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After Guantánamo: Extraterritoriality of Fundamental Rights in U.S. Constitutional Law

Since 2001, the question of when fundamental rights limit a government's action outside its own national territory has increasingly claimed the attention of constitutional courts, human rights bodies, and the International Court of Justice. The U.S. Supreme Court's recent decision on the Guantánamo detainees provides only one example. Prominent analogues in Europe include the Grand Chamber decisions of the European Court of Human Rights in *Banković v. Belgium*, which denied the applicability of the European human rights convention to the NATO bombing of Serbia, and *Őcalan v. Turkey*, which applied the European Convention to Turkey's acquisition of custody over the PKK leader in Kenya prior to bringing him back to its own territory for trial.[1] The *Banković* decision stands for the proposition that the concept of "jurisdiction" governing the applicability of Convention obligations is primarily territorial, but that exceptional circumstances may demonstrate an extraterritorial exercise of jurisdiction activating those obligations. Individual Chambers of the Court have tested the limits of the European Convention's reach, recently affirming its applicability to a British-run detention facility in Iraq in *Al-Saadoon v. United Kingdom*.[2]

The UN Human Rights Committee's approach to the extraterritorial effect of the International Covenant on Civil and Political Rights has developed over the years. It currently argues for an expansive "effective control" test that would make the Covenant applicable to the actions of a state outside its own sovereign territory when the state has either effective control over the foreign territory in which it acts or effective control of the individual victim.[3]

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1. Banković v. Belgium et al., 2001-XII Eur. Ct. H.R., App. No. 52207/99 (Grand Chamber) (admissibility decision); Őcalan v. Turkey, 2005-IV Eur. Ct. H.R., App. No. 46221/99 (Grand Chamber).

2 Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08, paras. 88-89 (Eur. Ct. H.R. 30 June 2009) (admissibility decision).

3. See Human Rights Committee, General Comment No. 31, Nature of the Legal Obligations

The International Court of Justice addressed questions of this kind in its Advisory Opinion on the Wall in occupied Palestine, and later in a contentious case regarding the activities of Uganda in the Democratic Republic of the Congo.[4] The territorial scope of obligations under the Convention on the Elimination of All Forms of Racial Discrimination is crucial to the case currently pending before the ICJ between Georgia and the Russian Federation.[5]

The Canadian Supreme Court has recently revised its approach to the extraterritorial application of its bill of rights, the Canadian Charter of Rights and Freedoms. The Court asserted that comity to a foreign sovereign limited the application of Canadian law even to the actions of Canadian officials operating within its territory. Canadian constitutional rights would apply only if the foreign sovereign consented to their application or if the challenged action would also violate Canada's obligations under international law.[6]

The problem of extraterritorial rights seems to have attracted relatively little discussion in French constitutional law. Questions of this kind could potentially arise for France in connection with military deployments in such locations as Afghanistan, Chad, or the Côte d'Ivoire. Interdiction of drug smuggling vessels on the high seas provides another relevant sphere of activity, as illustrated by the case of the *Winner*, pending before the Grand Chamber of the European Court of Human Rights in 2009.[7] Or the intervention against Somali pirates,

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Imposed On States Parties to the Covenant (Article 2), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10 (2004).

4. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Rep. (July 9); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. Rep. (December 19).

5. See Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for Indication of Provisional Measures, 2008 I.C.J. Rep. (October 15).

6. See R. v. Hape, [2007] 2 S.C.R. 292 (Sup. Ct. of Canada); Khadr v. Canada (Minister of Justice), [2008] 2 S.C.R. 125 (Sup. Ct. of Canada); see also Amnesty International Canada v. Canada (Minister of National Defense), 2008 F.C.A. 401 (Fed. Ct. App. Canada), leave to appeal to S.C.C. refused, 2009 CarswellNat. 1245 (Sup. Ct. of Canada 2009) (finding that the government of Afghanistan had not consent to the application of the Charter to detentions by Canadian Forces in Afghanistan).

7. The original Chamber majority held that the detention of the crew of the *Winner* during its thirteen day voyage from the waters off the Cape Verde islands to the port of Brest lacked a sufficient legal basis and violated Article 5(1) of the European Convention, but that the unavoidable delay in bringing the detainees before a judge did not violate Article 5(3). *Medvedyev v. France*, App. No. 3394/03 (Eur. Ct. H.R. 10 July 2008). The Chamber also noted that the Government conceded the applicability of the Convention to the detention of the crew as an extraterritorial exercise of jurisdiction.

whether brought back to France for trial, transferred to a third country, or returned to Somalia.

