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# One Case, Two Decisions: *Khalid v. Bush, In re Guantanamo Detainee Cases*, and the Neutral Decisionmaker

Daniel Freeman<sup>†</sup>

*Khalid v. Bush*, 335 F. Supp. 2d 311 (D.D.C. 2005).

*In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

“Non-Resident Aliens Captured and Detained Outside the United States Have No Cognizable Constitutional Rights.”<sup>1</sup>

*Judge Richard J. Leon*

“[T]he Court interprets *Rasul*, in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.”<sup>2</sup>

*Judge Joyce Hens Green*

These statements lie at the core of two recent decisions by judges of the District Court for the District of Columbia. Each judge ruled on identical motions to dismiss, supported and opposed by identical briefs, deciding whether indefinite detention of alien enemy combatants at Guantánamo Bay was impermissible under a variety of legal theories ranging from executive overreach to customary international law. On January 19, 2005, Judge Richard Leon answered an unequivocal no, dismissing each of the petitioners claims. Less than two weeks later, Judge Joyce Hens Green denied the motion to dismiss, granting that the petitioners had cognizable rights under both the Fifth Amendment and the Geneva Conventions and that the current system of Combat Status Review Tribunals (CSRTs) was insufficient to vindicate those rights.

These cases thus provide a unique empirical demonstration of a core tenet

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1. *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *appeal docketed*, No. 05-5063 (D.C. Cir. Mar. 2, 2005).

2. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005), *appeal docketed*, No. 05-8003 (D.C. Cir. Feb. 9, 2005).

of legal realism: the vacuity of the notion of judge as neutral decisionmaker.<sup>3</sup> In this era of ideological judicial appointments, these cases provide concrete evidence for efforts to temper the aggressive partisanship of the nomination process. After first looking at the unique procedural circumstances that put the same motion in front of two judges, this Comment explores how and why two jurists struck starkly different legal conclusions when presented the same arguments under the same binding precedents. A close analysis of each decision's structural and rhetorical framework provides clues to its author's normative preferences. With an absence of clear instruction from higher courts, this Comment describes how each judge manipulated some precedents and discarded others to fit their preference. Finally, the Comment places the decision in the larger context of national security jurisprudence and the debate over judicial nominations.

## I. BACKGROUND

The Supreme Court's decision in *Rasul v. Bush* held that federal courts have jurisdiction under statute<sup>4</sup> to hear petitions for a writ of habeas corpus from detainees at the U.S. Naval Station at Guantánamo Bay.<sup>5</sup> The Court's decision in *Rumsfeld v. Padilla*, handed down on the same day, established procedural guidelines for habeas petitions from outside the territorial jurisdiction of any district court.<sup>6</sup> The third of the Court's triumvirate of enemy combatant cases, *Hamdi v. Rumsfeld*, stated that courts can and must adjudicate conflicts between the military and asserted constitutional rights.<sup>7</sup> A rush of filings<sup>8</sup> and transfers<sup>9</sup> followed, and by August 4, 2004, thirteen habeas petitions, representing more than fifty detainees, rested in the United States District Court for the District of Columbia.<sup>10</sup> Each would be decided under the same precedent, from the pronouncements of the Supreme Court to the

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3. See William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525 (2005). *But see* Republican Party of Minn. v. White, 536 U.S. 765, 775-84 (2002).

4. 28 U.S.C. §§ 2241-2243 (2000).

5. *Rasul v. Bush*, 542 U.S. 466 (2004).

6. *Rumsfeld v. Padilla*, 542 U.S. 426, 447 n.16 (2004)

7. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (“[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”).

