

## The Extraterritorial Constitution after *Boumediene v. Bush*

Gerald L. Neuman<sup>1</sup>

[Note: My apologies to colleagues who are tired of the subject of extraterritorial constitutional rights. Since I last took up your time on this issue, the Supreme Court has spoken, and has said more than even I had hoped (though not necessarily *what* I would have hoped). The following draft – **definitely a work in progress** – tries to shed some light on where this should lead in the future. I look forward to your comments and questions.]

Over the past decade, the geographical reach of individual rights has become a central concern of both the international human rights regimes and U.S. constitutional law. Much of the international attention has grown out of U.S. strategies in the “war on terrorism,” while related issues have arisen in other conflict situations and civil regulatory disputes.<sup>2</sup> The answers given in one context need not carry over simplistically to another context. Still, in a sense they all raise the eternal question of why a state should be permitted to violate in one location a right that it must respect as fundamental in another location.

The U.S. Supreme Court’s decision in *Boumediene v. Bush* has crucial importance within these debates, as well as for other reasons. Most directly, *Boumediene* confirms what should have been obvious from the Court’s 2004 decision in *Rasul v. Bush*, that the extent of U.S. control over the Guantanamo Bay Naval Base entails the extension of constitutional rights to protect foreign nationals detained there. In particular, the clause of the Constitution limiting the power of Congress to suspend the writ of habeas corpus required the invalidation of Section 7 of

---

<sup>1</sup> J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School. (I should disclose that I wrote an amicus brief in the *Boumediene* case, on behalf of Professors of Constitutional Law and Federal Jurisdiction, mostly on other issues.)

<sup>2</sup> See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Rep. (July 9) (obligations of Israel as occupying power); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. Rep. (December 19) (atrocities committed during occupation of district in Congo); *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. (Grand Chamber) (overseas arrest of separatist leader); *Banković v. Belgium et al.*, 2001-XII Eur. Ct. H.R. 333 (Grand Chamber) (dec.) (NATO bombing of Serbia); *Quark Fishing Ltd. v. United Kingdom*, 2006-XIV Eur. Ct. H.R. (dec.) (dispute over fishing license in overseas territory); *Ben El Mahi v. Denmark*, 2006-XV Eur. Ct. H.R. (dec.) (residents of Morocco claim injury from hate speech in Denmark); *Treska v. Albania and Italy*, 2006-XI Eur. Ct. H.R. (dec.) (dispute over land expropriated by Albania and purchased for embassy by Italy).

the Military Commissions Act. Contrary to the hopes of the Bush administration and the fears of international observers, there is no “legal black hole” or rights-free zone at Guantanamo. Moreover, for the first time in history the Court found it necessary to strike down a statute as violating the Suspension Clause, rather than construe it to avoid invalidity.<sup>3</sup> The decision will also be important for the protection it affords to security detainees who have been innocent victims of the administration’s extraterritorial arrests, and the additional insights it affords on how constitutional rights constrain the United States’s conduct of its conflict with al Qaeda. The Court’s explanation and justification of its decision made clear its sensitivity to the security implications of its holdings, even as the dissenters castigated the majority for wrongly interfering with a war.

More broadly, *Boumediene* confirms and illustrates the current Supreme Court’s “functional approach” to the extraterritorial application of constitutional rights. The Court rejects formalistic reliance on single factors such as nationality or location as a basis for wholesale denial of rights, and essentially maintains that functionalism has long been its standard methodology for deciding such questions.

[This draft examines *Boumediene* and its likely consequences from both of these perspectives. Part I describes the majority’s analysis. Part II comments on that analysis (section A), and then comments on some of the issues on which the majority was silent (section B). Part III discusses future implications of the majority’s approach to extraterritorial constitutional rights, first proximate implications with regard to the national security cases (section A), and then broader implications (section B) for (1) the rights of U.S. citizens, (2) the rights of foreign nationals in U.S. territory, and (3) the rights of foreign nationals abroad.]

## I. The “Functional Approach” in *Boumediene*

The Supreme Court held in *Boumediene v. Bush*<sup>4</sup> that Section 7 of the Military Commissions Act violated the habeas corpus suspension clause of the Constitution by withdrawing the jurisdiction of the federal courts to entertain habeas corpus petitions from security detainees at Guantanamo Bay Naval Base in Cuba, without giving them an adequate and effective substitute judicial remedy. Justice Kennedy wrote the Opinion of the Court for a united majority of five. Chief Justice Roberts and Justice Scalia wrote dissenting opinions addressing different aspects of the case, each on behalf of all four dissenters.<sup>5</sup> Justice Souter filed a short

---

<sup>3</sup> That holding is especially significant because it gives clear precedential force to the account of the Suspension Clause that the Court had articulated in *INS v. St. Cyr*, and then applied in *Boumediene*. But that is the subject for another article.

<sup>4</sup> 128 S. Ct. 2229 (2008).

<sup>5</sup> The main theme of the Roberts dissent was that the Suspension Clause had not been violated, even if it applied; the main legal theme of the Scalia dissent was that the Suspension

conurrence joined by Justices Ginsburg and Breyer, emphasizing a few points in response to the dissents, but wholly consistent with the majority opinion.

For present purposes, the core of the Supreme Court’s reasoning lies in its discussion of why foreign nationals detained at Guantanamo were protected by the Suspension Clause.<sup>6</sup> The government made the straightforward argument that the United States lacked *de jure* sovereignty over Guantanamo, and that the Suspension Clause did not guarantee rights to foreign nationals detained at locations outside the sovereign territory of the United States.<sup>7</sup> Thus, the combination of nationality and location would remove the detainees from constitutional protection. The majority accepted the proposition that the United States did not possess *de jure* sovereignty over Guantanamo, but rejected the government’s other premise.

Kennedy’s Opinion of the Court first examined the history of habeas corpus leading up to the adoption of the clause, and then turned to more general considerations of constitutional methodology. In both *Rasul* and *Boumediene*, the parties had submitted extensive briefing on the geographical reach of the writ in English and colonial courts before 1787, along with conflicting interpretations of the meaning of the record.<sup>8</sup> Kennedy found the historical evidence inconclusive both regarding precisely where and to whom the writ was available, and regarding the real reasons why the writ was sometimes available to detainees outside the King’s territories, and sometimes unavailable to detainees within the King’s territories. On the latter point, Kennedy suggested that the unavailability of habeas corpus to detainees in Scotland may have been “motivated not by formal legal constructs but by what we would think of as prudential concerns” arising from the separate legal traditions and judicial systems of England and

---

Clause did not apply.

<sup>6</sup> In this draft, I often use the terms “foreign national,” “alien,” and “noncitizen” interchangeably. Technically, this usage is erroneous, because it glosses over the fact that some noncitizens (or aliens) are stateless, and that some individuals may have both U.S. and foreign nationality. Nonetheless, I think the meaning will be clear in context.

<sup>7</sup> [cite] I will use the phrase “sovereign territory” as a shorthand for “territory over which the United States exercises *de jure* sovereignty,” although the Court warned that the term “sovereignty” had multiple meanings. 128 S. Ct. at 2252.

<sup>8</sup> The briefing was prompted partly by statements in prior cases that the Suspension Clause, at the absolute minimum, protected the writ as it existed in 1789. Cites; see Neuman, *The Habeas Corpus Suspension Clause after INS v. St. Cyr*, 33 Colum. Hum. Rts. L. Rev. 555 (2002). At the same time, Kennedy emphasized that the Court had “been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments.” 128 S. Ct. at 2248. The dissenters, meanwhile, insisted that “[t]he writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written.” 128 S. Ct. at 2297 (Scalia, J., dissenting).

