

2012

# Habeas Corpus, Protection, and Extraterritorial Constitutional Rights

Andrew Kent

*Fordham University School of Law*, [akent@law.fordham.edu](mailto:akent@law.fordham.edu)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#)

---

## Recommended Citation

Andrew Kent, *Habeas Corpus, Protection, and Extraterritorial Constitutional Rights*, 34 Iowa L. Rev. 34 (2012)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/500](http://ir.lawnet.fordham.edu/faculty_scholarship/500)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# Habeas Corpus, Protection, and Extraterritorial Constitutional Rights: A Reply to Stephen Vladeck’s “Insular Thinking About Habeas”

*Andrew Kent\**

## I.

My recent article in the *Iowa Law Review* shows that the Supreme Court’s landmark ruling in *Boumediene v. Bush* relied on a demonstrably incorrect understanding of key precedents known as the Insular Cases, which arose from actions of the United States military and the new civil governments of the islands acquired by the United States at the turn of the twentieth century—Puerto Rico, the Philippines, Hawaii, and for a time Cuba.<sup>1</sup> The *Boumediene* Court claimed that the Insular Cases held that the Constitution protects noncitizens outside the sovereign territory of the United States under a flexible, “practical,” multi-factor balancing test premised on the degree of “de facto” “control” that the United States government exercises in a given place and over a given person.<sup>2</sup> But, as my article demonstrates, a century ago when the Insular Cases were decided literally no one—no member of the Supreme Court, no counsel arguing before the Court, no members of Congress or Executive branch lawyers who opined on the issue, no prominent legal commentators who wrote on the issue—understood the Insular Cases in that way. Instead, it was essentially undisputed that the Constitution did not provide protections to any noncitizens outside the sovereign territory of the United States—even when the territory was governed by the United States, as Cuba was during the temporary military occupation. Furthermore, the Court held that even in a newly acquired de jure United States territory like Puerto Rico, a military government controlled by the international laws of war but not the Constitution could continue until and unless Congress established a civil government.

---

\* Associate Professor, Fordham Law School. Thanks to Ethan Leib for helpful comments on a prior draft of this reply. Thanks also to Steve Vladeck for his thoughtful response to my article.

1. Andrew Kent, *Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases*, 97 IOWA L. REV. 101 (2011).

2. *Boumediene v. Bush*, 553 U.S. 723, 762–66 (2008).

It is hard for me to find much fault with Professor Stephen Vladeck's generous response essay because he concludes that "the bulk of Professor Kent's historical work seems irrefutable," and "wholeheartedly agree[s]" with my analysis showing "that the Insular Cases do not support the extension of constitutional rights to non-citizens and/or 'military enemies' outside the territorial United States."<sup>3</sup>

## II.

Professor Vladeck does identify two disagreements with me, however, one of which I take up in some detail in this reply. First, Professor Vladeck thinks that I over-read *Boumediene* and *Munaf v. Geren*, concerning habeas for detainees in the Iraq conflict,<sup>4</sup> when I assert that they represent important new departures in United States law that presage a future extension by the Court of constitutional rights to noncitizens worldwide.<sup>5</sup> Professor Vladeck points out that the D.C. Circuit has, to date, read *Boumediene* in a more measured fashion.<sup>6</sup> He is right about the D.C. Circuit, and his prediction about the future trajectory of Supreme Court decisions may prove more prescient than mine. With its changing membership and the ever-dynamic institutional, legal, and political contexts in which it decides cases, it is hard to predict the Court's future.

Professor Vladeck's second disagreement with me concerns a distinction he draws between habeas corpus, protected by the Constitution's Suspension Clause,<sup>7</sup> and individual constitutional rights like due process, equal protection, and the like. Professor Vladeck contends that habeas is available even to people who lack individual constitutional rights because habeas is not, properly understood, an individual constitutional right at all.<sup>8</sup> It is rather a structural principle of the Constitution that primarily enforces the separation of powers between the branches of the federal government, and only secondarily protects individual liberty interests. As Professor Vladeck writes, "habeas is not a right; it is a remedy, and one the availability of which in no way turns on whether or to what extent *other* constitutional protections apply."<sup>9</sup> Professor Vladeck contends that during the era of the Insular Cases the Supreme Court never confronted questions about the potential extraterritorial reach of the Constitution's Suspension Clause.<sup>10</sup>

---

3. Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 18 (2012), [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_97\\_Vladeck.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Vladeck.pdf).

4. *Munaf v. Geren*, 553 U.S. 674 (2008).

