A. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ALIENS

Notwithstanding the Supreme Court's decision in Rasul that the District Court's dismissal of the petitioners' claims was incorrect as a matter of law, the respondents argue in their October 2004 motion that the Rasul decision resolved only whether individuals detained at Guantanamo Bay had the right merely to allege in a United States District Court under the habeas statute that they are being detained in violation of the Constitution and other laws. Respondents argue that the decision was silent on the issue of whether the detainees actually possess any underlying substantive rights, and they further contend that earlier Supreme Court precedent and the law of this Circuit make clear that the detainees do not hold any such substantive rights. Accordingly, it is the respondents' position that although Rasul clarified that a detainee has every right to file papers in the Clerk's Office alleging violations of the Constitution, statutes, treaties and other laws, and although the Court has jurisdiction to accept the filing and to consider those papers, the Court must not permit the case to proceed beyond a declaration that no underlying substantive rights exist. While the Court would have welcomed a clearer declaration in the Rasul opinion regarding the specific constitutional and other substantive rights of the petitioners, it does not interpret the Supreme Court's decision as narrowly as the respondents suggest it should. To the contrary, the Court interprets Rasul, in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.

The significance and scope of the Rasul decision is best understood after a review of earlier case law addressing the applicability of the Constitution outside of the United States and

to individuals who are not American citizens. At the end of the nineteenth century, the Supreme Court interpreted the Constitution to have no applicability outside of the United States, even to activities undertaken by the United States government with respect to American citizens. In Ross v. McIntyre, 140 U.S. 453, 464 (1891), a habeas case involving a U.S. citizen convicted of murder by an American consular tribunal in Japan, the Court declared, "By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guaranties it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country." 140 U.S. at 464 (citing Cook v. United States 138 U.S. 157, 181 (1891)).

The Supreme Court reexamined this broad declaration beginning a decade later and recognized the potential for a more liberal view of the Constitution's applicability outside of the United States in a line of precedent known as the "Insular Cases." One of the earliest of those cases, Downes v. Bidwell, 182 U.S. 244 (1901), addressed whether the imposition of duties on products from Puerto Rico after it became a U.S. territory was a violation of the Constitution's Uniformity Clause, which requires that "all duties, imposts, and excises shall be uniform throughout the United States." Art. I, § 8, cl. 2. As part of its analysis, the Court held that the "unincorporated" territory of Puerto Rico – meaning a territory not destined for statehood – was not part of the "United States" and that, as a result, the imposition of duties on Puerto Rican goods did not violate the Constitution. In dicta, the Court acknowledged that Congress had traditionally interpreted the Constitution to apply to territories "only when and so far as Congress

shall so direct." 182 U.S. at 278-79. The Court noted the apprehension of "many eminent men" caused by such an interpretation, however, and it described that concern as "a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism." Id. At 280. Significant to the resolution of the cases brought by the Guantanamo detainees, the Court went on to minimize such concern by suggesting that the Constitution prevented Congress from denying inhabitants of unincorporated U.S. territories certain "fundamental" rights, including "the right to personal liberty . . . ; to free access to courts of justice, [and] to due process of law." Id. at 282. Because such fundamental rights were not at issue in Downes v. Bidwell, the Court did not address this concept in greater detail at that time.

Three years later, the Court faced more directly the applicability of the Constitution outside of the United States when it resolved whether the defendant in a criminal libel action in a Philippines court was entitled to a trial by jury under Article III and the Sixth Amendment of the U.S. Constitution. Dorr v. United States, 195 U.S. 138 (1904). At the time of the litigation, the United States had control of the Philippines as an unincorporated territory after the conclusion of the Spanish-American War. Congress, however, had enacted legislation expressly exempting application of the U.S. Constitution to the area. The defendant in that case was prosecuted for libel under the previously existing Spanish system and was not permitted a trial by jury. On appeal, the defendant argued that the right to trial by jury was a "fundamental" right guaranteed by the U.S. Constitution and that Congress did not have the power to deny that right by statute. Although the Court ultimately ruled that the Constitution did not require a right to jury trial in the

