The Lasting Viability of *Rasul* in the Wake of the Detainee Treatment Act of 2005

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“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

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I. INTRODUCTION

I recently authored an article dealing with the Supreme Court's ruling in *Rasul v. Bush*—a case where the Court determined that federal courts possessed jurisdiction to hear habeas corpus claims brought by detainees held at Guantánamo Bay, Cuba—where I discussed the questionable logic of that decision and how it arguably expanded federal jurisdiction beyond the scope of the habeas statute. Because *Rasul* rested exclusively on statutory grounds, I suggested that Congress act to remedy the Court's error and proposed several statutory "fixes" to accomplish this.

Congress did indeed take action following the *Rasul* decision by enacting the Detainee Treatment Act of 2005 ("DTA"), which was signed into law on December 30, 2005 and enacted on January 6, 2006. Specifically, section 1005(e)(1) of the Act amends the federal habeas corpus statute to read:

(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who—

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

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5. Id.
The Act also provides that "the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision" made by Combatant Status Review Tribunals ("CSRTs")\(^9\) and military commissions\(^10\) established by the Department of Defense. Furthermore, the scope of review is limited to consideration of "whether the final decision was consistent with the standards and procedures" specified by the Department of Defense, and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."\(^11\)

After Rasul was decided, but prior to the enactment of the DTA, attorneys had filed more than a dozen habeas corpus petitions on behalf of sixty detainees in the United States District Court for the District of Columbia.\(^12\) One of those cases, Hamdan v. Rumsfeld,\(^13\) made its way to and was decided by the United States Supreme Court. During the course of the litigation, the Government filed a motion to dismiss the case for lack of jurisdiction. As authority for its position, the Government cited the DTA and claimed the statute stripped the Court of jurisdiction over pending cases. However, the Court denied the motion, finding that the DTA did not apply to habeas cases currently pending before it or any other federal court.

This article seeks to summarize those portions of the DTA that affect Rasul and contends that Congress failed to abrogate its broad holding, leaving it viable precedent for habeas petitions filed by detainees held in places other than Guantánamo Bay. This article also seeks to summarize

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9. *Id.* § 1005(e)(2)(A). The statute also directs that not later than 180 days after its enactment the Secretary of Defense shall provide to the Senate Armed Services Committee and the Judiciary Committee as well as the Armed Services Committee and the Judiciary Committee of the House of Representatives a report establishing procedures that the CSRTs must utilize in determining whether to detain an alien held in Guantánamo Bay, Cuba, and in Afghanistan and Iraq. *Id.* § 1005(a)(1).

10. *Id.* § 1005(e)(3)(A). Review of decisions of military commissions "shall be as of right" for those aliens sentenced in "a capital case" or "to a term of imprisonment of 10 years or more" and "shall be at the discretion of the [Court of Appeals for the District of Columbia Circuit]" in "any other case." *Id.* § 1005(e)(3)(B). The Act further limits the jurisdiction vested in the Court to appeals "brought by or one behalf of an alien" who was detained at Guantánamo Bay "at the time of the [military commission] proceedings" and "for whom a final decision has been rendered." *Id.* § 1005(e)(3)(C).


briefly the jurisdictional issues raised in the Hamdan litigation, which directly impact Rasul and the DTA.  

Part II of this article will summarize the Rasul decision and point out many negative implications flowing from its logic. Part III will summarize the federal jurisdictional portion of the DTA, its impact on Rasul, and will explain how the statute fails to remediate adequately the effects of its holding. Part IV will explore the DTA in the context of the Hamdan litigation. Specifically, this article will examine the federal jurisdiction questions raised in that litigation. Ultimately, this article opines that Rasul's imperfect holding opened a Pandora's box Congress has failed to close, leaving a great deal of uncertainty in an area where certainty is needed. The tangled web created by Rasul is a perfect example supporting the proposition that federal courts should not seek to extend their jurisdiction beyond what is expressly sanctioned by constitution and statute. Only confusion and mischief results whenever that limited jurisdiction is expanded by judicial fiat. In addition, this article points out that Congress may yet amend the habeas statute to more fully remediate the infirmities caused by Rasul.