5. Vladeck, *supra* note 3, at 18.

6. *Id.* at 20–22.

7. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

8. Vladeck, *supra* note 3, at 19.

9. *Id.*

10. *Id.* at 19–20.

*Boumediene* can be wrong about the Insular Cases but still right that habeas corpus is constitutionally required for detainees at the nonsovereign territory of Guantanamo Bay, Cuba, according to Vladeck.

A.

In a narrow sense, Professor Vladeck is correct that habeas is a right not a remedy and its “availability . . . in no way turns on whether or to what extent *other* constitutional protections apply.”<sup>11</sup> But I believe his claim is mistaken, as a historical matter, in a more fundamental sense. True, the writ of habeas corpus is more in the nature of a remedy (release from detention) than a right. True, the habeas statute has long allowed courts to free detainees who are held in violation of United States statutes and treaties, not just in violation of constitutional rights. True, whether one has an individual constitutional right under, say, the Takings Clause, does not itself somehow control or determine whether one may invoke the writ of habeas corpus. But—and here is the crucial point—whether one has a right to the habeas corpus remedy has, historically, been determined by the exact same inquiry that determined whether one has other individual constitutional rights. That inquiry was whether the individual was within the protection of the laws or not.<sup>12</sup> If a person was within protection of the laws, he could invoke habeas corpus and was also protected by other individual constitutional rights like the Due Process Clause. If the person was not within protection, he had no access to habeas and no entitlement to individual constitutional rights.<sup>13</sup> Protection was the key, and protection treated habeas the same as all other constitutional rights and remedies. Subsequent to the Insular Cases, in a controversial 1942 decision, the Supreme Court severed the link between protection and habeas corpus.<sup>14</sup> If this more recent doctrine is accepted, it is not clear to what role the principle of protection should play today. But historically, before the mid-twentieth century, the role of protection was fundamental.<sup>15</sup>

---

11. *Id.* at 19 (citing 28 U.S.C. § 2241(c)(3) (2006)). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (plurality opinion) (stating that “the Due Process Clause . . . informs the procedural contours of” habeas corpus for a U.S. citizen detained by the military in the United States); *id.* at 555-57 (Scalia, J., dissenting) (discussing the close relationship between “due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned”).

12. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009); Kent, *supra* note 1, at 124-32; Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1853-60 (2010); Andrew Kent, *The Court's Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. (forthcoming 2013) [hereinafter Kent, *Court's Fateful Turn*].

13. *See* sources cited *supra* note 12.

14. *See generally* Kent, *Court's Fateful Turn*, *supra* note 12.

15. I do not want to appear to suggest that the disagreement I have with Professor Vladeck can be resolved easily in my favor. As I understand it, Professor Vladeck's views are rooted in an

## B.

I also take issue with Professor Vladeck's suggestion that during the era of the Insular Cases the Supreme Court never confronted questions bearing on the potential extraterritorial reach of the Constitution's Suspension Clause.<sup>16</sup> As it happens, there are a few cases from which we might be able to infer the views that the Supreme Court (and the Executive branch) had about the territorial scope of the Suspension Clause. Several times the Court refused to intervene in habeas cases arising in various insular territories during time periods in which Executive courts were functioning but Congress had not provided any statutory mechanism for review in Article III courts. Though it did not issue fully reasoned opinions, it seems apparent that the Supreme Court believed it had no jurisdiction because Congress had not granted it. If the Court thought that the Suspension Clause positively required Congress to provide habeas jurisdiction, one would have expected to the Court to say so in at least one of the cases. It did not.

Two of the cases, which arose in Puerto Rico, were discussed in my article on the Insular Cases.<sup>17</sup> On April 11, 1899, Puerto Rico was formally annexed to the United States when the Treaty of Paris went into effect.<sup>18</sup> Prior to this date, the President governed the territory through his war powers, and the Supreme Court confirmed this was lawful and that the Constitution did not then protect persons in Puerto Rico.<sup>19</sup> Even after Puerto Rico was annexed, the President's military government had to continue because Congress did not get around to creating a civil government for the island until May 1900. During this interim period, the island was at peace and under the *de jure* sovereignty and complete *de facto* control of the United States, but because Congress had not acted the Court approved the continuance of the President's military government.<sup>20</sup> In mid-1899, the military governor of Puerto Rico created a military tribunal which he called the "United States Provisional Court for the Department of Porto

---

understanding of the history of habeas corpus in Britain prior to the American Founding, as set forth in important work by two eminent historians. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008); see also Stephen I. Vladeck, *The New Habeas Revision*, 124 HARV. L. REV. 941 (2011) (reviewing HALLIDAY, *supra*). The historical questions are hard. Both Professor Hamburger and I have separately taken issue with the Halliday-White-Vladeck views on habeas corpus and the principle of protection in British history. See Hamburger, *supra* note 12; Kent, *Court's Fateful Turn*, *supra* note 12. *Boumediene*, with its focus on separation of powers rather than individual status as determining the reach of the writ, sided with Halliday, White and Vladeck.

