



Does the Constitution Follow the Flag?: Iraq, the War on Terror, and the Reach of the Law By [KAL RAUSTIALA](#)

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A bedrock principle of American democracy is that the Constitution defines and limits our government. Yet does the Constitution constrain the exercise of government power abroad? For instance, would it constrain the U.S. if we occupy Iraq after the war ends?

The venerable question of "whether the Constitution follows the flag" --a major issue in the 1900 Presidential campaign--has reemerged, over a hundred years later, due to the war on terror and the current conflict in Iraq.

As is true with respect to many questions of foreign relations law, the leading precedents here are old, and they reflect often outdated conceptions of law and politics. There are also complicated cross-currents of citizenship and war powers at play.

Moreover, the question of the Constitution's extraterritorial reach itself is perhaps misleading. The Constitution certainly applies globally. The real question is how it applies, and whether specific rights guaranteed by the Constitution are somehow territorially-limited.

Existing precedents suggest that they are. Even when the U.S. annexes territory, inhabitants of the territory do not necessarily enjoy the full protection of the Constitution. Thus, residents of Puerto Rico, though U.S. citizens, are not as a constitutional matter protected by the full Bill of Rights.

Meanwhile, when the U.S. occupies foreign territory, pursuant to military action, or leases territory, pursuant to a treaty, the constitutional constraints are even weaker--some would say non-existent.

Just how weak are the constraints with respect to issues that have arisen in the war on terror? One post-9/11 decision already provides some insight; precedents and practice also help suggest an answer.

For present purposes, the most significant question is probably this one: Can the U.S. government act as it pleases if we occupy Iraq--subject only to the limitations of international law--or must it also abide also by the U.S. Constitution's principles?

Some commentators, as well as some courts, have suggested that the answer is that basic constitutional protections are completely inapplicable to non-citizens abroad. But that answer is clearly at odds with the best spirit of our constitutional tradition.

[Column continues below ↓](#) **Border Games: A Decision Explores Rights at Guantanamo**

Last month, in [Odah v. U.S.](#) the U.S. Court of Appeals for the D.C. Circuit faced the question of whether citizens of Australia, Kuwait, and Britain captured in Afghanistan and detained at the U.S. base in Guantanamo, Cuba have a legal right to challenge their detention.

The fact that the detainees are non-citizens was not crucial to the decision: non-citizens in the U.S. enjoy many of the same constitutional rights that citizens do. Accordingly, the court in [Odah](#) acknowledged that the relief sought - a writ of habeas corpus - was indeed available to non-citizens.

What was crucial was the fact that Guantanamo is technically Cuban, rather than U.S., soil. For this reason, the court could not "see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not." And it concluded that the detainees could not invoke the writ.

The D.C. Circuit's decision vindicates the Administration's policy of detaining suspected Al Qaeda members outside U.S. borders - in the sense that it proves that, as the Administration thought, it has gained a legal advantage from doing so.

But that legal advantage is misguided - in reality, Guantanamo is U.S. territory for all relevant purposes. Is it appropriate for the government to act unfettered by the Bill of Rights simply because it chooses to place detainees 90 miles off Florida, rather than in Florida itself?

Geography and the Law: A Primer

The connection between geography and the law is something few of us think about, though our legal system is replete with implicit assumptions about territory.

For most of our history, the prevailing belief was that U.S. law did not have any force outside the U.S.. Indeed, in 1891 the Supreme Court held that the Bill of Rights did not apply at all when the U.S. government acted against citizens abroad.

Courts of this period also ruled that U.S. statutes did not apply outside our borders. At the same time, however, we maintained special courts abroad for our citizens in countries that were deemed "uncivilized," such as China. Until 1943, the U.S. even had a special District Court for China, which answered to the U.S. Court of Appeals for the Ninth Circuit.

Perhaps the most important cases relating to the territorial reach of the law emerged from the Spanish-American War. In that war, the U.S. became, for the first time, an imperial power, acquiring Puerto Rico and other former colonies of Spain. In the *Insular Cases* the Supreme Court faced the burning question of whether the constitution applied to our new possessions, which were clearly not destined for statehood.

