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Boumediene v. Bush and Guantanamo, Cuba: Does the Empire Strike Back

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Boumediene v. Bush and Guantánamo, Cuba: Does the "Empire Strike Back"?

*Ernesto Hernández-López**

ABSTRACT

Commenting on the U.S. Supreme Court decision in Boumediene v. Bush *and the U.S. occupation of the Naval Station at Guantánamo Bay, Cuba, this Article argues that anomaly with respect to U.S. control of the base has heavily influenced "War on Terror" detention jurisprudence. This anomaly was created by agreements between the United States and Cuba in 1903 and 1934. These agreements affirm that the United States lacks sovereignty over Guantánamo but retains "complete jurisdiction and control" for an indefinite period, while Cuba has "ultimate sovereignty." Gerald Neuman labels this an "anomalous zone" with fundamental legal rules locally suspended. The base was chosen as a detention center because of this anomaly, with checks in constitutional and international law perceived to not apply. This Article makes three arguments about how the United States determines what legal norms apply on Guantánamo. First, the base's legal anomaly is not an aberration, but instead is a precise objective of U.S.-Cuba relations, evident in the Platt Amendment and international agreements. Second, four legal objectives frame this anomaly, historically and presently. They are that the United States avoids sovereignty abroad, limits incidents of Cuban sovereignty, avoids constitutional limits for overseas authority, and protects strategic overseas interests. Using these objectives,* Boumediene *addressed this anomaly. To hold that detainees have access to the writ of habeas corpus in the Constitution's Suspension Clause, the Court found that the United States exercises de facto sovereignty over the base and that the Constitution has extraterritorial application. Third, tracking legal similarities in base occupation and base detention, post-colonial*

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analysis illuminates how current doctrine evades individual rights protections with overseas authority. These three points illuminate how in the future U.S. law may determine what legal norms check (or not) overseas authority, whether on Guantánamo or in other extraterritorial settings.

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Darth Vader: Perhaps you think you're being treated unfairly?
Lando Calrissian: No.
Darth Vader: Good. It would be unfortunate if I had to leave a garrison here.

—*The Empire Strikes Back*[1]

"[E]ven if we do not own the island, we are responsible for its conduct . . . and the just and equitable treatment of foreigners residing thereunder."

—*General Leonard Wood (U.S. Military Governor of Cuba, 1900–02)*[2]

I. INTRODUCTION

FOLLOWING over six years of detention and over seven hundred detainees[3] at the U.S. Naval Station at Guantánamo Bay, Cuba ("Guantánamo"),[4] Supreme Court opinions in *Boumediene v.*

1. STAR WARS EPISODE V: THE EMPIRE STRIKES BACK (20th Century Fox & Lucasfilm 1980).

2. Robert Freeman Smith, *Latin America, the United States and the European Powers*, 1830-1930, *in* THE CAMBRIDGE HISTORY OF LATIN AMERICA, VOL. IV c. 1870 to 1930, at 96 (Leslie Bethell ed., 1984) (quoting a letter from Gen. Leonard Wood to President Theodore Roosevelt).

3. The total base detainee population since 2002 including those released is estimated to be 779, including persons from 47 nationalities. As of January 27, 2009, 242 persons remain detained on the base. *See generally* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Brookings Institute, *The Current Detainee Population of Guantánamo: An Empirical Study*, Dec. 16, 2008 & Jan. 22, 2009, http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx; *Names of the Detained in Guantanamo Bay, Cuba*, WASH. POST, http://projects.washingtonpost.com/guantanamo/ (last visited Feb. 21, 2009) (providing imperfect, due to state secrecy, but thorough analysis of the detainee population).

