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ARTICLE: **INTERNATIONAL LAW AND THE WAR ON TERROR:** Rights over Borders: Transnational Constitutionalism and Guantanamo Bay

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LEXISNEXIS SUMMARY:

... Yet in Boumediene the Court extended the constitutional right of habeas corpus not only to foreign nationals outside our borders, but to what some might call the modern-day equivalent of "enemy aliens"--foreign nationals said to be associated with the enemy in wartime. ... For all its assertions that "everything changed" after the terrorist attacks of September 11, the Bush administration relied on old-fashioned conceptions of sovereignty and rights in arguing that habeas corpus jurisdiction did not extend to Guantanamo, and that federal courts should have no constitutionally recognized role there. ... In particular, international human rights law has made substantial inroads on traditional notions of sovereignty and territoriality that once left states both unaccountable to outsiders for what they did to their own citizens inside their borders, and unaccountable to domestic law for what they did to others outside their borders. ... The United States argued in Boumediene that the key to Eisentrager was that the prisoners were not and had never been within U.S. sovereign territory, and that because Guantanamo was subject to Cuban, not U.S., sovereignty, a similar result should obtain. ... The Inter-American Human Rights Commission, for example, has stated that the obligations of the Inter-American Convention on Human Rights apply wherever a state exercises effective control over an individual, regardless of territorial considerations. ... Extending habeas corpus to Guantanamo detainees as a constitutional matter insists on the rights of individuals over formal conceptions of sovereignty and territoriality, and on the role of courts in ensuring that democracies respect human rights.

TEXT:

[*47] In June 2008, more than six years after the first prisoners were brought to a makeshift military prison camp at Guantanamo Bay, Cuba--bound, gagged, blindfolded, and labeled "the worst of the worst"--the Supreme Court in *Boumediene v. Bush* [n1] declared that they have a constitutional right to challenge the legality of their detention in federal court. The detainees may be excused if they did not leap for joy at the result. After all, the Court ordered no one released, did not address the question of whether the detainees were lawfully detained or treated, and merely decided as a threshold matter that they had a right to take their cases to a federal district court--a question the Court seemed to have decided four years earlier in the first Guantanamo case it considered, *Rasul v. Bush.* [n2] Yet the decision was in fact a profound--and in many respects surprising--defeat for the Bush administration in the legal "**war on terror**." It means

that Guantanamo is no longer a "law-free zone"--and that the courts will play a vital role in ensuring that the rule of law applies to the ongoing struggle with Al Qaeda. As critically important as the *Boumediene* decision is for the place of law in the **war on terror**, however, its most profound implications may lie in what it reflects about altered conceptions of sovereignty, territoriality, and rights in the globalized world.

I.

Boumediene is groundbreaking in at least three respects. First, for the first time in its history, the Supreme Court declared unconstitutional a law enacted by Congress and signed by the president on **[*48]** an issue of military policy in a time of armed conflict. While the Court has on rare occasions found that presidents exceeded their powers where they acted *contrary* to congressional will during wartime, as in *Youngstown Sheet & Tube Co. v. Sawyer* [n3] and *Little v. Barreme*, [n4] this decision went much further, upending the joint decision of the political branches acting together on a military matter during a time of military conflict.

Second, and also for the first time, the Court extended constitutional protections to noncitizens outside U.S. territory during wartime. As recently as 2001, the Court had stated--without reasoning--that the Constitution was no solace for foreign nationals outside our borders, articulating a traditional understanding of the Constitution as guided by territory and citizenship. [n5] Yet in *Boumediene* the Court extended the constitutional right of habeas corpus not only to foreign nationals outside our borders, but to what some might call the modern-day equivalent of "enemy aliens"--foreign nationals said to be associated with the enemy in wartime.

