# THE TIES THAT BIND: HOW THE CONSTITUTION LIMITS THE CIA'S ACTIONS IN THE WAR ON TERROR

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*In the war on terror, the Executive, through the Central Intelligence Agency (CIA), has detained, mistreated, and tortured suspected "enemy combatants" in secret prisons around the world. Shocking evidence of torture and denial of due process has provoked widespread condemnation. Yet, the Executive continues to deny that its agencies—in particular the CIA—are prohibited by law from engaging in such activities. Scholars have argued that the Executive's actions violate both international treaties and domestic statutes prohibiting torture. This Note takes a different approach and contends that, even in the absence of treaty or statutory law, the Constitution limits the authority of an executive agency like the CIA to act against foreigners abroad. The author relies on Supreme Court case law on the extraterritorial application of the Constitution, which holds that certain fundamental constitutional provisions limit the government's actions wherever and against whomever it acts. She also highlights references to the fundamental rights approach in recent war on terror cases. She then argues that such fundamental rights include, at minimum, prohibitions against indefinite detention and torture under the Fifth Amendment Due Process and Self-Incrimination Clauses and the Eighth Amendment. Ultimately, she concludes that the Constitution simply does not permit the United States to engage in indefinite detention or torture—regardless of the end, the place, or the victim.*

## INTRODUCTION

Since September 11, 2001, the extent and nature of the Central Intelligence Agency's (CIA) role in the war on terror has remained shrouded in secrecy. Now, however, it has become clear that the CIA is engaged in the secret, indefinite detention and mistreatment of terror suspects.[1] CIA interrogators beat one Iraqi detainee to death after forcing him headfirst into a sleeping bag.[2] In another case, CIA

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[1] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (describing covert prison system in which CIA interrogators use techniques prohibited by both U.N. conventions and U.S. military law).

[2] Douglas Jehl & Tim Golden, *C.I.A. Is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, § 1, at 6.

agents stripped an Afghani prisoner of his clothes, chained him to the concrete floor of his cell, and left him to freeze to death.[3] Recent reports described the death of Manadel al-Jamadi, a detainee who asphyxiated during a CIA interrogation at Abu Ghraib prison, his head in a hood and his body shackled in a torture position known as a "Palestinian hanging."[4] A CIA guard who witnessed that interrogation recounted that, after stripping Jamadi and dousing him in cold water, a CIA interrogator threatened to "barbecue" him if he did not talk.[5] Several hours later, Jamadi was dead, with six broken ribs and blood gushing from his mouth and nose.[6]

These reported incidents were not the acts of a few maverick interrogators.[7] Rather, they represent an executive policy of indefinite secret detention and cruel interrogation techniques, some of which amount to torture.[8] Indeed, prisoners like Jamadi are demonstrative of the wider problem of "ghost prisoners": prisoners whose names are never officially registered at military facilities, and who remain in secret isolation for interrogation by the CIA.[9] Similarly,

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[3] Priest, *supra* note 1.

[4] Jane Mayer, *A Deadly Interrogation: Can the CIA Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44, 49–50; *see generally* Press Release, ACLU, U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq (Oct. 24, 2005), *available at* http://www.aclu.org/intlhumanrights/gen/21236prs20051024.html (reviewing U.S. government autopsy reports from U.S. facilities in Afghanistan and Iraq which concluded that twenty-one of forty-four deaths were homicides and at least eight were caused by abusive interrogation techniques).

[5] *See* Mayer, *supra* note 4, at 48.

[6] *Id.* at 44, 48–50.

[7] It is likely that there are many other incidences of CIA mistreatment of prisoners. See the collection of documents produced in response to a Freedom of Information Act (FOIA) request from the American Civil Liberties Union (ACLU), www.aclu.org/torture foia/released/030905, for an indication of a CIA policy of mistreatment; *see also* John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 28 (quoting Republican Senator Lindsey Graham as saying abuse at Abu Ghraib "certainly involved more than six or seven MPs" and "seems to have been planned").

[8] Barry et al., *supra* note 7, at 29, 31 (describing methods deemed "tantamount to torture" by Red Cross). Ten interrogation techniques approved by the CIA in early 2002 for use against terror suspects went well beyond those authorized by the military. These techniques included waterboarding, in which a prisoner is strapped to a board and made to believe he is drowning. Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1. For a detailed discussion of the Executive's detention policy following the events of September 11, 2001, see generally Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

[9] The existence of "ghost detainees," who were not identified or registered on official rolls at Department of Defense facilities and who were moved by the CIA, is confirmed in detail by documents released to the ACLU in response to its FOIA requests. ACLU, Department of Defense (Mar. 10, 2005), www.aclu.org/torturefoia/released/030905; *see also* MAJOR GENERAL ANTONIO M. TAGUBA, AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 26–27 (Feb. 26, 2004), *available at* http://www.aclu.org/torturefoia/released/TR3.pdf [hereinafter TAGUBA REPORT] (reporting that U.S. military police "have

prisoners in "black sites"[10]—secret detention facilities authorized by the President and operated by the CIA[11]—have been held incommunicado, without access to courts or even the International Committee of the Red Cross (ICRC).[12] In such facilities, CIA agents have subjected detainees to torture and other forms of cruel, inhuman, and degrading treatment.[13]

However, rather than prosecute CIA officials, the Bush Administration has repeatedly insisted that no law applies to these detainees.[14] It has asserted, for example, that the war against ter-

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routinely held persons brought to them by Other Government Agencies (OGAs) without accounting for them").

[10] Such facilities include special CIA-operated wings of U.S. military prisons in Iraq and Afghanistan, previously at Guantanamo Bay, and allegedly on the island of Diego Garcia. *See* Mark Bowden, *The Persuaders: When Does Coercion Become Torture?*, OBSERVER (London), Oct. 19, 2003 (Magazine), at 28. Other facilities have been independently operated by the CIA in various foreign countries, including Thailand and possibly Romania and Bulgaria. Jamie Wilson & Ian Traynor, *East Europe "Has Secret CIA Jails for al-Qaida,"* GUARDIAN (London), Nov. 3, 2005, at 19.

[11] President Bush expressly authorized the CIA to set up secret detention facilities outside of the United States and to use harsh interrogation techniques. Barry et al., *supra* note 7, at 31; *see* David Rennie, *Inquiry into CIA's "Secret European Jails,"* DAILY TELEGRAPH (London), Nov. 4, 2005, at 16 ("[T]he Czech Republic, which joined the EU last year, said that it had recently refused a request from American officials to set up a detention centre.").

[12] It is unlikely that the International Committee of the Red Cross (ICRC) has seen these detainees. The CIA placed detainees in military prisons in Afghanistan and Iraq without giving the ICRC access to them. *See* TAGUBA REPORT, *supra* note 9, at 26–27 (reporting incident in which U.S. military police hid "ghost detainees" from ICRC survey team). However, since the ICRC maintains confidentiality, any access they may have been given to CIA detainees is unverifiable. *See* Emily Ann Berman, Note, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241, 262 (2005) ("In order to maintain . . . impartiality, the Red Cross has adopted a practice of confidentiality.").

[13] Jehl, *supra* note 8.

[14] Brief for the Respondents at 49, Rasul v. Bush, 542 U.S. 456 (2004) (No. 03-334), 2004 WL 425739, at *39 ("[T]he [International Covenant on Civil and Political Rights (ICCPR)] is inapplicable to conduct by the United States outside its sovereign territory."); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President 31, 39 (Aug. 1, 2002), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf [hereinafter Bybee Aug. 1 Memo] (concluding that federal statute implementing United Nations Convention Against Torture (CAT), 18 U.S.C. §§ 2340–2340B (2000 & Supp. 2003), would be unconstitutional were it understood to regulate President's detention and interrogation of "enemy combatants"); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel, Dep't of Def. 1–2 (Jan. 22, 2002), *available at* http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf [hereinafter Bybee Jan. 22 Memo] (declaring international treaties inapplicable to members of al Qaeda on multiple grounds); Memorandum from John Yoo, Deputy Assistant Attorney Gen. and Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. 1–2 (Jan. 9, 2002), *available at* http://www.msnbc.msn.com/id/5025040/site/newsweek/ [hereinafter Yoo & Delahunty Memo] (asserting that Geneva

rorism "renders obsolete [the Geneva Conventions'] strict limitations on questioning of enemy prisoners and renders quaint some of its [sic] provisions."[15] In one now-infamous torture memorandum, the Administration further argued that the application of the proscriptions contained in the United Nations Convention Against Torture (CAT) to the President's "detention and interrogation of enemy combatants" would be unconstitutional,[16] and that, even if an executive official were to engage in torture—as narrowly defined by the memo—such torture could be legally justified.[17] Thus, while reiterating its agreement to follow certain norms or principles, the Executive continues to emphasize that compliance is strictly voluntary, rather than compulsory.[18] Reports indicate that the Administration

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Conventions, War Crimes Act (WCA), and customary international laws of war do not apply to al Qaeda detainees). Professor Golove has observed:

> [T]he administration has adopted a truly revolutionary approach to constitutional law and the war on terrorism. The main thrust of its vision, extraordinary as it may seem, is that there is no law by which the Executive is bound, nor any checks and balances to which it is subject, in its conduct of the war on terrorism.

David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128, 145 (2005).

[15] Memorandum from Alberto R. Gonzales, Counsel to the President, to the President 2 (Jan. 25, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf [hereinafter Gonzales Jan. 25 Memo]; *see also* Bybee Jan. 22 Memo, *supra* note 14 (arguing that laws of armed conflict do not apply to al Qaeda or Taliban militia members); Yoo & Delahunty Memo, *supra* note 14 (same).

[16] Bybee Aug. 1 Memo, *supra* note 14, at 31–39.

[17] *Id.* at 39–46. The Department of Justice issued a revised version of this memo more than two years later, giving a broader reading of the definition of torture, but leaving the conclusion intact. Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen. 2 (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/dagmemo.pdf.

[18] Gonzales Jan. 25 Memo, *supra* note 15, at 1 (stating that "you have the constitutional authority to make the determination . . . that the GPW [Geneva Convention III on the Treatment of Prisoners of War] does not apply to al Qaeda and the Taliban. . . . you could nevertheless, as a matter of policy, decide to apply the principles of GPW to the conflict"). Assistant Attorney General Moschella expressed the "voluntariness" of compliance by the Executive:

> Despite the fact that the protections of the GPW do not apply to al Qaeda and Taliban fighters, the President early on announced the policy that the Department of Defense will treat al Qaeda and Taliban detainees "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949 [GPW]."

Letter from William E. Moschella, Assistant Attorney Gen., to Senator Patrick J. Leahy 4 (June 8, 2004), *available at* http://www.aclu.org/torturefoia/released/11.pdf.

The Supreme Court recently dealt a severe blow to the Executive's arguments by holding that Common Article 3 of the Geneva Conventions, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 136, applies to the conflict between the United States and al Qaeda and thus binds the United

specifically selected the CIA to conduct potentially violent interrogations because it considered the Agency to be unconstrained by domestic and international law.[19] Consequently, the CIA was preferred over the military or FBI, who might be limited by their internal regulations.[20]

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States in its treatment of alleged al Qaeda detainees. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–96 (2006).

[19] *Cf.* Barry et al., *supra* note 7, at 32. Pentagon officials initially shared the view that the military should not be involved in these interrogations:

> While the CIA could do pretty much what it liked in its own secret centers, the Pentagon was bound by the Uniform Code of Military Justice. . . . According to one source, both military and civilian officials at the Pentagon ultimately determined that such CIA techniques were "not something we believed the military should be involved in."