II. THE “NARROW” RASUL V. BUSH DECISION AND ITS BROAD IMPLICATIONS

A. THE RASUL DECISION

In the landmark case of Rasul v. Bush, decided in 2004, the United States Supreme Court held that federal courts possess the power to hear habeas corpus petitions brought by detainees held at Guantánamo Bay, Cuba. The case decided the “narrow” issue of “whether the habeas statute confers a right to judicial review of the legality of Executive detention of

14. Hamdan also dispensed with several other issues beyond the scope of this article. In its opinion, the Hamdan Court determined that abstention was inappropriate in the matter. The Court also found that the military commissions created by the Bush administration were not authorized by congressional act. Furthermore, the Court determined that Common Article 3 of the Geneva Conventions did apply to the Guantánamo detainees. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
16. 542 U.S. 466 (2004). Rasul sets forth the Court's decision in two cases that were consolidated by the Court and argued together: Rasul v. Bush (No. 03-334) and Al Odah v. United States (No. 03-343).
17. The Rasul petitioners were foreign nationals who were captured during United States military operations in Afghanistan. The petitioners included four British and Australian citizens and twelve Kuwaiti nationals. Brief for the Respondents at 9, Rasul v. Bush, 542 U.S. 466 (2004). The petitioners were later transported to a military detention center known as Camp Delta located at Guantánamo Bay, Cuba. Id.
aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'”\(^{18}\)

Although there was a paucity of precedent dealing with this issue, the primary source of authority, _Johnson v. Eisentrager_,\(^{19}\) concluded that a foreign national held in territory outside the United States could not petition a federal court for habeas review.\(^ {20}\) _Eisentrager_ is a World War II case involving twenty-one German nationals who were captured by the United States in China.\(^ {21}\) The men were accused of assisting the Japanese forces and were accordingly tried by a United States military tribunal.\(^ {22}\) They were then transported back to Germany, which was still under allied occupation, in order to serve their sentences.\(^ {23}\) Subsequent to returning to Germany, the men filed petitions in the United States District Court for the District of Columbia for habeas corpus review of their detentions.\(^ {24}\) The District Court dismissed their petitions\(^ {25}\) but was reversed on constitutional grounds by the Court of Appeals.\(^ {26}\) The Supreme Court granted certiorari and reversed finding that “[n]othing in the text of the Constitution extends [the right of habeas relief to an alien held outside the territory of the United States], nor does anything in our statutes.”\(^ {27}\) In so deciding, the Court based its decision on a territorial predicate saying that “these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the

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18. _Rasul_, 542 U.S. at 475. In addition to the many nettlesome and complicated legal questions decided in the case, it also had many ethical and human rights implications. Prior to the disposition of the case, many domestic and international human rights organizations and scholars had roundly criticized the entire United States detention program and called on the federal judiciary to review its legality. See, e.g., Neil A. Lewis, _Red Cross Criticizes Indefinite Detentions in Guantánamo Bay_, N.Y. TIMES, Oct. 10, 2003, at A1; Richard J. Wilson, _United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole.”_ HUM. RTS. BRIEF (Ctr. for Human Rights and Humanitarian Law, Washington, D.C.), 2003, at 2. For a more thorough discussion of the political context of the _Rasul_ decision, see Pope, _supra_ note 2, at 337.


20. _Id._

21. _Id._ at 765.

22. _Id._ at 766.

23. _Id._

24. _Id._ at 767.


26. _Eisentrager v. Forrestal_, 174 F.2d 961 (D.C. Cir. 1949), _rev’d sub nom._ _Johnson v. Eisentrager_, 339 U.S. 763 (1950). The Court of Appeals found that the German detainees were entitled to the writ of habeas corpus as a substantive Constitutional right. The Court argued that the detainees fell within the “any person” language found in the Fifth Amendment of the Constitution. _Id._ at 963–65.