The Court held that Puerto Rico was "foreign in a domestic sense" and thus only some constitutional provisions applied. The ruling was pithily summed up by then-Secretary of War Elihu Root: "the Constitution indeed follows the flag, but it doesn't quite catch up."

The Uneven Erosion of Territoriality

During the Twentieth Century, the view that U.S. law stopped at the water's edge eroded. Courts started to enforce domestic statutes extraterritorially, especially in regulatory areas such as antitrust. As the world economy grew interconnected, the notion that U.S. law was limited to U.S. territory began to seem archaic.

After World War II, the U.S. occupied Germany and Japan. In neither case did the U.S. purport to annex the territories concerned. The Allies did claim, however, that German sovereignty had been extinguished in the war. Nonetheless, German and Japanese law, with some exceptions, continued to remain in force, and the U.S. Constitution was not generally considered relevant to the occupation.

The year 1957 marked a watershed in our conception of legal geography. That year, the Supreme Court's decision in *Reid v. Covert* expressly overturned the rule that the Bill of Rights did not apply abroad, calling it a relic from another era. *Reid* declared that "when the Government reaches out to punish a citizen who is abroad, the shield [of] the Bill of Rights...should not be stripped away just because he happens to be in another land."

Technically, the Court's holding was limited to citizens alone. Nevertheless, some of the language in *Reid* is so sweeping that it strongly suggests an extension to non-citizens. They, too, are protected by the Constitution when they confront the U.S. government within the U.S.; why should its protections be stripped away when they confront the U.S. government abroad, just because they "happen to be in another land?"

Thus, it is not too surprising that, in an unusual case in 1979, *U.S. v. Tiede*, a U.S. court in occupied Berlin built on *Reid's* logic, holding that even non-citizens abroad possessed constitutional rights.

The Upshot of Mixed Precedents on the Constitution's Reach

In short, the role of territory in our legal system is unclear, or at least inconsistent.

On the one hand, the basic powers granted by the Constitution are unaffected by geography. Many statutes are routinely applied to conduct abroad. And citizens are clearly protected by the Bill of Rights wherever they go in the world.

On the other hand, while the holdings of *Insular Cases* have been limited, their basic principle--that territories ruled by the U.S. are constitutionally distinct from the U.S. itself--has not changed. In 1990, the Supreme Court expressly reaffirmed this principle in *U.S. v. Verdugo-Urquidez*, on the way to ruling that the Fourth Amendment did not apply to a search by U.S. government agents of a non-citizen's property in Mexico.

The *Odah* decision discussed above - denying the writ of habeas corpus to those on Guantanamo - continues this line of thought. According to this logic, non-citizens abroad lack any constitutional rights, even when they confront the U.S. government there. However, they continue to enjoy constitutional rights within U.S. borders, even when here illegally.

Future Directions: What Will Happen with the Extraterritorial Constitution?

Despite the musty origins of much of the doctrine I have described, the issue of the geographical reach of the Constitution is not arcane. In a globalizing world, the U.S. frequently acts abroad. FBI agents interrogate suspects in Africa; U.S. drug officers collaborate with colleagues in Mexico; and antitrust officials prosecute cartels in Europe. As the war on terror makes clear, the U.S. will act abroad--even rule abroad--when necessary.

The increasing prevalence of these situations ought to make us rethink the constitutional significance of territory. In particular, the notion that the U.S.--which prides itself on the rule of law--can act unfettered by any constitutional consideration simply because it acts extraterritorially is in tension with the core principles of limited government that our nation was founded upon.

Rethinking the role of territory in the law is not easy, but a few considerations are germane.

Some issues are relatively straightforward. U.S. rule in Puerto Rico or the Virgin Islands is effectively indefinite. Given this, it is clearly unjust to treat these areas differently simply because they are outside the territorial boundaries of the 50 states. The Constitution should apply fully and completely wherever the U.S. is sovereign.

Law enforcement presents harder questions. Should the FBI provide *Miranda* warnings when it interrogates criminal suspects abroad? Recently, in the case of *U.S. v. Bin Laden*, a federal court said it must. (The defendants involved in the ruling did not include Osama Bin Laden, as the case name might suggest; rather, they were two alleged participants in bombings of U.S. embassies in Kenya and East Africa.)