Third, the Court declared unconstitutional a law restricting federal court jurisdiction. The Court has traditionally sought to avoid such confrontations through the application of statutory interpretation, bending over backward to interpret statutes to preserve judicial review where it might be unconstitutional to deny such review. [n6] Only on two prior occasions has the Court actually declared a jurisdiction-stripping law unconstitutional, and on both occasions it **[*49]** found reasons for doing so that were independent of the pure question of jurisdiction. [n7] The courts have traditionally avoided enforcing constitutional limits on Congress's control over jurisdiction because congressional control is seen as important in conferring democratic legitimacy on an unelected institution. Yet in *Boumediene*, despite the availability of statutory constructions that could have saved the statute, the Court declared Congress's repeal of habeas corpus unconstitutional.

The result in *Boumediene* was also surprising because the government had precedent on its side. In 1950, the Supreme Court had expressly ruled that the writ of habeas corpus was unavailable to enemy fighters captured and detained abroad during wartime. [n8] Both the district court and the court of appeals had found that decision, *Johnson v. Eisentrager*, to be controlling, and no subsequent case law had directly undermined its reasoning.

Critics will point to these features as evidence that the Court's decision was illegitimately "activist." To many observers, there are good reasons for judicial reticence in military matters, especially where the political branches act in concert; [n9] good reasons not to extend constitutional protections to foreign nationals; [n10] and good reasons for the Court to avoid a direct confrontation with Congress over the scope of its jurisdiction. Justice Antonin Scalia charged in dissent that "[w]hat drives today's decision is neither the meaning **[*50]** of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy." [n11]

At the same time, the decision was not entirely unprecedented. It vindicated the right to a "writ of habeas corpus," an ancient form of judicial remedy that finds its origins in the Magna Carta, and that the Framers deemed so fundamental that they included it in the main body of the Constitution at a time when they considered a "Bill of Rights" unnecessary. [n12] Habeas corpus gives prisoners the right to challenge the legality of their detentions in court, and is both an essential part of the separation of powers and the "stable bulwark of our liberties." [n13] It is fundamental to the protection of all other rights, because no right can be safely exercised if the government is free to imprison people without judicial recourse.

In addition to enforcing a fundamental and long-standing right, the Court applied established doctrine--albeit in a new setting. In assessing whether the constitutional right of habeas corpus extended to Guantanamo, the Court applied a contextual and pragmatic inquiry that it had developed and applied in assessing whether constitutional rights extend to "unincorporated territories," jurisdictions over which the United States exercises control but does not intend to incorporate as states. That test asks whether the application of a given constitutional right would be "anomalous or impracticable" in light of the particular circumstances of the jurisdiction, and applies those rights that would not create serious anomalies or impracticalities.

The real significance of the Court's decision in *Boumediene*, however, lies not in whether it correctly applied or modified past precedent to a novel context, but in what it portends for modern-day conceptions of sovereignty, territoriality, and rights. For all its assertions that "everything changed" after the terrorist attacks of September 11, the Bush administration relied on old-fashioned conceptions **[*51]** of sovereignty and rights in arguing that habeas corpus jurisdiction did not extend to Guantanamo, and that federal courts should have no constitutionally recognized role there. The Court's decision, by contrast, reflects new understandings of these traditional conceptions, understandings that pierce the veil of sovereignty, reject formalist fictions of territoriality where the state exercises authority beyond its borders, and insist on the need for judicial review to safeguard the human rights of citizens and noncitizens alike.

While *Boumediene* may appear unprecedented from a domestic standpoint, it fits quite comfortably within an important transnational trend of recent years, in which courts of last resort have played an increasingly aggressive role in reviewing (and invalidating) security measures that trench on individual rights. The Law Lords in Britain, the Supreme Courts of Canada and Israel, the European Court of Human Rights, and the Constitutional Court of Germany have all issued major decisions restricting political prerogative on issues of terrorism and national security in the name of individual rights. [n14]