Scotland.<sup>9</sup> These prudential concerns were not relevant to Guantanamo, where only U.S. courts and U.S. law operated.<sup>10</sup> Particular precedents about prisoners of war were susceptible to competing interpretations, and the habeas practices of a British court sitting in Calcutta did not necessarily reflect what a common law court sitting back in England would have done. Furthermore, no historical parallel might exist for the “particular dangers of terrorism in the modern age.”<sup>11</sup>

Thus, preconstitutional history did not provide clear answers, but it seemed to show that *de jure* sovereignty had not been the “touchstone” of habeas corpus jurisdiction, neither a necessary nor a sufficient condition for its exercise.<sup>12</sup> Furthermore, Kennedy proceeded to explain, exclusive reliance on presence in foreign territory to determine foreign nationals’ rights under the Suspension Clause would be inconsistent with the Court’s precedents construing other rights, and would undermine the constitutional separation of powers.<sup>13</sup>

Kennedy gave a quick summary of the Court’s prior exploration of the Constitution’s geographic scope, concentrating on three key highlights, the series of *Insular Cases* beginning in 1901, *Reid v. Covert* (1957), and *Johnson v. Eisentrager* (1950). He thereby amplified the methodology he had outlined in his short concurring opinion in *United States v. Verdugo-Urquidez* (1990). The *Insular Cases* had addressed the constitutional status of the overseas territories recently acquired in the Spanish-American War, and had given a differentiated answer to the question whether the Constitution followed the flag by extending full constitutional protection to new sovereign territory. The Court had held that the Constitution applied of its own force in these territories,<sup>14</sup> but had taken into account the disruptive effect of immediately imposing a new legal culture on a society previously accustomed to a different legal system (and possibly for a temporary period, if the territory would later be granted independence). As a

---

<sup>9</sup> 128 S. Ct. at 2250. At this point, Kennedy cited *Munaf v. Geren*, decided the same day, as illustrating that “ ‘prudential concerns’ ... such as comity and the orderly administration of criminal justice” affect the appropriate exercise of habeas jurisdiction.” *Munaf* is discussed in Part III(B)(1) *infra*.

<sup>10</sup> 128 S. Ct. at 2251. Kennedy confirmed the Court’s authority to examine the objective degree of control that the United States asserted in foreign territory. *Id.* at 2252.

<sup>11</sup> 128 S. Ct. at 2251.

<sup>12</sup> 128 S. Ct. at 2253.

<sup>13</sup> *Id.*

<sup>14</sup> 128 S. Ct. at 2254. Indeed, as Kennedy had noted in *Verdugo*, the Court had stated more broadly that the Constitution applies wherever the government acts, although this does not mean that every constitutional provision applies in all locations. *Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring).

compromise, the *Insular Cases* doctrine extended only a subset of “fundamental” constitutional rights to so-called “unincorporated territories” not expected to become states of the Union. “[N]oting the inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere,’” Kennedy wrote, “the Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed.”<sup>15</sup>

Kennedy saw the same “functional approach”<sup>16</sup> at work in *Reid v. Covert*. (Although Kennedy did not point out this fact, that decision provided the first occasion on which the Supreme Court had ever found a violation of the Bill of Rights in extraterritorial action taken by the government against a citizen.) There, six Justices had held that civilian spouses of U.S. servicemen stationed abroad could not be tried by court martial for murder. Justice Hugo Black wrote for the plurality that the Bill of Rights protects citizens overseas. Justices Felix Frankfurter and John Marshall Harlan each concurred separately in the judgment, concluding that the Constitution required civilian jury trial for capital cases but not necessarily for lesser offenses.<sup>17</sup> As Kennedy emphasized, both Frankfurter and Harlan chose to distinguish rather than overrule the nineteenth century precedent of *In re Ross*, which had upheld the then-existing system of consular trial of Americans in non-Western countries; they relied on “practical considerations that made jury trial a more feasible option” in the current situation.<sup>18</sup> Harlan’s opinion articulated a flexible methodology that Kennedy himself later employed in his *Verdugo* concurrence: “whether a constitutional provision has extraterritorial effect depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”<sup>19</sup>

Kennedy characterized the Court’s decision in *Johnson v. Eisentrager* as equally dictated by “[p]ractical considerations.”<sup>20</sup> This interpretation continued a process of cutting back on broad readings of *Eisentrager*, which the Court had begun in *Rasul*. The *Eisentrager* majority had held that habeas corpus was unavailable to German nationals convicted of war crimes by military commission and then imprisoned in occupied Germany. Kennedy discounted as dictum the suggestions in *Eisentrager* that constitutional rights never protect foreign nationals outside U.S. borders. Instead, the substantial discussion of practical reasons why habeas corpus *should*

---

<sup>15</sup> 128 S. Ct. at 2255 (citation omitted).

<sup>16</sup> 128 S. Ct. at 2258.

<sup>17</sup> The sentences in *Reid v. Covert* were actually to life imprisonment, but the charges were capital and the result was not certain at the outset.

<sup>18</sup> 128 S. Ct. at 2257.

<sup>19</sup> 128 S. Ct. at 2255 (quoting *Reid v. Covert* ...).

<sup>20</sup> 128 S. Ct. at 2257.

be unavailable to actual enemies in Landsberg Prison was necessary to the judgment. In short, the case should be understood as consistent with the “functional approach.” “A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”<sup>21</sup>

Kennedy warned that elevating formalism over practicality would permit the government to avoid constitutional constraints by manipulating the status of territory, as the history of Guantanamo itself could illustrate.<sup>22</sup>

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.”<sup>23</sup>

Under the constitutional separation of powers, it is the Supreme Court’s responsibility to say what the Constitution requires, and the concern about manipulation was particularly relevant in the context of habeas corpus, which “is itself an indispensable mechanism for monitoring the separation of powers.”<sup>24</sup>

On the basis of these general considerations and the specific reasoning of *Eisentrager*, Kennedy concluded that

at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the

---

<sup>21</sup> 128 S. Ct. at 2258.

<sup>22</sup> 128 S. Ct. at 2258. Possibly overstretching the analogy, Kennedy suggested that making *de jure* sovereignty determinative would permit the government to create new rights-free zones from unincorporated territories by engaging in sale-leaseback transactions with foreign sovereigns. That is not quite what happened at Guantanamo, but perhaps the proper exercise of judicial restraint would prevent the Court from identifying and denying the intended effect to such devious transactions.

<sup>23</sup> 128 S. Ct. at 2259 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (discussing congressional power over the Utah territory)).

<sup>24</sup> 128 S. Ct. at 2259. Of course, the passage quoted *Marbury v. Madison*, as establishing the Court’s responsibility to say “what the law is.” Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Kennedy, J.).

prisoner's entitlement to the writ.<sup>25</sup>

Regarding the first factor, the petitioners were foreign nationals; whether they were enemy combatants was disputed; and the CSRT process, unlike the trials in *Eisentrager*, fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”<sup>26</sup> Regarding the second factor, as in *Eisentrager* the apprehensions and detentions occurred outside the *de jure* borders of the United States, “a factor that weighs against finding that they have rights under the Suspension Clause,” but U.S. control at Guantanamo was absolute and indefinite, in contrast with U.S. control in occupied Germany, which was temporary and “answerable to its Allies.”<sup>27</sup> Kennedy emphasized, as he had in *Rasul*, that “[i]n every practical sense, Guantanamo is not abroad.”<sup>28</sup> Regarding the third factor, some of the logistical concerns about extraterritorial application of habeas corpus to military detention identified in *Eisentrager* remained relevant, but they were not sufficient to deny application of the Suspension Clause at Guantanamo. The assured security of the naval base contrasted with the difficult task of occupying the large and populous territory of a defeated enemy.<sup>29</sup> The government had not shown that the exercise of habeas jurisdiction would impair the “military mission” of the naval base.<sup>30</sup> Nor would habeas jurisdiction “cause friction with the host government,” given the absence of Cuban control. “Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’

---

<sup>25</sup> 128 S. Ct. at 2259. It bears repetition that this complex inquiry addressed the threshold determination of *whether* the Suspension Clause applied, and not merely *how* it applied.

<sup>26</sup> 128 S. Ct. at 2260. (This phrasing seems odd to me as a basis for a threshold determination. Its advantages from the Court’s perspective may have included (1) being consistent with *Eisentrager*, (2) making it possible for the question of status not to be an issue of jurisdictional fact subject to *de novo* determination, (3) being non-normative (i.e., permitting the Court to say that the right is not needed, rather than that it is not deserved.)

<sup>27</sup> 128 S. Ct. at 2260-61. Kennedy repeated here the idea that the *Insular Cases* addressed the problem of temporary governance of territory.

<sup>28</sup> 128 S. Ct. at 2261.

<sup>29</sup> 128 S. Ct. at 2261. (Interestingly, to me at least, Kennedy cites the size of Guantanamo to reassure us that it is small.)