*Id.* The CIA is required to follow classified regulations approved by the Department of Justice as well as Executive Orders (most of which are classified). *See, e.g.*, Exec. Order No. 12,333, 3 C.F.R. 200, 210 (1982), *reprinted in* 50 U.S.C. § 401 (2000) ("Collection of such information is a priority objective and will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded."); DOJ Office of Intelligence Policy and Review, 28 C.F.R. § 0.33b (2006) (noting that one duty is to "[r]eview and comment upon proposed statutes, guidelines, and other directives with regard to intelligence activities; and, in conjunction with the Office of Legal Counsel, review and comment upon the form and legality of proposed Executive Orders"). In addition, however, the National Security Act of 1947 and the successor to the Central Intelligence Agency Act of 1949 both provide nonspecific indications that the CIA must act within the bounds of U.S. law (which should include statutes such as the CAT-implementing statute and the War Crimes Act). *See, e.g.*, National Security Act of 1947 § 501(b), 50 U.S.C. § 413(b) (2000 & Supp. 2003) (requiring President to report any illegal intelligence activity to congressional intelligence committee); Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 302, 115 Stat. 1394, 1397 (2001) (noting that appropriations to CIA "shall not be deemed to constitute authority for the conduct of any intelligence activity which is not otherwise authorized by the Constitution or the laws of the United States").

The CIA has expressed skepticism about the Bush Administration's stance. According to current and former intelligence officials who have seen his report, John Helgerson, the CIA's Inspector General, found that techniques authorized for the CIA constituted cruel, inhuman, and degrading treatment in violation of CAT. Jehl, *supra* note 8.

[20] The FBI has generally accepted that its internal policies prohibit the use of force, cruel treatment, and physical abuse during interrogation. *See* FBI GEN. COUNSEL, TREATMENT OF PRISONERS AND DETAINEES 1–2 (May 19, 2004), *available at* http://www.aclu.org/torturefoia/released/44A.pdf (stating that FBI policy prohibits "force, threats, physical abuse, threats of such abuse or severe physical conditions" from being used during interrogations). The military is similarly limited in what interrogation methods may be utilized. *See, e.g.*, Uniform Code of Military Justice art. 93, 10 U.S.C. § 893 (2000) (imposing liability on any member of U.S. military who mistreats "any person subject to his orders"); DEP'TS OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, ARMY REGULATION 190-8: ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES 4 (Oct. 1, 1997) [hereinafter ARMY REGULATION 190-8] (prohibiting "use of physical or mental torture or any coercion to compel prisoners to provide information"); DEP'T OF THE ARMY, FM 34-52: INTELLIGENCE INTERROGATION 1-8 (1992) (prohibiting "acts of violence or intimidation, including physical or mental torture, threats,

Faced with the Bush Administration's claims that there is no law limiting the CIA abroad, the Senate and House of Representatives apparently conceded the point. Although Congress adopted a defense bill amendment to prohibit the CIA's use of torture and cruel, inhuman, and degrading treatment,[21] it neglected to ask: Is it possible that there is no law that applies to CIA actions abroad? In other words, prior to the defense bill amendment, was the CIA authorized by law to torture, mistreat, and indefinitely detain prisoners?

The answer to that question, I contend, is an emphatic no. The CIA is bound by law—both U.S. and international.

Scholars have argued at length that international treaties, customary international law, and the U.S. statute implementing CAT[22] must apply to CIA action.[23] While analytically sound, such arguments have significant shortcomings. The approach presumes that when Congress has not legislated nor the Senate ratified a treaty, the CIA may act on foreigners outside the United States without limitations. Moreover, because U.S. courts have often found treaties to be non-self-executing or without extraterritorial application, treaties may not offer a realistic remedy.[24] In light of the potential inefficacy of treaties, requiring Congress to legislate would likely leave those who have been mistreated, tortured, or mistakenly imprisoned with no opportu-

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insults, or exposure to inhumane treatment as a means of or aid to interrogation"). The Pentagon has issued a directive requiring CIA interrogators to follow Pentagon guidelines when questioning prisoners in military facilities. DEP'T OF DEF., DIRECTIVE NO. 3115.09: DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING 4 (Nov. 3, 2005).

[21] Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1403, 119 Stat. 3136, 3475 (2006) (to be codified at 42 U.S.C. § 2000dd). The Act provides no explicit private right of action. Pub. L. No. 109-163, §§ 750, 1401–06, 119 Stat. 3136, 3364, 3474–80 (to be codified at 10 U.S.C. § 801, stat. note, 28 U.S.C. § 2241(e), and 42 U.S.C. §§ 2000dd, 2000dd-1).

[22] 18 U.S.C. §§ 2340–2340B (2000 & Supp. 2003).

[23] *See, e.g.*, Jordan J. Paust, *After 9/11, "No Neutral Ground" with Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees*, 50 WAYNE L. REV. 79, 85–95 (2004) (asserting that forced disappearance and unacknowledged detention of terror suspects violates customary international law and ICCPR); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 813–14 (2005) (arguing that detainee treatment violates Geneva Conventions and CAT); Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801 (2005) (using ICCPR, CAT, and Geneva Conventions to analyze indefinite detention and targeted assassinations).

[24] The Supreme Court's recent jurisprudence in the war on terror, however, suggests that the Geneva Conventions, specifically Common Article 3, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 136, protect alleged al Qaeda detainees, and suggests that arguments based on treaty law may be more robustly rights-protective than previously thought. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793–99 (2006).

nity for redress because they have no political representation or power in the United States. Most importantly, such analysis might imply that unless specific prohibitions have been legislated or ratified, the Executive has plenary power to act as it will once outside the confines of U.S. territory—a constitutional scheme quite different from the checks and balances imagined by the Framers.[25]

I take a different approach and argue that, even where Congress has not acted, certain fundamental constitutional provisions limit the authority of an executive agency such as the CIA to act against noncitizens abroad.[26]

In Part I, using the Supreme Court's case law on the extraterritorial application of the Constitution, I contend that at all times, in all places, and against all people, the government's actions are limited by certain fundamental constitutional provisions.[27] In Part II, I examine references to the fundamental rights approach in the war on terror cases and suggest that limiting the application of fundamental rights to Guantanamo Bay because of its territorial status would be analytically unsound and would also leave the Executive unaccountable. Then, in Part III, I identify some fundamental rights, and argue that, at minimum, they include prohibitions against indefinite detention and torture under the Fifth Amendment Due Process and Self-Incrimination Clauses and the Eighth Amendment. In concluding, I highlight some additional considerations that likely will arise in the

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[25] *See infra* notes 122–24 and accompanying text.

[26] I use the CIA as the primary example because other executive agencies have accepted (at least in theory) that they are bound by some law; my analysis, however, should be applicable to all executive officials involved in the detention and mistreatment of terror suspects.

Certainly, in the case of armed conflict, the United States is bound by international humanitarian law. With regard to prisoners detained on the battlefield, humanitarian law generally applies, protecting detainees and calling for humane standards of care. *See* ARMY REGULATION 190-8, *supra* note 20, § 1-5a ("All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation."). For all detainees, the military is prevented from "murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment." *Id.* § 1-5b. I mention this to clarify the limits of my analysis. Any discussion of humanitarian law and whether and how it applies to the war on terror is beyond the scope of this Note.

[27] The argument applies whether these constitutional provisions are envisioned as limits or as rights. By analogy, Professor Yin asks if a decision stating that the President does not have constitutional authority to attack an allied nation means that the citizens and government of that country have rights. Professor Yin then states, "We can call these 'rights' that cannot be enforced, or we can call them 'limitations on government,' but . . . [they] are, in some sense, opposite sides of the same coin." Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1035, 1069 (2005).

war on terror cases and should help determine the constitutional limits on all government agencies, including the CIA.

## I
## FUNDAMENTAL CONSTITUTIONAL LIMITS ON THE U.S. GOVERNMENT ABROAD

Under Supreme Court jurisprudence, aliens do not benefit from the entire Constitution wherever and whenever the government might act against them. While aliens enjoy the protection of most constitutional rights within U.S. territory, they receive only some constitutional protection from U.S. government action once outside the United States. When and where, then, is our government's treatment of aliens limited by the Constitution? And how are these limits enforced?

These questions have sparked considerable debate. Although some argue that the government is restrained only in territories fully under its control,[28] this approach does not offer a coherent constitutional theory.[29] Indeed, this territorial argument originates in an understanding that Congress has no power to legislate beyond U.S. borders—an understanding that no longer comports with our jurisprudence.[30] Furthermore, this analysis is flawed because the Constitution itself does in fact protect U.S. citizens outside the United States.[31]

Another approach relies on social contract theory, which would permit only citizens (and perhaps aliens with voluntary connections to the United States) to invoke constitutional protection against government action. This theory has been widely discredited,[32] as it was used to deny protection to aliens under the Alien and Sedition Act[33] and to blacks in *Dred Scott*.[34] In modern times, this approach has not

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[28] *See In re* Ross, 140 U.S. 453, 464–65 (1891) (holding that Constitution does not protect U.S. citizens or aliens outside United States).

[29] Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2044 (2005) (characterizing territoriality as "demonstrably false").

[30] *Id.* at 2045.

[31] Reid v. Covert, 354 U.S. 1, 5–14 (1957) (dismissing notion that Constitution has no applicability abroad and holding that United States is limited by Constitution when acting against citizens abroad). See *infra* notes 113–24 and accompanying text for a critique of the territorial approach in the war on terror cases.

[32] *See, e.g.*, Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329, 344–51 (1994) (compiling critiques).

[33] 1 Stat. 570–72, 577–78, 596–97 (1798) (expired).

[34] Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857). Federal representatives argued: "[T]he Constitution was made for citizens, not for aliens, who of consequence have no rights under it." 9 ANNALS OF CONG. 2987 (1799). Others argued to the contrary. MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* 4 JONATHAN

secured a majority of the Court.[35] In fact, in the specific context of the extraterritorial application of the Constitution, Chief Justice Rehnquist's attempt to revive social contract theory was met with sharp criticism for leaving "nonmembers" without remedy and "outside the realm of the law."[36] Social contract theory would deny protection to "nonmembers" within the United States and to foreign defendants abroad in U.S. lawsuits. This theory would also leave illegal aliens within the United States without constitutional rights on the grounds that they had not signed on to the contract. It therefore does not correspond to modern day constitutional jurisprudence, "which *does* extend constitutional rights to illegal aliens, involuntary entrants, and even aliens abroad who are defendants in civil suits."[37]

A third approach, mutuality, "extends [constitutional] rights and limitations to persons or places that become subject to the governing power of the United States."[38] While conceptually sound, the theory has failed to muster a majority of the Court—except with regard to citizens—and is usually found in dissents.[39] In short, while each of these three approaches has its adherents, all suffer from limited precedential support and contradict modern day practice.[40]

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ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Philadelphia, Lippincott 2d ed. 1836) ("[I]t does not follow [that] because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection.").

35 Chief Justice Rehnquist expressed support for this view in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). His reliance on social contract theory summoned only four members of the Court and engendered concurrences written specifically to counter this notion. For further discussion of *Verdugo-Urquidez*, see *infra* notes 70–83 and accompanying text.

36 Bentley, *supra* note 32, at 348.

37 Roosevelt, *supra* note 29, at 2047 (emphasis added).

38 Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 7 (2004); *see Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting) (concluding that because United States imposed legal obligations on foreign defendant outside United States, defendant was entitled to full constitutional protections); Reid v. Covert, 354 U.S. 1, 5–13 (1957) (using mutuality approach to reverse prior precedent denying constitutional protection to U.S. citizens abroad).

39 *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 279–97 (Brennan, J., dissenting) (disapproving of majority opinion holding that Fourth Amendment protections do not apply to nonresident alien whose property is located in foreign country); *id.* at 297 (Blackmun, J., dissenting) ("[W]hen a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of 'the governed' and therefore is entitled to Fourth Amendment protections."); Downes v. Bidwell, 182 U.S. 244, 384 (1901) (Harlan, J., dissenting) ("When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory . . . .").

