

## **Injustice Abhors a Vacuum: Habeas, Extraterritoriality, and Guantanamo Bay.**

By Robert Hull

### **Winding the Clock**

In response to the terror attack of September 11<sup>th</sup>, the Defense Department established Combatant Status Review Tribunals (hereafter CSRTs) at Guantanamo Bay. CSRTs consisted of military officers who would determine whether individual prisoners are enemy combatants. Under this system of detention prisoners could be held indefinitely at the pleasure of the Executive without facing charges, without access to lawyers, and without knowledge of specific claims, and the evidentiary basis of claims, the government was making against them. Critics of the prison at Guantanamo alleged that the status of prisoners held as alien enemy combatants doomed them to legal limbo. In *Rasul v. Bush*<sup>1</sup> the Executive argued that the prisoners had no rights whatsoever to vindicate—whether implied by the Constitution or by international treaty-- because the United States does not maintain de jure sovereignty over Guantanamo. For this reason the habeas protections of the Constitution did not reach them; of course, no other Constitution protected them either. But in *Rasul* a bare majority of the Court ruled that, since Guantanamo is under de facto sovereignty of the United States, and since the provisions in the Constitution for suspending habeas had not been invoked by Congress, the prisoners at the base were entitled to the protections of the Great Writ. The majority argued that the jurisdictional standard for determining the reach of habeas is not de jure sovereignty but complete practical control and “plenary and exclusive jurisdiction,”<sup>2</sup> or de facto sovereignty. The Pentagon had contended that the CSRTs afforded the prisoners due process rights equivalent to habeas. In 2005 Congress passed the Detainee Treatment Act (hereafter DTA) which would deprive prisoners held at Guantanamo of habeas rights while assigning exclusive jurisdiction to review CSRT decisions to the D. C. Court of

---

<sup>1</sup> *Rasul v. Bush* 124 S. Ct. 2686 (2004).

<sup>2</sup> *See Rasul*, 124 S. Ct. at

Appeals. In *Hamdi v. Rumsfeld*<sup>3</sup> the Court ruled the DTA inapplicable to detainees already held when the DTA was enacted. In 2006 Congress responded with the Military Commission Act (hereafter MCA), which would deny habeas to any detainees determined to be enemy combatants and would apply to any enemy combatant held since September 11, 2001. In 2007, in response to the actions taken by the political branches, the Court agreed to hear *Boumediene*.<sup>4</sup>

## **Boumediene**

In *Boumediene* the essential questions before the Court were: Are nonresident alien “enemy combatants” held at Guantanamo entitled to the habeas protections in the Constitution and the Bill of Rights? Do the CSRTs fail as an acceptable equivalent to habeas? Are there practical considerations in this case that make the habeas privilege anomalous? A five member majority answered in the affirmative while two of four Justices who disagreed wrote emphatic dissents. Writing for the majority, Justice Kennedy noted that “the protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.”<sup>5</sup> The Suspension Clause, Kennedy argued, was written to prevent cynical manipulation of habeas by the political branches. According to Kennedy, reserving habeas review in this case as an essential function of the Judiciary is of a piece with the essential design of the Constitution as a political instrument that balances governmental power, protects individual liberty, and sustains the rule of law. Kennedy conceded that the unique situ of the petitioners’ confinement meant that the Court would look in vain for founding-era precedents that accounted definitively for the geographical reach of habeas. But according to Kennedy the common thread uniting precedents from the *Insular Cases* through *Johnson v Eisentrager* and *Reid v Covert* was that the geographical reach of the Constitution in extraterritorial cases “turned on objective factors and practical concerns, not formalism.”<sup>6</sup> In cases where habeas provisions were found inapplicable in

---

<sup>3</sup> *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004).

<sup>4</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

<sup>5</sup> *Id.* at 2244.

<sup>6</sup> *Id.* at 2258.

extraterritorial cases the determining factors involved logistics and implementation, not abstract definitions of sovereignty. The Executive, Kennedy was suggesting, was maintaining a prison over which it exercised total and indefinite control and exclusive jurisdiction while (in concert with Congress) manipulating the definition of sovereignty to evade providing the Constitutional protections owed to people whose lives are held in that power. While the Constitution grants the political branches power to acquire and govern territory it does not allow them “the power to decide when and where its terms apply.”<sup>7</sup> For Kennedy, the attempt by the political branches to define away the Constitutional protections concomitant with the rule of law violated the balance of powers principle that is itself a fundamental protection of liberty in the American system. In essence, the Executive and Congress sought to replace effective judicial review with a sophisticated definition of sovereignty.

