitions because the petitioners were being held outside U.S. sovereign territory.³² The petitioners then sought certiorari raising several issues, including the need to define the limits that the due process clause places on indefinite detention in these circumstances. But the Supreme Court limited its grant of review to the single question of whether the courts lacked jurisdiction over these cases.³³

Six Justices voted to reverse and uphold jurisdiction in habeas corpus;³⁴ all but one of the six joined in Justice Stevens' opinion for the Court.³⁵ That opinion initially emphasized several crucial distinctions between the Guantanamo cases and *Eisentrager*:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.³⁶

Although Stevens hinted that these differences might well call for a different ruling on the petitioners' constitutional entitlement to ha-

³² *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The *Rasul* and *Al Odah* cases, both involving habeas petitions on behalf of Guantanamo detainees, were consolidated for decision at both the Court of Appeals and Supreme Court levels, but were known by different captions in the two settings. After the Supreme Court granted certiorari in *Rasul*, the Ninth Circuit reached a contrary result and found that it had jurisdiction over habeas petitions filed on behalf of detainees at Guantanamo. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003). But no split in the circuits existed at the time the Supreme Court granted certiorari.

³³ See *Rasul v. Bush*, 124 S. Ct. 534 (2003) (order granting certiorari).

³⁴ See *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004).

³⁵ See *id.*

³⁶ *Id.* at 2693. In this passage, Stevens was examining their situation with respect to a list of six factors expressly enumerated in Justice Jackson's *Eisentrager* opinion. *Id.*; *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950). Stevens suggested that the presence of *all* six was critical to the Court's disposition of the constitutional question in a manner that disfavored the petitioners.

beas, he ultimately chose not to resolve that question, basing his ruling for *Rasul* and his fellow petitioners entirely on the habeas statute itself, 28 U.S.C. § 2241.³⁷ *Eisentrager* had barely discussed the statutory entitlement question because, Stevens wrote, it considered such jurisdiction foreclosed by the recently decided *Ahrens v. Clark*.³⁸ That case had held that the petitioner's physical presence in the judicial district was a jurisdictional prerequisite to habeas relief.³⁹ In the *Rasul* majority's view, this statutory holding in *Ahrens* had been later overruled.⁴⁰ Modern doctrine provides that, so long as the court has personal jurisdiction over a person with the power to command the prisoner's release, the petitioner's current absence from the judicial district is not necessarily a fatal jurisdictional defect.⁴¹ Because later cases had "overruled the statutory predicate to *Eisentrager's* holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over peti-

³⁷ See *Rasul*, 124 S. Ct. at 2698–99. The central statutory language pertinent to military detainee cases is the following:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions

(c) The writ of habeas corpus shall not extend to a prisoner unless

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

28 U.S.C. § 2241 (2000).

³⁸ See *Rasul*, 124 S. Ct. at 2694.

³⁹ *Ahrens v. Clark*, 335 U.S. 188, 190–91 (1948). The *Ahrens* petitioners were located in another district, not outside U.S. territory, but as a dissenting opinion in *Ahrens* pointed out, the same jurisdictional holding would *a fortiori* apply to a petitioner held on foreign soil. *Id.* at 209 (Rutledge, J., dissenting).

⁴⁰ 124 S. Ct. at 2695 (relying principally on *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973)). Justice Scalia's dissent sharply disagreed that *Braden* could be read as overruling this portion of *Ahrens*. See *id.* at 2704.

⁴¹ See *Rasul*, 124 S. Ct. at 2695 (citing cases exemplifying this evolution). On the same day as the *Rasul* decision, however, a differently composed majority persisted in asserting that a habeas petition must be filed in the district of confinement and against the immediate custodian, provided that the person is in "present physical custody" within the United States. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2722–23 (2004). A more relaxed rule applies, permitting filing in other districts (where service can be made on a proper defendant somewhere in the chain of command), if the person is detained outside the boundaries of any judicial district or is not in actual physical custody. In the latter instance, of course, he must still be under constraints sufficient to bring the case within the ambit of habeas corpus. See *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Once a proper filing is made, the district court retains jurisdiction even if the government thereafter moves the petitioner to another district.

tioners' claims."⁴² Stevens apparently considered this conclusion regarding the coverage of the statute as so clearly commanded by the language that he offered no further explication of that reading.

B. *Its Reach*

To this point, the *Rasul* ruling would seem to apply to any persons detained by U.S. forces anywhere in the world.⁴³ The next section of the opinion, however, casts some doubt on such a conclusion. That section dealt with the government's argument that even if *Eisentrager* did not wholly dictate dismissal of the petitions, the habeas statute should still be read in light of the well-established principle "that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested."⁴⁴ Stevens dismissed that claim rather abruptly. The principle, he noted, has no application when the persons detained are within the territorial jurisdiction of the United States. The treaty with Cuba gives the United States "complete jurisdiction and control." Relying on that treaty language, the Court held in essence that such an extensive range of ceded territorial authority amounts to territorial jurisdiction for purposes of applying the government's proffered canon of construction.⁴⁵ Stevens went on to assert that applying habeas in this fashion beyond core national territory is consistent with the historical reach of the writ.⁴⁶ Lord Mansfield, he wrote, recognized that the writ would extend to any territory:

"under the subjection of the Crown." Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of

⁴² *Rasul*, 124 S. Ct. at 2695.

⁴³ *See id.* at 2698. The penultimate paragraph of the opinion, dealing briefly with the other non-habeas claims filed by the *Rasul* petitioners, also points in the same direction: "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained *in military custody outside the United States* from the privilege of litigation in U.S. courts." *Id.* (emphasis added, internal quotation marks and citations omitted).

⁴⁴ *Id.* at 2696.

⁴⁵ *See id.* The government's argument about the canon suffered significantly from its inescapable concession that, in view of prior U.S. practice, the habeas statute would afford jurisdiction over a petition filed by a U.S. citizen detained on Guantanamo. The Court saw "little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Id.* at 2695.

⁴⁶ *Id.* at 2697.

“the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.”⁴⁷

Justice Stevens gave no further indication of the criteria to be used in providing a “practical” assessment of the extent of such dominion. But his phrasing certainly suggests that there may be U.S. detention sites beyond the reach of the writ. Such a possibility is bolstered by his earlier hint that, on a military base that cannot be viewed as functionally a part of U.S. territory owing to more limited U.S. authority under the basing treaty, the government’s favored canon might well apply to block the application of statutory habeas.⁴⁸ And once habeas petitions are filed on behalf of persons detained by U.S. forces, for instance, at Bagram Air Base in Afghanistan, the government can be expected to argue forcefully that *Rasul* applies only to the unique circumstances of Guantanamo.⁴⁹

Justice Kennedy’s concurrence in *Rasul* may also strengthen the government’s determination to push such a narrow reading.⁵⁰ Kennedy did not rely on any ostensible overruling of *Ahrens* (and implicitly of *Eisentrager*) to find jurisdiction over the Guantanamo petitions. Instead, he viewed *Eisentrager* primarily through a separation-of-powers lens, and on that basis distinguished it. “[T]here is a realm of political authority over military affairs where the judicial power may not enter.”⁵¹ The detention of the German petitioners in occupied Germany was the concern of the Commander-in-Chief and Congress, not of the judiciary.⁵² But Guantanamo was different. “First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities.”⁵³ Second, the detainees:

are being held indefinitely, and without benefit of any legal proceeding to determine their status. . . . Perhaps, where detainees are taken from a zone of hostilities, detention with-

⁴⁷ *Rasul*, 124 S. Ct. at 2697 (citations omitted). Justice Scalia’s dissent took strong exception to this reading of British practice. *See id.* at 2708–10 (Scalia, J., dissenting).

⁴⁸ *Id.* at 2696.

⁴⁹ The United States reportedly holds approximately 300 detainees at Bagram, out of roughly 9000 detained by U.S. military authorities worldwide. *See* Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons is Coming to Light*, WASH. POST, May 11, 2004, at A1.