16. Vladeck, *supra* note 3, at 19.

17. Kent, *supra* note 1, at 139 n.157.

18. *Id.* at 133-34.

19. *Id.* at 134-36.

20. *Id.* at 138-39.

Rico.”<sup>21</sup> On two occasions, convictions of this court were brought to the United States Supreme Court for review.

In one case, *Ex parte Baez*, the Supreme Court denied an application for leave to file a habeas corpus petition and for a writ of certiorari to bring up the record of Ramon Baez’s criminal conviction in the Provisional Court.<sup>22</sup> Baez alleged in his filing with the Supreme Court that he had requested a grand jury indictment and petit jury trial, but both had been unconstitutionally refused by the Provisional Court.<sup>23</sup> Among other things, the Solicitor General’s brief maintained that Congress had made “[n]o provision whatever . . . for extending the judicial power of the United States over Puerto Rico,” “[t]he island has not been erected into a separate judicial district, nor has it been included in any existing judicial district,” and so people and institutions in Puerto Rico were not “within the territorial jurisdiction” of the Supreme Court.<sup>24</sup> Statutes descended from section 14 of the Judiciary Act of 1789 provided that the Supreme Court, lower federal courts and the individual judges and justices had the “power to issue writs of habeas corpus,” and all other necessary writs, within “their respective jurisdictions.”<sup>25</sup> In essence, the Executive argued that Puerto Rico was not within the statutory jurisdiction of the Supreme Court because Congress had not so provided. Faced with these difficult issues, the Supreme Court punted in an unconvincing, technical fashion.<sup>26</sup>

At the time, federal district and circuit courts also lacked statutory jurisdiction over Puerto Rico; in other words, it was clear that Mr. Baez had no access to an Article III court to review his criminal convictions and ongoing detention by a military court. The Supreme Court’s apparent unconcern is hard to understand if *Boumediene* is correct that the Constitution positively requires habeas corpus to be available in Article III courts for noncitizens in nonsovereign or quasi-sovereign territory that is under the total de facto jurisdiction and control of the United States. At the time, Puerto Rico was de jure United States territory and the still the Court did not intervene.

Cases also came to the Supreme Court from the Panama Canal Zone. One of them raised issues of habeas, judicial power, and territoriality in a particularly acute fashion—in a capital case briefed by one of the most prominent lawyers in America. But the Court still showed no concern about the lack of access to Article III review.

---

21. *Id.* at 138.

22. 177 U.S. 378 (1900).

23. *Id.* at 385.

24. Brief for the United States at 4-5, *Ex parte Baez*, 177 U.S. 378 (1900) (No. -).

25. U.S. Rev. Stat. § 751 (2d ed. 1878) (habeas corpus); *id.* § 752 (habeas corpus); *id.* § 716 (all other necessary writs).

26. See Kent, *supra* note 1, at 139 n.157.

By a 1903 treaty, Panama granted “to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal.”<sup>27</sup> The President governed the Canal Zone as a military reservation under the direction of the Secretary of War and, beneath him, the Isthmian Canal Commission.<sup>28</sup> Congress ratified this structure by vesting in the President and his appointees all necessary powers to create and run a government, until Congress superseded it.<sup>29</sup> The President then issued “instructions” to the Commission which declared a bill of rights for inhabitants of the Canal Zone; petit and grand jury guarantees were not included.<sup>30</sup> The Commission created trial courts and a Supreme Court of the Canal Zone.<sup>31</sup> Congress considered but did not act on bills which would have given federal courts in the United States jurisdiction to review cases arising in Canal Zone courts.

