

## *Boumediene v. Bush* and the extraterritorial reach of the U.S. Constitution A step towards judicial cosmopolitanism?

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*'Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.'*

Justice William J. Brennan, Jr.<sup>1</sup>

### 1. Introduction

On June 12, 2008 the U.S. Supreme Court held in a 5-4 ruling in *Boumediene v. Bush* that aliens detained as 'unlawful enemy combatants' at Guantanamo Bay have a right under the U.S. Constitution to seek release and to challenge the lawfulness of their detention in a *habeas corpus* procedure before American district courts. The Court also struck down Section 7 of the Military Commissions Act (MCA) which limited a judicial review of the detainees' status determinations as enemy combatants by the executive. The Court held that the limited Detainee Treatment Act (DTA) review did not provide an adequate substitute for *habeas corpus* review and therefore has to be qualified as an unconstitutional suspension of the writ of *habeas corpus*. This Supreme Court decision has already been decried by conservatives as 'judicial imperialism of the highest order' and a victory for 'aliens captured fighting against the U.S.' while it has been hailed by liberals as one of the most important landmark rulings in recent years.<sup>2</sup> To Berkeley Professor of Law John Yoo, who served as one of the leading legal advisors in the Bush Administration's Office of Legal Counsel and who played an important role in the design of Bush's policy on detainee treatment in the global war on terrorism, the '*Boumediene five*' ignores 'the Constitution's structure which grants all war decisions to the president' and defies Congress which has the authority to establish the procedures for appeals against detentions and which gave the Guantanamo prisoners 'more rights than any prisoners in any war, ever.'<sup>3</sup> Yoo's statement about

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1 *McClesky v. Kemp*, 481 U.S. 279 (1987) Brennan, J., dissenting.

2 J. Yoo, 'The Supreme Court Goes to War', *The Wall Street Journal*, 17 June 2008, cf. <http://online.wsj.com/article/SB121366596327979497.html>; R. Dworkin, 'Why It Was a Great Victory', *The New York Review of Books*, 14 August 2008; cf. <http://www.nybooks.com/articles/21711>

3 Yoo, *ibid.* Yoo's contention that 'aliens captured while fighting against the U.S.' will get their day in court, is a gross misrepresentation of the facts. Many of the Guantanamo detainees were not at all captured on the battlefield, but were abducted from their homes; from airports or while at work. The plaintiff in this case for example, Lakhdar Boumediene, was kidnapped by American forces in Bosnia at the precise

the generosity of the rights granted to the Guantanamo detainees echoes the first sentence of the dissenting opinion of Chief Justice Roberts in *Boumediene*: ‘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>4</sup> Presidential candidate for the republicans John McCain called the decision one of the worst in the history of the U.S. and fears that it will harm America’s ability to ensure the people’s safety. McCain also said that he would appoint more Justices like Roberts and Alito if he were to become the next President. Senator Barack Obama supports the decision.

The extreme political polarisation of the judicial debate about the Guantanamo detainees is also manifest within the Court itself. As was foreseeable the four more ‘liberal’ Justices Breyer, Ginsburg, Souter and Stevens stood against the ‘conservative’ side of Chief Justice Roberts and Justices Alito, Thomas and Scalia. The pragmatic Justice Kennedy represents the ‘swing vote’ between the liberal and the conservative side and in this very important case, Kennedy, as was predicted by some observers,<sup>5</sup> joined the liberal group and wrote the Court’s opinion. The dissatisfaction in the conservative group was very outspoken as Justice Scalia demonstrated in his vitriolic dissent which was joined by Chief Justice Roberts and Justices Alito and Thomas. Scalia says that the majority opinion will hamper the war on terrorism and ‘will almost certainly cause more Americans to be killed’.<sup>6</sup> Scalia cites reports about some 30 Guantanamo prisoners who were released by the military and who have returned to the battlefield or to their murderous terrorist activities. To Scalia the example of these detainees whom the military had concluded were not enemy combatants, illustrates the extreme difficulty of the process of status determination ‘in a foreign theatre of operations where the environment does not lend itself to rigorous evidence collection’.<sup>7</sup> Scalia expresses his concern that with civil courts raising the standards of proof the number of enemy combatants returning to fight will obviously increase. It has to be conceded that the risk of *false negatives* (erroneously determining a person as a ‘nec’ – not enemy combatant) and the consequential release of dangerous people will persist before civilian courts. But the primary goal of a habeas review is not the release of the prisoner but to oblige the jailor to provide sufficient justification for why a detainee should continue to be held. Is this too much of a burden for the executive, given the fact that many of these prisoners have been held in a so-called ‘legal black hole’<sup>8</sup> for years? So far there has been no meaningful check to prevent *false positives* in the process of determining who is an ‘enemy combatant’ and the evidence that many of the detainees who were held at Guantanamo were low-level Taliban or even innocent Afghan villagers with no relation to international terrorism is growing.

In this article I analyse the Supreme Court’s landmark ruling in *Boumediene v. Bush* against the background of the discussion about the extraterritorial scope of the U.S. Constitution

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moment when he left prison as he was acquitted by the Bosnian Supreme Court who found that there was no evidence for the charge of planning an attack on the American embassy. He was then shipped at Guantanamo. Another example is the German citizen Khaled El-Masri who was kidnapped while on vacation in Macedonia, shipped around the world, tortured and isolated from the outside world during months. The executive finally released him once they realised that they had arrested the wrong person. Canadian citizen Maher Arar was arrested at JFK Airport, sent to Syria to be tortured and only liberated after ten months thanks to a relentless campaign started by his wife and supported by human rights organisations. He was totally innocent and charged with no crime at all.

4 *Boumediene v. Bush; Al Odah v. U.S.*, 553 U.S. (2008), Chief Justice Roberts, with whom Justice Scalia, Justice Thomas and Justice Alito join, dissenting, p. 1 (The Guantanamo cases *Hamdi*, *Rasul*, *Hamdan* and *Boumediene* are quoted from the slip opinions).

5 Cf. M. Cohn, ‘Why Boumediene Was Wrongly Decided’, available at <http://jurist.law.pitt.edu/forumy/2007/02/why-boumediene-was-wrongly-decided.php>

6 *Boumediene v. Bush; Al Odah v. U.S.*, 553 U.S. (2008), Scalia, J., dissenting, at 2.

7 *Ibid.*, at 4.

8 J. Steyn, ‘Guantanamo Bay: The Legal Black Hole’, 2004 *International and Comparative Law Quarterly* 53, available at <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>: ‘The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors.’

(Section 3). Then I point to the division between the majority and the dissenters as a symptom of the tension between the principle of separation of powers and the principle of checks and balances (Section 4). In Section 5 I explain why the Court rejects the ‘DTA review’ process as an inadequate substitute for *habeas corpus* review. The long-standing discussion about the scope of constitutional rights is then situated within the theoretical framework elaborated by Gerald Neuman who distinguishes between membership models, universalism, ‘global due process’ and the model of ‘mutual obligations’ (Section 6). The last model, which is based on a limited government perspective (Section 7) tends to lean towards the ideal of judicial cosmopolitanism. I argue that Justice Kennedy’s opinion for the Court does not live up to the cosmopolitan ideal of the model of mutual obligations as it was elaborated in Justice Brennan’s dissenting opinion in *Verdugo* and that Kennedy’s casuistic and flexible approach lends itself to possible manipulation. In Section 8 I argue that this danger can be reduced by adopting the minimum standards of international law as a second order framework for constitutional interpretation and I show that the ethical nexus between effective control and responsibility is common to the normative model of mutual obligations, on the one hand, and to the framework adopted in European human rights law and international humanitarian law, on the other. In Section 9 I conclude that Kennedy’s opinion for the Court is a precarious victory for the rule of law. But before all that I have to explain the legislative and the judicial developments that preceded this case (Section 2).

## 2. What preceded *Boumediene*

In reaction to the 9/11 terrorist attacks Congress passed the Authorisation to Use Military Force (AUMF). The AUMF authorized the President ‘to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 (...)’.<sup>9</sup> Subsequently President Bush announced in his military order of 13<sup>th</sup> November 2001 the creation of ‘military commissions’<sup>10</sup> to try persons suspected of terrorism including aliens arrested on American soil as well as fighters captured on the battlefield in Afghanistan and deported to Guantanamo Bay.<sup>11</sup> Moreover, the Bush administration decided to label the detainees as ‘unlawful enemy combatants’ who would neither be tried before civil courts nor be granted the rights and protections of prisoners of war under the Geneva Conventions.<sup>12</sup>

The first rebuke of the Bush policy came with the 2004 case of *Hamdi v. Rumsfeld*.<sup>13</sup> Yasser Hamdi was an American citizen captured on the Afghan battlefield. He was first transferred to Guantanamo and subsequently to different military prisons in the U.S. The plurality opinion in *Hamdi* written by Justice Sandra Day O’Connor has become widely known for her statement that ‘a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens’ and for her underlining of the role of the judiciary in reviewing the

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9 Cf. Authorization for Use of Military Force, September 18, 2001, Public Law 107-40 [S. J. RES. 23]; 107th CONGRESS.

10 Such special wartime tribunals traditionally used by the U.S. to try violations of the laws of war were used during the Mexican War, during the Civil War and following World War II, both in Europe and in the Far East.

11 The Government acted as if aliens captured in the U.S. had no rights at all under the Constitution, ignoring several Supreme Court rulings that protection under the fifth and fourteenth amendments’ *due process clauses* applied not only to citizens but to all ‘persons’ under U.S. jurisdiction including aliens, regardless ‘whether their presence here is lawful, unlawful, temporary, or permanent’ as Justice Breyer wrote in his opinion for the Court in *Zadvydas v. Davis*. 533 US 678 (2001), Opinion of the Court, p. 13; cf. also *Plyler v. Doe*, 457 U. S. 202, 210 (1982); *Mathews v. Diaz*, 426 U. S. 67, 77 (1976).

