Availability of U.S. Courts to Detainees at Guantanamo Bay Naval Base - Reach of Habeas Corpus - Executive Power in War on Terror (Rasul v. Bush)

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But the ambiguous judicial ratification of new legal standards for use in the "war on terrorism" is inferior to addressing any needed changes to existing legal regimes through the treaty-making process or, in appropriate circumstances, through domestic legislation (subject, of course, to subsequent review by the courts for constitutionality and protection of human rights).

On a more encouraging note, the *Hamdi* plurality was appropriately cautious about extending legal categories created with traditional armed conflicts in mind to the broader "war on terrorism." The plurality acknowledged that "the national security underpinnings of the 'war on terror'... are broad and malleable," and warned that its holding in *Hamdi* was grounded in an "understanding [that] is based on longstanding law-of-war principles" and that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." One may hope that if we are unfortunate enough to see the scourge of terrorism continue, the U.S. Supreme Court's understanding of international humanitarian law will increase over time as it becomes more familiar with this complex, but indispensable, body of law.

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*Availability of U.S. courts to detainees at Guantánamo Bay Naval Base—reach of habeas corpus—executive power in war on terror*

RASUL v. BUSH. 124 S.Ct. 2686.
United States Supreme Court, June 28, 2004.

In *Rasul v. Bush,* the U.S. Supreme Court entertained claims by aliens imprisoned at the Guantánamo Bay Naval Base in Cuba. The Court held that the federal habeas corpus statute "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention" at Guantánamo Bay. The Court also held that petitioners' status as aliens held in military custody at Guantánamo Bay did not preclude the district court from exercising jurisdiction over their non-habeas claims challenging their conditions of confinement.

*Rasul* involved two separate cases that were consolidated in the district court. In *Al Odah v. United States,* twelve Kuwaiti nationals sought "a declaratory judgment and an injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families." The *Al Odah* plaintiffs did not seek habeas corpus relief. Indeed, they expressly "disclaim[ed] any desire to be released from confinement." In contrast, the petitioners in *Rasul*—two British and two Australian citizens—filed their action...
as a petition for a writ of habeas corpus, requesting the court to order their release from unlawful custody. The *Rasul* petitioners also raised conditions-of-confinement claims.

The district court in *Rasul* held that it lacked jurisdiction over any of the claims presented by any of the petitioners. First, it held that "a petition for a writ of habeas corpus is the exclusive avenue" for petitioners to seek relief. In order to support this holding, the court had to read the *Rasul* petition selectively, ignoring those portions of the petition that presented claims for relief other than release from custody. Moreover, the court effectively rewrote the *Al Odah* complaint, concluding that the plaintiffs "plainly challenge the lawfulness of their custody," even though the plaintiffs expressly disclaimed any intention to seek release from confinement.

After concluding that habeas corpus provided the exclusive avenue for relief, the district court held that the Supreme Court’s 1950 decision in *Johnson v. Eisentrager* barred jurisdiction over petitioners’ habeas claims. *Eisentrager* was a World War II case in which twenty-one German nationals petitioned a federal district court for writs of habeas corpus. The *Eisentrager* petitioners had been convicted by a U.S. military commission in China of violating the laws of war. After their trial and conviction in China, they were transferred to Landsberg prison, a U.S. Army facility in Germany, to serve their sentences. The Supreme Court held in *Eisentrager* that the district court lacked jurisdiction to entertain the German nationals’ habeas petitions. In *Rasul*, the district court construed *Eisentrager* to mean that "writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States." Petitioners had argued that “the United States has de facto sovereignty over the military base at Guantanamo Bay, and that this provides the Court with the basis needed to assert jurisdiction.” The district court rejected this argument, though, emphasizing that “Guantanamo Bay is not part of the sovereign territory of the United States.” As a result, the court concluded that *Rasul* was indistinguishable from *Eisentrager*. The Court of Appeals for the D.C. Circuit agreed: it construed *Eisentrager* to mean “that the ‘privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’” Therefore, the court of appeals concluded, the holding in *Eisentrager* “dooms [petitioners'] additional causes of action [as well], even if they deal only with conditions of confinement and do not sound in habeas.”

The Supreme Court reversed the lower courts, holding that *Eisentrager* did not preclude the district court from exercising jurisdiction over petitioners’ claims. Justice Stevens, writing for the majority, identified several grounds for distinguishing between *Rasul* and *Eisentrager*. First, the *Rasul* petitioners “are not nationals of countries at war with the United States.” In contrast, the *Eisentrager* petitioners were “alien enemies”—a term defined to mean “subject[s] of a foreign state at war with the United States.” The Court’s analysis in *Eisentrager* was framed in terms of distinctions between citizens and aliens, and between “alien friends” and “alien enemies.”

