67 STAN. L. REV. ONLINE 9
June 25, 2014

THE POST-*BOUMEDIENE* PARADOX: HABEAS CORPUS OR DUE PROCESS?

Mary Van Houten*

INTRODUCTION

In *Boumediene v. Bush*,[1] the Supreme Court famously held that the writ of habeas corpus, guaranteed by the Suspension Clause,[2] had "full effect" at Guantanamo Bay, Cuba.[3] But *Boumediene* did not specify how other constitutional rights, such as the writ's oftentimes-inextricable partner, the Due Process Clause,[4] should influence the analysis. After *Boumediene*, the D.C. Circuit maintained that habeas only protected the fact, place, or duration of detention,[5] and it expressly refused to apply due process to extraterritorial habeas challenges.[6] It also strictly enforced the categorical dichotomy prescribed by the Military Commissions Act (MCA), which restored federal habeas jurisdiction but stripped jurisdiction over "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of detainees.[7] Indeed, after almost ten years of litigation, many commentators condemned the D.C. Circuit for practically vitiating *Boumediene*'s holding.[8]

But in *Aamer v. Obama*[9]—brought to enjoin the physically invasive force-feeding procedures used against hunger strikers at Guantanamo[10]—the D.C.

---

* Stanford Law School, J.D. 2014. Many thanks to Janet Alexander and Lucas Guttentag for their invaluable support throughout the writing process.

1. 553 U.S. 723 (2008).

2. 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.").

3. *Boumediene*, 553 U.S. at 771.

4. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

5. *See, e.g.*, Maqaleh v. Hagel, 738 F.3d 312, 329 (D.C. Cir. 2013); Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1026 (D.C. Cir. 2009).

6. *See Kiyemba I*, 555 F.3d at 1026 ("[T]he due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.").

7. 28 U.S.C. § 2241(e)(2) (2012).

8. *See* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1453 (2011).

9. 742 F.3d 1023 (D.C. Cir. 2014).

10. Appellants' Reply Brief at 20, *Aamer*, 742 F.3d 1023 (No. 13-5223).

Circuit recently held that a habeas suit *can* be brought to challenge more than the fact, place, or duration of detention.[11] Substantially broadening its previous interpretation of the writ, the D.C. Circuit ruled that habeas jurisdiction can encompass challenges to conditions of confinement—one of the "other action[s]" proscribed by the MCA. Even though the detainees' claim failed on the merits, the detainees were ultimately permitted to challenge the government's procedures as an unlawful violation of the right against unwanted medical treatment.

In effect, *Aamer* creates an interesting paradox: despite the D.C. Circuit's decisions ruling otherwise, noncitizen detainees at Guantanamo are effectively allowed to bring due process challenges, but under the auspices of habeas corpus. Further exploring the habeas-due process relationship in prior case law and scholarship, this Essay will consider this paradox as applied in *Aamer* and future prisoner litigation.

I. THE HABEAS-DUE PROCESS RELATIONSHIP

Much has been written regarding the "inextricably intertwined"[12] yet "completely unsettled"[13] relationship between habeas corpus and due process.[14] The ambiguity stems from two independently amorphous doctrines, which share historical origins[15] and were almost always jointly applied before *Boumediene*.[16] Indeed, as Justice Brennan wrote in 1963, "[v]indication of due process is precisely [the Great Writ's] historic office."[17] Still, the Supreme

---

11. *Aamer*, 742 F.3d at 1026, 1038.

12. Fay v. Noia, 372 U.S. 391, 401 (1963).

13. Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1364 (2010).

14. *See* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2503 (1998) ("[B]oth habeas corpus and due process require that taking an individual into custody be subject to the rule of law. . . . The two principles work in tandem to require judicial review of the legality of all executive detentions. Barring judicial review of any such detention would violate due process, and any such detention must be redressable on habeas corpus.").

15. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *133-34 (linking the guarantees of the Magna Carta and the writ of habeas corpus to the battle against royal despotism).