[*52] These increasingly confident judicial assertions of authority in turn reflect global transformations in **international law** since the end of World War II, including most significantly international human rights law. The latter half of the 20th century and the beginning of the 21st have witnessed an extraordinary explosion of human rights, beginning with the UN's Universal Declaration of Human Rights, and finding reflection in international treaties such as the International Covenant on Civil and Political Rights, the Geneva Conventions, and the Convention Against Torture. This trend is reinforced by regional agreements for the establishment and enforcement of human rights, especially the European Convention on Human Rights; the growth in influence and power of nongovernmental human rights groups; the increasing resort by domestic courts to international and comparative standards in the interpretation of their own laws; [n15] and the recognition of "universal jurisdiction" as a way of holding abusers of certain fundamental human rights accountable wherever they are found. [n16]

These developments have transformed **international law** from a subject that concerned only state-to-state relations to one that focuses just as significantly on the relations of states to their own citizens, and to others subject to their authority. In particular, international human rights law has made substantial inroads on traditional notions of sovereignty and territoriality that once left states both unaccountable to outsiders for what they did to their own citizens inside their borders, and unaccountable to domestic law for what they did to others outside their borders. The lasting significance of *Boumediene* will rest on its recognition of, and critical role in, the transformation of our understandings of this interplay between sovereignty, territoriality, and human rights.

[*53] II.

The central issue in *Boumediene* was whether the privilege of habeas corpus protects foreign nationals captured abroad and held as enemy combatants at Guantanamo. The Bush administration consciously chose to house its detainees at Guantanamo, a military base in Cuba that we have the right to lease as long as we choose, because it thought its location beyond our borders would afford it a "law-free zone."

In 2004, the Court ruled in its first Guantanamo case, *Rasul v. Bush*, that the existing federal habeas statute

provided review to persons held at Guantanamo. [n17] But that decision was superseded when, in the Military Commissions Act, Congress stripped the courts of habeas jurisdiction over detainees' claims. [n18] As a result, the Court in *Boumediene* was confronted with the question of whether Guantanamo detainees have a *constitutional* right to habeas corpus--that is, one that cannot be taken away unless Congress suspends the writ in times of "rebellion or invasion." The Court in *Rasul* had simply employed statutory interpretation, and as such left Congress free to respond, as it did, by changing the law. In *Boumediene*, however, the Court thwarted the will of the president and Congress acting together, and did so on constitutional grounds--which are far less susceptible to a political override.

In arguing that habeas did not extend to Guantanamo, the administration invoked traditional territorial conceptions of national sovereignty and rights. While the Constitution is unquestionably supreme within U.S. sovereign territory, courts have generally been reluctant to extend its protections beyond our borders, even to restrict our own government's actions. For example, the Court has held that the Fourth Amendment does not apply to a search by U.S. agents of a Mexican national's home in Mexico, [n19] and that the Fifth Amendment's Due Process Clause does not protect foreign nationals with respect to admission to the United States, even if they have been **[*54]** detained on Ellis Island for years. [n20] And in *Johnson v. Eisentrager*, the Court noted that the foreign prisoners had committed their offenses abroad, been captured abroad, tried abroad, and had never been inside U.S. territory, in declining to extend habeas corpus to them. [n21]

The government also stressed the status of the detainees as foreign enemies of the state. Even if the constitutional right of habeas corpus might extend to a U.S. citizen held by the United States abroad, the government maintained, it should not reach foreigners deemed to be enemies in a military conflict. The Supreme Court had previously extended constitutional protections to U.S. citizens abroad, [n22] but the government argued that those cases rested on the ties of citizenship and could not be extended to foreign nationals--much less those associated with the enemy.

The *Boumediene* Court ruled that at least some constitutional rights can reach beyond U.S. borders to foreign nationals. As a formal matter, it did so by looking back, not forward. It initially examined the historical evidence regarding the scope of habeas corpus under English common law at the time of the Founding, and concluded that the evidence was ambiguous. British courts had exercised habeas jurisdiction over claims of alleged "enemy aliens" during wartime, but they had generally been in custody in England at the time. British courts had also exercised habeas jurisdiction over India and Ireland, but had declined to do so over Scotland. The Court ultimately concluded that this historical evidence left the issue open: There were no clear precedents establishing or denying habeas corpus jurisdiction in analogous circumstances (in large part because there were no precisely analogous circumstances).