⁵⁰ 124 S. Ct. at 2699–701 (Kennedy, J., concurring). Justice Kennedy was the sixth vote for reversal, but wrote only for himself.

⁵¹ *Id.* at 2700 (Kennedy, J., concurring).

⁵² *See id.* (Kennedy, J., concurring).

⁵³ *Id.* (Kennedy, J., concurring).

out proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.⁵⁴

Justice Kennedy's opinion, particularly his discussion of the second factor, probably reflects more candidly the considerations that are likely to govern when the Court confronts petitions filed by detainees at other overseas U.S. bases. Whether the Court will permit judicial oversight then will depend, I suspect, more on its assessment of whether such oversight can be reconciled with "military necessity" or "military exigencies" than on an evaluation of the "extent and nature of the jurisdiction and dominion" exercised by the United States, as suggested by Justice Stevens.⁵⁵ Or perhaps Stevens's language will be used to describe a ruling that really rests, at bottom, on judgments about military needs.

But the key point is this: assessing whether judicial review in settings beyond Guantanamo intrudes unduly on military operations hinges on precisely what courts actually do when they review overseas military detentions. Three main questions are at issue. What substantive standards will courts apply to determine if detention is valid? What procedures will they either undertake themselves or insist that military authorities observe before a person is subjected to lengthy detention? And to what extent will courts take upon themselves the task of determining the underlying facts? By limiting its grant of certiorari in *Rasul*, the Court deliberately deferred its own rulings on those questions, presumably to allow both the executive branch and the lower courts—as well as academic commentary, and, should it bestir itself, Congress—to wrestle first with those issues, now that we know definitively that courts will in some fashion scrutinize the actions of the authorities at Guantanamo.

In my view, only if the Court judges it reasonably possible to reconcile judicial protection with genuine military needs will it rule that habeas jurisdiction extends to military detention at other foreign sites established under basing agreements that are more constrained than that governing Guantanamo. What follows is my effort to sketch such a framework, one that effectively holds courts to a limited role in view of military needs, while still affording significant incentives for those who run the detention system to honor the rights of detainees and to

⁵⁴ *Id.* (Kennedy, J., concurring).

⁵⁵ *See Rasul*, 124 S. Ct. at 2697.

act promptly to sort the guilty from the innocent—thus providing a genuine check on improper executive action. The latter is my main objective, as it apparently was for the Supreme Court in its June trilogy. The point is not to aggrandize the third branch, nor to proliferate detailed factual investigations into military activities carried out by federal courts, nor to feed some notion that only courts can adequately determine contested facts. Rather, the point is to use the judicial instrument carefully and cleverly, in order to maximize the chances that persons wrongfully detained can secure prompt release—while still allowing amply for the real demands of military efficacy. My sketch draws extensively on signals from a companion case in the June trilogy, *Hamdi v. Rumsfeld*.⁵⁶

III. LINE DRAWING FOR A NEW KIND OF CONFLICT

A. *Justice Jackson as a Starting Point*

Justice Jackson's opinion in *Eisenrager* provides a good starting point for thinking about the necessary set of standards, for three reasons. First, although Jackson seems to indicate that foreign detainees such as the petitioners there have no "standing to demand access to our courts,"⁵⁷ and though the holding has been traditionally understood in that jurisdictional fashion, Part IV of his opinion in fact considers the merits of the detainees' arguments against the validity of their trials and sentences, albeit according to a limited standard of review.⁵⁸ He also emphasized that "the doors of our courts have not been summarily closed upon these prisoners."⁵⁹ Thus, he implicitly acknowledged that some sort of judicial access, with some form of limited merits consideration, was not wholly inconsistent with military

⁵⁶ 124 S. Ct. 2633 (2004). The Court's holdings in *Hamdi* are, strictly speaking, applicable only to U.S. citizens picked up in combat areas and detained as enemy combatants. So far as is known, to date only *Hamdi* fits that description. But the Department of Defense, in developing procedures for the foreign-national Guantanamo detainees after *Rasul*, appears to have drawn significantly on the procedures specified in *Hamdi*. This was a logical place for the military to look, because *Hamdi* surely provides a high-water mark for the kinds of protections the Supreme Court could conceivably decree for the latter detainees. *See id.* at 2644, 2650–52. For these reasons, in this paper I will often look to the *Hamdi* standards as benchmarks, without continually observing that *Hamdi* is, in the end, potentially distinguishable.

⁵⁷ 339 U.S. 763, 777 (1950).

⁵⁸ *See id.* at 785–90; MEADOR, *supra* note 4, at 41–42; David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2072 (2003).

⁵⁹ 339 U.S. at 780.

effectiveness. The key today, as was the case in 1950, is exactly what sort of scrutiny accompanies that access.

Second, Jackson himself took great care to place the *Eisenstrager* controversy in historical context, pointing out several times and with evident approval that legal rules have been evolving toward according greater rights to foreign nationals. For example, citing a host of cases considering the deportation of aliens, Jackson noted that “*this Court has steadily enlarged [an alien’s] right against Executive deportation except upon full and fair hearing.*”⁶⁰ Quoting the court’s then-recent decision in *ex parte Kawato*, he further observed that the “ancient rule against suits by resident alien enemies *has survived only so far as necessary* to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy.”⁶¹ And lest one miss the significance of this evolutionary message, the very first sentence of Part I of the opinion had emphasized that theme: “Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder.”⁶²

To be sure, Justice Jackson then offered a host of reasons, including the practical difficulties referred to above, why granting the petitioners’ specific claims would have pushed that evolution too far at that stage of legal development.⁶³ But he certainly implied that such an evolution is ongoing. Jackson’s opinion reminds its readers that war does not represent an absence of legal rules, but merely a time when a different set of rules is called into play, in order to sustain fundamental elements of the rule of law while still allowing for the effective use of arms.⁶⁴

If such evolution is a continuing process, then it would not be at all surprising to find that a more protective regime, albeit one still carefully crafted to honor military needs, would be appropriate fifty-four years later. Fully a quarter of our life as a nation under the Constitution has elapsed since the Court decided *Eisenstrager*—a very substantial period of time. In the meantime, statutory, constitutional, and

⁶⁰ *Id.* at 771 (emphasis added).

⁶¹ *Id.* at 776 (emphasis added) (quoting *Ex parte Kawato*, 317 U.S. 69, 75 (1942)).

⁶² *Id.* at 768–69.

⁶³ Part II of his opinion, which contains the central reasoning for the denial of the petitioners’ access claims, starts by lamenting “*how much further we must go* if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.” *Id.* at 777 (emphasis added).

⁶⁴ See David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 321–23 (2004).

treaty law have developed significantly in the direction of affording more protections to criminal defendants and other detainees, including significant changes in the military justice system.⁶⁵

Third, Jackson's account of practical problems that might result from habeas jurisdiction, summarized in Part I, highlights the main functional concerns that still haunt the debate about whether to afford foreign detainees access to U.S. courts. A central question for today's Court in considering whether *Rasul* should apply to U.S. prisoners held on bases other than Guantanamo is this: what might the lapse of those fifty-four years mean for evaluating afresh the practical or functional difficulties that contributed to Justice Jackson's jurisdictional conclusions?

B. *Analyzing the Functional Impact of Judicial Review of Military Detention*

Jackson expressed concern with the logistics of moving the petitioner and necessary witnesses to the habeas court, as well as the possibility of distracting and potentially demeaning military commanders by placing them on the witness stand or second-guessing their judgments.⁶⁶ To the extent that Jackson's concern rested on the logistics of sea transport,⁶⁷ we are plainly in a different era. Today's vast, speedy, and relatively inexpensive air transport network makes transoceanic movement far less problematic. Further, one could certainly envision the statutory or regulatory development of a system for judicial review relying primarily on remote video hookup when live testimony is necessary in cases involving overseas military detainees.⁶⁸

Far more importantly, modern habeas practice tends to postpone or downplay the physical production of the prisoner in response to the writ, as courts strive to the greatest extent possible to resolve the

⁶⁵ Those relying on *Quirin* and *Eisenstrager* in shaping their suggestions for our response to terrorism usually ignore the fact that the law has evolved considerably since that time—both in providing greater protections for all persons, whether civilian or military, charged with a crime, and in expanding the protections given prisoners of war. See, e.g., William P. Barr & Andrew G. McBride, *Military Justice for al Qaeda*, WASH. POST, Nov. 18, 2001, at B7. For example, the 1929 Geneva Conventions, operative during the key events in both those cases, were replaced by the 1949 Conventions, based on lessons learned during World War II. Glazier, *supra* note 58, at 2073–84.