16. *See* Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 748 (2012) ("Because the prevailing assumption has been that habeas and due process generally stand or fall together, the few cases and writings addressing both habeas and due process have explored the nature and extent of judicial protections when both clauses are inapplicable or, more typically, when both clauses are applicable." (footnote omitted)).

17. *Fay*, 372 U.S. at 402; *see also id.* at 405 ("[A]t the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law [under due process]."); Heikkila v. Barber, 345 U.S.

Court has avoided "answer[ing] the difficult question of what the Suspension Clause protects,"[18] leaving the content of the writ and the contours of the habeas-due process relationship undefined. While this Essay cannot fully explore those contours, it concludes, like most of the academic community, that at least some substantive due process protections follow on the heels of habeas corpus and that the two clauses may be inextricable in some contexts.

The Supreme Court's definition of the habeas-due process relationship was central in *Boumediene*. By extending the Suspension Clause extraterritorially at Guantanamo, the Court made clear that the Clause was more than just an "empty vessel" used to achieve a remedial or procedural outcome.[19] But "it did not specify what process the Suspension Clause ensures, nor to what degree due process concerns influence the analysis."[20] Following the decision, many predicted a faithful application of *Boumediene*'s functional approach,[21] which affords a constitutional right extraterritorially if doing so would not be "impracticable and anomalous."[22] And, because of its tight nexus with habeas, many anticipated that due process would be the next right afforded.[23] Former Solicitor General Neal Katyal reasoned, "*Boumediene*'s right to habeas corpus would be meaningless if there were no substantive rights to protect."[24] Thus, apart from the extraterritoriality question, one implicit question was left unanswered:

229, 236 (1953) ("Regardless of whether or not the scope of inquiry on habeas corpus has been expanded, the function of the courts has always been limited to the enforcement of due process requirements." (footnote omitted)).

18. INS v. St. Cyr, 533 U.S. 289, 301 n.13 (2001).

19. Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 52 (2012).

20. *Id*. at 53.

21. *See, e.g*., Vladeck, *supra* note 8, at 1477 ("*Boumediene*, . . . though not about the Due Process Clause, may well recalibrate the Court's approach to whether *all* individual constitutional rights apply extraterritorially, including whether the Guantánamo detainees are entitled to due process protections.").

22. Boumediene v. Bush, 553 U.S. 723, 759 (2008) (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)) (internal quotation marks omitted); *see also* Geltzer, *supra* note 16, at 772-73.

23. *See, e.g*., Benjamin J. Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021, 1036 (2009) ("[P]erhaps the Due Process Clause, not just the Suspension Clause, reaches Guantánamo."); Stephen I. Vladeck, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78, 87 (2012), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-PENNumbra-78.pdf ("[T]he courts will eventually hold that the Due Process Clause places limits on the type and length of detentions that are otherwise lawful.").

24. *Implications of the Supreme Court's* Boumediene *Decision for Detainees at Guantanamo Bay, Cuba: Non-Governmental Perspective: Hearing Before the H. Comm. on Armed Servs*., 110th Cong. (2008) (prepared statement of Neal K. Katyal, Paul and Patricia Saunders Professor of National Security Law, Georgetown University Law Center), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1078&context=cong.

If the Suspension Clause was indeed more than just an empty vessel, then what rights or protections would accompany it?

The answer proved increasingly unclear. The D.C. Circuit quickly rejected procedural protections for detainees' trials,[25] and, again, it explicitly declined to apply due process.[26] But some opinions suggested that due process protections might be applied in certain situations.[27] Gradually (or perhaps inevitably), lower courts began to conflate the two rights. For instance, in *In re Guantanamo Bay Detainee Continued Access to Counsel*, the district court asserted: "'[A]ccess to the Court [granted in *Boumediene*] means nothing without access to counsel.' They are inseparable concepts and must run together."[28] It is an easy but significant step to conclude that access to counsel became part and parcel of *Boumediene*'s holding. As Stephen Vladeck reasoned:

> In every other context, . . . the Supreme Court has assessed a litigant's right of access to counsel according to traditional due process analysis . . . . And so, unless the right of access to counsel could be traced simultaneously (or independently) to *both* the Due Process Clause *and* the Suspension Clause, the real significance of [*In re Guantanamo Bay*] may be the implicit but necessary conclusion that the detainees *do* have at least a modicum of due process rights.[29]

Access to counsel is one example of how the right to habeas corpus may necessarily be comprised of some other protections to give it substance. Of course, this example could equally be viewed as habeas corpus bringing along independent due process rights. Though the correct framing may be mere semantics, recognition of the clauses' inextricability may eventually necessitate an affirmative answer to the post-*Boumediene* question in the D.C. Circuit. This could have significant implications for future litigation brought by prisoners in the D.C. Circuit.

The next Part will discuss the significance of *Aamer*'s newly expanded habeas protection: if detainees can challenge the conditions of their confinement through habeas corpus, then certain substantive due process protections are being afforded.

---

25. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 876 (D.C. Cir. 2010) ("The Suspension Clause protects only the fundamental character of habeas proceedings, and any argument equating that fundamental character with all the accoutrements of habeas for domestic criminal defendants is highly suspect.").

26. *Kiyemba I*, 555 F.3d 1022, 1026 (D.C. Cir. 2009).

27. *See* Vladeck, *supra* note 23, at 87-90; *see also* Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (holding that even if the petitioner had a constitutional right to due process and the district court violated it by relying on evidence outside of the record, such error would be harmless); Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 512 (D.C. Cir. 2009) (recognizing habeas claims even if those claims were "ancillary" to the traditional or "core" protections of habeas (internal quotation marks omitted)).

28. 892 F. Supp. 2d 8, 15 (D.D.C. 2012) (citation omitted) (quoting Al-Joudi v. Bush, 406 F. Supp. 2d 13, 22 (D.D.C. 2005)).

29. Vladeck, *supra* note 23, at 90 (footnote omitted).

II. *AAMER V. OBAMA*

A. *Background Information*

The detainees in *Aamer* contested the "painful, humiliating, and degrading" forcible tube-feeding process used on them in their 2013 hunger strikes.[30] As expected, two lower court judges held that the MCA stripped the courts of jurisdiction, characterizing the claims as challenges to conditions of confinement.[31] On appeal before the D.C. Circuit, the two-to-one panel disagreed: it held that challenges to conditions of confinement properly sound in habeas, even though they fall outside the "historical core" of the writ.[32] This ruling applied not only to Guantanamo detainees subject to the MCA but also to all federal habeas appeals.[33]

After extending habeas jurisdiction, the court turned to the merits. It concluded that the government's legitimate interests in preserving life and maintaining order and security could possibly justify the force-feeding of hunger-striking detainees.[34] Though the preliminary injunction failed on the merits, the court reasoned that it was "conceivable that petitioners could establish" a valid constitutional claim on remand.[35]

B. *Analysis*

The *Aamer* decision suggests that the D.C. Circuit used habeas jurisdiction to effectuate prisoners' underlying due process rights. This is evident in two primary ways. First, the court relied on detainees' underlying constitutional rights in broadening habeas as a jurisdictional matter. Second, it assumed that detainees possess due process rights as a basis for the court's adjudication on the merits. Ultimately, this allowed the detainees to assert a quintessential substantive due process claim.

---

30. Aamer v. Obama, 742 F.3d 1023, 1027 (D.C. Cir. 2014) (quoting Dhiab v. Obama, 952 F. Supp. 2d 154, 156 (D.D.C. 2013)).

31. *See* Aamer v. Obama, 953 F. Supp. 2d 213, 218 (D.D.C. 2013); *Dhiab*, 952 F. Supp. 2d at 155. This was not the first time litigation surrounding force-feeding fell short: the lower courts have denied preliminary injunctions a number of times since 2005. *See, e.g.*, Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 108-09 (D.D.C. 2010) (dismissing Fifth and Eighth Amendment claims on grounds that the MCA strips the courts of jurisdiction), *aff'd*, 669 F.3d 315 (D.C. Cir. 2012); Al-Adahi v. Obama, 596 F. Supp. 2d 111, 117-18 (D.D.C. 2009) (denying jurisdiction under the MCA).