The Court then turned to its own jurisprudence concerning the application of the Constitution to so-called unincorporated territories--areas such as Guam or the Philippines that were (for a time) under U.S. control, but were not intended to be "incorporated" as states into the Union. The Court held that the Constitution applies of its own force in full to "incorporated" territories destined to **[*55]** become states, but applies only in part to "unincorporated" territories. The selective application of the Constitution to unincorporated territories was motivated by the need to be respectful of the territory's own legal tradition and culture. Accordingly, the Court--in what have come to be known as the *Insular Cases*--undertook a context-specific inquiry that asks "whether judicial enforcement of the provision would be 'impracticable and anomalous.'" [n23]

The *Boumediene* Court read *Johnson v. Eisentrager* within this doctrinal tradition, noting that the *Eisentrager* decision had cited a variety of pragmatic factors in concluding that habeas corpus should not extend to prisoners of war held at Landsberg Prison in Germany, including "the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding." [n24] The United States argued in *Boumediene* that the key to *Eisentrager* was that the prisoners were not and had never been within U.S. sovereign territory, and that because Guantanamo was subject to Cuban, not U.S., sovereignty, a similar result should obtain. The Court rejected this argument on two grounds. First, the *Eisentrager* Court had cited the petitioners' relationship to U.S. sovereign territory only briefly, while employing other arguments that seemed in keeping with the broader functional inquiry used in the *Insular Cases.* Second, and more significantly, the Court noted that because "sovereignty" was determined by the political branches, making sovereignty

the linchpin for rights protections would make it "possible for the political branches to govern without legal constraint" n25 --or in other words, to establish "law-free zones." Accordingly, the Court concluded, questions of extraterritorial application of the Constitution "turn on objective factors and practical concerns, not formalism." n26

The majority then determined that several factors distinguished *Eisentrager* and made application of habeas corpus to the Guantanamo detainees neither anomalous nor impracticable. *Eisentrager* concerned individuals who did not dispute their status as "enemy aliens" captured during a declared war; the Guantanamo detainees, **[*56]** by contrast, were not citizens of any state with which the United States is at war, and denied that they had been correctly identified as "enemy combatants." The *Eisentrager* petitioners had been convicted of war crimes after a full-fledged criminal trial; the Guantanamo detainees had received only the summary procedure of a Combatant Status Review Tribunal, the procedural shortcomings of which made habeas corpus review more essential. The *Eisentrager* petitioners were held in Landsberg Prison in Germany, which was subject to the control of the Allied Powers, while the United States exercises exclusive jurisdiction and control over Guantanamo. And while the United States faced significant security threats in Germany at the end of World War II, the government cited no security obstacles to extending habeas jurisdiction to Guantanamo, an isolated location thousands of miles from any battlefield.

As the dissenting justices pointed out, however, this sort of all-things-considered contextual analysis gives rise to few general principles of law. As a result, it leaves government officials guessing as to which, if any, constitutional constraints will apply to official action abroad, and gives the Court a relatively free hand in future cases. Moreover, as Justice Scalia illustrates in his dissent, one could read both the British and the U.S. precedent to preclude extension of habeas corpus to foreign nationals held as enemy combatants outside U.S. borders.

III.

The real significance of the *Boumediene* decision, however, lies not in how it reads the past, but in what it says about the present and the future. Although the decision rested entirely on domestic constitutional grounds, the Court's ruling reflects important modern-day developments in conceptions of sovereignty, rights, and judicial review--each of which has been profoundly transformed by the human rights revolution of the past half century.