⁶⁶ See *Eisenstrager*, 339 U.S. at 778–79.

⁶⁷ See *id.* at 779.

⁶⁸ Cf. *Rivera v. Santirocco*, 814 F.2d 859, 860 (2d Cir. 1987); *United States v. Mandel*, 857 F. Supp. 253, 255 (E.D.N.Y. 1994) (blessing the use of alternative means to obtain the testimony of witnesses commanded to appear via habeas corpus ad testificandum, such alternatives including depositions at the place of confinement or the use of video or audio technology).

issues based on legal rulings without the need for a detailed factual inquiry.⁶⁹ This element—the nature of the factual inquiry—furnishes a central measure for judging the practicality of access to habeas at a wider range of U.S. detention facilities overseas. If the still-developing ground rules for such habeas review lend themselves to frequent factual disputes that can be resolved only by live testimony, then intrusion into military operations is inevitably magnified. If the rules instead permit most cases to be resolved as a matter of law, or solely on the basis of documents or transcripts generated in the course of military routine—albeit military routine reshaped to some extent in view of the Supreme Court’s rulings—then we will be better positioned to reconcile judicial access with military necessity.

C. *The Importance of Hamdi*

The *Hamdi* decision, handed down the same day as *Rasul*, contains strong indications that detention doctrine in this new setting will move in the latter direction, toward a more limited need for factfinding by the habeas court—although the initial terms of the Supreme Court’s remand in *Hamdi* helped to disguise these indications.⁷⁰

Hamdi involved a detainee picked up in a combat area in Afghanistan in late 2001 and then confined for three months at Guantanamo before the authorities discovered that he held U.S. citizenship. He was then moved to a navy brig at Norfolk, Virginia, for ongoing detention.⁷¹ He never received an opportunity to contest his designation as an “enemy combatant” (except, perhaps, in the course of military interrogations whose contents have not been revealed), and the government fought vigorously to assure that he could not consult an attorney, even during the course of the habeas proceed-

⁶⁹ See MEADOR, *supra* note 4, at 39–40; RONALD P. SOKOL, HANDBOOK OF FEDERAL HABEAS CORPUS 57–70, 80–82 (1965) (describing the favored practice, as permitted by 28 U.S.C. § 2243 (2000), calling for the use of an order to show cause directed to the custodian, to allow resolution of the petition on legal rulings wherever possible, without having to produce the body of the detainee); *cf.* 28 U.S.C. § 2255 (2000). Enacted in 1948, section 2255 created a procedure to serve as an alternative to habeas corpus for considering the lawfulness of sentences imposed by federal courts; it expressly provides that “[a] court may entertain and determine such motion without requiring the production of the prisoner at the hearing.” See *Sanders v. United States*, 373 U.S. 1, 20–21 (1963) (suggesting that section 2255 cases should be resolved without the petitioner’s presence when possible).

⁷⁰ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (2004).

⁷¹ *Id.* at 2635–36.

ings. It asserted that military necessity required such lengthy incommunicado detention.⁷² In the lower court decision, the Fourth Circuit did not doubt that Hamdi, as a citizen, had a right to engage the court on habeas corpus, but it ruled that the district court's inquiry had to be tightly circumscribed, owing to separation-of-powers concerns and the need for courts not to intrude on military decision-making.⁷³ The district court essentially was instructed to accept without further inquiry the broad factual assertions made in an affidavit from a Defense Department official as to the basis for Hamdi's imprisonment.⁷⁴ That affidavit described a version of the facts that the court deemed legally sufficient to justify battlefield-originated detention.⁷⁵ Hamdi would have no right either to consult with an attorney or to be heard in person to contest those assertions.⁷⁶

The Supreme Court reversed, holding that due process requires a more ample opportunity for such a detainee, with the assistance of counsel, to contest the facts allegedly justifying his detention. In *Hamdi* itself, the Court remanded under the apparent assumption that the habeas court would provide the forum for such a contest, and so undertake its own detailed inquiry into the affidavit's assertions, with a full opportunity for Hamdi to be heard on these factual questions. Whether further questioning of military personnel could take place was not resolved; we find in the opinion only general directives for the lower court to proceed with "caution" and employ "a factfinding process that is both prudent and incremental."⁷⁷

If this were all that the Supreme Court gave us in *Hamdi*, and if the *Hamdi* approach were one day applied to the far wider class of noncitizen detainees, a modern-day Justice Jackson might well fear that habeas courts would intrude unduly into military secrets and operations. But the *Hamdi* plurality seemed at pains to indicate that such a factual inquiry in the habeas court was meant to be the exception

⁷² See *id.* at 2653. In the related case involving Jose Padilla, the government offered a more detailed explanation of its reasons for wanting to deny access to counsel, in the form of an affidavit filed with the district court in connection with a motion to reconsider that court's initial ruling granting such access. See *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 44 (S.D.N.Y. 2003). In the affidavit, a vice admiral asserted that permitting contact with counsel would interfere with the "psychological pressure" necessary for effective interrogation. *Id.* at 46.

⁷³ *Hamdi v. Rumsfeld*, 316 F.3d 450, 472-77 (4th Cir. 2003), *vacated and remanded*, 124 S. Ct. 2633 (2004).

⁷⁴ See *id.* at 473.

⁷⁵ See *id.*

⁷⁶ See *id.* at 475.

⁷⁷ *Hamdi*, 124 S. Ct. at 2652.

rather than the rule—necessary here only because a stubborn government had provided no alternative administrative procedure that met minimum due process standards.⁷⁸ The opinion amounted to a broad hint that the government should develop such an administrative process, based on a system of military tribunals, that could be invoked fairly early in the period of detention by alleged “enemy combatant” detainees.⁷⁹ The Court then sketched a partial blueprint of the procedures to be observed to provide due process, apparently without regard to whether that process is afforded in an administrative or a judicial tribunal.⁸⁰

D. *The Current Process at Guantanamo*

Exactly some such administrative procedure appears likely to be the lasting legacy of *Hamdi* and *Rasul*, rather than the prospect of widespread habeas actions entailing detailed factual inquiries in federal court. In fact, after those June 2004 rulings, the Defense Department swiftly established special “combatant status review tribunals” at Guantanamo to hear out the evidence presented by both government and detainee and then to determine whether the prisoner is in fact an

⁷⁸ *See id.*

⁷⁹ *Id.* at 2651. The Court stated:

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. . . . In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.

Id. (citations omitted). It is important to clarify that this would be a far different tribunal system from the military commissions authorized in President Bush’s November 13, 2001, Military Order, which are often also referred to as military tribunals. Exec. Order, *supra* note 7, at 57,834. The Bush order sets up commissions meant to try charges of criminal violations and assess criminal penalties, including the death penalty. The *Hamdi*-inspired tribunals are meant to provide an administrative forum for deciding whether the detainee may continue to be held in the preventive detention (similar to that customarily employed for prisoners of war in more conventional conflicts) that the executive branch apparently contemplates for most of those detained as “enemy combatants,” both at Guantanamo and at other U.S.-run foreign facilities. To date, however, these tribunals have been established only at Guantanamo.

