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EXHAUSTED WITH THE JUDICIARY: DEFERENTIAL OVERSIGHT AND THE NEED FOR CERTAINTY IN AN UNCERTAIN TIME: *RASUL V. BUSH*, 124 S. CT. 2686 (2004)

Adam J. Gentile[*]

I. INTRODUCTION

Nothing is certain during military conflict. The best-laid plans change at a moments notice. Decisions are made quickly and decisively. The foremost concern is military success, not the Constitution. The war on terror is no different. Warfare in the 21st century does not resemble the wars our fathers fought. The enemy is new and unconventional. The theater for military action is not confined to territorial borders or identified by the colors of a hostile nation. The battle against terror after September 11, 2001, is an unknown challenge, fought in all corners of the globe.[1] It has been said that in order to meet the new challenges facing our nation and our freedom, the executive branch must be able to exercise its constitutionally authorized power to wage war free from unnecessary interference by the judiciary.[2] Still, we must be mindful of the freedoms and liberties that we defend.

In *Rasul v. Bush*, the Court was forced to decide between deference to executive decisions during a time of war and the protection of civil liberties that are foundational to our free society.[3] The issue was whether the United States District Courts have jurisdiction to entertain challenges about the detention of enemy foreign nationals captured abroad and incarcerated at Cuba's Guantanamo Bay Naval Base.[4] The Court held that jurisdiction exists,[5] reversing both the United States District Court[6] and

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[1] *Rasul v. Bush* ("*Rasul II*"), 215 F. Supp. 2d 55, 68 n. 13 (D.D.C. 2002) (stating that "[t]he United States confronts an untraditional war that presents unique challenges in identifying a nebulous enemy. In earlier times when the United States was at war, discerning 'the enemy' was far easier than today").

[2] Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 Hofstra L. Rev. 795, 796 (2004) (presenting the different answers to the question of "what . . . is the standard by which a judge should review executive or legislative actions taken in wartime?").

[3] *Rasul v. Bush* ("*Rasul*"), 124 S. Ct. 2686 (2004).

[4] *Id*. at 2690.

[5] *Id*. at 2698.

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Court of Appeals for the District of Columbia.[7]

This Note will argue that the Supreme Court in *Rasul* did not consider its holding's effect on the United States' ability to conduct military operations in the war on terror and all future conflicts involving the United States. Part II of this Note sets forth the background of *Rasul*, the context in which it was decided, and outlines the holding of the Court in detail. Part III argues that the Court should have deferred to executive decision-making during wartime, by adopting the principles found in the exhaustion doctrine, while protecting petitioner's rights. Part III further argues that while the *Rasul* decision may have been correct, the Court should have refused to hear petitioners' claims until all of their remedies under international law had been exhausted.

II. BACKGROUND

A. *Factual Background*

On September 11, 2001, members of Al Qaeda[8] hijacked four commercial airplanes.[9] The planes were used as missiles, striking at the heart of America's political, financial, and military centers.[10] Almost 3,000 people were killed in the terrorist attacks.[11] The United States reacted swiftly and decisively, launching military action against the Al Qaeda terrorist network and the Taliban[12] in Afghanistan.[13] The military action in Afghanistan was authorized by a joint resolution[14] of the United States

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[6] *Rasul II*, 215 F. Supp. 2d at 55.
[7] *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003).
[8] Al Qaeda is a global terrorist network led by Osama Bin Laden, a Saudi Arabian citizen by birth.
[9] *Rasul*, 124 S. Ct. at 2690.
[10] *Id*. One of the airplanes hit the Pentagon; two of the planes hit New York City's World Trade Center. News reports have suggested that the target of the fourth airplane would have been the United States Capital Building or the White House. The fourth airplane crashed into a barren field in Pennsylvania due to the heroism of the passengers who attempted to retake control of the airplane from the terrorists.
[11] *Rasul*, 124 S. Ct. at 2690. 2,830 people were killed in the attack on the World Trade Center; 189 killed in the attack on the Pentagon; 44 people were killed on United Airlines Flight 93 which crashed in Pennsylvania.
[12] The Taliban was the ruling government in Afghanistan at the time of the September 11, 2001 attacks on the United States.
[13] *Rasul*, 124 S. Ct. at 2690.
[14] *Authorization for Use of Military Force*, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001). The Joint Resolution reads as follows: "To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. SHORT TITLE. This joint resolution may be cited as the "Authorization for Use of Military Force." SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES. (a) In General.– That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized,