The U.S. Supreme Court rejected the Bush Administration's efforts to exploit the extraterritorial character of the Guantánamo Bay Naval Base in Cuba as a basis for maintaining a rights-free detention zone in *Boumediene v. Bush* (2008).[8] The Supreme Court's account of the geographical scope of the U.S. Bill of Rights involves a distinctive "functional approach" to considering individual and governmental interests in the context of extraterritorial government action.

I. The relevance of extraterritoriality

Why are questions about extraterritorial of application of fundamental rights, especially to foreign nationals, difficult?

The basic concern is that positive fundamental rights provisions of human rights treaties and constitutions were originally drafted for the purpose of being applied within the domestic territory, and without taking into consideration the problems that could arise from extraterritorial application. These problems are both theoretical and practical.

The theoretical problems include the non-cosmopolitan character of the duties imposed by some rights provisions, and the non-universal character of some locally protected rights. There may be duties that a state owes only to its own citizens (such as access to elective office), or duties that a state owes only to its own residents (such as access to public education), or duties that a state owes only to persons within its territorial jurisdiction (such as police and fire protection), or duties that a state owes only to persons who stand in a particular relationship of power to the state. These limitations may be relevant to duties that are universally recognized as between states and the relevant classes of individuals. Furthermore, different national constitutions and different regional human rights treaties may recognize different sets of rights, or protect different concrete conceptions of abstractly similar rights. These locally protected rights may be appropriate for application within a particular culture or within a particular political system, but inappropriate – unnecessary or even wrongful – elsewhere.

The implementation of rights outside a state's own territory may also face serious practical obstacles. The effective provision of some rights requires affirmative support from governmental institutions that the state cannot maintain in foreign territory. Moreover, there may be some situations in which the local sovereign objects to, or actively opposes, the state's compliance with the

8. 128 S. Ct. 2229 (2008).

right in foreign territory. These obstacles can arise among states in amity, but can be even more severe when the state is engaged in armed conflict with the local sovereign.

The relevance of these theoretical and practical concerns presumably varies depending on which fundamental right is at issue, for example, the right to education, the right to jury trial, or the right not to be tortured. Consequently, the best answer to the question of extraterritorial application of a legal instrument cannot be given in the abstract, but turns on the particular treaty or constitution involved. Relevant considerations may include: What rights does it contain? How are they constructed? What methods for implementing and enforcing the rights exist? Does the document permit partial application, or is it all or nothing? And, of course, what does the document itself say about its own territorial scope?

It may be recalled that in the *Banković* decision, the European Court of Human Rights announced that it had no power to apply the European Convention selectively, that either all of the rights applied or none of them did. This positive methodological conclusion contributed significantly to the Court's finding that the right to life under the European Convention did not limit the NATO action in Serbia.

The ICJ proceeded treaty by treaty in its Advisory Opinion on the Wall in occupied Palestine. It endorsed the Human Rights Committee's view that the International Covenant on Civil and Political Rights applies to any exercise of jurisdiction by a state over persons outside its own territory, despite the conjunctive form of the language in Article 2(1) of the Covenant that defines a state's obligations in terms of "all individuals within its territory and subject to its jurisdiction." But the ICJ described the International Covenant on Economic, Social and Cultural Rights differently, saying that it "guarantees rights which are essentially territorial," and found it applicable to occupied Palestine because of Israel's longstanding exercise of territorial jurisdiction. This distinction reflects the general contrast between civil and political rights as principally negative duties and economic and social rights as principally affirmative duties of government provision, although a full account of each Covenant would include both types of duties.

II. The road to *Boumediene*

Debates over the territorial scope of constitutional rights have a long history in the United States.[9] At first these questions arose with regard to territorial expansion across the North American continent, and the slow process of settlement and organization of governments. In the nineteenth century the courts resolved that the U.S. Bill of Rights applies to U.S. government action throughout U.S. territory, but not outside the United States. That approach was consistent with the legal theory that law applies only within the territory of the sovereign. Ironically, the leading case for application of the Bill of Rights in the territories was the *Dred Scott* decision, which held that Congress could not interfere with the property rights of Southern slaveholders who moved west.[10]

After the United States acquired overseas territories and sought to become a colonial power on the European model, the Supreme Court modified this doctrine. It held in 1901 that not all constitutional rights applied in these new territories, which were not intended to become states of the union in the future.[11] Instead, only a limited subset of the most fundamental rights applied. The list of applicable rights has grown over time, but the basic principle of partial extension of rights (known as the Insular Cases doctrine) is still valid law in the United States.