12 On the subject of privileged and unprivileged combatants and the laws of war see J.-M. Piret, ‘The “war against terrorism”, international law and the growth of unchecked executive power in the U.S.’, 2008 *Revue Interdisciplinaire d’Etudes Juridiques* 60, pp. 59-111 (especially pp. 73-87).

13 *Hamdi v. Rumsfeld*, 542 U.S. (2004).

legality of executive detention even in times of military conflict as long as Congress has not suspended the Great Writ of *habeas corpus*.<sup>14</sup> O'Connor said also that a rebuttable presumption in favour of the Government's evidence on the basis of which it classifies detainees as unlawful enemy combatants would not offend the constitution because it would be too heavy a burden on the military to require them to keep elaborate dossiers justifying the capture of every battlefield detainee. The procedural rights of unprivileged combatants had therefore to be fine-tuned in order not to hamper the task of the executive in times of ongoing military conflict.<sup>15</sup> It is worth noting that Justice Scalia in his dissenting opinion considered that absent the suspension, by Congress, of the writ of *habeas corpus*,<sup>16</sup> the military exigency is not sufficient to permit indefinite detention of a citizen without charge. In Scalia's view either Hamdi had to be released or he had to be tried before a criminal court for treason (as was the case with John Walker Lindt). But it must also be noticed that Scalia explicitly underlined that his argumentation applied only to *citizens* detained within the territorial jurisdiction of a federal court.<sup>17</sup>

The second rebuke came when sixteen alien detainees held at Guantanamo Bay filed *habeas corpus* petitions in the Federal District Court of Columbia (*Rasul v. Bush*). They complained that they were illegally detained without being charged of any crime and without having access to counsel and that they had not taken up arms against the U.S. The District Court, relying on *Johnson v. Eisentrager*,<sup>18</sup> dismissed the claim on the ground that aliens detained outside the reach of the territorial jurisdiction of any federal court are not entitled to petition for the writ. The Court of Appeals affirmed. The Supreme Court reversed this in a 6-3 plurality opinion delivered by Stevens. The Court acknowledged that under the 1903 Lease Agreement for the naval base of Guantanamo Bay 'the U.S. recognizes the continuance of the ultimate sovereignty of the Republic of Cuba' over the area, while the U.S. exercises 'complete jurisdiction over and within' it. The Federal Habeas Corpus Statute grants the federal district courts authority 'within their respective jurisdictions' to hear applications for *habeas corpus* by 'any person' (it does not say: 'any citizen') who asserts to be 'held in custody in violation of the Constitution or laws or treaties of the U.S.'<sup>19</sup> The Government held that no federal court had jurisdiction over Guantanamo Bay, which is under U.S. control, but outside of its territorial sovereignty. As the Government conceded that it would not contest the jurisdiction of a federal court in case a *citizen* detained at Guantanamo had filed a *habeas* petition,<sup>20</sup> and considering that the statute draws no distinction between citizens and aliens held in federal custody, the Court held that the geographical coverage of the statute did not vary depending on the detainee's citizenship.<sup>21</sup> The Court therefore inferred that aliens held at the Cuban naval base, 'no less than American citizens, are entitled to invoke the Federal Court's authority under the habeas statute'. With this ruling the Supreme Court interpreted the scope of protection of the writ of *habeas corpus* in accordance with the common law tradition. In English law the writ protects citizens and aliens alike.<sup>22</sup>

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14 *Ibid.*, pp. 29-30.

15 *Ibid.*, p. 27.

16 The Suspension Clause (Art. 1, Sec. 9, Clause 2) of the U.S. Constitution states that 'the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it'.

17 *Hamdi v. Rumsfeld*, 542 U.S. (2004), Scalia, J., dissenting, Para. VI, p. 25.

18 339 U.S., 763 (1950).

19 28 U.S.C. Para. 2241.

20 *Cf. Rasul v. Bush*: Oral argument available at [http://www.oyez.org/cases/2000-2009/2003/2003\\_03\\_334/argument/](http://www.oyez.org/cases/2000-2009/2003/2003_03_334/argument/)

21 *Rasul v. Bush*; 542 U.S. (2004), Opinion of the Court, IV.

22 See Steyn, *supra* note 8: 'that is how it should be because foreign nationals must obey our laws and therefore deserve the protection of our laws. The writ is available whenever the detained person enters territory under the control of the Crown. That is also consistent with human rights law'.

Justice Kennedy took another path in his concurring opinion to reach the conclusion that the federal courts have jurisdiction to consider challenges to the legality of the detention of alien detainees at Guantanamo. In *Eisentrager* the Court acknowledged an ascending scale of rights depending on the connection of a person with the U.S. On top is citizenship as the source of entitlement to rights. Second is the physical presence of aliens in the U.S. In the case of detainees this was also important: detention within U.S. territory provides constitutional protection. The detainees in *Eisentrager* were held in a German prison and the fact that they were proven enemies whose access to the courts would harm the nation's military interests was also of influence in denying them such access. Mitigating the dangers of undue court interference in military affairs pointed out by Justice Scalia, Kennedy explicitly underscores that '*Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter'.<sup>23</sup> But that realm, in turn, is not boundless in a political system with three branches, and depending on the *circumstances* of detention there may be cases 'in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated'. And in so far the facts in *Rasul* justify such a judicial intervention because Guantanamo is in every practical respect U.S. territory, far removed from the military necessity of the battlefield where the detainees are held indefinitely without charge and without a meaningful judicial review of their status. This situation 'suggests a weaker case of military necessity and much greater alignment with the traditional function of *habeas corpus*'.<sup>24</sup> Kennedy's more casuistic approach avoided an automatic statutory entitlement to challenge the legality of their detention by aliens held outside the U.S.

Although Justice Scalia went the furthest in restricting the scope of the executive detention of a *citizen* (even if he were an illegal enemy combatant) in his dissenting opinion in *Hamdi*, he denied the (alleged enemy) *aliens* even the slightest right to challenge the lawfulness of their detention in his sharp dissent in *Rasul*.<sup>25</sup> Faithful to his commitment to judicial restraint, Scalia held that the Court was irresponsibly overruling settled law (*Eisentrager*) in a matter of the utmost importance to the military troops in the field.<sup>26</sup>

In *Rasul* the Supreme Court considered *habeas corpus* as the procedural vehicle for the Guantanamo detainees to bring their claims before a court, and decided that they had a statutory right to that vehicle. But the judgement did not address the substantive content of the claims themselves and so it remained unclear if the detainees who were aliens held abroad, had any constitutional rights (such as due process rights) that they could claim before a court. The only hint that they had such rights was given in footnote 15 of Justice Stevens' opinion for the Court. Stevens said that the allegations of the petitioners unquestionably described 'custody in violation of the Constitution (...) of the United States' which implied that the detainees at least had access to *some* constitutional rights. But the subsequent rulings of two district courts about *habeas corpus* petitions filed by Guantanamo detainees reached opposite results. Judge Leon in *Khalid v. Bush* dismissed the petitions because non-resident aliens had no constitutional rights following the precedents of the Supreme Court. Judge Green concluded the opposite in another case because, according to her, *Rasul* implied that the prisoners had constitutional rights including due process, because of the complete control of the United States over Guantanamo.

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23 *Rasul (et al.) v. Bush*; 542 U.S. (2004), Kennedy concurring, p. 3.

24 *Ibid.*, p. 4.

25 *Rasul (et al.) v. Bush*; 542 U.S. (2004), Scalia, J., dissenting.

26 According to Scalia the approximately two million enemy soldiers in the custody of the U.S. forces at the end of World War II could have filed petitions in federal district courts had this ruling of the court applied at that time. But is that so? The majority of those prisoners were POWs (and not 'illegal enemy combatants') who were held mostly in areas under martial law.

In reaction to the Supreme Court rulings in *Hamdi* and *Rasul* the Government announced the creation of Combatant Status Review Tribunals (CSRTs) where detainees could challenge their classification as unlawful enemy combatants. But the republican dominated Congress also passed the Detainee Treatment Act of 2005, which largely overturned the prisoners' rights granted in *Rasul* by providing that 'no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba (...)'. This provision constituted a *de facto* suspension of the writ of *habeas corpus*.

The next confrontation between the executive and the judicial branch which resulted in a setback for the Government was the case *Hamdan v. Rumsfeld*,<sup>27</sup> in 2006, where the Supreme Court held that the jurisdiction-stripping provision in the DTA did not apply to pending cases. On the substantive issues Justice Stevens, who wrote the opinion, concluded that the military commissions lacked the power to proceed because their procedures violated the Uniform Code of Military Justice and the Geneva Conventions. In their concurring opinions Kennedy and Breyer both suggested that nothing prevented the President from returning to Congress to seek the necessary authority and that is precisely what the Government did. That resulted in the Military Commissions Act (MCA) of 2006.<sup>28</sup> This statute gave the Bush administration just about everything it wanted to deal with the Guantanamo prisoners and other enemy combatants held in Afghanistan. Section 7 of the MCA which amended the Federal Habeas Statute so as to expressly eliminate court jurisdiction over all pending and future *habeas* actions by Guantanamo detainees has now been declared unconstitutional by the Supreme Court in *Boumediene*.