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7 *Rasul* (district court), *supra* note 5, at 57.
8 *Id.* at 64.
9 *Id.* at 62.
10 *Id.* at 62.
11 *Id.* at 66.
13 *Id.* at 766.
14 *Id.*
15 *Rasul* (district court), *supra* note 5, at 72-73.
16 *Id.* at 69.
17 *Id.*
18 *Al Odah* (circuit court), *supra* note 4, at 1144.
19 *Id.*
20 *Rasul* (Supreme Court), *supra* note 1, at 2693.
21 *Eisentrager*, 339 U.S. at 769 n.2.
22 *See id.* at 769-77.
Under the analytic framework of *Eisentrager*, alien enemies receive the lowest degree of legal protection. The Court in *Rasul* made no attempt to justify this analytic framework, or to explain why an individual who has engaged in hostile activities against the United States, but who happens to be a citizen of a friendly country, should receive greater legal protection than a citizen of a hostile country who has not personally engaged in any belligerent activity.

The Court's other three grounds for distinguishing *Rasul* from *Eisentrager* were better articulated. First, the *Eisentrager* petitioners were accused of engaging in unlawful belligerent activities against the United States; they "were tried and convicted by a Military Commission . . . pursuant to authority specifically granted by the Joint Chiefs of Staff"; and their "sentences were duly reviewed and . . . approved by military reviewing authority." In contrast, the *Rasul* petitioners "deny that they have engaged in or plotted acts of aggression against the United States," and "they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing." Thus, the *Eisentrager* Court could reasonably assume that the petitioners in that case had engaged in hostile activities against the United States, since a duly appointed military commission had already so held. In contrast, although the government alleged in *Rasul* that petitioners had engaged in belligerent actions against the United States, the Court was unwilling to assume the truth of those allegations—precisely because petitioners had not been charged or convicted.

Second, the *Eisentrager* petitioners were tried in China and subsequently imprisoned in Germany, "all beyond the territorial jurisdiction of any court of the United States." Moreover, the fact that the petitioners were outside U.S. territory was central to the Court's holding in *Eisentrager*. In contrast, the *Rasul* petitioners have been imprisoned for more than two years at the Guantánamo Bay Naval Base. The United States occupies the base under the terms of a 1903 Lease Agreement, which stipulates that the U.S. "shall exercise complete jurisdiction and control over and within" the leased territory. In 1934, the United States and Cuba concluded a treaty providing that "the lease would remain in effect so long as the United States of America shall not abandon the . . . naval station of Guantánamo." Thus, the Court in *Rasul* concluded that the presumption against extraterritorial application of U.S. law did not restrict the application of U.S. law in Guantánamo, because the naval base is, for all practical purposes, within the territorial jurisdiction of the United States.

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25 *See id.* at 771–72 ("It is war that exposes the relative vulnerability of the alien’s status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. . . . But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.").

26 *Eisentrager*, 339 U.S. at 766.

27 *Rasul* (Supreme Court), *supra* note 1, at 2693.

28 *Id.*

29 Justice Kennedy emphasized this point in his concurring opinion in *Rasul*. *See id.* at 2700 (Kennedy, J., concurring).

30 *Eisentrager*, 339 U.S. at 778.

31 *Rasul* (Supreme Court), *supra* note 1, at 2691.
Finally, the Court reasoned that Rasul was distinguishable from Eisentrager because Supreme Court decisions after Eisentrager had "overruled the statutory predicate to Eisentrager's holding." At issue was the federal habeas corpus statute granting federal district courts authority to entertain habeas petitions "within their respective jurisdictions"—statutory language that has not changed since the time that Eisentrager was decided. The district court in Eisentrager construed this statutory phrase, in accordance with Supreme Court precedent controlling at that time, to mean that district courts lack jurisdiction over habeas petitions unless petitioners are physically present within the territory where the district court is located. Accordingly, the district court dismissed the habeas petition for lack of statutory jurisdiction. The D.C. Circuit in Eisentrager reversed the district court judgment—not because the district court had misinterpreted the statute, but because the Constitution itself secured for petitioners a right of access to U.S. courts.