8. See, e.g., Petition for Writ of Habeas Corpus, *Khalid v. Bush* (July 6, 2004) (D.D.C. 2004) (No. 04-1142).

9. See *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2003).

10. See Motion for Joint Case Management Conference at 5-6, *Rasul v. Bush* (D.D.C. 2004) (No. 02-0299), *Al Odah v. United States* (D.D.C. 2004) (No. 02-0828), *Habib v. Bush* (D.D.C. 2004) (No. 02-1130), *Kumaz v. Bush* (D.D.C. 2004) (No. 04-1135), *Khadr v. Bush* (D.D.C. 2004) (No. 04-1136), *Begg v. Bush* (D.D.C. 2004) (No. 04-1137), *Benchellali v. Bush* (D.D.C. 2004) (No. 04-1142), *El-Banna v. Bush* (D.D.C. 2004) (No. 04-1144), *Gherebi v. Bush* (D.D.C. 2004) (No. 04-1164), *Boumediene v. Bush* (D.D.C. 2004) (No. 04-1166), *Anam v. Bush* (04-1194), *Almurbati v. Bush* (04-1227), *Abdah v. Bush* (D.D.C. 2004) (No. 04-1254).

collegial deference within a district court.

In an effort to promote judicial efficiency, Judge Gladys Kessler of the District Court's Calendar and Case Management Committee granted, in part, the government's Motion for Joint Case Management, allowing Senior Judge Joyce Hens Green to hear common issues of law, with the consent of each original judge.<sup>11</sup> In response, seven judges allowed Judge Green to adjudicate the crucial motion to dismiss. Only one judge declined: Richard J. Leon, a recent appointee to the court.<sup>12</sup> Judges Green and Leon held back-to-back oral arguments, in which attorneys argued the same motions<sup>13</sup> in front of judges with opposite attitudes; Judge Leon was skeptical toward the petitioners<sup>14</sup> while Judge Green prodded the government's interpretation of the President's war powers.<sup>15</sup>

## II. STRUCTURE AND RHETORIC

The resulting decisions both open with the now-standard introduction to national security cases: the paean to September 11.<sup>16</sup> From there the structure and language divert, giving their opposing outcomes each an air of justice and inevitability.

Judge Leon's decision frames the result as upholding the President's necessary and well-established powers. His principle technique is to establish a tone of legality and formalism, hinting at the propriety of the detentions.<sup>17</sup> He also stresses that the petitioners are "foreign nationals . . . [without] any connection to the United States, other than their current status as detainees at a

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11. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 451 (D.D.C. 2005). Both sides had agreed, "[I]t was best to have one judge resolve all the cases." Neal A. Lewish, *Judge Extends Legal Rights for Guantánamo Detainees*, N.Y. TIMES, Jan. 31, 2005, at 12.

12. *See In re Guantanamo Detainee Cases*, 355 F. Supp. at 451 n.14.

13. *Compare* Individual Respondents' Motion to Dismiss and Supporting Memorandum, *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (No. 04-CV-1142) *with* Individual Respondents' Motion to Dismiss and Supporting Memorandum, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (No. 02-0299).

14. *See Khalid v. Bush*, 355 F. Supp. 2d 311, 326 (D.D.C. 2005) ("Although the petitioners assert that their continued detention violates the Geneva Convention, they subsequently conceded at oral argument that that Convention does not apply . . . .") (internal citations omitted); Lauren Ahwan, *Lawyers Expect Sympathetic Habeas Corpus Ruling for Hicks*, AUSTRALIAN ASSOCIATED PRESS, Dec. 3, 2004.

15. *See* Carol Leonnig, *Judge Questions Sweep of Bush's War on Terrorism*, WASH. POST, Dec. 2, 2004, at A4; Jonathan Turley, *A Check on Wartime Powers*, NAT'L L.J., Mar. 7, 2005, at 26.

16. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 446; *Khalid*, 355 F. Supp. 2d at 314-15. *See also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (invoking the September 11 attacks as a premise to a decision concerning detainees); *Rasul v. Bush*, 542 U.S. 466, 470 (2004) (same).

17. *See, e.g., Khalid*, 355 F. Supp. 2d at 315 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) and Exec. Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001)); *id.* at 317-20 (describing the extent of the President's war powers). Judge Leon dedicates nearly as much ink to describing the President's war powers and the applicability of the Authorization for Use of Military Force as he does to the inapplicability of the Fifth Amendment. *See id.* at 320-23.