40 In reviewing these theoretical approaches to constitutional application, it is important to note that they are mutually exclusive, as they rely on broadly different theoretical and ideological underpinnings which by their logic and terms inevitably lead to divergent results. For example, because social contract theory is based on Lockean notions of mem-

A more precedentially sound approach—and one that has been a common thread through the Court's jurisprudence—is a fundamental rights approach. This approach maintains that the Constitution's fundamental provisions apply to U.S. government actions abroad against foreigners, just as they do to its actions against citizens.[41]

### A. *Development of the Supreme Court's Fundamental Rights Approach*

The fundamental rights approach to the extraterritorial application of constitutional provisions originates in the Insular Cases, a group of cases in which the Supreme Court confronted the question of whether the Constitution's protections extended beyond U.S. borders to newly acquired territories with widely differing statuses.[42] While the Court decided these cases primarily on the basis of the nature of U.S. control over the territory (whether the territory was "incorporated" or "unincorporated"), it consistently held that certain "fundamental rights" apply regardless of where and against whom the government acts.[43]

The first case in the Insular Cases line, *Downes v. Bidwell*,[44] raised the question of whether the Constitution's Article I, Section 8 requirement that duties, imposts, and excises be "uniform throughout the United States" applied to Puerto Rico, which at the time had only been temporarily acquired and was considered unfit for incorporation into the United States.[45] In concluding that the Impost Clause did not apply to Puerto Rico, the Court "observe[d] that some constitutional prohibitions might 'go to the very root of the power of Congress to act

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bership, it denies constitutional protections to nonmembers and extends them only to members of society or parties to the Constitution, regardless of where the members or parties are found. By contrast, a theory grounded in territorial status attaches special importance to where a person is found, regardless of member or nonmember status.

[41] I focus on two rights enshrined in the Fifth and Eighth Amendments that are considered fundamental; both are universally recognized and nonderogable, were considered fundamental and inalienable by the Founding Fathers, and are well-supported as such in Supreme Court precedent. *See infra* Part III.

[42] Ocampo v. United States, 234 U.S. 91 (1914) (Filipino defendant appealing libel conviction in Philippines); Dowdell v. United States, 221 U.S. 325 (1911) (defendants, members of Philippine constabulary, appealing convictions in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (defendants, owners of newspaper in Philippines, appealing libel conviction); Hawaii v. Mankichi, 190 U.S. 197 (1903) (review of habeas petition filed by Hawaiian convicted of manslaughter in Hawaii); *Downes*, 182 U.S. 244 (suit to recover back duties on goods from Puerto Rico).

[43] *See generally Verdugo-Urquidez*, 494 U.S. at 268–69 (discussing Insular Cases); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 85–89 (1996) (same).

[44] 182 U.S. 244 (1901).

[45] *Id.* at 249.

at all' and therefore restrain it 'irrespective of time and place.'"[46] The Court also reasoned that "even if regarded as aliens, [the inhabitants of Puerto Rico] are entitled under the principles of the Constitution to be protected in life, liberty and property."[47] Most significantly, in his concurrence, which "soon became established doctrine,"[48] Justice White laid down the principle that the U.S. government may not violate certain constitutional provisions regardless of where it acts.[49] He reasoned that the Constitution has "general prohibitions" which "are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts."[50] He concluded that "limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."[51]

In subsequent Insular Cases, the Court continued Justice White's fundamental rights approach. For example, in *Dorr v. United States*,[52] the Court evaluated whether the right to a trial by jury extended to the Philippine Islands, which had been ceded by Spain after the recent Spanish-American War and were unincorporated. The Court concluded that certain fundamental provisions apply by "inference and the general spirit of the Constitution," even in unincorporated territories.[53] Consequently, in *Hawaii v. Mankichi*,[54] the Court held that a Hawaiian in the new U.S. territory of Hawaii could be convicted by nine out of twelve jurors and indicted without a grand jury on the basis that these rights were "not fundamental in their nature, but concern merely a method of procedure well calculated to conserve the rights of their citizens to their lives, their property and their well-being."[55] A number of years later, the Court held that "[t]he guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life,

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[46] Roosevelt, *supra* note 29, at 2034 (quoting *Downes*, 182 U.S. at 277).

[47] *Downes*, 182 U.S. at 283.

[48] Neuman, *supra* note 38, at 9.

[49] *Downes*, 182 U.S. at 294–95 (White, J., concurring).

[50] *Id.* at 294.

[51] *Id.* at 294–95.

[52] 195 U.S. 138 (1904).

[53] *Id.* at 146 (quoting Mormon Church Case, 136 U.S. 1, 44 (1890)); *see also* John W. Broomes, Note, *Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba*, 42 WASHBURN L.J. 107, 117 (2002) ("[T]he determinative factor in whether a constitutional provision automatically applied to the newly ceded territory was whether the right was procedural or fundamental in nature.").

[54] 190 U.S. 197 (1903).

[55] *Id.* at 218. When the case was decided, Hawaii was not a state, but a newly acquired territory with a separate system of government and laws.

liberty or property without due process of law, had from the beginning full application"—even in unincorporated territories such as the Philippines and Puerto Rico.[56]

Significantly, at the time these cases were decided and the fundamental rights approach was developed, most constitutional provisions had not been extended to the states or to U.S. citizens abroad.[57] Consequently, the Court's application of fundamental rights to all people (regardless of their nationality) in territories with varying U.S. presence and its insistence that the existence of such rights was independent of territorial status are both highly significant. Nonetheless, a territorial analysis continued to guide the Court; in spite of its insistence on protection for fundamental rights, the Court found that the rights to a grand jury, unanimous jury, and the Impost Clause did not apply to unincorporated territories as they would to the federal government. The territorial approach denied full constitutional protection to both aliens and U.S. citizens outside the United States.[58] However, after World War II, as the United States became more involved on the world stage—through the acquisition of territories as well as the establishment of military control and law enforcement abroad—an analysis premised on full territorial control no longer expressed the reality of where and against whom the government was acting.

Thus, in 1957, in the landmark case of *Reid v. Covert*,[59] the Court turned again to the issue of the extraterritorial application of the Constitution and dealt a dramatic blow to the territorial approach.[60]

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[56] Balzac v. Porto Rico [sic], 258 U.S. 298, 312–13 (1921) (reviewing right to jury trial in Puerto Rico); *see also In re* Guantanamo Detainees, 355 F. Supp. 2d 443, 455 (D.D.C. 2005) (summarizing Insular Cases as standing for proposition that "the Constitution prevent[s] Congress from denying inhabitants of unincorporated U.S. territories certain 'fundamental' rights, including 'the right to personal liberty . . . to free access to courts of justice, [and] to due process of law'" (quoting *Downes*, 182 U.S. at 282)).

[57] The Supreme Court first began to incorporate the Bill of Rights against the states in the 1930s. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 323–27 (1937) (citing cases in which certain constitutional amendments had been incorporated).

In *In re Ross*, regarding the conviction of a U.S. citizen by a consular court with very few due process protections, the Supreme Court held that "[t]he Constitution can have no operation in another country." 140 U.S. 453, 464 (1891).

[58] *See* cases cited *supra* note 57.

[59] 354 U.S. 1 (1957).

[60] *Id.* at 5–9 (holding that "various constitutional limitations apply to the Government when it acts outside the continental United States"). Therefore, at least with regard to Americans, the Constitution requires the CIA and other executive agencies to act in accordance with the Bill of Rights. This was not always thought to be so. *See, e.g.*, *In re Ross*, 140 U.S. at 464. In *Reid*, interestingly, "[t]he Court initially rejected the petitions on the theory that the Fifth and Sixth Amendments' jury guarantees did not extend to Americans tried 'in foreign lands for offenses committed there' (though the Due Process Clause did)," and only after granting reargument did the Court reverse itself and ultimately hold that the

The combined cases involved women who had killed their armed-service-member husbands abroad, were tried and convicted by court-martial, and subsequently challenged the constitutionality of the denial of an Article III trial.[61] A majority of the Court discredited the territorial approach to the extraterritorial application of the Constitution; regardless of the nature of its control over territory, the United States was prohibited from violating the Constitution abroad, at least with regard to American citizens.[62] The plurality adopted a mutuality approach, suggesting that when the United States seeks to enforce law against anyone abroad, it must similarly accept the enforcement of the Constitution against itself.[63] Thus, the *Reid* plurality said, "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."[64] The plurality continued, "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States."[65]

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government could not act to violate citizens' rights abroad. Roosevelt, *supra* note 29, at 2036–37.

While there have been few press reports of U.S. citizens detained abroad by federal intelligence agencies, the FBI has participated in interrogations of U.S. citizens arrested and detained by other "friendly" governments at the request of the United States. *See* Press Release, Human Rights Watch, Pakistan: U.S. Citizens Tortured, Held Illegally (May 24, 2005), http://hrw.org/english/docs/2005/05/24/pakist11005_txt.htm. United States citizens arrested abroad for their involvement with the Taliban or al Qaeda do receive constitutional protections, "[b]ut if the rest of the thousands of detainees are neither POWs . . . nor American citizens, they are fair game. They are protected only by this country's international promises—which are, in effect, unenforceable." Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 72.

[61] *Reid*, 354 U.S. at 1, 3–5.

[62] *Id.* at 5–6.

[63] *Id.* The decision was not based on the theory that either citizenship or territorial control determined the Constitution's applicability. Rather, it was based on the idea that the United States is constrained in its actions against anyone it affects. Tellingly, the opinion was written by Justice Hugo Black, a staunch proponent of fully incorporating the Bill of Rights against the states (rather than engaging in determinations of fundamentality), and a strong believer in a constitutionally limited government. *See* Adamson v. California, 332 U.S. 46, 68 (1947) (clarifying Justice Black's opinion that Bill of Rights is applicable in full to states); HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 31 (1968) (noting that Bill of Rights should not be interpreted to bestow grants of federal power given that it was adopted because "original Constitution's grants of federal power were too broad and needed to be restricted").

[64] *Reid*, 354 U.S. at 5–6. Some thought that *Reid* reversed *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a case in which the Court refused to grant habeas corpus to World War II enemy aliens who had been tried, convicted, and detained by an international tribunal in Japan; others thought that *Eisentrager* was limited to its very particular historical context and facts. For further discussion, see *infra* notes 86–96 and accompanying text.

[65] *Reid*, 354 U.S. at 8. Justice Black added:

In coming to the decision that the Constitution universally limited government action, the *Reid* plurality criticized the piecemeal application of the Constitution in the Insular Cases.[66] Justice Harlan's concurrence, however, reaffirmed the continuing validity of the fundamental rights approach. Arguing that the Insular Cases should not be discarded, he took from them the proposition "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[67] In certain cases, there might be "conditions and considerations . . . that would make adherence to a specific guarantee altogether impracticable and anomalous."[68] Where such conditions did not exist, the Constitution applied.

### *B. Modern Application of the Fundamental Rights Approach*

Later case law eroded the *Reid* plurality's notion that the United States is bound by the Constitution whenever and wherever it acts but continued to support Justice Harlan's and the Insular Cases' approach.[69] Arising in the context of FBI and Drug Enforcement

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> While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.

*Id.* at 8–9.

These statements strongly conform to Justice Black's view of the Constitution as imposing strict, nontransgressible limits on the federal government. Justice Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) (observing that purposes of Constitution, history, and separation of powers "all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed"). Also, as in *Reid*, Justice Black confirms his rejection of a fundamental rights approach as too subjective, preferring instead an absolute bar on government action. *Id.*

66 *Reid*, 354 U.S. at 14.

67 *Id.* at 74 (Harlan, J., concurring). Once again, for Justice Harlan, the question was not one of whether the person affected was a U.S. citizen or a person in U.S. territory. Rather, as in the Insular Cases, the question of whether the Constitution applied was resolved by looking to whether the right was fundamental and whether its application would be "impractical and anomalous." *Id.*

68 *Id.*

69 In the words of Justice Ginsburg, "[o]ne might assume that . . . [the Bill of Rights] guides and controls U.S. officialdom wherever in the world they carry our flag or their credentials. But that is not our current jurisprudence." Justice Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 334 (2004). After *Reid*, however, some lower courts took *Reid*'s holding that the government was a creature of the Constitution very seriously. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979), which was decided during the Cold War, remains instructive given the present circumstances. The case involved two East German defendants who had committed the terrorist act of hijacking a plane at gunpoint and diverting it into U.S.-occupied West Berlin. The United States

Agency (DEA) enforcement actions abroad, and involving searches without warrants and interrogations without *Miranda* warnings, case law in the 1990s limited *Reid* but left the fundamental rights approach intact.