### 3. Who has rights under the U.S. Constitution?

Although the MCA effectively denied enemy combatants detained at Guantanamo any *statutory* right to file petitions for a writ of *habeas corpus*, Congress cannot overrule the U.S. Constitution which provides in its 'Suspension Clause' that 'the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' The first thing was that Congress never explicitly stated that the nation found itself in such a situation. Second is the question of who is exactly protected under the Suspension Clause? Do non-resident aliens have extraterritorial rights under the U.S. Constitution? We saw that Judge Leon and Judge Green reached opposite conclusions on this difficult question.

Constitutional rights were created first and foremost for the citizens of the United States. But from the end of the 19<sup>th</sup> century onwards, the Supreme Court has held that aliens within U.S. borders are also entitled to constitutional protection. Moreover, the Court has also ruled that aliens not present in the U.S. 'are entitled to constitutional protection with regard to actions taken within the United States against their property rights'.<sup>29</sup> At the beginning of the 20<sup>th</sup> century, in the so-called *insular cases*, the Court held that the Constitution fully 'follows the flag' only in those territories destined to become states of the Union but that in 'unincorporated' territories (over which the U.S. nevertheless acquired sovereignty) the Government will only be bound by those constitutional provisions the Court deems 'fundamental'. Since *Reid v. Covert* (1956), it has been generally accepted that the Constitution applies wherever the United States may act

27 *Hamdan v. Rumsfeld*, 548 U.S. (2006); cf. <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>

28 The Military Commissions Act 2006 is available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:s3930enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf) It authorizes the President to establish Military Commissions to try unlawful enemy combatants; it confirms the role of the CSRTs and it denies unprivileged combatants the right to file *habeas corpus* petitions (Section 7).

29 Cf. G. Neuman, 'Whose Constitution?', 1991 *Yale Law Journal*, p. 915. See *ibid.* for the relevant case law.

against its own civilian citizens. But what about U.S. extraterritorial actions against aliens? In *Verdugo-Urquidez* (1990) the Court held that the Fourth Amendment warrant clause protecting ‘the people’ in their houses, papers and effects against unreasonable searches and seizures does not protect an alien living abroad, even if he is imprisoned in the U.S. Verdugo-Urquidez was a Mexican citizen whose home in Mexico had been searched by U.S. law enforcement officials in the ‘war on drugs’ after he had been extradited to the U.S. where he was imprisoned. Chief Justice Rehnquist in his opinion for the Court construed the term ‘the people’ in the Fourth Amendment as embracing only citizens and those aliens who have developed a sufficient voluntary connection with the United States to be considered part of the community.

Now let us return to the petitioners in *Boumediene* who are all aliens detained at Guantanamo, which is outside the territorial sovereignty of the U.S. but within its total control. They filed *habeas corpus* petitions to challenge their continued detention and their determination as enemy combatants by CSRTs. In February 2007 two of the three judges from a panel of the Court of Appeals of the District of Columbia circuit considered *Boumediene’s habeas corpus* petition and upheld the MCA’s stripping of statutory habeas jurisdiction that the Supreme Court granted in *Rasul*.<sup>30</sup> The judges said that in the absence of a statutory right to *habeas*, the constitution did not protect *habeas* rights to aliens held by the executive outside sovereign U.S. territory and that Guantanamo is outside that territory for constitutional purposes, even if the U.S. is in full control over the area. The first time the Supreme Court denied the petitioners’ request for a review of the Court of Appeals’ judgement. But two months later, in June 2007, the Court spectacularly reversed its position and granted a writ of *certiorari* to *Boumediene, Al Odah* and their co-defendants.<sup>31</sup> So now the important question that the Court had to answer was whether or not the petitioners possessed a *constitutional* privilege to file a writ of *habeas corpus*. The Government argued that aliens detained outside the sovereign territory of the U.S. had no constitutional rights at all and that as a consequence the jurisdiction-stripping provision in Section 7 of the MCA did not constitute a violation of the Suspension Clause of the Constitution.

Justice Kennedy begins his analysis for the Court by questioning the history and origins of the writ of *habeas corpus* in the common law. At first he notes that the writ was one of the few safeguards of liberty before the addition of the Bill of Rights in the Constitution. But the historical survey of the writ is inconclusive for the Court as to the question whether alien prisoners detained outside the formal territory of the United States by U.S. officials are entitled to it.<sup>32</sup> In the history of English common law not a single case granted or rejected a *habeas* petition to aliens detained outside the territory over which the Crown was sovereign. Justice Scalia dissents as to the meaning of the historical record, which to him clearly indicates that the writ never ran in favour of aliens abroad.

The Court agrees with the Government that Cuba maintained the ultimate sovereignty over Guantanamo, but disagrees with the Government’s contention that the reach of the Constitution

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30 Cf. M. Cohn, ‘Why Boumediene Was Wrongly Decided’, available at <http://jurist.law.pitt.edu/forumy/2007/02/why-boumediene-was-wrongly-decided.php>

31 Some say that this change in the position of the Court was largely due to an impressive affidavit by Lieutenant Colonel Abraham that had been attached to the defendants’ petition for a rehearing. In his declaration Lieutenant Colonel Abraham, an intelligence officer and a lawyer who had some experience in the CSRT process, declared in a very detailed way why the whole status determination process was fundamentally flawed. One of the fundamental flaws of the process addressed by Abraham is the impossibility to certify the military’s contention that there was no disculpatory evidence relating to the CSRT subjects. The Abraham declaration is available at <http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf>

32 *Boumediene v. Bush; Al Odah v. U.S.*, 553 U.S. (2008), opinion of the Court, p. 16.

necessarily stops where *de iure* sovereignty ends. The *insular cases*<sup>33</sup> resulted in a doctrine which made a distinction between incorporated and unincorporated territories (only the first of which were to become states). According to this doctrine the Constitution applied in full in incorporated Territories and only in part in unincorporated Territories. But already in 1922,<sup>34</sup> the Court took for granted that the real issue in the *Insular Cases* was the limitation upon the exercise of executive and legislative power and the idea that the Government of the United States was bound to provide to non-citizen inhabitants ‘guarantees of certain fundamental personal rights declared in the Constitution’.<sup>35</sup> Yet the Court also admitted that ‘inherent practical difficulties’ would make it impossible to enforce all constitutional provisions ‘always and everywhere’.

The Government’s position in *Boumediene* leaned heavily on the subsequent case of *Johnson v. Eisentrager* (1950) about a group of German prisoners who had continued to support the Japanese war effort in China after Germany had already surrendered. They were caught by American troops and tried for war crimes by a military commission. The prisoners were transferred to occupied post-war Germany and served their sentences at the Landsberg prison. They filed *habeas corpus* petitions in the District Court for the District of Columbia. Aside from the major arguments based on sovereignty and territorial jurisdiction, the Supreme Court as an *a fortiori* argument underlined also the practical difficulties of ordering the Government to produce the prisoners before an American court in a *habeas* procedure and the damage it would cause to the prestige of the military commanders in difficult times.<sup>36</sup> The Court held that the detainees never had been within the reach of the territorial jurisdiction of any U.S. court. For the Government this decision by the *Eisentrager* Court proved that, in order to determine the reach of the Suspension Clause, a formalistic test had to be adopted, based on the fact that Guantanamo Bay, although under the *de facto* control of the U.S., lies beyond its *de iure* territorial sovereignty. Kennedy rejects this argument and holds that another, non-formalistic reading of *Eisentrager* is possible which is more in line with the functional approach of extraterritoriality that was developed in the *insular cases* and *Reid v. Covert*<sup>37</sup> in the last of which Justices Harlan and Frankfurter had both insisted that questions about the extraterritorial scope of the Constitution should be determined on a casuistic and functional basis. In his concurring opinion in *Reid* Justice Harlan wrote that the extraterritorial reach of the Constitution depends upon the particular circumstances and the practical necessities of the case. In particular, the enforcement of constitutional provisions would not be required if this would be ‘impracticable and anomalous’.<sup>38</sup>

This is notably the weakest part in Kennedy’s opinion for the Court. He tries (rather unconvincingly) to read a functional scheme into *Eisentrager* although that case established beyond any doubt that alien enemy combatants held outside the sovereign territory of the U.S. had no constitutional right to *habeas corpus*, not only because they were *alien* enemy combatants but because, in addition to that status they were at no relevant time within the territorial jurisdiction of any American civil court. In *Eisentrager* the Court held that the privilege of litigation had previously been extended to aliens, whether friendly or enemy, because their presence in the

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33 *De Lima v. Bidwell*, 182 U.S. (1901); *Dooley v. United States*, 182 U.S. (1901); *Armstrong v. United States*, 182 U.S. (1901); *Downes v. Bidwell*, 182 U.S. (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. (1904). In these cases the application of constitutional provisions to persons who were located in territories acquired by the U.S., such as the Philippines, Puerto Rico and Hawaii, were at stake.

34 *Balzac v. Puerto Rico*, 258 U.S. (1922).

35 *Ibid.* at 312 (cited in *Boumediene*, Opinion of the Court, p. 28).

36 *Johnson v. Eisentrager*, 339 U.S. (1950), at 779.

37 *Reid v. Covert*, 354 U.S. (1956).

38 *Reid v. Covert*, 354 U.S. (1956), Harlan, J., concurring in the result, at 74.

country implied protection.<sup>39</sup> The decision in *Eisentrager* was essentially based on citizenship and territoriality. The additional argument about the ‘practical obstacles’ that stood in the way of issuing the writ had merely an *a fortiori* character. Because the Court does not want to explicitly admit that it is overruling *Eisentrager* in holding on principled grounds that the *Suspension Clause* should extend its protective scope to aliens detained by U.S. officials abroad,<sup>40</sup> it undermines the force of its holdings and renders its argumentation vulnerable to Justice Scalia’s sharp criticism that the majority were misreading *Eisentrager* and were artificially trying to ‘wring’ some support out of *Reid v. Covert* for the new holding.<sup>41</sup> Kennedy’s somewhat excessively ‘creative’ reading of *Eisentrager* was also unnecessary to reach the conclusion he wanted, because the facts in *Boumediene* are sufficiently different from *Eisentrager* in order to immediately distinguish the two cases.