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Congress, which allowed the President to use "all necessary and appropriate force" against those involved in the September 11, 2001 attacks on the United States.[15]

During these hostilities, the United States captured and detained members of Al Qaeda, the Taliban regime and people who had taken up arms against the United States Military and its coalition[16] partners.[17] Among those captured and detained were petitioners in the present case.[18] The detainees were originally held in Afghanistan.[19] After a prison uprising took the life of a United States Central Intelligence Agent, military and administration officials made the decision to move the detainees to the United States Naval Base[20] in Guantanamo Bay, Cuba.[21] While in Guantanamo Bay, it was alleged that detainees were not permitted to consult with counsel, were denied contact with their families, and as of the date of this action, had not been charged with any crime or brought before any court or military tribunal.[22]

By Presidential Order, the detainees were classified as enemy or unlawful combatants[23], and were to be tried before military tribunals.[24]

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committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (b) War Powers Resolution Requirements.– (1) Specific statutory authorization.– Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. (2) Applicability of other requirements.– Nothing in this resolution supercedes any requirement of the War Powers Resolution." *See also Al Odah*, 321 F.3d at 1136.

[15] *Rasul*, 124 S. Ct. at 2690.

[16] The United States was joined in the war effort by other countries including Great Britain and Spain.

[17] *Rasul*, 124 S. Ct. at 2690.

[18] *Id*.

[19] K. Elizabeth Dahlstrom, Student Author, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Humanitarian Law: The Executive Policy toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 Berkeley J. Intl. L. 662, 673-74 (2003).

[20] *Rasul*, 124 S. Ct. at 2690-91. The base is within the sovereign territory of Cuba pursuant to a 1903 lease executed between the governments of the United States and Cuba. Under the terms of the lease agreement, Cuba retains ultimate sovereignty of the leased area even though the United States has complete jurisdiction and control. *Agreement Between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations*, art. III, (Feb. 16, 1903), T.S. No. 418 [hereinafter *Lease of Lands*]. A modification to the lease in 1934 provides that "absent an agreement to modify or abrogate the lease, the lease would remain in effect '[s]o long as the United States of America shall not abandon the naval . . . station of Guantanamo.'" *Rasul*, 124 S. Ct. at 2691 (quoting *Treaty Defining Relations with Cuba*, art. III (May 29, 1934), T.S. No. 866 [hereinafter *Relations with Cuba*]).

[21] Dahlstrom, s*upra* n. 19, at 673-674 ("In November 2001, a violent prison uprising among detained Afghan soldiers resulted in the widely-publicized death of CIA agent Michael Spann, the first known American casualty in the conflict. This incident, in part, prompted the government to begin transporting captives to locations outside of Afghanistan to better ensure the safety of United States military personnel.").

[22] *Rasul*, 124 S. Ct. at 2691.

[23] An enemy combatant is defined as "[a] combatant captured and detained while serving in a hostile force during open warfare. In general, the separation-of-powers doctrine prevents a [United States] civilian court from interfering with the military's handling of enemy combatants, at least as long as the

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B. *Procedural Background*

The case before the Supreme Court in *Rasul* was a consolidation of two actions, *Rasul v. Bush* and *Al Odah v. United States.*[25] The *Rasul* petitioners filed a petition for writ of habeas corpus on February 19, 2002.[26] The petition was filed on behalf of three detainees by their relatives after the United States District Court of the Central District of California dismissed a similar action[27] for lack of standing.[28] The detainees in *Rasul* are two citizens of the United Kingdom and one Australian.[29] The petition requested the following relief: release from unlawful custody; access to counsel; and cessation of all interrogation during litigation.[30] The *Al Odah* petitioners filed their action on May 1, 2002.[31] The detainees in *Al Odah* are twelve Kuwaiti nationals.[32] The *Al Odah* plaintiffs requested that the court issue a preliminary and permanent injunction that would allow access to counsel and their families, inform them of any charges against them, and provide them with access to the courts or an impartial tribunal.[33]

Respondents in *Rasul* and Defendants in *Al Odah* filed motions to dismiss based on jurisdictional grounds.[34] The district court consolidated the cases to rule on the jurisdictional question in both cases before proceeding to assess each case on the merits.[35]

C. *The Lower Court Decisions*

The United States District Court for the District of Columbia construed both actions as petitions for habeas corpus relief.[36] On the question of jurisdiction, the court found the Supreme Court ruling in

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hostilities continue. An enemy combatant may be detained without charge and does not have the right to legal representation." *Black's Law Dictionary* 283 (Bryan A. Garner ed., 8th ed., West 2004).