For example, in *United States v. Verdugo-Urquidez*,[70] the Court examined the constitutionality of the DEA's search of a Mexican citizen's home in Mexico. The Court split sharply as to the application of the Fourth Amendment to law enforcement activity taken abroad against noncitizens, dividing into a plurality, two concurrences, and one vehement dissent.[71] A majority of the Court agreed that the Fourth Amendment's warrant requirement does not apply to extraterritorial searches conducted against nonresident aliens.[72] More significantly, however, no majority could be summoned for the plurality's assertion that the Fourth Amendment's requirement that searches and seizures be reasonable does not constrain the federal government when it acts abroad against nonresident aliens.

Thus, although many scholars understood *Verdugo-Urquidez* to foreclose the Constitution's application to law enforcement actions against noncitizens abroad,[73] it actually endorsed the principle that, at

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Court for Berlin held that the U.S. Constitution gave these detainees the right to speak with counsel and the right to a trial by jury. *Id.* at 249–53; *see also* David R. Chludzinski, *A Most Certain Tragedy, but Reason Enough to Side-Step the Constitution and Values of the United States*, 23 PENN ST. INT'L L. REV. 227, 242–44 (2004) ("In *Tiede*, although the prosecution attempted to show that only American citizens were entitled to constitutional protections when outside of the U.S., Judge Stern sharply disagreed, stating that certain fundamental constitutional rights, as they are written, should apply to all people, not just United States' citizens."); Neuman, *supra* note 38, at 34 ("[U]nder *Reid v. Covert* or under the Insular Cases, [the judge concluded that] an alien defendant being prosecuted by the federal government was entitled to such fundamental rights as due process and (more controversially) trial by jury.").

70 494 U.S. 259 (1990).

71 Both Justices Kennedy and Stevens wrote concurring opinions disagreeing with the plurality's conclusions; Justice Brennan wrote in dissent. I focus on Justice Kennedy's concurrence, as Justice Stevens contributed only a very brief explanation that he could not "join the Court's sweeping opinion" but would not require warrants in Mexico because U.S. courts have no authority there. *Id.* at 279 (Stevens, J., concurring). Justice Kennedy's opinion also probably represents the narrowest grounds for the Court's position, because Justice Stevens maintains a broader view of the Constitution's applicability. *See infra* note 79 (noting rule of construction privileging narrowest rationale for decision).

72 *Verdugo-Urquidez*, 494 U.S. at 274–75.

73 For example, Professor Jonakait makes the broad statement, "Constitutional doctrine states that aliens outside American territories do not have rights under the U.S. Constitution." Randolph N. Jonakait, Rasul v. Bush*: Unanswered Questions*, 13 WM. & MARY BILL RTS. J. 1103, 1104 (2005).

A number of courts have cited *Verdugo-Urquidez* in support of the proposition that the Fourth Amendment (and often the Fifth) does not apply to noncitizens abroad. *See, e.g.*, United States v. Barona, 56 F.3d 1087, 1091 n.1 (9th Cir. 1995) (determining wiretaps in Belgium and Italy to be constitutional under *Verdugo-Urquidez*); United States v. Raven, 103 F. Supp. 2d 38, 40 (D. Mass. 2000) (concluding, based on *Verdugo-Urquidez*,

minimum, with regard to aliens, the government is limited by fundamental due process rights. The plurality's rejection of *Reid*'s "sweeping proposition"[74] that the United States is everywhere limited by the Bill of Rights, and its restricted application of the Fourth Amendment to citizens or those who have "substantial connections"[75] to the United States, "can be read as representing the views of only four justices."[76] Moreover, while the plurality opinion may have read *Reid* more restrictively, it also reaffirmed the continuing vitality of the fundamental rights approach, citing extensively to the analysis used in *Dorr* and the other Insular Cases.[77]

While joining the majority in the conclusion that the Warrant Clause did not apply,[78] Justice Kennedy's concurring opinion disputed the plurality's assertion that the Fourth Amendment does not limit the United States abroad. As a key vote in the case's outcome, Justice Kennedy's concurrence holds precedential value.[79] It is also more firmly rooted in past cases than the plurality opinion and gives a central role to fundamental rights. In stark contrast to the plurality, Justice Kennedy took "it to be correct, as the plurality opinion in *Reid v. Covert* sets forth, that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or

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that Supreme Court has "rejected the extraterritorial application of the Fourth and Fifth Amendments to aliens"). By and large, such analysis has neglected Justice Kennedy's concurrence, preferring instead to focus on the plurality's language.

[74] *Verdugo-Urquidez*, 494 U.S. at 270.

[75] *Id.* at 271.

[76] Zachary Margulis-Ohnuma, Note, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. INT'L L. & POL. 147, 197 (1999) ("The most restrictive recent case, *Verdugo-Urquidez*, mustered only a slim majority and can be read as representing the views of only four justices, one of whom is no longer on the Court." (citing *Verdugo-Urquidez*, 494 U.S. at 268)). Former Chief Justice Rehnquist's reasoning in *Verdugo-Urquidez* has been widely criticized. *See* Bentley, *supra* note 32, at 344–49 (compiling criticisms). Nor did a majority join the plurality's dictum, which suggested that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), represents the "rejection of the extraterritorial application of the Fifth Amendment." *Verdugo-Urquidez*, 494 U.S. at 269. The plurality clarified that this was dictum, stating that the Fifth Amendment "is not at issue in this case." *Id.* at 264. See *infra* notes 86–96 and accompanying text for further discussion of *Eisentrager*.

[77] *Verdugo-Urquidez*, 494 U.S. at 268.

[78] Justice Kennedy analyzed the Warrant Clause in the same manner that he analyzed the Fourth Amendment generally, and concluded that it did not apply because it would be "impractical and anomalous" to require it in the international context. *Id.* at 278 (Kennedy, J., concurring).

[79] Because Justice Kennedy concurred in the judgment on grounds narrower than the plurality's, those grounds may be properly considered the Court's holding. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted).

domestic."[80] However, he expressed the view that a determination as to which constitutional guarantees apply depends on the full range of circumstances and whether such guarantees would be "impracticable and anomalous."[81] In this case, as the United States could not issue a valid warrant to Mexico and the equivalent of a warrant had been issued in accordance with Mexican law, Justice Kennedy found the Fourth Amendment Warrant Clause inapplicable.[82] He further emphasized that the defendant still enjoyed all the constitutional protections available in an Article III court and that "[n]othing approaching a violation of due process has occurred in this case," thus hinting at the fundamental nature of due process rights.[83]

Justice Kennedy's analysis, therefore, confirms the continued vitality of both the fundamental rights model and the principle that the government is a creature of the Constitution, both of which were developed in previous cases. Most importantly, the fundamental rights approach, originating in the Insular Cases and carrying through to *Verdugo-Urquidez*, creates a strong analytical basis for applying the Constitution to the CIA's indefinite detention and mistreatment of noncitizens abroad.

## II
## FUNDAMENTAL CONSTITUTIONAL RIGHTS APPROACH AND THE WAR ON TERROR CASES

The war on terror cases (thus far filed exclusively by Guantanamo Bay or American citizen detainees) suggest that certain fundamental constitutional rights limit government action against all aliens abroad. Although some believe the cases indicate that the Constitution applies only to territories like Guantanamo, where the United States has complete control, a better understanding of the case law is that the U.S. government is required to respect fundamental constitutional provisions regardless of the level of territorial control.

The Supreme Court first confronted the problem of the indefinite detention of aliens outside of U.S. territory in *Rasul v. Bush*,[84] a case

[80] *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

[81] *Id.* at 278 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Gerald Neuman has termed Justice Kennedy's concurrence "global due process." Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076 (2005) ("As the narrowest explanation of the holding in *Verdugo*, this 'global due process' approach enjoys precedential support. . . . In the past, I have criticized its unpredictability and lack of textual anchor, although I regard it as normatively superior to Chief Justice Rehnquist's [the plurality's] Hobbesian stance.").

[82] *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

[83] *Id.*

[84] 542 U.S. 466 (2004).

brought on behalf of Guantanamo Bay detainees. Given the Court's more restrictive jurisprudence in the 1990s, many commentators expected the Court to hold that no remedy was available.[85] They presumed that the outcome would be controlled by *Johnson v. Eisentrager*,[86] which held that U.S. courts "lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in . . . occupied Germany."[87] Instead, Justice Stevens, writing for the majority in *Rasul*, held that *Eisentrager* did not apply because it had been based on a subsequently discredited understanding of the habeas statute and therefore dealt only with constitutional, not statutory, habeas.[88] He further decided that the situation of the *Rasul* petitioners was not analogous to that in *Eisentrager*—the war on terror detainees were not nationals of countries at war with the United States, were alleging innocence, and, most significantly, had never been charged, tried, or convicted of any offense.[89] Justice Stevens then went on to issue a decision addressing the relatively narrow question of whether the detainees were entitled by statute to file habeas petitions with the courts. Largely relying on the United States' territorial control of the base (as previous Courts had done in the Insular Cases), he concluded that the detainees were so entitled.[90]

Nonetheless, in the much-discussed footnote fifteen, the majority strongly implied that the detainees—though aliens outside of the United States—have constitutional rights, stating:

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[85] *See, e.g.*, Amann, *supra* note 8, at 2130 ("[A] judgment in *Rasul* that persons held beyond U.S. borders had no hope of redress from U.S. courts would have been in keeping with these precedents."); Bryan William Horn, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367, 389 (1992) ("[T]he courts could put hijackers and terrorists into the classification of enemy aliens under *Johnson v. Eisentrager*.").

[86] 339 U.S. 763 (1950).

[87] *Rasul*, 542 U.S. at 475. Some scholars have argued that *Eisentrager*'s holding is very narrow. *See, e.g.*, Horn, *supra* note 85, at 378–79 ("[I]t is when the nonresident alien's nation 'takes up arms against us' that the alien loses the protection of the Constitution.").

[88] *Rasul*, 542 U.S. at 478–79. By its own terms, the Detainee Treatment Act, which purports to remove jurisdiction from district courts for habeas petitions filed by Guantanamo Bay detainees, does not apply to detainees outside of Guantanamo Bay. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)-(g), 119 Stat. 2680, 2741–43 (2005) (to be codified at 10 U.S.C. § 801, stat. note and 28 U.S.C. § 2241). Nor does it apply retroactively to habeas petitions pending at the time of its passage. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2762–69 (2006).

[89] *Rasul*, 542 U.S. at 476. Further, Justice Kennedy wrote a concurrence setting forth the proposition that the facts of *Rasul* were very different from those in *Eisentrager*. *Id.* at 487–88. (Kennedy, J., concurring).

[90] *Id.* at 480–82 (majority opinion).

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—*unquestionably* describe "custody in violation of the Constitution or laws or treaties of the United States."[91]

Most tellingly, the footnote cited Justice Kennedy's concurring opinion in *Verdugo-Urquidez* and "cases cited therein,"[92]—i.e., the Insular Cases, as well as the plurality's opinion[93] and Justice Harlan's concurrence in *Reid*[94]—thereby recognizing both the principle of limited government and the importance of a fundamental rights analysis for determining the rights due to detained terror suspects. As Professor Katyal says, "The sharp reference to Justice Kennedy's *Verdugo* concurrence underscores the point—that certain fundamental rights may apply abroad."[95] Yet, despite language indicating that war on terror detainees (at least those at Guantanamo Bay) have some constitutional rights, the *Rasul* Court did not elaborate as to what fundamental constitutional rights they may have.[96]

After *Rasul*, two district court judges for the District of Columbia ruled on the question of whether Guantanamo detainees have any constitutional rights. In *Khalid v. Bush*,[97] relying almost exclusively on *Johnson v. Eisentrager*,[98] the court held that the detainees have no cognizable rights.[99] Judge Leon made the broad assertion that "[d]ue to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the petitioners possess no cognizable constitutional

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91 *Id.* at 483 n.15 (emphasis added) (quoting 28 U.S.C. § 2241(c)(3) (2000)).