Kennedy argued that the CSRTs fail to provide an adequate substitute for habeas because they do not provide a “meaningful opportunity”<sup>8</sup> for prisoners to rebut charges. In his Opinion Kennedy maintained that prisoners do not have legal counsel, are given little opportunity to produce exculpatory evidence or to contest the factual basis of the charges against them, face charges based on hearsay, and sometimes are denied, on national security grounds, any knowledge of the allegations that justify their detention. Finally, the CSRTs do not have authority to release prisoners determined to have been unjustly detained. These infirmities heighten the risk of judicial error and, since the prisoners face detention until the end of hostilities in the “war on terror,” unjust detention for life.

### **Dissents: Justice in a “Foreign Land”**

In his dissent, Chief Justice Roberts claimed that any claims regarding the adequacy of the CSRTs are “entirely speculative.”<sup>9</sup> Since the Supreme Court preempted the D.C. Court of Appeals by deciding this case, the system established by the political

---

<sup>7</sup> Id. at 2264.

<sup>8</sup> Id. at 2270.

<sup>9</sup> Id. at 2298 (Roberts, C. J., dissenting).

branches was not permitted to follow its natural legal course. Roberts claimed that had appeals proceeded through the D. C. Court of Appeals, the unfolding legal process itself would have assessed the constitutionality of the actions taken by Congress and the Executive branch. Roberts was nevertheless prepared to concede the propriety of the system, claiming that “Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.”<sup>10</sup> Using previous military tribunals holding enemy combatants abroad as the appropriate juridical threshold, Roberts claimed that the provisions of the DTA are an adequate substitute for habeas because the CSRTs do afford detainees a meaningful opportunity to contest charges. For Roberts the most noteworthy source of due process protection is the Personal Representative (sic) detainees are assigned. The Personal Representative is given access to classified intelligence and is permitted to summarize it for the detainee, can assist the detainee in arrange for witnesses, and can help the detainee present evidence to the tribunal. As Roberts points out, under the Geneva Convention prisoners of war are not allowed access to classified information, and in any event CSRT verdicts are reviewed by the D. C. Court of Appeals.<sup>11</sup>

Assessing the adequacy of the CSRTs by comparing them to military tribunals abroad is a compelling strategy only if United States authority at Guantanamo is not sovereign: only if Guantanamo is “a foreign land,” as Justice Scalia called it. Dismissing as dictum the majority’s claim in *Rasul* that the Writ extends to the prisoners at Guantanamo, Scalia argued that the history of common law as well as precedents from the *Insular* cases through *Eisentrager* conclusively establish that the Constitution does not extend habeas to aliens held abroad by the military wherever the United States is not sovereign. Consequently, the practical and functional considerations that the Court’s majority deemed constitutive of the relevant notion of sovereignty in this case are irrelevant. The test for “sovereignty” here is *de jure* sovereignty, and Guantanamo is formally within Cuban, not American, territory, according to the lease agreement signed by Cuba and the United States. Scalia argued that he political branches got this right and

---

<sup>10</sup> Id. 2286.

<sup>11</sup> Id. 2290.

designed the DTA and the CSRTs to balance carefully a proper regard for the jurisdictional history of habeas and the grave national security threat the nation faces in its war with Islamist terror. By intruding illegitimately and clumsily into a function of government about which it has no expertise the Court's decision undermines a balance of power that would otherwise more effectively keep the nation safe. The Supreme Court's action is an ill-conceived and likely disastrous overreaching of its jurisdiction: "The nation will live to regret what the Court did today,"<sup>12</sup> Scalia ominously concludes.