27. _Johnson_, 339 U.S. at 768.
Simply stated, the *Eisentrager* Court found that so long as foreign nationals were held outside the territorial jurisdiction of the United States, they were precluded from filing habeas petitions in a court of the United States.\(^\text{29}\)

In *Rasul v. Bush*, the Supreme Court distinguished *Eisentrager*, noting that the *Rasul* detainees were “differently situated” from the *Eisentrager* prisoners in that (1) they were not nationals of a country at war with the United States; (2) they deny that they were “engaged in or plotted acts of aggressions against the United States”; (3) they had not been granted access to a tribunal, military or otherwise; and (4) they were imprisoned in territory over which the United States exercises “exclusive jurisdiction and control” though not ultimate sovereignty.\(^\text{30}\) The Court then limited *Eisentrager*, finding that it was not controlling as to whether the habeas corpus statute applied to the *Rasul* detainees.\(^\text{31}\) Rather, the Court characterized *Eisentrager* as a case considering the constitutional parameters of habeas corpus and not the statutory question that was presented in *Rasul*.\(^\text{32}\) In fact, the *Rasul* court found that the issue of whether the habeas statute applied to the claims of foreign nationals held outside the United States was never before the *Eisentrager* court.\(^\text{33}\) In sum, the court found that the habeas statute provided the federal courts with the authority to entertain habeas petitions filed by Guantánamo detainees.

In a biting dissent,\(^\text{34}\) Justice Scalia argued that the *Rasul* majority had done great violence both to the habeas statute and to the *Eisentrager* decision.\(^\text{35}\) Scalia noted that the plain text of the habeas statute would only allow a court to issue a writ of habeas corpus “‘within their respective
Scalia also argued that the *Eisentrager* court did pass judgment on whether the habeas statute granted jurisdiction over the claims of foreign nationals held outside the United States. He asserted that the brevity of the *Eisentrager* court’s analysis signified that it was nothing more than an axiomatic proposition that the statute failed to reach the *Eisentrager* detainees. Accordingly, in his view, the Court had completely recast precedent in order to reach a more palatable result while at the same time appearing to give due deference to precedent. This jurisprudence, he argued, was an example of “judicial adventurism of the worst sort.”

**B. RASUL’S IMPLICATIONS**

The *Rasul* opinion abrogated the principle that the physical presence of a detainee within the territorial jurisdiction of a district court is a necessary jurisdictional requirement. Accordingly, a federal district court could issue the writ of habeas corpus “to the four corners of the earth” and any prisoner held by the United States during a time of war could petition the court for a writ of habeas corpus. To ameliorate this effect the Court attempted to restrict habeas jurisdiction to only those territories over which the United States exercised jurisdiction and control. However, this “restriction” is really no restriction at all because any territory where the United States holds military detainees will necessarily be a territory over which it exercises jurisdiction and control. As a result, “[f]rom this point forward, federal courts will entertain petitions from... prisoners, and others like them around the world, challenging actions and events far away....”

The jurisdictional expansion also serves to interfere with the military’s ability to wage war. It seems axiomatic that one of the chief tools enabling

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36. *Id.* at 466 (majority opinion) (quoting 28 U.S.C. § 2241(a)) (emphasis added).
37. *Id.* at 490 (Scalia, J., dissenting).
38. *Id.* at 491.
40. *Id.* at 506.
41. Oddly enough, on the same day that the Court released *Rasul*, the Court announced its decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), which considered a habeas challenge brought by a detainee held in the United States. There, the Court held that federal courts could only issue the writ of habeas corpus to “the warden of the facility where the prisoner is being held” rather than “some other remote supervisory official.” *Id.* at 435. The Court also held that the detainee could only file his petition in the district of his confinement. *Id.*
42. *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting).
43. *Id.* at 471.
44. *Id.*
45. *Id.* at 499 (Scalia, J., dissenting).
a nation to wage war and subdue its enemies is the ability to capture and detain enemy fighters. "Such detention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks. The military's authority to capture and detain such combatants is both well-established and time honored."  

The Rasul decision also created an exception to the "immediate custody" rule announced in Padilla v. Rumsfeld. Padilla limits a district court's ability to issue writs of habeas corpus in the domestic context to "some person who has immediate custody of the party detained." Under the regime created by Rasul, a district court can issue the writ upon any executive official having a supervisory connection to the detainee's immediate custodian, so long as the official is within the long-arm jurisdiction of that court. Therefore, a foreign detainee would be permitted to name the President, the Secretary of Defense, or any other executive official with some supervisory control over the detainee's custodian. Furthermore, because every district court would have jurisdiction over those officials, the detainee could file his petition in any court of his choosing.