<sup>30</sup> 128 S. Ct. at 2261. The term is ambiguous, but it seems that Kennedy may have meant the normal military mission of the naval base, apart from its use to detain and interrogate prisoners flown in from thousands of miles away. Scalia, however, reads it as being about enemy prisoners, 128 S. Ct. at 2296 (Scalia, J., dissenting).

would have more weight.”<sup>31</sup>

Taking these factors together, Kennedy concluded that the Suspension Clause “has full effect at Guantanamo Bay.”<sup>32</sup> He went on to find that Congress had purported to strip the federal courts permanently of habeas corpus jurisdiction over the petitioners’ claims, without providing an adequate substitute, and had thereby violated the Suspension Clause.<sup>33</sup>

Before ending the opinion, Kennedy paused to examine whether the federal courts, in the exercise of their constitutionally guaranteed jurisdiction, should refrain from adjudicating the petitions on prudential grounds. First, courts should await exhaustion of appropriately designed executive remedies for foreign detentions, and even for domestic detentions in emergency situations, for a reasonable period of time. Consequently, habeas courts should not intervene immediately after an arrest abroad, nor “the moment an enemy combatant steps foot in a territory where the writ runs.”<sup>34</sup> Second, some modifications of normal habeas corpus procedure may be required in order to reduce the administrative burdens on the government, such as consolidation of challenges in one judicial district, and in order to limit the dissemination of classified information.<sup>35</sup>

## II Initial Reflections on the *Boumediene* Opinion

### A. [Evaluation]

The Court’s synthesis of constitutional history from the *Insular Cases* through *Reid v. Covert* to Kennedy’s decisive concurrence in *Verdugo* offers a trajectory and a rationale for the series of judicial responses to changing geopolitical contexts. The United States joined the Great Powers and acquired an overseas empire at the turn of the previous century, and became a superpower maintaining a global military presence after the Second World War. Judicial conservatives such as Edward Douglass White, the younger Harlan and Kennedy have endeavored to provide a constitutionalist framework for these developments that does not disable the government’s overseas projects.

Kennedy has not spelled out at length the normative justification for his approach. His *Verdugo* concurrence can be read as suggesting that the constitutional limitations represent principles chosen by the citizenry, and not merely advantages that they reserved exclusively for

---

<sup>31</sup> 128 S. Ct. at 2262.

<sup>32</sup> 128 S. Ct. at 2262.

<sup>33</sup> 128 S. Ct. at 2274.

<sup>34</sup> 128 S. Ct. at 2275-76.

<sup>35</sup> 128 S. Ct. at 2276.

themselves.<sup>36</sup> The extension of rights to noncitizens in particular contexts results from the recognition that their situation renders the principle applicable, whether due to presence in U.S. territory or otherwise. Both for citizens and for aliens, however, location matters and can result in the inapplicability or partial applicability of a principle. The *Boumediene* opinion indicates by example some of the factors that might make the enforcement of a familiar right in an unfamiliar location “impracticable and anomalous.” One is its cultural inappropriateness, as illustrated by the hesitancy to impose common law procedures on a population accustomed to the civil law in the *Insular Cases*. Another is the tendency of the right to interfere with intergovernmental cooperation in contexts where the United States cannot operate unilaterally. Thirdly, there are logistical constraints that may result from distance or from the disorder prevailing in the location where the right would be enforced. This list is not necessarily exhaustive. These considerations justify the functional approach, partly on practical grounds, and partly because by now it is embedded in our constitutional doctrine.

In historiographical terms, the Court’s flattened description of the extraterritorial application of the U.S. Constitution in Part IV of its opinion contrasts strikingly with its careful examination of the preconstitutional evidence concerning habeas corpus in the British empire and its awareness of the ambiguity of that record in Part III. Part IV glided rapidly from the framing through the nineteenth century,<sup>37</sup> and then asserted that “[f]undamental questions regarding the Constitution’s geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories.”<sup>38</sup> The Court also gave a sanitized account of the motivations for the *Insular Cases* doctrine, underplaying the racial element in U.S. colonialism, and overemphasizing the usefulness of the doctrine in temporary governance of a territory that would later be granted independence (viz., the Philippines). But such simplification is hardly atypical in tracing a line of precedent.

---

<sup>36</sup> See 494 U.S. at 369 (quoting Joseph Story’s explanation that the Constitution may have originated in a compact, but should not be interpreted in contractual terms but as a fundamental law). Contrast Scalia’s argument in dissent that in the constitutional republic rule is derived from the consent of the governed, and that citizens are the ones who are afforded constitutional protection. 128 S. Ct. at 2306. Scalia’s current position is even more extreme than Rehnquist’s in *Verdugo*, which at least tentatively suggested that aliens lawfully residing in the United States were entitled to extraterritorial constitutional protection. *Verdugo* expressly limited its holding to extraterritorial searches of the property of nonresident aliens.

<sup>37</sup> The Court did characterize the *Dred Scott* decision as one of “a few notable (and notorious) exceptions,” 128 S. Ct. at 2253, before moving on. This dismissal echoed Justice Brown’s refusal to treat *Dred Scott* as precedent in *Downes v. Bidwell*, 182 U.S. 252, \_ (1901) (opinion of Brown, J.), memorably lampooned by Mr. Dooley: “This horrible fluke iv a decision throws a gr-reat, an almost dazzlin’ light on th’ case. I will turn it off.” Finley Peter Dunne, *The Supreme Court’s Decisions*, in Mr. Dooley’s Opinions 21, 25 (–).

<sup>38</sup> 128 S. Ct. at 2253.

The concepts of “extraterritorial” and “overseas” location operate equivocally in this body of opinions. White famously referred to Puerto Rico as “foreign in a domestic sense,”<sup>39</sup> despite its acquisition as sovereign territory. Hugo Black characterized the insular territories as “abroad,” and used them as precedent for applying constitutional rights in wholly foreign countries,<sup>40</sup> while Harlan and Kennedy used the same adverb to make them a precedent for *not* applying certain rights in Japan or Mexico.<sup>41</sup> This duality resonates with the Court’s discussion of the geographic scope of the writ at common law in *Boumediene*, explaining that prudential concerns might equally lead to withholding the writ from Scotland and extending it to nonsovereign territory. *Boumediene* treats Guantanamo as another of these dual status spaces: on the one hand its formal extraterritorial character “weighs against” finding that the petitioners have rights, and on the other hand, “[i]n every practical sense, Guantanamo is not abroad.”

The Court is clearly correct that a functional approach informed the adoption of the *Insular Cases* doctrine, the concurring opinions in *Reid v. Covert*, and Kennedy’s own opinion in *Verdugo*. Nonetheless, the functionalist project requires at least a preliminary understanding of the purposes the project is expected to serve. At the outset, the Court identifies the writ of habeas corpus as a central safeguard of liberty in the original Constitution,<sup>42</sup> and indeed protecting liberty is generally speaking a principal purpose of the Constitution, identified in the Preamble. But the Court does not clarify *whose* liberty. The history of the writ at common law and the Court’s own precedents confirm that not only the liberty of citizens has been protected, but even that conclusion does not explain *which* foreign nationals’ liberty, and the Court does not find sufficient historical certainty to resolve the extraterritoriality question on originalist grounds. For Justice Scalia, the answer is clear: only foreign nationals within the sovereign territory of the United States ever have constitutional rights.<sup>43</sup>

The Court would seem to need some presumptive category of foreign nationals abroad whose interests the Constitution protects in order to make a functionalist evaluation. (The Court could rule *against* the application of the right on functionalist grounds by showing that *even if*

---

<sup>39</sup> More precisely, “foreign to the United States in a domestic sense.” *Downes v. Bidwell*, 182 U.S. at 341 (White, J., concurring in the judgment).

<sup>40</sup> *Reid v. Covert*, 354 U.S. at 8-9 & nn. 10-11 (plurality opinion).

<sup>41</sup> 354 U.S. at 74-75 (Harlan, J., concurring in the judgment); *Verdugo*, 494 U.S. at 259 (Kennedy, J., concurring).

<sup>42</sup> 128 S. Ct. at 2244.