After the Second World War, as the United States became a superpower with a permanent military establishment in foreign countries, new arguments arose for constitutional rights to be applied extraterritorially, at least where U.S. citizens were involved. The breakthrough came in 1957, when the Supreme Court held in *Reid v. Covert* that wives of U.S. soldiers on military bases in foreign countries could not be subjected to military trials, but had a right to a civilian trial consistent with the Bill of Rights.[12] The wives had killed their husbands and faced a possible death penalty. This decision, however, did not have a unified majority. Some members of the Court asserted that all of the Bill of Rights applied extraterritorially to U.S. citizens, while other members accepted only selective application of the Bill of Rights, in conditions where doing so would not be "impracticable and anomalous." These Justices concluded that capital

9. See Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law (1996).

10. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Many issues divided the concurring and dissenting Justices in that case, but the applicability of the Fifth Amendment to the western territories was not one of them.

11. See Downes v. Bidwell, 182 U.S. 244 (1901).

12 . 354 U.S. 1 (1957).

cases against civilian citizens abroad were rare enough and serious enough that the government should be required to provide a full civilian trial.

This decision did not guarantee constitutional rights for foreign nationals outside the United States, and in 1990 the Supreme Court held in *United States v. Verdugo-Urquidez* that the Fourth Amendment, which prohibits unreasonable searches and which presumptively requires the issuance of warrants by neutral magistrates, does not apply to property of nonresident foreign nationals outside the United States.[13] Again the Court was divided. Some Justices thought that the full Bill of Rights should apply to any person when the United States seeks to enforce its laws against him. Some Justices insisted that there was no precedent for giving foreign nationals outside the United States any constitutional rights; they also discussed a possible requirement that a foreign national must have prior significant voluntary connection to the United States in order to receive any constitutional protection, with the Court reserving the power to decide what connections are significant. And one Justice, Anthony Kennedy, favored a selective approach to extraterritoriality but thought that extraterritorial application of the Fourth Amendment would be "impracticable and anomalous," because U.S. magistrates cannot authorize searches in foreign territory and because notions of privacy differ from country to country.

This line of decisions provided the background of the constitutional debate about the Guantánamo Bay Naval Base. The Bush administration argued that Guantánamo is not U.S. territory, and that therefore foreign nationals imprisoned there had no constitutional rights -- no right to liberty, no right to fair trial, and no right to habeas corpus. This claim of rightlessness especially concerned so-called "enemy combatants," but applied more broadly to anyone who was not a U.S. citizen. That broad rejection of rights represents a categorical extrapolation from the *Verdugo* opinion. It is the approach that has been taken by the D.C. Circuit Court of Appeals, which is the most important of the intermediate appellate courts in the United States, and is the one where most of the Guantánamo litigation has taken place.

The Supreme Court rejected this argument by a five-to-four vote in *Boumediene v. Bush* (2008). It held that the Habeas Corpus Suspension Clause of the Constitution guaranteed the right of the Guantánamo detainees to a judicial determination of the lawfulness of their detention, and it struck down a congressional statute that had attempted to deprive the detainees of access to the courts for that purpose. Justice Kennedy could have written a very narrow opinion focusing on the total U.S. control over Guantánamo, but instead he took the opportunity to adopt his more general view of extraterritorial rights from *Verdugo* as the theory of the Court. Under this theory, formal consider-

13. 494 U.S. 259 (1990).

ations of sovereignty over territory and nationality of individuals are factors, but only partial factors, in deciding whether a constitutional right applies to a particular person in a particular place in a particular context. Functional analysis of whether it is practicable to implement the right is the ultimate question. Kennedy repeats the language "impracticable and anomalous," sometimes as "impracticable or anomalous," from prior cases. The Court accepted that Guantánamo is extraterritorial, but it recognized that the U.S. has total control there, and that no conflict with a local sovereign would arise from the extension of habeas corpus rights to foreign detainees there. The fact that they were being held without a fair and reliable procedure to examine the justification for holding them weighed heavily in favor of extending the right.