U.S. military base,”<sup>18</sup> providing a preliminary foundation for the claim that the United States owes the petitioners no rights, despite their multi-year detention. Perhaps most glaring, however, are Judge Leon’s rhetorical barbs, broadcasting his view of the suit as entirely frivolous. After stating each party’s position, he frames the question presented as “the *novel issue* of whether there is *any viable legal theory* under which a federal court could issue a writ of habeas corpus challenging the legality of the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict.”<sup>19</sup>

In contrast, Judge Green rests her decision on the need to rectify the fundamental injustice being perpetrated on Guantánamo. She begins with a discussion of the petitioners’ seizure, framing the detentions as battlefield captures, rather than the arrest and detention of terrorists, and referring to the petitioners as “individuals” rather than “aliens.”<sup>20</sup> She also uses the term “enemy combatants” in quotation marks, shifting from a tone of neutrality to one of open skepticism.<sup>21</sup> She then discusses the judicial history of the *Rasul* decision, stressing the Supreme Court’s reversal of the lower court decisions in order to highlight the continuing legal evolution. By beginning her discussion in nineteenth-century jurisprudence, she describes an absolute rejection of extraterritorial rights, even for citizens, that is plainly at odds with current law. While discussing the applicability of the Fifth Amendment, Judge Green chastises the government’s claims of deference. “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.”<sup>22</sup> Most importantly, because Judge Green rules that the detainees have rights under the Fifth Amendment, she is able to dedicate several pages to the violations of those rights at Guantánamo, demonstrating the extent of unconstitutional conduct and establishing an air of incredulity, if not indignation.<sup>23</sup> Facing such grave violations of procedural

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18. *Khalid*, 355 F. Supp. 2d at 316.

19. *Id.* at 314 (emphasis added). Judge Leon also asserts that petitioners’ argument “make[s] a mockery of Congress’s intent” and “presupposes that non-resident aliens . . . enjoy [constitutional] rights,” *id.* at 320, and that “[i]t is not surprising that the petitioners have been unable to cite any case in which a federal court has engaged in the substantive review and evaluation they seek of . . . the military’s decision to capture and detain a non-citizen as an enemy combatant.” *Id.* at 328. Labeling individuals who deny any belligerent act as enemy combatants had no historical precedent favoring either party prior to September 11, 2001. See George C. Harris, *Terrorism, War & Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT’L & COMP. L. REV. 31, 37 (2003).

20. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 446.

21. *E.g.*, *id.* at 447. Judge Green also notes that the government did not define the term “as used by the respondents” until July 7, 2004. *Id.* at 450.

22. *Id.* at 464.

23. *Id.* at 465-78. Describing the CSRTs taking place on Guantánamo, she states, “[t]he laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the

norms, Judge Green appears justified ruling against the government in the sensitive realm of national security.

### III. APPLICABILITY OF THE FIFTH AMENDMENT TO GUANTÁNAMO DETAINEES

The pivotal legal distinction between the two decisions is the applicability of the Fifth Amendment to alien detainees captured outside the United States and held on Guantánamo.<sup>24</sup> The conditions of the detainees' detention— indefinite incarceration, nearly incommunicado conditions, and a tribunal without the rights of either a criminal trial or a tribunal under the Uniform Code of Military Justice—would face a stiff challenge if applied to individuals protected by the Fifth Amendment.<sup>25</sup>

Judge Leon answers the petitioners' challenge directly, titling the relevant section, "Non-Resident Aliens Captured and Detained Outside the United States Have No Cognizable Constitutional Rights."<sup>26</sup> He bases this contention on what he deems "the Supreme Court's unequivocal and repeated denial of such rights to non-resident aliens."<sup>27</sup> Literally applying treaty language, Judge Leon first asserts that Guantánamo remained "subject to the 'ultimate sovereignty' of Cuba,"<sup>28</sup> rather using the "plenary and exclusive jurisdiction" framework stressed in *Rasul*.<sup>29</sup> He then applies this "foreign territory" categorization to the absolute statements in *Johnson v. Eisentrager*<sup>30</sup> and *United States v. Curtiss-Wright Export Corp.*,<sup>31</sup> decisions denying all constitutional protections to non-resident aliens. Recognizing the age of his argument's foundation, he cites several modern cases to establish that he continues to be bound to deny any and all constitutional rights to aliens outside

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consequences of the detainee's 'enemy combatant' status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate." *Id.* at 470.