[24] Dahlstrom, s*upra* n. 19, at 672-73; s*ee also Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 (Nov. 16, 2001) [hereinafter *November 13 Order*].

[25] *Rasul II*, 215 F. Supp. 2d at 58-59.

[26] *Id*. at 57.

[27] *See Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002).

[28] *Rasul II*, 215 F. Supp. 2d at 57. "Standing is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication." Standing is a tool used by the court to pay deference to the other branches of government. It "promotes separation of powers by restricting the availability of judicial review." Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, ch. 2, § 2.5.1, 60 (2d ed., Aspen 2002).

[29] *Rasul II*, 215 F. Supp. 2d at 57.

[30] *Id*.

[31] *Id*. at 58.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*. at 59.

[36] *Id*. at 64. The Plaintiffs in *Al Odah* attempted to have the case considered as a request for a preliminary and permanent injunction to compel certain government actions, and not as a petition for Habeas Corpus requesting relief in the form of release from custody. Stating that the Plaintiffs "plainly challenge the lawfulness of their custody," the court held that "a petition for writ of habeas corpus is the exclusive avenue for relief." *Id*. at 62, 64.

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Johnson v. Eisentrager[37] controlling and dismissed both cases for lack of jurisdiction.[38] The court relied on *Johnson*'s distinction between citizens and aliens and its holding of presence within the sovereign territory of the United States as key factors in determining whether a district court of the United States has jurisdiction to hear petitions for a writ under 28 U.S.C. § 2241.[39] The court found that one of two criteria must be met under *Johnson* in order for the court to have jurisdiction.[40] First, the court could exercise jurisdiction over any Petitioner or Plaintiff who was a citizen of the United States.[41] Second, the presence of any Petitioner or Plaintiff within the sovereign territory of the United States would confer jurisdiction on the court.[42] Since no Petitioner or Plaintiff was a United States citizen or was present at any time within the sovereign territory of the United States, the court could not consider the petitions on the merits and dismissed both cases with prejudice.[43]

Petitioners and Plaintiff attempted to advance a theory of *de facto* sovereignty by the United States over the Naval Base in Guantanamo Bay

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[37] 339 U.S. 763 (1950). In *Johnson*, the United States District Court for the District of Columbia entertained a petition for writs of habeas corpus filed by non-citizens who were captured and detained oversees near the end of World War II. The *Johnson* detainees were German citizens who were captured in China while spying against the United States after the end of hostilities with Germany. The detainees were tried and convicted by a United States Military commission in China. Following the trial, the prisoners were transferred to the control of the United States Army in Germany, where they were to serve their sentence in Landsberg Prison. The Supreme Court in *Johnson* reversed the Court of Appeals and held that the court did not have jurisdiction over non-citizens who are held outside of the sovereign territory of the United States.

[38] *Rasul II*, 215 F. Supp. 2d at 65.

[39] *Id*. at 65-73. 28 U.S.C. § 2241 (2000) reads as follows: "Power to grant writ (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. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it. (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 (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial. (d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination."

[40] *Rasul II*, 215 F. Supp. 2d at 68.

[41] *Id*. at 65-66.

[42] *Id*. at 72-73.

[43] *Id*.

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based on the nature of the lease[44] between the United States and Cuba.[45] In rejecting this argument, the court relied on the specific language of the Naval Base lease, which states that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the leased areas]."[46]

On appeal to the United States Court of Appeals for the District of Columbia, the court affirmed the decision of the District Court.[47]

D. *The Decision of the United States Supreme Court*

On November 10, 2004, the Supreme Court granted certiorari, limiting the question considered to "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of the foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."[48]

On the narrow question presented, a majority of the Court held that the District Court had jurisdiction over Petitioners' habeas actions, reversing the decision of both the District Court and the Court of Appeals.[49] The Court began with an examination of the historical origins of the writ of habeas corpus to support its holding.[50] It then compared the factual situation of petitioners to those in *Johnson*[51] and discussed *Johnson*'s effect in terms of jurisdiction conferred by statute and jurisdiction conferred by the Constitution.[52] Finally, the Court reviewed the nature of the lease between the United States and Cuba[53] and found that statutory jurisdiction under 28 U.S.C. § 2241[54] does exist because the United States exercises plenary and exclusive jurisdiction over the Naval Base in Guantanamo Bay.[55]

