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THE UNCERTAIN LEGACY OF *RASUL V. BUSH*

Bradford A. Berenson[†]

I am going to focus my remarks this morning primarily on one of the three major enemy combatant decisions that the U.S. Supreme Court handed down last June. The *Rasul v. Bush*¹ decision, which related to the detainees held at Guantanamo Bay, posed the question of what rights of access the Guantanamo detainees have to our federal courts to challenge their detentions.

I would like to start with a riddle. What do the following four things have in common: First, a theater military commander in the midst of a hot war spending hours on the telephone with lawyers from the Department of Justice rather than with his subordinate commanders in the field who are carrying the fight to the enemy; second, an Al Qaeda terrorist bringing a civil suit against our Secretary of Defense and doing so with a lawyer paid for by United States taxpayers; third, an Al Qaeda terrorist receiving some of our nation's most highly classified information, information classified above Top Secret, at the SCI (Sensitive Compartmented Information) level; and fourth, a captured terrorist being released by the United States in order to return to the fight against the U.S. and to continue trying to kill our soldiers and our allies? The answer is that all four of those things are gifts potentially bestowed upon us by the U.S. Supreme Court through its *Rasul* decision last June.

I imagine that there are those of you in the audience right now who are saying, "Come on, those things are absurd and far-fetched." Well, I agree with you on the absurd part, but they are not far-fetched. Several of them are happening right now, and whether the others happen depends only upon the outcome of the litigation currently before the United States District Court for the

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1. 124 S. Ct. 2686 (2004).

District of Columbia. With that as a starting point, I would like to advance three propositions about the *Rasul* case and its impact.

The first is that the interesting question from *Rasul* is not what international law did to the U.S. Supreme Court – in other words, what effect international law had on the Court's adjudication of that case. Rather, the interesting question is what effect the U.S. Supreme Court's decision is going to have on international law.

The second proposition is that the decision in *Rasul* was important less for what it resolved than for what it did not resolve. Almost all of the important and difficult questions that will help us to determine the long-term impact of that decision on the United States and on international law have actually been left to be decided in subsequent rounds of litigation, primarily in the lower federal courts and potentially in future cases before the U.S. Supreme Court.

The final proposition is that if the questions left outstanding by *Rasul* are resolved incorrectly (at least in a way that I would consider to be incorrect), then *Rasul* could precipitate a true disaster for American national security. Let me briefly expand upon these three points.

First, the U.S. Supreme Court's decision in *Rasul* was notable for having foregone reliance on international law in rendering its decision. The petitioners and numerous amici invited the Court to continue the trend from last term's *Lawrence*² decision, and other cases,³ and rely, at least to some degree, on international law, whether in the form of customary international law, the Geneva Conventions, or other, more exotic international agreements and declarations. Yet the Court resolutely (and intentionally) declined this invitation. As you read the opinions, you will note that from the majority opinion right through the dissents, the argument is very much about habeas corpus jurisdiction, about the scope of our federal habeas statute, about previous U.S. Supreme Court decisions interpreting that statute, about the Suspension Clause,⁴ and the like. No significant aspect of the Court's decision relied in any way on international law norms or the international law obligations of the United States.

I believe that the Court, adjudicating the case in the way that it did, created an absolutely unheard-of right in international law. Thus, although the Court did not allow international law to enter into its decision making, it has now placed a very significant data point on the map that might echo back into international law elsewhere. There was absolutely no precedent – I argue none, from any court, any jurisdiction, any country in the world – for allowing alien enemy

2. *Lawrence v. Texas*, 539 U.S. 558 (2003).

3. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003).

4. U.S. CONST. art. I, § 9, cl. 2.

combatants being held abroad by a nation's military in the course of an active armed conflict to have recourse to the domestic courts of that country, to sue the leader of that country, and to challenge their detention. Military law and the international law of armed conflict prior to *Rasul* simply did not admit such a principle.