24. The two decisions also differ over the applicability of the Third Geneva Convention. Despite the judges' conflicting general statements concerning the doctrine of self-execution, compare *Khalid v. Bush*, 355 F. Supp. 2d 311, 327 (D.D.C. 2005) with *In re Guantanamo Detainee Cases* 355 F. Supp. 2d 443, 479 (D.D.C. 2005), their conclusions ultimately rest on a factual distinction. Both judges agreed that individuals not affiliated with the Afghan army were not entitled to the protection of the conventions, and none of the petitioners in *Khalid* could claim such affiliation. *Khalid*, 355 F. Supp. 2d at 326. The D.C. Circuit opinion in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), cert. granted, 126 S. Ct. 622 (2005), found the Conventions non-self-executing, and the Supreme Court will hear the issue in the January Term of 2006. See Charles Lane, *High Court To Hear Case on War Powers*, WASH. POST, Nov. 8, 2005, at A1 (noting oral argument scheduled for March 2006 and forecasting a July 2006 decision).

25. *But see* *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (upholding arguably lesser conditions for an American citizen captured by civil authorities in the United States).

26. *Khalid*, 355 F. Supp. 2d at 320-21.

27. *Id.*

28. *Khalid*, 355 F. Supp. 2d at 321 (quoting *Lease of Lands for Coaling and Naval Stations, U.S.-Cuba*, Art. III, Feb. 23, 1903, T.S. No. 426).

29. *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

30. 339 U.S. 763 (1950).

31. 299 U.S. 304 (1936).

of U.S. territory.<sup>32</sup> Finally, he distinguishes *Rasul* as a purely statutory holding and dismisses Justice Kennedy's statement in footnote fifteen that "[p]etitioner's allegations . . . unquestionably describe custody in violation of the Constitution or laws or treaties of the United States"<sup>33</sup> as dicta outside the scope of the question presented.

Judge Leon reaches his decision by ignoring evolution in the doctrine. While he quotes *Curtiss-Wright* for the proposition that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens,"<sup>34</sup> he fails to recognize that *Rasul* upheld the application of the federal habeas statute in "foreign territory" with respect to non-citizens. Similarly, Judge Leon quotes the Supreme Court's decisions in *Zadvydas* and *Verdugo-Urquidez* as modern affirmations of an absolutist denial of rights for which they do not stand.<sup>35</sup> Finally, Judge Leon's narrow construction of *Rasul* reiterates portions of Justice Scalia's dissent; had *Rasul* meant what Judge Leon interpreted it to mean, Justice Scalia would not have needed to write much of his opinion.<sup>36</sup> With only one exception, each of the decision's quotations from prior cases is a quote used by the Justice Department in its motion to dismiss,<sup>37</sup> reflecting an unquestioning dedication to one party's desired result, not just its argument.

Judge Green begins her discussion of constitutional applicability with a deferential nod to the government's argument before stating her conclusion: "[T]he Court interprets *Rasul*, in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable

32. See *Khalid*, 355 F. Supp. 2d at 322 (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002); *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999); and *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960)).

33. *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004).

34. *Khalid*, 355 F. Supp. 2d at 321 (quoting *Curtiss-Wright*, 299 U.S. at 318).

35. *Zadvydas*, 533 U.S. 678, granted resident aliens greater rights than non-residents in removal proceedings without defining away those lesser rights. Similarly, *Verdugo-Urquidez* limits the applicability of the Fourth Amendment outside of the United States based on a textual interpretation that does not apply to the Fifth Amendment. 494 U.S. at 265 ("[T]he people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."). *But see id.* at 269 (reiterating the *Eisenstrager* holding in dicta).

36. See *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting) ("The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits.").

37. Compare *Khalid*, 355 F. Supp. 2d at 320-23 with Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 19-22, 20 n.23, 25, *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (No. 04-1142). *But see Khalid*, 355 F. Supp. 2d at 321 (quoting *Eisenstrager* for the proposition that the key factor in determining the government's obligation is "the alien's presence within its territorial jurisdiction," a quote not found in the government's motion to dismiss).