1. History of the Writ

The Court stated that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been

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[44] *See Lease of Lands* and *Relations with Cuba*, *supra* n. 20 (describing the specifics of the lease between the United States and Cuba).
[45] *Rasul II*, 215 F. Supp. 2d at 69.
[46] *Id*.; s*ee also Lease of Lands*, *supra* n. 20.
[47] *Al Odah*, 321 F.3d at 1145.
[48] *Rasul v. Bush* ("*Rasul III*"), 124 S. Ct. 534 (2003).
[49] *Rasul*, 124 S. Ct. at 2692.
[50] *Id*.; *see infra* pt. II(D)(1), nn. 56-57 and accompanying text (discussing the historical origins of the writ of habeas corpus).
[51] *Rasul*, 124 S. Ct. at 2693.
[52] *Id*. at 2693-96; *see i*n*fra* pt. II(D)(2), nn. 58-63 and accompanying text (discussing the effect of *Johnson*).
[53] *Id*. at 2696.
[54] 28 U.S.C. § 2241; *supra* n. 39 (for full reproduction of the statute).
[55] *Rasul*, 124 S. Ct. at 2699; *see* i*nfra* pt. II(D)(3), nn. 64-68 and accompanying text (discussing the basis for statutory jurisdiction).

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strongest."[56] The Court then found that the protections afforded by the writ have conferred power upon the courts to entertain such petitions in times of war and peace.[57]

2. Constitutional Entitlement: The Effect of *Johnson* on *Rasul* Petitioners

The Court concluded that the *Rasul* Petitioners are differently situated from Petitioners in *Johnson* because: 1) they have not been tried and convicted by any court or tribunal; 2) they are not citizens of any country at war with the United States; 3) they deny they were involved in acts of aggression against the United States; and 4) they have been held where the United States "exercises exclusive jurisdiction and control."[58] Additionally, in analyzing *Johnson*, the Court found that the decision went towards the "*constitutional entitlement*" of the writ, rather than any statutory basis for jurisdiction.[59] The only statement regarding statutory jurisdiction by the Court in *Johnson* was that "[n]othing in the text of the Constitution extends such a right [to habeas review], nor does anything in our statutes."[60] Finding that *Johnson* controlled only Constitutional entitlement[61] to the writ, the contention of respondents, that *Johnson* controlled the question of jurisdiction, was rejected.[62] In the opinion of the Supreme Court, the language of 28 U.S.C. § 2241, along with the nature of the Naval Base lease, controlled the question presented for review.[63]

3. Plenary and Exclusive Jurisdiction as a Basis for Statutory Jurisdiction

Title 28 U.S.C. § 2241, which sets forth the power to grant writs of habeas corpus, states that "[w]rits of habeas corpus may be granted by the Supreme Court, . . . the district courts and any circuit judge within their respective jurisdictions."[64] The key to jurisdiction pursuant to statute is

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[56] *Id*. at 2692 (quoting *INS v. St. Cyr*, 533 U.S. 289 (1953)).
[57] *Id*. at 2692-2693. It is worth noting that in the three cases the court cites for the proposition that the power to review habeas petitions in a time of war exists, the petitioners were all, at one time, located within the territory of the United States or one of its "insular possessions." *See Ex parte Milligan*, 71 U.S. 2 (1866) (where petitioner was a citizen of the United States); *Ex parte Quirin*, 317 U.S. 1 (1942) (where petitioners were held within the United States); *In re Yamashita*, 327 U.S. 1 (1946) (where petitioner was located within the Philippines at the time that it was a United States possession).
[58] *Rasul*, 124 S. Ct. at 2693 (stating that in *Johnson*, the court refused to find jurisdiction over "prisoner[s] of our military authorities . . . [who are] (a) enemy alien[s]; (b) [have] never been or resided in the United States; (c) [were] captured outside of our territory and there held in military custody as . . . prisoner[s] of war; (d) [were] tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [are] at all times imprisoned outside of the United States").
[59] *Id*.
[60] *Id*. at 2694; *Johnson*, 339 U.S. at 768.
[61] *Rasul*, 124 S. Ct. at 2693-2694.
[62] *Id*. at 2695.
[63] *Id*. at 2698.
[64] 28 U.S.C. § 2241; *supra* n. 39 (for full reproduction of statute).