The U.S. Supreme Court, for the first time, has opened the door a crack to that notion. During World War II, we held about 380,000 Axis prisoners of war on our soil in P.O.W. camps.⁵ Although a handful may have tried to file habeas petitions, none was successful in bringing a habeas action against President Roosevelt or his Secretary of War. In older, more sensible times, such an accommodation to presumed enemies in time of war was properly regarded as ludicrous, and the U.S. Supreme Court expressly held that no habeas jurisdiction existed over alien enemies held abroad just a few years later in *Johnson v. Eisentrager*.⁶ Settled law provides that alien enemies, during the course of war, do not even have the right to come into our court to sue on ordinary commercial contracts.⁷ That includes alien enemy civilians: they are simply disabled from availing themselves of our judicial system by virtue of their loyalty and adherence to our enemies.⁸ They do not have the privilege of litigation in our courts. There is also no judicial redress for the damage that the United States (or any other nation at war) inflicts during combat, even when that damage is collateral, i.e. when it deprives complete innocents of their lives, health, or property.⁹ Thus, to hold, as the U.S. Supreme Court did, that the people we are detaining at Guantanamo Bay – the vast majority of whom, by any reasonable interpretation of the facts, are active enemies of the United States fighting against us militarily – have the right to come into our courts and sue the Secretary of Defense and call him to account at the same time he is trying to wage war against their brethren in foreign fields of battle is a dramatic and truly radical step.

Just how damaging to the security interests of the United States that decision turns out to be really depends on the questions left unresolved in *Rasul*. These questions include almost all the really important ones apart from the existence of jurisdiction itself.

5. Lynn Ermann, *Learning Freedom in Captivity*, WASH. POST, Jan. 18, 2004, at W16.

6. 339 U.S. 763, 776 (1950).

7. See, e.g., *id.* at 776; *Ex parte Colonna*, 314 U.S. 510, 511 (1942) (per curiam); *Masterson v. Howard*, 85 U.S. 99, 105 (1873); *Hanger v. Abbott*, 73 U.S. 532, 536-39; 50 U.S.C. app. § 7(b) (2002).

8. 50 U.S.C. app. § 7(b) (2002).

9. See, e.g., *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952); *United States v. Pacific R.R.*, 120 U.S. 227 (1887); see also 28 U.S.C. § 2680(j) (2003) ("combatant activities" exception to Federal Tort Claims Act).

The first of these questions is what substantive rights enemy detainees will be able to assert in habeas corpus proceedings. The U.S. Supreme Court recognized that there was habeas jurisdiction, but it said nothing or very little about what claims the habeas courts could hear.¹⁰ There is some debate about whether footnote 15 in the Court's decision, which suggests that long-term military detention without charges violates U.S. law, pours a little wine into the bottle, but it is not at all clear that it does.¹¹ Thus there is considerable uncertainty about what the detainees will actually be doing in their habeas proceedings.

The position the U.S. government has taken so far is that the detainees have no substantive rights to assert in these proceedings.¹² Interestingly, as broad as the *Rasul* decision is, Justice Steven's final paragraph opens with a sentence that says, "Whether . . . further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now."¹³ The government is placing a lot of reliance on that, suggesting that the *Rasul* decision leaves open the possibility that there will not be habeas corpus proceedings even though there is habeas corpus jurisdiction in the abstract, and that there is no private right possessed by the detainees of which the federal courts can take cognizance. This is obviously an ambitious reading of *Rasul* and one that is unlikely to find favor in the lower courts.

In the alternative, the government contends that if a detainee goes through the Combatant Status Review Tribunal¹⁴ process, he has no further rights under the U.S. Constitution or under international law to assert in the course of the habeas proceeding.¹⁵ The Combatant Status Review Tribunals (CSRTs) are

10. *Rasul*, 124 S. Ct. 2686.

11. *Id.* at 2698 n.15.

12. See, e.g., Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, Hicks v. Bush, No. 02-CV-0299 (CKK), slip op. at 19-30 (D.D.C. filed Oct. 4, 2004) (on file with author).

13. *Rasul*, 124 S. Ct. at 2699.