⁸⁰ *Hamdi*, 124 S. Ct. at 2651–52.

enemy combatant and thus subject to continuing detention.⁸¹ The procedures generally seem to follow the outlines set forth in *Hamdi*, even though the government could easily have taken the position that those prescriptions were limited to *citizens* detained as alleged enemy combatants and thus were inapplicable to the foreign nationals held at Guantanamo.⁸² Some important deviations from the *Hamdi* outlines exist, however. For example, detainees at Guantanamo will not have access to counsel, but instead will be appointed a “personal representative”—a military officer, who may or may not be an attorney. Additionally, advocates have raised questions about the neutrality of the tribunal members.⁸³ The first thirty such review procedures confirmed the ongoing detention of twenty-nine prisoners, but the tribunal ruled that one person was erroneously classified and directed his release.⁸⁴ Once that procedure was put into place, government lawyers began to argue that habeas actions should be limited to consideration of the legal sufficiency of this procedural structure rather than the accuracy of the tribunals’ findings about the detainees’ past activities that qualified them as enemy combatants.⁸⁵ In this regard, the government can point to abundant case law supporting its position that a

⁸¹ John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A1; John Mintz, *Four Detainees At Guantanamo to Get Hearings*, WASH. POST, July 30, 2004, at A5.

⁸² See DEPUTY SECRETARY OF DEFENSE, MEMORANDUM FOR THE SECRETARY OF THE NAVY, ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIBUNAL 2–4 (2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter TRIBUNAL MEMORANDUM]. More detailed implementation procedures were provided in a later memorandum. Enclosure (1), SECRETARY OF THE NAVY, IMPLEMENTATION OF COMBATANT STATUS REVIEW TRIBUNAL PROCEDURES FOR ENEMY COMBATANTS DETAINED AT GUANTANAMO BY NAVAL BASE, CUBA 1–9 (2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

⁸³ See, e.g., HUMAN RIGHTS FIRST, HUMAN RIGHTS FIRST ANALYZES DOD’S COMBATANT STATUS REVIEW TRIBUNALS (Aug. 2, 2004), at http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm [hereinafter HUMAN RIGHTS FIRST].

⁸⁴ Josh White, *Suspect Is Freed From Guantanamo: Release Is First Under Tribunals*, WASH. POST, Sept. 9, 2004, at A3. As of early November 2004, 317 such hearings had been held and 131 decisions issued, still with only the one ruling for release. Carol D. Leonnig & John Mintz, *Judge Says Detainees’ Trials are Unlawful*, WASH. POST, Nov. 9, 2004, at A1.

⁸⁵ See, e.g., Respondents’ Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 43–51, Hicks v. Bush, No. 02-CV-0299, Al Odah v. Bush, No. 02-CV-0828, Habib v. Bush, No. 02-CV-1130, Kurnaz v. Bush, No. 04-CV-1135, O.K. v. Bush, No. 04-CV-1136, Begg v. Bush, No. 04-CV-1137, Khalid v. Bush, No. 04-CV-1142, El-Banna v. Bush, No. 04-CV-1144, Ghorebi v. Bush, No. 04-CV-1164, Boumediene v. Bush, No. 04-CV-1166, Anam v. Bush, No. 04-CV-1194, Almurbati v. Bush, No. 04-CV-1227, Abdah v. Bush, No. 04-CV-1254 (D.D.C. filed Oct. 4, 2004). Advocates for the detainees are attempting to hold on to a more extensive role for the federal courts, despite the creation of the combatant status review tribunals. See HUMAN RIGHTS FIRST, *supra* note 83.

habeas court ordinarily has, at best, a tightly constrained role in reviewing factual determinations, at least where the detention rests on a formalized set of administrative findings. The court retains an important role, but one primarily confined to considering the adequacy of the procedures and the validity of the legal standards employed by the administrative body.⁸⁶

*E. Implications for Establishing the Right Balance—
The Military Side of the Scale*

Substantial questions remain about the constitutional adequacy of the administrative procedure deployed thus far in the Guantanamo tribunals, and we can expect that such issues will be vigorously litigated via habeas corpus.⁸⁷ But these difficult questions—such as the proper role of the noncitizen detainee’s counsel, the detainee’s access to key information, especially classified information, in order to build and present his case, and the precise specifications for a neutral decisionmaker—should lend themselves to categorical resolution, after a period of judicial sparring. Within a few years, the general framework for a constitutionally acceptable administrative procedure should be settled. Once that has happened, military routine can adjust accordingly—thereby minimizing the diversion of military resources to litigation. If a refined tribunal system can be made workable at Guantanamo, it should be equally workable in other foreign detention sites, at least those situated away from the field of active combat.

Justice Jackson, to be sure, worried that recognizing habeas corpus jurisdiction to challenge any foreign-soil detention by the military would require us to allow litigation in all sites, even in the midst of active combat, because the writ is “a matter of right.”⁸⁸ Jackson’s rather rigid and categorical views about the availability of habeas corpus, however, have not prevailed.⁸⁹ Succeeding courts have been quite open to

⁸⁶ See, e.g., *Bakhtiger v. Elwood*, 360 F.3d 414, 420–24 (3d Cir. 2004) (summarizing Supreme Court cases describing the core scope of review required by the Constitution in habeas corpus cases).

⁸⁷ See, e.g., Carol D. Leonnig, *Charges for Detainees Ordered*, WASH. POST, Sept. 21, 2004, at A2 (describing the major Guantanamo habeas litigation being pursued after the remand in *Rasul*).

⁸⁸ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

⁸⁹ See *id.* at 777–81. His similarly rigid approach to due process (considering that it either did not apply or, if applicable, demanded a rather comprehensive set of procedures approaching that of a judicial trial) has likewise been rejected by the Court in favor of a more flexible and contextual approach to deciding what process is due. *Mathews v. Eldridge*, 424

procedural variation to suit the precise circumstances of the contested detention.⁹⁰ In any event, the *Hamdi* plurality indicated rather clearly that it would make accommodation for battlefield exigencies and would shield field commanders from the need to incorporate the ways of the courtroom into their most sensitive field operations.⁹¹ It strongly suggested that “initial captures on the battlefield need not receive the process discussed here: that process is due only when the determination is made to *continue* to hold those who have been seized.”⁹² It would be but a short step from this dictum to a future decision finding habeas jurisdiction inapplicable to immediate battlefield captures and detentions, but instead available only when the person is placed in some form of protracted detention away from the battlefield. Drawing that precise line in a way that fully honors military needs while affording minimally necessary assurances against lengthy unlawful detention poses a decided challenge, but workable guidelines should prove possible.⁹³

It is useful to summarize the key elements of what will probably become a settled system for review of the combatant status of detainees, a system that could readily be applied beyond Guantanamo. To honor due process, the military provides a system of tribunals that consider within the first few weeks of a detainee’s arrival at such a facility whether the case for detention is valid.⁹⁴ The procedures, refined by what could be a lengthy and sharply contested dialogue

U.S. 319 (1976); see THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 481 (5th ed. 2003).

⁹⁰ See, e.g., *Swain v. Pressley*, 430 U.S. 372, 379–82 (1977) (allowing traditional habeas in an Article III court to be statutorily displaced by a procedure that permitted an Article I court to resolve the key legal and constitutional issues; the “substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus”).

⁹¹ 124 S. Ct. 2633, 2649.

⁹² *Id.* Technically, this passage from Justice O’Connor’s opinion for the plurality notes only that the parties in *Hamdi* agreed to this initial insulation of battlefield captures—but the discussion strongly suggests that the Court also subscribes to such an approach. Justice Kennedy’s concurring opinion in *Rasul* also suggests that such line-drawing is appropriate to shield battlefield detentions from judicial inquiry. *Id.* at 2700 (Kennedy, J., concurring).

⁹³ The issue may not even come up on any significant scale; it seems unlikely that many battlefield detainees will be in a position to file habeas actions, even through “next friends.” (“Next friends” are persons allowed to act for an otherwise incapable party in litigation. This practice can be especially important to challenging executive branch detention, because the detainee may not be in a position to file court papers. The *Hamdi* petition, for example, was filed by the detainee’s father as next friend. *Id.* at 2636.)