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presence within the jurisdiction of a court of the United States.[65] Having found that the concept of presence within the sovereign territory of the United States as defined in *Johnson* went only towards constitutional jurisdiction,[66] the Court looked at the text of the Naval Base lease which "[b]y the express terms of [the] agreement" grants "complete jurisdiction and control" to the United States for an indefinite time.[67] On this basis, along with the presence of Petitioner's custodians within the jurisdiction of the Court, the decisions of the lower courts were reversed.[68]

III. ANALYSIS

This Note will argue that the *Rasul* Court should have applied, at a minimum, a diminished standard of review to the petitions of the Guantanamo detainees, giving some consideration to the concept of judicial deference to the Executive in wartime decision-making, while still protecting the detainees' rights to be free from illegal restraint. As it stands, the Court's ruling made an uncertain situation even more difficult. Our military commanders must now choose between the safety of our troops and nation on one side, and judicial interference in military affairs on the other. While the Court has a role to play in protecting the civil liberties of the detainees, a compromise could have been fashioned that would have balanced the war effort against these civil liberties.

The argument for application of a diminished standard of review is supported by the rationale underlying the concept of judicial deference. Exercising judicial deference in this situation is justified by the Constitution,[69] the history of the Court's decisions in wartime,[70] and by the authority under which the decision to hold the detainees at the Naval Base in Guantanamo Bay was made.[71] This Note argues that the long-standing doctrine of exhaustion should have been employed by the Court in order to balance deference to the Executive with the Court's role in protecting civil liberties.[72] A compromise utilizing the exhaustion doctrine would have paid due deference to the executive's role in conducting the military affairs of the nation by requiring that the petitioners exhaust all remedies for

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[65] Presence with the jurisdiction of the court includes that of the petitioner or petitioner's custodian. *See Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494-495 (1973) (holding that "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him" and that jurisdiction under § 2241(a) exists as long as "the custodian can be reached by service of process").

[66] *See supra* pt. II(D)(2) (discussing the Court's finding regarding constitutional entitlement versus statutory entitlement to the writ of habeas corpus).

[67] *Rasul*, 124 S. Ct. at 2696; *see also Lease of Lands*, *supra* n. 20.

[68] *Rasul*, 124 S. Ct. at 2699.

[69] *Infra* pt. III(A)(1).

[70] *Infra* pt. III(A)(2).

[71] In the November 13 Order, President Bush bases the decision on "the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code." *See November 13 Order*, *supra* n. 24, at 57833.

[72] *Infra* pt. III(B).

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challenging their detention under international law. This compromise would leave the determination of petitioners' rights to the body of law specifically applicable to the conduct, responsibilities, and duties of nations at war; a body of law under which the petitioners have remedies available.[73] By adopting the exhaustion doctrine, the Court would ultimately retain the right to review the detention of the *Rasul* petitioners as a final resort, ensuring that it can live up to its Constitutional duties, while respecting the Constitutional authority of the Executive in wartime decision-making.

A. *Justification of Deference to Executive Wartime Decision-Making*

Constitutional grants of authority create the difficult question of determining when the Court should defer to the Executive.[74] Many answers have been given to the question of deference in wartime, ranging from complete "non-deferential review"[75] to complete deference in wartime,[76] with most courts settling on a diminished standard of review.[77] The majority opinion in *Rasul* never mentions judicial deference.[78] The only consideration given to the Executive's Constitutional authority is in the concurring opinion.[79] In *Rasul*, the majority of the Court ignored the approach "traditionally adopted by American courts,"[80] and entered the United States into a "suicide pact"[81] that threatened to undermine the ability of the Executive to protect the country from the new threats we face.[82] Instead of ignoring the concept of deference, the Court, while keeping an eye on the rights of the detainees, should have reviewed the detention of petitioners with a higher level of deference to those branches that are constitutionally and historically authorized in making and executing war.

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[73] *See* i*nfra* pt. III(B)(3), nn. 120-130 and accompanying text (discussing the remedies available under international law).
[74] *See generally* U.S. Const.
[75] Scheindlin, s*upra* n. 2, at 796. Complete non-deferential review during wartime has been rejected by the court on numerous occasions. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (stating "while the Constitution protects against invasions of individual rights, it is not a suicide pact").
[76] Scheindlin, s*upra* n. 2, at 796 (stating that complete deference in wartime is unacceptable because it creates unacceptable precedents after the war has ended). While it may be true that complete deference to the Executive in wartime has created unacceptable precedents, s*ee Korematsu v. U.S.*, 323 U.S. 214 (1944), the precedents set in such times can be viewed as only applying during wartime which would restrict the use of such precedents in times of peace.
[77] Scheindlin, s*upra* n. 2, at 796.
[78] *Rasul*, 124 S. Ct. 2686 at pages where majority opinion located.
[79] *Id*. at 2700 (Kennedy, J., concurring) (stating that prior decisions have recognized "a realm of political authority over military affairs where the judicial power may not enter").
[80] Scheindlin, s*upra* n. 2, at 796.
[81] *Id.; see supra* n. 75.
[82] Since the ruling in *Rasul*, the government began releasing some of the Guantanamo detainees to avoid having to justify their decision-making before the court. As a result, some enemy combatants who are hostile to the United States have been returned to the battlefield and have continued their aggression against the United States. One released detainee, Abdullah Mehsud, was the mastermind behind the kidnapping of two Chinese nationals. At least two other detainees who have been released have rejoined the fight against American interests. *See* Tim McGirk, *After Gitmo, Back to Terror*, Time Mag. 24, 24 (Oct. 25, 2004).

