

# Inquiring Minds topic - 21 November 2014

Moderator: Howard Pachman

## “We the People....”

In October, I submitted this op ed piece, from an issue of the NY Times, for the group’s consideration. After reviewing the document for presentation, I realized there was much explanatory information not supplied in the piece. Issues were raised, cases cited, but no access to the sources. I then decided to annotate the article and add an appendix of “END NOTES” as a guide to the reader.

I trust this adds to the discussion.

The New York Times  
Sunday Review | **OPINION**

### Who Are ‘We the People’?/\_1

By **ERIC L. LEWIS**

OCT. 4, 2014

WHO is a person?/\_2\_How do you qualify for basic human rights?/\_3\_ What is required for you to be able to speak or worship freely or to be free from torture?/\_4

Throughout American history, the Supreme Court has considered and reconsidered the criteria for membership in the club of rights, oscillating between a vision limiting rights to preferred groups and another granting rights to all who require protection. These competing visions have led to some strange results.

Corporations (as well as unions) can spend on political speech to further their group interests as though they were individual political actors. /\_5Corporations can assert religious rights to gain legal exemptions from laws that would otherwise apply to them. /\_6Muslim detainees at Guantánamo Bay, however, have none of these rights./\_7

As a corporate litigator/ \_8who has also spent more than a decade defending Guantánamo detainees, I have been trying to figure out why corporations are worthy of court protection and Muslims held in indefinite detention without trial by the United States at a naval base in Cuba are not.

The direction of the Supreme Court under Chief Justice John G. Roberts Jr. over the past decade has been anything but consistent. As the court readies itself for another term, it may not be possible to speak of a Roberts court jurisprudence at all. Even within the conservative and liberal blocs there are a range of views on the limits of executive power,/\_ 9the relationship between the federal government and the states, the protection of politically expressive speech and the applicability of the Constitution abroad./\_ 10But the bulk of the most controversial cases come down to 4-to-4 bloc voting, with Justice Anthony M. Kennedy’s worldview defining the court’s path.

But we are not completely in the dark about who is likely to be granted legally enforceable rights and who is not. This term the court will consider whether Arkansas can force a Muslim prisoner to shave his beard, /\_11 whether a Muslim woman who wears a head scarf can get a job at Abercrombie & Fitch, /\_12 and whether Alabama can cram African-American voters into a few districts to dilute their political impact. /\_13

The Roberts court has already charted a course in which rights are extended to those who have real clout in American society and denied to those who are more marginal. In two critical cases, *Citizens United* /\_14 and *Hobby Lobby*, /\_15 the court decided by a 5-to-4 vote that corporations had broad rights of speech and of religion, which left corporate owners in a position to trumpet their political and religious views while diminishing or even silencing other voices.

In *Citizens United*, the court held that corporations had the right under the First Amendment to spend unlimited amounts on election advertising. The court evaded the issue of whether corporations were legal “persons” with rights, finding that the political process was always improved by more speech rather than less. Justice Kennedy, writing for the court, found that corporate spending contributed to the dissemination of information and ideas that “the First Amendment seeks to foster.” He rejected the argument that corporations should be limited “simply because such associations are not ‘natural persons.’”

But Congress limits speech all the time. Foreign nationals, for example, even those who live legally in the United States, are not permitted to make campaign contributions or expenditures.

/\_16

They may be “persons,” but for First Amendment purposes, they are not legitimate speakers. /\_17 Unless, of course, they own shares in corporations.

The Supreme Court’s decision said nothing about the interests of the corporation or the identity of its stakeholders. Chinese or Russian shareholders could gain control of an American corporation and use shareholder funds to influence elections in the United States. According to the court, money is speech, and once it is corporate money, it is laundered of its foreign taint. /\_18

In *Hobby Lobby*, the court considered whether corporations had the right to deprive employees of contraceptive coverage required under the Affordable Care Act, based on the religious objections of their controlling shareholders. /\_19 The court applied the Dictionary Act, an obscure statute from 1871 /\_20 that says that a reference in a given statute to a “person” includes corporations “unless the context indicates otherwise.” Normal dictionaries do not define persons to include corporations. Justice Samuel A. Alito Jr.’s opinion takes a “just folks” view of the matter: “A corporation is simply a form of organization used by human beings to achieve desired ends.”