As noted above, the worldview underlying the government's position in *Boumediene* was decidedly old-fashioned. It treated sovereignty as absolute, and strictly tied to territory; and viewed rights as derivative of sovereignty, and therefore also territorially limited. Within our borders, the United States is sovereign, and the governing sovereign law, the Constitution, establishes rights that are subject to judicial protection and enforcement. Guantanamo, however, lies **[*57]** outside our borders and is subject to the absolute sovereignty of another nation, Cuba. The government argued, therefore, that constitutional rights cannot govern there, even if the United States, as a practical matter, exercises exclusive jurisdiction and control.

This worldview is consistent with traditional conceptions of sovereignty and **international law**. At the time of the Constitution's framing, for example, nations were seen as independent sovereigns and sovereignty was seen as virtually impregnable. It followed, almost as a corollary, that national sovereignty was territorially limited. If sovereignty is absolute, it cannot coexist with the sovereignty of another nation, and so territorial lines are necessary to demarcate the beginning of one nation's absolute sovereignty and the end of another's.

Traditionally, the realms of domestic and **international law** were similarly defined by borders. A state's domestic laws were presumptively limited to its territory, and only in limited contexts could domestic law extend extraterritorially--as such an extension would risk interfering with the absolute sovereignty of another state. And as a traditional matter **international law** addressed relations among, not within, states. The objects of international and domestic law were thus strictly divided. **International law** concerned external relations between nation-states as such, while domestic law concerned the relation between "the people" and their government. Individual rights were accordingly a domestic matter, subject to the will of the sovereign, and not a concern of **international law**.

The Bush administration's arguments rested on these notions: Sovereignty is territorially defined, and individual rights are a matter of the sovereign's domestic law. That domestic law generally does not extend beyond our borders, except (and even this exception is a post-constitutional development) when the state's actions affect its own citizens abroad. As domestic law, the Constitution should not extend beyond our borders to another sovereign's territory unless the extension is based on the (domestic) tie between the state and its own citizens.

This understanding still largely governed international and domestic law at the time *Eisentrager* was decided. Long before September 11, however, these conceptions had begun to change. International human rights, globalization, and modern communications and transportation have rendered borders and sovereignty considerably **[*58]** less sacrosanct, while simultaneously providing new bases for the protection of rights. Sovereigns no longer enjoy absolute supremacy within their own borders, but are subject to the limits of inalienable human rights. [n27] Those rights in turn are predicated not on an individual's geographic location, nor on his or her relation to the state, but on human dignity, a quality that exists independently of both territory and citizenship.

International human rights norms have increasingly been interpreted as applicable beyond a nation's own borders, wherever the nation exercises effective control over a place or a person. [n28] The Inter-American Human Rights Commission, for example, has stated that the obligations of the Inter-American Convention on Human Rights apply wherever a state exercises effective control over an individual, regardless of territorial considerations. It reasons that the rights articulated in the Convention inhere in human dignity, and therefore it should not matter where the individual is found. [n29] If a Convention state exercises control over the individual, it must respect his rights under the treaty. The European Court of Human Rights has similarly ruled that the obligations of the European Convention apply wherever a state exercises effective control over a particular jurisdiction, and in some instances, over a particular individual. [n30] Applying this **[*59]** principle, the United Kingdom's Law Lords held that the European Convention on Human Rights applied to a British prison maintained in Basra, Iraq, because the British Army exercised effective control over the prison. [n31]

Even though the United States has been a leader in pressing for many of these international developments, it has found the implications for its own conduct difficult to accept. When the Senate has ratified human rights treaties, for example, it has generally insisted on reservations that ensure that the treaty's obligations do no more than duplicate those already imposed by our own Constitution. [n32] Moreover, the Bush administration has relied on territorial and citizenship arguments to shield other "**war on terror**" initiatives from legal constraint. Thus it maintained that the international treaty prohibition on cruel, inhuman, and degrading treatment did not protect foreign nationals waterboarded and otherwise abused by the CIA in secret "black sites" abroad. [n33] And it has argued that federal officials' "renditions" of foreign nationals to other countries to be interrogated under torture there implicate no constitutional rights so long as the individual was not admitted to the United States when the rendition occurred. [n34]