The Supreme Court in Eisentrager then reversed the court of appeals on constitutional grounds, holding that the Constitution did not grant petitioners a right of access to U.S. courts. Thus, the Supreme Court in Eisentrager did not decide the correct interpretation of the federal habeas statute.

In 1973, more than twenty years after its decision in Eisentrager, the Supreme Court revisited the question of how best to interpret the statutory phrase "within their respective jurisdictions." In Braden v. 30th Judicial Circuit Court of Kentucky, the Supreme Court held that this statutory language did not require petitioners to be physically present within the territory where the district court is located. Thus, the majority in Rasul concluded that it did not need to address the constitutional question at issue in Eisentrager. According to the Rasul majority, the federal habeas corpus statute, as construed in Braden, granted the district court statutory jurisdiction over the detainees' habeas petition "as long as 'the custodian can be reached by service of process.'"

ferred substantial authority to Germany and promised that "the exercise of direct powers by the Allies should be regarded as temporary and self-liquidating in nature." Agreed Memorandum Regarding the Principles Governing Exercise of Powers and Responsibilities of US-U.K.-French Governments Following Establishment of German Federal Republic, April 8, 1949, Art. 3, 63 Stat. 2817, TIAS 2066. Thus, a key distinction between Guantánamo Bay and the Landsberg prison is that Cuba has granted the U.S. jurisdiction over Guantánamo Bay in perpetuity.

Rasul (Supreme Court), supra note 1, at 2695.

The district court opinion in Eisentrager is unpublished. According to the D.C. Circuit, the district court dismissed the petition "upon the authority of Ahrens v. Clark." Eisentrager v. Forrestal, 174 F.2d 961, 962 (D.C. Cir. 1949). Ahrens held, as a matter of statutory interpretation, that "the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of habeas corpus." Ahrens v. Clark, 335 U.S. 188, 189 (1948).


See Johnson v. Eisentrager, 339 U.S. at 777 ("We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus") (first emphasis added).

Justice Scalia, in his dissenting opinion in Rasul, contested this interpretation of Eisentrager. See Rasul (Supreme Court), supra note 1, at 2701–03 (Scalia, J., dissenting). He contended that the court of appeals decided Eisentrager on statutory grounds, not constitutional grounds. Id. at 2702. In fact, the court of appeals in Eisentrager focused primarily on petitioners' constitutional right to habeas corpus. See 174 F.2d at 963–65. Justice Scalia claimed, however, that the court employed constitutional analysis in support of its statutory holding, invoking the canon of constitutional avoidance to support a statutory interpretation that would avoid constitutional difficulties. See Rasul (Supreme Court), supra note 1, at 2702 (Scalia, J., dissenting). Admittedly, there is some language in the court of appeals' decision in Eisentrager that supports Justice Scalia's interpretation. Regardless, the Supreme Court in Eisentrager construed the lower court's decision as a constitutional decision, not a statutory decision. See 339 U.S. at 767 (stating that the court of appeals concluded that "although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States"), 781 (stating that the court of appeals "gave our Constitution an extraterritorial application"), 784 ("The decision below would extend coverage of our Constitution to nonresident alien enemies"). Accordingly, the Supreme Court in Eisentrager based its own decision on constitutional grounds, not statutory grounds. See id. at 770–76 (explaining how the constitutional rights accorded to aliens hinge upon distinctions between residents and nonresidents, and between friends and enemies), 777–81 (rejecting the claim that an enemy alien outside the United States is constitutionally entitled to the writ of habeas corpus).

Rasul (Supreme Court), supra note 1, at 2695 (quoting Braden, 410 U.S. at 494–95). Justice Scalia criticized the majority opinion as follows: "From this point forward, federal courts will entertain petitions from . . . prisoners . . . around the world, challenging actions and events far away, and forcing the courts to oversee one aspect
After concluding that the district court had jurisdiction over the *Rasul* petitioners' habeas corpus claims, the Supreme Court addressed their non-habeas claims. The Court explicitly cited both the federal question statute and the Alien Tort Statute as potential grounds for jurisdiction. The Court did not actually hold, however, that these statutes grant the district court jurisdiction over petitioners' non-habeas claims. Rather, it held only that *Eisentrager* does not bar jurisdiction over such claims, leaving it for the district court to resolve any other jurisdictional objections on remand. In order for the district court to exercise jurisdiction under either the Alien Tort Statute or the federal question statute, it must find that some federal law grants petitioners a private cause of action for their non-habeas claims. Therefore, the *Rasul* petitioners have the burden of establishing a private right of action if they wish to pursue their non-habeas claims under the jurisdictional grant of either the Alien Tort Statute or the federal question statute.