This inability to make the distinction between individual corporate stakeholders and the legal fiction of the corporation is not only weird, it is bad corporate law. Whatever else corporations may be, they are not the sum of their people. In her dissent, Justice Ruth Bader Ginsburg cited Chief Justice John Marshall’s two-centuries-old observation that a corporation is “an artificial being, invisible, intangible and existing only in contemplation of law.” /\_21

The modern corporation is a brilliant invention of 19th-century capitalism that creates a separate entity — a legal “person” /\_22 that can enter into contracts, borrow money, sue and be sued without exposing its shareholders to personal liability. The shareholders are not the corporation; directors, executives and employees aren’t either. Shareholders, executives and employees do have religious rights — as individuals. *Hobby Lobby* does not expand anyone’s religious rights. What it does do is allow the religious beliefs of the owners of a company to trump the beliefs of its employees. /\_23

The Supreme Court did not declare Hobby Lobby a person with religious rights because it was confused about whether a corporation could pray or have a bar mitzvah. The court chose to allow business owners to retain the powerful protection of limited liability while awarding them the further benefit of an exemption from the financial obligations of the Affordable Care Act. The majority took one definition of a legal person and used it as a hook to impose its own views about the importance of religion and business in American public life. When she was asked recently which court decision during her tenure would be most significant 50 years from now, Justice Ginsburg noted the strangeness inherent in the court's reasoning: "Well," she said, "I think 50 years from now, people will not be able to understand Hobby Lobby."

IN holding that corporations had religious rights, the Hobby Lobby decision sat in contrast to a case I brought under the same statute in 2004, in which the court found that Muslims at Guantánamo Bay were not persons and had no religious rights.

That case, *Rasul v. Rumsfeld*,/\_24 alleged that Defense Secretary Donald H. Rumsfeld and the chain of command had established a regime at Guantánamo that systematically humiliated and abused detainees when they tried to practice their religion. In an attempt to break these people, guards threw Qurans in the toilet bucket, blasted rock music to interrupt prayers and forced prisoners to pray with their genitals exposed.

To me, the case seemed open-and-shut. The Religious Freedom Restoration Act (R.F.R.A.),/\_25 which was passed in 1993, prohibits the government from "substantially" burdening "a person's exercise of religion" unless it serves some important government interest that cannot be accomplished in any other way. My clients were "persons"; throwing Qurans in the toilet bucket certainly made it difficult for them to worship; and it served no governmental interest to humiliate people who were praying.

The Federal District Court in Washington, which first heard the case, agreed that "R.F.R.A. expressly protects the religious exercise of 'persons,' a broadly applicable term, commonly including aliens." But the government appealed and the United States Court of Appeals for the District of Columbia Circuit held that, as aliens held outside the United States, these men were not "persons"/\_26 after all. The Bush administration had put them offshore precisely to ensure this.

Even the arch-conservative Judge Janice Rogers Brown, who once said that "in the heyday of liberal democracy, all roads lead to slavery," was uncomfortable, noting in concurrence, "It leaves us with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantánamo are not 'persons.' /\_27 This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human."

The case went to the Supreme Court twice. The first time the court ordered the court of appeals to reconsider the case, which it duly did, reaching the same conclusion. The second time the Supreme Court declined to hear the case and the appeals court decision remains the law.

So while Muslims in United States custody do not have redress from the coarsest attacks on their religious dignity, corporations do have religious rights that the law protects. Why were my clients, undeniably actual people, abused when they worshiped, while state-chartered artificial entities were allowed an exemption from the law in deference to the religious beliefs of their shareholders?

One possibility is that detainees are excluded because they are aliens outside the United States. But the Supreme Court held in 2008 in *Boumediene v. Bush*/\_28 again with a 5-to-4 vote, that detainees at Guantánamo did have the constitutional right to habeas corpus. /\_29 To rule otherwise, Justice Kennedy wrote, would be to hold that the "political branches have the power to switch the Constitution on or off at will" based on where the executive has chosen to bring prisoners. Under this reasoning,

the Constitution should be a backpack that travels with governmental authority and protects those subject to American custody.

Justice Antonin Scalia was apoplectic. Warning of “disastrous consequences,” he wrote in dissent that “today, for the first time in our nation’s history, the court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.” His dire prediction: “It will almost certainly cause more Americans to be killed.”

He need not have worried. As Judge Laurence H. Silberman, a mainstay of the conservative D.C. Circuit, wrote in a concurrence /\_30 in 2011, Boumediene was a “charade,” a “defiant — if only theoretical — assertion of judicial supremacy.” The courts refused to extend habeas or any other rights to detainees at bases other than Guantánamo. No detainee has ever been released as a direct result of an American court order. As a practical matter, aliens in American custody outside the United States have no enforceable rights. President Obama has forbidden torture by executive order. /\_31

Yet his predecessor allowed torture, and so could his successor. Whatever else may go into the knapsacks of military personnel, the Constitution is not on the packing list.