### **Analysis: Injustice Abhors a Vacuum**

The question of how far the geographical scope of the Constitution and the Bill of Rights extends geographically is a profound one with a history leading back to the founding generation. In the early 20<sup>th</sup> century, an expansionist foreign policy led to newly "acquired" territories like the Philippines, Guam, and Puerto Rico. In the so-called Insular cases (and beyond) the Supreme Court attempted to determine the relation between the Constitution and people living in new territories. The Insular cases often have since been interpreted as establishing constitution-free zones in territories where the United States maintained political and practical hegemony, thus establishing a precedent for the use of power unrestrained by constitutional protections ordinarily reserved for the people governed by that power. According to this interpretation, territories on track for incorporation into the United States were "integral to" the United States and the people living in them enjoyed the rights and protections of the Constitution. "Unincorporated" territories belonged to but were not part of the United States, and the people living in them were accorded only those fundamental rights that applied *ex proprio vigore*.<sup>13</sup>

But this is a truncated reading of these cases. In *Boumediene* Justice Kennedy is closer to the truth when he points out that a survey of relevant precedents through *Reid v. Covert* reveals that the "the Constitution had independent force in the territories that was

---

<sup>12</sup> Id. 2296 (Scalia, dissenting).

<sup>13</sup> For an excellent review of the Insular cases see Gerald Neuman, "Whose Constitution? *Yale Law Journal*, Vol. 100, No. 4 (Jan., 1991), pp. 976-981. Neuman's work on extraterritoriality, particularly his arguments supporting "mutuality" as a cogent normative model for legitimizing the coercive power of democratic institutions, has influenced my view of the geographical scope of the Constitution.

not contingent upon acts of legislative grace.”<sup>14</sup> To support his position Kennedy could cite Justice White, who in *Dowes v. Bidwell* argued that “In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self evident, but whether the provision relied upon is applicable.”<sup>15</sup> The nature of that force, according to Kennedy, depended largely on practical considerations: for example, the differences between the legal traditions in colonies once held by Spain and those of the Anglo system limited the adoption of legal provisions normally found in the latter system. This strategy for determining the application of the Constitution to new territories eventually gives rise to the “impracticable and anomalous” test; where the application of a constitutional provision is impractical or anomalous on pragmatic grounds the extension of the provision is held in abeyance. The overarching juridical and historical thrust of the Insular cases was that the Constitution did “follow the flag” (in the vernacular of the Insular cases). Kennedy’s point is that formalistic or definitional considerations have not been juridical destiny in assessing the geographical scope of the Constitution, and that the majority Opinion’s functionalist approach reflects fealty to relevant precedent cases.<sup>16</sup>

The United States government has indefinite, exclusive, plenary control and jurisdiction at Guantanamo, and has maintained such control for over one hundred years. This constitutes de facto sovereignty, and it is also true that formal or de jure sovereignty is maintained by Cuba, according to the political instrument signed by both countries. But what does it mean to say that Cuba, and not the United States, maintains de jure

---

<sup>14</sup> Id. 2267 (Kennedy).

<sup>15</sup> Justice White, *Downes v. Bidwell*, 182 U.S. 244, 292 (1901). While I concede that Kennedy’s reading of the Insular cases correctly reflects their ultimate influence in Constitutional law, his gloss fails to account underplays sharp disagreements in the Opinions. For example Justice Brown argued in *Bidwell* in his Opinion for the Court that (contra White) the Constitution does not apply in the territories unless extended to them by Congress. Nevertheless, that a given provision does not apply to a territory or a State (as in the case of the right to grand jury indictment) does not mean that the Constitution is not fully in force if the provision is withheld because of a supererogatory imperative in the Constitution itself.

<sup>16</sup> For an excellent argument supporting Justice Kennedy’s interpretation of the Insular cases see Christina Duffey Bennett “A Convenient Constitution? Extraterritoriality after *Boumediene*,” *Columbia Law Review*, June 2009, pp.1-57. While my view of the Insular cases is influenced by Duffey’s argument I disagree with her claim that functionalism (as found in *Boumediene*, for example) is an inevitably consequentialist and thus fatally flawed approach to extraterritoriality. As long as functionalist criteria are anchored in constitutionally sound normative imperatives they need not devolve into crass consequentialism.

sovereignty at Guantanamo, *and* that de jure sovereignty should determine the jurisdictional reach of habeas in this case? What can the word “sovereignty” mean here? That the intense legal dispute over the meaning of sovereignty for Guantanamo, and with it the actual rules and policies that are enforced there, occurs without any input whatsoever on the part of Cuba itself belies the minority court’s claims regarding “sovereignty” at Guantanamo. The only practical significance, the only *potential* perlocutionary force of “de jure sovereignty” for Guantanamo derives utterly from the construction ultimately placed on it by the United States Supreme Court and the political branches of our government, the very government the minority Court is claiming has no legally meaningful jurisdictional sovereignty. In an absurdity truly worthy of Orwell, in this context the term “sovereignty” is the worst kind of juridical manipulation: a vacuity of meaning used as judicial legerdemain for enforcing policies that transcend the reach of *any* sovereign’s judicial branch. The minority Court would permit the political branches to disavow sovereignty in order for the government to have complete unilateral practical authority. Only by disavowing sovereignty would the political branches have a free hand. Cynically availing itself of the vocabulary of the American political values, the Executive established at Guantanamo a rights-free constitutional dead zone, aptly described by a British court as a “legal black hole.”<sup>17</sup> For its part a complicit Congress attempted to run legal interference by legislating away constitutional objections to the prison at Guantanamo