* * *

One week after the Supreme Court's decision in *Rasul*, the administration issued an order establishing Combatant Status Review Tribunals (CSRTs). The CSRTs' mandate is to review the available factual information for each of the individuals currently detained at Guantánamo Bay in order to ascertain, in each case, whether the individual qualifies as an "enemy combatant." The order defines the term "enemy combatant" to include "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." The CSRTs issued their first decisions on of the Executive's conduct of a foreign war." *Id.* at 2707 (Scalia, J., dissenting). Since the time that the Supreme Court decided *Rasul*, the parents of Ahmed Abu Ali—an individual with alleged ties to Al Qaeda who is currently detained in Saudi Arabia—have filed a habeas corpus petition in a U.S. federal court. See Carlyle Murphy, *Saudi Plan Terror Case Against Virginia Man, Family Says, WASH. POST.*, July 30, 2004, at A9. If the court asserts jurisdiction in that case, Justice Scalia's prediction may prove to be right. But courts might also reasonably conclude that Guantánamo Bay is a special case and that the holding in *Rasul* does not extend to prisoners detained in other parts of the world. If that is the correct interpretation of *Rasul*, then the ultimate lesson for the executive branch may be that it can evade the jurisdiction of U.S. courts by holding prisoners in Iraq or Afghanistan, instead of transferring them to Guantánamo Bay.

*See*, e.g., *Erwin Chemerinsky, Federal Jurisdiction* 279–80 (3rd ed. 1999) (federal question statute confers jurisdiction on federal district courts to entertain claims in which federal statute creates private right of action).

*See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 CORNELL L. REV. (forthcoming 2004) (contending that the Administrative Procedure Act creates a private right of action that authorizes suit by the detainees to enjoin the continued use of interrogation methods that violate the Geneva Conventions).


*CSRT Order, supra* note 48, para. a. The order adds that the term "includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.*. The broader language quoted above seems purposefully designed, however, to allow an individual to be designated an "enemy combatant" simply by virtue of association with Al Qaeda, even if that individual did not directly support hostilities.
August 13, 2004, ruling that four detainees had been properly classified as enemy combatants. The administration plans to release any individuals whom the CSRTs determine are not enemy combatants; it claims the authority to detain enemy combatants indefinitely.

In accordance with the Supreme Court’s decision in *Rasul*, individuals deemed by the CSRTs to be enemy combatants have a right to file habeas corpus petitions in federal court to challenge the lawfulness of their detention. In addressing such claims, courts will need to determine what rule of law to apply in evaluating the status of the detainees. The position presented in this comment is that the Geneva Conventions provide the appropriate legal rules for the courts to apply. In applying the Conventions, it is not necessary for the courts to decide whether the detainees are “enemy combatants,” as defined by the administration, because the administration’s definitions do not conform to the legal framework of the Conventions.

The Senate consented to ratification of the Geneva Conventions on July 6, 1955. The United States ratified the treaties on July 14, 1955. Under the express terms of the Constitution, the Conventions are “the supreme Law of the Land.” Thus, as a matter of domestic law, the Conventions supersede any prior conflicting treaties, statutes, and common law rules governing the treatment of wartime detainees. Moreover, since treaties are equivalent to statutes, and since statutes trump conflicting regulations, including those enacted later in time, it follows that the Geneva Conventions take precedence over any subsequently enacted regulations that conflict with them. Therefore, insofar as the government’s classification of the detainees as “enemy combatants” relies on legal rules that antedate U.S. ratification of the Geneva Conventions, or on regulations promulgated without express statutory authorization, the courts are bound to apply.


52 CSRT Order, supra note 48, para. 1.


54 Clearly, the courts owe deference to the factual findings that support the CSRTs’ designation of an individual as an “enemy combatant.” Nevertheless, the conclusion that a particular individual is an “enemy combatant” is a legal one. Therefore, since the CSRTs are made up primarily of military officers who are not lawyers, the courts should not defer to the tribunals’ legal conclusions. See CSRT Order, supra note 48, para. (e) (“A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces . . . One of the members shall be a judge advocate.”)


56 U.S. CONST. Art. VI, cl. 2.

57 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(2) (1987) (“A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States.”).

58 See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 600–02 (1889); Whitney v. Robertson, 124 U.S. 190, 193–95 (1888); Edye v. Robertson, 112 U.S. 580, 597–99 (1884).