Philippines, it did so only after examining the legal traditions employed in the Philippines prior to annexation as a U.S. territory, the significance of the constitutional right asserted, and the ability of the existing system to accept the burdens of applying new constitutional constraints. In reaching its conclusion that a right to trial by jury was not a "fundamental" right guaranteed outside of the United States, the Court emphasized that the legal system pursuant to which the defendant was prosecuted already provided numerous procedural safeguards, including fact finding by judges, a right of appeal, a right to testify, a right to retain counsel, a right to confront witnesses, a right against self-incrimination, and a right to due process. Id. at 145. After suggesting that a large majority of the population would be unfit to serve as jurors, the Court further noted that recognizing a fundamental constitutional right to a jury trial might, in fact, "work injustice and provoke disturbance rather than . . . aid the orderly administration of justice." Id. at 148.[25]

That holding was reaffirmed in a similar criminal case involving a prosecution for libel in Puerto Rico. Balzac v. People of Porto Rico, 258 U.S. 298 (1922).[26] Like the defendant in Dorr, the defendant in the Puerto Rican case claimed his denial of a jury trial violated Article III and the Sixth Amendment of the U.S. Constitution. Unlike the defendant in Dorr, however, the defendant in Balzac was a United States citizen. The Court rejected that this distinction held any

[25] At a time critics might call less enlightened, the Dorr opinion expressed a fear that further expansion of the application of the Constitution might result in requiring "savages" to serve as jurors. Id.

[26] Citations to most, if not all, Insular Cases decided during the period between Dorr and Balzac can be found in United States v. Pollard, 209 F. Supp.2d 525, 539 n.17 (D. Virgin Islands 2002), rev'd, 326 F.3d 397 (3rd Cir. 2003).

significance, reiterating that a right to trial by jury was not a "fundamental" right and emphasizing that U.S. citizens had no constitutional right to a trial by jury in a proceeding outside of the United States. As the Court explained, "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." 258 U.S. at 309.

A plurality opinion issued by the Supreme Court in Reid v. Covert, 354 U.S. 7 (1957) sharply criticized this portion of the Balzac opinion and argued for the further liberalization of the application of the Constitution outside of the United States. Reid involved two wives charged with the capital murders of their husbands. Both men were soldiers in the United States military and were killed at overseas posts, one in England and the other in Japan. The wives, who were American citizens, were tried and convicted abroad by courts martial under the Uniform Code of Military Justice and subsequently sought habeas relief, arguing that as civilians they were entitled under the Constitution to civilian trials. Initially, a majority of the Court ruled in the Japanese case during the previous term that the guarantees of an indictment by grand jury and subsequent jury trial under the Fifth and Sixth Amendments in a prosecution by the United States government did not apply in foreign lands for acts committed outside the United States. Kinsella v. Krueger, 351 U.S. 470 (1956). Upon further argument and reconsideration the following term, however, the Court overruled its earlier decision, with four Justices subscribing to a plurality opinion and two Justices issuing separate opinions concurring in the result.

The plurality began its analysis of the issues with the following pronouncement, a marked contrast from the language used a half century earlier in Ross:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.

354 U.S. at 5-6 (footnotes omitted). After noting the language of the Fifth Amendment expressly states that "no person" shall be tried for a capital crime without a grand jury indictment and acknowledging that the Sixth Amendment requires that "in all criminal prosecutions" the defendant shall enjoy the right to a speedy and public trial, id. at 7, the plurality was critical of the narrower, "fundamental rights" approach taken in the previous Insular Cases, at least as applied to U.S. citizens, and explained, "While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." Id. at 8-9. The plurality went on to clarify that the "fundamental" rights approach limiting the full application of the Constitution to territories under U.S. control had been intended to avoid disruption of long established practices and to expedite the carrying out of justice in the insular possessions. Id. at 13. Accordingly, the plurality suggested that any further abridgement of constitutional rights under a "fundamental" rights

approach should not be countenanced. They reasoned, "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes." Id. at 14.

In his concurring opinion, Justice Harlan, who had voted to deny habeas relief in the case during the previous term, explained that his change of opinion was based on an increased concern about the fact that the underlying crimes for which the defendants were charged were capital offenses. Id. at 65. He was careful to emphasize, however, his belief that the Insular Cases still had "vitality," id. at 67, and that the precedent remained "good authority for the proposition that there is no rigid rule that jury trial must always be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." Id. at 75 (emphasis in the original). Justice Harlan posited further that the types of constitutional rights that should apply overseas depended on "the particular local setting, the practical necessities, and the possible alternatives." Id. Agreeing with what Justice Frankfurter wrote in a separately concurring opinion, Justice Harlan commented that the issue was analogous to a due process inquiry in which the courts must look to the particular circumstances of a particular case to determine what constitutional safeguards should apply. Id.