<sup>43</sup> See 128 S. Ct. at 2302 (Scalia, J., dissenting); and even among those within the territory, possibly not enemy soldiers, see *id.* (“The category of prisoner comparable to these detainees are . . . the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one of them was accorded the right to have his detention validated by a habeas corpus action ...”).

the individual's liberty were taken into account, practical considerations would outweigh it, but the Court cannot rule *in favor of* the application of the right merely by making an assumption (*arguendo*). One might begin from the baseline that every human being's liberty has value. I am reluctant to attribute this methodology to the *Boumediene* opinion, however, because Kennedy's *Verdugo* concurrence expressly rejected the notion that the U.S. Constitution extends constitutional rights to every person on the planet.<sup>44</sup>

Conceivably the *Boumediene* majority considered it unnecessary to fully specify the baseline, because the case provided an adequate context-specific baseline, such as "individuals in U.S. custody."<sup>45</sup> A cautious strategy of judicial minimalism might motivate this incremental approach. The category of individuals in U.S. custody could be regarded as a limited enough subset of the global population, sufficiently subject to government control and vulnerable enough to government mistreatment, for their interests to count in the functional analysis.<sup>46</sup> This interpretation might also be supported by the Court's categorization of the *Eisentrager* decision as seeking "to balance the constraints of military occupation with constitutional necessities."<sup>47</sup>

Of course, neither this possible baseline nor the holding in *Boumediene* itself is consistent with the occasional statements in Chief Justice Rehnquist's opinion in *Verdugo* that possession of U.S. constitutional rights requires "previous significant voluntary connection with the United States."<sup>48</sup> *Boumediene* provides a long overdue repudiation of Chief Justice Rehnquist's opinion in *Verdugo*, which Kennedy had nominally joined, while sharply limiting it in his concurrence. Abducting an innocent foreigner, and then denying him all constitutional protection precisely because he was abducted, is too perverse a doctrine to maintain in the modern era. Some lower courts, and the D.C. Circuit in particular, have demonstrated the unacceptable consequences of

---

<sup>44</sup> See *Verdugo*, 494 U.S. at 368 (Kennedy, J., concurring) ("[T]he Constitution does not create . . . any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.").

<sup>45</sup> Cf. 128 S. Ct. at 2262 ("It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution."). Compare the discussion in Part II(B) *infra* of extraterritorial application of international human rights to persons within a state's effective control.

<sup>46</sup> Note that my argument is *not* that individuals in U.S. custody are the relevant category for the Suspension Clause *because* the writ of habeas corpus addresses custody. That would beg the question whether only a more limited category of individuals is eligible for the protection of the clause.

<sup>47</sup> 128 S. Ct. at 2257.

<sup>48</sup> 494 U.S. at 271 (Rehnquist, C.J.); *id.* at 265. Rehnquist's opinion is also internally inconsistent.

this proposition, including the notion that the Constitution generally permits U.S. agents to torture foreign nationals abroad.<sup>49</sup>

Another factor, inherent in the functional approach but not discussed at length in the *Boumediene* opinion, is a nontextual, normative valuation of the importance of the particular right under consideration. Kennedy emphasizes the “centrality” of the writ of habeas corpus and the “vital” protection for liberty that it affords. He recalls the “fundamental” character of the (selected) rights extended to overseas territories under the *Insular Cases*, and characterizes habeas corpus as “fundamental” in his closing paragraphs.<sup>50</sup> These distinctions underline his statement that the functional approach allowed the Court “to use its power sparingly and where it would be most needed.”<sup>51</sup>

Undoubtedly, the functional approach to the geographical scope of constitutional rights suffers from the lack of certainty that bright line rules would provide. In previous writing, I have criticized this approach (which I have called “global due process”) on that ground; Black condemned it as applied to citizens for the same reason in *Reid v. Covert*. Scalia’s dissent in *Boumediene* similarly objects: “it is the Court’s ‘functional test’ that does not (and never will) provide clear guidance for the future.”<sup>52</sup> But what is the alternative? Scalia would gladly sacrifice all the extraterritorial rights of foreign nationals to a bright-line rule, yet would he also overrule the *Insular Cases*? He joined Rehnquist’s opinion in *Verdugo*, which elevated Harlan’s selective approach to the extraterritorial rights of citizens over Black’s plurality position.<sup>53</sup> The *Boumediene* dissent fails to resolve its own contradictions concerning the extraterritorial application of the Suspension Clause to U.S. citizens, and constitutional rights more generally. If some functional methodology is needed to decide whether rights to habeas corpus, warrants, counsel, and just compensation can practicably be applied to citizens in unusual locations, then

---

<sup>49</sup> See *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir 2000), rev’d on other grounds sub nom. *Christopher v. Harbury*, 536 U.S. 403 (2002). The victim in that case was married to a U.S. citizen, but even that connection did not give him due process rights in the court’s view. See also *Rasul v. Myers*, 512 F.3d 644, 664-65 (D.C. Cir. 2008) (maintaining that detainees at Guantanamo have no constitutional rights, even against torture).

<sup>50</sup> 128 S. Ct. at 2277. Similarly, “few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.” *Id.*

<sup>51</sup> 128 S. Ct. at 2255.

<sup>52</sup> 128 S. Ct. at 2302 (Scalia, J., dissenting); see *id.* at 2303 (“the ‘functional’ test . . . is so inherently subjective that it clears a wide path for the Court to traverse in the years to come”).

<sup>53</sup> Prior to *Verdugo*, lower court’s had assumed that the full Bill of Rights applied to U.S. citizens abroad, after Black obtained a majority for the *Reid v. Covert* approach in *Kinsella v. United States ex rel. Singleton* (1960) and its companion cases.

the same methodology may also be appropriate for analyzing the claims of foreign nationals subjected to U.S. governance abroad.

## B. Some Dogs That Did Not Bark

Given the context of *Boumediene* and its potential implications, it may be useful to pause over some of the proffered supporting arguments that the Court did not employ. The majority opinion made very limited use of international law, and engaged in no comparative discussion, aside from largely negative comments on later British practice. Silence does not necessarily mean that the majority was unaffected by the extensive briefing on foreign and international law that the Court received; the Justices might have felt that the decision would be controversial enough without providing another stimulus for shrill dissent. In the future it will be important to see what role external law plays in the functional analysis.

The briefs of the various petitioners in *Boumediene* put forward arguments about historic and later British habeas practice, international humanitarian law (a.k.a the laws of war), and British, European, and Israeli counterterrorism law. Supportive *amici* briefed, among other things, international humanitarian law, Israeli law, Canadian constitutional law, international law concerning torture and the use of evidence gained through torture, the extraterritorial application of international human rights treaties, the relationship between human rights law and humanitarian law, the applicability of human rights law during periods of emergency, and specific international human rights obligations regarding fair trial, arbitrary detention, and judicial remedies for unlawful detention.

A brief filed on behalf of the United Nations High Commissioner for Human Rights explained the UN human rights establishment's understanding of U.S. obligations at Guantanamo under the International Covenant on Civil and Political Rights, and urged that U.S. law be construed consistently with those obligations.<sup>54</sup> It propounded the current view that all the human rights obligations under the Covenant apply not only within a state's sovereign territory, but also to other territory under the state's effective control, and to individuals within a state's effective control regardless of location. The brief observed that this "authoritative" international interpretation conflicted with the interpretation favored by the United States.<sup>55</sup>

The *Boumediene* opinion said little about international and comparative law, even on the issues that it reached. The Court did discuss the multivalent notion of sovereignty in

---

<sup>54</sup> Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners, available at 2007 WL 2441586. The UNHCHR did not take a position on whether this goal should be accomplished by giving appropriate interpretations to federal statutes or to the Constitution itself. *Id.* at \*24.

<sup>55</sup> *Id.* at \*6-\*7

international law and/or U.S. foreign relations law, citing one early-twentieth-century British case among its illustrations.<sup>56</sup> It discussed various treaties that had formed the background of U.S. governance in earlier extraterritoriality cases, and the international customs relevant to consular jurisdiction in *In re Ross*. It supplemented its examination of pre-constitutional British habeas law – which was originalist rather than comparative<sup>57</sup> – with a glance at later practice that might shed light on the earlier cases.<sup>58</sup> The Court did make *negative* comparison with post-1789 British experience, concluding that Parliament’s abuse of the power to suspend the writ confirmed the foresight of the Framers in adopting the Suspension Clause.<sup>59</sup> But the Court said literally nothing about international human rights law, about the extraterritorial application of human rights treaties, about the extraterritorial application of written constitutions in other countries, or about other countries’ counterterrorism practices.

A number of factors may have combined to produce this silence. The majority probably believed that the extraterritorial application of constitutional rights could be better defended by concentrating on the domestic pedigree of the practice, and by discussing international constraints as possible obstacles to extraterritorial application rather than as reasons favoring it. The Court’s own precedent would provide legitimacy, and the persuasive force of external parallels would have been outweighed by distracting methodological objections.

Yet even if the majority had been willing to invoke international practice, the international human rights arguments did not specifically favor the functional approach to extraterritoriality. The claim that *all* civil and political rights,<sup>60</sup> not merely habeas corpus, should extend to *all* individuals within the government’s effective control greatly simplifies and makes highly constraining an inquiry that the functional approach treats as complex and flexible.