60 For fuller development of this argument, see Jinks & Sloss, supra note 47. If a later regulation is promulgated on the basis of an express grant of statutory authority, and if the statute authorizes regulations inconsistent with a prior treaty, then the regulation would arguably trump the treaty. None of the administration regulations concerning the Guantánamo Bay detainees is supported, however, by a statute authorizing regulations inconsistent with the Geneva Conventions. See id.

apply the legal rules codified in the Conventions, rather than the legal framework set forth in recent executive orders, in the event of a conflict between the two.

The government contends that federal courts are not authorized to apply the Geneva Conventions since they are not self-executing. In support of this claim, the government cites several cases in which courts have asserted that the Conventions do not create a private cause of action. However, for the purpose of habeas corpus petitions in which petitioners assert rights under the Geneva Conventions, it is immaterial whether the Conventions create a private cause of action; the federal habeas statute provides an express private right of action for petitioners who allege that they are in “custody in violation of the Constitution or laws or treaties of the United States.” Therefore, even assuming that the Conventions are not self-executing—in the sense that they do not create private rights of action—they are still judicially enforceable, because they are the law of the land under the Supremacy Clause, and the federal habeas statute expressly authorizes private enforcement of treaties that have the status of supreme federal law.

The Geneva Conventions provide substantial support for claims challenging the validity of the military commissions established pursuant to President Bush’s November 2001 military order, necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”; 10 U.S.C. §821 (2000) (addressing the jurisdiction of military commissions); and 10 U.S.C. §836 (2000) (authorizing the president to prescribe the rules for trials by military commissions). None of these statutes authorize the president, explicitly or implicitly, to promulgate rules inconsistent with the Geneva Conventions. See Jinks & Sloss, supra note 47. Therefore, regulations enacted pursuant to the November 2001 Military Order lack statutory authorization insofar as those regulations conflict with the Geneva Conventions.


63 See id. (citing, inter alia, Hamdi v. Rumsfeld, 316 F.3d 450, 468–69 (4th Cir. 2003), Al Odah v. United States, 521 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808–10 (D.C. Cir. 1984) (Bork, J., concurring)). The Supreme Court handed down its decision in Hamdi, 124 S.Ct. 2635, the same day as Rusal. Hamdi is discussed in a case report by Jenny S. Martinez at 98 AJIL 782 (2004).


66 This statement requires two caveats. First, the Conventions differ from some treaties in that they are manifestly intended to create primary rights for individuals. Treaties that create only horizontal duties between states, rather than vertical duties owed by states to individuals, do not create primary rights for individuals and are therefore not judicially enforceable at the behest of private individuals. See, e.g., Edye v. Robertson (Head Money Cases), 112 U.S. 589, 598 (1884) (distinguishing between treaties that are “primarily . . . compact[s] between independent nations” and treaties that “confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other”).

Second, in consenting to ratification of a particular treaty, the Senate could presumably adopt a condition to exempt that treaty from the general application of the federal habeas corpus statute. One could argue that recent non-self-executing declarations attached to human rights treaties have that effect. The Senate did not adopt any such condition, however, when it consented to ratification of the Geneva Conventions. There is also no evidence in the Senate record associated with ratification of the Conventions that the Senate intended to exempt the Conventions from the general application of the habeas statute.

67 November 2001 Military Order, supra note 61. Among other things, the military order authorized the Secretary of Defense to issue regulations for trials before military commissions. As of July 2004, the president had determined that fifteen detainees were eligible for trial by military commission pursuant to the military order. See Dep’t of Defense News Release, Presidential Military Order Applied to Nine More Combattants (July 7, 2004). As of this writing, charges have been filed against only four detainees. See Dep’t of Defense News Release, Military Commission Charges Referred (June 29, 2004) (naming three individuals who have been charged); Dep’t of Defense News Release, Additional Military Commission Charges Referred (July 14, 2004) (naming one additional defendant). The Navy officer assigned to represent Salim Ahmad Hamdan, one of the detainees who has been charged, has filed a petition in federal court challenging the validity of the military commissions. See Petition for Writ of Mandamus Pursuant to 28 U.S.C. §1361 or, in the Alternative, Writ of Habeas Corpus (Apr. 6, 2004), Swift v. Rumsfeld (W.D. Wash.) (CV04-0777), at <http://www.nimj.com>.

and also for claims challenging the conditions of confinement at Guantánamo Bay. The Conventions provide very little support, however, for the Guantánamo detainees’ claims asserting a right to be released from custody. In order to clarify this point, it is helpful to review the debate about the detainees’ status under the Geneva Conventions.