III. CONGRESSIONAL ACTION AND THE ADOPTION OF THE DTA

In response to the Rasul decision, Congress took action to abrogate its holding by enacting § 1005(e)(1). The first incarnation of § 1005(e)(1), the Graham-Kyl-Chambliss Amendment, contained two provisions: (1) a section stripping the federal courts of jurisdiction over habeas petitions filed by Guantánamo detainees; and (2) a provision vesting the Court of Appeals for the District of Columbia with exclusive jurisdiction to consider appeals from CSRTs. The amendment also contained language in § 1005(h)(2) stating that both provisions would apply to cases "pending on or after the date of the enactment of this Act." The Senate passed the bill as written over the objection of Senator Carl Levin (D-MI), who complained that the


47. 542 U.S. 426 (2004).

48. Id. at 435 (quoting Wales v. Whitney, 114 U.S. 564, 547 (1885)).

49. 151 Cong. Rec. S12,655 (daily ed. Nov. 10, 2005) (S. Amend. 2515). (The Amendment was named after Senators Lyndsey Graham (R-SC), Jon Kyl (R-AZ), and Saxby Chambliss (R-GA)).

50. Id.

51. Id.

52. Id. at S12,667. (The bill was passed on November 10, 2005, by a 49-42 vote, mainly along party lines.).
bill would "eliminate jurisdiction already accepted by the Supreme Court in *Hamdan*."

Not to be deterred, just four days later Senator Levin introduced a competing bill addressing the "problem . . . with the first Graham amendment," which he saw as stripping "all the courts, including the Supreme Court, of jurisdiction over pending cases." To this effect, Senator Levin asserted that his amendment would "not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in *Hamdan* is not affected." Senator Levin later reiterated his argument saying:

> The habeas prohibition in the [first] Graham amendment applied retroactively to all pending cases—this would have the effect of stripping the Federal courts, including the Supreme Court, of jurisdiction over all pending case[s], including the Hamdan case. The Graham-Levin-Kyl amendment would not apply the habeas prohibition in paragraph (1) to pending cases. . . . The approach in this amendment preserves comity between the judiciary and legislative branches. It avoids repeating the unfortunate precedent in Ex parte McCardle, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court.

Soon after Senator Levin introduced his substitute bill, the Bush administration began pressuring members of the Senate to reject this new measure; however, those efforts failed.

On November 15, 2005, the Senate formally adopted the new bill, which became known as the Graham-Levin-Kyl amendment. The new §
1005(e) and 1005(e)(2) retained their original language, which stated "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas application or any other action that "relat[es] to any aspect of the detention" of an alien held at Guantánamo Bay. However, Senator Levin's modification to § 1005(h)(1) provided that the section "take[s] effect on the date of the enactment of this Act." Congress did, however, retain the language of § 1005(h)(2), giving the Act immediate effect as to § 1005(e)(2) and (3)—the CSRT provisions. The amendment proceeded to Conference, where, against pressure from the Administration and a competing House proposal seeking to insert the original retroactive application language, the provision won approval.

Both the House of Representatives and the Senate went on to pass the DTA, which included the Graham-Levin-Kyl amendment, as it appeared in two separate provisions. The DTA was first incorporated in the final version of the Department of Defense Appropriations Act of 2006, passed by the Senate on December 21, 2005, and signed by President Bush on December 30, 2005. The DTA was also a part of the National Defense Authorization Act for Fiscal Year 2006, passed by the Senate on December 21, 2005, and signed by the President on January 6, 2006. After passage of the DTA, a co-sponsor of the bill, Senator Kyl, inserted language into the Congressional Record, arguing that the DTA completely "extinguish[es] one type of action—all of the actions now in the courts—

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59. 151 CONG. REC. S12,803 (daily ed. Nov. 15, 2005) (The bill passed the Senate by a vote of 84-14.).
61. Id. § 1005 (h)(1).
62. Id. § 100(h)(2). The language of (h)(2) provides that subsections 1005(e)(2) and (3) shall apply to all cases "pending on or after" the date of enactment. Id.
64. Id.
65. In order to further clarify the legislative intent of section 1005(h)(1), Senator Levin stated:

The jurisdiction-stripping provision in the Graham amendment initially approved by the Senate over my objections would have applied retroactively to all pending cases in federal court—stripping the courts of jurisdiction to consider pending cases, including the Hamdan case now pending in the Supreme Court. The revised amendment... does not apply to or alter any habeas case pending in the courts at the time of enactment. The conference report retains the same effective date for the Senate bill, thereby adopting the Senate position that this provision will not strip the courts of jurisdiction in pending cases.

and create[s] in their place a very limited judicial review of certain military administrative decisions.\textsuperscript{68}

IV. \textit{HAMDAN V. RUMSFELD}

After \textit{Rasul} was decided, but before the DTA was enacted, more than a dozen habeas petitions were filed on behalf of over sixty of the more than five hundred Guantánamo detainees.\textsuperscript{69} Among them was a case filed by Salim Ahmed Hamdan.\textsuperscript{70} Hamdan was alleged to have served as a bodyguard and driver of Osama Bin Laden.\textsuperscript{71} Hamdan argued that the military commission rules and procedures established by the President\textsuperscript{72} were inconsistent with the Uniform Code of Military Justice (UCMJ) and that the protections of the Geneva Convention applied to him.\textsuperscript{73} The district court agreed with Hamdan, finding that the President’s order violated the UCMJ and that he was indeed entitled to protection under the Geneva Conventions.\textsuperscript{74} The District of Columbia Circuit Court of Appeals reversed, holding the individual rights of the Geneva Conventions were not “judicially enforceable” and the military commissions qualified as “competent tribunals” within the meaning of the UCMJ’s regulations.

\textsuperscript{68} 151 CONG. REC. S14,263 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl). Senator Kyl began his statement by saying, “I would like to say a few words about the now-completed National Defense Authorization Act for fiscal year 2006, and in particular section 1405 of that act, which expels lawsuits brought by enemy combatants from United States courts.” \textit{Id.} at S14,260.


\textsuperscript{71} \textit{Id.}


\textsuperscript{73} Hamdan, 344 F. Supp. 2d at 156.

\textsuperscript{74} \textit{Id.} at 173-74.
implementing the Conventions.\textsuperscript{75} Hamdan then sought Supreme Court
review, and certiorari was granted on November 7, 2005.\textsuperscript{76}

On January 12, 2006, the Government filed its motion to dismiss for
lack of jurisdiction,\textsuperscript{77} arguing because "the Detainee Treatment Act in plain
terms removes the Court's jurisdiction to hear this action, the Court should
dismiss this case for want of jurisdiction or vacate with instructions for the
lower courts to dismiss, or, at a minimum, dismiss the writ as improvidently
granted."\textsuperscript{78} In the Government's view, newly enacted § 1005(h)(1)
"explicitly provides—without reservation—that" it "shall take effect on the
date of the enactment of this Act."\textsuperscript{79} Hamdan challenged this contention
claiming "[t]he text, drafting history, and legislative history of the DTA
demonstrate that Congress intended to preserve jurisdiction over pending
actions, including particularly this case."\textsuperscript{80} Hamdan also objected to the
Government's theory on constitutional grounds, arguing that allowing
Congress to strip the Court of appellate jurisdiction in habeas cases raises
"grave questions" of the efficacy of the writ itself.\textsuperscript{81} The Supreme Court
postponed its ruling on the Government's motion pending arguments on the
merits.\textsuperscript{82}

After oral argument and upon considering the Government's position,
the Court denied the motion to dismiss finding the DTA did not divest it of
jurisdiction as to pending cases.\textsuperscript{83} Although the Court summarized the
constitutional issues raised by \textit{Hamdan},\textsuperscript{84} it found it unnecessary to reach
them\textsuperscript{85} and instead grounded its analysis in "[o]rdinary principles of
statutory construction.”\textsuperscript{86}

In its analysis the Court found the relevant principle of statutory
construction is that "a negative inference may be drawn from the exclusion
of language from one statutory provision that is included in other provisions
of the same statute."\textsuperscript{87} Keeping that principle in mind, the Court pointed
out that § 1005(h)(1), which applied to subsection (e)(1), stated the

