

- 1. As Solicitor General, you chose not to file a brief on behalf of the United States in the landmark case *McDonald v. Chicago*. Why did the government decide not to file a brief in this case?**

Response:

It has long been the practice of the Office of the Solicitor General not to file an amicus brief in cases concerning the application of a constitutional provision to the states (so-called incorporation cases). Although incorporation cases raise important issues of constitutional interpretation, and may matter greatly to individual citizens, those issues do not implicate the responsibilities and obligations of the federal government under the Constitution. Incorporation cases therefore do not fall within the category of cases in which the Office of the Solicitor General files amicus briefs: those where the federal government itself has a clear and specific interest in the resolution of the case. *McDonald v. City of Chicago* was an incorporation case. The issue in *McDonald* was whether the Second Amendment individual right to bear arms recognized in *District of Columbia v. Heller* also applies to the states. The application of the Second Amendment individual right to bear arms to the federal government was settled by *Heller*, and the decision not to file an amicus brief in *McDonald* was consistent with the longstanding practice of the Office of the Solicitor General.

- 2. Justice Kennedy’s opinion in *Boumediene* set out a multi-factor test for determining whether habeas corpus rights extend to detainees held at Guantanamo Bay. Is this multi-factor test relevant to whether other constitutional rights extend to detainees held at Guantanamo or other areas abroad? How would you analyze whether other constitutional rights extend to detainees held at Guantanamo or other areas abroad?**

Response:

In *Boumediene v. Bush*, the Supreme Court held, among other things, that foreign nationals apprehended abroad and detained at Guantanamo Bay have the constitutional privilege of habeas corpus. The Court based its conclusion on the following factors: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” 128 S. Ct. 2229, 2259 (2008). Some or all of these factors may be relevant in deciding whether and to what extent other constitutional provisions apply to detainees held at Guantanamo or other areas abroad, depending on the particular constitutional provision at issue. In considering whether other constitutional rights apply abroad, the Court has looked to the text, structure, and history of the particular constitutional

provision. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-68 (1990) (looking to text and Framers’ intent to conclude that the Fourth Amendment does not apply to a search of a nonresident alien located outside the United States by United States agents). The Court has also found relevant the citizenship status of the claimant, *id.*, and the status of the territory, *see, e.g., Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). The practical consequences of applying the particular constitutional right abroad might also be relevant to the Court’s analysis. *See, e.g., Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1 (1957) (Harlan, J., concurring in the judgment) (looking to the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it” in concluding that the constitutional right to a trial by jury applied to spouses of American soldiers tried before military courts on military bases in England and Japan).

**3. How would you analyze whether enemy belligerents held in the United States are entitled to a particular constitutional right by virtue of their presence in the United States? For example, if non-citizen military detainees were transferred from abroad to a domestic prison, how would you determine whether their presence in the United States entitled them to particular constitutional rights?**

Response:

The Supreme Court has never considered whether non-citizen military detainees transferred from a location abroad to a domestic prison are entitled to greater constitutional protections by virtue of their presence in the United States. Whether and to what extent a particular constitutional provision applies to an enemy belligerent held in the United States likely would depend on the facts of the case, as well as the text, structure, and history of the constitutional provision at issue. In such a case, the detainees might argue that constitutional provisions typically apply with greater force in the United States than they do abroad. But the United States presumably would argue that the mere transfer of detainees from a prison abroad to a domestic prison should not affect their constitutional status given that the detainees have no substantial connection with this country.

**4. How would you determine whether the Authorization for Use of Military Force authorizes the detention of citizen or non-citizen enemy belligerents captured in the United States? How would you analyze whether the President’s power under Article II of the Constitution authorizes the**

**detention of citizen or non-citizen enemy belligerents captured in the United States?**

Response:

Whether the Authorization for Use of Military Force authorizes the detention of citizen or non-citizen enemy belligerents captured in the United States is a question of statutory interpretation. In considering whether Congress meant to confer such authority on the President when it enacted the AUMF, the Court would look to the text of the statute as the best evidence of Congress's intended meaning. If the text is ambiguous, the Court would look to the structure and legislative history of the statute. In a prior case interpreting the AUMF, a plurality of the Court also looked to principles of the law of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004). In *al-Marri v. Pucciarelli*, 534 F.3d 213 (4<sup>th</sup> Cir. 2008) (en banc), the Fourth Circuit held that the AUMF authorizes the President to detain a non-citizen legal resident as an enemy combatant. The Supreme Court granted certiorari, 129 S.Ct. 680 (2008), but vacated and remanded the case after the detainee was transferred from military to civilian custody, 129 S. Ct. 1545 (2009). Whether the President has the authority under Article II of the Constitution to detain a citizen or non-citizen enemy belligerent captured in the United States is a question of executive power that the Court likely would analyze under the framework set forth in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

**5. How would you analyze whether particular questioning falls within the public safety exception to *Miranda*, as established by *Quarles*?**

Response:

In *New York v. Quarles*, 467 U.S. 649, 657 (1984), the Supreme Court held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." The Court concluded that "overriding considerations of public safety" justified a police officer's decision to ask an arrestee questions about the location of an abandoned weapon before providing him with *Miranda* warnings. In analyzing whether particular questioning falls within the public safety exception, the Court likely would consider the gravity and immediacy of the public safety threat and whether the questions were directed to addressing that threat. The Court might also consider whether *Quarles* should apply differently in terrorism cases than in ordinary criminal cases because of the distinctive public safety needs involved in the former.