AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Criminal Justice/Due Process and Habeas Corpus/Due Process

**Al Hela v. Trump, No. 19-5079** (DC Cir. 2020)

*Abdulsalam Ali Abdulrahman Al Hela was a Yemini citizen, businessman, and associate of the Yemini internal security agency. In 2002, he disappeared while on a business trip to Egypt. In 2004, American military forces obtained custody over him and detained him in Guantanamo Bay, the American military base in Cuba where a number of foreign nationals detained in the war on terror are held. In 2005, Al Hela petitioned for a writ of habeas corpus, arguing that he was being detained unlawfully. After the Supreme Court’s decision in* Boumediene v. Bush *(2008), detainees were recognized as having the right to challenge their detention through a habeas review and a process was established under the jurisdiction of the federal Court of Appeals for the District of Columbia for providing “meaningful review” of Guantanamo detainees, including Al Hela. In 2016, the district court responsible for such cases determined that Al Hali was being lawfully detained for providing substantial support to terrorist organizations involved in attacks on the United States. Al Hela appealed to the D.C. circuit court, arguing that his detention violated his substantive due process rights under the U.S. Constitution and the government’s refusal to grant him access to confidential materials that he wanted for his defense violated his procedural due process rights under the Constitution. A panel of the D.C. circuit court affirmed the district court, holding that aliens held in an American military base on foreign soil did not have due process rights under the Constitution.*

JUDGE RAO.

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The Due Process Clause of the Fifth Amendment provides “[n]o person shall . . . deprived of life, liberty, or property.” The Amendment’s protections apply to all “person[s]” within the United States, citizens and noncitizens alike. *Matthew v. Diaz* (1976); *Yick Wo v. Hopkins* (1886). In *Johnson v. Eisentrager* (1950), the Court held the Fifth Amendment does not apply to aliens located outside the United States: “[T]he Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.” . . .

*Eisentrager* addressed whether the Fifth Amendment applies to aliens abroad — specifically, enemy combatants detained by American military forces in Germany. In answering this question categorically in the negative, the Court noted:

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction ... could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against ‘unreasonable’ searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Building on earlier cases, the Court held in no uncertain terms that the Fifth Amendment could not be interpreted to apply to aliens outside the territory of the United States. In reaching this conclusion, the Court explicitly rejected the decision and reasoning of this court, which interpreted the term “person” to cover “any person who is deprived of his liberty by officials of the United States.” . . .

The Supreme Court has repeatedly affirmed *Eisentrager*’s holding as to the Fifth Amendment and its Due Process Clause. *Zadvydas v. Davis* (2001); *United States v. Verdugo-Urquidez* (1990). . . .

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Al Hela argues the “substantive” component of the Due Process Clause bars indefinite detention without trial and that “his continued deprivation of liberty is excessive and is therefore punitive.” We need not assess whether Al Hela has articulated a cognizable due process right because longstanding precedent forecloses any argument that “substantive” due process extends to Guantanamo Bay. . . . Al Hela is an alien held outside the sovereign territory of the United States and therefore may not invoke the protections of the Due Process Clause to challenge his detention.

First, Al Hela argues that *Boumediene*’s extension of the Suspension Clause to Guantanamo Bay abrogated *Eisentrager* because due process rights are implied by and inextricably intertwined with access to the habeas writ. On this view, habeas is a jurisdictional vehicle for presenting substantive claims rooted in the Fifth Amendment, and *Boumediene* could not have extended one without the other. Yet the Court in *Boumediene* clearly differentiated between the Suspension and Due Process Clauses and carefully limited its holding to the Suspension Clause. . . .

In *Boumediene*, the Court established for the first time that the Suspension Clause guarantees Guantanamo detainees a “meaningful opportunity” to challenge their detention before a court with “the power to order the conditional release of an individual unlawfully detained.” . . .