[*60] The *Boumediene* decision suggests that the Court is more open to these transformations in international legal culture than is the administration. That in turn may be because under the modern conception of **international law**, the legitimacy of judicial review has itself been reinforced in important ways. The international human rights regime insists that democracy is not the ultimate test of a legitimate government, but that respect for inalienable human rights is. And democracies are not particularly likely to protect human rights when the majority feels threatened by outsiders or by a minority group. In those settings, as in the "**war on terror**," the political branches, responsive as they are to majoritarian desires, are likely to sacrifice the rights of those without a powerful voice in the political process in the name of preserving the security of the majority. [n35] This is not a flaw unique to the United States, but is an inevitable feature of a majoritarian process. Precisely for that reason, courts have an essential role to play in protecting individual rights on behalf of those without a voice in the political process. [n36]

The transnational trend referred to above, in which courts have restrained the national security measures of political branches, reflects an increasingly broad acceptance of the importance of individual rights, and of the appropriate role of courts in enforcing them. When the Israeli Supreme Court barred coercive interrogations of Palestinian terror suspects, the Law Lords deemed incompatible with human rights obligations a U.K. law authorizing indefinite detention of

foreign terror suspects, or the European Court of Human Rights ruled that nations may not deport a foreign national suspected of terrorist ties to a country where he faces a risk of cruel, inhuman, or degrading treatment, they were insisting on the propriety--and indeed the *necessity*--of meaningful judicial review where states take action against outsiders in the name of national security. The Supreme Court's decision in *Boumediene* does the same. Chief Justice John Roberts's complaint that the majority gave "unelected, politically unaccountable judges" an inappropriate role in overseeing "the Nation's foreign policy" [n37] misses the point of the last half century. **[*61]** The protection of fundamental human rights requires not only the piercing of once-impermeable sovereign borders, but also the robust intervention of unelected courts.

Conclusion

The United States' legal defense of Guantanamo in the *Boumediene* case turned ultimately on outmoded claims about sovereignty, territoriality, and rights. The Court's rejection of those arguments in turn is in keeping with a global shift in modern understandings of these concepts. Sovereignty is no longer absolute, territorial, and sacred, but conditional and limited by legal obligations to the individual that simultaneously pierce the border--insisting that a state respect the rights of those within its own jurisdiction--and extend beyond the border, limiting the state's range of choice wherever it exercises effective control over an individual or place. At the same time, the Court's confident assertion of its own role in enforcing rights is also in keeping with a transnational understanding that, while democracy is good for many things, it is not the sine qua non of legitimate government; respect for individual autonomy and human rights is. Because democracies are not particularly good at protecting the rights of unpopular minorities, especially those minorities outside the polity, the courts have an essential role to play. Extending habeas corpus to Guantanamo detainees as a constitutional matter insists on the rights of individuals over formal conceptions of sovereignty and territoriality, and on the role of courts in ensuring that democracies respect human rights. It ushers U.S. law into the 21st century.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentInternational DetaineesInternational LawSovereign States & IndividualsHuman RightsTerrorismMilitary & Veterans LawWarfare

FOOTNOTES:

n1 553 U.S. , 128 S. Ct. 2229 (2008).

n2 542 U.S. 466 (2004).

n3 343 U.S. 579, 609 (1952). In *Youngstown*, the Supreme Court invalidated President Truman's seizure of the steel mills during the Korean War, where Congress had "rejected an amendment which would have authorized such governmental seizures in cases of emergency." *Id.* at 586; see also *id.* at 597-609 (Frankfurter, J., concurring); *id.* at 656-660 (Burton, J., concurring); *id.* at 662-666 (Clark, J., concurring in the judgment).