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1. Constitutional Justification of the Traditional Approach

Deference to the political branches during military conflict is justified by the text of the Constitution. "The President shall be Commander in Chief of the Army and Navy of the United States[.]"[83] "He shall have Power . . . to make Treaties[.]"[84] "The Congress shall have power . . . To declare War . . . To raise and support Armies . . . To provide and maintain a Navy[.]"[85] These words specifically allocate authority over military affairs to the Executive and Legislative branches of the government.[86]

By contrast, judicial Constitutional authority in the area of war powers is limited, if it exists at all.[87] "The judicial Power of the United States, shall be vested in one supreme Court."[88] "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties."[89] While this grant of authority to the judicial branch implies oversight of Executive and Legislative decision-making, "[n]o provision [of the Constitution] explicitly authorizes the federal courts to intervene in war powers questions."[90] The absence of any explicit judicial war making authority justifies the approach "traditionally adopted by American courts."[91]

2. Historical Justification

Historically, courts have shown great deference to decisions of the political branches of the government in times of war.[92] Relying on doctrines including political questions, separation of powers, and ripeness and by refusing to grant certiorari, the Court has avoided becoming involved in war-power disputes.[93] In *Marbury v. Madison*, the Court stated that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[94] The language of the Constitution shows that questions of war and peace

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[83] U.S. Const. art. II, § 2, cl.1.
[84] *Id*. at cl. 2.
[85] *Id*. at art. I, § 8, cl. 1, 11-13.
[86] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 175 (1996).
[87] *Id*. at 176.
[88] U.S. Const. art. III, § 1.
[89] *Id*. at § 2, cl.1.
[90] Yoo, *supra* n. 86, at 176.
[91] Scheindlin, *supra* n. 2, at 796.
[92] *Id*.
[93] *See* Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111-198 (2d ed., Yale University Press 1962). Collectively referred to as justiciability questions, these doctrines are often invoked by the court to avoid conflict between the equal but separate branches of government. "[J]usticiability doctrines define the judicial role; they determine when it is appropriate for the federal courts to review a matter and when it is necessary to defer to the other branches of government." Chemerinsky, *supra* n. 28, at ch. 2, § 2.3, 50.
[94] *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

have been submitted to the Executive and Legislative branches.[95]

While the Court has never completely refused to hear cases challenging the decisions of the Executive,[96] the Court has set a high standard for setting aside such decisions made pursuant to constitutionally authorized war powers.[97] In this regard, the Court has stated that the detention of enemy combatants "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution."[98]

Additionally, courts considering questions of judicial deference in wartime start with the assumption that the decisions of the political branches, which restrain civil liberties during wartime, are narrowly tailored to balance civil liberties with wartime needs.[99] In *Ex parte Mitsuye Endo*, the Court stated: "In interpreting a wartime measure we must assume that [the Congress' and the Chief Executive's] purpose was to allow for the greatest possible accommodation between [civil] liberties and the exigencies of war."[100] Judicial deference in *Rasul* would have been historically justified by combining the assumption that the political branches of the government are sensitive to civil liberties in wartime, with the Court's historical acknowledgment of the separate powers within the government.

3. Present Day Justification

Deference to the wartime powers of the President is justified under the circumstances surrounding the decision to hold the petitioners at the Naval Base in Guantanamo Bay. The current military action and the decision to hold detainees at the Naval Base was undertaken pursuant to the President's Constitutional war-power as Commander in Chief and under a joint resolution of Congress, which authorized military force.[101] Thus, the two branches exercised their authority provided by the Constitution's war–powers.[102] The Legislative branch authorized the use of "all necessary and appropriate force" by the President,[103] and the President exercised this authority. This exercise of power should not be set aside without some level of deference because there exists no "clear conviction that [their decisions] are in violation of the Constitution."[104]

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[95] *Supra* pt. III(A)(1).
[96] *See e.g. Korematsu*, 323 U.S. 214.
[97] *Ex parte Quirin*, 317 U.S. at 25.
[98] *Id*.
[99] *Ex parte Mitsuye Endo*, 323 U.S. 283, 299-300 (1944).
[100] *Id*. at 300.
[101] *Authorization for Use of Military Force*, *supra* n. 14.
[102] *See supra* pt. III(A)(1).
[103] *Authorization for Use of Military Force*, *supra* n. 14.
[104] *Supra* n. 97-98 and accompanying text.