Because of the lack of a five Justice majority in Reid, Balzac continues to be interpreted as binding authority. Thus, for example, the Fifth Circuit held that a U.S. citizen charged with distribution of cocaine in the United States District Court for the Canal Zone District at Balboa was not entitled to the nonfundamental rights to a grand jury indictment and to a jury that had the

potential to include military personnel. Government of the Canal Zone v. Scott, 502 F.2d 566, 568 (5th Cir. 1974) ("non-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive"). Indeed, although Reid far from settled the issue of the Constitution's application abroad, it certainly did not weaken the long held doctrine that fundamental constitutional rights cannot be denied in territories under the control of the American government, even where the United States technically is not considered "sovereign" and where the claimant is not a United States citizen.

The District of Columbia Circuit so recognized in a case this Court finds to be particularly relevant to the litigation presently under consideration. Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977), required the application of the Fifth Amendment to U.S. government activities in Micronesia, a "Trust Territory" pursuant to a United Nations designation under which the United States acted as administrator. More specifically, the case involved a constitutional challenge to the procedures undertaken by a commission created by Congress to compensate residents who suffered property damage as a result of American military activities against Japan during World War II. The plaintiff in that case owned a home that had been destroyed by the American offensive, and although the commission ultimately awarded compensation, the commission's valuation of the plaintiff's loss was lower than what he had claimed. More significantly, the valuation was based on evidence that the plaintiff was not permitted to examine or rebut. In addressing whether the Due Process Clause of the Fifth Amendment regulated the commission's valuation procedures, the D.C. Circuit expressly recognized that the United States

was not technically "sovereign" over Micronesia, 569 F.2d at 619 n.71, and noted that the exact scope of the Constitution's foreign reach was a "matter of some controversy," commenting on the criticism in the Reid plurality opinion of the more limited "fundamental" rights approach taken in the Insular Cases. Id. at 618 & n.69. Nonetheless, the court concluded that at a minimum, due process was a "fundamental" right even with respect to property and that "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" Id. at 618-19 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 n.5 (1974)). Thus, the court required the commission to give the plaintiff access to the evidence upon which its decision relied.[27]

The Supreme Court again tried to bring some clarity to the issue of extraterritorial application of the Constitution when it reviewed the legality of the search and seizure by American government officials of items in the Mexican residence of a Mexican citizen charged with various narcotics-related offenses under U.S. law. United States v. Verdugo-Urquidez, 494

[27] At least twice since the Ralpho decision, the D.C. Circuit recognized the continuing murkiness of whether the Constitution provides protection to noncitizens abroad in cases involving action by American authorities in locales far from the absolute control of the U.S. Congress. Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), involved a claim by Nicaraguan citizens and residents that the alleged support of the Contras by American government officials violated Fourth and Fifth Amendment rights. The Court of Appeals found it unnecessary to resolve whether the Constitution applied in Nicaragua by concluding that even if it did, other grounds prevented the plaintiffs from recovering the relief they sought. Id. at 208. The second case, United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988), involved the seizure and alleged mistreatment of a Lebanese citizen by FBI agents on a boat off the coast of Cyprus. At his trial in District Court for alleged hijacking, the defendant sought the suppression of a confession he provided while in international waters on the ground that his interrogation violated asserted Fifth Amendment rights. Again, the majority avoided the threshold issue of extraterritorial application of the Constitution by accepting a stipulation between the prosecution and defendant that the Fifth Amendment was applicable. Id. at 957.

U.S. 259 (1990). Citing language from Reid that "the Constitution imposes substantive constraints on the Federal Government, even when it operates abroad," the Court of Appeals for the Ninth Circuit had ruled that the Fourth Amendment required the suppression of the evidence gained through the search, notwithstanding its conclusion that a search warrant obtained in the United States would have had no legal validity in Mexico. 856 F.2d 1214, 1218 (9th Cir. 1988). The Supreme Court reversed and began its analysis with a comparison of the language in the Fourth Amendment with the terminology in the Fifth and Sixth Amendments, noting that the Fourth Amendment is written to apply to "the people" while the Fifth and Sixth Amendments protect "person[s]" and the "accused." 494 U.S. at 265-66. The Court interpreted the linguistic differences as evidence that the drafters of the Fourth Amendment intended it to protect the people of the United States rather than to impose restrictions on the government against nonresident aliens. Id. at 266.