The administration divides the detainees into two categories: Taliban detainees and Al Qaeda detainees. The administration claims that the Geneva Conventions do not apply to the conflict between the United States and Al Qaeda since Al Qaeda is not a state party to the Conventions. The administration concedes that the Geneva Conventions apply to the armed conflict between the United States and the Taliban. It maintains, however, that the Taliban detainees are not protected by the Third Geneva Convention (protecting prisoners of war (POWS)) since they are unlawful combatants. In addition, the administration contends “that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because . . . the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’”

The administration’s analysis is seriously flawed. Under the scheme of the Conventions, there are two types of armed conflicts: international and non-international. The bulk of the Conventions apply to international armed conflicts—that is, conflicts between states. Common Article 3 applies to “armed conflict not of an international character” that is, conflicts that are not between states. The latter category includes conflicts between a state and a nonstate entity. Thus, insofar as individual Al Qaeda members were fighting in support of the Taliban in the conflict between the United States and Afghanistan, they are protected by Convention provisions that address international armed conflicts. Insofar as individual Al Qaeda members were not aligned with any state, they are protected by common Article 3. The administration’s position—that the conflict with Al Qaeda is neither international nor non-international—is utterly without foundation.

As noted above, the administration contends that the Conventions apply to the U.S. conflict with the Taliban, but that the Taliban detainees do not qualify as POWs. Assuming for the sake of argument that the administration is correct in this regard, the inescapable conclusion is


See Jinks & Sloss, supra note 47 (contending that the interrogation methods employed by the government at Guantánamo Bay violate detainees’ rights under the Geneva Conventions).

See Memorandum from George W. Bush, President, to the Vice President, the Secretaries of State and Defense, the Attorney General, and Other Officials (Feb. 7, 2002) (“Humane Treatment of al Qaeda and Taliban Detainees”) [hereinafter, Bush memorandum]. Many of the U.S. government memoranda concerning the treatment of detainees can be found on the Web site of Georgetown University’s online National Security Archive, <http://www.gwu.edu/~nsarchive/NSAEBB/NSAEBB127/index.htm> [hereinafter Georgetown University archive].

Id., para. 2(a).

Id., para. 2(d). For Third Geneva Convention, see supra note 53.

Bush memorandum, supra note 69, para. 2(c).

See Geneva Conventions, supra note 53, common Article 2 (stating that the Conventions “apply to all cases of . . . armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”). Currently, there are 191 states parties to the Conventions. See Int’l Comm. of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at <http://www.icrc.org/eng/party_gc> (documenting 191 ratifications as of October 2004). Thus, under common Article 2, the Conventions apply to almost every armed conflict between states.

Geneva Conventions, supra note 53, common Article 3.


See Third Geneva Convention, supra note 53, Art. 4(A)(2) (granting POW protections to members of militias and volunteer corps who are not members of the armed forces of a party); see also JEAN DE PREUX, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 57 (Jean S. Picquet gen. ed., A. P. de Heney trans., 1960) (noting that militias other than the armed forces of a party “must be fighting on behalf of a Party to the conflict in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable”).

The merits of the government’s position turn on the interpretation of Article 4(A) of the Third Geneva Convention, supra note 53. Article 4(A)(1) states that “[m]embers of the armed forces of a party to the conflict” qualify
that the Taliban detainees are protected by the Fourth Geneva Convention, which applies to “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict . . . , in the hands of a Party to the conflict . . . of which they are not nationals.”

In its internal deliberations on these issues, the administration did not address the application of the Fourth Convention to the Taliban detainees, apparently because administration lawyers assumed that the Convention applies only to “civilian non-combatants.” That assumption is mistaken for two reasons. First, the Fourth Convention specifies only three exceptions to the broad language quoted above, and there is no exception for combatants. Second, the Convention includes a specific provision to address individual civilians who are “suspected of or engaged in activities hostile to the security of the State.” Although such individuals may be denied “rights of communication” under the Fourth Convention, in all other respects they are entitled to the same rights as civilian noncombatants.