⁹⁴ The military is continuing to move new prisoners to Guantanamo—a sign that it does not consider the tribunal review system adopted in the wake of *Rasul* to unduly impede necessary military operations. Nation in Brief, WASH. POST, Sept. 22, 2004, at A12 (reporting the move of ten detainees from Afghanistan to Guantanamo).

with reviewing courts exercising the authority affirmed in *Rasul*, afford a genuine opportunity for the detainee to make his case.⁹⁵ Military officers will be the primary decisionmakers, however, not civilian judges. These officers will hear the witnesses, consider in detail any classified information, assess its relevance and worth, and provide a comprehensive statement of reasons for their conclusions. Perhaps there will also be an appellate body likewise composed of military officers.⁹⁶ But it does appear likely that the Supreme Court will remain vigilant to assure that the military officers who make the primary decisions are appropriately insulated from command pressures so that they can provide an honestly neutral forum. If so, this will parallel a hard-fought evolution that has led to similar reforms for the system of ordinary courts-martial.⁹⁷ *Hamdi* expressly rejected a government argument that military interrogation could afford the necessary opportunity for the individual to be heard.⁹⁸ Repeatedly the plurality opinion emphasized the need for a *neutral* decisionmaker.

1. Military Officers as Primary Decisionmakers

Even with that important qualification regarding the insulation of the decisionmakers, the fact that the primary functions will be carried out by military officers offers a major reason why such a system can operate in a way that takes sufficient account of military necessity. Military officers will figure prominently in the operation, management, and oversight of this process, subject only to the broad outside superintendence of the courts applying deferential review standards. Sensitive or classified information will be used primarily in the military forum, presumably handled by personnel with the appropriate level of clearance. And the current Guantanamo tribunal system also provides for the assignment of military officers as representatives for the detainees—even though the provisions for the officers' appointments (including the failure to require that they be military lawyers),

⁹⁵ *Rasul*, 124 S. Ct. at 2696–99.

⁹⁶ The current procedures allow for only limited review by the Convening Authority. TRIBUNAL MEMORANDUM, *supra* note 82, para. h.

⁹⁷ See Glazier, *supra* note 58, at 2075–77 (describing important reforms pursuant to the Military Justice Acts of 1968 and 1983, Pub. L. No. 90-632, 82 Stat. 1335 (1968); Pub. L. No. 98-209, 97 Stat. 1393 (1983)).

⁹⁸ 124 S. Ct. at 2651. Justice O'Connor writes, "An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." *Id.*

their actual involvement before the tribunal, and the confidentiality of client communications still raise serious due process concerns.⁹⁹

2. The Limited Role for Courts in Factfinding, Once the Military Tribunal Has Matured

A second crucial feature of this emerging regime, from the standpoint of assuring adequate observance of military needs, is that courts will not be authorized to investigate the facts *de novo*. That factfinding task falls to the military tribunal. What is less clear is the exact shape of the deferential review standard that will govern judicial consideration of a tribunal's factual findings. Fifty years ago the rule was a virtual hands-off. *Yamashita*, in a passage quoted with approval in *Eisentrager*, announced the following standard of review:

If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.¹⁰⁰

Today's Supreme Court seems unlikely to honor this extreme version of the judicial "passive virtues."¹⁰¹ *Hamdi* reversed a Fourth Circuit ruling that essentially forbade the district court to look behind the factual assertions of a Defense Department official, and the plurality clearly contemplated that the district court would in fact hold detailed factual proceedings on remand.¹⁰² But as noted above, that immediate result derived primarily from the failure of the government to provide any sort of neutral forum wherein the detainee could be heard, rather than from a long-term plan to sustain such an intrusive judicial role. Once there is a more formalized finding after alternative administrative

⁹⁹ See, e.g., HUMAN RIGHTS FIRST, *supra* note 83. A properly structured role for military attorneys possessing high-level security clearances, as representatives for the detainees, could also help afford a fair system for dealing with classified information. A model could be the role provided by statute for individual counsel drawn from a roster of attorneys possessing top-secret security clearances in proceedings before the Alien Terrorist Removal Court. INA §§ 502(e), 504(e)(3)(F), 8 U.S.C. §§ 1552(e), 1554(e)(3)(F) (2000). See Peter H. Schuck, Commentary, *Terrorism Cases Demand New Hybrid Courts*, L.A. TIMES, July 9, 2004, at B13. See generally Martin, *supra* note 17, at 126-36. Difficult questions remain about what role, if any, outside civilian counsel might play.

¹⁰⁰ 327 U.S. 1, 8 (1946), quoted in *Johnson v. Eisentrager*, 339 U.S. 763, 786-87 (1950).

¹⁰¹ See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

¹⁰² 124 S. Ct. at 2652.

procedures that conform to the *Hamdi* court's prescriptions, the situation should be quite different. But it cannot be expected that the standard of review will then track *Yamashita*. This Court will rather plainly preserve some judicial role in considering the validity of the factual findings.¹⁰³ Numerous habeas cases from other settings employ the "some evidence" standard of review in dealing with administrative findings of fact.¹⁰⁴ That is, courts consider the findings in light of the record established in a formalized administrative proceeding, to satisfy themselves that "some evidence" supported the factual rulings. The *Hamdi* opinion suggests that such a standard of review will come into play if the military were to set up a tribunal system as the primary forum for considering claims of invalid detention.¹⁰⁵ But though this standard unmistakably gives a court a greater role in considering the correctness of the factual conclusions than did *Yamashita*, it remains highly deferential, demanding less than the "substantial evidence" standard familiar to

¹⁰³ In response to a government argument, the plurality wrote:

the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.

Id. at 2650.

¹⁰⁴ See Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 636–58 (1988) (summarizing the history of usage of the "some evidence" standard).

¹⁰⁵ 124 S. Ct. at 2651. To be sure, the Court signaled the likely application of the "some evidence" standard to the suggested military tribunal procedures in a backhanded way in *Hamdi*. In the course of rejecting the government's assertion that that standard should be applied to evaluate the *ex parte* DOD affidavit filed to justify Hamdi's confinement, the Court said this:

As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker.

Id.

administrative law.¹⁰⁶ It certainly does not contemplate de novo factfinding by a court, but instead asks only that findings be measured against a record compiled in the administrative forum.¹⁰⁷ Employing the “some evidence” standard, courts should rarely, if ever, have occasion to call commanders or combat personnel to testify, nor should they require the presence of the alien petitioner to offer live testimony.

3. Judge Wilkinson’s Further Line-Drawing Challenge

In principle, then, this emerging combatant status review tribunal system, even if adjusted to provide more protective procedures for the detainee, solidly recognizes the primacy of the military role and avoids most of the practical hindrances on military effectiveness that Justice Jackson feared. But one other line-drawing issue must be considered. Systems that seem sound in principle might not work as intended. Here, the stakes are high on both sides. If courts do not *in practice* adhere to the limits envisioned for them in this broad model of the emerging regime, then the model’s compatibility with military needs might have to be rethought.

This exact concern evidently played a significant role in the Fourth Circuit’s conclusions in *Hamdi*—a ruling that barred the district court from looking behind the Defense Department affidavit that contained the alleged justifications for Hamdi’s detention. After the three-judge appellate panel ruled, petitioners sought a rehearing en banc. Four judges voted in favor, while eight opposed. Two of the four wrote at length explaining their reasons for dissenting from the denial of rehearing.¹⁰⁸ They particularly argued that a more complete inquiry was necessary, involving hearing directly from Hamdi in some fashion, before accepting the government’s word for the circumstances of his capture and the reasons for his detention.¹⁰⁹ This salvo prompted Judge Wilkinson, author of the panel opinion, to file his own lengthy opinion concurring in the denial of rehearing en banc and explaining why he found such deeper inquiry, though tempting,

¹⁰⁶ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1950). The Administrative Procedure Act provides for “substantial evidence” review at 5 U.S.C. § 706(2)(E) (2000); see Neuman, *supra* note 104, at 714, 730–32.

¹⁰⁷ See Neuman, *supra* note 104, at 713–17. This article contains a thoughtful and nuanced discussion of the “some evidence” standard and the manner in which it should be applied.

¹⁰⁸ *Hamdi v. Rumsfeld*, 337 F.3d 335, 357–76 (4th Cir. 2003) (Luttig, J., and Motz, J., dissenting) (disagreeing with the denial of rehearing en banc).