14. DEPUTY SECRETARY OF DEFENSE, MEMORANDUM FOR THE SECRETARY OF THE NAVY, ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIBUNAL (July 7, 2004) available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (last visited Jan. 10, 2005) (establishing this tribunal) [hereinafter MEMO FOR THE SECRETARY OF THE NAVY]; see also *Combatant Status Review Tribunals*, U.S. DEP'T OF DEFENSE, July 7, 2004, available at <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf> (last visited Jan. 10, 2005) (describing the reasoning for the tribunal, the processes of the tribunal, and the hearings of the tribunal).

15. See, e.g., Supplemental Memorandum of Law in Support of Respondents' Motion to Dismiss or for Judgment as a Matter of Law Pursuant to Court's December 2, 2004 Order, Khalid v. Bush, No. 1:04-CV-1142 (R.JL), slip op. at 8-12 (D.D.C. Dec. 13, 2004)(on file with author). In the first ruling on the merits of Guantanamo Detainees' habeas petitions, Judge Richard Leon of the United States District Court for the District of Columbia accepted this position of the government and

panels of neutral military officers, akin to those that the detainees would be entitled to under Article V of the Third Geneva Convention¹⁶ if those Conventions applied, that sit to review whether the detainees have been appropriately classified as combatants subject to the laws of war.¹⁷ Thus, the government takes the position that the only right possessed by an alien enemy combatant being held abroad is to have a neutral military tribunal make a factual determination that he is in fact properly classified as an enemy combatant.¹⁸ The purpose of the habeas review, according to this argument, is simply to ensure that such process is afforded and fairly administered by the military. In practice, this means that once the federal courts have blessed the basic structure and procedures of the CSRTs as consistent with due process and international law, further habeas proceedings should be de minimis affairs.¹⁹ Future habeas petitions would be easily dismissed without significant adversarial or court proceedings after the government's return avers that the detainee in question received the CSRT process he was due and was found by the CSRT to be properly classified.

The diametrically opposite view is being taken by the detainees and their counsel. Many of them are espousing the view that they have almost the full complement of rights under the U.S. Constitution that a U.S. citizen would have in ordinary criminal proceedings.²⁰ They also claim a robust suite of rights under a variety of sources of international law.²¹ According to the detainees and

denied the detainees' petitions. *Khalid v. Bush*, Nos. 1:04-1142 (RJL), 1:04-1162 (RJL) (D.D.C. Jan. 19, 2005).

16. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 972 U.N.T.S. 136, 140-42.

17. See MEMO FOR THE SECRETARY OF THE NAVY, *supra* note 13; Office of the Assistant Secretary of Defense (Public Affairs), *News Release, Administrative Review Implementation Directive Issued*, U.S. DEP'T OF DEFENSE, Sept. 15, 2004, available at <http://www.defenselink.mil/releases/2004/nr20040915-1253.html> (last visited Jan. 12, 2005).

18. See, e.g., Supplemental Memorandum of Law In Support of Respondents' Motion To Dismiss Or For Judgment As A Matter Of Law Pursuant To The Court's December 2, 2004 Order, *Khalid* (No. 1:04-cv-1142), slip op. at 8-12 (on file with author).

19. In direct conflict with Judge Leon's ruling, see *supra* note 15, Judge Joyce Hens Green of the D.C. District Court recently rejected the adequacy of the CSRT procedures under the Due Process Clause, finding that the Constitution entitles the detainees to fuller hearings in district court habeas proceedings. See Memorandum Opinion Denying In Part And Granting In Part Respondents' Motion To Dismiss Or For Judgment As A Matter Of Law, *In re Guantánamo Detainee Cases*, No. 02-CV-00828 (CKK) (D.D.C. filed Jan. 31, 2005) (on file with author). The proper role of the CSRTs in the overall process of legal review is clearly destined for decision by the D.C. Circuit and perhaps the Supreme Court.

20. See, e.g., Petitioner's Memorandum in Opposition to Respondents' Motion to Dismiss, *In re Guantánamo Detainees*, No. 02-CV-00828 (CKK), slip op. at 28-40 (D.D.C. filed Nov. 5, 2004) (on file with author).

21. See *id.* at 17-27.

their counsel, the claims they may press in support of their freedom in the post-*Rasul* habeas proceedings are almost unlimited. The extent to which these post-*Rasul* habeas proceedings become an intolerable burden on the military effort and result in the erroneous release of dangerous terrorists hinges in large part on how broadly or narrowly the lower courts define the rights cognizable in these proceedings.