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To be sure, *Boumediene* applied a “functional test” to determine when and where the Suspension Clause follows United States forces abroad. But nothing in *Boumediene* suggests this functional test applies beyond the Suspension Clause. To the contrary, the Court emphasized the limited and exceptional nature of its holding, a conclusion bolstered by the fact that the Court has never applied *Boumediene*’s “functional test” to any other constitutional provision. Nor has this court applied *Boumediene* to constitutional provisions other than the Suspension Clause or extended the extraterritorial reach of the Suspension Clause beyond Guantanamo Bay. . . .

Al Hela effectively asks us to expand *Boumediene* and abrogate *Eisentrager* as well as longstanding circuit precedent. Yet *Boumediene* recognized only the availability of habeas relief to detainees in Guantanamo Bay. The “Privilege of the Writ of Habeas Corpus” is a “procedural protection” for challenging unlawful detention but does not include substantive rights. . . .

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. . . . *Eisentrager* made no distinction between “substantive” and “procedural” due process, nor between the Due Process Clause and other provisions of the Fifth Amendment. Rather in *Eisentrager*, the Court built on earlier precedents that declined to review the adequacy of procedures granted to enemy combatants and limited judicial inquiry to whether the government acted within its authority. *In re Yamashita* (1946); *Ex parte Quirin* (1942). . . .

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Similarly, this circuit has consistently cited *Eisentrager* for the proposition that procedural due process protections are unavailable to aliens and organizations without property or presence in the United States. For example, we rejected a foreign entity’s challenge to the Secretary of State’s terrorism designation because the foreign entity was not entitled to procedural due process protections. *32 County Sovereignty Committee v. Department of State* (D.C. Cir. 2002). After *Boumediene*, our court continued to understand the *Eisentrager* rule as foreclosing extraterritorial application of the Due Process Clause in its entirety. *Rasul v. Myers* (D.C. Cir. 2008). . . .

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. . . . Determining that procedural due process rights apply extraterritorially would require us to read *Boumediene* to effectuate an implied repeal of *Eisentrager* and its progeny. In the absence of direction from the Supreme Court, we decline to reverse binding precedent and extend new constitutional protections to alien detainees at Guantanamo Bay.

At bottom, Al Hela presses us to recognize and create a new body of constitutional law for alien detainees held outside the sovereign territory of the United States. Yet judicial innovation in this sphere would have far reaching consequences for the government’s detention and national security policies in this and future wars. As the Supreme Court has explained, we must accord “proper deference . . . to the political branches” when assessing “detention to prevent acts of terrorism.” Our court has carefully followed this command by declining to craft additional judicial standards to govern the War on Terror. Instead, for over a decade we have faithfully applied the Supreme Court’s directive in *Boumediene* by developing a distinct body of law that guarantees a “meaningful opportunity” for habeas review while respecting the national security prerogatives of the political branches. The Executive Branch has relied upon these procedural standards and neither Congress nor the Supreme Court have suggested we should embellish further constitutional limits on the detention of terrorists abroad.

Under longstanding precedents of this court and the Supreme Court, the Due Process Clause cannot be invoked by Guantanamo detainees, whether those due process rights are labeled “substantive” or “procedural.” The Suspension Clause provides all the process to which Al Hela is entitled. . . .

*Affirmed*.

JUDGE GRIFFITH, concurring.

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Al Hela brings two sets of challenges under the Due Process Clause — a substantive challenge to the length of his detention and procedural challenges to the district court’s evidentiary rulings. Like my colleagues, I would reject those challenges. But unlike my colleagues, I would do so without taking on the broader question of whether the Due Process Clause applies at Guantanamo. That is a question with immense sweep that our court has repeatedly reserved for a case in which its answer matters. It does not here. Al Hela’s challenge to the length of his detention fails under established case law, regardless of whether he may bring that challenge under the Due Process Clause in the first place. And his three procedural challenges fail under our precedent developed under the Suspension Clause in the wake of *Boumediene v. Bush* (2008). That precedent provides Al Hela as much process as he would have been due under the Due Process Clause with respect to his particular claims.

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