Four dissenters insisted in categorical terms that as foreign nationals outside the United States, the detainees had no constitutional rights. They also criticized the majority for adopting a contextual balancing approach that makes it too difficult to predict when constitutional rights will and will not apply. (I also have previously criticized Justice Kennedy's *Verdugo* opinion for its indeterminacy, and that is certainly a disadvantage of the methodology. Still, it may be the best compromise available for U.S. constitutional law.)

III. Evaluating the functional approach

The question of how consistent Kennedy's approach in *Boumediene* is with positive U.S. constitutional law may be too provincial an inquiry to be of interest to European observers.

One could evaluate the Court's interpretation of the Habeas Corpus Suspension Clause from the perspective of originalism, or textualism, or evolutive interpretation. Kennedy's narrative of a functionalist history does have support in some of the prior decisions, especially those of the twentieth century. The Insular Cases doctrine itself could be characterized as both formalist and functionalist: functionalist in its acceptance of arguments of colonial administrability in favor or restricting the extension of the Bill of Rights to new territories, and formalist in its continuation of the nineteenth century assumption that the Bill of Rights would not apply until the United States acquired sovereignty over the territories.

Kennedy's reanalysis of the most closely analogous precedent, a case arising in the 1940s in occupied Germany, as turning on practical considerations may be more questionable; on the other hand, the argumentation in that precedent was complex and overdetermined, and arguably left room for reinterpretation.[14]

14.The precedent was Johnson v. Eisentrager, 339 U.S. 763 (1950), which denied the right to

Greater interest presumably lies in the normative evaluation of the *Boumediene* approach, and the exploration of its consequences.

The Supreme Court did not adopt the UN Human Rights Committee's position that all civil and political rights should apply when the state exercises "effective control" over a person, and not even an approach extending rights whenever a state exercises "effective control over territory." The Court had information about the international interpretations, which were extensively briefed by *amici curiae*, including a brief filed on behalf of the UN High Commissioner for Human Rights. But the *Boumediene* majority made no mention of international human rights law in its opinion.

The Supreme Court's approach to the extraterritorial application of the Bill of Rights was more cautious than that of the Human Rights Committee, and that is understandable. Firstly, U.S. constitutional rights are not all universal human rights. The U.S. understanding of freedom of speech, of property rights, and of separation of church and state, for example, are stricter than international standards. Some U.S. constitutional rules on criminal procedure have no counterpart in the international instruments, such as the right to jury trial, and the right to indictment by grand jury. Extraterritorial application of rights does not interfere as much with international cooperation when the rights involve standards that all governments should comply with, as when it imposes one country's culturally distinctive standards in another country.

Second, some U.S. constitutional rules are structurally grounded. To give them effect requires the support of government institutions that the United States cannot maintain in many external locations. In this regard, the UN Human Rights Committee is too facile in assuming that all human rights provisions can always apply extraterritorially when a state exercises effective control over a person. The right to an effective judicial remedy against unlawful detention is a civil right, but like some other civil rights it also partakes of the character of a right to an affirmative government service. Perhaps the real solution to this dilemma is that states should be less willing to exercise power extraterritorially. But that is not a constraint that the Supreme Court feels authorized to impose unilaterally on the U.S. government.

Third, some U.S. rights are defined in too rigid a fashion to take into account the variations that would be needed to apply them extraterritorially. They operate as absolute rules, or rules with limited categorical exceptions, or as rules that can be outweighed only by genuinely compelling necessity. International human rights law places greater reliance on flexible proportionality standards

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habeas corpus of German nationals who had been convicted of war crimes by military commission and were imprisoned in Allied-occupied Germany. In my own view, this decision rests on formal assumptions about territory that were superseded by *Reid v. Covert*.

than U.S. constitutional law does. Grafting such flexible balancing tests onto the definition of U.S. constitutional rights in order to facilitate their extraterritorial application could distort their meaning when they are applied domestically. It would be highly threatening, for example, to interpret the right to jury trial as permitting the government to dispense with juries when it shows a substantial need to convict the defendant. (From this perspective, perhaps the Fourth Amendment standard of "unreasonable searches and seizures" would appear well suited to extraterritorial application, although the Supreme Court has already denied its applicability to foreign nationals abroad in *Verdugo*.)

