Constitutional Rights for Nonresident Aliens

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What claim, if any, do nonresident aliens have on the U.S. for basic legal protections? Until recently, many argued that the answer was, essentially, none. Those aliens who live in territory controlled by the U.S. were long held to be entitled to some basic constitutional protections. But aliens in territory not controlled by the U.S. were thought by many to be beyond the protection of the U.S. Constitution. The Congress could grant them certain protections as a matter of statute, but what Congress grants, Congress can take away.

Then in 2008 the Supreme Court decided the case of *Boumediene* v. *Bush*, which held that alien detainees, held by the U.S. in Guantanamo Bay, Cuba, have a constitutional right to contest their detention by filing for a writ of habeas corpus. This case extended constitutional rights further than they had ever been extended before, but it still left open a basic question: Do the detainees in Guantanamo benefit from a right to file habeas petitions because U.S. control over Guantanamo is effectively equivalent to owning a territory, or do aliens anywhere in the world benefit from basic constitutional rights that protect them from abuse at the hands of the U.S. government?

This issue is now working its way through the lower courts. But it should not be thought of simply as a legal issue. It is a legal *policy* issue, which ought ultimately to be governed not by some narrow reading of case precedent, but by considerations of what would be just.

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Prior to the decision in *Boumediene*, I had argued that the question whether nonresident aliens benefit from constitutional protections was legally open, and that the moral reasons weigh in favor of extending core protections to nonresident aliens. At the same time Benjamin Wittes, in his book *Law and the Long War*, argued that if this were so, there would be no principled basis for limiting their constitutional rights. Thus, according to Wittes, if the courts were to accept that nonresident aliens can bring habeas suits to protect their liberty, then there would be no principled reason why they should not also be able to bring suit for wrongful deaths if their family members were killed in military attacks. Since no country could prosecute a war, no matter how just, if it had to defend every military act in court, no country should have to extend habeas rights to nonresident aliens.

I argue here that nonresident aliens, in places that are clearly not U.S. territory, should benefit from constitutional rights. At the same time, I argue, contra Wittes, that not all harms inflicted by the U.S. government can give rise to a lawsuit, and that the distinction between those who should have a right to sue and those who should not can be drawn in a principled way.

Factual Background

In the recent case of *Al Maqaleh* v. *Gates*, federal district court Judge John D. Bates held that at least some nonresident aliens, detained in Bagram Air Base in Afghanistan, have the constitutional right to seek their freedom through a writ of habeas corpus. Through this right, they can ask the federal courts to determine whether they are being held in a way consistent with, or in violation of, federal law, including the U.S. Constitution. If their detention is unlawful, the courts can order their release.

Judge Bates based his opinion on the Supreme Court's holding in *Boumediene v. Bush*. Justice Kennedy's opinion in *Boumediene* described a number of factors that are relevant to determining whether a particular detainee benefits from the right of habeas and held that these factors imply that the detainees in Guantanamo *do* have a constitutional right to habeas. Judge Bates held that these factors imply that detainees captured and detained in a war zone do *not* have a constitutional right to habeas, but that

detainees captured *outside* a war zone, and *shipped into* a war zone like Afghanistan, *do* have a constitutional right to habeas.

Some have argued that Bagram is the new Guantanamo—a legal black hole where the U.S. president can detain suspected terrorists free from any court supervision. Others argue that Bagram, being a war zone, is fundamentally different from Guantanamo, and that it would be completely inappropriate for detainees to have constitutional rights that a court can enforce in a war zone. The Obama administration takes the second view and is appealing this decision. It wants to be free to hold detainees in detention centers outside of the U.S. and outside of its facility in Guantanamo Bay, Cuba, without any supervision from the courts. That is, it wants to treat nonresident aliens, at least those outside Guantanamo, as having no constitutional rights that the courts can protect.

I argue here that Judge Bates got the case basically right. More specifically, I argue that nonresident aliens have basic constitutional rights that limit what can be done to them by the U.S. government, that courts would normally not be in a position to enforce those rights in a war zone, but that the U.S. government cannot strip nonresident aliens of their constitutional protections by choosing to ship them *into* a war zone.

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The Moral Case for Extending Constitutional Protections to Nonresident Aliens

The core argument for extending constitutional protections to nonresident aliens appeals to the idea of mutuality of obligation: aliens cannot have duties to respect U.S. law unless the U.S. has a legal duty to respect them. The United States claims the right to prosecute even nonresident aliens for crimes, including various crimes that constitute international terrorism, that affect the United States or its citizens. This implies that the U.S. holds them to have a duty to avoid committing these crimes. In return, however, the U.S. must recognize that they are entitled to the Constitution's most basic protections. These include the right to petition for a writ of habeas corpus, which implies the right not to be deprived of their liberty without due process of law.