Perhaps more significant for purposes of these Guantanamo detainee cases, the majority opinion then addressed the Insular Cases and reaffirmed that in U.S. territories, only "fundamental" constitutional rights are guaranteed. Accordingly, the Court concluded that the ability of noncitizens in foreign countries to invoke Fourth Amendment rights must be even weaker. Id. at 268. Citing Johnson v. Eisentrager, 339 U.S. 763 (1950), the Court then declared, "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. The Court described its rejection in Eisentrager of the extraterritorial application of the Fifth Amendment as "emphatic," and concluded that if the Fifth Amendment, with the universal term "person," did not apply to aliens

extraterritorially, then neither should the Fourth Amendment, which applies only to "the people." Id.

Justice Kennedy joined the majority opinion but also wrote a separate concurring opinion. Minimizing the majority opinion's reliance on the term "the people" as used in the Fourth Amendment, Justice Kennedy preferred to focus on the Insular Cases and Reid, giving particular attention to Justice Harlan's concurring opinion. More specifically, Justice Kennedy invoked a contextual due process analysis to resolve the issue, making specific reference to Justice Harlan's comments that there is no rigid and abstract rule that requires Congress to provide all constitutional guarantees overseas where to do so would be "impracticable and anomalous." Id. at 277-78 (quoting Reid, 354 U.S. at 74). Ultimately, Justice Kennedy concluded that under the facts of the case, it would have been impracticable and anomalous to require the U.S. authorities to obtain a warrant for a search of property in Mexico, citing the lack of Mexican judicial officials to issue such warrants, potentially differing concepts of privacy and what would constitute an "unreasonable" search, and practical difficulties involved in dealing with foreign officials. Id. at 278.

So existed the state of relevant constitutional law at the time of Judge Kollar-Kotelly's dismissals of Rasul, Al Odah, and Habib. As a technical matter, her dismissals were not based on a finding that the Guantanamo detainees lacked underlying substantive constitutional rights, although the opinion does make brief references to some of the Insular Cases and to the Supreme Court's reference in Verdugo-Urquidez to the lack of extraterritorial Fifth Amendment rights. Rather, the District Court dismissed on the basis that it lacked jurisdiction under the habeas

statute, 28 U.S.C. §§ 2241 and 2242, in light of the Supreme Court's decision in Eisentrager. In that case, the Supreme Court held that federal courts did not have the authority to entertain the habeas claims of German nationals captured in China, convicted of war crimes by a U.S. military commission in China, and serving their sentences in a Landsberg prison, located in Germany but administered by the U.S. military. The crucial aspect of the Eisentrager decision, according to Judge Kollar-Kotelly, was its conclusion that habeas relief could not be granted to individuals in custody outside the sovereign territory of the United States. Her opinion emphasized the importance of the conclusion that the Guantanamo Bay Naval Base is not on sovereign United States territory, and rejected the argument made by counsel for the detainees that under Ralpho v. Bell, de facto sovereignty, rather than de jure sovereignty, was sufficient support for habeas jurisdiction. While recognizing that Micronesia, the location at issue in Ralpho, was not de jure sovereign U.S. territory, the District Court concluded that those islands are much more similar in character and status to sovereign territories than Guantanamo Bay is. According to the District Court, "The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base." 215 F. Supp.2d at 71.

In reviewing the District Court's decision dismissing the cases for lack of habeas jurisdiction, the D.C. Circuit took a somewhat different approach, relying more heavily than the District Court on an analysis of the substantive constitutional rights upon which the detainees' petitions were based. The D.C. Circuit interpreted Eisentrager to characterize the right to a writ of habeas corpus as a "subsidiary procedural right that follows from the possession of substantive

constitutional rights." 321 F.3d at 1140 (quoting Eisentrager, 339 U.S. at 781). Further noting that Eisentrager rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," id., the Court of Appeals then commented that this language "may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." Id. at 1140-41. Invoking the language in Verdugo-Urquidez that Eisentrager "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" and that such rejection in Eisentrager was "emphatic," the Court of Appeals then noted its previous reliance on Verdugo-Urquidez and Eisentrager in earlier cases that made clear that "[t]he law of the circuit now is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" Id. at 1141 (quoting People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999), and also citing Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000), rev'd sub nom. Christopher v. Harbury, 536 U.S. 403 (2002); Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960); and 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797 (D.C. Cir. 2002)). Emphasizing that Guantanamo Bay was not part of sovereign U.S. territory and rejecting any material significance to the U.S. government's practical control over the area, the court thus concluded in Al Odah:

> The consequence is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of Eisentrager. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke

> the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. Eisentrager itself directly tied jurisdiction to the extension of constitutional provisions . . . .

