Guantanamo, Torture and Federal Habeas Corpus

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In this course we will study in depth the evolution of habeas corpus and how the habeas remedy is utilized in the federal court system today. The study of habeas corpus law gives the students an opportunity to observe how constitutional law, criminal law and procedure, civil procedure, and even trial and appellate practice, all bear upon the courts' struggle to apply the body of habeas corpus law to individual cases.

This course will examine recent litigation, particularly cases pertaining to the detention of terrorist suspects formerly and presently held at Guantanamo. Three categories of cases will be examined.

First, there are a plethora of federal habeas corpus cases being decided in the aftermath of *Boumediene v Bush*. These cases are consolidated in the District of Columbia federal courts and are re-writing habeas corpus jurisprudence. Procedurally these cases are wrestling with the meaning of a habeas "hearing" in terms of standards and burdens of proof, nature and means of evidence required in determining the legality of detention. The D.C. federal courts are making new habeas jurisprudence in dealing with evidence gained through coerced interrogations. These cases are also deciding the extent of the "new ground" plowed by *Boumediene* as to the reach of extraterritorial jurisdiction for detainees in other facilities, e.g. Bagram Air Force base in Afghanistan. Finally, in cases where the detainee is successful, the courts are considering the appropriateness of release or alternative forms of relief.

Second, there are a variety of non-habeas civil suits brought under various federal statutes including the 1991 Torture Victim Protection Act on behalf of detainees who have allegedly

been subjected to torture or other mistreatment. The defendants in these suits include both private contractors who have transported detainees for "rendering" for extreme interrogation and the federal government. The nature and scope of these statutes and the various defenses, including sovereign immunity and national security issues will be surveyed. Other torture cases will be considered, including a case argued in 2010 before the Supreme Court against the former Prime Minister of Somalia. Additionally, there have been both civil and criminal proceedings brought in other countries for alleged torture/rendition of U.S. detainees; the outcome of these cases will be compared to the U.S. litigation.

Third, non-Guantanamo habeas litigation continues to occupy the Supreme Court. We will examine the special role habeas has played in death penalty litigation in the United States, focusing on the state and federal habeas proceedings in *Draughon v. Dretke*. Of particular interest are the claims of ineffective assistance of counsel (*Strickland* and *Wiggins*), and claims of actual innocence brought in collateral attacks on convictions. (*Herrera*). We will then survey the various procedural obstacles to habeas review in federal court, including exhaustion of state remedies (*Fay v. Noia, Rose v. Lundy, Granberry v. Greer*); retroactivity (*Yates v. Allen, Teague v. Lane*); adequate and independent state grounds for decision (*Coleman v. Thompson*); full and fair opportunity to litigate (*Withrow v. Williams*); successive petitions (*McCleskey*); harmless error (*Brecht*); and obtaining a hearing in federal court (*Michael Williams v. Taylor*).

Syllabus

"Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."

- Justice Kennedy, Boumediene v Bush (2008)

Weeks 1, 2 & 3. History Through Boumediene.

Students will become familiar with the history of the Great Writ at common law and will study the ongoing expansion and contraction of federal habeas corpus in our federal courts from 1789 to the present. We will then step back and trace the historical developments which led, ultimately to *Boumediene*. For the historic overview we will utilize several sources including excerpts from the following law review articles: J. Hafetz, *The untold Story of Non-Criminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L. J. 2509 (1996), and L. Yackle, *A Primer on the Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996), and Chapter 13 of Rivkind & Schatz's *The Death Penalty*. In the historical survey, we will first focus on Lincoln and habeas corpus in the Civil War. We will utilize *Ex parte Merryman* and *Ex parte Milligan* and Chapter 2 from Geoffrey Stone's *Perilous Times*. *Rasul v. Bush and Boumediene v. Bush* will be studied in depth, including the oral argument in *Boumediene*. *Boumediene* will be considered for the functionality test to be prospectively applied.

Week 4, 5, 6. Habeas as Guantanamo Closes.

A. **Jurisdiction.** What scope f extraterritorial jurisdiction should exist in habeas cases. *Al Magaleh v Gates*, 604 F. Supp 2d 205; rev'd 605 F. 3d 84 (2010).

- B. **Procedure and Evidence**. Are the D.C. decisions proving to afford detainees a 'meaningful hearing?" Standards and burdens of proof, admissibility of hearsay, government reports. *Al Bihani v Obama; Saleh Hatim v Obama; Suhail Anam v Obama*.
- C. **Torture**. Admissability of evidence produced by "coerced interrogation." *U.S. v Ghailani*.
- D. Relief. Efficacy of Habeas Relief. Uigher detainees. 2008 WL 4508768, rev'd 555
 F. 3d 1022. Read the Supreme Court merit briefs for a discussion of the issues of limits on an Article 3 Court's powers to fashion relief.

Week 7 & 8. Litigation Collateral to National Security.

Liability for Rendition

<u>Arar</u> v Ashcroft (2nd Cir. 2009); Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009); Abu Omar Extradition (Italian rendition convictions)

Torture Victim Protection Act

Bashe Yousuf v Mohamed Ali Samantar (case against former Prime Minister of Somalia)

Free Speech in Times of War

Holder v. Humanitarian Law Project, 130 S. Ct 2705 (2010). People's Mojahedin Org. of Iran v U.S. Deptrment of State, 613 F. 3d 220. Read Rasul amicus brief by Geoffrey Stone.

Week 9. Death Penalty Habeas Litigation.

The contraction of federal habeas corpus during the Burger and Rehnquist courts, reviewing in particular *Stone v. Powell* (1976), and *McCleskey v. Zant* (1991). We will then study the Antiterrorism and Effective Death Penalty Act (AEDPA)(1996).

Exhaustion of state remedies (Fay v. Noia, Rose v. Lundy, Granberry v. Greer); retroactivity (Yates v. Allen, Teague v. Lane); adequate and independent state grounds for decision (Coleman v. Thompson); full and fair opportunity to litigate (Withrow v. Williams); successive petitions (McCleskey); harmless error (Brecht); and obtaining a hearing in federal court (Michael Williams v. Taylor).

Week 10. Ineffective Assistance of Counsel. Mental Deficiency. Juvenile Defendant.

Strickland v Washington; Wiggins v Smith; Draughon v. Dretke; Rompilla v Beard.

Atkins v Virginia, 122 S. Ct 2242; Roper v Simmons, 125 S. Ct 1183

Week 11. Actual Innocence.

Herrara v Collins, 506 U.S. 390 (1993). Schlup v Delo, 513 U.S. 298 (1995).

Weeks 12 & 13.

Oral student presentations of précis of papers.

The syllabus is subject to change to the extent significant habeas cases are decided, or other reading materials become available.

Grades & Attendance:

Grading will be based 80% on a final paper in general "law review article" format, 10% on class participation and 10% on the presentation of précis of the paper. The final paper of 20 pages in length must be well-supported by footnotes. The work must reflect a substantial analytical section presenting the student's *thesis* -- the student's personal perspective on the chosen topic. In other words, the article cannot simply address the topic and summarize the law without taking a position.

Permissible topics include any of the issues raised during the course, and in addition, other topics related to the material as approved by the professors. An outline for the paper is due at the midpoint of the course and must be approved by the professors. During the last two classes, each student will give an oral presentation of their paper, in summary form, to the class. The paper is due a week after the last day of final exams. An electronic copy is to be sent to the instructor by the deadline and a hard copy shall be mailed on the same date.