32. *Aamer*, 742 F.3d at 1030.

33. *See* Steve Vladeck, *The True Significance of Judge Tatel's Opinion in the Force-Feeding Appeal*, JUST SECURITY (Feb. 11, 2014, 2:53 PM), http://justsecurity.org/7016/true-significance-judge-tatels-opinion-force-feeding-appeal.

34. *Aamer*, 742 F.3d at 1041.

35. *Id.*

Jurisdictionally, *Aamer* relied on detainees' underlying substantive rights in affording the newly broadened habeas remedy. In the court's lengthy discussion assessing the scope of habeas, much of its analysis proceeded entirely on the bases of otherwise-adjudicable constitutional rights. For instance, *Aamer* relied on precedent upholding a federal prisoner's transfer to another institution via habeas in "circumstances so extreme as to transgress *constitutional* prohibitions."[36] It similarly relied on precedent finding that subjecting an inmate "to cruel and unusual punishment, to punishment without cause, and to unconstitutional discrimination" approximated an "unlawful deprivation of liberty" under habeas.[37] Yet similar constitutional due process rights have been consistently denied to noncitizen detainees at Guantanamo. When habeas is properly expanded to encompass challenges to conditions of confinement, therefore, it is usually the litigant's underlying rights that give force to that challenge. This demonstrates the difficulty (and perhaps impossibility) of parsing habeas from the due process rights that so often comprise it.

Substantively, *Aamer* relied on constitutional due process claims in its adjudication on the merits. At the threshold, the court made the following concession: "[W]e shall, for purposes of this case, assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantanamo . . . ."[38] While the D.C. Circuit had made similar concessions in the past, this assumption was the *predicate* for the *Aamer* court's analysis on the merits. It paved the way for the ultimate consequence: detainees may bring habeas claims based on substantive due process challenges—here, the right to be free from unwanted bodily intrusion—even though they do not technically possess these rights under D.C. Circuit precedent. Indeed, effectively extending due process in this manner could impact a number of claims currently denied to detainees, including civil damages actions and criminal trials in federal court.[39]

Moreover, on the merits, the *Aamer* court used the standard set out in *Turner v. Safley*[40]—yet another case that rests entirely on the constitutional rights of those imprisoned in the United States—to evaluate the detainees' claim. *Turner* established a test for assessing the legality of a prison regulation that "impinges on inmates' *constitutional* rights," holding that such regulation is "valid if it is reasonably related to legitimate penological interests."[41] Even though the preliminary injunction was denied under this standard, the *Aamer* court still (1) permitted a full analysis on the substance of the detainees' force-feeding claim, and (2) anticipated an even fuller analysis on the claim below.[42]

---

36. Miller v. Overholser, 206 F.2d 415, 419 (D.C. Cir. 1953) (emphasis added).
37. Hudson v. Hardy, 424 F.2d 854, 855 (D.C. Cir. 1970).
38. *Aamer*, 742 F.3d at 1039.
39. *See* Geltzer, *supra* note 16, at 730-33.
40. 482 U.S. 78 (1987).
41. *Id.* at 89 (emphasis added).
42. *See Aamer*, 742 F.3d at 1041.

As a result, detainees are able to challenge the government's force-feeding procedures as an unlawful deprivation of liberty.

Indeed, *Aamer*'s newly broadened habeas right opens the door for future challenges to conditions of confinement by prisoners within the D.C. Circuit. Ultimately, perhaps this will lead to a better understanding of the paradox of extending the right of habeas corpus without correlative due process protections. Whatever the result, it seems that *Boumediene* is far from dead, and future detainee litigation—based on habeas or, perhaps, due process—is far from over.