#### 4. Checks and balances, separation of powers and *habeas* jurisdiction

More important and more convincing is the Court’s principled holding that the ‘Government’s formal sovereignty-based test raises troubling separation-of-powers concerns’:<sup>42</sup>

‘by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. 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”. (...) Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. (...) These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.’<sup>43</sup>

As Columbia Law Professor Michael Dorf argues, the Majority’s holding is not so much based on separation of powers concerns as on concerns of checks and balances.<sup>44</sup> Both principles find their roots in the eighteenth century’s intellectual resistance against absolutist tyranny in the writings of Locke and Montesquieu, where they were not yet clearly distinguished. And even

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39 Gerald Neuman repeatedly pointed out that the *Eisentrager* holding that presence in the U.S. was a necessary condition for constitutional protection was never accurate because it ignored *inter alia* the property rights within the U.S. of non-resident aliens. Cf. G. Neuman, ‘The abiding significance of law in foreign relations’, 2004 *The Supreme Court Review*, no. 3, p. 150.

40 Extending the scope of the Suspension Clause on principled grounds is precisely what the Court does in *Boumediene*, as Justice Souter admits in his concurring opinion.

41 *Boumediene v. Bush; Al Odah v. U.S.*, 553 U.S. (2008), Scalia, J., dissenting, pp. 11-15. As Scalia points out *Reid* was about *citizens* and ‘to say that “practical considerations” determine the precise content of the constitutional protections American citizens enjoy when they are abroad is quite different from saying that “practical considerations” determine whether aliens abroad enjoy any constitutional protections whatever, including habeas.’ (*ibid.* at 15) And two pages later Scalia concludes sharply that ‘by blatantly distorting *Eisentrager* the Court avoids the difficulty to explain why it should be overruled’ (*ibid.* at 17).

42 *Boumediene*, Opinion of the Court, p. 34.

43 *Ibid.*, p. 35.

44 Cf. M. Dorf, ‘Did the Supreme Court Violate or Vindicate the Constitution in the Latest Guantanamo Bay Decision? The Difference Between Separation of Powers and Checks and Balances’, *FindLaw*, Monday, June 16, 2008, available at <http://writ.news.findlaw.com/dorf/20080616.html>

today these two principles of the rule of law are often conflated, but they should be carefully distinguished in order to see that there can be a serious amount of tension between them, as is the case here.<sup>45</sup> The principle of separation of powers divides the power of the state into three different functions: legislation, execution of the laws and interpretation of the laws. The separation principle must prevent that one branch of government interferes with the specific role of the two other branches. The principle of checks and balances prevents that one of the branches could become too powerful through the balancing power of the two other branches. In the American constitutional system this has developed into a multifocal and interdependent power structure.

The Constitution itself contains no clear rule as to which of the two principles should be given priority and at what moment. In hard cases revealing the structural tension between the branches the Supreme Court itself divides into two camps, one considering that the principle of separation of powers and the other that the principle of checks and balances should predominate. Dorf rightly points out that the dissenters in *Boumediene* think the separation principle ought to prevail because of the deference to the political branches that is due in times of war. The courts have to play a modest role and defer in these matters to the President as Commander-in-Chief and to Congress as the body which declares and funds war. The *Boumediene* majority, on the other hand, thought that despite the war powers attributed to the political branches by the Constitution, the need to check the power of the executive and to block abuses was higher in this case<sup>46</sup> and that, given the fact that the writ of *habeas corpus* had not been formally suspended by Congress, the Court had a moral duty to interfere because, in Montesquieu's phrase, '*seul le pouvoir arrête le pouvoir*'.

For Kennedy, in a political system with three branches, proper deference to the political branches in matters related to external and military affairs should not become an excuse for legitimizing the abusive abrogation of constitutional protections. As the writ of *habeas corpus* has always been essentially a check on arbitrary detention by executive power, the test for determining the protective scope of the Suspension Clause 'must not be subject to manipulation, by those whose power it is designed to restrain'. For the core of the rule of law is that those who should execute the law must not be the final arbiters of the law.<sup>47</sup>

In determining the extraterritorial reach of the Suspension Clause the Court identified three relevant factors: the citizenship and status of the detainee and the adequacy of the status determination process; the nature of the place where the person is detained; and the weight of practical obstacles<sup>48</sup> to the prisoners' entitlement to the writ. Applying this framework the Court states that the prisoners are aliens who have been determined to be enemy combatants (which they all deny). They are held in a site that is under the complete jurisdiction<sup>49</sup> and practical control of the U.S. and the Government presents no credible arguments that granting the prisoners habeas review would compromise the military mission in Afghanistan or elsewhere. In all these respects this case differs from *Eisentrager*. The detainees are held by executive order, some for more than six years in an area under the complete control of the U.S., far away from any battlefield and with little or no opportunity to challenge the factual basis for their detention.

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45 *Ibid.*

46 *Ibid.*

47 T. Franck, 'Criminals, Combatants, or What? An examination of the Role of Law in Responding to the Threat of Terror', 2004 *The American Journal of International Law* 98, no. 4, p. 688.

48 As Gerald Neuman recently suggested, some practical and logistical obstacles such as transporting the prisoner from a far remote area to an American court could be overcome by technological advances such as video conferencing.

49 Some have observed that the jurisdiction by the U.S. Government's political branches over Guantanamo is more complete than its jurisdiction over the States because there are no federalism issues here.

While it was ‘impracticable and anomalous’ to hold that there was constitutional *habeas* jurisdiction over the German prisoners, this is not at all true in this case where the prisoners are held for years in an area under complete U.S. control (what the Court calls *de facto* in opposition to *de iure* sovereignty) and far away from any active war zone.<sup>50</sup> Should there be other practical obstacles (such as the need for the protection of classified information) then the *habeas* procedures can be modified to address them. Based on these elements the Court concludes that the detainees at Guantanamo are entitled to the protection of the Suspension Clause. And the Court even cunningly cites Scalia’s words in his dissent in *Hamdi* that absent a formal suspension of the writ of *habeas corpus*, ‘indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy’.<sup>51</sup>

It is very likely that the Court’s decision that (alleged enemy) aliens held by the United States at Guantanamo have a constitutional right to *habeas* review also implies that they are entitled to other due process rights which the Constitution provides for, as the constitutional structure of protections against arbitrary detainment is an interlinked system<sup>52</sup> and the language of the due process provisions in the Constitution does not discriminate *ratione personae* (see below).

## **5. The inadequacy of the DTA review as an alleged *habeas* substitute**

Once the Court had established that petitioners had a constitutional right to *habeas* review, Kennedy next addressed the Government’s assertion that the review process provided in the DTA and MCA was an adequate substitute for *habeas corpus*. A *habeas* Court must have sufficient authority to offer a meaningful review of the factual cause for detention as well as the executive’s legitimate power to detain and, if necessary, the Court should have the authority to order the prisoner’s release.<sup>53</sup> The Court doubts that the petitioners have a fair opportunity to rebut the factual basis for their designation as enemy combatants in the CSRT process. The nature of this process does imply a considerable risk of errors in the findings of fact with far-reaching consequences such as detention for the duration of hostilities that may last a generation or more. Following the Canon of Constitutional Avoidance which obliges a statute to be construed in order to avoid constitutional problems if that is possible, the Court holds that even in assuming that the DTA review process can be construed to allow the Court of Appeals for the DC circuit to correct the CSRT’s factual determinations, there is no way to construe the statute as allowing the detainee to introduce new exculpatory evidence in order to provoke such a correction. The Court thus finds that the DTA review process is an inadequate substitute for *habeas corpus* review and in consequence, Section 7 of the MCA effects an unconstitutional suspension of the writ.

Then the Court addresses the Government’s argument that petitioners must complete the DTA review of their CSRT determination process. As a general rule the Court requires an exhaustion of alternative remedies before prisoners can start a federal *habeas corpus* action. In this case, however, that would require additional months, if not years of delay while some of the detainees would have already been held for more than six years without judicial oversight. The Court holds that ‘the costs of additional delay can no longer be borne by those who are held in

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50 Even if the opinion of the Court in *Boumediene* does not mention norms of International Humanitarian Law, it is highly probable that the majority of the Justices were ready to extend the constitutional *habeas* protection to alien enemy combatants at Guantanamo, precisely because these people were denied POW status and the corresponding protections under the Geneva Conventions.

51 Cf. *Hamdi v. Rumsfeld*, 542 U.S., Scalia, J., dissenting, at 564. But of course for Scalia this sentence applies to *citizens* only!