The second big unanswered question is related: to what extent are the determinations made by CSRTs entitled to deference in subsequent habeas proceedings? Even if the courts reject the proposition that the detainees have no rights to assert in habeas or that those rights are limited only to complaining that they did not get to appear before a CSRT, there is still the prospect that the scope of habeas review will be very limited if administrative-style deference is given to the substantive determinations made by the CSRTs. Even in a world where federal habeas courts arrogate to themselves the power to review whether a particular detainee was or was not in fact an enemy combatant, much will depend on their standard of review.

On this question, the U.S. government not surprisingly argues that the habeas courts would be available only to conduct a review of the administrative record compiled by the CSRTs under a very deferential “some evidence” standard.²² What this means in practice is that the habeas courts will not be making *de novo* determinations of whether the detainee was, in fact, an enemy combatant; instead, the courts will simply review what the military itself did to make that determination and ensure that it complied with the basic standards of due process and regularity. Drawing on precedents from the selective service²³ and immigration²⁴ arenas, the government argues that the courts should defer to the determinations of the CSRTs as long as those determinations were supported by “some evidence” – in other words, were not completely arbitrary or irrational.

The detainees envision a much more robust judicial function, in which mini-trials will be conducted in the federal habeas courts to make new determinations through adversarial proceedings of a particular detainee’s proper status.²⁵ During the pendency of the U.S. Supreme Court case, the *Rasul* petitioners and their amici implied that all they really wanted were Article V

22. See, e.g., Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, *Hicks* (No. 02-CV-0299) slip op. at 43-51 (on file with author).

23. See, e.g., *Eagles v. United States*, 329 U.S. 304, 312 (1946).

24. See, e.g., *United States ex rel. Vajtauer v. Comm’r*, 273 U.S. 103, 106 (1927); *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

25. See, e.g., Petitioners’ Joint Supplemental Brief in Opposition to Respondents’ Motion to Dismiss or for Judgment as a Matter of Law, *Khalid v. Bush*, Civ. No. 1:04-CV-1142 (RJL), slip op. at 19-31 (D.D.C. Dec. 13, 2004) (on file with author).

hearings under the Geneva Convention,²⁶ which in truth are rather less robust proceedings than the Combatant Status Review Tribunals. (Indeed, only three nations have ever actually convened Article V tribunals, and one of them, Canada, simply had a single junior military officer spend a short time listening to an informal presentation of the detainee's tale.) It is now clear that was a Trojan horse, as many of us have said all along. The detainees and their counsel were not, in fact, simply seeking CSRTs or Article V hearings conducted by the military. In truth, their agenda is to import the framework of the criminal law into the context of modern irregular warfare and to trigger full trial-type adversarial hearings under a *de novo* standard of review in the federal courts.

Leaving aside the formidable separation of powers problems inherent in this approach,²⁷ there are numerous subsidiary questions that relate to how the habeas courts could ever sensibly adjudicate such cases. Flowing from a hint dropped by Justice O'Connor in the *Hamdi* case,²⁸ one significant question is whether the U.S. government is entitled to a presumption of correctness in determining whether the individuals it captures in battle are enemy combatants. Put another way, can the burden of proof be shifted to the detainees to prove that they were not in fact fighting against the United States when they were captured? Much potentially hinges on this question given the practical absence of admissible evidence, especially of the unclassified sort, that can establish the identities and activities of terrorists and their fellow travelers captured on the global battlefield.

Another important question revolves around the ability of the government to rely on hearsay to make whatever showing it is obliged to make. If, for example, the government may not rely on affidavits and must instead provide live witnesses to testify to the circumstances of capture or the activities of the detainees and to be available for cross-examination on those topics, then military commanders and soldiers will have to be pulled back from the battle front to the courtroom. In addition, the government will be unable to rely on one of the principal categories of evidence it typically has in these cases: intelligence reports provided by cooperating foreign intelligence services.