Wittes spells out the contrasting position, which I call the membership position, as follows:

> The Constitution is a social compact among the people and the states to create a national government to govern them. An American citizen is party to that compact wherever she goes in the world, and therefore retains a claim on the adjudicatory power of the courts when mistreated by her government abroad. The alien domestically is, to a lesser but still considerable degree, also party to the compact—subject to American law, entitled to many of its rights and protections, and therefore entitled as well to have its courts resolve her disputes with its sovereign. But not everyone in the world is a party to that compact.

In particular, on Wittes's view, nonresident aliens are not part of the compact and not entitled to "a claim on the adjudicatory power of the courts when mistreated by the U.S. government."

The question raised by the membership position is what is this compact, and who is really a member of it? It turns out that when one pushes on this question, there is no good reason for excluding nonresident aliens. Instead, such an exclusion expresses a simple prejudice in favor of treating outsiders as beyond the pale.

Let us start, then, with the question whether this idea of a social compact can be taken literally. The answer is clearly no, at least not if all citizens are to be members of it. Those born into U.S. citizenship often do nothing to indicate that they are part of a compact or agreement. They take no oaths of loyalty, and their mere acquiescence in the constitutional order need indicate nothing other than that they view the costs of leaving or resisting as too high. Arguably voting is a sign that one sees oneself as a citizen in the rich sense of the word: one who takes her share of responsibility for the choices made by her government. But one does not forfeit one's citizenship in the thinner, legal sense, that gives one the protections of the Constitution, by refraining from all such exercises of civic engagement.

One might take a cue from Wittes when he says that the resident alien is entitled to legal protections because she is subject to U.S. law. But, as noted above, if the condition that would allow one to benefit from constitutional rights is that one is subject to prosecution by U.S. prosecutors for violations of U.S. laws, then everyone in the world benefits from constitutional rights, as everyone in the world is subject to prosecution by U.S. prosecutors enforcing laws that defend the United States and its citizens. Indeed, that is what the Military Commissions Act (MCA) of

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2006 is premised on. On the one hand it attempts to strip nonresident aliens of the right to seek the protection of habeas corpus, but on the other hand it lists a range of crimes for which nonresident aliens can be prosecuted by U.S. military prosecutors. As the MCA states, the purpose of the Act is to "establish . . . procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."

One might try to narrow, rather than broaden, the conception of membership, so that it includes only citizens. On this view, resident aliens do not have constitutional *rights*, they have something more like constitutional *privileges*; that is, they benefit from constitutional rights not as a matter of right, but as a privilege extended to them. The question then is: Why should the benefit of constitutional protections be extended to them? Two reasons come to mind. First, it would avoid the unsightly spectacle of a two-tiered system of justice within the "homeland." Second, it would indicate a spirit of generous hospitality toward guests. Neither of these, one might think, needs to be extended to nonresident aliens. Rather, it can be left to the legislature to determine how best to handle nonresident aliens in particular contexts. If the legislature feels that the country can be magnanimous, or if comity between states demands it, then it can grant procedural protections to nonresident aliens. But if other considerations, such as security or a desire to prevent a flood of litigation, are dominant, then Congress can block access to our courts.

The problem with this move is that it undermines the idea of *constitutional* rights for resident aliens. Start with the unsightly spectacle of a two-tiered system of justice within the homeland. Appearances matter, but are they the source of constitutional constraints that override all countervailing considerations? If aliens were a source of a distinct threat, would appearances suffice to keep the U.S. from treating them differently? If appearances were all that weighed on the side of treating them the same, it would seem that Congress should have the power to decide that other considerations matter more. And in that case, the protections aliens benefit from should be conceived of as statutory rather than constitutional.

Appearances matter, but are they the only source of constitutional constraints that override all countervailing considerations?

It might be pointed out, at this juncture, that resident aliens *do* benefit from less protection than citizens in times of war when they are seen as threats. Since the dawn of the country, the U.S. has allowed "enemy aliens" to be detained with little to no process. The Alien Enemies Act of 1798 allows the president, in times of war, or threatened war, to declare that aliens from the enemy or threatened enemy country "shall be liable to be apprehended, restrained, secured and removed, as alien enemies." To its later shame, the U.S. Supreme Court deemed constitutional the detention of U.S. citizens of Japanese ancestry during World War II, but no great fuss has ever been made about the simultaneous detention of Japanese aliens.