92 *Id.*

93 *See* Reid v. Covert, 354 U.S. 1, 5–6 (1957) ("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.").

94 *See supra* notes 78–83 and accompanying text (discussing Justice Kennedy's concurrence in *Verdugo-Urquidez*); *supra* Part I.A (discussing Insular Cases); *supra* notes 59–66 and accompanying text (discussing *Reid* plurality); *supra* notes 67–68 and accompanying text (discussing Justice Harlan's concurrence in *Reid*).

95 Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49, 55.

96 The narrowness of the *Rasul* Court's holding has allowed the Bush Administration, somewhat implausibly, to argue that footnote fifteen is about treaties or laws, rather than the Constitution. *Id.*

97 355 F. Supp. 2d 311 (D.D.C. 2005).

98 339 U.S. 763 (1950).

99 *Khalid*, 355 F. Supp. 2d at 320–21.

rights."[100] The court then dismissed *Rasul*'s footnote fifteen as irrelevant.[101]

Far more convincing is Judge Green's sharply contrasting opinion in *In re Guantanamo Detainees*,[102] in which she held that aliens detained outside the United States at Guantanamo are entitled to fundamental due process rights.[103] In a discussion three times the length of Judge Leon's, Judge Green engaged in a thorough examination of applicable precedent. For example, she cited a case ignored by the *Khalid* court but binding upon it, in which the Court of Appeals for the D.C. Circuit held, in regard to the application of the Constitution to a United Nations trust territory, "that at a minimum, due process was a 'fundamental' right even with respect to property and that 'it is settled that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'"[104]

Significantly, instead of dismissing footnote fifteen of *Rasul*, Judge Green responded to it, arguing that it was especially relevant:

> Given the *Rasul* majority's careful scrutiny of *Eisentrager*, it is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed.[105]

Giving particular weight to the Supreme Court's citation to Justice Kennedy's concurrence in *Verdugo-Urquidez* and cases cited therein,[106] Judge Green found that the detainees were entitled to due process protections and reaffirmed the importance of a fundamental

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[100] *Id.* at 321.

[101] *Id.* at 323.

[102] 355 F. Supp. 2d 443 (D.D.C. 2005). By order, Judge Green was designated "to coordinate and manage all proceedings" and "rule on procedural and substantive issues common to the cases." *Id.* at 451.

[103] *Id.* at 463.

[104] *Id.* at 457–58 (citations omitted) (citing Ralph v. Bell, 569 F.2d 607, 618–19 (1977)).

[105] *Id.* at 463 (quoting Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004); 28 U.S.C. § 2241(c)(3) (2000)).

[106] *Id.* Judge Green stated:

> [R]ather than citing *Eisentrager* or even the portion of *Verdugo-Urquidez* that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the *Rasul* Court specifically referenced the portion of Justice Kennedy's concurring opinion in *Verdugo-Urquidez* that discussed the continuing validity of the Insular Cases, Justice Harlan's concurring opinion in *Reid v. Covert*, and Justice Kennedy's own consideration of whether requiring adherence to constitutional rights outside the United States would be "impracticable and anomalous."

*Id.*

rights analysis for war on terror detainees who have been subjected not to possible procedural violations such as warrantless searches, but to indefinite detention and mistreatment.[107]

Judge Green's discussion seems closer than Judge Leon's to what the *Rasul* Court intended because "regardless of whether the Court intended to comment on the merits of the detainees' petitions, they have indicated they are sympathetic to the claim that the detainees have been denied their right to liberty absent due process."[108] Indeed, a number of scholars consider footnote fifteen to be a good indication that the Supreme Court will decide future litigation in favor of detainees' constitutional rights.[109] Furthermore, the Supreme Court made clear that *Eisentrager* does not control with regard to Guantanamo detainees—Justice Stevens sharply distinguished it in the majority opinion, and Justice Kennedy wrote a concurrence precisely for the purpose of underscoring *Eisentrager*'s inapplicability.[110] Yet, the *Khalid* court relied almost exclusively on *Eisentrager*, cited *Verdugo-Urquidez* only briefly, and did not consider the century-long line of cases addressing the extraterritorial application of the Constitution.[111] The *Khalid* court also insisted that *Rasul*'s footnote fifteen was not meant to guide the "further proceedings" in lower courts to which the Supreme Court referred,[112] even though it seems particularly unlikely that the Court would have found habeas jurisdiction first and then required the cases to work back up through the

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[107] *Id.* at 463–64.

[108] Alan Tauber, *Ninety Miles from Freedom? The Constitutional Rights of the Guantanamo Bay Detainees*, 18 ST. THOMAS L. REV. 77, 109–10 (2005). He further concludes, "Judge Green's analysis, therefore, was correct." *Id.* at 111.

[109] Golove, *supra* note 14, at 135 ("*Rasul* thus suggests, albeit in a footnote, that the administration's larger theory of constitutional law and the war on terrorism is radically unsound."); Neuman, *supra* note 81, at 2073 ("[T]he majority opinion strongly suggests in a footnote that foreign nationals in U.S. custody at Guantanamo Bay Naval Base . . . possess constitutional rights."); Roosevelt, *supra* note 29, at 2018 ("*Rasul* is most plausibly read to imply that the Constitution extends rights to the Guantanamo detainees.").

Decisions of lower courts as well as the Administration's position prior to *Rasul* suggest that habeas jurisdiction does not exist where there are no enforceable constitutional rights. Al Odah v. United States, 321 F.3d 1134, 1141 (D.C. Cir. 2003). It follows that a finding of habeas jurisdiction means detainees have some constitutional rights. The district court stated:

> We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. . . . If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.

*Id.*

[110] *See supra* note 89 and accompanying text.

[111] Khalid v. Bush, 355 F. Supp. 2d 311, 322 (D.D.C. 2005).

[112] *Id.* at 323.

courts merely to conclude that the detainees have no rights. Consequently, the *Khalid* opinion is likely wrong on this point.

Assuming that the Supreme Court will agree with the *In re Guantanamo Detainees* decision, a key question remains: Given Justice Stevens's emphasis in *Rasul* on U.S. territorial control of Guantanamo Bay, will the Court's ruling (and the lower courts' extension of constitutional rights) remain limited to Guantanamo Bay because of the United States' particular territorial control of it, or extend to all persons detained by the United States in the war on terror?[113]

Although the Supreme Court grounded its decision in *Rasul* on territorial control (perhaps because it was more comfortable with this more limited basis for its holding), the Court should extend *Rasul*'s reasoning to all war on terror detainees. First, there is no convincing legal distinction between the Department of Defense (DOD) indefinitely detaining and mistreating detainees at Guantanamo—the issue in *Rasul*—and the CIA doing the same at "black sites" in Poland.[114] Whereas the Bush Administration has argued that habeas jurisdiction is restricted to places over which the United States exercises sovereignty,[115] the Supreme Court has not set such a limitation. Courts have taken jurisdiction based on the principle of agency where the Executive has requested that an individual be detained by another body, individual, or state—or based on the principle of directive custody where a superior in the court's jurisdiction can issue an order to

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[113] Golove, *supra* note 14, at 136 ("[A] great deal turns on how liberally the Court ultimately applies its new standard. . . . Will the Court's ruling apply to [the detainees in secret detention facilities] . . . even though the extent of U.S. jurisdiction and control over the facilities where they are held may be somewhat less complete or permanent . . . ?"). A number of scholars have opined that *Rasul*'s reasoning "is more likely to turn on features peculiar to Guantanamo than on a general exploration of extraterritorial due process." Neuman, *supra* note 81, at 2073; *see also* Roosevelt, *supra* note 29, at 2041 (arguing that any future decision "seems far more likely to focus on the special attributes of Guantanamo Bay"). Others believe *Rasul* may apply more widely. *See* Katyal, *supra* note 95, at 55 ("The majority refused to cabin its holding to nonmilitary tribunal detainees or to those only at Guantanamo. And the justices may have tipped their hands about a pivotal issue, the extraterritorial application of the Constitution to the detainees.").

[114] *See* Gordon Rayner, *Dark Secrets of the "Black Site" Prisons*, DAILY MAIL (London), Jan. 25, 2006, at 25 ("The torture techniques are carried out at secret CIA prisons known as 'black sites' said to be in Poland, Romania, Afghanistan and Thailand."); Mayer, *supra* note 4, at 46 (noting that "the CIA . . . has operated secret prisons in Thailand and Eastern Europe"); Priest, *supra* note 1 (stating existence of "black sites" in Eastern Europe).

[115] Brief for the Respondents at 13–15, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334), *available at* http://www.ccr-ny.org/v2/rasul_v_bush/legal/unitedStates/Brief for Respondents.pdf.

an immediate custodian located abroad.[116] Second, under a narrow, territorial reading of *Rasul*, the Bush Administration could, and likely will, seek to avoid constitutional restrictions by simply changing the location of prisoners.[117] Pre-*Rasul*, detainees were kept at Guantanamo because the Executive presumed it to be beyond constitutional reach.[118] Shortly after *Rasul*, once it was established that some law did apply to the base, the DOD and CIA stopped transferring prisoners there.[119] The CIA closed its own separate facility and moved the detainees to other, more secretive—and less legally constrained—facilities.[120]

It seems illogical, however, that the Constitution allows the CIA, as an arm of the Executive, to flee its mandates simply by changing addresses.[121] The Framers were fully aware of the British sovereign's attempts to avoid the legal limits on the detention of prisoners by moving the prisoners outside of the Kingdom's borders; these prac-

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116 These principles of jurisdiction are respectively known as constructive and directive custody. For an illustration of the theory of directive custody, see, for example, *Ex parte* Hayes, 414 U.S. 1327 (1973), a case that involved a soldier on duty in Germany who filed habeas petition, which was accepted, because, although immediate commanding officer was outside territorial limits of U.S. courts, others in chain of command were not. For a discussion of constructive custody, see Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 50, 69 (D.D.C. 2004), which ordered discovery based on petitioner's allegations that the "United States ha[d] worked through Saudi officers to detain" him.

During oral argument in *Rasul*, one Justice expressed concern over "the fact that there would be a large category of unchecked and uncheckable actions dealing with the detention of individuals that are being held in a place where America has power to do everything"—a concern that the directive and constructive custody theories would remedy. Transcript of Oral Argument at 45, *Rasul*, 542 U.S. 466 (No. 03-334), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf.

117 *See, e.g.*, Neuman, *supra* note 81, at 2074 ("If the government blundered by bringing its captives to Guantanamo, it may rely more heavily in the future on other, more authentically extraterritorial venues for detention.").

118 A memo written for the Department of Defense discussed the fact that the Administration was considering possible detention sites on the basis of whether a federal court could exercise habeas jurisdiction over them, concluding that "a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay Naval Base." Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen. & John C. Yoo, Deputy Assistant Attorney Gen., to William J. Haynes, Gen. Counsel, Dep't of Def. 9 (Dec. 28, 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf. One former Administration attorney described Guantanamo as "the legal equivalent of outer space." Barry et al., *supra* note 7, at 30.

119 Priest, *supra* note 1.

120 *Id.*

121 *See* Neuman, *supra* note 38, at 53 ("If no constitutional rights apply to offshore detainees, merely by reason of their nationality and location, then . . . [t]he Government may erect extraterritorial courts and extraterritorial prisons to punish extraterritorial crimes without legal oversight or legal constraint.").

tices resulted in Parliament's adoption of the Habeas Act.[122] As Justice Breyer pointed out during the oral argument of *Rasul*, "It seems rather contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they want, without a check."[123] Indeed, the implications of a purely territorial approach go far beyond Guantanamo, suggesting an unlimited executive that "can kill, maim, and imprison aliens abroad, . . . not just during a war, but at any time, for any purpose, without violating any of their constitutional rights."[124] A conceptually sound approach to war on terror cases would abandon the territorial notion and hold that certain fundamental constitutional provisions restrict executive power everywhere.