Id. at 1141.

The D.C. Circuit's decision was reversed in Rasul v. Bush, ___ U.S. ___, 124 S. Ct. 2686 (2004). In reviewing the decision of the Court of Appeals, the majority opinion addressed two grounds upon which a detainee traditionally could assert a right to habeas relief: statutory and constitutional. The Rasul majority interpreted Eisentrager to have focused primarily on the German detainees' lack of a constitutional right to habeas review, and distinguished the material facts upon which that portion of the Eisentrager decision relied from the circumstances concerning the Guantanamo Bay detainees. Among other distinguishing facts, the Rasul opinion emphasized that the Guantanamo Bay detainees were not citizens of countries formally at war with the United States, denied committing any war crimes or other violent acts, were never charged or convicted of wrongdoing, and – most significant to the present motion to dismiss – are imprisoned in "territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Next, Rasul turned to the issue of statutory habeas jurisdiction and ruled that post-Eisentrager precedent required the recognition of statutory jurisdiction even over cases brought by petitioners held outside the territorial jurisdiction of any federal district court. Noting that the habeas statute made no distinction between citizens and aliens held in federal custody, the Court ultimately ruled that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." Id. at 2696.

While conceding as they must in light of the Rasul decision that this Court has habeas jurisdiction over these cases, the respondents assert in their current motion to dismiss that the Supreme Court did not grant certiorari to review the D.C. Circuit's decision that the Guantanamo Bay detainees have no underlying constitutional rights. Accordingly, the respondents argue, the D.C. Circuit's pronouncement in Al Odah that the detainees lack substantive rights is still binding on this Court and the portions of the petitions invoking the Constitution must be dismissed for failure to state a claim upon which relief can be granted. Counsel for the petitioners, on the other hand, assert that in upholding this Court's habeas jurisdiction, the Supreme Court also made clear that the Constitution applies to Guantanamo Bay and that the detainees possess substantive constitutional rights. This Court finds the arguments made on behalf of the petitioners in this regard far more persuasive.

As an initial matter, the conclusion that the D.C. Circuit's holding on lack of substantive constitutional rights is no longer the law of the case could be deduced merely from the facts that: (1) the appellate court's opinion emphasized that the existence of habeas jurisdiction and substantive constitutional rights were "directly tied," 321 F.3d at 1141; (2) the appellate court believed Eisentrager applied to the facts of these cases and prevented the detainees from asserting substantive constitutional rights; and (3) the Supreme Court held that habeas jurisdiction did in fact exist and that Eisentrager was inapplicable to these cases. Additionally, and on a more detailed level, careful examination of the specific language used in Rasul reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases.

On appeal to the D.C. Circuit, counsel for the petitioners argued for the application of Ralpho v. Bell by challenging the District Court's finding that Guantanamo Bay was simply another naval base on land leased from a foreign sovereign and nowhere near the legal equivalent of a United States territory. 215 F. Supp.2d at 71. The D.C. Circuit rejected the challenge and agreed with the District Court on this point. Although the appellate court conceded that Micronesia, like Guantanamo Bay, was not technically sovereign U.S. territory, it concluded that Ralpho nonetheless did not "justify this court, or any other, to assert habeas corpus jurisdiction at the behest of an alien held at a military base leased from another nation." 321 F.3d at 1144. Instead, the appellate court found Landsberg prison in Germany to be a more suitable analogy, and because Eisentrager held that no constitutional rights existed there, the D.C. Circuit concluded that no constitutional rights could exist at Guantanamo Bay. Rasul, however, unequivocally rejected the D.C. Circuit's analogy and made clear that Guantanamo Bay cannot be considered a typical overseas military base.