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constitutional rights.”<sup>38</sup> This statement lies at the end of a doctrinal evolution beginning in the nineteenth century and reaching its peak in *Rasul*. She begins with *Ross v. McIntyre*, the now-untenable pronouncement that even citizens have no constitutional protections outside of sovereign American territory.<sup>39</sup> Soon after, in the *Insular Cases*, the Supreme Court suggested that “the Constitution prevented Congress from denying inhabitants of unincorporated U.S. territories certain ‘fundamental’ rights, including . . . ‘to due process of law.’”<sup>40</sup> Judge Green then moves to D.C. Circuit precedent, finding that the status of a “trust territory” discussed in *Ralpho v. Bell*, functional jurisdiction without sovereignty, is analogous to the status of Guantánamo, requiring her to uphold the petitioners’ fundamental rights.<sup>41</sup>

After describing the district and circuit court decisions made in *Rasul* on the way to the Supreme Court, both of which highlighted *Eisenstrager*’s rejection of habeas jurisdiction over non-citizens abroad,<sup>42</sup> Judge Green turns to the Supreme Court’s decision in *Rasul* and its application of the habeas statute to Guantánamo. She describes that application as an indication that Guantánamo falls under *Ralpho*, “for all significant purposes, the equivalent of sovereign U.S. territory.”<sup>43</sup> Perhaps most importantly, Judge Green accepts the petitioners’ argument that footnote fifteen of *Rasul* indicates intent, if not an explicit declaration, that the Justices “considered the petitioners to be within a territory in which constitutional rights are guaranteed.”<sup>44</sup>

Judge Green too bends the law, coming to her absolute decision through reliance on concurrences and plurality decisions that neither bind lower courts nor overturn past precedent. Her use of *Reid v. Covert*, a plurality decision, to overcome the Supreme Court’s decision in *Balzac v. Porto Rico* limiting “fundamental rights,” allows her perception of a shift in the Court to overcome a precedent that still binds the lower courts. Similarly, she uses Justice Kennedy’s narrow concurrence in *Verdugo-Urquidez* to limit the majority’s

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38. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

39. 140 U.S. 453 (1891).

40. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 455 (citing *Downes v. Bidwell*, 182 U.S. 244, 282 (1901)). Judge Green follows this jurisprudence through several more modern cases, noting that allowable limitations on non-fundamental rights existed to leave in place local legal traditions and facilitate justice, regardless of citizenship. *Id.* at 455-57 (citing *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); and *Dorr v. United States*, 195 U.S. 138, 145 (1904)). This jurisprudence finds its most modern application in Justice Kennedy’s concurrence to *Verdugo-Urquidez*. 494 U.S. at 278 (Kennedy, J., concurring) (“All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.”).

41. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 458 (citing *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (“[T]here cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law.”) (internal citations omitted)).

42. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom. Rasul v. Bush*, 542 U.S. 466 (2004); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *rev’d*, 542 U.S. 466 (2004).

43. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 462.

44. *Id.* at 463.

statement that *Eisentrager* “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States . . . .”<sup>45</sup> Judge Green’s over-reliance on *Rasul*, a statutory decision, to address the continued viability of *Eisentrager*’s constitutional pronouncements leaves her decision under-supported and vulnerable on appeal.

#### IV. FUTURE EFFECTS OF THE DECISIONS

Given the absolute pronouncements provided by these two decisions and the litigation assault being waged on the system of detentions at Guantánamo, these decisions will continue to provide ammunition for government and public interest litigators, who have already cited them for their conclusions of law. The government’s motion to dismiss in *Rasul v. Rumsfeld* cites *Khalid* for absolute pronouncements and forthright language concerning the role of the court and the self-execution of treaties.<sup>46</sup> Similarly, the plaintiffs’ memorandum in opposition cites *In re Guantanamo Detainee Cases* extensively, particularly for its interpretation of *Rasul*’s footnote fifteen.<sup>47</sup>

Of course, a definite pronouncement from the Supreme Court concerning the applicability of the Fifth Amendment and the Geneva Conventions to prisoners at Guantánamo Bay would remedy the confusion created by these two decisions. Even President Bush has stated that he expects the courts to dictate the procedures under which Guantánamo detainees will be judged.<sup>48</sup> Judge Green stated in her opinion that “the Court would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights of the petitioners.”<sup>49</sup> Perhaps the Supreme Court will provide her with one in the next go-round.