As the Roberts court begins its 10th term, there is a clear shift away from decades of jurisprudence in which the court envisioned its role as protector of the essential human dignity of those who lacked the political power to protect themselves. Justice William J. Brennan Jr. called the Constitution “a sublime oration on the dignity of man.” But historically the Supreme Court had ignored the dignity of a broad section of humanity: Native Americans,/\_ 32 slaves, /\_33 women,/\_34 racial minorities,/\_35 *aliens*, /\_36 Japanese internees,/\_37 gays and lesbians,/\_ 38 and now Muslims at Guantánamo.

The current court is solicitous of those who pool their capital and obtain the protection of the corporate form. It is sympathetic toward the interests of mainstream elites, expanding religion, protecting commercial wealth and even protecting gay rights, an issue that crosses class lines. The dignity of prisoners, employees, or ethnic and racial minorities is far less likely to engage the moral imagination of this court.

Years ago, my constitutional law professor, Judge Robert H. Bork, taught us about the cases that challenged the government edict that ordered the rounding up of citizens of Japanese ancestry into remote internment camps during World War II. The Supreme Court upheld that order by a vote of 6 to 3, finding that “the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast.” Judge Bork was no progressive, but he told us that he was shocked that “we the people” could so easily succumb to racist, nativist hysteria. Surely it could never happen again.

It takes courage for the Supreme Court to stand up for the powerless and the despised. Sometimes it has risen to the challenge and sometimes it has not. With the Roberts court, what we see is a self-referential worldview, which leads the court to enhance the rights of insiders and deny protection to outsiders. On Monday, the justices will begin another term with the question of whether their commitment to the protection of human dignity will be universal or limited to “persons” just like them.

*Eric L. Lewis /\_39 is a partner at the law firm Lewis Baach and the chairman of Reprieve US.*

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END NOTES

1. **Black's Law Dictionary** -- What is a PREAMBLE? Clause at the beginning of a constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished. See *Townsend v. State*, 147 Ind. 024, 47 N. E. 19, 37 L. R. A. 294. 62 Am. St Rep. 477...
2. **26 U.S. Code § 7343** - The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.
3. **The Universal Declaration of The Universal Declaration of Human Rights (abbreviated)** -- [http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-5/8\\_udhr-abbr.htm](http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-5/8_udhr-abbr.htm)
4. **U.S. Constitution** -- First and Eighth Amendments
5. **Citizens United v. Federal Election Commission** -- Docket No. 08-205 | The Oyez Project at IIT Chicago-Kent College of Law [http://www.oyez.org/cases/2000-2009/2008/2008\\_08\\_205](http://www.oyez.org/cases/2000-2009/2008/2008_08_205)
6. **Burwell v. Hobby Lobby Stores** -- Docket No. 13-354 | The Oyez Project at IIT Chicago-Kent College of Law [http://www.oyez.org/cases/2010-2019/2013/2013\\_13\\_354](http://www.oyez.org/cases/2010-2019/2013/2013_13_354)
7. **Legal dictionary.thefreedictionary.com** -- legal definition of enemy combatant: Captured fighter in a war who is not entitled to prisoner of war status because he or she does not meet the definition of a lawful combatant as established by the Geneva convention; a saboteur.
8. See 39 infra
9. **National Labor Relations Board v. Noel Canning** | The Oyez Project at IIT Chicago-Kent College of Law [http://www.oyez.org/cases/2010-2019/2013/2013\\_12\\_1281](http://www.oyez.org/cases/2010-2019/2013/2013_12_1281)
10. **DaimlerChrysler AG v. Bauman** | Docket No. 11-965 The Oyez Project at IIT Chicago-Kent College of Law [http://www.oyez.org/cases/2010-2019/2013/2013\\_11\\_965](http://www.oyez.org/cases/2010-2019/2013/2013_11_965)
11. Purposefully deleted
12. **"Case of Muslim Woman Denied Job At Abercrombie & Fitch To Go Before Supreme Court"** -- [http://www.huffingtonpost.com/2014/10/02/muslim-woman-abercrombie\\_n\\_5921292.html](http://www.huffingtonpost.com/2014/10/02/muslim-woman-abercrombie_n_5921292.html)
13. **"Supreme Court Takes Up Appeal on Alabama Redistricting Plan"** -- <http://online.wsj.com/articles/supreme-court-takes-up-appeal-on-alabama-redistricting-plan-1401718882>
14. See 5 supra
15. See 6 supra
16. **Benefits of green card or permanent resident card** -- <http://www.immihelp.com/greencard/benefits-of-permanent-resident-card.html> Benefits of green card or permanent resident card Benefits of Green Card Green Card is a commonly used name for Permanent Resident Card, previously known as Resident Alien Card.
17. **U. S. 766 First National Bank v Belloti 435 US @p.766** The expression proposed by appellants, namely, the expression of views on an issue of public importance, is at the heart of the First Amendment's concern. There is no support in the First or Fourteenth Amendment, or in this Court's decisions, for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation that cannot prove, to a court's satisfaction, a material effect on its business. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748, 425 U. S. 764. Pp. 435 U. S. 776-783.
18. **Foreign Nationals Brochure** -- <http://www.fec.gov/pages/brochures/foreign.shtml>  
The ban on political contributions and expenditures by foreign nationals was first enacted in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA)
19. **Corporations Close Corporations Law & Legal Definition** --