26. *Rasul v. Bush*, Nos. 03-334, 03-343, slip op. at 3-9 and 13-15 (U.S. Apr. 20, 2004), Oral Argument (questioning General Olson).

27. *See, e.g., Stewart v. Kahn*, 78 U.S. 493, 506 (1870) (decisions concerning “[t]he measures to be taken in carrying on war” belong to and “rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution”); *The Prize Cases*, 67 U.S. 635, 670 (1863) (“Whether the President in fulfilling his duties, as Commander-in-chief . . . [chooses] to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”).

28. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004).

A similar question exists with respect to the other major category of evidence the government often has with respect to a detainee's belligerent status: information derived from interrogations conducted by our own military or intelligence agents. Such information might come from the detainee himself, or it might come from other detainees whose status is not being adjudicated in the particular case in question. It will almost always have been obtained without the detainee having had the benefit of counsel. And it will also typically have been obtained in circumstances that, if transported into the ordinary criminal law context, would be regarded as coercive. In common parlance, these detainees are anything but free to go, and they are interrogated aggressively without a series of warnings about their presumed rights. I am not talking here about torture or the infliction of physical pain, but rather interrogations that occur in circumstances or under various forms of psychological pressure that would be highly unusual if applied to a normal criminal defendant.

The third big question left completely unresolved both in *Hamdi* and *Rasul* is the question of access to counsel and the right to counsel. Here again, there are very active debates going on in the district court in Washington D.C. where all of these cases have now been consolidated. The coordinating judge is Joyce Hens Green, and other judges of the D.C. district court are handling individual cases. The U.S. decided to provide the detainees with access to counsel for these habeas proceedings but conditioned it on some monitoring. They wanted to monitor writings to the detainees to ensure that classified information was not passed to them, either deliberately or inadvertently, through their lawyers. In some very special cases involving very dangerous, high-level Al Qaeda people, they also wanted to monitor in real time the actual attorney/client meetings to ensure that the detainees were not using their meetings with counsel (even if counsel was entirely unwitting) to pass messages to confederates on the outside. Judge Kollar-Kotelly of the D.C. district court recently disallowed such security-related monitoring, holding that the captured terrorists and Taliban being held at Guantanamo must have unmonitored access to their lawyers.²⁹ In essence, she imported notions of the right to counsel developed in the context of the criminal law into the wholly different military detention setting.

In addition, some of the detainees now have CJA (Criminal Justice Act) applications pending.³⁰ For these detainees, it is not enough that they should enjoy the same right of unmonitored access to counsel as would be enjoyed by a loyal U.S. citizen accused of a common crime; they claim, in addition, the right

29. *Al Odah v. United States*, No. 02-828 (CKK), slip op. at 6 (D.D.C. Oct. 20, 2004), available at <http://www.dcd.uscourts.gov/02-828a.pdf> (last visited Jan. 12, 2005).

30. See, e.g., Motion for Appointment of Counsel, *Zemiri v. Bush*, No. 04-2046 (CKK) (D.D.C. Nov. 29, 2004) (on file with author); Petitioners' Motion for Appointment of Counsel Pursuant to 18 U.S.C. § 3006A(a)(2)(B), *El-Banna v. Bush*, No. 1:04-CV-01144 (RWR) (D.D.C. Sept. 24, 2004).

to have counsel and/or litigation expenses paid for by the U.S. taxpayers – the same taxpayers they would presumably like to slaughter in their office buildings on a clear September morning if they could. These applications would, if granted, result in the United States public paying for presumed terrorists to have lawyers with which to sue our military commanders in the middle of a war. This would not demonstrate how enlightened and humane we are; it would instead demonstrate how warped our sensibilities have become, how little resolve we have left to do the tough things necessary to defend freedom against its most dangerous enemies, and how our common sense has been progressively degraded by the steady march of our love affair with litigation.