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B. *The Exhaustion Doctrine as a Viable Solution*

While deference to the Executive is constitutionally and historically justified, courts still have the responsibility to protect the civil liberties of the detainees and must not completely "abdicate their responsibility."[105] Deference with oversight of the detainees' civil liberties could have been accomplished by adopting a long-standing doctrine in habeas cases: exhaustion of remedies.

1. The Origins of Exhaustion

The Supreme Court first established the exhaustion doctrine[106] in *Ex parte Royall*.[107] The exhaustion doctrine requires that a person who is deprived of his liberty by the state exhaust all available remedies under state law, in state courts, as a prerequisite to obtaining federal habeas relief.[108] Based on notions of federalism, the *Royall* Court, in creating the exhaustion doctrine, stated that "the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of the other, is a principle of comity[109]. . . . It is a principle of right and of law, and, therefore, of necessity."[110] To ensure compliance with these "principle[s] of right and of law,"[111] the exhaustion doctrine was created by the courts and later codified at 28 U.S.C. § 2254(b)(1).[112] The

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[105] Scheindlin, *supra* n. 2, at 816.

[106] David B. Levendusky, *Annotation: Exhaustion of State Remedies as Condition of Issuance by Federal Court of Writ of Habeas Corpus for Release of State Prisoner – Supreme Court Cases*, 54 L. Ed. 2d 873, § 2, (2004).

[107] 117 U.S. 241 (1886).

[108] *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (stating, "[b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.").

[109] Comity is defined as "the informal and voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another." *Merriam-Webster's Dictionary of Law* 85 (Merriam-Webster, Inc. 1996).

[110] *Ex Parte Royall*, 117 U.S. at 252.

[111] *Id*.

[112] *O'Sullivan*, 526 U.S. at 842; 28 U.S.C. § 2254 (2000) (reading, in part, as follows: "State custody; remedies in Federal courts (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–(A) the applicant has exhausted the remedies available in the courts of the State; or (B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement. (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the

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exhaustion doctrine has been invoked by courts petitioned for a writ of habeas corpus by prisoners held under state authority as a means of paying deference to the power of state governments.[113] With few adjustments, the principles and rationale that support this doctrine could also support a decision requiring the Guantanamo detainees to exhaust their remedies under international law.

2. Justification for Requiring Exhaustion in *Rasul* as a Prerequisite for Habeas Relief

The authority to grant habeas relief is discretionary.[114] In *Urquhart v. Brown*, the Court stated that although the courts of the United States have the authority to issue writs of habeas corpus to one held in custody in violation of the Constitution or of any treaty or law of the United States, such authority is discretionary.[115] Since habeas relief is discretionary, the *Rasul* Court could have checked their authority and deferred to those specifically authorized in military affairs.

Although specifically applicable to exhaustion of state remedies by state prisoners, the same rationale and principles underlying the exhaustion doctrine would support its conversion to require the *Rasul* petitioners to exhaust remedies available under international law or by military tribunal. The rationale for the exhaustion doctrine is based on the principle of federal-state comity, whereby federal courts defer to the jurisdiction or power of state courts.[116] The concept of separation of powers has a similar rationale as justification; comity amongst the co-equal branches of government. The statement[117] made by the *Royall* Court in support of the exhaustion doctrine could apply almost word for word in support of the principle of separation of powers: "the forbearance which courts of co-ordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity . . . . It is a principle of right and of law, and, therefore, of necessity."[118]

Additionally, prisoners tried under the authority of military tribunals have been subject to exhaustion requirements. In *Noyd v. Bond*, the Court held that "habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies

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adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

[113] *Ex Parte Royall*, 117 U.S. at 251-52.

[114] *Urquhart v. Brown*, 205 U.S. 179, 181 (1907).

[115] Levendusky, *supra* n. 106, at § 3; *Urquhart*, 205 U.S. at 181.

[116] *Supra* pt. III(B)(1).

[117] *Supra* n. 110 and accompanying text.