4. This Article refers to the U.S. Naval Station at Guantánamo Bay, Cuba as "Guantánamo" for the sake of simplicity. In English popular discourse, the base is also referred to as "Gitmo," "GTMO," or "Guantánamo Bay." More precise identifications refer to the base detention camps, e.g. Camp Delta, Camp Echo, Camp Iguana, and Camp X-Ray. Specifically, the U.S. Navy uses the acronyms "GTMO" or "Gitmo." "Guantánamo" is actually a city in Cuba, independent of any base. The city's population provided the base much material and labor support until 1961. For the Cuban population, though, "Guantánamo" implies the city, and the base is referred to independently. The base does not include exclusive control of the Bay, which since its inception has been regarded as within

Bush refer to the base as a "quirky outpost"[5] with a "unique and unusual" jurisdiction.[6] Critics call it the "gulag of our time"[7] and a "legal black hole,"[8] where detention includes torture, indefinite confinement, no charges or court proceedings, and violations of individual rights guaranteed by the Constitution, Geneva Conventions, and international humanitarian and human rights law. The base's "quirky" location in Cuba, which the United States considers part of an "Axis of Evil,"[9] facilitates this type of detention. Agreements between the United States and Cuba shape this anomaly. A 1903 agreement states that Cuba has "ultimate sovereignty" over the base and that the United States has "complete jurisdiction and control."[10] Between sovereignty-and-jurisdiction and Cuba-and-United States, legal norms ambiguously check military authority on the base. Gerald Neuman describes this as an anomalous legal zone, with "legal rules" fundamental to larger policies "locally suspended" in a geographic area.[11] Perceived as far from checks in constitutional or international law, Guantánamo was chosen as a detention center to benefit from this uncertainty.[12] Examining the legality of this deten-

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Cuban jurisdiction. The base is limited to the territory on the east and west sides of the entrance to Guantánamo Bay, with the Caribbean Sea to the south. The base does not fully surround the Bay, with the northern land around the Bay part of Cuba. The base is over ten miles from the city of Guantánamo. For descriptions of changing jurisdictions, territory, and waterway access, see generally JANA LIPMAN, GUANTÁNAMO: A WORKING-CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION 11-14 (2009).

5. Boumediene v. Bush, 128 S. Ct. 2229, 2293 (2008) (Roberts, C.J., dissenting).

6. *Id.* at 2279.

7. *See* Irene Khan, Amnesty Int'l, Rep. Speech at Foreign Press Association (May 26, 2005), www.amnesty.org/en/library/info/POL10/014/2005 [hereinafter Khan speech]; Richard Norton-Taylor, *Guantánamo Is Gulag of Our Time, Says Amnesty*, THE GUARDIAN, May 26, 2005, *available at* www.guardian.co.uk/world/2005/may/26/usa.Guantánamo.

8. *See* Lord Johan Steyn, 27th F.A. Mann Lecture at Lincoln's Inn Old Hall: Guantánamo Bay: The Legal Black Hole, (Nov. 25, 2003), *available at* www.nimj.com/documents/Guantánamo.PDF (describing how U.S. policy and law keep the base anomalous to rights protections in international and U.S. law); Clive Stafford Smith, *America's Black Hole*, L.A. TIMES, Oct. 5, 2007 (presenting base secrecy and the absence of detainee protections as interrelated from firsthand experience representing detainees).

9. *See* John R. Bolton, U.S. Under Sec'y Arms Control & Int'l Security Remarks to the Heritage Foundation: Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction (May 6, 2002), *available at* www.state.gov/t/us/rm/9962.htm; MARK. P. SULLIVAN, CONG. RESEARCH SERV., CUBA AND STATE SPONSORS OF TERRORISM LIST, RL32251 (2005), *available at* www.fas.org/sgp/crs/terror/RL32251.pdf (detailing how the United States has placed Cuba on the terrorism support list during the Cold War in 1979 and presently with states such as Iran, Libya, Sudan, and North Korea).

10. Agreement Between the United States and Cuba for the Lease of Lands for Coaling or Naval Stations, U.S.-Cuba, Feb. 16–23, 1903, T.S. No. 418, art. III [hereinafter U.S.-Cuba Feb. 1903 Lease].

11. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996).

12. *E.g.*, Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29-37 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Philbin & Yoo Memo]; Daniel F. McCallum, *Why GTMO?* 8–9, 11 (cited in the Brief for Petitioners, Al Odah v. United States, 124 S. Ct. 534 (2003) (No. 03-43)) (reporting on the Dec. 2001 inter-agency decision making process choosing the base as a detention center and how it was regarded as "unique piece of property" with minimal foreign relations and domestic security concerns

tion, *Rasul v. Bush*,[13] *Hamdan v. Rumsfield*,[14] and *Boumediene v. Bush* address this anomaly.