Some of the Guantanamo detainees have also claimed that they have the right to have their lawyers disclose classified intelligence to them. Under the rules the Pentagon has established, lawyers with proper security clearances are entitled to view classified evidence on which the enemy combatant determination has been based with respect to their clients.³¹ The government has actually been quite generous in providing access to very sensitive information to the lawyers representing the detainees. But the detainees themselves are, understandably, barred from having access to our nation's most sensitive secrets. Yet, although the court orders currently in place to regulate access to classified information in these cases generally do not provide for access to classified information by detainees,³² some detainees have claimed that they cannot effectively challenge their classification as an enemy combatant unless they see all of the government's evidence and can discuss and evaluate it with their lawyers. This claim is, once again, based on the view that ordinary criminal law notions should be imported unaltered into the military context. But what may be a perfectly reasonable, common sense proposition in the context of an ordinary criminal trial may be a dangerous and nonsensical one as applied to captures and detentions occurring in the course of armed conflict. This issue, too, was unresolved in *Rasul* and is now before the federal courts in Washington, D.C.

Finally, there is an issue that has not yet arisen in the litigation but which certainly will arise sooner or later, and that is the question of timing: when does the right to consult a lawyer attach? This is a vitally important question, because it will determine whether the U.S. military, when it takes a captured terrorist or enemy fighter into custody, will have an opportunity to interrogate that person effectively. If a right to counsel attaches immediately, then there will be no period during which we can gather intelligence effectively from the detainees because their lawyers will undoubtedly advise them not to talk and give them

31. MEMO FOR THE SECRETARY OF THE NAVY, *supra* note 14, at para. c.

32. Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, *In re* Guantanamo Detainee Cases, Civ. Nos. 02-CV-0299 etc. (consolidated cases) (D.D.C. Nov. 5, 2004) (on file with author).

hope by promising legal action to free them. This war, to an even greater extent than most wars, is really about getting actionable, real-time intelligence that will allow our military to roll up terrorist networks operating across the world.

There are a few other issues to keep your eye on that I will tick off very quickly without discussion. First is the definition of an enemy combatant. Who is an enemy combatant? Is a conscript who was forced to fight for the other side an enemy combatant? Is a citizen of a terrorist group that is not Al Qaeda, but that the President determines is working in concert with Al Qaeda an enemy combatant for this purpose? Are people enemy combatants who provide various kinds of material support to Al Qaeda, such as service support, transportation, communications, or money? And who decides, the courts or the executive? How much deference is the Executive Branch determination of those kinds of issues going to receive?

Second, can people outside Guantanamo avail themselves of the new right recognized by the Court in *Rasul*? If the words of Justice Stevens' formulation

for the majority are read literally,³³ *Rasul* may mean that the Court has extended the writ across the globe. Given that, there is no reason that I can think of currently why the Al Qaeda masterminds who were behind 9/11 and are in custody outside of Guantanamo – top terrorists like Khalid Sheikh Mohammed, Ramzi Binalshibh, and Abu Zubayda – could not come into federal court in Alexandria, Virginia tomorrow with actions styled *Mohammed v. Goss* or *Binalshibh v. Bush* seeking release no matter where in the world they are being held. It is really just a matter of time until we see people outside Guantanamo coming in to sue, which could include some of the most high-value detainees and intelligence sources that we have abroad, detainees and sources whose whereabouts are undisclosed and highly classified.

Finally, there are also a whole range of issues that will be litigated with respect to military commissions and the use of commissions to dispense military justice for war crimes to detainees against whom charges are brought, as opposed to detainees who are simply being held for the duration of the conflict.³⁴

So what does the existence of all these significant open questions tell us about the practical consequences of *Rasul*? In the worst case scenario, if some of the questions I have just described are resolved in a manner that is favorable to the detainees and unfavorable to the executive, we will have the time and attention of our military commanders consumed with litigation. That is happening right now. Many of our military commanders are being forced to

33. *Rasul*, 124 S. Ct. at 2698 (“No party questions the District Court’s jurisdiction over petitioners’ custodians. [The habeas statute] by its terms, requires nothing more.”).

34. Although unlikely to survive on appeal, Judge James Robertson’s decision in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), appeal filed No. 04-5393 (D.C. Cir.), provides a foretaste of some of these issues.

spend substantial time with Department of Justice (DOJ) lawyers helping the DOJ prepare its responses to these habeas petitions.