52 Dworkin, *supra* note 2.

53 *Boumediene*, Opinion of the Court, p. 54.

custody. The detainees in these cases are entitled to a prompt habeas corpus hearing'.<sup>54</sup> And, finally, the Court recognized the Government's legitimate interests in protecting intelligence sources when the security of the nation is at stake. It may be expected from the courts that they use discretion in order to avoid 'widespread dissemination of classified information.'<sup>55</sup> But although proper deference must be accorded to the political branches in matters of national security, the Court underscores that

'security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint (...) The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.'<sup>56</sup>

In his dissenting opinion Chief Justice Roberts (joined by Alito and Scalia) argues that the constitutional question of the scope of the Suspension Clause should not have been reached because the D.C. circuit Court of Appeals should have been given the opportunity to decide whether the CSRT proceedings are consistent with 'the constitution and the laws of the United States' as was provided for in the DTA. Roberts insists that the DTA process followed by a review in an Article III court is precisely the kind of procedure that the Court blessed in *Hamdi* (who was a citizen).<sup>57</sup> Roberts argues that whatever due process rights aliens detained at Guantanamo as enemy combatants may have, they can be no greater than those of American citizens.<sup>58</sup> But is this not a somewhat disingenuous comparison given the fact that a citizen like *Hamdi* has a *constitutional* entitlement to the writ of habeas corpus, while Section 7 of the MCA took away the *statutory* entitlement to habeas that was granted to (alleged enemy) aliens in *Rasul*. The consequence is that 'now there must be constitutionally based [*habeas* – addition JMP] jurisdiction or none at all'.<sup>59</sup> Roberts further contends that the DTA and the MCA provide the prisoners with an adequate opportunity to contest the basis of their detentions and that they provide more process than that afforded to prisoners of war, which is pertinently false, provided that a nation respects its obligations under the Geneva Conventions and other agreements under international law.<sup>60</sup>

## 6. Rights based on membership or rights based on subjection and mutuality?

As Gerald Neuman demonstrated, the scope of the U.S. Constitution has been a disputed issue from the beginning of its history.<sup>61</sup> While the Preamble speaks the language of social contract by emphasizing that 'we the people of the United States, in order to (...) secure the Blessings of liberty to *ourselves and our posterity*, do ordain and establish this Constitution *for the United States of America*', the Supremacy Clause characterises the Constitution as the Supreme Law of the Land and Article III establishes Justice for foreign citizens, subjects etc. Neuman distinguishes four approaches to the extraterritorial scope of the Constitution: membership models, municipal law including strict territoriality, universalism, and 'global due process'. Membership

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<sup>54</sup> *Ibid.*, at 66.

<sup>55</sup> *Ibid.*, at 67.

<sup>56</sup> *Ibid.*, at 69-70.

<sup>57</sup> *Boumediene v. Bush; Al Odah v. U.S.*, 553 U.S. (2008), Roberts, J., dissenting, pp. 1-13.

<sup>58</sup> *Ibid.*, at 15.

<sup>59</sup> *Boumediene v. Bush; Al Odah v. U.S.*, 553 U.S. (2008), Souter, J., with whom Justice Ginsburg and Justice Breyer join, concurring, at 1.

<sup>60</sup> Piret, *supra* note 12.

<sup>61</sup> Neuman, *supra* note 29, pp. 909-991.

models are mostly based on the idea of social contract. They define a limited class of ‘members’ who have duties and are also the beneficiaries of rights based on the contract; non-members are outside of the contractual rights community and ‘are relegated to whatever rights they might have independent of the contract’.<sup>62</sup> Membership approaches can be restrictive (for the citizens) or more open and widening the membership status to the inhabitants of some territories.

Under a territorial model the Constitution constrains the Government only when it acts within the borders of the United States. During the nineteenth century, with its emphasis on the sovereignty of the nation state, this model prevailed as a dogma of American constitutionalism. But the narrow territorial approach reflected in Justice Field’s holding that ‘the Constitution can have no operation in another country’<sup>63</sup> quickly proved to be mistaken as the Constitution itself contains several clauses that provide for extraterritorial applications such as the power to declare war,<sup>64</sup> the ‘commander-in-chief clause’<sup>65</sup> and the provision that attributes Congress the power to ‘punish Piracies and Felonies committed on the high Seas’.<sup>66</sup> Strict territoriality is interpreted by Neuman as a special case of a ‘municipal’ or domestic law model which defines the sphere of municipal law (‘the Supreme Law of the Land’) not solely in geographical terms but also in terms of ‘mutuality’, considering rights to be prerequisites for justifying political and legal obligations imposed on persons. The applicability of constitutional rights thus expands in accordance with the widening sphere of American municipal law, as from the second part of the twentieth century onwards the United States has subjected more and more people outside of its borders to obligations ensuing from American law in areas such as anti-trust, anti-drugs law, counterterrorism etc. When a nation applies its national laws to actions of non-resident aliens because of the effect of those actions on the legitimate interests of that nation, the mutuality of obligations model requires that, when non-resident aliens are prosecuted for offences against such extraterritorial laws, they are entitled to all the concomitant constitutional protections. According to Neuman the modern form of the municipal law approach presumes constitutional rights applicable (i) within U.S. territory, to all persons, (ii) to citizens of the U.S. everywhere in the world, and (iii) to aliens outside the U.S. in those circumstances in which the U.S. imposes obligations upon them under U.S. law.<sup>67</sup>

Universalists read constitutional provisions that create rights with no express limitations as to the persons or places covered as applicable to anyone everywhere. The universalist approach may be based on a natural rights conception or rely on contemporary human rights law. This conception is often criticized because of the danger which that nation exposes itself to when it unilaterally renounces powers that other nations exercise without restraint. Finally, the fourth model considers a constitution to be a contract balancing power between the governors and the governed. Individual rights of the governed may then be restricted in order to give room to the legitimate interests of the Government and, *vice versa*, the Government’s power can be restricted in order to give priority to individual rights. This balancing activity can be operated on the

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62 *Ibid.*, p. 917.

63 When in 1891 an American seaman, who was tried for murder before an American consul in Japan, claimed that he was deprived of his constitutional right to trial by jury, the Court denied him this constitutional right. The denial was largely based on a territorial conception of the Constitution’s scope. Justice Field held that ‘the Constitution can have no operation in another country’, *In re Ross*, 140 U.S. (1891), at 464-465.

64 U.S. Const. Art. I, Section 8, Clause 11.

65 U.S. Const. Art. II, Section 2, Clause 1.

66 U.S. Const. Art. I, Section 8, Clause 10.

67 Neuman, *supra* note 29, p. 919. The due process rights of aliens who are residing abroad and who are sued as civil defendants in U.S. courts have been acknowledged since many years by the Supreme Court. The same can be said about the constitutional rights of non-resident aliens who own property in the United States. *Cf.* G. Neuman, ‘Closing the Guantanamo Loophole’, 2004 *Loyola Law Review*, pp. 49, 50. See there also for the relevant case law.

domestic level, but is also potentially applicable worldwide so that extraterritorial constitutional rights boil down to the single right of ‘global due process’.<sup>68</sup>

Gerald Neuman showed that the legitimacy of restricting the Constitution’s reach to the citizens stood central in the debates concerning the constitutionality of the *Alien and Sedition Acts* (1798). In these statutes the constitutional rights of foreigners suspected of being a potential risk as to the propagation of dangerous revolutionary ideas coming from France were curtailed to the amount of exposing them to expulsion by executive order on mere suspicion. In the resistance by the Jeffersonian Republicans the Alien Act was criticized as an example of Federalist tyranny. It created a class of persons with no rights and wholly dependent on the President and that constituted a great danger to civil liberties as it created a precedent for future usurpations. While the Jeffersonian Republicans argued that the language of the Constitution and its due process clause speaking of ‘persons’ rather than of ‘citizens’ made its protections available to aliens also, the Federalists responded that aliens were not parties to the Constitution, that they had no rights under it and that nothing in the Constitution indicated that ‘We the People’ had fraternized with the whole world in drafting its fundamental law.<sup>69</sup> For the Federalists only citizens as parties to the compact could assert constitutional rights. In 1800 James Madison emphasized that although aliens are not parties to the Constitution,

‘it does not follow that the Constitution has vested in Congress an absolute power over them. (...) If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without (...) fair trial. (...) it does not follow, because aliens are not parties to the Constitution (...) that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on the one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.’<sup>70</sup>

This municipal law approach which holds that non-membership in the social contract does not imply that aliens who are subject to American laws are deprived of constitutional protection, was also upheld by the Supreme Court in these days.<sup>71</sup> But the cases were mostly concerned with the constitutional rights of aliens present in the United States.

In his dissent in *Hawaii v. Mankichi*, one of the *insular cases* in which the Court refused grand and petit jury rights to inhabitants of Hawaii, Justice John Marshall Harlan articulated the mutuality approach of the extraterritoriality question in a very distinct way. Harlan argued that ‘the Constitution speaks (...) to all peoples, whether of States or territories, who are subject to the authority of the United States.’<sup>72</sup> This conception of subjection in which obedience to the laws is concomitant to the entitlement to fundamental rights is in accordance with the common law tradition in which citizenship was not a notion. Only subjection under the Crown (although in itself also an imprecise notion) was relevant to the question whether a person had a right to *habeas corpus* for example.<sup>73</sup> The fact that the Supremacy Clause speaks of the Constitution as ‘the supreme law of the land’ was of great significance to Harlan. He argued that the ‘land’

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68 Neuman, *supra* note 29, p. 920.

69 *Ibid.*, p. 929.

70 Cited *ibid.*, pp. 935-936.

71 For the relevant case law see *ibid.*, p. 942.

72 *Hawaii v. Mankichi*, 190 U.S. (1903), Harlan, J., dissenting, cited *ibid.*, p. 962.

73 *Boumediene v. Bush*; *Al Odah v. U.S.*, 553 U.S. (2008), see the exchange of arguments between Seth Waxman, counsel for the petitioners and Justice Scalia on this subject in the first minutes of the oral hearings available at [http://www.oyez.org/cases/20002009/2007/2007\\_06\\_1195/argument/](http://www.oyez.org/cases/20002009/2007/2007_06_1195/argument/)

referred to ‘all the peoples and all the territory, whether within or without the States, over which the United States could exercise jurisdiction or authority.’<sup>74</sup> The question whether a territory was incorporated into the United States or not, should be understood as whether it was ‘for all purposes of government by the Nation, under the complete jurisdiction of the United States’.<sup>75</sup> In *Reid v. Covert* (1957) the predominant regime of territoriality was finally ended. Justice Black’s plurality opinion for the Court has some accents of a universalist interpretation of constitutional rights.<sup>76</sup> But he also emphasizes the citizenship of the defendants.