[118] *Royall*, 117 U.S. at 252 (quoting *Covell v. Heyman*, 111 U.S. 176, 182 (1884)).

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within the military court system have been invoked in vain."[119] Since granting habeas relief is discretionary, and since the rationale for the exhaustion doctrine rests upon concerns that are similar to the idea of separation of powers, an idea which underlies judicial deference, the adoption of an exhaustion requirement is a justifiable compromise.

3. Availability of Remedies Under International Law

Although the detainees have been classified as enemy combatants[120] rather than prisoners of war, the government has recognized that the petitioners have recourse under international law. The United States has maintained that the detainees would be treated as if they were covered by international law dealing with prisoners of war and that international law remains "a viable means to address the claims" brought by petitioners.[121]

a. Diplomatic Channels

It is the position of the government that other countries will play a role, under international law, in determining the scope of rights to which detainees are entitled.[122] Diplomatic channels are already at work.[123] Australia has used diplomatic means for addressing the detention of David Hicks, an Australian citizen, captured and detained in Afghanistan by the Northern Alliance[124] and subsequently transferred into the custody of the United States.[125] The Attorney General of Australia has been involved.[126] Australia has indicated that the detention of Hicks is appropriate while Australia works through the complex legal issues and investigates further.[127]

b. Geneva Conventions

The Third Geneva Convention applies in "any . . . armed conflict," even if one of the powers is not a party to the convention.[128] Under the Third Geneva Convention, Al Qaeda and Taliban fighters would be covered as "[m]embers of regular armed forces who profess allegiance to a

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[119] 395 U.S. 683, 693 (1969).
[120] *See supra* n. 23 (for definition of enemy combatant).
[121] *Rasul II*, 215 F. Supp. 2d at 57. During oral arguments the government stated, "there's a body of international law that governs the rights of people who are seized during the course of combative activities." *Rasul II*, 215 F. Supp. 2d at 56-57 (stating that "the government recognizes that these aliens fall within the protections of certain provisions of international law").
[122] *Id*.
[123] *Id*. at 57.
[124] The Northern Alliance is "a coalition of Afghan groups opposed to the Taliban," [t]he ruling government of Afghanistan at the time of United States Military action. *Rasul*, 124 S. Ct. at 2691.
[125] *Rasul II*, 215 F. Supp. 2d at 57; *Rasul*, 124 S. Ct. at 2691.
[126] *Rasul II*, 215 F. Supp. 2d at 57.
[127] *Id*.
[128] *Geneva Convention Relative to the Treatment of Prisoners of War* pt. 1, art. 2 (Aug. 12, 1949) 6 U.S.T. 3316 [hereinafter *Geneva Convention: POW]*.

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government or an authority not recognized by the Detaining Power."[129] Under the Third Geneva Convention, detainees have a right to have their status determined by tribunal.[130]

Since the petitioners have remedies available under international law, the adoption of the exhaustion doctrine could apply.

IV. CONCLUSION

The Supreme Court in *Rasul* did not consider the effect of their holding on the ability of the United States to conduct military operations in the war on terror and all future conflicts that the United States finds itself involved. The Court spent most of their time looking to the past instead of considering the future. After an exhaustive lesson about the origins of habeas relief, and a detailed look at the nature of a lease signed over 100 years ago, the Court concluded that jurisdiction to hear petitioner's habeas claims rests in the district courts of the United States without considering another concept with historical justification: judicial deference to the executive. Since the early days of our Nation, the Court has recognized the necessity of allowing the political branches of government to operate with more freedom in the area of warfare. Why, after the most devastating terrorist attacks in the history of the United States, does the Court not pay any attention to such an important policy?

The decision will unfortunately affect the safety of troops on the ground in the present, and the safety of the nation in the future. Due to the ruling in *Rasul*, the government has accelerated its review of the Guantanamo detainees. The one opportunity for deliberative decisions during wartime has been erased. With their hand forced by the Court, several detainees have been released only to continue their crusade against the United States and more generally, against freedom of all people around the world.

If the Court was so focused on history, it could have reached into prior case law and concepts which limit the right of habeas relief in order to find the "middle road," and providing deference while maintaining a watchful eye over the detainees' civil liberties. The exhaustion doctrine would have been a good "middle road" to travel.

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[129] Dahlstrom, s*upra* n. 19, at 664; *Geneva Convention: POW*, *supra* n. 128, pt. 1, art. 4 (3).
[130] *Geneva Convention: POW*, *supra* n. 128, pt. 1, art. 5.

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