While these observations may contribute to justifying the Court's rejection of the straightforward extension of the Bill of Rights to extraterritorial government conduct, the Court's opinion fails to explicitly provide a sufficient justification, or even a sufficient definition, of its functional approach. The opinion does not really explain the rationale for including the Guantánamo detainees within the category of persons protected by constitutional rights. We do not yet know whether the Court's approach potentially protects only persons physically detained by the United States outside its borders, or also persons under long-term governance by the United States outside its borders, or also persons affected by U.S. power in other ways. We know that rights will not extend when it is impracticable to extend them, but we do not know what characteristics make people eligible for an inquiry into the practicability of extending rights. We do not even know for sure whether Guantánamo detainees who *admit* that they are Al Qaeda members have constitutional rights, or only those who *deny* that they are Al Qaeda members.

The decision is undertheorized. That is not unusual for a Supreme Court opinion, but it is not fully satisfying even to sympathetic observers, and it leaves the Court vulnerable to the criticisms of those who would have denied the extraterritorial applicability of constitutional rights to foreign nationals on purely historical, positivist grounds.

From a different perspective, arguments have been made in the past for applying constitutional rights extraterritorially when the US brings a foreign national within its juridical community by imposing legal obligations on the individual.[15] (I have called this the "mutuality of obligation" approach to constitutional interpretation.) The functional approach applied in *Boumediene* appears to be both broader and narrower than this mutuality of obligation approach. It is narrower because it is more selective in deciding which rights apply to a given situations. It is broader because it is not limited to the law enforcement context. Kennedy appears to treat wartime detention of suspected enemies as a possible occasion

15. See United States v. Verdugo-Urquidez, 494 U.S. 259, 279 (1990) (Brennan, J., dissenting); Neuman, Strangers to the Constitution, at 108-117.

for the application of rights, subject to constraints of location and practicability. The mutuality of obligation approach would not have done that.

At this moment in history, the broader potential of Kennedy's functional approach has distinct advantages over mutuality. There was always a grey area between the spheres of law enforcement and national security activities. Since 2001, and for the foreseeable future, this grey area is where important constitutional questions will frequently arise, because the U.S. government has the option of treating counterterrorism operations within either the law enforcement framework or the armed conflict framework. Mutuality would require that all constitutional rights impose limits that the government must respect, and that it must refrain from law enforcement activity that cannot be made compatible with those rights – but those limits would not apply if the government used military force instead. The functional approach seeks a lesser set of constitutional limits that can be imposed on both law enforcement and military conduct abroad, without obstructing the government's decision to act. This set of limits must necessarily be more selective.

Although the Court is recognizing constitutional rules that apply in the context of armed conflict, we cannot expect a full constitutionalization of international humanitarian law, or even of those parts of international humanitarian law that the United States recognizes.[16] The Court is describing U.S. constitutional rules, enforceable in the usual U.S. manner – by the Court itself if necessary. It will not authorize judicial intervention in an actual battlefield, or commit the United States unilaterally to a stricter regime of observance of humanitarian law than its potential adversaries maintain.

Nonetheless, international law may play a subsidiary role in implementing the functional approach in the future. International law may reassure the court. It may provide evidence that certain U.S. rights – or certain aspects of U.S. rights – are not American idiosyncracies, and that it may be both practicable and desirable to apply them in foreign territory. The international law briefing in *Boumediene* about the right to judicial review of the lawfulness of detention may have played that role, even though the Court's opinion never mentioned it. The 1950 decision in *Johnson v. Eisentrager*, which described habeas corpus as a peculiarity of the Anglo-American system, is out of date. Modern expectations of the rule of law ordinarily include judicial control of detention. Awareness of those expectations probably influenced the majority.

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16. For example, the United States is a party to the Geneva Conventions of 1949, but not to the Additional Protocols of 1977. It has long criticized some of the rules included in the Additional Protocol, although it agrees that other rules contained there have become customary international law.