‘At the beginning, we reject the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.’<sup>77</sup>

Black recalled the English constitutional principle that subjects of the Crown carry with them ‘the duty of obedience to the lawful commands of the Sovereign, [and] (...) all the rights and liberties of British Subjects.’<sup>78</sup> From then on it was generally agreed that the Constitution and its Bill of Rights not only follow the Flag, but that they follow also every U.S. citizen. As we saw, the expansion of the international ramifications of constitutionalism was limited by the Rehnquist Court in *U.S. v. Verdugo-Urquidez* (1990). In his opinion for the Court Chief Justice Rehnquist reinvigorated a restrictive version of the membership approach of the social contract in holding that the defendant had no Fourth Amendment rights in the search of his home in Mexico because he was not a member of ‘the people’ to whom the Constitution guaranteed rights. The fact that he had been brought to the United States and was imprisoned in San Diego did not impress Rehnquist because the involuntary character of the transfer and the fact that it had been carried out only one or two days before the search, implied that the defendant had not developed substantial connections with the United States.<sup>79</sup>

In *Verdugo* Rehnquist took a formalist position based on precedent: to grant aliens extraterritorial constitutional rights would be an undue extension of *Reid v. Covert*, because *Reid* involved citizens.<sup>80</sup> It is noteworthy that this position of Justice Rehnquist in *Reid* is highly analogous to Justice Scalia’s position in *Boumediene*. But there is another analogy. One of the important reasons why Rehnquist was opposed to the finding that aliens have extraterritorial constitutional rights was that this could have far-reaching implications in situations of military

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74 *Hawaii v. Mankichi*, 190 U.S. (1903), Harlan, J., dissenting, at 383-385, cited in Neuman, *supra* note 29, p. 963.

75 Harlan, J. dissenting, at 398, cited *ibid*.

76 Black’s inclination towards a mutuality of obligations model with universal accents was even more pronounced in his dissenting opinion in *Eisentrager* where he wrote ‘Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice. Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. (...) Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by the Executive or by Congress. I would hold that our courts can exercise it whenever any United States official illegally imprisons *any person in any land we govern*. [emphasis added]’ Cf. *Johnson v. Eisentrager*, 339 U.S. (1950), Black, J., dissenting, at 798.

77 *Reid v. Covert* 354 U.S. at 6

78 *Ibid*.

79 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990). I agree with Neuman that ‘the argument that a defendant has *no* Fourth Amendment rights because she is in the country involuntarily is shocking and unacceptable’, (Neuman, *supra* note 29, p. 972, note 381).

80 Neuman, *ibid.*, p. 973.

involvement by the United States abroad.<sup>81</sup> To put such a burden on the American military in times of war is precisely what is unacceptable to Scalia too.

In his concurring opinion in *Verdugo* Justice Kennedy confirmed the importance of the distinction between citizens and aliens with regard to the extraterritorial reach of the Constitution.<sup>82</sup> But Kennedy distances himself from the narrow ‘members only’ approach of Rehnquist and denies that the reference to ‘the people’ in the Fourth Amendment had the significance of restricting the category of persons who may assert it. Kennedy says that the *Reid* plurality holding ‘that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic’ is correct, but he argues that this principle can only be the first step towards resolving the case at hand. Kennedy quoted from Justice Harlan II’s concurring opinion in *Reid* that

‘there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.’

That enabled him to take the position that in this case adherence to the Fourth Amendment’s warrant requirement would be ‘impracticable and anomalous’ as the search had to be done in Mexico in the home of an alien under different laws and conceptions as to the reasonableness of that action. Would warrants issued by U.S. judges even be obeyed in Mexico? But this casuistic denial of Fourth Amendment protection was not tantamount to stating that non-resident aliens lack any constitutional protection. To Kennedy the safeguards to be applied depend on the particular casuistic circumstances. What due process requires is a contextual matter. This rather pragmatic attitude focussing upon the particularities of a case and the ‘practical obstacles’ has been continued by Kennedy in his opinion for the Court in *Boumediene*, although, as we have seen, he raises some principled separation of powers concerns also.

The mutuality of obligations approach acknowledging that every person has rights *pro hac vice* (Neuman) each and every time he is obliged to abide by the laws of the United States, clearly manifests itself in the dissenting opinion of Justice Brennan in *Verdugo*. On the basis of this mutuality approach the limited government reasoning developed by the *Reid* plurality (of which he was himself a member) is extended by Brennan to aliens. Brennan’s opinion deserves a careful scrutiny because it is of great importance for the conception of judicial cosmopolitanism. He starts by observing that today the extraterritorial scope of American law is expanding. Foreign nationals must take care not to violate American drug laws, securities laws, anti-trust laws and a host of federal criminal statutes (one could add: commercial laws and anti-terrorism laws). For Brennan the *Reid* plurality’s holding that the United States is entirely a creation of the Constitution and that, consequentially, it can only act in accordance with all the limitations imposed by the Constitution cannot be invalidated on the sole ground that the defendant in this case (*Verdugo*) is an alien and that the search of his home occurred abroad. As government officials enforce U.S. criminal laws abroad, the Fourth Amendment protections should travel with them.

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81 ‘Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.’ *U.S. v. Verdugo-Urquidez*, 494 U.S. (1990), at 275.

82 ‘The Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory.’ *U.S. v. Verdugo-Urquidez*, 494 U.S. 276 (1990) Kennedy, J., concurring.

To Brennan constitutional limits are unavoidable correlatives of the exercise of governmental power, whether at home or abroad.<sup>83</sup> What the majority ignore in their contention that an alien must have developed ‘sufficient connections’ with the United States is that by being investigated and prosecuted for violations of U.S. law, it is the Government who establishes the sufficient connection to *Verdugo-Urquidez*.

‘Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose “societal obligations”, (...) such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment. By concluding that respondent is not one of “the people” protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.’<sup>84</sup>

And Brennan quotes the relevant passage in James Madison’s criticism of the *Aliens and Sedition Acts* where he speaks about mutuality. Brennan also rejects the majority’s reading of the reference to ‘the people’ as a term of art restricting the entitlement to constitutional rights to the limited category of ‘members’ of the national community. To Brennan ‘the people’ functions as a rhetorical counterpart to ‘the Government’ so that rights that were reserved to ‘the people’ were destined to protect all those who were subject to ‘the Government’. ‘The people’ are ‘the governed’ who are to be protected from potential abuses of power.<sup>85</sup> In drafting the Constitution and the Bill of Rights the framers intended to establish a constitutional system of limited government that was different from the British conception of the unconstrained ‘Sovereignty of Parliament’. The Bill did not ‘grant’ or ‘confer’ rights to the people, but it was intended to ‘protect’ pre-existent, natural rights and liberties. The Fourth Amendment, for example, does not create a new right against unreasonable searches and seizures. It states that the (pre-existing) ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated* (...)’

## **7. Habeas corpus and limited government**

The consequence of not explicitly overruling *Eisentrager* in *Boumediene* and of underscoring the importance of the casuistic ‘practical concerns’ in determining the extraterritorial scope of the Constitution, will be that in future cases involving alien detainees in *habeas* procedures, courts will have to assess if the situation of the petitioners resembles more that of the *Eisentrager* or that of the *Boumediene* prisoners.<sup>86</sup> The fact that the functional test elaborated in *Boumediene* depends to an important extent on ‘practical concerns’ leaves the Court with a standard that is hardly less

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83 *U.S. v. Verdugo-Urquidez*, 494 U.S. (1990), Brennan, J., dissenting at 281-282.

84 *Ibid.*, at 284.

85 *Ibid.*, at 287.

86 Cf. M. Garcia, ‘*Boumediene v. Bush*: Guantanamo detainees’ right to habeas corpus’, Congressional Research Service Report for Congress, June 18, 2008, available at: <http://www.fas.org/sgp/crs/natsec/RL34536.pdf>

vague and unpredictable in its application than the ‘impractical and anomalous’ test that was put forward in Justice Harlan’s concurring opinion in *Reid*.