<http://definitions.uslegal.com/c/corporations-close-corporations/> A close corporation is generally defined as a corporation owned by a limited number of stockholders, usually no more than 35, who generally are active in the affairs of the corporation.

20. See 2 supra

21. See 19 supra

22. Purposefully deleted

23. See 19 supra

**24. Rasul v. Rumsfeld | Center for Constitutional Rights --**

<http://ccrjustice.org/ourcases/current-cases/rasul-v.-rumsfeld> Rasul v. Rumsfeld Synopsis Rasul v. Rumsfeld is a lawsuit against former Secretary of Defense Donald Rumsfeld on behalf of four former detainees seeking damages

**25. 42 U.S. Code Chapter 21B - RELIGIOUS FREEDOM RESTORATION | LII / Legal Information Institute**

<http://www.law.cornell.edu/uscode/text/42/chapter-21B>

26. See 24 supra

27. See 26 supra In a separate concurrence, Judge Janice Rogers Brown agreed with the result but attacked the majority for using a definition of person “at odds with its plain meaning.” She observed, “There is little mystery that a ‘person’ is an individual human being...as distinguished from an animal or thing.” Judge Rogers Brown concluded that the majority’s decision “leaves us with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantánamo are not ‘person[s].’ This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human.”

**28. Boumediene v. Bush | Docket No. 06-1195 The Oyez Project at IIT Chicago-Kent College of Law**

[http://www.oyez.org/cases/2000-2009/2007/2007\\_06\\_1195](http://www.oyez.org/cases/2000-2009/2007/2007_06_1195)

29. **Legal-dictionary.thefreedictionary.com/ Habeas corpus --** A writ (court order) that commands an individual or a government official who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release.

**30. What Is the Difference Between a Concurring & Dissenting Opinion? | By James Haskell**

[http://www.ehow.com/info\\_8599709\\_difference-between-concurring-dissenting-opinion.html](http://www.ehow.com/info_8599709_difference-between-concurring-dissenting-opinion.html)

**31. President Barack Obama Executive Order 13491**

**32. US Constitution, Section 7**

**33. US Constitution, 13<sup>th</sup> Amendment**

**34. US Constitution, 19<sup>th</sup> amendment**

**35. Lawrence and Garner v. Texas Docket No. 02-102 | The Oyez Project at IIT Chicago-Kent college of Law**

[http://www.oyez.org/cases/2000-2009/2007/2007\\_06\\_1195](http://www.oyez.org/cases/2000-2009/2007/2007_06_1195)

**36. Yick Wo v. Hopkins Opinion 118 U.S. 356 (1886) | The Oyez Project at IIT Chicago-Kent college of Law**

[http://www.oyez.org/cases/1851-1900/1886/1886\\_0](http://www.oyez.org/cases/1851-1900/1886/1886_0)

**37. Korematsu v. United States Opinion 323 U.S. 214 (1944) | The Oyez Project at IIT Chicago --**

[www.oyez.org/cases/1940-1949/1944/1944\\_22](http://www.oyez.org/cases/1940-1949/1944/1944_22)

38. Purposefully deleted

**39. Eric Lewis bio at Lewis Baach pllc website --** <http://www.lewisbaach.com/attorneys-35.html>