n4 6 U.S. (2 Cranch) 170 (1804). In *Little*, the Court held unlawful a seizure pursuant to presidential order of a ship during the "Quasi War" with France. The Court found that Congress had authorized the seizure only of ships going *to* France, and therefore the president could not unilaterally order the seizure of a ship coming *from* France.

n5 Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

n6 See, e.g., INS v. St. Cyr, 533 U.S. 289, 304 (2001).

n7 In US v. Klein, 80 U.S. 128 (1871), the Court struck down a statute stripping federal court jurisdiction over claims by former rebel soldiers during the Civil War who had obtained presidential pardons, but the decision can be seen as resting on the impermissibility of interfering with the president's pardon power. And in Plaut v. Spendthrift Farm, 514 U.S. 211 (1995), the Court invalidated a statute that sought to reopen prior final judgments under the Securities and Exchange Act, on the narrow ground that it violates the separation of powers for Congress to reopen a final judgment of the courts.

n8 Johnson v. Eisentrager, 339 U.S. 763 (1950).

n9 Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inquiries in Law 1 (2004) (available at http://www.bepress.com/til/default/vol5/iss1/art1/); Eric Posner and Adrian Vermeule, Terror in the Balance: Security, Liberty and the Courts (2007); John Yoo, War By Other Means: An Insider's Account of the **War on Terror** (2007).

n10 J. Andrew Kent, A Textual and Historical Case Against a Global Constitution, 95 Geo. L. J. 463 (2007).

n11 Boumediene, 128 S. Ct. at 2302 (Scalia, J., dissenting). Chief Justice Roberts similarly declared that "[a]ll that today's opinion has done

is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary." *Id.* at 2280 (Roberts, C.J., dissenting).

n12 The Bill of Rights was drafted subsequently as the first 10 amendments to the Constitution, at the insistence of the ratifying conventions.

n13 Boumediene, 128 S. Ct. at 2245 (quoting 1 William Blackstone, Commentaries *137).

n14 In Great Britain, the Law Lords, the equivalent of our Supreme Court, have since 9/11 issued three decisions rejecting counterterrorism measures in whole or in part. They declared invalid a law authorizing indefinite preventive detention of foreign terror suspects, A and others v Secretary of State for the Home Department, 2 A.C. 68 (U.K.H.L. 2005); barred any consideration of evidence obtained by torture, even when British authorities played no part in the torture, A and others v Secretary of State for the Home Department (No 2), 2 A.C. 221 (U.K.H.L. 2005); and barred the use of secret evidence in procedures employed to justify imposing curfews on terror suspects, Secretary of State for the Home Department v MB, [2008] A.C. 48 (U.K.H.L. 2008).

In 2007, Canada's Supreme Court ruled that the use of secret evidence to detain foreign nationals suspected of terrorist activities was unconstitutional. Charkaoui v. Minister of Citizenship and Immigration, 2000 S.C.R. LEXIS 9 (Can. 2000). And in 2008, the Court unanimously ordered the Canadian government to disclose to Omar Khadr, a Canadian held at Guantanamo, evidence that Canadian authorities had obtained from him when they interviewed him there. Minister of Justice v. Khadr, 2008 Can. Sup. Ct. LEXIS 32 (Can. 2008).

Israel's Supreme Court has barred the use of coercive interrogation tactics against Palestinian terror suspects, HCJ 5100/94 Public Committee Against Torture in Israel v. State of Israel [1999] IsrSC , forbade detention of Palestinians as "bargaining chips" to seek the release of Israeli hostages, CrimFH 7048/97 A v. Minister of Defence [2000] IsrSC 44(1) 721, and restricted when the military may seek to kill suspected terrorist leaders. HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel [2005] IsrSC .

The European Court of Human Rights has barred countries from deporting terror suspects to countries where they face a risk of cruel, inhuman or degrading treatment. Saadi v Italy, [2008] Eur. Ct. H.R. 37201/06.