We will also have significantly diminished capabilities to gather intelligence through interrogation of detainees. The value of the intelligence taken from Guantanamo, from everything I have heard, has been high. It may not have directly stopped an imminent plot to execute another 9/11-type attack, but we have learned a lot about Al Qaeda's methods from our interrogations of detainees. For example, we have learned about smuggling routes through Central America which Al Qaeda used to get its agents into this country; we have learned about Al Qaeda methods of making and detonating explosives; we have learned a lot about their organization and their financing. That intelligence would be dramatically reduced, and in the worst case scenario, we could be prevented from stopping another 9/11, if there were an immediate right of counsel that attached to detainees captured worldwide.

There will also be civil suits. A short while ago, four detainees who had been released from Guantanamo sued the Secretary of Defense and the Chairman of the Joint Chiefs of Staff for \$10 million each.³⁵ It is worth repeating again that this came in the middle of a war. The suits allege that Secretary Rumsfeld and General Myers permitted or allowed these detainees to be held under abusive conditions or to be tortured.³⁶ If these detainees have any success at all, this will become a routine claim going forward. And success need only be defined as surviving a motion to dismiss, such that the suits will impose costs and burdens on the defendants and on the United States while we try to prosecute this war. There are also abundant propaganda and harassment opportunities presented by having recourse to the habeas courts and the ability to file complaints against senior government officials, no matter how spurious or false the allegations may be. In addition, the existence of the habeas remedy will threaten our Allies' ability to entrust prisoners to us because they will then fear being brought into litigation in U.S. courts. These cases may also eventually compromise our ability to protect – and therefore receive – sensitive intelligence from foreign sources.

My closing point about the practical consequences of *Rasul* is also potentially the most interesting and most ironic. *Rasul* will, unless carefully cabined by the lower courts, result in the erroneous release of committed enemies of the United States who will return to the fight against us. This is interesting and ironic because the fundamental reason for the international law of armed conflict – and for the traditional rule that when you capture an enemy in battle, you can

35. Karla Crosswhite-Chigbue, *Four British Gitmo Detainees sue: Claim they were drugged stripped naked and chained*, Nov. 27, 2004, CNN.COM INT'L, at <http://edition.cnn.com/2004/LAW/10/27/gitmo.lawsuit> (last visited Jan. 14, 2005).

36. See generally *id.*

hold him for the duration of the conflict without charging him and without providing him lawyers – is to minimize the length and suffering of war by, among other things, preventing captured combatants from returning to the fight and thereby prolonging it. That central humanitarian rationale and wellspring for this body of law will actually be undermined here in the name of humanitarian principles. Imagine it: individuals whom our soldiers have risked or perhaps even given their lives to take into custody will be released and will find their way to the battlefield again to force some other son of some other American family to risk or give his life in order to subdue or capture them once again.

This is not a flight of fancy. This is happening right now. In part due to litigation pressure, in part due to diplomatic pressure, and in part due to public pressure, we have already released approximately 150 individuals who were once held at Guantanamo.³⁷ This trend will undoubtedly accelerate if courts take an active role in trying to determine who our military should really keep control over.

These releases include many mistakes, which is not surprising given the assiduous efforts Al Qaeda agents are trained to make to deceive their captors. Already, there are at least ten confirmed cases in which individuals we have released believing them not to constitute a threat have gone back into battle against us.³⁸ Two of them were killed recently in Afghanistan and were identified after they were killed. Another has been recaptured.³⁹

There is also an individual in Denmark named Abderrahmane whom the Danish government put a lot of pressure on us to release. Responding to that pressure, we released him, but only after he signed a pledge abjuring jihad and swearing he would not make war against the United States. Upon release, he gave a number of press interviews and has become quite a celebrity in Denmark. To make a long story short, the Danes were recently forced to seize his passport when he tried to go to Chechnya to resume jihad. He offered the view that the pledge he signed procuring his release from Guantanamo is mere “toilet

37. *Gitmo Detainees Return to Terror*, CBSNEWS.COM, Oct. 17, 2004, at <http://www.cbsnews.com/stories/2004/09/24/terror/main645493.shtml> (last visited Jan. 5, 2005); Matt Moore & John Lumpkin, *Some ex-prisoners are returning to terrorism; but pentagon says most honor pledge*, DETROIT FREE PRESS, Oct. 18, 2004, at http://www.freep.com/news/nw/terr18e_20041018.htm.

