

## The boundaries of the Bill of Rights; [HOME EDITION]

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### Abstract (Document Summary)

In 1957, the court changed its position, overturning decades of precedent to declare that American citizens are in fact protected against U.S. government misbehavior by the Bill of Rights even outside the country. Unfortunately for the rest of the world, the court limited its ruling to U.S. citizens. Foreigners remained stuck with the old rule that the Bill of Rights doesn't apply abroad.

This sovereignty-based view explains a lot about current policy. For example, the U.S. is a signatory to the U.N. Convention Against Torture, and the Justice Department has interpreted the treaty-based restrictions to be the same as our constitutional restrictions on cruel punishment. The catch, however, is that neither the treaty nor the Bill of Rights applies to foreigners abroad. Likewise, the secret European prisons are in Europe rather than North Dakota not because facilities are less secure in the Great Plains but to escape the legal restrictions that would bind the hands of CIA agents here.

These considerations put the torture debate in perspective. As a matter of domestic law, U.S. agents abroad may behave as they please toward foreign detainees. What the McCain amendment does is try to narrow this by extending a U.S. statute abroad -- and declaring that Congress' will on inhumane treatment follows U.S. agents wherever they go.

### Full Text (811 words)

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ON THURSDAY, after several weeks of vehement opposition, the White House reversed itself and agreed to back a law banning the cruel or inhumane treatment of terror suspects by American officials, not just in the U.S. but anywhere in the world.

The White House made its decision just a week after Condoleezza Rice faced outrage in Europe over a different, but related, set of allegations: that the U.S. operates clandestine prisons in Europe where suspects are being interrogated.

Both of these cases, in addition to raising questions about wartime morality and the fundamental values of American society, challenge the traditional geographic assumptions of our legal system -- about the role of borders, the meaning of territory and just how and where our laws should be applied. Most of us rarely think about how geography affects legal rules, yet as the torture debate shows, the U.S. government has thought long and hard about how to escape legal restrictions by moving activities "offshore."

Like a corporation seeking a more favorable tax system by relocating to the Caymans, or a firm seeking cheaper labor by hiring software programmers in India, the Bush administration is seeking a more favorable legal climate by moving detainees offshore. Once outside American territory, American agents have a much freer hand.

Why is this so? The framers drafted the Constitution in very general terms. It refers to the rights of persons, not citizens. It doesn't say who these persons are or where they must be located to enjoy its protections.

For a long time, federal courts interpreted the Bill of Rights to apply only within U.S. territory. Consequently, for most of our history, the American government did not have to live by its restrictions when it acted abroad.

But this idea -- that our most fundamental legal rules evaporate on crossing the border -- reflects very old notions about sovereignty. When sovereign states first emerged in Europe in the 17th century, their distinguishing feature was that they had a clearly defined territory and the right to regulate what went on within that territory. What happened outside national borders was another story.

So when, in 1880, American diplomats in Japan "tried" and convicted one American for killing another in Yokohama Bay, they did not need a jury to convict. When the defendant asserted that his 6th Amendment right to a jury trial had been violated, the Supreme Court declared "the Constitution has no operation in another country."

In 1957, the court changed its position, overturning decades of precedent to declare that American citizens are in fact protected against U.S. government misbehavior by the Bill of Rights even outside the country. Unfortunately for the rest of the world, the court limited its ruling to U.S. citizens. Foreigners remained stuck with the old rule that the Bill of Rights doesn't apply abroad.

This sovereignty-based view explains a lot about current policy. For example, the U.S. is a signatory to the U.N. Convention Against Torture, and the Justice Department has interpreted the treaty-based restrictions to be the same as our constitutional restrictions on cruel punishment. The catch, however, is that neither the treaty nor the Bill of Rights applies to foreigners abroad. Likewise, the secret European prisons are in Europe rather than North Dakota not because facilities are less secure in the Great Plains but to escape the legal restrictions that would bind the hands of CIA agents here.

The current debate over economic offshoring puts globalization at center stage. It is a globalizing world that makes the offshoring of jobs, tax homes and services attractive to American firms. But globalization is also central to the debate over the offshoring of torture and prisons. The enormous volume of air traffic; the existence of phones, video links and e-mail; and the close and frequent ties between U.S. and foreign forces all enable the Bush administration to pursue its interrogation of high-value detainees abroad.

With a permissive set of legal precedents in hand, the only surprise is that we have not moved more foreign prisoners offshore. Perhaps this is only the beginning, and we can soon expect to see ordinary foreign convicts transferred to prisons offshore. Arizona has considered opening a state prison across the border in Mexico. The incentives, both fiscal and legal, are powerful.

These considerations put the torture debate in perspective. As a matter of domestic law, U.S. agents abroad may behave as they please toward foreign detainees. What the McCain amendment does is try to narrow this by extending a U.S. statute abroad -- and declaring that Congress' will on inhumane treatment follows U.S. agents wherever they go.

But the fundamental idea that the Bill of Rights stops at the border is not affected by the amendment. Only the Supreme Court can change this rule. And it should.

Credit: KAL RAUSTIALA is a professor of law and global studies at UCLA.

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