And Germany's highest court has twice in recent years ruled that computer "data mining" measures designed to identify terrorists violate privacy rights. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 4, 2006, 1 BvR 518/02 (F.R.G.); Bundesgerichtshof [BFG] [Federal Court of Justice] Oct. 26, 2006, III ZR 40/06 (F.R.G.).

n15 See, e.g., Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558, 573 (2003).

n16 See, e.g. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that U.S. courts could hold a Paraguayan official liable for torturing a Paraguayan in Paraguay); Kenneth Roth, The Case for Universal Jurisdiction, 80 Foreign Affairs 5 (Sept./Oct. 2001).

n17 542 U.S. 466.

n18 The Military Commission Act provided that "[n]o 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 United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C.A. § 2241(e)(1) (Supp. 2007).

n19 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

n20 United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

n21 Johnson v. Eisentrager, 339 U.S. 763, 778 (1950).

n22 See, e.g., Reid v. Covert, 354 U.S. 1 (1957).

n23 Boumediene, 128 S. Ct. at 2255 (quoting Reid, 354 U.S. at 74-75) (Harlan, J., concurring in result)).

n24 *Id.* at 2257.

n25 *Id.* at 2258-59.

n26 *Id.* at 2258.

n27 See, e.g., Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 452-83 (2008).

n28 Sarah Cleveland, Geography or Control? International Jurisdiction and Constitutional Protection for Aliens Abroad, presented at Georgetown University Law Center Symposium on Human Rights and Immigrants' Rights (2007) (manuscript on file with author).

n29 Coard and Others v. the United States ('US military intervention in Grenada'), IACHR Report No. 109/9, Case No. 10.951, Sec. V, P 37 (Sept. 29, 1999) (available at http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm).

n30 The Court has stated that the obligations of the European Convention on Human Rights are primarily territorial, but extend where a state, "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government." Bankovic and Others v. Belgium and 16 Other Contracting States, Eur. Ct. H.R. appl. No. 52207/99; Adm. Dec., P 71 (Dec. 12 2001). And in a case involving Turkey's abduction of a terror suspect from Kenya, the Court held that Turkey's obligations were triggered by the suspect's abduction, even though it took place in Kenya. Ocalan v. Turkey, P 93, Eur. Ct. H.R. appl. No. 46221/99, Judgment P 93 (Mar. 12, 2003).

n31 R. (on the application of Al-Skeini and others) v. Sec'y of State for Defence, 1 A.C. 153 (U.K.H.L. 2007).

n32 Ryan Goodman, Human Rights Treaties, Invalid Reservations, and State Consent, 96 Am. J. Int'l L. 531 (2002); William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party? 21 Brook. J. Int'l L. 277, 295-96 (1995).

n33 This interpretation, adopted in secret, was disclosed in response to questions put to Alberto Gonzales when the Senate was considering whether to confirm him as attorney general. See, e.g., Transcript of Confirmation Hearing on the Nomination of Alberto Gonzales to be U.S. Attorney General: Hearing Before the S. Comm. on Judiciary, 109th Cong. (Jan. 6, 2005) (available at http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6.html). When Congress learned that the administration had adopted this interpretation, it overruled it in what came to be known as the McCain Amendment, which insisted that the obligation to desist from cruel, inhuman, and degrading treatment applied to everyone held in U.S. custody, no matter what their citizenship and no matter where they are held. The McCain Amendment was included as Title X in Division A of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, H.R. 2863, 109th Cong. (2006) (available at

http://www.govtrack.us/congress/billtext.xpd?bill = h109-2863).

n34 U.S. Brief in Arar v. Ashcroft, 532 F.3d 157, No. 06-4216-cv, 27-35 (available at http://ccrjustice.org/files/US%20Appellee%20Brief%202.22.07.pdf) (2d Cir. en banc review pending).

n35 See David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (2005).

n36 John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

n37 Boumediene, 128 S. Ct. at 2293 (Roberts, C.J., dissenting).