---

<sup>56</sup> 128 S. Ct. at 2252-53.

<sup>57</sup> Cf. Antonin Scalia, Keynote Address: Foreign Legal Authority in Federal Courts, 98 Am. Soc’y Int’l L. Proc. 305, 306 (2004) (approving use of pre-framing English legal authority on originalist grounds).

<sup>58</sup> 128 S. Ct. at 2248, 2250.

<sup>59</sup> 128 S. Ct. at 2247 (“Post-1789 habeas developments in England, though not bearing upon the Framers’ intent, do verify their foresight.”).

<sup>60</sup> For analytical clarity, I should point out the ambiguity in the phrase “*all* civil and political rights,” and observe that the international human rights approach to extraterritoriality offers (at least) two distinct models that a national constitutional court might consider: first, at an abstract level, a model of extraterritorial application of all national constitutional rights to persons within the state’s effective control, and second, in more detail, a model of extraterritorial application of those national constitutional rights that are also protected by the Covenant on Civil and Political Rights to persons within the state’s effective control. The functional approach appears to reject both these models.

Moreover, the human rights advocates were asking the Court to reject the government's interpretation of the geographical scope of its treaty obligations. The Court has the authority to interpret treaties (as it did in *Hamdan*), but it observed in *Boumediene* that the executive construction of an international agreement "would be entitled to great respect."<sup>61</sup>

Still, the Court may have been reassured by some of the material that it did not cite. Kennedy's peroration, insisting that "[s]ecurity subsists, too, in fidelity to freedom's first principles,"<sup>62</sup> may have been fortified by the responses of other judges and democratic governments to campaigns of terrorism, both before and since 2001.

The Court may have been reassured in a different way by its awareness of the international human right to a judicial remedy for unlawful detention. The institution of habeas corpus has spread globally, and is not (as Justice Jackson had claimed in *Eisentrager*) an idiosyncratic Anglo-American custom. The Court has received numerous briefs (from both parties and amici) discussing this right, embodied among other places in Article 9(4) of the International Covenant on Civil and Political Rights, to which the United States is a party.<sup>63</sup> Some of these briefs, including the petitioner's brief in *Rasul*, expressly argued that these developments undermined the reasoning in *Eisentrager*. The internationalization of habeas corpus distinguishes it from the right to jury trial – which was also contained in the original Constitution (although the Sixth Amendment may make us forget that) – and which Justices employing the functional approach have been hesitant to extend.<sup>64</sup>

One form of "anomalous" consequence that weighs against the extraterritorial application of a constitutional right under the functional approach is the cultural inappropriateness of a distinctive U.S. right in foreign territories. Reference to international human rights standards can aid the Court in recognizing norms that are widely shared, so that insisting on their inclusion in the terms of cooperation is less likely to cause friction with foreign governments, and foreign populations have more of an expectation that they will be observed.

---

<sup>61</sup> 128 S. Ct. at 2252 (discussing the construction of the lease agreement for Guantanamo).

<sup>62</sup> 128 S. Ct. at 2277 (citing nothing).

<sup>63</sup> Briefs in *Hamdi*, *Rasul*, *Padilla*, *Boumediene*, and *Munaf*. It would be as wrong to assume that none of the Justices know such basic facts about international human rights law as it would be unwise to assume that all of them do.

<sup>64</sup> Thus, the *Insular Cases* declined to guarantee trial by jury in unincorporated territories, see *Hawaii v. Manikichi*, 190 U.S. 197 (1903); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); in *Reid v. Covert*, Harlan and Frankfurter sought to limit the extraterritorial reach of the Sixth Amendment to capital cases; and Kennedy has insisted that *In re Ross*, 140 U.S. 453 (1891) (permitting trial by consular court rather than by jury in a capital case) has never been overruled.

Taking these standards into account in the application of the functional approach would not involve the importation of foreign values into the constitutional system as constraints on our government. Rather, the Court would be enforcing U.S. constitutional values in circumstances where the international background helped make extraterritorial compliance more feasible.

### III. Future Implications of the Functional Approach

#### A. Proximate implications

The most direct consequences of the *Boumediene* decision will be the creation of further opportunities for detainees at Guantanamo to demonstrate their innocence, and efforts by the government to find substitutes for the detention regime there. Another set of questions concerns the limits of the Court's holding: does the Suspension Clause protect everyone at Guantanamo, and does it protect security detainees in other locations?

As for Guantanamo itself, the decision may leave some issues open. Recall that the Court identified the factors relevant to the possession of extraterritorial rights under the Suspension Clause as including the "status of the detainee and the adequacy of the process through which that status determination was made." Given the weaknesses of the CSRT process, that factor favored recognition of rights for the petitioners, who disputed their characterization as "enemy combatants."<sup>65</sup> For any detainees who concede their combatant status, or who are later adjudicated to be combatants through reliable procedures, a possible distinction emerges. That distinction would become important for individuals who were not challenging their detention as combatants per se, but who sought on habeas corpus to challenge a future conviction for war crimes by a military commission. The Court's statement that the Suspension Clause "has full effect at Guantanamo Bay" could already be telling us that enemy combatants convicted there by military commission are entitled to habeas corpus review like the enemy soldiers in the World

---

<sup>65</sup> I put the phrase in scare quotes, because there were also challenges to the government's definition of "enemy combatant," and the Court expressly declined to "address the content of the law that governs petitioners' detention." 128 S. Ct. at 2277. If there were a category of hostile actors not protected by the Suspension Clause, it might or might not coincide with the government's definition. I will not address the definition here, either.

War II cases *Ex parte Quirin*<sup>66</sup> and *In re Yamashita*.<sup>67</sup> Or it might have meant only that the Suspension Clause had full effect at Guantanamo for the petitioners. The logic of the opinion, however, favors the former result. If “[i]n every practical sense, Guantanamo is not abroad,”<sup>68</sup> then the Suspension Clause should apply to every category of detention there.<sup>69</sup>

As for detention in other locations, the Court’s opinion indicates that the claims of detainees will be tested by the functional approach, and several passages foreshadow the possibility that functionalism may often lead to the denial of habeas rights. A detainee’s situation may be more comparable to either *Boumediene* or *Eisentrager* in (at least) three dimensions: status and certainty of status, degree of control over the location, and logistical obstacles. Detention in a genuine “active theater of war”<sup>70</sup> would make the second and third factors even weightier than in *Eisentrager*, perhaps weighty enough to overwhelm the likelihood of a foreign detainee’s innocence. But this argument presupposes a genuine war zone with a certain threshold of local intensity, not a nominal one produced by the claim that the conflict with al Qaeda is being waged worldwide, or that the presence of a jihadist cell in an allied country suffices. Moreover, the Court’s salutary inclusion of *both* the site of apprehension and the site of detention as factors should prevent the government from evading constitutional constraint by deliberately moving detainees from locations where the writ protects them (including the mainland United States) to locations where it does not.

The Court also identified as a factor, present in *Eisentrager* but not at Guantanamo, the question whether the United States was “answerable to [another] sovereign for its acts;” if so, then “arguments that issuing the writ would be ‘impracticable or anomalous’ would have more

---

<sup>66</sup> 317 U.S. 1 (1942) (upholding on habeas conviction by military commission of Nazi saboteurs who landed on the U.S. mainland).

<sup>67</sup> 327 U.S. 1 (1946) (upholding on habeas conviction by military commission of defeated Japanese general in the Philippines, then an unincorporated territory scheduled for imminent independence).

<sup>68</sup> 128 S. Ct. at 2261.

<sup>69</sup> It may be worth pointing out that habeas corpus provides review of an unlawful detention, even if the prisoner could lawfully be detained in another manner or on other grounds. The remedy the court ultimately affords may differ, but the current basis of detention is still reviewed. For example, a capital defendant is entitled to challenge an unconstitutional death sentence even if he concedes that life imprisonment would be proper; a soldier is entitled to challenge imprisonment after a court-martial conviction even if she concedes that her term of military service (a form of custody for which habeas also lies) is not over. In *Hamdan v. Rumsfeld*, - U.S. - (2006), the Court upheld a habeas corpus challenge to unauthorized trial by military commission, while assuming that the accused could properly be detained.