IV. Beyond *Boumediene*

Whether the functional approach will place significant constraints on U.S. counterterrorism practices remains to be seen. For the Guantánamo detainees themselves, consequences have begun to follow, although more slowly than many had hoped. President Obama's decision to move toward closure of the Guantánamo detention facility has raised opposition in Congress, especially with regard to bringing detainees to the U.S. mainland. Federal trial judges have been adjudicating habeas corpus petitions, finding that some detainees were properly held and that others should be released.[17]

The broader application of the methodology is difficult to predict, even in closely analogous cases. In part, it depends on the judicial philosophies of the Supreme Court members. If predictions must be based on five-to-four decisions to be determined by Justice Kennedy, then experience suggests that he favors standards that permit the courts to intervene in extreme situations, but not very frequently. In other hands, the methodology may constrain government more strictly.

For the moment, the effect of the methodology described in *Boumediene* has been limited by resistance from the D.C. Circuit Court of Appeals. That court has treated the Supreme Court's holding as an extremely limited exception to a general rule that foreign nationals have no extraterritorial constitutional rights.

Even at Guantánamo, that court of appeals says that detainees have habeas corpus rights but no other constitutional rights, including no due process rights.[18] I regard this as a kind of civil disobedience, but the court claims that it is just following prior law, and that it will not apply the *Boumediene* methodology to any other constitutional provisions until the Supreme Court tells it do so expressly.

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17. See, e.g., Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008) (finding one detainee properly detained and five others improperly); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. 2008) (properly detained); Al Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. 2008) (properly detained); El Gharany v. Bush, 593 F. Supp. 2d 144 (D.D.C. 2009) (improperly detained); Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. 2009) (properly detained); Hammamy v. Obama, 604 F. Supp. 2d 240 (D.D.C. 2009) (properly detained); Basardh v. Obama, 612 F. Supp. 2d 30 (D.D.C. 2009) (improperly detained); Ali Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. 2009) (improperly detained); Al Ginco v. Obama, 626 F. Supp. 2d 123 (D.D.C. 2009) (improperly detained).

18. See Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009), cert. pending.

With regard to the right to habeas corpus itself, one might wonder whether Guantánamo is the only extraterritorial location where the Supreme Court will find that the application of the constitutional right is not impracticable. But a first instance court in the District of Columbia gave a very interesting decision about detention in Afghanistan in the spring of 2009.[19] Applying the *Boumediene* methodology, it found that the Constitution guaranteed habeas corpus rights to some but not all of the detainees at the Bagram air force base in Afghanistan.

The Status of Forces Agreement between the United States and Afghanistan is not as extreme as the Guantánamo agreement in the powers it confers, but it gives the United States extensive rights of control, for as long as it wishes to stay. Afghanistan is an active war zone and the judge concluded that foreign nationals captured in Afghanistan, whatever their nationality, and held at Bagram are not protected by the Habeas Corpus Suspension Clause. But the United States has also brought detainees captured outside Afghanistan to Bagram, and the judge held that those detainees do have habeas corpus rights under *Boumediene*—except if they are Afghan nationals, because then they would have to be released inside Afghanistan, and that would cause tension with the Afghan government. This decision is now being appealed by the government to the D.C. Circuit Court of Appeals. If upheld, it would be an important extension of *Boumedien*e.

A different example of *Boumediene*'s impact comes from the Second Circuit Court of Appeals, which sits in New York. That court held in late 2008 that even U.S. citizens in foreign countries are not protected by the Warrant Clause of the Fourth Amendment – that is, the government does not need prior judicial authorization to conduct searches of U.S. citizens' property outside U.S. borders.[20] That holding represents a use of the functional approach to contract rights that lower courts had previously thought U.S. citizens enjoyed extraterritorially. One might say that it is a fair conclusion that if requiring warrants is structurally impracticable for foreign nationals abroad, it is probably not structurally practicable for U.S. citizens either.

As these first examples demonstrate, it will take a long time for U.S. courts to clarify and stabilize the implementation of the functional approach to extraterritorial rights. But its establishment as majority doctrine adoption represents an important legal and moral advance over the Hobbesian model of extraterritorial power without rights favored by the *Boumediene* dissenters.

The selective and pragmatic functional approach does not coincide with

19. Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), appeal pending.

20. In re Terrorist Bombings of U.S. Embassies in East Africa (Fourth Amendment Challenges), 548 F.3d 276 (2d Cir. 2008).

the simpler alternatives preferred by some international human rights bodies. Without criticizing their interpretations of their own regimes, one may conclude that the question of extraterritorial application of rights cannot be decided in the abstract; it depends on the particular treaty or constitution at issue, the content of the rights it contains, and the methods for their enforcement.

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