¹⁰⁹ *Id.* at 360–68, 371–75.

ultimately unworkable.¹¹⁰ He acknowledged that his dissenting colleagues were suggesting only limited further steps to explore the facts, far short of what the district court had commanded in its sweeping discovery orders.¹¹¹ But he thought it unlikely that any such process could be managed without inexorably pulling the judiciary too far into the process:

This desire to have courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step. . . . My colleague's desire for more and more information signals not the end of a constitutionally intrusive inquiry, but the beginning. To start down this road of litigating what Hamdi was actually doing among the enemy or to what extent he was aiding the enemy is to bump right up against the war powers of Articles I and II. Judges are ill equipped to serve as final and ultimate arbiters of the degree to which litigation should be permitted to burden foreign military operations. The ingredients essential to military success—its planning, tactics, and intelligence—are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil.

Because I think it both unreasonable and unfair to expect either judges or attorneys to discard a lifetime of honed instinct, I suspect that in time, if the course of the dissent is followed, the norms of the criminal justice process would come to govern the review of battlefield detentions in federal court. The prospect of such extended litigation would operate to inhibit our armed forces in taking the steps they need to win a war. The specter of hindsight in the courtroom would haunt decision-making in the field.¹¹²

Judge Wilkinson sounds a valuable cautionary note, and he does identify a genuine dynamic—an undertow—that is operative in these sorts of cases. It is not easy or natural for a human being, even one wearing judge's robes and steeped in the judicial ethos, to curb an understandable instinct to reverse a decision he believes is wrong,

¹¹⁰ *Id.* at 341–45.

¹¹¹ *Id.* at 342–44.

¹¹² *Id.* at 342–43.

even if he is told that ultimate factual rightness or wrongness is not his responsibility. But, as I discuss below, the very existence of that temptation, given the right institutional framework, actually helps to achieve a better balance between the competing needs of individual protection and military effectiveness.

Ultimately, I would argue that Judge Wilkinson's concerns are overblown. For one thing, to provide a forum for hearing a detainee's fundamental claim that he was innocent of any involvement in unlawful violent acts against U.S. forces or interests—and so was improperly characterized as an enemy combatant—need not entail review of planning and tactics, nor of the broad conduct of a military campaign. As the Supreme Court plurality in *Hamdi* ruled, factual inquiries in these cases are to be “limited to the alleged combatant's acts,” and courts are not to “meddle[] . . . in the strategy or conduct of war.”¹¹³ Such factual inquiries, the Court suggested, should normally be able to proceed by means of documentation already routinely maintained by the military.¹¹⁴

Second, most of Judge Wilkinson's objections address a system wherein primary factual hearings take place before a generalist Article III judge—the system anticipated in the early rounds of the *Hamdi*, *Padilla*, and *Rasul* cases, before the introduction of administrative combatant status review panels. Even if valid, these objections at best argue against setting up habeas courts as the principal factfinding venue. They do not prove that military needs would be disrupted if the detainee has an individual right to a meaningful hearing in a factfinding forum operated and managed by the military itself, with only the general superintendence of the courts.

Perhaps Judge Wilkinson is also concerned that even general superintendence under that framework would inevitably morph into more intrusive factual inquiry—that a judge's “lifetime of honed instinct” will result in the transgression of the boundaries that formally circumscribe the judicial role, and that such boundaries cannot prevent usurpation of the primary factfinding function.¹¹⁵ This conclusion underestimates the capacity of judicial self-discipline, coupled with appellate correction when necessary, to resist such encroachment, once it becomes clear that the military forum is the primary factfinder *and* once administrative procedures have been structured

¹¹³ 124 S. Ct. at 2649.

¹¹⁴ *Id.*

¹¹⁵ 337 F.3d at 343.

so as to provide an adequate opportunity for the individual to be heard in that setting. For reasons outlined above, *Hamdi* and *Rasul* point us in exactly that salutary direction, though it will certainly require further dialogue between courts and the executive branch—and perhaps Congress—before the structure becomes settled.

E. *The Other Side of the Scale—The Protection of Rights*

By now the reader might be thinking: Fine, the system described here may afford adequate allowance for military needs. But does it do enough to protect the rights of the individual? Certainly advocates have continued to argue for a much more ambitious judicial role.¹¹⁶

To assess the real prospects for adequate protection of rights under the regime sketched here, it is useful to disaggregate the kinds of claims that are at issue:¹¹⁷

1. The tribunals, it is asserted, afford inadequate procedures to protect the individuals involved. For example, advocates argue that detainees deserve more ample rights to counsel, better access to the evidence used against them, placement of the burden of proof on the government, and wider possibilities to call or cross-examine witnesses.
2. The developing administrative forum allows the military to apply improper substantive standards in deciding whether the individual's past acts justify his preventive detention as an "enemy combatant."
3. Military tribunals are inherently skewed toward upholding the detention and cannot be counted on to assess the facts in a balanced manner that is fair to the detainee. The deferential "some evidence" review standard lets decisionmakers get away with systematic bias.

All three points raise unquestionably valid concerns. But examining them one by one reveals how much the courts will remain involved in assuring individual protections under a refined tribunal system.

¹¹⁶ See, e.g., HUMAN RIGHTS WATCH, BACKGROUND BRIEFING: MAKING SENSE OF THE GUANTANAMO BAY TRIBUNALS, (Aug. 16, 2004), available at <http://hrw.org/english/docs/2004/08/16/usdom9235.htm> [hereinafter HUMAN RIGHTS WATCH BRIEFING]; Adam Liptak, *In First Rulings, Military Tribunals Uphold Detentions of 4*, N.Y. TIMES, Aug. 14, 2004, at A11.

¹¹⁷ See, e.g., HUMAN RIGHTS FIRST, *supra* note 83; HUMAN RIGHTS WATCH BRIEFING, *supra* note 116.

1. The Court's Role in Each Domain

With regard to the first set of claims, a military tribunal-based regime still gives the courts a highly significant role in considering the adequacy of the procedures. Nothing in *Hamdi* (which, as indicated, actually sketches its own mini-code of procedure, applicable at least in cases involving U.S. citizen detainees), nor in the broad body of procedural due process jurisprudence, suggests a deferential standard of review when the court is considering the procedural structure applicable in the administrative forum. For example, if the *Eldridge* calculus calls for a wider role for the detainee's counsel in examining and cross-examining witnesses before the tribunals, then a habeas court is fully positioned to remand for a new hearing that honors that right.¹¹⁸ Of course, advocates may disagree with the Supreme Court's calculations under *Eldridge* and conclude that the balance should be cast more strongly in the individual's direction.¹¹⁹ But that complaint amounts to a substantive disagreement over the application of due process doctrine. Making habeas courts the primary factfinders or ratcheting up the level of scrutiny for factual conclusions would not change the situation. Courts still have the last word with regard to delineating and policing the minimum procedural requirements that satisfy the Constitution.

Similar observations apply with regard to the second claim. It is of course vital that any substantive legal standards leading to indefinite detention be fully authorized—a question of both adoption by proper authorities and consistency with the Constitution. The rule of law also requires that such standards be clearly spelled out. It is truly remarkable that before June, 2004, the Administration had relied so heavily on the notion of “enemy combatant” as a foundation

¹¹⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting up a three-part balancing test that is now regularly used to assess the adequacy of procedures under the due process clause). The *Hamdi* plurality employed this methodology at length in reaching its conclusions about what due process requires in that specific enemy combatant context. See 124 S. Ct. at 2646–48.