Under this legal architecture, a British national named Adolphus Coulson, born in the West Indies, was found guilty in the Canal Zone courts of poisoning his wife. The Supreme Court of the Canal Zone affirmed his conviction, over his objection that his constitutional rights, including the right to a grand jury indictment and petit jury trial, had been violated.<sup>32</sup> Somehow, probably through the intervention of the British diplomatic corps, Coulson obtained the services of one of the most eminent private lawyers in America, Moorfield Storey of Boston. He was formerly president of the American Bar Association and soon to be president of the National Association for the Advancement of Colored People. Storey and his team quickly petitioned the United States Supreme Court for a writ of error to bring up the case for review. The case was ordered docketed by the Chief Justice.<sup>33</sup>

---

27. Hay–Bunau-Varilla Treaty, U.S.–Pan., art. II, Nov. 18, 1903, 33 Stat. 2234. Article III provided further that “The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement . . . which the United States would possess and exercise if it were the sovereign of the territory . . . .”

28. See Letter from the Secretary of War to the President (Jan. 12, 1905), *reprinted in* H. Doc. No. 226, 58th Cong., 3d Sess., at 5–6 (1905).

29. Act of April 28, 1904, ch. 1758, § 2, 33 Stat. 429.

30. Instructions from the President to Isthmian Canal Comm. (May 9, 1904), *reprinted in* S. Doc. No. 401, vol. 3, 59th Cong., 2d Sess., at 2419 (1907).

31. See ISTHMIAN CANAL COMM., LAWS OF THE CANAL ZONE, ISTHMUS OF PANAMA, Act No. 1 of the Isthmian Canal Comm., *reprinted in* H. Doc. No. 226, 58th Cong., 3d Sess., at 113–18 (1905).

32. *Canal Zone v. Coulson*, 1 C.Z. Rep. 50 (1907) (No. 28), *in* 1 CANAL ZONE SUPREME COURT REPORTS: CASES ADJUDGED IN THE SUPREME COURT OF THE CANAL ZONE FROM JULY TERM, 1905 TO OCTOBER TERM, 1908 (1909).

33. Transcript of Record at 67, *Coulson v. Govt. of Canal Zone*, 212 U.S. 553 (1908) (No. 187). The Governor of the Canal Zone later wrote that the Court agreed to hear the case because the British Ambassador in Washington had been raising a stink about Coulson’s case

The Solicitor General's brief pointed out that no statute gave the Supreme Court jurisdiction to review judgments of the Supreme Court of the Canal Zone by writ of error.<sup>34</sup> Coulson responded with a new filing, seeking leave to petition for writs of habeas corpus and certiorari instead. Coulson argued that, especially in a capital case involving the "gravest" constitutional questions about Executive power over the individual, the Court was empowered by the Constitution to review the judgment of an inferior tribunal unless Congress had specifically negated its jurisdiction.<sup>35</sup> Coulson's theory seemed based on Article III and habeas case law rather than the Suspension Clause as such, but the brief suggested that habeas corpus is a constitutionally required backstop when no other form of statutory review is available.<sup>36</sup> The Solicitor General responded that *Baez* had denied review in similar circumstances, thus reiterating that the Court had no jurisdiction unless granted by Congress.<sup>37</sup>

In two memorandum decisions, the Court dismissed the writ of error "for want of jurisdiction" and denied the motions to file for writs of habeas corpus and certiorari.<sup>38</sup> We cannot know for sure why the Court did this, because it did not explain its reasoning. But, in light of the circumstances—a capital case, pressure from the British ambassador, impassioned argument by a leading light of the American bar—it is tempting to assume that the Court would have exercised jurisdiction if it thought the Constitution required it or even merely allowed it. Read alongside *Baez*, I am inclined to see *Coulson* as evidence that the Court did not believe that the Constitution required Congress to extend habeas jurisdiction to detainees in nonsovereign or quasi-sovereign territory.

---

and the lack of jury trials in the Canal Zone. See GEORGE W. GOETHALS, GOVERNMENT OF THE CANAL ZONE 71 (1915).

34. Motion to Dismiss or Affirm and Brief in Support Thereof at 2, *Coulson*, 212 U.S. 553 (No. 187).

35. Brief in Opposition to Motion to Dismiss or Affirm at 9-11, 16, *Coulson*, 212 U.S. 553 (No. 187). Note that Coulson's lawyers filed two briefs with this same title. The material cited in this and the following footnote are from the 16-page brief, not the 30-page brief with the same title.

36. *Id.* at 9-11, 15-16.

37. Brief by United States in Opposition Filed by Leave of Court at 2, 12-13, *Coulson*, 212 U.S. 553 (No. -).

38. *Coulson*, 212 U.S. 553 (1908) (mem.) (No. 187); *In re Coulson*, 212 U.S. 553 (1908) (mem.) (No. -).