In his concurring opinion in Rasul, Justice Kennedy unambiguously repudiated the D.C. Circuit's analogy of Guantanamo Bay to Landsberg prison, and he made a Ralpho-type conclusion that Guantanamo Bay was, for all significant purposes, the equivalent of sovereign U.S. territory. He explained:

> Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Id. at 2700 (Kennedy, J., concurring) (citing Eisentrager, 339 U.S. at 777-78). Although the majority opinion was not as explicit as Justice Kennedy's concurrence, it too found significant the territorial nature of Guantanamo Bay and dismissed the D.C. Circuit's characterization of Guantanamo Bay as nothing more than a foreign military prison. For example, in refusing the application of Eisentrager's constitutional analysis to these cases, the majority took special note that, unlike the German prisoners, the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Additionally, in rejecting an argument made by respondents that applying the habeas statute to prisoners at Guantanamo Bay would violate a canon of statutory interpretation against extraterritorial application of legislation, the majority wrote:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the "territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

124 S. Ct. at 2696 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949), in which the Court refused to interpret a statute mandating an eight hour work day to have application to an American citizen working for a contractor in Iran and Iraq absent evidence that the "United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.").

These passages alone would be sufficient for this Court to recognize the special nature of Guantanamo Bay and, in accordance with Ralpho v. Bell, to treat it as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist. But perhaps the strongest basis for

recognizing that the detainees have fundamental rights to due process rests at the conclusion of the Rasul majority opinion. In summarizing the nature of these actions, the Court recognized:

> Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 277-278, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990) (Kennedy, J., concurring), and cases cited therein.

124 S. Ct. at 2698 n.15. This comment stands in sharp contrast to the declaration in Verdugo-Urquidez relied upon by the D.C. Circuit in Al Odah that the Supreme Court's "rejection of extraterritorial application of the Fifth Amendment [has been] emphatic." 494 U.S. at 269. Given the Rasul majority's careful scrutiny of Eisentrager, it is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed. Indeed, had the Supreme Court intended to uphold the D.C. Circuit's rejection in Al Odah of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect, rather than delay the ultimate resolution of this litigation and require the expenditure of additional judicial resources in the lower courts. To the contrary, rather than citing Eisentrager or even the portion of Verdugo-Urquidez that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the Rasul Court specifically referenced the portion of Justice Kennedy's concurring opinion in Verdugo-Urquidez that discussed the continuing validity of the Insular Cases, Justice Harlan's concurring

opinion in Reid v. Covert, and Justice Kennedy's own consideration of whether requiring adherence to constitutional rights outside of the United States would be "impracticable and anomalous." This Court therefore interprets that portion of the opinion to require consideration of that precedent in the determination of the underlying rights of the detainees.

There would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment. Recognizing the existence of that right at the Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States. American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice.[28] The situation in these cases is very different from the circumstances in Verdugo-Urquidez, where the defendant claimed the United States government was required to get a warrant to perform a search in Mexico, a sovereign country that employs an entirely different legal system, lacks officials to issue warrants, and has potentially different concepts of privacy. Similarly, the imposition of constitutional rights would be less difficult at Guantanamo Bay than it was in any of the Insular Cases, where the courts were

[28] Ironically, the Cuban government has alleged that the U.S. military is violating the human rights of the detainees at Guantanamo Bay and has demanded more humane treatment of the prisoners. The U.S. government, however, does not appear to have conceded the Cuban government's sovereignty over these matters. See What's News, The Wall Street Journal, Jan. 20, 2005, at A1(2005 WL 59838432); Cuba Demands US Stop Alleged Abuses at "Illegally Occupied" Guantanamo Base, Agence France Presse, Jan. 19, 2005 (2005 WL 69517025).

required to determine whether imposition of American rights such as the right to trial by jury and indictment by grand jury were even possible in places such as the Philippines and Puerto Rico with native legal systems and populations previously unexposed to American jurisprudence.

Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected "enemy combatants" at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test. By definition, constitutional limitations often, if not always, burden the abilities of government officials to serve their constituencies. Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years. As articulated by the Supreme Court after the conclusion of the Civil War:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Ex Parte Milligan, 71 U.S. 2, 120-21 (1866). See also United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation – the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution. In light of the Supreme Court's decision in Rasul, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, and under the precedent set forth in Verdugo-Urquidez, Ralpho, and the earlier Insular Cases, the respondents' contention that the Guantanamo detainees have no constitutional rights is rejected, and the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment.

B. SPECIFIC REQUIREMENTS OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

Having found that the Guantanamo detainees are entitled to due process under the Fifth Amendment to the United States Constitution, the Court must now address the exact contours of that right as it applies to the government's determinations that they are "enemy combatants." Due process is an inherently flexible concept, and the specific process due in a particular circumstance depends upon the context in which the right is asserted. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Resolution of a due process challenge requires the consideration and weighing of three factors: the private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing interests of the