While the government argued that the obligation to provide such warnings would hobble law enforcement, the court found otherwise. Its ruling, in my view, was reasonable. In general, and where practicable, foreign citizens whom we subject to the coercive force of our criminal law ought to receive the basic protection of our constitution, with respect to the rights of criminal suspects and defendants, as well.

The War on Terror: Do Combatants Have Any Constitutional Rights?

What if, however, the U.S. pursues suspected terrorists abroad not as criminals. but rather as combatants? In that instance, must it still honor their constitutional rights?

A war paradigm rather than a criminal justice paradigm provides a very different set of legal rules. Within the U.S., courts have upheld, albeit with much controversy, treatment for "enemy combatants" - specifically, indefinite detention without access to an attorney that would be unconstitutional in a criminal prosecution. (Joanne Mariner's [column on the case of Yaser Hamdi](#) explains the issue in greater detail.)

While this is an evolving area of the law, it is plain that U.S. agents are even less restrained when they act against enemy combatants outside U.S. territory.

Guantanamo presents an unusual situation, in which the U.S. is clearly the de facto sovereign. Cuban sovereignty over Guantanamo is formal at best. The U.S. leases Guantanamo from Cuba, but does so pursuant to an agreement that Cuba cannot terminate without US consent. Given the realities of Guantanamo, U.S. courts ought to treat Guantanamo as if it were U.S. soil.

That would not necessarily alter the treatment that the detainees receive. But it would mean that habeas corpus pleas would not be per se barred based on the fiction that Guantanamo is really Cuban territory. Put simply, *Odah* and similar precedents holding the base on Guantanamo to be the equivalent of a foreign country ought to be overruled.

Occupation and Iraq: Does the U.S. Constitution Apply At All?

The hardest questions of all are raised by the possible long-term occupation of Iraq. While the Constitution cannot shackle U.S. forces in a war, if the U.S. does occupy and govern Iraq, are there any legal restrictions on what the U.S. may do?

First, international law itself - through the Geneva Conventions and the earlier Hague Conventions, as well as customary law, prohibits a range of actions by "belligerent occupiers" against civilians.

Under these Conventions, occupiers cannot institute ex post facto laws (for more on such laws, see Vikram Amar's [recent column for this site](#)), seize private property, or restrict religious practice. These prohibitions are rough equivalents to the U.S. Constitution's Ex Post Facto Clauses, Takings Clause, and Free Exercise Clause.

Importantly, these prohibitions apply whether the occupation is deemed "civil" or "military"--a distinction that is currently being debated within the U.S. government. The Geneva Conventions also grant various rights to occupied civilians, including the right to an attorney if charged with a crime. (In the U.S. Constitution, this right is contained in the Sixth Amendment.)

Second, as a matter of domestic law, including the U.S. Constitution, it is clearly constitutional for the U.S. to establish an interim government and courts in Iraq, such as military commissions.

What about other actions of the U.S. in postwar Iraq, however? That is an open question. Older precedents suggest that the Constitution itself would not limit the actions of the U.S.. Yet it seems difficult to believe today that there are no constitutional restraints on U.S. actions abroad in a country it is occupying and essentially governing.

For instance, could the U.S. occupation administration constitutionally treat some races or religions in Iraq differently than others - for instance, privileging Shiites when distributing food or shelter? Could it subject Iraqi civilians to arbitrary punishments, without giving them the benefits of notice and a hearing so that they could present their own version of events?

Surely the Constitution provides some minimal restraint in these situations, which implicate fundamental rights. One hopes such questions will not be put to the test.

The Reach of the Law: A Question Likely to Recur

In the U.S., the Constitution is the law of the land, for citizens and non-citizens alike. But where does the reach of that law end?

There are no simple answers to this question. Yet one thing is clear: in a globalizing and dangerous world, we will be forced to consider the connection between law and geography again and again. The current war magnifies the stakes, both for our security and for our constitutional tradition.

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