This Article makes three general arguments about how U.S. law has determined what norms apply to Guantánamo. First, Guantánamo's legal anomaly is not an aberration, but instead is a precise objective of U.S. foreign relations since Cuban independence in 1898. This anomaly is the product of legal determinations in the Platt Amendment from 1901, which limited Cuba's foreign relations power, provided the United States with a "right to intervene" in Cuba, and required that Cuba provide the United States bases on Cuban territory.[15] Second, four legal objectives concerning U.S. influence overseas frame this anomaly, historically and presently. These are that the United States avoids sovereignty abroad, limits incidents of sovereignty for foreign states, avoids constitutional limits for its overseas authority, and protects strategic overseas interests (geopolitical, economic, and legal). With the Platt Amendment securing influence over Cuba by limiting its sovereignty, these objectives characterized U.S.-Cuba foreign policy. Specific to Guantánamo, these objectives appear in bilateral agreements, which provide the United States infinite control over the base without formal sovereignty, while Cuba has "ultimate sovereignty" and no power to end U.S. occupation.[16] Outside

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and providing existing facilities, expansion space, vital support, and proximity to the United States and law enforcement and intelligence personnel). *See generally* Brief for Respondent, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195 & 06-1196) (arguing that the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 eliminate federal court jurisdiction for Guantánamo detainees). *Cf.* U.S. Dep't of Def., *The Legal Basis for Detaining Al Qaida and Taliban Combatants* (2005), *available at* www.defenselink.mil/news/Jul2007/Legal%20basis%20Guantánamo%20Detainees%20OGC%20FINAL.pdf (arguing that detainees are not "prisoners of war" entitled to Geneva Convention rights, but "enemy combatants," and that the law of war permits detaining persons in "unlawful belligerence" without charges or trial); The White House Fact Sheet: Status of Detainees at Guantánamo, Feb. 2, 2002, *available at* www.whitehouse.gov/news/releases/2002/02/20020207-13.html. *But see* Press Release, U.S. Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantánamo Detainees (Mar. 13, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html (presenting the government's most recent position in habeas proceedings that base detention authority is sourced in the Authorization for Use of Military Force (AUMF) from Sept. 2001 versus sourced in the Executive's Commander-in-Chief power, withdrawing the previous detainee classification of "unlawful enemy combatant," and arguing this authority is informed by international laws of war); Exec. Order No. 13492, *infra* note 18, § 7 (finding base detainees are protected by Common Art. III of the Geneva Conventions).

13. 542 U.S. 466, 480-83 (2004) (holding that the federal habeas corpus statute extends extra-territorially to the base because it is for practical purposes within U.S. jurisdiction); *see also id.* at 487 (Kennedy, J. concurring) (stating the base is "in every practical respect a United States territory"). *But see id.* at 500–01 (Scalia, J. dissenting) (explaining Cuban sovereignty is a bar to extraterritorial application of habeas rights on the base).

14. 548 U.S. 557, 578 (2006) (interpreting base specific jurisdiction-stripping provisions from the Detainee Treatment Act of 2005 as inapplicable retroactively and holding military commissions initially created by the Executive to be unauthorized by law and inconsistent with the Uniform Code of Military Justice and the Geneva Conventions).

15. An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 13, 1902, ch. 803, para. VII, 31 Stat. 895, 898 (1902) [hereinafter Platt Amendment—U.S. appropriations]; *see also* discussion *infra* Part III.B.

16. U.S.-Cuba Feb. 1903 Lease, *supra* note 10, art. III; *see also infra* Part III.C (discussing the Guantánamo lease termination provisions of the U.S.-Cuba 1934 Treaty). This

U.S. territorial sovereignty, Guantánamo is perceived to be beyond the Constitution's application. *Boumediene* addresses this anomaly with these four legal objectives. Specifically, to hold that the Constitution's Suspension Clause has extraterritorial effect, the Court makes significant determinations regarding sovereignty on the base and the Constitution's limited application overseas.[17] Objectives regarding United States and Cuban sovereignty, limited rights protections, and strategic overseas goals are highly influential in the Court's reasoning. These objectives are central to legal reasoning supporting base occupation in 1903, as well as *Boumediene*'s holding in 2008. Third, tracking the relationship between legal norms, base occupation, and base detention, a post-colonial analysis of U.S. foreign relations suggests how current legal doctrine evades individual rights protections with overseas authority. This illuminates how, capitalizing on legal determinations since 1898, the United States attempted to create a rights-free zone overseas in 2002. These post-colonial points shed light on how U.S. law may carve similar zones after base detention is set to end on January 22, 2010.[18] This Article argues legal anomaly remains embedded in the law supporting overseas authority.