¹¹⁹ See, e.g., HUMAN RIGHTS WATCH, U.S.: REVIEW PANELS NO FIX FOR GUANTANAMO, (July 27, 2004), at <http://hrw.org/english/docs/2004/07/27/usdom9135.htm>. Some have criticized the combatant status review panel arrangements for presuming that a detainee is an enemy combatant and effectively placing the burden of proof on the detainee. *Id.* This element of the procedure, however, seems rather clearly based on the plurality's dictum in *Hamdi*, issued in the course of its *Eldridge*-based due process discussion, stating that “the Constitution would not be offended by a presumption in favor of the government's evidence.” 124 S. Ct. at 2649. It bears noting, however, that the plurality, in sharp contrast to the Fourth Circuit, insisted that the presumption be rebuttable and that the procedures afford a genuine opportunity for the detainee to be heard in that process. See *id.*

for the most sweeping unilateral executive powers, and yet gave the public so little enlightenment on precisely what standards or criteria govern whether a particular individual falls within the category. In *Hamdi*, the Supreme Court itself expressed consternation at the government's stinginess in elucidating the concept.¹²⁰ But so long as habeas courts are in the business of entertaining petitions from detainees, as they clearly will be in the emerging habeas regime, that very review process forces the government, in the first place, to articulate its legal standards with clarity. Thereafter, the courts will clearly be involved in reviewing, refining, and sometimes rejecting such legal articulations. Habeas courts do not require *de novo* factfinding powers in order to play this wholly salutary role with regard to legal standards. Well-established habeas doctrine decrees that the courts have full authority to consider questions of law in response to petitions challenging executive detention.¹²¹ To be sure, many difficult legal and conceptual issues must still be resolved in developing workable substantive standards to sort lawful belligerents from unlawful combatants (and from mere civilians) in the struggle against terrorism. But under the regime that is developing in the wake of *Hamdi* and *Rasul*, the courts will be full players in that process—that is, if habeas review is ultimately ruled to apply to longer-term U.S. detainees in foreign facilities beyond Guantanamo.

This leaves us with the third point, which poses the biggest challenge in this realm. The individual rights concern may be elaborated upon as follows: A military panel might well be held to honor court-approved procedures (such as those governing a detainee's access to evidence, assistance of counsel, and burden of proof) and to describe its conclusions in terms that match a judicially prescribed substantive standard for continuing detention. And yet the individual still might not be given a fair shake if the panel is institutionally biased toward affirming what will obviously be a prior military decision to detain. How can a court possibly identify mere pretextual compliance with the appropriate procedures and substantive standards unless it is authorized to take a deeper look at the rightness or wrongness of the

¹²⁰ 124 S. Ct. at 2639 (“There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”).

¹²¹ This authority was recently and emphatically reaffirmed in *INS v. St. Cyr*, 533 U.S. 289, 300–03 (2001).

panel's factual conclusions? Ostensibly, such an inquiry is what both the *Yamashita* and the "some evidence" review frameworks forbid.¹²²

This line of argument certainly carries weight. And yet, as we have seen, it is exactly when habeas courts are broadly authorized to conduct their own factual inquiry that the process most seriously risks intruding on or hampering necessary military operations. If judicial authority to engage in separate factfinding must be part of the judicial access package, then the Supreme Court will be far less likely to extend the reach of habeas to foreign-national detainees in sites other than Guantanamo.

2. Real-World Effects on the Administration of Even a Deferential Standard of Review

a. *Initial Responses*

Upon closer analysis, however, there are two worthwhile responses to this concern. First, as noted above, the Supreme Court seems likely to insist on other structural or procedural guarantees of the neutrality of the decisionmaker, even though that person can be a military officer.¹²³ Insulating the hearing officer from the base commander's authority, or requiring appellate review by a wholly separate and specialist appellate unit, are possible steps that reviewing courts could require. Structures and procedures can be evaluated fully by the reviewing court without directly evaluating the rightness or wrongness of the factual conclusions.

Second, those who harbor this concern see the review process in overly formalistic terms. We must instead consider exactly how such a process, even with a highly deferential standard governing factual review, operates in actual practice, and we must see it from the differing standpoints of the key players involved. While detainees' advocates may feel that they are greatly disadvantaged by the court's inability to probe factual findings, the other players will have a considerably different perspective on the actual reach of the court's writ.

For administrative officers, including both those in charge of initial detention decisions and those who serve on the review tribunals, the single most important fact is that *the federal courts have a review role at all*—whatever the precise formal constraints on that role may be. Such

¹²² *But see* Neuman, *supra* note 104, at 633–36 (thoughtfully defending a version of the significant, though deferential, review authority that a court should exert when applying the "some evidence" standard).

¹²³ *See supra* Part III.E.

a role is now solidly entrenched for detainees at Guantanamo, and apparently for U.S. citizen detainees anywhere in the world; I argue here for extending that entrenchment to longer-term alien detainees at other overseas facilities. In such a setting, anything the administering authorities do is at least potentially subject to being called into question before a federal judge. This exposure provides significant inducements for greater rigor in the internal processes that lead to initial detention decisions, and in decisions to continue detention—especially when compared to a situation where the administrators know that they cannot be called to explain their actions in any external forum. The pattern of Defense Department responses to the Supreme Court’s “enemy combatant” cases illustrates this point. The press reported an accelerated pace of releases from Guantanamo shortly after certiorari was granted in *Rasul*.¹²⁴ More concretely, as noted, within two weeks of the actual decision in *Rasul*, the Defense Department began to establish combatant status review tribunals at Guantanamo, along lines generally consistent with *Hamdi* (even though that latter decision was technically distinguishable).¹²⁵ Internal review and quality control mechanisms doubtless existed before, but the prospect of court review gives them new urgency, polish, and force. Significantly, the mere prospect of court review greatly enhances the bargaining position of those within the agency who wish to adopt tighter standards, closer supervision, or more protective procedures.

The real-world operation of such review magnifies this effect. As a realistic matter, federal judges, even within the confines of a highly deferential standard, can increase the pressure on the agency in any case where they sense that the panel has acted questionably or reached a ruling deeply inconsistent with the evidence presented—even if there is enough, when it comes time to announce a final decision in the case, to sustain the final agency determination under the

¹²⁴ See generally *U.S. to Release 140 From Guantanamo; No Time Frame Given for Letting Detainees Go*, WASH. POST, Dec. 1, 2003, at A7; *Report: Guantánamo Inmates to be Released* (NPR radio broadcast, Dec. 1, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1525801>.

¹²⁵ See TRIBUNAL MEMORANDUM, *supra* note 82, at 2–4 (issued July 7, 2004). Well before the Supreme Court’s final rulings, but after the Court had granted certiorari in *Rasul*, the military also instituted another form of review panel, meant to conduct annual reviews of the cases of Guantanamo prisoners, with an opportunity for the detainee and his country of nationality to present information bearing on the decision. Apparently the panel was to judge whether the person could now be released in view of current dangerousness and any ongoing intelligence value. John Mintz, *U.S. Outlines Plan for Detainee Review*, WASH. POST, Mar. 4, 2004, at A10.

“some evidence” standard. A judge suspecting such a misfire of decisionmaking can, for example, minutely scrutinize the procedures employed, or find fault with some element of the description of the legal standard employed. In short, at least some judges will yield to the undertow about which Judge Wilkinson wrote, and find ways to put administrative officers through extra hoops while not overtly transgressing the boundaries of the governing deferential standard—at least until an appellate court calls them back into line.

Most courts, to be sure, will not undertake such a covertly interventionist role and will honor the prescribed limits on their powers. But here is the key to understanding administrative reactions to the presence of review: the administrators cannot know when they make an initial decision to put someone into longer-term detention, or when they conduct a formal review proceeding before a military tribunal, exactly which cases might run into a judicial buzz saw. This ineluctable uncertainty provides an ongoing external incentive for the administrators to set up the administrative system in as professional and careful a manner as possible, and to conduct each case with close attention to fairness, in order to avoid tempting a court into quietly pressing the boundaries of judicial deference and adopting, *de facto*, a more intrusive review process.

