

2011

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Recommended Citation

Martinez, Jenny S., "The Extraterritorial Constitution and the Rule of Law" (2011). *Constitutional Commentary*. 479.
<https://scholarship.law.umn.edu/concomm/479>

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THE EXTRATERRITORIAL CONSTITUTION AND THE RULE OF LAW

*Jenny S. Martinez**

Amendment: When acting outside the sovereign territory of the United States, the U.S. government, its officials, employees, and agents shall not deprive any person of life, liberty, or property without due process of law. The federal courts shall have jurisdiction to enforce this provision.

During the past decade, the U.S. government has engaged in a variety of activities outside the territorial United States of questionable legality under domestic and international law. Individuals in U.S. custody allegedly have been tortured or subjected to cruel, inhuman and degrading treatment.¹ Some detainees have reportedly been turned over to other governments for abuse through the process of extraordinary rendition.² Many prisoners have been held in places such as Bagram Airfield in Afghanistan under the authority of the U.S. government for years without meaningful judicial review of the fact or conditions of their detention.³ Additional controversy has surrounded the practice of targeted extrajudicial killings, outside the context of lawful armed conflict.⁴

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1. See *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (rejecting claims based on alleged torture at Guantanamo on qualified immunity grounds and suggesting that “aliens captured on foreign soil and detained beyond sovereign U.S. territory” have no clearly established constitutional rights “under the Fifth Amendment, the Eighth Amendment, or otherwise”).

2. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073–76, 1092–93 (9th Cir. 2010) (dismissing on state secret grounds claims based on alleged extraordinary rendition); *Arar v. Ashcroft*, 585 F.3d 559, 563–64 (2d Cir. 2009) (dismissing lawsuit based on alleged extraordinary rendition).

3. See, e.g., *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010) (holding that habeas jurisdiction of federal courts does not extend to Bagram).

4. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010) (holding that political question doctrine barred resolution of suit seeking injunction against targeted killing of American citizen in Yemen).

These actions are inconsistent with the fundamental values embodied in the U.S. Constitution. The United States was established as a country under the rule of law—a government of laws and not of men, as John Adams put it.⁵ Respect for the “unalienable [r]ights” of man was the foundational principle on which our independence was declared.⁶ The United States government should act in accordance with our laws and values wherever in the world it acts.

But the courts have long been vexed by the question of the whether and how the U.S. Constitution applies outside the territorial United States. In 1891, the U.S. Supreme Court suggested that “the Constitution can have no operation in another country,”⁷ though that extreme view was rejected in later cases.⁸ Still, considerable confusion remains.⁹ In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to the search of a residence in Mexico by federal agents.¹⁰ But the Court was fragmented in its rationale, and Justice Kennedy (who provided the fifth vote for the majority) suggested that the Constitution *should* apply extraterritorially except when it would be “impracticable and anomalous.”¹¹ In *Boumediene v. Bush*, in an opinion by Justice Kennedy, the Court held that the Habeas Suspension Clause does apply to the U.S. naval base at Guantanamo—but was vague about where else it might apply, not to mention which other constitutional provisions applied at Guantanamo.¹²

Obviously, not all provisions of the U.S. Constitution make sense in the extraterritorial context, particularly when the United States is engaged in armed conflict. The military does not, and should not, need a search warrant for Osama Bin Laden’s cave. A court hearing is not required before foreign military targets are bombed. But people should not be detained for decades in U.S. custody, or subjected to ill treatment, without the protection of law. That is precisely why I have chosen the

5. This phrase is frequently attributed to Adams, though others may have said similar things before him; Adams included it, among other places, in his draft of the 1780 Massachusetts Constitution.

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

7. *Ross v. McIntyre*, 140 U.S. 453, 464 (1891).

8. *See Reid v. Covert*, 354 U.S. 1, 12 (1957).

9. *See Johnson v. Eisentrager*, 339 U.S. 763, 765–66, 790–91 (1950) (dismissing habeas petition of German nationals confined in the custody of the U.S. Army in Germany).

10. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

11. *Id.* at 278 (Kennedy, J., concurring).

12. *Boumediene v. Bush*, 553 U.S. 723, 770–71 (2008).

familiar language of “due process.” In American constitutional law, due process is a flexible concept, one which takes into account the circumstances of particular types of government action. The process due to non-citizens in extraterritorial situations would not necessarily be the same process due within the territory of the United States. But the law would provide some protections to those individuals who are detained or otherwise deprived of basic human rights by the U.S. government or its agents. The United States could not, for example, hold unfair military commission trials and evade scrutiny simply by locating the commissions in some far-flung place.

My amendment also makes clear that the courts are entitled to review the government’s extraterritorial actions, and cannot decline jurisdiction simply because the activity takes place outside the United States. Other doctrines, like the political question doctrine or standing rules, would still apply, and of course the courts could consider the extraterritorial nature of the government action in applying the due process standard.

In truth, my proposed change would not dramatically alter the course charted by recent Supreme Court decisions. The Court’s approach in recent cases is captured by the words of Justice Kennedy, who pragmatically suggested that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”¹³ But Justice Kennedy is just one man, and he will not be on the Court forever. Meanwhile, some lower courts—especially the D.C. Circuit—seem determined to deny the extraterritorial application of even the most basic human rights protections.¹⁴ Why not remove all doubt and make clear what the Framers meant: ours is a government of laws, always and everywhere.

13. *Id.* at 764.

14. *See Rasul v. Myers*, 563 F.3d 527, 530 (2009).