The Executive and Congress have a grave responsibility to protect national security, and Justice Scalia is right to address these concerns in his dissent. Scalia correctly notes that prisoners released from Guantanamo have since committed acts of terror against the United States and its allies. However, his argument fails to take into account the damage done to the reputation of the United States abroad, particularly in countries that have a predominantly Muslim population, by our maintaining a facility like Guantanamo. When making a case for American foreign policy, our representatives invoke traditional American political values: freedom, justice, personal autonomy, and the rule of law. In the battle for the hearts and minds of people who might be recruited to

---

<sup>17</sup> Johan Steyn, 27<sup>th</sup> F. A. Mann Lecture, November 25<sup>th</sup>, 2003.

become terrorists, these words are likely to be construed as cynical hypocritical posturing when coming from representatives of a country maintaining a facility like Guantanamo. While it is difficult to quantify the effect of the damage to American prestige by the use enemies of the United States make of this damage, it isn't obvious that a utility calculus would favor Scalia's position.

Consequentialist considerations will always have a limited role in assessing the normative legitimacy of Opinions like *Boumediene*. The fundamental moral question is whether the decision embodies and makes manifest the aspirant values constitutive of the Constitution. The nature of rights and the justification of political authority were issues firmly held in mind by the founding generation when it established the Constitution. The terse statement of natural rights in the second paragraph of the Declaration of Independence tracks closely John Locke's argument for rights in the *Second Treatise of Government*: Our shared, equal humanity makes each person the rightful owner of her own life, liberty, and property, and the primary justification for and responsibility of government is to protect rights and thereby correct the injustice of the State of Nature. In the social contract tradition interference with an individual's life and property requires justification, whether a private individual or government is responsible for that interference, because humans possess natural rights. Early American political thinkers were acutely aware of the potential of any political system for tyranny, and some of the most intense debates among the Framers concerned identifying and implementing political structures and institutions that would prevent government from violating rights. Federalists like Madison believed that a Constitution creating representative government with such now familiar features as republican separation and balancing of powers, with limitations built into the political and judicial branches and regular elections, needed no Bill of Rights. Furthermore, habeas rights are among a very narrow range of privileges specified explicitly before the addition of the Bill of Rights.

As Kermit Roosevelt III has observed, “The United States government is not a Principal”<sup>18</sup>: neither is the Constitution that authorizes all of its institutions and actions. The Constitution is a written political instrument establishing rights and privileges while furnishing a system of government that protects those rights and discharges the responsibilities that normally accrue to any government. As the normative creation of the natural law, natural rights, and social contract traditions of early modern political philosophy, the moral legitimacy of the Constitution and the government it creates rests on the presumptive rational consent produced by the lawful performance of its responsibilities. The Constitution was created “to establish *Justice*,” a project the founders did not qualify geographically or on a ‘members only’ basis<sup>19</sup>. When government, in the name of the People, reaches out to control or to punish, the force it exerts must be guided by its constitutive values or it acts as the arbitrary Leviathan the founding generation considered anathema to its central projects. The due process rights Boumediene promises to restore to the prisoners at Guantanamo are an essential appendant to lawful governmental force. United States sovereignty and the Constitution that is its normative soil and substance can never be legitimately sundered: where the United States exerts sovereignty no extraconstitutional space can be legitimate. The majority opinion in Boumediene restores a measure of honor to a tradition of government that sometimes exhausts all too many lamentable alternatives before doing the right thing.

---

<sup>18</sup> Kermit Roosevelt III “Application Of The Constitution To Guantanamo Bay,” *University of Pennsylvania Law Review*, Vol. 153 p. 2068.

<sup>19</sup> These have often been aspirant ideals, of course: important exceptions to this observation include the United States’s original sins—slavery, the treatment of native peoples, and gender based political and social discrimination.