<sup>70</sup> See 128 S. Ct. at 2261-62; TAN *supra*.

weight.”<sup>71</sup> One could imagine this argument developing in a direction familiar from Europe – that an alternative system of accountability for equivalent rights could substitute for compliance with the national system of constitutional rights.<sup>72</sup> Perhaps U.S. courts should defer to host state remedies, just as the English courts deferred to the judicial system of Scotland.<sup>73</sup> Alternatively, the majority’s concern may simply be that the exercise of habeas jurisdiction could be inconsistent with the terms on which a foreign sovereign is willing to let the United States operate, either in its own territory or in territory where they exercise joint authority.

To give a concrete example, take the possibility of detainees being brought by extraordinary rendition to a U.S. naval base in, say, Singapore; assume that Singapore permits this nonstandard use of the base, but would be embarrassed by the revelation that some detainees were brought there by mistake, and therefore wants neither U.S. courts nor its own courts involved; assume that Singapore was chosen as a matter of convenience rather than operational necessity. Would the prospect of “friction with the host government”<sup>74</sup> outweigh the claim of innocent detainees to habeas corpus, even in a country fully at peace and with no other impairment of any military mission?

On a stipulation of these facts, functional arguments against the availability of the writ appear weak. Leaving detainees without legal recourse suits the convenience of the United States and the host government, but no genuine need for this regime has been articulated. The United States might have negotiated an arrangement more consistent with its own constitutional values, and could always move the detainees to another location where the host government would not object – if necessary, to one of its own overseas sovereign territories (such as Guam, or Wake Island) or Guantanamo, where the writ would be guaranteed. Placing this example on a continuum between *Eisentrager* and *Boumediene*, the dimensions of nonpermanence and foreign constraint make it more like *Eisentrager*, while the logistical dimensions of insecurity and military necessity make it more like *Boumediene*. Allowing the features of nonpermanence and host country disinclination always to be determinative would enable the government to inflict severe violations of individual rights whenever it could find a compliant foreign partner.

---

<sup>71</sup> 128 S. Ct. at 2261-62 (citing *Reid v. Covert*, 354 U.S. at 74 (Harlan, J., concurring in the result)). Just to be pedantic, I would point out that Harlan used the adjectives “impracticable” and “anomalous” conjunctively, not disjunctively. But they are probably overlapping criteria, and it is hard to imagine the Court enforcing a requirement that it openly characterizes as either.

<sup>72</sup> [Footnote on the Solange concept.]

<sup>73</sup> They still do. Scotland has its own judicial remedies for unlawful detention, not known as habeas corpus, and the writ does not lie in England for detention in Scotland. See David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* 24-26 (2000).

<sup>74</sup> 128 S. Ct. at 2261.

That would facilitate the kind of manipulation that the *Boumediene* majority sought to inhibit. It would also be inconsistent with the approaches employed by the majority in *Reid v. Covert*.<sup>75</sup>

However, the government would not be quick to stipulate these facts. The host country's motivations and degree of resistance may be unknown; the availability of alternative locations other than U.S. territory may be speculative; and the government may claim logistical or diplomatic needs for conducting the detention abroad (e.g. in the region where the detainees were arrested). By now, Guantanamo has been under an intense global spotlight for several years. Other U.S. detention practices are less well understood, or less well documented. In such circumstances, the functional approach may give the government substantial benefit of the doubt, despite the opportunities for manipulation that result.

Moreover, the functional approach might not accord much importance to the stipulated facts. Functionalism can operate at various levels of specificity. It can give case-specific responses to thickly described factual situations, or rules of thumb for a small number of coarsely-defined categories, or something in between. The functional approach might treat the Singapore hypothetical as an instance of a broader category of modern overseas base arrangements, or of operations in reluctant host countries, and might adopt a single constitutional rule for the category, such as refusal to apply the Suspension Clause. Kennedy's *Verdugo* opinion asserted a highly general rule for the Warrant Clause of the Fourth Amendment – no application to nonresident foreign nationals abroad.<sup>76</sup> So far, the functional approach appears to leave to the judgment of the analyst the choice of the frame that structures the analysis.

## B. Broader implications

The affirmation of the functional approach in *Boumediene* has much broader implications, particularly for issues that lower courts may have mistakenly decided by relying on the Rehnquist opinion in *Verdugo*. Putting aside the national security context, what other rights

---

<sup>75</sup> *Reid v. Covert* is well known for the plurality's insistence that an agreement with a foreign nation cannot confer power on the government that is free from the restraints of the Constitution. 354 U.S. at 16-18; see *Boos v. Barry*, 485 U.S. 312, 324 (1988) (citing this proposition as well-established, while leaving open the possibility that First Amendment analysis might need to be "adjusted" to accommodate international obligations). The concurring Justices also agreed that the constraints imposed by an international agreement were at most a relevant factor and not in themselves determinative. See 354 U.S. at 48 (Frankfurter, J., concurring in the judgment); *id.* at 76-77 & n.12 (Harlan, J., concurring in the judgment).

<sup>76</sup> 494 U.S. at 278 (Kennedy, J., concurring). Presumably this rule applies to generic foreign countries, and not to Guantanamo, where foreign officials do not exercise power and foreign conceptions of privacy do not prevail; other analogous exceptions may be conceivable.

of what other foreign nationals in what locations deserve constitutional protection under the functional approach? The decision also has significance for the rights of U.S. citizens abroad.

## 1. For U.S. Citizens

With regard to citizens, in one sense the *Boumediene* opinion merely repeats what both Kennedy and Rehnquist seemed to be saying in *Verdugo*. Rehnquist explicitly described the selective (functional) approach articulated by Harlan and Frankfurter in *Reid v. Covert*, not Black's plurality opinion, as controlling the overseas application of the Bill of Rights to citizens.<sup>77</sup> To the extent that lower courts doubted this,<sup>78</sup> dicta in *Boumediene* provide clarification. Interestingly, the majority both reaffirms the *Insular Cases* and hints at their further development: the opinion gives new prominence to the idea that the doctrine facilitated temporary governance,<sup>79</sup> and speculates that additional constitutional protections may later become appropriate in unincorporated territories.<sup>80</sup>

The same day as it decided *Boumediene*, the Court made some cryptic pronouncements about the constitutional rights of U.S. citizens who travel to Iraq. In *Munaf v. Geren*,<sup>81</sup> a unanimous Court rejected the effort of two U.S. citizens detained by U.S. armed forces on behalf of the Iraqi government to block their transfer to Iraqi custody for prosecution. The majority opinion by Chief Justice Roberts confirmed habeas corpus jurisdiction,<sup>82</sup> but held that the

---

<sup>77</sup> Neither *Verdugo* nor *Boumediene* gave attention to the minor follow-on cases in which Black's approach to overseas courts martial received majority support.

<sup>78</sup> See *United States v. Boynes*, 149 F.3d 208, 211 n.3 (3d Cir. 1998).

<sup>79</sup> See 128 S. Ct. at 2254-55, 2260-61; cf. *id.* at 2253 (citing Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797 (2005), though for a different proposition).

<sup>80</sup> Kennedy wrote:

It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance. Cf. *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment--or any other provision of the Bill of Rights--to the Commonwealth of Puerto Rico in the 1970's").

128 S. Ct. at 2255.

<sup>81</sup> 128 S. Ct. 2207 (2008).

<sup>82</sup> This aspect of the case was important, as the Court unanimously rejected the government's claim that custody over the prisoners should be attributed to the "Multinational

requested exercise would be inappropriate. Roberts refused to enforce a substantive due process right of U.S. citizens not to be transferred to a foreign sovereign in whose hands they feared torture. The grounds for this refusal were somewhat unclear. As a general matter, because the Bill of Rights does not apply to foreign sovereigns, it does not prohibit extradition or transfer of citizens to foreign countries where their trials will not conform to U.S. constitutional standards such as the right to jury trial.<sup>83</sup> In part, the opinion treated the threat of torture as “of the same nature as the loss of [other] constitutional rights.”<sup>84</sup> In part, the majority left open “a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.”<sup>85</sup> For less extreme cases, the opinion seems ambiguous on whether substantive due process permits the transfer, or whether the constitutional claim was nonreviewable on prudential grounds, because it would require a federal court to evaluate the operation of a foreign judicial system and to second-guess the executive’s own evaluation (and

---

Force Iraq” rather than to the United States. The government had hoped to expand the effect of *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam) (holding that habeas jurisdiction did not extend to defendants convicted by the International Military Tribunal for the Far East).