The Court could have avoided this if it had tailored its ‘functional test’ in such a manner that the practical factors would have been clearly subordinate and secondary to a normative approach based on the principle of limited government<sup>87</sup> and the principle of checks and balances. From such a normative perspective the Suspension Clause is as much a limitation on Congressional power as it is a source of individual rights.<sup>88</sup> The fundamental idea is that the Constitutional limits on governmental power should apply everywhere the United States exercises power, because it is a system of limited government. As Justice Black said in his opinion in *Reid*, since the United States is entirely a creature of the Constitution and its power and authority have no other source, they are subject to constitutional limitations whether at home or abroad. Extending the limited government perspective to aliens held in long-term custody would also have made it possible to avoid that artificial reading of *Eisentrager* as a judicial opinion containing essentially a functional test in which the practical factors play an unduly important role. Practical obstacles should operate as possible limitations to the applicability of a principled approach and not themselves become the core of a functional test when the important question at stake is whether or not persons who become subject to long-term deprivation of their freedom by the United States have fundamental rights. One of the dangers of the Court’s emphasis on the casuistic practical necessities and particular circumstances relevant to the question whether the writ extends to alien detainees held outside the United States, is that these practical factors are capable of being manipulated by the Government. If the answer to the question whether a prisoner is entitled to *habeas* review depends not only on the degree and the duration of effective control over the location of detention but also on the logistical obstacles and the costs of effectuating the procedures, the Government, advised by well-informed legal counsel, could be tempted, for example, to hold its prisoners captured in the ‘war on terror’ somewhere in Afghanistan or Iraq not too far remote from the theatre of military operations such as to render the exercise of whatever constitutional rights they have ‘impracticable and anomalous’. Although it has been held by the Supreme Court that ‘due process is flexible and calls for such procedural protections as the particular situation demands’,<sup>89</sup> this consideration should not be instrumentalised in order to put

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87 Cf. R. Knowles & M.D. Falkoff, ‘Toward a limited government theory of extraterritorial detention’, 2007 *NYU Annual Survey of American Law*, pp. 637-670, available at [http://www1.law.nyu.edu/pubs/annualsurvey/documents/62\\_N.Y.U.\\_Ann.\\_Surv.\\_Am.\\_L.\\_637\\_2007.pdf](http://www1.law.nyu.edu/pubs/annualsurvey/documents/62_N.Y.U._Ann._Surv._Am._L._637_2007.pdf) I agree with the limited government approach by these authors but not with their unconvincing attempt to distinguish that approach from Neuman’s mutuality of obligations perspective (cf. *ibid.*, p. 661). In Neuman’s theory, as I understand it, the limited government perspective and the mutuality of obligations model are complementary. Principles of limited government and restrictions on government power have become concomitant over time with claims based on subjective rights. In other words restrictions on government power and subjective rights claims are two sides of the same coin. The tendency to reorient the analytical framework with regard to *habeas corpus* exclusively on the inquiry into the lawfulness of the detention and the jailor’s power to detain as is proposed by Jared Goldstein (‘Habeas without rights’, 2007 *Roger Williams University School of Law Faculty Papers*, Paper 16) seems to be an overreaction to the unwillingness (until *Boumediene*!) of the Supreme Court to acknowledge the existence of extraterritorial constitutional rights to (alleged enemy) aliens held by the U.S. Even if it is true as a matter of history that original *habeas* claims developed as a check on imprisonment power and not as a protection of individual rights, and that these kinds of ‘common law *habeas* claims of unauthorized detention, without regard to rights, remain available under federal law’ (*ibid.*, p. 20), it nevertheless remains unclear how a detainee who is not granted a right to counsel, who is not informed of the exact nature of the reasons for his imprisonment and who is not allowed to introduce disculpatory evidence to challenge his status determination, is going to bring his claims before a *habeas* court. The claim that the jailer exceeds his authority has to be made by some party on behalf of the detainee and this can only be done in relation to the alleged violation of the detainee’s rights. Limited government by constitutionally enumerated powers, on the one hand, and subjective rights on the other, are complementary even if historically the limited government perspective had been developed prior to the rights perspective.

88 Goldstein, *ibid.*, p. 642, citing the dissenting opinion of Judge Rogers in *Boumediene* at the Court of Appeals level.

89 *Mathews v. Eldridge*, 424 U.S. (1976) at 334. On the ‘Mathews v. Eldridge balancing test’ in relation to the Guantanamo detainees debate see Tung Yin, ‘Procedural due process to determine enemy combatant status in the war on terrorism’, 2006 *Tennessee Law Review*, (University of Iowa Legal Studies Research Paper, no. 05-22, August, 2005).

the question the other way around: which particular situation should be created in order to ensure that defendants can be denied any due process protections in a ‘flexible’ assessment?<sup>90</sup>

## 8. Extraterritorial rights and the interpretive relevance of international law

This propensity to manipulation which is inherent in flexible standards could be reduced by adopting the minimum standards of international human rights law and international humanitarian law (IHL) as a reference framework for interpreting questions about extraterritorial constitutional rights. But this stands in opposition to the long-established dualist tradition in American jurisprudence that does not bind the national legislature to comply with its treaty obligations. In American jurisprudence treaties that are signed by the U.S. are part of the ‘supreme law of the land’ under the Supremacy Clause. But that does not mean that all treaties are self-executing. In fact the U.S. has often committed itself to the principles of international human rights conventions, but not to their automatic incorporation in domestic law, which means that in such a case the U.S. is internationally bound by its obligations, but an individual cannot enforce rights in domestic litigation by reference to the treaty. Treaties that are not self-executing have to be implemented by legislation in domestic law.<sup>91</sup> Moreover, using international law in constitutional interpretation is criticised for allowing judges to encroach on the constitutional role of the political branches to determine to what extent treaties are relevant in the domestic legal order. But in interpreting the ‘impracticable and anomalous’ standard courts could still ask

‘institutionally appropriate second-order questions that have relevant international-level answers: Is the nation’s power to engage in a particular behaviour inherent in the nature of sovereignty? Is a particular right fundamental in the *international* sense? These questions less closely resemble the political branches’ decisions about whether to comply with international law as a substantive policy matter, and instead fall within the judicial function as traditionally conceived.’<sup>92</sup>

Norms of international law could be used in that manner to inform the question of whether constitutional due process protections should extend extraterritorially in order to render the ‘impracticable and anomalous’ standard more objective and less vague. Within the body of the law of war, for example, there is a well-established distinction between the law applicable in situations of detention by enemy forces which are in robust control over the prisoners, and the law applicable in situations relating to battlefield targeting.<sup>93</sup> For obvious reasons military necessity plays a much greater part in the latter case than in the former. The laws of war have never been exclusively humanitarian law, but have always addressed the legitimate military interests of belligerents and the acceptable methods of warfare.<sup>94</sup> But once the enemy has been

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90 For a dramatic example of the inherent susceptibility to manipulation of flexible approaches see Knowles & Falkoff, *supra* note 87, p. 663. After the Supreme Court’s *Rasul* ruling the Government slowed down considerably its transportations of detainees to Guantanamo and held them in Afghanistan or elsewhere. See also R. Chesney, ‘Judicial review, combatant status determinations, and the possible consequences of *Boumediene*’, 2007 *Harvard International Law Journal Online*, March 30, p. 67.

91 Cf. D. Sloss, ‘The Domestication of International Human Rights. Non-Self-Executing Declarations and Human Rights Treaties’, 1999 *Yale Journal of International Law*, pp. 129-222.

92 Cf. ‘The extraterritorial constitution and the interpretive relevance of international law’, 2008 *Harvard Law Review*, no. 7, p. 1916 (no author mentioned). Available at [http://www.harvardlawreview.org/issues/121/may08/notes/extraterritorial\\_constitution.pdf](http://www.harvardlawreview.org/issues/121/may08/notes/extraterritorial_constitution.pdf) For the relevant norms of international human rights law and international humanitarian law with regard to the ‘unlawful enemy combatants’ at Guantanamo see Piret, *supra* note 12.

93 Cf. ‘The extraterritorial constitution and the interpretive relevance of international law’, *ibid.*, pp. 1924-1928.

94 Piret, *supra* note 12, pp. 73-78.

rendered *hors de combat* and becomes a detainee by the opposite military camp, he becomes automatically entitled to specific protections under the Geneva Conventions.

The criterion of being under effective control as a factor triggering protections under international law also plays an important role in determining the scope of extraterritorial protection under the European Convention on Human Rights. The European Court of Human Rights (ECHR) has held on different occasions that the extraterritorial application of human rights obligations is the exception and not the rule, but there can be situations in which such obligations arise. In *Loizidou v. Turkey* the Court held that its jurisdiction could on some occasions extend beyond the territorial boundaries of member states. When a state exercises effective control over an area outside its national territory as a consequence of a military action (whether lawful or unlawful) ‘the obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration’<sup>95</sup>

The core of the Strasbourg Court’s holding reflects one of the basic assumptions of the model of mutual obligations: that effective control entails responsibility and obligations *vis-à-vis* those who are under that control. Those affected by actions or policies involving military occupation and effective control over an area come within the jurisdiction of the occupant and that extends the territorial scope of the occupant’s positive obligations under Article 1 of the Convention to the same extent.<sup>96</sup> The territorial extension of effective control entails a territorial extension of jurisdiction and of the protective scope of human rights, regardless of the citizenship of the affected persons. The Court affirmed this approach in *Cyprus v. Turkey*<sup>97</sup> where it held that the inhabitants of the part of Cyprus under Turkish occupation fell under the protective scope of the Convention. In *Bankovic*<sup>98</sup> the Court confirmed the ‘effective overall control’ standard but refused to ‘divide and tailor’ the positive obligation under Article 1 of the Convention in order that it could be applicable in situations of incomplete control (proportional to the actual amount of control in the case at hand), such as in NATO’s precision air strikes in the former Yugoslavia.

The restriction of the scope of applicability of the Convention to the *ordre public Européen* was explicitly abandoned when the Court affirmed its jurisdiction in *Issa v. Turkey*,<sup>99</sup> a case where the military action took place in a country that is *not* a party to the European Convention. In *Issa*, the wives and mothers of Iraqi Kurdish shepherds who had been killed and mutilated, allegedly by Turkish military troops, complained of grave violations of human rights. This potentially dramatic extension of the extraterritorial applicability of the Convention was however attenuated as the Court weighted the burden of proof to the standard ‘beyond reasonable doubt’. Therefore it became more difficult to prove that the standard of ‘effective overall control’ had been met in a situation such as a temporary Turkish military incursion into Iraqi territory.

In *Öcalan v. Turkey*<sup>100</sup> the extraterritorial scope of the Convention was clarified with regard to the extraterritorial arrest of individuals. Öcalan, the leader of the Kurdish PKK, was arrested at Nairobi Airport by Turkish special services agents who flew him to Turkey where he was sentenced to death for murder. The Court found that Turkey had brought Öcalan into its jurisdiction by arresting him. That kind of police arrest demonstrated a sufficient amount of control over

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95 *Loizidou v. Turkey*, 1996-VI ECHR.