## III
## DEFINING FUNDAMENTAL CONSTITUTIONAL RIGHTS

I have argued that a fundamental rights analysis is the correct way to approach the CIA's indefinite detention and mistreatment of terror suspects and that, as a result, fundamental rights limit the CIA's power wherever and against whomever it acts. This approach raises the question: Which rights are fundamental? Which constitutional rights limit government agencies—whether the CIA, military, or FBI—everywhere that they act?

Mindful of Justice Harlan's admonition that the application of the Constitution must not be "impracticable and anomalous,"[125] I ground my analysis in those constitutional provisions that are never impractical nor anomalous and that most clearly fall into the category of "fundamental rights." Rather than attempting to draw out all possible constitutional provisions that might restrain the CIA, I look to those prohibitions that were considered most essential by the Founders, are universally accepted, and are strongly supported by our nation's history and jurisprudence.[126] I argue that, at bare minimum, the fundamental dictates of the Fifth and Eighth Amendments prohibit the CIA from engaging in indefinite detention, torture, and other behavior that "shocks the conscience."[127] Under this analysis, these fundamental

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[122] WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 42, 51–52 (1980).

[123] Transcript of Oral Argument, *Rasul*, *supra* note 116, at 42.

[124] Jonakait, *supra* note 73, at 1119.

[125] Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

[126] It is essential to note that no case directly answers this question—for the simple reason that the Executive's claim that the CIA is authorized to indefinitely detain and inhumanely treat detainees is entirely novel.

[127] *See infra* Parts III.B.2, III.B.3.

provisions reach the CIA no matter how hidden or remote its "black sites" may be. Accordingly, although the CIA might be permitted to subject terror suspects to trial without a jury or detain them incommunicado for longer than is constitutionally allowable in the United States, it cannot treat them cruelly or detain them indefinitely without charge.

### *A. The Due Process Clause's Prohibition on Indefinite Detention*

Freedom from indefinite detention without charge is a fundamental right, enshrined in the Fifth Amendment's guarantee that "no person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[128] The fundamental nature of this right cannot be overstated; its importance is demonstrated by its prominent placement in the Universal Declaration of Human Rights, as well as a multitude of international treaties and national constitutions.[129]

Recognition of the fundamentality of the freedom from indefinite detention is not a product of recent times. Rather, with the Declaration of Independence, the Framers proclaimed the inalienability of "Life, Liberty, and the Pursuit of Happiness."[130] They then adopted the Bill of Rights to form "an essential barrier[ ] against arbi-

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[128] U.S. CONST. amend. V.

[129] Universal Declaration of Human Rights art. 5, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc A/810 (Dec. 10, 1948). This fundamental right is also present in international treaties:

> In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearances of persons. . . . Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay . . . .

Inter-American Convention on the Forced Disappearance of Persons arts. X–XI, June 9, 1994, 33 I.L.M. 1529; *see also* Declaration on the Protection of All Persons from Enforced Disappearance art. 1.1, G.A. Res. 47/133, U.N. GAOR, 47th Sess., 92nd plen. mtg., U.N. Doc. A/RES/47/133 (Dec. 18, 1992) (declaring that forced disappearance amounts to "a denial of the purposes of the Charter of the United Nations and [is] a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights"); U.N. High Comm'r for Human Rights, Human Rights Comm., *General Comment No. 29: States of Emergency (Article 4)*, ¶ 13(b), U.N. Doc. CCPR/C21/Rev.1/Add.11 (Aug. 31, 2001) (noting that unacknowledged detention of persons violates International Covenant on Civil and Political Rights and is not subject to derogation); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 261 & n.117 (1993) (citing one hundred and nineteen national constitutions that include right "to be free from arbitrary arrest and detention").

[130] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

trary or unjust deprivation" of these inalienable rights.[131] The Framers did not doubt that certain rights—such as physical liberty—were fundamental rights of all humanity; indeed, they believed the Constitution that they were drafting *recognized*, but did not *create*, these fundamental rights.[132] Therefore, the argument that aliens detained by U.S. officials outside the United States have no constitutional rights, simply by virtue of being kept outside U.S. borders, seems not only to deny fundamental rights but also to offend the values enshrined in the Bill of Rights.[133] Gerald Neuman powerfully illustrates this point: "[I]f the Due Process Clause addresses any extraterritorial conduct, it surely speaks to the calculated establishment of an offshore prison, outside any war zone or territory under belligerent occupation, where captives can be gathered from afar for prolonged detention, interrogation, and possible execution."[134]

Supreme Court precedent corroborates the fundamental nature of the Due Process Clause's prohibition on indefinite detention. The Insular Cases, discussed above, substantiate the claim that the Due Process Clause is a fundamental provision that restricts the government, wherever and against whomever it acts.[135] For this reason, as *In re Guantanamo Detainees* reaffirmed, the basis of the finding that fundamental rights were not violated in the Insular Cases was the existence of "numerous procedural safeguards, including fact finding by judges, a right of appeal, a right to testify, a right to retain counsel, a right to confront witnesses, a right against self-incrimination, and a right to due process."[136] This precedent indicates that the absence of

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[131] Mark L. LaBollita, Note, *The Extraterritorial Rights of Nonresident Aliens: An Alternative Theoretical Approach*, 12 B.C. THIRD WORLD L.J. 363, 378 (1992) (alteration in original).

[132] Neuman, *supra* note 38, at 51. Jon Andre Dobson adds, "The Framers, who fought to protect inalienable rights, could hardly have intended for the government to ignore the Constitution when acting abroad." Jon Andre Dobson, Note, Verdugo-Urquidez: *A Move Away from Belief in the Universal Pre-Existing Rights of All People*, 36 S.D. L. REV. 120, 130 (1991).

[133] Broomes, *supra* note 53, at 119 ("As a matter of principle, it seems improper for the United States to deprive the liberty of any person without due process of law.").

[134] Neuman, *supra* note 38, at 44.

[135] *See supra* notes 42–56 and accompanying text.

[136] 355 F. Supp. 2d 443, 455 (D.D.C. 2005) (citing Dorr v. United States, 195 U.S. 138, 145 (1904)). Whether the military commissions established under the Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), *reprinted in* 10 U.S.C. § 801 (Supp. III 2003), would provide sufficient protection is outside the scope of this Note. In any case, CIA prisoners kept abroad in secret prisons have not been provided those procedural safeguards enumerated in *In re Guantanamo Detainees*. Many commentators have discussed the constitutionality of the military commissions. *See generally, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002) (arguing that President Bush had statutory authority to issue order authorizing

any of these procedural safeguards might constitute a fundamental due process violation—and that the denial of *all* such protections violates fundamental due process rights.

In another war on terror case, the Supreme Court recently confirmed the fundamental nature of the Fifth Amendment's procedural due process safeguards against arbitrary and indefinite detention. In *Hamdi v. Rumsfeld*,[137] which involved an American citizen who was subjected to prolonged detention as an "enemy combatant," the Court reviewed the extensive pedigree of the prohibition on indefinite detention.[138] The plurality then concluded that the case implicated "the *most elemental* of liberty interests—the interest in being free from physical detention by one's own government."[139] For this reason, they continued, "We have always been careful not to minimize the importance and *fundamental* nature of the individual's right to liberty, and we will not do so today."[140]

In *In re Guantanamo Detainees*, using a fundamental rights approach, Judge Green extended the *Hamdi* opinion's reasoning to aliens detained at Guantanamo Bay. Starting with the plurality's assertion that freedom from physical detention by one's own government was "the most elemental of liberty interests," she reasoned that the fact that the detainees were not held by their own respective governments "does not lessen the significance of their interests in freedom from incarceration and from being held virtually *incommuni-*

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military commissions); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing Presidential Order establishing military tribunals to try terrorists is unconstitutional, although military tribunals themselves are not necessarily unconstitutional in all circumstances); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002) (arguing that military tribunals violate "constitutional principle of separation of powers"). The Supreme Court recently held that the President was not duly authorized by Congress to establish military commissions as constituted after the attacks of September 11, 2001, that these commissions were not militarily necessary, and that they were thus invalid. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2772–75, 2785–86 (2006).

137 542 U.S. 507 (2004).

138 During oral arguments, Justice Breyer noted:

> [T]he words in the Constitution are due process of law. And also the words in the Magna Carta were according to law. And whatever form of words in any of those documents there are, it seemed to refer to one basic idea that's minimum. That a person who contests something of importance is entitled to a neutral decision maker and an opportunity to present proofs and arguments.

Transcript of Oral Argument at 35–36, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 1066082.

139 *Hamdi*, 542 U.S. at 529 (emphasis added) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992))).

140 *Id.* (emphasis added) (citations omitted).

*cado* from the outside world."[141] Therefore, just as the *Hamdi* Court recognized the necessity of certain procedural safeguards to provide meaningful protection against indefinite detention without charge,[142] Judge Green held unconstitutional the failure "to provide the detainees with access to material evidence upon which the tribunal affirmed their 'enemy combatant' status" and the "failure to permit the assistance of counsel to compensate" for such denial of information.[143]

Under a fundamental rights analysis, the Constitution's prohibition on prolonged or indefinite detention without charge should similarly apply to aliens detained by the United States in remote, foreign locations. While fundamental rights can adequately be protected by procedural safeguards that may not fully comply with the Bill of Rights,[144] they are undeniably violated in the absence of any process at all—as in the case of CIA detainees held incommunicado in secret, isolated sites. Therefore, by engaging in such detentions, the CIA is violating fundamental rights guaranteed by the Fifth Amendment's Due Process Clause.[145]

### *B. Prohibition on Torture and Cruel, Inhuman, and Degrading Treatment*

Like the prohibition on indefinite detention, the prohibition on torture and cruel, inhuman, and degrading treatment is universally accepted as a fundamental right.[146] The fundamentality of this

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[141] *In re Guantanamo Detainees*, 355 F. Supp. 2d at 465.

[142] *Hamdi*, 542 U.S. at 533 ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (internal quotation marks omitted))).

[143] *In re Guantanamo Detainees*, 355 F. Supp. 2d at 468.

[144] For a discussion of what might be acceptable procedural safeguards, see *supra* note 136 and accompanying text.

[145] *See, e.g.*, Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 332 (2002) ("[T]he November 13 Order is highly questionable under the Due Process Clause.").

[146] A multitude of international documents and treaties give the prohibition against torture and cruel, inhuman, and degrading treatment a prime position. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR]; Universal Declaration of Human Rights, *supra* note 129, art. 5. Under international law, the prohibition on torture permits no derogation for times of emergency. CAT, *supra*, art. 2(2); ICCPR, *supra*, art. 4; ECHR, *supra*, art. 15(1)–(2); *see also In re* Estate of Marcos (Human Rights Litig.), 25 F.3d 1467, 1475 (9th Cir. 1994) ("[T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under

freedom is confirmed by the principles upon which our nation was founded, as well as by the jurisprudence on the Fifth Amendment's Self-Incrimination and Due Process Clauses and the Eighth Amendment's prohibition on cruel and unusual punishment.[147] These provisions should prohibit government agents from engaging in the torture and cruel, inhuman, and degrading treatment of any person in U.S. custody, regardless of location.

### *1. The Fifth Amendment's Self-Incrimination Clause*

In addition to the Fifth Amendment's guarantee against deprivation of life, liberty, or property without due process of law, the Fifth Amendment's Self-Incrimination Clause[148] protects an individual from being compelled to give self-incriminating evidence and, as a fundamental right, should apply extraterritorially.[149] Through this clause, the Framers unequivocally disallowed the government's use of torture to compel confessions. The Star Chamber in the United Kingdom, which routinely exacted confessions by torture, remained fresh in the Framers' historical memory.[150] Firmly rooted in our legal system by 1776,[151] "[t]he privilege against compulsory self-incrimination was developed by painful opposition" to precisely such proceed-

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international law, a norm of *jus cogens*." (quoting Siderman de Blake v. Argentina, 965 F.2d 699, 717 (9th Cir. 1992))); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65 (1978) (concluding that the European Convention "prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct"); Press Release, U.N. Sec'y-Gen., Freedom from Torture "Fundamental Human Right," Says Secretary-General, U.N. Doc. SG/SM7855 (June 25, 2001), *available at* http://www.un.org/News/Press/docs/2001/sgsm7855.doc.htm ("Freedom from torture is a fundamental human right that must be protected under all circumstances.").