38. See generally Shaun Waterman, *Freed Gitmo detainees back in rebel ranks, officials say*, WASHINGTONTIMES.COM, July 6, 2004, at <http://www.washingtontimes.com/national/20040706-125552-4477r.htm> (last visited Jan. 12, 2005); John Mitz, *Released Detainees Rejoining The Fight*, WASHINGTON POST, Oct. 22, 2004, at A01.

39. See generally *Ex-Gitmo detainees return to terror*, WASHINGTONTIMES.COM, Oct. 18, 2004, at <http://washingtontimes.com/national/20041018-124854-2279r.htm>; Mitz, *supra* note 33.

paper.”⁴⁰ He has also since expressed the view that the Danish Prime Minister who worked so hard for his release is a legitimate military target in the war on terror.⁴¹ Most Danes originally saw his release as a victory; now, many Danes are starting to wonder who and what his release really represented a victory for.

Likewise, there is an individual named Abdullah Mehsud in Pakistan, who has been giving a lot of press interviews, boasting how he fooled his U.S. interrogators into believing that he was a mere tribesman in Afghanistan. In fact, he is a hardened jihadi with ties to Al Qaeda. We had him in our custody in Guantanamo, but now he is taking aid workers hostage and leading a Taliban combat unit in the field against our soldiers.⁴²

These are just some of the really perverse and dangerous practical consequences that could eventuate if the post-*Rasul* litigation in the lower courts turns out wrong. The prospect that the litigation could turn out wrong – or at minimum, take many years and many trips to the Supreme Court to resolve – forces one to ask a final, important question: is the path we are now on really the right one institutionally for resolving these questions? What *Rasul* has made clear is that the legal landscape governing the rights of alien military detainees held abroad will not be defined by the Executive Branch alone, contrary to the Administration’s initial hope. Instead, one way or another, the rules governing military detentions will emerge through an interbranch dialogue. Right now, the dialogue is ongoing between the Executive and the Judiciary. But the institutional limitations and disabilities of the Judiciary, and the comparative competence of the Congress in weighing significant policy implications like those I’ve just described, almost certainly means that this is a conversation better had between the political branches. With both Houses of Congress in Republican hands, the Administration should have far less to fear from a legislative process than it otherwise might. And given the record of the courts so far in addressing these questions, there is a strong case to be made that a more expeditious, more nuanced, and ultimately more sensible resolution of the conflicting claims of individual rights and collective security will be arrived at by engaging in a forthright and constructive policymaking process with the

40. *Danish detainee ‘to join rebels,’* BBC NEWS WORLD EDITION, Sept. 30, 2004, at <http://news.bbc.co.uk/2/hi/europe/3704176.stm> (last visited Jan. 12, 2005).

41. *Id.*

42. See Tim McGirk, *After Gitmo, Back to Terror*, TIME, Oct. 25, 2004, available at <http://www.time.com/time/archive/preview/0,10987,1101041025-725097,00.html> (last visited Jan. 27, 2005); Lisa Myers, *Ex-Guantanamo Detainee Turns to Terrorism*, MSNBC News, Oct. 21, 2004, at <http://msnbc.msn.com/id/6300363> (last visited Jan. 27, 2005); see also *Pakistan Puts Bounty on Militant*, BBC NEWS WORLD EDITION Dec. 17, 2004, at http://news.bbc.co.uk/2/hi/south_asia/4104589.stm (last visited Jan. 27, 2005); Daniel Cooney, *Ex-Guantanamo Prisoner Heads Militants Who Threaten to Kill Kidnapped Chinese Engineers*, AP NEWS, Oct. 12, 2004, at <http://ap.tbo.com/ap/breaking/MGBBFYTE80E.html> (last visited Jan. 27, 2004).

people's elected representatives than by continuing to allow the agenda to be set by the detainees and the decisions to be made by unelected judges who typically have little or no background, training, or expertise in military or national security affairs.