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Nevertheless, aliens are still held to benefit from constitutional rights quite generally. But the characteristic firmness of these rights—that they cannot be removed by simple legislative act—cannot be explained by appeal to the unsightliness of a two-tiered system of justice generally. Nor can it be explained by appeal to a spirit of hospitality. One might say that it would be too awkward to have a dual track system of justice, but it is historically common for countries to offer second-class justice to some in their midst. Awkwardness, appearances, and hospitality are all thin reeds on which to hang constitutional rights.

If there is to be a reason why resident aliens *must* benefit from constitutional protections on a par with citizens—a reason of justice that would explain why the Congress should not be *allowed* to treat them as it deems most prudent and convenient—it has to be mutuality of obligation. As James Madison once put it: "as they owe, on one hand, a temporary obedience [to the laws], they are entitled, in return, to their protection and advantage." But, as noted above, mutuality of obligation, in the context of a global power enforcing its laws on any who would dare to violate them, requires global protection against abuse by that same government.

Reductio ad Absurdum Objection

Wittes acknowledges that one might think that "judicial review somehow flows from the fact of detention by American forces." But he objects that this leads to an absurd conclusion.

Muslim detainees line up for prayers at Guantanamo Bay, Cuba. (Kyodo via AP Images)

> The family of a person killed in an errant missile attack has suffered a great deal more than someone merely detained, and the victim of that strike has certainly been subject to the exertion of American power no less subject to the Constitution than the person detained. Yet at least under current doctrine, neither the alien's injury nor the illegality of the government's conduct that led to the tragedy—however egregious the illegality may have been—would induce the courts to entertain a wrongful-death suit by such a family.

The logic of the argument is this: if the courts would not hear a suit based on a worse violation—presumably of the right not to be deprived of life without due process of law—then there is no reason for them to hear a suit based on a lesser violation.

One might be tempted to say that courts *should* hear lawsuits from nonresident aliens based not only on loss of liberty but also on loss of life. But Wittes raises the specter of a flood of litigation: "There are untold numbers of people abroad who might ascribe their misfortunes, real or imagined, to American governmental behavior alleged to defy legal norms." If the U.S. is not to let them all in through the courthouse door, as it were, then it ought not to open the courthouse door to nonresident aliens at all.

Wittes insists that he is not making a slippery slope argument to the effect "that allowing habeas jurisdiction will lead willy-nilly to extensive judicial supervision of war planning." He does not "doubt that the judiciary could open the door just a crack and entertain habeas claims but not others." His argument is rather that "[t]here would … be little principled reason to make these distinctions." In other words, he thinks the only morally defensible position is one in which nonresident aliens have no court-enforceable constitutional rights.

Reply to Wittes's Objection

Wittes's argument appeals to the thought that if U.S. courts crack open the door to constitutionally grounded lawsuits, then they will have no principled basis for stopping a flood of litigation, nearly all of which they have neither the opportunity nor the obligation to address. But the threat of inappropriate litigation is no more pressing in the international arena than domestically. And the solution in both cases is the same: appropriate pleading requirements. Plaintiffs

must state a legal claim before they can bring a lawsuit, and not every harm caused by government action can ground a legitimate claim.

For example, economic regulation regularly harms people by reducing the value of their property. But one can state a claim for a taking of property only if the regulation deprives one of all productive use of it. This pleading requirement—that one claim to have been deprived of *all* productive use of one's property before making a claim for a regulatory taking—provides a reasonable balance between allowing the government the freedom to regulate and protecting individual property rights.

A similar point can be made in the context of military action. The government needs to be free to detain threatening individuals in war zones where normal law enforcement practices are not possible. That is the essence of the idea of suspending habeas in times of rebellion or invasion. Those are times when normal policing will not keep order, and in those times one has no right to go to a court to seek vindication of one's constitutional right to liberty.

Likewise, the government needs to be free to use lethal force against legitimate military targets. Given the limits of military intelligence and weapon technology,, this will inevitably cause some collateral damage to innocent civilians. Causing collateral damage does not violate the victims' right not to be deprived of life except with due process of law. That right applies paradigmatically to *punishment*, not military action. And even if there must be a derivative sense in which the right protects against the government's use of lethal force more generally, the right must be stated in such a way as to allow the government the latitude it needs for legitimate military action.

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Generalizing the point, in a military context only clearly and egregiously illegal actions should give potential plaintiffs a right to sue. That means that if the U.S. has committed a war crime, say by dropping bombs on a village containing no legitimate military targets, and if the plaintiffs can make a case that this was not simply an accident in the effort to hit a legitimate military target, then there is no reason the U.S. should not allow suit for damages. But if the U.S. is pursuing proportionately large legitimate military targets, the courts should not be open to hearing lawsuits from those harmed in that effort.