In sum, the Taliban detainees are protected either by the Third or Fourth Geneva Convention, depending upon whether they qualify as lawful combatants. The Al Qaeda detainees are protected either by the Fourth Convention or common Article 3, depending upon whether they were fighting on the side of the Taliban in Afghanistan. None of the detainees is bereft of legal rights under the Geneva Conventions. However, the Conventions strike a balance between the

as POWs. Hence, the Taliban detainees arguably qualify as POWs under this provision. Article 4(A)(2) states, however, that “[m]embers of other militias and members of other volunteer corps” must satisfy four criteria in order to qualify as POWs: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” The administration claims that the Taliban detainees do not qualify as POWs because they fail to satisfy the conditions in Article 4(A)(2). See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Feb. 7, 2002) (“Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949”), at Georgetown University archive, supra note 69. However, individuals who are “members of the armed forces of a Party” under Article 4(A)(1) arguably qualify as POWs regardless of whether they satisfy the four criteria in Article 4(A)(2). See, e.g., George H. Aldrich, New Life for the Laws of War, 75 A.J.I.L. 764, 768–69 (1981). Since many of the Taliban detainees were apparently members of the armed forces of Afghanistan, they can make a strong case that they are entitled to POW status.

Fourth Geneva Convention, supra note 53, Art. 4.

On June 22, 2004, the administration declassified a large volume of documents that shed light on the internal deliberations resulting in the president’s decision regarding the application of the Geneva Conventions to the Guantánamo Bay detainees. See Press Briefing by White House Counsel Judge Alberto Gonzales (June 22, 2004) (discussing the declassified documents), at <http://www.whitehouse.gov/news/releases/2004/02/20040207-13.html>. The White House issued the fact sheet on the same day that President Bush rendered his decision about the status of the detainees under the Geneva Conventions. As suggested in the preceding footnote, the declassified documents do not contain any legal analysis supporting the claim that the Fourth Geneva Convention applies only to noncombatants.


The three exceptions are set forth in Article 4 of the Fourth Geneva Convention, supra note 53. First, persons protected by one of the other three Geneva Conventions are not protected by the Fourth Geneva Convention. Under the administration’s position, the Taliban detainees do not fit within this exception since they are ostensibly not protected under the Third Geneva Convention. Second, “Nationals of a State which is not bound by the Convention are not protected by it.” Assuming that the Taliban detainees are nationals of Afghanistan, they do not fit within this exception because Afghanistan is a party to the Convention. Third, “Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.” Again assuming that the Taliban detainees are Afghan nationals, this exception does not apply since they are not nationals of either a neutral state or a co-belligerent state. To the contrary, in the context of the international armed conflict between the United States and Afghanistan, they are nationals of an enemy state.

Fourth Geneva Convention, supra note 53, Art. 5.

Id.

This statement assumes that the Al Qaeda detainees do not qualify as POWs since they do not satisfy the four criteria set forth in Article 4(A)(2) of the Third Geneva Convention. See supra note 77.
rights of detainees and the powers of government. Just as the detainees' legal rights limit the lawful authority of the government, so, too, does the government's legal authority limit the rights of the detainees. Thus, while the Geneva Conventions codify the legal rights of the prisoners in relation to the government, they also codify a set of rules that authorize the government to detain the prisoners.

The Third Convention expressly grants the government the authority to detain POWs until "the cessation of active hostilities."[^86] The executive branch maintains that active hostilities are ongoing. Under current circumstances, there is no basis for a court to second-guess the government on this matter. Therefore, the government has the legal authority to maintain custody for the foreseeable future over any detainees who qualify as POWs, and there is no obligation to file criminal charges against POWs in order to justify their continued detention.

Similarly, the Fourth Convention authorizes the internment of protected persons "if the security of the Detaining Power makes it absolutely necessary."[^87] Moreover, the government is authorized to detain an individual protected by the Fourth Convention until "the reasons which necessitated his internment no longer exist"[^88]—though "[i]nternment shall cease as soon as possible after the close of hostilities."[^89] With respect to detainees who qualify as protected persons under the Fourth Convention, habeas corpus provides a mechanism for judicial review of the executive branch's determinations that detention of an individual is "absolutely necessary" for U.S. security and that "the reasons which necessitated his internment" still exist. Such judicial review will necessarily be highly deferential, however, to executive branch claims regarding the threat that a particular individual poses to U.S. national security. Therefore, detainees who qualify as protected persons under the Fourth Convention are unlikely to win release from custody by means of a habeas corpus petition—at least not while the United States is engaged in active hostilities in Afghanistan and Iraq.