<sup>83</sup> 128 S. Ct. at 2222. Roberts relied on two somewhat tenuous precedents, *Neely v. Henkel*, 180 U.S. 109 (1901) (upholding extradition because right to jury trial did not apply in Cuba), and *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam) (upholding transfer of U.S. soldier in Japan to local authorities for trial). Roberts evaded the question of how much of *Neely* remains good law after *Reid v. Covert* by ignoring the problematic fact that the “Cuban custody” to which *Neely* resisted transfer was that of the U.S. occupation regime. The rushed decision in *Girard*, based on a grant of certiorari before judgment in the last week of the Court’s 1956 Term, responded to a scatter-shot attack on the consistency of transfer to Japanese authorities with the Bill of Rights by saying only, “We find no constitutional or statutory barrier to the provision as applied here.” 354 U.S. at 530; see Brief for Appellee, *Girard v. Wilson*, (No. 1103), at 39-49. The district court had granted an injunction against transfer on the basis of a supposed constitutional rule that U.S. officials could not be prosecuted by foreign governments for actions done in the performance of duty.

The basic principle that the Constitution permits extradition to countries that do not fully comply with the Bill of Rights is doubtless correct, but *Neely* and *Girard* do not afford any meaningful insight into what the limits of that principle might be.

<sup>84</sup> 128 S. Ct. at 2225 (“The present concerns are of the same nature as the loss of constitutional rights alleged in *Wilson* and *Neely*, and are governed by the same principles.”). Unfortunately, that statement may indicate that the Chief Justice sees no fundamental objection to torture. It is obviously inconsistent with the reservation in the following paragraph of the question whether the Constitution would forbid the transfer of a citizen to a country that our government knows will probably torture him. The Constitution clearly does not forbid the transfer of a citizen to a country where he is 100% certain to be denied a jury trial.

<sup>85</sup> *Id.* at 2226.

in an “active theater of combat”<sup>86</sup>).

The *Munaf* opinion frequently emphasizes the duties of the United States toward a foreign sovereign when we are detaining one of our own citizens within the foreign sovereign’s territory. To that degree, despite occasional passages in which it treats extradition from within the United States as equivalent to transfer from a foreign detention, its analysis might be regarded as an application of the functional approach to a citizen’s extraterritorial rights.

Justice Souter, joined by Justices Ginsburg and Breyer, concurred in an opinion that emphasized eight facts about the context of the claim that should provide limits to the Court’s holding. Seven of these can remain in the margin,<sup>87</sup> while the last one deserves attention: “(8) ‘the State Department has determined that ... the department that would have authority over Munaf and Omar . . . as well as its prison and detention facilities have generally met *internationally accepted standards* for basic prisoner needs.’ ”<sup>88</sup> Souter also added that the question left open should be phrased more broadly, as including a situation “in which the probability of torture is well documented, even if the Executive fails to acknowledge it,” for it would then “be in order to ask whether substantive due process bars the Government from consigning its own people to torture.”<sup>89</sup> The concurrence might only have been referring to an available evaluation, phrased in international terms, that subsumed a distinctive domestic constitutional concern about torture, but the choice of language suggests something different: that international standards assist the Justices in deciding which U.S. constitutional norms appropriately constrain U.S. cooperation with a foreign country’s criminal justice system under the functional approach.

## 2. Rights of Noncitizens Within the United States and its Territories

With regard to noncitizens, it should be observed first that the repudiation of Rehnquist’s *Verdugo* opinion may have consequences for the constitutional rights of people *within* the United States. Some of Rehnquist’s dicta attempted to reopen questions concerning the rights of aliens unlawfully residing in the several states, and a few district judges have taken up this invitation,

---

<sup>86</sup> *Id.* at 2224.

<sup>87</sup> “(1) Omar and Munaf ‘voluntarily traveled to Iraq.’ They are being held (2) in the ‘territory’ of (3) an ‘all[y] of the United States, (4) by our troops, (5) ‘during ongoing hostilities’ that (6) ‘involv[e] our troops.’ (7) The government of a foreign sovereign, Iraq, has decided to prosecute them ‘for crimes committed on its soil.’” 128 S. Ct. at 2228 (Souter, J., concurring) (citations to the majority opinion omitted).

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.*

proposing that some illegal aliens' unauthorized ties to the country should not count for purposes of Rehnquist's "previous voluntary significant connection" test.<sup>90</sup> This argument falls with the test itself. The adoption of the better rationale for the result in *Verdugo* may also be relevant to disputes about the rights of aliens *at* the border (including its numerous extensions by legal fiction into the interior). To give one important current example, lower courts need to rethink how the Suspension Clause applies to aliens subjected to "expedited removal" proceedings.<sup>91</sup>

Another internal variant concerns the rights of foreign nationals outside the United States in relation to government actions taken within the United States, including administrative and judicial processes. The D.C. Circuit's enthusiastic use of Rehnquist's *Verdugo* opinion has led it to the conclusion that foreigners without presence or property inside the United States have no constitutional rights, and therefore have no procedural due process rights in proceedings that impose legal sanctions against them.<sup>92</sup> The *Boumediene* opinion makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration. The lower court cases need to be rethought. The Supreme Court has ruled repeatedly that foreign defendants who lack minimum contacts to the United States have due process rights that restrict the power of state courts to adjudicate claims against them. It is not clear that the functional approach even applies to such infraterritorial contexts, despite the foreign location of the litigant; the Court has decided them as ordinary domestic cases. But if it does, then more specific examination of the competing interests may be necessary to determine what proceedings have sufficient impact on foreign individuals overseas to make procedural due process applicable, and what in detail procedural due process requires.

Returning for a moment to Guantanamo itself, the decision has consequences not only for national security matters but also for ordinary law enforcement. If the dissenters' view had prevailed, the "court" and prisons built at Guantanamo could have been used for extraterritorial prosecutions of foreign nationals, such as interdicted drug smugglers, migrant smugglers and migrants themselves, free from all constitutional constraint. The characterization of Guantanamo as effectively U.S. territory for constitutional purposes probably means that the due process clause and the Eighth Amendment apply there; whether the right to jury trial would attach is a

---

<sup>90</sup> See *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (D. Utah 2003) (adopting this argument with regard to alien who returned after deportation), *aff'd* on other grounds, 386 F.3d 953 (10th Cir. 2004); *United States v. Guiterrez*, 983 F. Supp. 905 (N.D. Cal. 1998) (initially adopting and then rejecting this argument), *rev'd* on other grounds, 203 F.3d 833 (9th Cir. 1999).

<sup>91</sup> See Neuman, *Federal Courts Issues in Immigration Law*, 78 *Tex. L. Rev.* 1661, 1668-79 (2000).

<sup>92</sup> See, e.g., *32 County Sovereignty Committee v. Department of State*, 292 F.3d 797 (D.C. Cir. 2002).

harder question given the *Insular Cases*.<sup>93</sup> The functional approach should also impede similar evasions of the Bill of Rights by means of rendition of criminal defendants to overseas bases or aircraft carriers.

### 3. Fully Extraterritorial Rights of Foreign Nationals

United States action in foreign countries against foreign nationals may also implicate some constitutional rights under the functional approach. For an observer wishing to take a synoptic view, the first question that arises concerns the category of foreign nationals presumptively eligible for protection. That threshold question could receive a uniform answer for all rights, or different answers appropriate to the content of particular rights. For Kennedy, it appears from *Boumediene* and *Verdugo* that persons in U.S. custody are within the category, at least for the Suspension Clause, and that not everyone else is. It does not appear to matter at the threshold whether the custody is intended to serve a military function or a law enforcement function, although that distinction can become important later in applying the functional analysis. Presence in a territory where the U.S. exercises *de facto* governing authority also suffices at the threshold.

To take a different example, the rejection of universal coverage by constitutional rights suggests that First Amendment equality principles would not give nationals of countries where the United States subsidizes a pro-American political party a legal basis for objection, even though biased funding of parties within the United States does implicate the First Amendment. Something more would be required to bring the individual over the threshold.<sup>94</sup>

Even if the functional approach were always limited to persons in U.S. custody or territory, it would be capable of placing some salutary limits on the abuse of government power. Could the U.S. abduct and prosecute – or detain without trial – critics of its foreign policy, so long as it conducted the trial abroad? Or could it prosecute people it has already abducted, for

---

<sup>93</sup> At the risk of repetition, the Court held that the right to jury trial did not extend to unincorporated territories in *Hawaii v. Mankichi* and *Balzac v. Porto Rico*. Whether the functional approach still justifies that result is uncertain. It has been held that the right to jury trial does apply in American Samoa, see *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977), and a passing dictum in *Boumediene* suggests that additional rights may become owing to an unincorporated territory over time.