The thought that the courts would be open to hearing cases from nonresident aliens who are harmed by unjustified activity that violates the internationally recognized law of war should not strike alarm bells. There is actually longstanding precedent for such cases. In 1900 the U.S. Supreme Court allowed a Cuban boat owner to sue for damages when his fishing boat was taken in the Spanish American War, in violation of longstanding international law. And in 2004, the Court held that new developments in *jus cogens*—international law considered so fundamental to a just international order that no country should be free to reject it in its domestic legal regime—could be enforced in U.S. courts

Prohibitions on war crimes are core examples of *jus cogens*, so aliens should already be able to bring the sort of tort suits that Wittes thinks would be absurd. They are not absurd, and there is no reason the U.S. Constitution should not provide a parallel ground for the same suits. Doing so would provide recognition of the moral standing of nonresident aliens, and would do no more to open the doors of the courthouse to a flood of litigation than is already the case.

Conclusion

In sum, there is no reason to think that granting habeas rights to those detainees the U.S. chooses to ship *into* a war zone would inhibit the U.S.'s ability to fight a war. Rather, this should inhibit the choice to ship detainees into a war zone. If that means that the U.S. then has to provide constitutionally adequate due process to those nonresident aliens whom it picks up outside of a war zone and then seeks to detain, so much the better. Given that the U.S. claims the right to prosecute nonresident aliens for crimes, it implicitly takes the position that nonresident aliens owe a duty of respect to U.S. law. Accordingly, it is only just and fair to insist that the U.S. must afford them due process of law in return. It must afford them basic constitutional rights not only if it actually chooses to prosecute them, but if it does anything to them that clearly threatens their basic rights, including subjecting them to long-term detention outside of a war zone, or attacking them in a way clearly prohibited by the law of war.

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Sources: Alec Walen and Ingo Venzke, "Detention in the 'War on Terror': Constitutional Interpretation Informed by the Law of War," *ILSA Journal of International & Comparative Law* 14 (2008); Benjamin Wittes, *Law and the Long War* (Penguin Press, 2008); Glenn Greenwald, "Bagram, The Sham of Closing Guantanamo," available at http:/www.salon.com/opinion/greenwald/2009/09/15/bagram/index.html; Brief for Respondents-Appellants, *Maqaleh* v. *Gates*, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir); Gerald L. Neuman, *Strangers to the Constitution* (Princeton University Press, 1996); James Madison, *Madison's Report on the Virginia Resolutions (1800),* in 4 Debates, Resolutions and Other Proceedings, in Convention, on the Adoption of the Federal Constitution 556 (J. Elliot ed., 2d ed. 1836).

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The Harms of Homeschooling

Robin L. West

Over the last thirty years, "homeschooling"—teaching one's children at home rather than entrusting their education to either a public or private school — has virtually exploded: around ten thousand children were homeschooled in the early eighties; today, over *two million* children are being educated at home. There are now more children being homeschooled than are enrolled in charter and voucher schools combined. Of course, there have always been some parents, both religious and secular, who have homeschooled since the advent of public schools and compulsory attendance laws in the middle of the nineteenth century. For a hundred and fifty years, parents of special needs children, parents in isolated parts of the country who live far from any public schoolhouse, as well as a smattering of parents of circus performers, professional athletes, and child stage actors have homeschooled their children, and exemptions in the various states' compulsory attendance laws have explicitly allowed them to do so.

The explosion in homeschooling of the last quarter century, however, is a different phenomenon altogether. The majority of homeschoolers today, and by quite a margin, are devout, fundamentalist Protestants. And, of the hundreds of thousands of fundamentalist Protestant parents who in the past two decades have pulled their children from public schooling, the majority have done so not because their kids have special needs, or because they live too far from a schoolhouse, but rather because they do not approve of the public schools' secularity, their liberalism, their humanism, their feminist modes of socialization, and in some cases, of the schools' very existence. Because they disapprove, they choose to educate their children at home, in accordance with their own traditions and by their own religious lights.

They do so, furthermore, with little or no oversight from public school officials, who in some states need not even be notified of the parents' intent to homeschool. Because of lax or no regulation, in most of the country parents who homeschool now have virtually unfettered authority to decide what subjects to teach, what curriculum materials to use, and how much, or how little, of each day will be devoted to education. In most (but not all) states, testing is optional, and in almost all states, the parent-teachers need not be certified or otherwise qualified to teach. In other words, in much of the country, if you want to keep your kids home from school, or just never send them in the first place, you can. If you want to teach them from nothing but the Bible, you can. If they want to skateboard all day, and you choose to let them, you can.

As late as the late 1970s, these massive withdrawals from the public schools that have become so common-