As noted above, Al Qaeda detainees who were not fighting on the side of the Taliban in Afghanistan are protected only by common Article 3 since they were not involved in an international armed conflict. Common Article 3 does not expressly grant the government authority to detain individuals who are captured during a non-international armed conflict, nor does it constrain the government's authority to do so. Accordingly, from the standpoint of international law, the government's authority to detain such individuals is governed by customary international law. Moreover, from the standpoint of domestic constitutional law, the president, as commander-in-chief, has the authority to detain combatants in a non-international armed conflict in accordance with the customary laws of war. The contours of the customary rules governing detention of such combatants are not entirely clear, but the government can make a strong case that it has the authority to detain the combatants until the cessation of active hostilities. Therefore, although individuals protected only by common Article 3 have a right to petition for habeas corpus relief, the Supreme Court's decision in *Rasul* indicates that they are unlikely to win release from custody unless they can demonstrate that they did not engage in belligerent activities against the United States.[^90]

In sum, the Bush administration invokes the law of war as a source of legal authority for the government to maintain custody over the Guantánamo detainees,[^91] while simultaneously denying

[^88]: *Id.*, Art. 132.
[^89]: *Id.*, Art. 133; see also *id.*, Art. 5 ("Where in the territory of a Party to the conflict, . . . an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.").
[^90]: There may be some Al Qaeda detainees protected only by common Article 3 who satisfy the administration's definition of "enemy combatant" but who did not engage in belligerent activities against the United States. *See supra* note 50. In such cases, courts should directly address the question whether continued detention is consistent with the customary laws of war.
that the detainees have any legal rights under the Geneva Conventions. That position is untenable. The government's argument in support of its asserted authority relies almost exclusively on judicial decisions, such as *Ex parte Quirin*,92 that antedate U.S. ratification of the Geneva Conventions. *Quirin* and other law-of-war cases applied customary international law-of-war rules as a form of federal common law. In terms of international law, the old customary rules have been superseded in all relevant respects by the Geneva Conventions. Moreover, in terms of domestic law, the federal common law rules have been superseded by the Geneva Conventions—at least insofar as there is a conflict between the two sets of rules.93 Therefore, the law of war that applies to the detainees is the law codified in the Geneva Conventions. The government cannot have its cake and eat it too. Insofar as the government invokes the law of war as a source of legal authority, it must acknowledge that the Geneva Conventions also constrain that authority.94

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Scope of Alien Tort Statute—arbitrary arrest and detention as violations of custom

SOSA V. ALVAREZ-MACHAIN; UNITED STATES V. ALVAREZ-MACHAIN. 124 S.Ct. 2739.
United States Supreme Court, June 29, 2004.

The U.S. Supreme Court’s decision in *Sosa v. Alvarez-Machain*1 ends another chapter of the long-running legal saga arising out of the 1990 U.S. government-sponsored abduction of a Mexican national, Humberto Alvarez-Machain, and his forcible transfer to the United States in order to stand trial, over Mexico’s objections, on charges relating to the 1985 murder in Mexico of Drug Enforcement Agency (DEA) agent Enrique Camarena-Salazar. Although the stage was initially set for a second and more exhaustive Supreme Court examination of the proprieties of the extraterritorial seizure, detention, and transfer of Alvarez,2 these issues became overshadowed by questions about the continued viability of the Alien Tort Statute (ATS)3 as a vehicle for international human rights lawsuits, notwithstanding a generation of human rights litigation following the landmark 1980 decision by the Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*.4 In *Sosa*, the Supreme Court sufficiently circumscribed the legacy of the *Filartiga* line of cases to doom Alvarez’s ATS claim, but it generally left the door open to ATS-based human rights lawsuits. The precise dimensions of the opening left by this decision will undoubtedly be controverted for some time to come.

In its first treatment of the Alvarez abduction in 1992, the Supreme Court held that the forcible seizure and transfer, whether or not a violation of customary international law, did not violate the U.S.-Mexico Extradition Treaty and therefore did not affect the federal court’s jurisdiction over Alvarez for purposes of the criminal trial.5 At the subsequent trial, the district court granted Alvarez a judgment of acquittal at the conclusion of the prosecution’s case, holding that the evidence adduced was insufficient to support a guilty verdict.6

92 317 U.S. 1 (1942).
93 See supra notes 55–61 and accompanying text.
2 In 1992, the Supreme Court addressed these issues—also with regard to the abduction of Alvarez—in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).
4 630 F.2d 876 (2d Cir. 1980).
6 According to the Ninth Circuit, "The [district] court concluded that the case against Alvarez was based on 'suspicion and hunches but... no proof,' and that the government’s theories were 'whole cloth, the wildest speculation.'" Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003) (en banc).