<sup>94</sup> This does not fully dispose of the problem, however, because the same objection might be raised by a U.S. dual national who belongs to one of the disfavored parties in her other country. Then either an argument why the First Amendment limitation does not apply under the functional approach, or a substantive explanation of why it is not violated, or conceivably an assertion of the political question doctrine, would be needed. But a court would not reach this stage on behalf of a mono-national, if it concluded that she was below the threshold for invoking the functional approach.

anti-American statements rather than anti-American actions, if it concludes that its original suspicions were unfounded or that evidence of punishable acts is unavailable? To say that detainees are eligible for First Amendment protection of their freedom of speech under the functional approach does not necessarily mean that the First Amendment would bar such prosecutions. But at least it opens the inquiry.

The Court in *Boumediene* identified (at least) three sets of factors as relevant to the reach of the Suspension Clause: status and status certainty; locations of arrest and detention; and practical obstacles. This nonexclusive list was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights. The importance of the habeas right itself was an unlisted factor that apparently argued in favor of broader reach. The core of free speech is a highly prized American value. In the free speech context, the relevant locational factors might include where the speech originated, where its intended audience was, and the location of detention and trial. In terms of practical obstacles, some differences between the free speech context and the Suspension Clause context become significant. The right to habeas corpus is the right to affirmative governmental intervention, the right to the benefit of a governmental institution by which the U.S. judiciary exercises control over custodians. The free speech clause has a variety of ramifications, but many are primarily negative duties of restraint. Admittedly, negative duties can also create international complications,<sup>95</sup> and that possibility is enhanced when the government acts in cooperation with a foreign government within the latter's territory. Although freedom of expression is an internationally recognized human right, its content in the international system and in other countries does not coincide with U.S. free speech doctrine. These are problems that the functional approach must take into consideration, but they do not require the categorical denial of extraterritorial free speech rights either to citizens or to foreign nationals. First Amendment doctrine is complex and variable even within U.S. territory. The free speech rights of government employees, of soldiers, and of citizens present on domestic military bases all undergo adjustment to their circumstances.

It may bear repetition that the functional approach does not present a binary choice between nonapplication of a constitutional right and application of the right precisely as it operates in an analogous domestic setting. Intermediate positions with modified application of the right are also possible. Harlan argued for extraterritorial application of the jury trial right only in capital cases, stressing the urgent need for procedural fairness in that context, as well as its infrequency.<sup>96</sup> Within the *Insular Cases* line of precedent, the Supreme Court has also summarily affirmed a decision refusing to apply the one-person one-vote rule to the Senate of the Commonwealth of the Northern Mariana Islands.<sup>97</sup>

---

<sup>95</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 338 (1988) (Rehnquist, C.J., concurring in part and dissenting in part) (dissenting from invalidation of an ordinance regulating protests near foreign embassies).

<sup>96</sup> 354 U.S. at 77-78 (Harlan, J., concurring in the judgment).

<sup>97</sup> *Torres v. Sablan*, 528 U.S. 1110 (2000).

In contrast, consider recent disputes over the extraterritorial application of the Takings Clause. The Supreme Court itself has never held that the Takings Clause applies to U.S. citizens' property in foreign countries, but lower courts have,<sup>98</sup> and the Court of Claims began holding in the 1950s that foreign nationals could also raise claims for extraterritorial takings.<sup>99</sup> Subsequently, the lower courts have been rethinking that doctrine in light of *Verdugo*.<sup>100</sup> The *Atamirzayeva* case may provide a useful example. The claimant there owned a cafeteria building on public land adjoining the U.S. embassy in Tashkent. After September 11, the United States asked Uzbekistan to demolish the building in order to extend U.S. security protections for the embassy. Uzbekistan complied, with U.S. cooperation in the demolition, and neither Uzbekistan nor the United States compensated the owner for her building. One might conclude that the relationship between the United States and the owner was too remote to cross the threshold for the functional approach. The United States was the active beneficiary of a taking by her own sovereign, but it did not claim or exercise authority over her, and the allegations do not suggest that the United States interfered with her life in any other respect. Devastating as that interaction may have been to her livelihood, it could be considered too partial and transient to provide the occasion for constitutional protection.<sup>101</sup>

---

<sup>98</sup> The Supreme Court also decided a takings case involving the [Panama] Canal Zone, which it decided on the merits against the owner. *National Board of YMCA v. United States*, 395 U.S. 85 (1969).

<sup>99</sup> See *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953). It may be worth pointing out that, contrary to some recent descriptions, the venerable precedent of *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), involved a corporation wholly owned by the Imperial Russian Government, which had contracted indirectly for the construction of a vessel in the United States; the U.S. government requisitioned the vessel for use in World War I, and the Supreme Court confirmed that the Takings Clause required compensation. The case stands squarely for the proposition that foreign investors' property *in* the United States is protected by the Takings Clause. Even the D.C. Circuit recognizes that proposition.

<sup>100</sup> See *El-Shifa Pharmaceutical Industries Co. v. United States*, 55 Fed. Cl. 751 (2003) (finding *Turney* inconsistent with *Verdugo*, but feeling bound by circuit precedent, and ruling against the plaintiff on the merits), *aff'd* on other grounds, 378 F.3d 1346 (Fed. Cir. 2004) (dismissing plaintiff's claim on political question grounds), cert. denied, 545 U.S. 1139 (2005); *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007), *aff'd*, 524 F.3d 1320 (Fed. Cir. 2008), petition for reh'g en banc pending; [others]. The *El-Shifa* case involved a factory destroyed in air strike by the United States because of its suspected use by al Qaeda. The *Atamirzayeva* case is discussed in the text above.

<sup>101</sup> I should emphasize the conjunction in "partial *and* transient" – I am not arguing that a few hours of detention and torture should fall below the threshold of the functional approach. Detention entails total control over a detainee's life for as long as it lasts.

Under the "mutuality of obligation" approach to extraterritorial application of constitutional rights, which I have favored over the "global due process" functional approach in

If, on the other hand, the functional approach did apply, the takings claims of foreign nationals abroad might still fail. It may be relevant to the functional approach that the right to compensation for expropriated property is unevenly protected in international law. The global Covenant on Civil and Political Rights does not include it, although regional human rights treaties in Europe, Africa, and the Americas protect it in different ways. This may be one reason why Atamirzayeva was unable to obtain compensation from Uzbekistan. The Court might find, as Kennedy did regarding searches in *Verdugo*, that varying standards and expectations regarding the strength of property rights and the availability of compensation for expropriation would make it impracticable and anomalous to apply the Takings Clause in the territory of independent foreign sovereigns, even when a taking was genuinely attributable to the United States. That might be true regardless of the normative weight placed on the Takings Clause, or might be informed by a normative privileging of fundamental liberties over property.

Alternatively, the Court might emphasize the historical centrality of property rights in the U.S. constitutional system, and the United States's disappointment by the failure to protect individual property rights in the global human rights system. Exclusion of property rights from the functional approach might be seen as anomalous from the domestic perspective, instead of viewing its inclusion as anomalous from the global perspective. A court determined to enforce the right could also observe that the Takings Clause requires only ex post payment of money, and so could be seen as less impracticable than imposing direct constraints on the government's action. It should, however, also consider the problems of deterrence, extraterritorial valuation, and the possible sensitivity of inquiry into the government's responsibility for foreign uncompensated (or undercompensated) takings.

### Conclusion

[No doubt a conclusion is needed. The *Boumediene* decision is extremely important, and Scalia may be right that it "clears a wide path for the Court to traverse in the years to come." Probably the path will be narrower than some hope. It is not the path that I previously favored, and navigating it will require more work and thought.]

---

earlier writings, see *Strangers to the Constitution* (1996), this transaction would also not have entitled the owner to protection by the Bill of Rights because the United States did not claim authority over her, but only enjoyed benefits conferred on it by the law (or practice) of Uzbekistan.

Indeed, in a somewhat analogous situation, the European Court of Human Rights has held that no rights claims arose between an Albanian landowner and Italy because Italy did not exercise "jurisdiction" over him by purchasing and occupying his land after it had been expropriated by Albania, refusing to pay rent, and asserting foreign sovereign immunity against enforcement proceedings in Albanian courts. *Treska v. Albania and Italy*, 2006-XI Eur. Ct. H.R. (dec.).