96 Art. 1 of the ECHR provides: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

97 *Cyprus v. Turkey*, 2001-IV ECHR.

98 *Bankovic v. Belgium*, 2001-XII ECHR.

99 *Issa and Others v. Turkey*, 2004, ECHR App. No. 31821/96.

100 *Öcalan v. Turkey*, 2003 ECHR 125 - 46221/99.

a person for triggering protection under the Convention (in contrast to the NATO air strikes in the former Yugoslavia which were not considered to represent a situation of territorial ‘effective overall control’). The analogy with the distinction between battlefield targeting and detention in the domain of the laws of war is obvious.

So the conclusion is that state parties to the European Convention are obliged to uphold their human rights obligations anywhere they have sufficient control. This has already had some important consequences in the U.K. where the question was raised whether the Convention is applicable to the treatment of Iraqi prisoners by U.K. military personnel in the area of Basra. British courts applied the ‘effective overall control’ standard and found that the protections of the Convention did not apply to Iraqis killed by British soldiers during a patrol, but that it did apply to an Iraqi prisoner who was killed while being detained in a British military prison.<sup>101</sup> As in the *Bancovics* case this line of reasoning can also have some perverse effects because it could create an incentive to kill presumed enemies in a military-style operation rather than arresting them.

## 9. Conclusion

Gerald Neuman’s contention in 1990 that the distance between Rehnquist’s opinion and Kennedy’s concurrence in *Verdugo* was wider than a superficial reading might have suggested,<sup>102</sup> has now been confirmed in Kennedy’s opinion for the Court in *Boumediene*. The Rehnquist line of constitutional reasoning, which Neuman labelled as frankly ‘Hobbesian’, has now been continued by Justice Scalia: the alien (alleged) enemy combatant’s rightlessness results from a combination of two facts: his non-membership in the social contract of the national community and his being held outside the territorial sovereignty of the nation. In the Hobbesian model the commonwealth is in a state of nature with the rest of the world and that implies that it has no external obligations beyond those wilfully entered into for its own advantage. What the Hobbesian fears above all is being unilaterally disarmed.<sup>103</sup>

The mutuality of obligations model is based on a limited government perspective and starts from a totally different basic assumption: that aliens who are outside the United States and who are subjected to American laws when their actions abroad have effects on legitimate American interests, become automatically the beneficiaries of the constitutional protections correlative to the United States’ exercise of power over them. The mutuality of obligations model entails a form of judicial cosmopolitanism. Not that naïve and utopian cosmopolitanism which dreams of ‘global governance’ and ‘governance without government’,<sup>104</sup> but the kind of constitutional cosmopolitanism that spreads from the fundamental ethical principles common to the Western Legal Tradition which oblige us to grant even our enemies those minimum protections that *any* person is entitled to, simply because he is a human being.<sup>105</sup> As we have seen, this cosmopolitan conception of the U.S. Constitution based on a limited government perspective and a ‘mutuality of obligations model’ (Neuman) was articulated in Justice Brennan’s dissent in *Verdugo*.

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101 *Al-Skeini v. Secretary of State for Defence*, 2008 I A.C. 153.

102 Neuman, *supra* note 29, pp. 975-976.

103 *Ibid.*, p. 985.

104 For a critique of the naïve idealistic version of cosmopolitanism in the discourse on ‘global governance’, see J.-M. Piret, ‘Politics, Sovereignty and Cosmopolitanism in Times of Globalisation’, 2008 *Archiv für Rechts- und Sozialphilosophie*, forthcoming.

105 On ‘personhood’ (in contradistinction to ‘citizenship’) as the subject of human rights, see T. Gill & E. van Sliedregt, ‘Guantanamo Bay: A Reflection on the Legal Status and Rights of “Unlawful Enemy Combatants”’, 2005 *Utrecht Law Review*, no. 1, pp. 37, 47-48.

Brennan's cosmopolitanism ensues from a legal philosophy that identifies the nation with the Constitution, which creates the structures of government and defines the limits of its authority. This conception assumes that the U.S., as a juridical entity, have no existence outside of the Constitution and that notably Article IV and the Bill of Rights are to be conceived as a charter laying down the norms and prohibitions that circumscribe and delimit the extent of the Government.<sup>106</sup> The language of the due process clause of the Fifth and Fourteenth Amendments confirms the cosmopolitan reading as no particular class of people is determined as the beneficiary of the protections they guarantee. 'No person shall be deprived of life, liberty or property without due process of law' (emphasis added). The same applies to the eighth Amendment: 'cruel and unusual punishment shall not be inflicted'. The implied object of the phrase can be read as: *to anyone*. These rights are not the property of a specific class of persons, but the subjective counterpart of the normative boundaries imposed upon government by the Constitution. Without denying the enduring importance of the nation state, even in times of globalization, the cosmopolitan interpretation makes it impossible to hold that the Government owes its alien detainees no duties when they are held outside the U.S. 'The Fourth, Fifth and Eighth Amendments present themselves as universal prohibitions' and are 'the expression of principles of right behaviour'.<sup>107</sup> The fundamental principles a nation embraces should be honoured, not only with regard to its own citizens but to everyone who falls into the power of that nation.

Of course a nation may grant its citizens political rights, civil rights and some privileges and immunities that it denies to aliens, such as the right to vote, the right to be eligible, the right to hold public office or the right to enter the country when abroad. But we should distinguish from this reasoning the situations where a Government is deliberately inflicting injury to persons who are, in the language of the law of war, *hors de combat*, and under the total control of that Government. As Ronald Dworkin points out, a civilised Government that is abiding by the rule of law has 'no right or authority deliberately to injure foreigners for reasons or in circumstances in which it would not be permitted to injure its own citizens. This is emphatically true when the injury is grave. The domain of human rights has no place for passports.'<sup>108</sup>

On the premise that the Constitution does not protect the rights of non-citizens outside the U.S. the Bush administration thinks it may kidnap them and remove them to other countries for 'special' interrogation or imprison them indefinitely in extraterritorial detention camps. The elementary requirements of humanity and of due process cannot be withheld to our enemies on the grounds that they, as alleged (or proven) terrorists, have forfeited their rights to be treated as a person.<sup>109</sup> Adopting such an attitude would be the retributionist reflection of the terrorists' view that the victims of political violence deserve their fate and that defencelessness, or to use the language of the laws of war: the condition of being placed *hors de combat*, is no protection against continued assaults. The disgraceful policy of the Bush administration has damaged the honour and the international reputation of a nation that has always pretended to be a beacon of the rule of law.

In its *Boumediene* ruling the Supreme Court, once again, disapproved of the Government's deliberate policy to create legal 'black holes' where it could do *anything* without any legal constraint. *Boumediene* falls short of the ideals of judicial cosmopolitanism and the principled perspective of the mutuality of obligations model. In 2005 Gerald Neuman, who has been the

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106 Cf. O. Fiss, 'The War against Terrorism and the Rule of Law', 2006 *Oxford Journal of Legal Studies*, no. 2, p. 249.

107 *Ibid.*, p. 253-254.

108 R. Dworkin, *Is Democracy Possible Here?*, 2006, (Chap. 2, 'Terrorism and Human Rights'), p. 48.

109 Cf. M. Dorf ('Why the Military Commissions Act is No Moderate Compromise', <http://writ.news.findlaw.com/dorf/20061011.html>). Dorf rightly insists that 'due process rights are not rights for terrorists, but for people *accused* of being terrorists'.

leading advocate of this model amongst American constitutional lawyers, agreed that it is simply not the current law for non-resident aliens.<sup>110</sup> After *Boumediene* this is still true, because this ruling represents a casuistic step forward for the ‘global due process’ model developed in Harlan’s concurring opinion in *Reid* and in Kennedy’s concurring opinion in *Verdugo*. Nevertheless, there is also a slight shift to a more principled approach, despite the heavy emphasis on practical concerns in Kennedy’s opinion. For the functional test that Kennedy puts forward focuses also on the ‘nature of the place where the person is detained’. This creates some room for integrating the ethical nexus between control and responsibility, which is at the core of the mutuality of obligations model (and which also plays a preponderant role in the relevant case law of the ECHR on extraterritoriality) in Kennedy’s functional perspective.<sup>111</sup> That leaves the possibility of a principled approach based on the mutuality of obligations perspective being dependent on the contingent nature of the practical circumstances of each case at hand. But even that can be considered as a great victory in comparison to Scalia’s narrow ‘members only’ perspective and Roberts’ exaggerated obsequiousness to the political branches in matters concerning the minimal rights of individuals within the power of the United States. As Ronald Dworkin wrote, *Boumediene* is a great victory for the rule of law. Nevertheless, it is a victory that may reveal itself to be also precarious given the practice of partisan entrenchment in the U.S. judiciary. It needs only one right-wing appointment in the Supreme Court to overrule *Boumediene*.<sup>112</sup> And given the pragmatic, functional and casuistic approach in Kennedy’s opinion, which leaves *Eisentrager* formally a valid precedent and leans heavily on the practical circumstances of the case, overruling *Boumediene* could even be done without too much damage to the rule of *stare decisis*.

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110 G. Neuman, ‘Extraterritorial rights and constitutional methodology after *Rasul v. Bush*’, 2005 *University of Pennsylvania Law Review*, p. 2077.

111 Nothing in the language of Kennedy’s functional test implies that its scope of applicability should be restricted to Guantanamo. Nothing precludes it from being applied to other detention facilities in Afghanistan, Iraq or elsewhere.

112 The final version of this article was written before the presidential elections in the U.S.