\textsuperscript{75} Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).
\textsuperscript{76} Hamdan v. Rumsfeld, 126 S. Ct. 622 (2005) (No. 05-184).
\textsuperscript{77} Respondents' Motion to Dismiss for Lack of Jurisdiction, Hamdan v. Rumsfeld,
\textsuperscript{78} \textit{Id.} at 3.
\textsuperscript{80} Petitioner's Opposition to Respondent's Motion to Dismiss at 2, Hamdan v.
\textsuperscript{81} \textit{Hamdan}, 126 S. Ct. at 2763-64.
\textsuperscript{82} \textit{Id.} at 2762.
\textsuperscript{83} \textit{Id.} at 2762-63.
\textsuperscript{84} \textit{Id.} at 2763-64.
\textsuperscript{85} \textit{Id.} at 2764.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Hamdan}, 126 S. Ct. at 2765.
provision "take[s] effect on the date of the enactment of this Act." However, § 1005(h)(2), which applied to subsections (e)(2) and (3), specifically stated those provisions were given effect as to cases pending on or after enactment of the DTA. Furthermore, the Court noted that in its original form the Act specified that (e)(1) was to apply to pending cases. However, that language was removed in favor of the approach presented in the Graham-Levin-Kyl amendment, which was intended to make (e)(1) effective on the date of enactment without retroactive application to pending cases. Accordingly, the Court found that the omission of language in (h)(1) specifying that (e)(1) applied to pending cases suggested that Congress’s intention was not to divest it of jurisdiction to hear the merits of the Hamdan case.

V. THE CURRENT STATE OF FEDERAL JURISDICTION IN THE WAR ON TERROR

After Rasul, the federal judiciary was endowed with expansive territorial jurisdiction to hear habeas corpus petitions brought by prisoners captured during the course of the war on terrorism. This jurisdiction allowed courts to entertain petitions brought by detainees so long as the United States exercised jurisdiction and control over the area in which the prisoner was held. The adoption of the DTA clipped the sails of this expansive power by divesting the federal judiciary of habeas jurisdiction over petitions brought by detainees held at Guantánamo Bay, Cuba. However, Congress failed to address the broader implications of Rasul, which would allow federal courts to entertain habeas petitions brought by detainees held in other theaters of the conflict.

The Supreme Court’s decision in Hamdan had the effect of lessening the impact of the jurisdiction-stripping feature of the DTA. Specifically, because Congress was not explicit as to the retroactive application of the Act, the Court was not persuaded by the Government’s arguments that the

89. Id. § 1005(h)(2).
90. Hamdan, 126 S. Ct. 2749. See also supra Part III.
92. Hamdan, 126 S. Ct. at 2769. The Court went on to hold that Congress had not provided the President with the authority to convene military tribunals, that Common Article III of the Geneva Convention applied to Hamdan’s detention, and that the procedures established for use in the military tribunals did not comport with the mandates of the UCMJ. Id.
93. See Pope, supra note 2. See also supra Part II. B.
94. See Pope, supra note 2. See also supra Part II. B.
95. See supra Part III.
96. See supra Part IV.
federal courts were somehow stripped of jurisdiction to hear pending habeas petitions brought by the detainees.97

To be sure, the Rasul decision cast its broad shadow over the federal judiciary and the war on terrorism. As was previously argued, this expansion is unprecedented and dangerously intrudes upon the ability of the executive to conduct war and provides foreign held detainees with greater access to the federal courts than domestically held prisoners. Even though the present administration is vastly unpopular and has been criticized from all sides concerning its management of the war on terrorism and its treatment of foreign held detainees, the political process is the venue where these issues should be resolved, not the federal courts. The judicial scrutiny the military must now deal with, as it captures and detains suspected terrorists on foreign soil, is certainly an impediment to its mission, and Congress has failed to take the appropriate steps to remove this roadblock.

Because Congress has expressed its desire to abrogate Rasul, it should act quickly and adopt more comprehensive legislation to ameliorate Rasul's broader implications. Simply, Congress could draft legislation stripping the federal courts of habeas jurisdiction over all detainees captured and held in territories outside the United States. As it now stands, the military may only escape civilian judicial review by holding detainees at Guantánamo Bay, Cuba. Congress' attempt to designate Guantánamo as the one region over which federal habeas jurisdiction does not extend is inadequate as the nation attempts to wage, what has been described as, a "world-wide" war on terrorism.

97. See supra Part IV.