Even a deferential standard of review, then, creates an *external* force for serious *internal* checks and balances, an outside factor that also strengthens the hand of the inside players who push for better individual protections and closer internal review and monitoring. This dynamic significantly increases the odds of avoiding factually erroneous outcomes, as compared with a system that has no such external spur. Undeniably, it still falls short of guaranteeing against individual injustice worked by a biased or lazy or inattentive decisionmaker. It must be acknowledged, of course, that arming the reviewing court with a highly demanding standard of review would catch and correct a few more wrongful outcomes that evade the internal checks and balances than does a deferential standard. But the point here is that a deferential standard moves us a good deal further in the direction of accuracy than is ordinarily credited, precisely because of the interplay that will regularly occur between judges and the military. We may need to accept the remaining divergences as the price of assuring that the system does not intrude too far on military effectiveness in the struggle against terrorist forces.

b. *Illustrations*

An example of the dynamic described here can be found in a roughly analogous situation that arose in 1999–2000. Several provisions of U.S. immigration laws and regulations formally permit the use of secret evidence, unshared with the individual alien, in removal proceedings or in adjudication of benefit applications. Supreme Court jurisprudence and several lower court rulings have approved such a practice in at least some of those settings, providing, at most, for highly deferential review, owing to the potential national security sensitivity of classified information.¹²⁶ Though such use of classified evidence has not been frequent, any such case obviously raises profound questions of fairness to the individual. In 1999–2000, a cluster of judicial and administrative rulings found serious fault with the agency's use of such evidence.¹²⁷ In some instances, under judicial pressure, the Department of Justice backed off from plans to use the evidence, or even to pursue deportation, belatedly discovering weaknesses in the information.¹²⁸ Though many of the key judicial actions were not yet final, even at the district court stage, and even though the government retained reasonable prospects for eventually overturning the adverse decisions on appeal, this flurry of judicial activity and attendant press coverage prompted significant and much-needed changes in internal Justice Department procedures. The changes were meant to provide better internal assurance that use of classified information in immigration cases would be approved only when clearly necessary and only when the evidence had been closely considered for reliability in a forum other than the originating intelligence agency. The new mechanism was built around close internal review of the evidence by the Deputy Attorney General's office, thus elevating decisions on whether to use such evidence to the level of the Department's second-highest official.¹²⁹

This internal restructuring should be seen as a highly salutary outcome, both providing better protection for individuals facing de-

¹²⁶ See ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 89, at 1267–79.

¹²⁷ See, e.g., *Kiarelddeen v. Reno*, 71 F. Supp. 2d 402, 407–414 (D.N.J. 1999); *Al Najjar v. Reno*, 97 F. Supp. 2d 1329, 1349–60 (S.D. Fla. 2000).

¹²⁸ See *Alien Held on Secret Evidence Released from Detention*, 76 INTERPRETER RELEASES 1713, 1719 (Dec. 3, 1999).

¹²⁹ See *House Holds Hearings on Use of Secret Evidence, Visa Waiver Pilot Program*, 77 INTERPRETER RELEASES 301, 303 (2000); Niels W. Frenzen *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 INTERPRETER RELEASES 1677, 1683–84 (Nov. 22, 1999).

portation charges (because such evidence will be used less frequently and only after its reliability has been subjected to additional and more dispassionate review), and yet still shielding truly valid classified information and permitting action in response. The Department of Justice is in a far better position than are generalist judges to evaluate such information, both for its centrality to the case and for its background reliability. This more disciplined internal review continued even after the principal district court rulings that catalyzed it were either vacated on appeal or sharply criticized by an appellate court in ancillary proceedings.¹³⁰ A similar healthy interplay with the military's internal systems for enemy combatant detention decisions may well result from *Rasul*.

The immigration field provides a second illustration of the internal impact of judicial review, even when review standards are, in principle, highly deferential. Immigration law is notorious for such deference. Law reviews for decades have been filled with articles critical of standards of review requiring courts to defer to the so-called plenary power of the political branches in immigration cases or recognizing broad discretion in the immigration agencies.¹³¹ Immigration attorneys and advocates likewise bemoan the sweeping authority given to immigration agencies, illustrating their complaints with cases (often their own unsuccessful litigation) that have upheld questionable agency action.

But if one talks to government attorneys in immigration agencies, or field operations personnel, or indeed to immigration judges or members of the Board of Immigration Appeals, one gets a very different perspective. One finds no reveling in plenary powers, no broad sense that government actors have wide license to do as they please because courts will defer. Their attitude is the opposite—a mirror image. Like advocates, they tend to remember most vividly the cases that they lost—or at least instances where district or appellate court judges

¹³⁰ The original secret evidence ruling in *Kiareldeen* was not appealed because the INS decided to drop its deportation efforts. But the Third Circuit later reversed the district court's award of attorney's fees against the government, harshly criticizing the merits of the district court's initial secret evidence rulings. *Kiareldeen v. Ashcroft*, 273 F.3d 542, 552–56 (3d Cir. 2001). The *Al Najjar* ruling, finding due process violations in the use of secret evidence, was eventually vacated on the grounds of mootness. *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335–36 (11th Cir. 2001).

¹³¹ See, e.g., ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 89, at 208–10; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

engaged in what was perceived as highly demanding discovery or other scrutiny, or decreed remands on the basis of minute problems of procedure or articulation. They sense that judges could at any time, with virtually any of their actions, repeat such close scrutiny or negate what they decide, particularly if the initial decisionmaker does not act carefully and support the decisions with solid reasoning. Although the vast majority of an agency's day-to-day decisions will not lead to judicial review, and even though the immigration agencies in fact prevail in a solid majority of cases that do get to court, adverse litigation experiences (even if overturned on appeal) play a significant role in shaping future agency action. They thus help to instill a better internal discipline and to strengthen the hand of those within the agency who favor more careful or more protective procedures.

c. *The Paradox*

My argument for the value of deferential review, it must be acknowledged, rests at least in part on paradox. In the military detainee context, the argument presumes that we need a standard so accommodating to military needs that appellate courts will often be called on to rein in district courts when they give vent to a natural instinct to reach the merits and overturn administrative findings they simply feel to be erroneous. But at the same time, a portion of the stimulus for the military to develop and sustain the right kind of administrative process, with serious internal checks and balances, depends at least in part on the military's risk, in any given case, of encountering a cowboy district judge whose intrusions are supposedly precluded by the deferential standards that are to govern review. It is hardly a tidy system. But tidiness is not the objective. This precise dynamic, based on uncertainty about what federal judges might do once *Rasul* made it clear that Guantanamo detainees could bring habeas actions, has already triggered significant internal changes. It spawned the creation of a systematic review process at Guantanamo run by the military, one that has resulted in the release of at least one wrongfully detained individual. And this occurred though no court (as yet) either ordered the creation of that system or spelled out its procedures or standards. The sole ostensible motivation for the elaboration of the administrative tribunal system was simply the knowledge that habeas review of some kind would occur.

CONCLUSION: ACOUSTIC SEPARATION THAT HELPS ACHIEVE THE
NEEDED BALANCE

In sum, deferential standards of review give rise to a salutary form of acoustic separation¹³² that actually bolsters a delicate but indispensable balance when the strongest of governmental needs conflicts with the most elemental of individual liberty claims. Preventive detention of alleged enemy combatants in the struggle against terrorism is exactly such an arena.

Acoustic separation in this setting can be understood as follows. Individual detainees and their family members and attorneys, considering what is billed as *a deferential standard of review*, will likely focus on the word *deferential*, hearing daunting strains that may deter most filings—at least in the absence of what they believe to be a strong case for proving military injustice. Such a message minimizes intrusions on the operations of the military and encourages advocates to be more selective in the cases they bring. At the same time, however, the officers who are the designers and stewards of the detention system are far more likely to focus primarily on the word *review*. Once review exists, all actors know that courts will be looking over their shoulders. Every single case thus holds the potential for triggering uncomfortable judicial intrusions, especially if the administrators do not do their best to provide internally for high-quality and balanced decisions.

In the end, these underappreciated virtues of the emerging *Rasul/Hamdi* framework mean that it can make fully adequate room for genuine military needs while affording real, albeit imperfect, protection for individuals against military overreaching. This regime deserves to be applied to longer-term U.S. detainees elsewhere in the world.

¹³² This metaphor was first introduced into the legal discourse, so far as I know, by Meir Dan-Cohen, *Decision Rules and Conduct Rules: on Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). I employ the concept here in a related but slightly different fashion from the framework used in that article.