147 Justice Black illustrates the fundamental nature of these rights in Chambers v. Florida, 309 U.S. 227, 236–37 (1940) ("From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions . . . evolved the fundamental idea that no man's life, liberty or property be forfeited . . . until there had been a charge fairly made and fairly tried in a public tribunal . . . .").

148 U.S. CONST. amend. V.

149 There is also a textual argument that the Fifth Amendment, unlike the Fourth Amendment, should apply abroad because of its use of the term "person." *See* Adam Shedd, Comment, *The Fifth Amendment Privilege Against Self-Incrimination—Does It Exist Extraterritorially?*, 77 TUL. L. REV. 767, 785 (2003) (arguing that "by virtue of simply using the word 'person' rather than 'the people,' the Fifth Amendment should apply to all persons regardless of their contacts with the United States or their citizenship").

150 *See* Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 903–04 (2003) ("[T]he Framers were aware of interrogation devices . . . that were utilized by those in authority in medieval and Renaissance Europe to obtain confessions.").

151 Horn, *supra* note 85, at 376; *see also* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 311 (2003) ("Though torture was not entirely absent in fifteenth and sixteenth century

ings.[152] Therefore, "[b]y including a provision in the Bill of Rights barring the government's use of compulsion to obtain statements, [the Framers] undoubtedly intended to prohibit the government's use of such penalties."[153] Given the Framers' belief in both a government of limited powers and the inalienability of certain rights—not least among them rights to life and bodily integrity—it seems unlikely that the Framers intended to ban the use of torture with regard to citizens and residents but to permit it freely outside the nation's borders.[154]

As a complement to the Framers' understanding, jurisprudence on the Self-Incrimination Clause came to stand for an absolute, fundamental limit on government action. As federal courts became more involved in criminal cases, they confronted the issue of the admissibility of confessions obtained through torture. At the beginning of the twentieth century, in response to state police interrogations involving physical brutality and the mistreatment of suspects,[155] the Supreme Court held that the admission of confessions obtained as a result of abusive interrogation practices violated due process under the Fourteenth Amendment just as it would under the Fifth Amendment.[156] Thus, violence in interrogation was considered absolutely forbidden by the Constitution. As Professors Parry and White note, "[d]icta in later cases provided further support for the view that interrogators' use of techniques involving force, threats of force, and other

English practice, it was always exceptional and the common law, by the time of Blackstone, excluded torture for purposes of obtaining information.").

152 Michigan v. Tucker, 417 U.S. 433, 440 (1974).

153 Godsey, *supra* note 150, at 904.

154 *Cf.* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2550–51 (2005) ("The [F]ramers of the Constitution plainly envisioned a territory . . . . Yet the language, and underlying concepts, of the constitutional order they forged are not inherently spatially delimited. The Constitution creates a government of limited powers and places further restrictions on the use of those powers."); Roosevelt, *supra* note 29, at 2044 n.139 ("The Framers doubtless understood the scope of the Constitution in territorialist terms, but no more so than the scope of national power more generally, and they could as plausibly be characterized as understanding that the Constitution would follow the exercise of such power . . . .").

155 Such interrogation techniques included "placing a rope around the suspect's neck or using the 'water cure,' which involved slowly pouring water into the nostrils of a suspect who was held down on his back," or "stripping the suspect of clothing, placing him in an airless, overcrowded or unsanitary room and subjecting him to protracted questioning without sleep." John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 748 (2002).

156 Brown v. Mississippi, 297 U.S. 278, 279 (1936). In *Brown*, a deputy sheriff whipped three black suspects until they confessed. *Id.* at 281–82. The Court stated, "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions." *Id.* at 286.

extreme tactics would not only lead to exclusion of resulting confessions but were also prohibited in themselves."[157]

Therefore, even when there is no trial, or no charges are brought, law enforcement does not have free rein to interrogate for any length of time, by any means, or for any purpose. The Supreme Court recently stated that "the proper scope of the Fifth Amendment's Self-Incrimination Clause [does] not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial."[158]

In the war on terror cases, courts have remained focused on the Fifth Amendment's fundamental prohibition on the use of torture to obtain confessions. In *Rumsfeld v. Padilla*,[159] a case involving an American citizen indefinitely detained as an "enemy combatant," "four Justices spoke of torture—an issue central to the Abu Ghraib scandal but not raised in the cases at bar."[160] Confirming that "nothing less than the essence of a free society" was at stake in the case, the four Justices in dissent reasoned that "[u]nconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber."[161]

Judge Green's opinion in *In re Guantanamo Detainees* also highlighted the fundamentality of the ban on the use of confessions obtained through torture or mistreatment. She cited the Supreme Court's statement that such prohibition exists "because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will.'"[162] While acknowledging that precedent absolutely disallows use of statements obtained by torture for precisely this reason, she held only that "[a]t a minimum, . . . due

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157 Parry & White, *supra* note 155, at 750.

158 Chavez v. Martinez, 538 U.S. 760, 773 (2003) (remanding case to determine substantive due process claims). It is difficult to take any one constitutional holding from *Chavez*, as the case generated six different opinions, with Justices concurring and dissenting from different parts of the two opinions (Justice Thomas's and Justice Souter's) needed to come to any holding at all. Significantly, however, "all nine U.S. Supreme Court Justices . . . agree[d] that abusive state conduct during interrogation may violate due process." Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 326 (2004).

159 542 U.S. 426 (2004).

160 Amann, *supra* note 8, at 2131.

161 *Padilla*, 542 U.S. at 465 (Stevens, J., dissenting). Justice Stevens also quoted Justice Frankfurter: "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Id.* at 465 n.10 (quoting Watts v. Indiana, 338 U.S. 49, 52 (1949)).

162 *In re* Guantanamo Detainees, 355 F. Supp. 2d 443, 472–73 (D.D.C. 2005) (citations omitted) (quoting Jackson v. Denno, 378 U.S. 368, 386 (1964)).

process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture."[163]

Another district court for the District of Columbia adopted a more principled approach, which better aligns with fundamental constitutional norms. In the context of a U.S. citizen detained, interrogated, and tortured by Saudi Arabia at the request of the U.S. government, the court stated, "This Court simply cannot agree that under our constitutional system of government the Executive retains such power free from judicial scrutiny when the fundamental rights of citizens have allegedly been violated."[164] While the case involved a U.S. citizen to whom the Constitution undeniably applies, the court's reasoning—which refers to limits on the Executive, rather than to individual rights—should apply to foreign suspects in the war on terror. Furthermore, given its strong, fundamental rights-supportive language in *Hamdi* and *Rasul*,[165] today's Supreme Court would likely hold that the Constitution forbids the Executive, including the CIA, from indefinitely detaining and torturing war on terror detainees.[166] Ideally, the Court would also demand safeguards robust enough to give those fundamental rights real meaning.

### 2. *Fifth Amendment Due Process: Acts That "Shock the Conscience"*

The Fifth Amendment's Due Process Clause also prohibits any person acting under color of law from extracting information through the use of torture, abuse, or other treatment that "shocks the conscience."[167] Though the "shocks the conscience" doctrine was developed under a regime that brought suspected international criminals *into* the U.S. court system rather than *excluding* them from it, it is significant because it extends constitutional protection to aliens where U.S. agents have engaged in torture or mistreatment.

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[163] *Id.* In *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005), the district court for the District of Columbia also arguably recognized this prohibition on torture, but it did not find a sufficient showing by the petitioner to warrant prospective relief from potential future mistreatment. *Id.* at 112–13.

[164] Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 40 (D.D.C. 2004). A discussion of what law should apply when a foreign government detains an American is beyond the scope of this Note.

[165] *See supra* Parts II (discussing *Rasul*), III.A (discussing *Hamdi*).

[166] *See* Kreimer, *supra* note 151, at 325 ("[O]n the question of whether scholars or courts should announce . . . that the Constitution permits torture, the answer seems clear[ ]: ours is not a Constitution that condones such actions.").

[167] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).

The "shocks the conscience" standard was first announced by the Court in *Rochin v. California*.[168] In that case, faced with a conviction based on evidence obtained through police brutality, the Court reversed the conviction, reasoning that to accept conduct which violates fundamental requirements of due process "would be to afford brutality the cloak of law."[169] Subsequently, in *United States v. Toscanino*,[170] the Second Circuit extended the doctrine to U.S. law enforcement actions against aliens abroad. The defendant, an Italian citizen, appealed his conviction for narcotics conspiracy, claiming to have been interrogated and severely tortured for weeks at the behest of the United States.[171] He argued that the alleged conduct violated his right to due process. The court agreed and held that proof of U.S. involvement in "kidnapping . . . violence and brutality" would divest the court of power over the defendant.[172] Quoting *Rochin*, the Second Circuit reasoned that torture represents conduct that "shocks the conscience" and "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[173]

While other parts of the *Toscanino* decision have been abrogated,[174] the "shocks the conscience" standard retains much of its

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168 *Id.* *Rochin* was the first case in which the Supreme Court set aside a state court conviction resting on evidence obtained through police brutality. State police took the defendant, handcuffed, to a hospital where a doctor forced "an emetic solution through a tube into [the defendant's] stomach against his will." *Id.* at 166. The police then recovered the morphine capsules the defendant was forced to vomit and subsequently introduced them at the defendant's trial. *Id.*

169 *Id.* at 173.

170 500 F.2d 267 (2d Cir. 1974). For a discussion of the case, see Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307, 333–34 (2002) and Leah E. Kraft, Note, *The Judiciary's Opportunity to Protect International Human Rights: Applying the U.S. Constitution Extraterritorially*, 52 U. KAN. L. REV. 1073, 1084–85 (2004).

171 *Toscanino*, 500 F.2d at 268–69. The defendant made serious allegations of torture. The techniques alleged included pinching the defendant's fingers with metal pliers, flushing alcohol in his eyes and nose, forcing other fluids up his anal passage, and repeatedly shocking him with electrodes. *Id.* at 270.

172 *Id.* at 275–76. In exercising its supervisory powers over government conduct, the court said: "This conclusion represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud." *Id.* at 275; *see* Margulis-Ohnuma, *supra* note 76, at 196 ("The court held that the Constitution requires no less drastic a measure in the face of the kind of brutality Toscanino alleged.").

173 *Toscanino*, 500 F.2d at 273 (citations omitted) (quoting *Rochin*, 342 U.S. at 169).

174 While expanding the "shocks the conscience" standard to conduct, such as torture, by U.S. officials abroad, *Toscanino* also dealt with the question of whether kidnapping in order to secure the jurisdiction of a U.S. court violated due process. The case was better known for its holding that the *Ker-Frisbie* rule, permitting kidnapping to obtain jurisdiction, was a historical anomaly and likely no longer applied. *Toscanino*, 500 F.2d at 272–75.

vitality. Although limited by subsequent jurisprudence to "only the most egregious official conduct,"[175] it continues to provide protection against "extreme acts of physical torture or other anomalous forms of bodily intrusions."[176] Moreover, the Court has since reaffirmed that egregious official conduct violates the Constitution, not only when presented to a court as evidence, but also when it takes place.[177] Thus, the "shocks the conscience" standard remains a useful mechanism to establish what limitations apply to the CIA's treatment of war on terror detainees.