These two decisions provide a startlingly clear demonstration of the effects of the politicization of judicial nominations.<sup>50</sup> Prior to becoming a federal judge, Judge Leon was hired by then-Congressman Dick Cheney as Deputy

45. *Id.* at 460 (citing *Verdugo-Urquidez*, 494 U.S. at 269). Although Justice Kennedy filed a separate concurrence, he also joined the majority opinion.

46. Individual Defendants’ Motions to Dismiss at 10, *Rasul v. Rumsfeld*, No. 04-1864 (D.D.C. filed Mar. 16, 2005) (“[T]he Court’s role in reviewing the military’s decisions to capture and detain a non-resident alien is, and must be, highly circumscribed.”); *id.* at 20 (“The Supreme Court in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to judicial review of the legality of their detention under the habeas statute . . . .”). See also *id.* at 6 n.6, 23 n.11 (citing *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005)).

47. See Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 30, No. 04-1864, *Rasul v. Bush* (D.D.C. filed May 6, 2005) (citing *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 463); see also *id.* at 31, 33, 35 n.20 (citing *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443).

48. William Douglas, *Bush Arrives in Scotland for G-8 Summit, Suffers Scrapes in Collision*, KNIGHT RIDDER WASH. BUREAU, July 7, 2005.

49. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454.

50. See Michael J. Gerhardt, Symposium, *Reconsidering the Federal Judicial Appointments Process: Merits vs. Ideology*, 26 CARDOZO L. REV. 353 (2005).

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Counsel to the Republican Members of the House Select Iran-Contra Committee. Leon subsequently served as lead counsel to the House Republicans in a number of congressional investigations, including the 1992 “October Surprise” investigation of President Bush and the 1994 Whitewater investigation of President Clinton.<sup>51</sup> Although unquestionably a well-qualified jurist,<sup>52</sup> as a figure of confirmed partisanship, Judge Leon’s decision not to cede the motion to dismiss along with the rest of his colleagues to the much longer-serving Judge Green provides concrete evidence for those who see President Bush’s nominations as overly political.<sup>53</sup> While Judge Green’s politically neutral record prior to her appointment to the bench shields her from similar criticism, her appointment by President Jimmy Carter in 1979 leads one to presume that she has some liberal leanings.<sup>54</sup>

Most importantly, these cases provide a clear demonstration that judges, the so-called neutral, apolitical branch of the American system of government, cannot be assumed to rise above their own proclivities to solve legal conundrums in the manner of mathematical equations. Rather, jurists’ attitudes, as revealed by the structural and rhetorical choices throughout their decisions, provide clues as to their real preferences, which they then support with the tool at hand: the law. Acknowledging this limitation on the impartiality of the judiciary, leaders should directly consider methods to temper the nomination of divisive and political figures, be it through use of the Senate filibuster<sup>55</sup> or through institutional innovations such as bipartisan nominating commissions or merit selection commissions<sup>56</sup> enforced on the executive through an aggressive use of the Advice and Consent clause.<sup>57</sup>

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51. Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining Our Vital Institutions?*, 31 SUFFOLK U. L. REV. 825, 825-26 (1998).

52. Judge Leon was given a unanimous “Well Qualified” rating by the American Bar Association Standing Committee on Federal Judiciary upon his nomination to the District Court for the District of Columbia. Am. Bar Ass’n, Ratings of Article III Judicial Nominees: 107th Congress, <http://www.abanet.org/scfedjud/ratings107.pdf> (last visited Dec. 15, 2005).

53. See Jim Fisher, *Bush-League Hearings—No Lawyers or Evidence*, LEWISTON MORNING TRIB. (Idaho), Feb. 5, 2005, at 10A (explicitly tying Judge Leon’s decision to the Senate debate over judicial confirmations).

54. See Senior Judge Joyce Hens Green, <http://www.dcd.uscourts.gov/joyce-green-bio.html> (last visited Sept. 19, 2005).

55. See Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331 (2005).

56. See Judith Resnik, *Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 585 nn.4-5 (2005) (describing alternative nomination mechanisms).

57. U.S. CONST. art. I, § 2.