Significantly, when faced with allegations of torture from a Guantanamo Bay war on terror detainee, the District Court for the District of Columbia recently looked to the "shocks the conscience" standard for guidance.[178] The court quoted Supreme Court precedent which established that "the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."[179]

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This part of the *Toscanino* decision was abrogated by the Supreme Court in *Alvarez-Machain*. United States v. Alvarez-Machain, 504 U.S. 655, 662, 669–70 (1991). The Court, however, did not address the "shocks the conscience" standard. Tuerkheimer, *supra* note 170, at 334 ("[T]he Supreme Court's decision in *Alvarez-Machain* . . . reasserted the validity of the *Ker-Frisbie* rule—a rule that the Second Circuit—mistakenly, it appears—thought no longer viable."). In fact, in *Alvarez-Machain*, the court below had applied the *Toscanino* "shocks the conscience" standard and had determined that the conduct alleged by Dr. Machain did not rise to that level and thus did not fall into the exception to the *Ker-Frisbie* rule. United States v. Caro-Quintero, 745 F. Supp. 599, 605–06 & n.10 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

175 County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); *see also* United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (affirming that only outrageous governmental misconduct is violation of due process); United States v. Lira, 515 F.2d 68, 70 (2d Cir. 1975) (noting that court may divest itself of jurisdiction if U.S. agents engage in "cruel and inhuman conduct"); United States v. Fernandez-Caro, 677 F. Supp. 893, 895 (S.D. Tex. 1987) (suppressing evidence that was "fruit" of confession extracted through torture from noncitizen defendant in Mexico). The "shocks the conscience" standard has also been applied to foreign officials acting on behalf of the United States. *See, e.g.*, United States v. Angulo-Hurtado, 165 F. Supp. 2d 1363, 1370 (N.D. Ga. 2001).

176 Randall K. Miller, *The Limits of U.S. International Law Enforcement After* Verdugo-Urquidez*: Resurrecting* Rochin, 58 U. PITT. L. REV. 867, 896 (1997).

177 Chavez v. Martinez, 538 U.S. 760, 773 (2003); *see also* Sean Kevin Thompson, Note, *The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation*, 90 CORNELL L. REV. 1601, 1628 (2005) ("Although the *Chavez* Court rejected the defendant's due process claim, the Court considered whether the state actor's behavior shocked the conscience without considering whether the evidence was used at trial.").

178 O.K. v. Bush, 377 F. Supp. 2d 102, 112 n.10 (D.D.C. 2005).

179 *Id.* (quoting *Lewis*, 523 U.S. at 847). Arguably, the court could be understood to read the exception narrowly, saying in dicta that "[c]onduct that 'shocks in one environment may not be so patently egregious in another.'" *Id.* (quoting *Lewis*, 523 U.S. at 850). The court also noted that "[n]o federal court has ever examined the nature of the substan-

While the "shocks the conscience" standard might not prohibit indefinite detention, it would prohibit conduct such as the CIA's reported brutal murders of prisoners during interrogation.[180] In addition, the CIA's use of physical force (threatened or real) and extreme psychological pressure during interrogation would be forbidden by the Constitution as acts that "shock the conscience."[181]

### 3. *The Eighth Amendment's Prohibition on Cruel and Unusual Punishment*

The Eighth Amendment should also apply to the CIA's activities. Although there is a dearth of case law dealing with its extraterritorial application, its core function is to proscribe such fundamental violations of rights as "torture[ ] and other barbarous methods of punishment."[182] As with the Fifth Amendment, the Eighth Amendment was largely a manifestation of the "Framers' repugnance toward the use of torture, which was regarded as incompatible with the liberties of Englishmen."[183]

The argument for the Amendment's extraterritorial reach is bolstered by the fact that the United States understands the CAT's prohibition on "cruel, inhuman or degrading treatment or punishment"[184] to mean those acts "prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[185] Moreover, the Department of Defense has conceded that "[t]he Eighth Amendment applies as to whether or not torture or inhuman treatment has occurred under the federal torture statute [which implements CAT]."[186]

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tive due process rights of a prisoner in a military interrogation or prisoner of war context." *Id.* Nonetheless, in all likelihood, the court was simply indicating an unwillingness to entertain allegations of minor incidents of mistreatment (e.g., harsh lighting or loud music) while accepting (as the "shocks the conscience" standard always has) that torture and severe physical force are constitutionally prohibited at all times.

180 *See supra* notes 1–6 and accompanying text.

181 *See* Thompson, *supra* note 177, at 1629.

182 Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)) (internal quotation marks omitted).

183 Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1730 (2005) (citing Ingraham v. Wright, 430 U.S. 651, 655 (1977)).

184 CAT, *supra* note 146, pmbl.

185 Letter from William J. Haynes II, Gen. Counsel of the Dep't of Def., to Senator Patrick J. Leahy (June 25, 2003), *available at* http://www.hrw.org/press/2003/06/letter-to-leahy.pdf (quoting same language).

186 Memorandum from Diane E. Beaver, Staff Judge Advocate, Dep't of Def., to Commander, Joint Task Force 170, at 3 (Oct. 11, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf [hereinafter Beaver Oct. 11 Memo]

Most tellingly, the DOD believes that the Eighth Amendment prohibits torture or cruel, inhuman, and degrading interrogation techniques against terror suspects abroad. In a legal opinion written for interrogators at Guantanamo Bay (prior to the *Rasul* decision, when the Executive still believed no law applied[187]), the DOD stated:

> Although the detainee interrogations are not occurring in the continental United States, U.S. personnel conducting said interrogations are still bound by applicable Federal Law, *specifically the Eighth Amendment of the United States Constitution*, 18 U.S.C. § 2340 [federal torture statute], and for military interrogators, the Uniform Code of Military Justice (UCMJ).[188]

The DOD opinion further reviewed Eighth Amendment case law and, by reading it narrowly, concluded that certain interrogation techniques are acceptable "so long as no severe physical pain is inflicted and prolonged mental harm intended" and as long as there is a "legitimate governmental objective in obtaining the information."[189] Therefore, the opinion allowed for yelling, use of stress positions, such as standing for a limited time (four hours), and isolation for thirty days, among other techniques.[190] Even with its very restrictive reading of the case law, however, the legal opinion expressed concern that certain tactics (such as making death threats), even when used extraterritorially against noncitizens, violate the Eighth Amendment.[191] Moreover, the DOD recommended that "all proposed interrogations involving category II and III methods . . . undergo a legal, medical, behavioral science, and intelligence review prior to their commencement," in order to meet the requirements of the Eighth Amendment.[192]

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(approved by Donald Rumsfeld, Sec'y of Def.) (attached to Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def., to Sec'y of Def. (Nov. 27, 2002)).

187 *See supra* text accompanying notes 84–91.

188 Beaver Oct. 11 Memo, *supra* note 186, at 3 (emphasis added). This statement is significant not only because it asserts that the Eighth Amendment is binding outside the United States, but also because it mentions U.S. personnel (implicitly FBI and CIA) in contradistinction to military interrogators.

189 *Id.* at 6.

190 *Id.* at 5–6.

191 *Id.* at 6.

192 *Id.* at 7. Category II methods include use of stress positions for a maximum of four hours, isolation for up to thirty days, forced grooming, etc. Category III methods include death threats, exposure to cold weather (with appropriate medical monitoring), mild and noninjurious physical contact, etc. Memorandum from Jerald Phifer, Dir., J2, to Commander, Joint Task Force 170, at 1–3 (Oct. 11, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf (approved by Donald Rumsfeld, Sec'y of Def.) (attached to Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def. (Nov. 27, 2002)).

Thus, under the DOD's own analysis, a number of the CIA's interrogation techniques, including injurious physical contact, and any severe techniques without medical monitoring, would be prohibited by the Eighth Amendment. Presuming that the Eighth Amendment applies extraterritorially—as conceded by the DOD—the death of inmates due to brutal beatings inflicted during interrogations would be conclusive proof that the Eighth Amendment has been violated.

### *C. Indefinite Detention and Torture: Prohibited by the Basic Conceptions of Fundamental Rights*

The prohibitions on indefinite detention, torture, and cruel, inhuman, and degrading treatment fall into the category of fundamental rights and should apply as limits on our government's activities against all people abroad. Our nation's history and jurisprudence, as well as universal recognition of these prohibitions, logically compels this conclusion.

Even in the war on terror, the Constitution does not allow the end to justify any means. Regarding the use of torture to solve even the most heinous crimes, the Court has said, "The Constitution proscribes such lawless means irrespective of the end."[193] It has also declared that "military necessity" cannot constitutionally justify indefinite detention without charge, even in the war on terror.[194] Justice Kennedy's concurrence in *Rasul* made the point compellingly: "[T]here are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."[195] Indefinite detention without legal process, he argued, presented precisely such a circumstance, because:

> Indefinite detention without trial . . . allows friends and foes alike to remain in detention. . . . Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be

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[193] Chambers v. Florida, 309 U.S. 227, 240–41 (1940) ("No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."); *see also* Godsey, *supra* note 150, at 903 ("Nothing in the scholarly literature suggests that the Framers intended to create a sliding scale that adjusts the amount of force permissible depending on characteristics unique to the suspect.").

Professors Parry and White warn that "U.S. law on torture . . . has not been tested against the more extreme circumstances presented by terrorism." Parry & White, *supra* note 155, at 753. However, these professors were writing prior to the *Rasul* decision, in which the Supreme Court asserted that "wartime" or "military necessity" does not justify prolonged or indefinite detention without any process at all.

[194] Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004); *id.* at 488 (Kennedy, J., concurring).

[195] *Id.* at 487 (Kennedy, J., concurring).

> justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.[196]

A fundamental rights approach implemented along the lines suggested by Justice Kennedy would not hamstring the Executive. It would not ban seizing combatants on the battlefield, require *Miranda* warnings, or prohibit some period of incommunicado detention. What it would do is absolutely prevent the CIA, or any other arm of the Executive, from secreting human beings away for indefinite interrogation, mistreatment, and torture.

## CONCLUSION

The real, practical value of the fundamental rights approach is that once we determine which constitutional rights are fundamental, those rights limit government action at all times and in all places—regardless of a person's nationality or alleged crimes. Given our history and our jurisprudence, it is difficult to deny the fundamental importance of freedom from being kidnapped from one's home and indefinitely detained with no hope, no contact with the outside world, and no ability to challenge detention or assert innocence. Thus, an argument that our current situation is somehow different—because we are engaged in a war on terror and hunting down "evildoers"—such that these rights are irrelevant is entirely unpersuasive.

Assuming that the courts will continue, as they have since the Insular Cases, to invoke the fundamental rights approach to the extraterritorial application of the Constitution, a number of legal issues remain. Faced with an administration that would deny "enemy combatants" even the most basic rights, the courts must decide which rights they will recognize as fundamental and how they will ensure that these rights are protected. Several cases presenting these questions have already been filed in U.S. district courts, including the case of Khaled Masri, a German citizen who was mistaken for someone else, kidnapped, and detained abroad by the CIA for months.[197]

These cases and others like them raise issues such as whether the United States is protected by sovereign immunity, whether officials will be granted official immunity, and what laws and remedies apply. The fundamental rights approach could be an extraordinarily useful

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196 *Id.* at 488.

197 Dana Priest, Wrongful Imprisonment: Anatomy of a CIA Mistake, WASH. POST, Dec. 4, 2005, at A1. In another suit, eight men allege that they were subject to torture under Secretary Rumsfeld's command and make claims under the Fifth and Eighth Amendments as well as international law. Consolidated Amended Complaint for Declaratory Relief and Damages, Ali v. Rumsfeld, No. 05-CV-1378 (D.D.C. Jan. 5, 2006).

tool to decide these issues because, if a constitutional right is fundamental and applies extraterritorially, it would set parameters for procedural protection. Thus, a court could aim to resolve these issues in the most rights-protective way, unless such a result would be "impracticable and anomalous."

Ultimately, the Constitution simply does not permit our government to engage in indefinite detention or torture, no matter the end. Nor can it accept the indefinite detention of anyone upon nothing more than the President's say-so. Essentially, if the Executive has discretionary power to act as it will—to torture, detain without charge, and act in secrecy—unlimited by the Constitution, it is effectively above the law and the Constitution itself.