As illustrated below, *Boumediene* examines the law in a post-colonial situation.[19] "Post-colonialism" refers to the effects of colonization and imperial influence on a society's culture or political structures.[20] Examin-

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Article uses the term "occupation" since the 1903 Lease refers to the U.S. "occupation." *See id.*

17. Boumediene v. Bush, 128 S. Ct. 2229, at 2237-39 (2008). The writ of habeas corpus is a common law action permitting a detainee or prisoner to seek relief from unlawful detention. With access to the writ, Guantánamo detainees may challenge the legality of their detention in a court, as opposed to in a military commission or tribunal proceeding or having no ability to challenge detention. *Boumediene* addresses whether detainees enjoy the privilege of the writ in the Constitution's Suspension Clause, art. I, § 9, cl. 2.

18. *See* Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf (order made on Jan. 22, 2009 and reported on Jan. 27, 2009) (ordering the Department of Defense appropriately dispose all individuals detained at Guantánamo, "promptly close" the base detention facilities as "soon as practicable" and no later than Jan. 22, 2010, and release or transfer of detainees to "another United States detention facility").

19. Beyond just the *Boumediene* legal issues, many scholars from diverging normative and theoretical positions have made the general correlation between the "War on Terror" and empire. *See, e.g.*, Amy Kaplan, *Violent Belongings and the Question of Empire Today, Presidential Address to the American Studies Association*, Oct. 17, 2003, 56 AM. Q. 1 (2004) (explaining how the denial of empire in American public discourse has been an "ideological cornerstone" of U.S. imperialism and American exceptionalism); EMPIRE'S LAW: THE AMERICAN IMPERIAL PROJECT AND THE "WAR TO REMAKE THE WORLD" (Amy Bartholomew ed., 2006) (examining how the law and practice of U.S. exceptionalism, unilateralism, and global power, with a focus on Iraq); Niall Ferguson, *Hegemony or Empire?*, FOREIGN AFFAIRS, Sept.-Oct. 2003 (presenting the difference U.S. scholars place on "leadership" or "hegemony" versus British counterpart do on "empire"); Tony Judt, *Dreams of Empire*, 51 N.Y. REV. BOOKS, Nov. 4, 2004 (reviewing nine books on "American empire," global power, and the "War on Terror" to suggest that the United States no longer serves as an example for the world or itself); Paul Krugman, *White Man's Burden*, NY. TIMES, Sept. 24, 2002, at A27 (finding similarities in the "Bush Doctrine" and historic practices during the Spanish-American War like favoring private and corporate interests, military interventions for strategic and market gains, and proclaiming the sense of "manifest destiny" or duty in foreign affairs).

20. BILL ASHCROFT ET AL., POST-COLONIAL STUDIES: THE KEY CONCEPTS 186 (2000).

ing overseas authority and the historic doctrine supporting it, *Boumediene* answers a post-colonial legal question: Do constitutional habeas corpus rights extend to non-sovereign territory under United States control? This is often presented as a constitutional, national security, or international law issue.[21] The decision relies on legal doctrine from American informal imperial influence over the Caribbean, Cuba, and Guantánamo.[22] This is intrinsically post-colonial, because it examines what happens after imperial influence, i.e., after U.S. overseas authority in the region commenced in 1898.

The phrase "The Empire Strikes Back" exemplifies the significance and ambiguity of what happens "after the empire." For this Article, the phrase questions how overseas power influences a central authority or its subjects overseas. Describing the uniqueness of literatures from decolonized countries, which are wrongly labeled English literature,

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21. *See, e.g.*, Paul A. Diller, *When Congress Passes and Intentionally Unconstitutional Law: the Military Commissions Act of 2006*, 61 SMU L. REV. 281 (2008) (presenting *Boumediene* as fulfilling Congress' intent of invalidating MCA's Section 7, which tried to strip habeas jurisdiction and as arrogating constitutional interpretation powers to the judiciary); Gerald Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, S. CAL. L. REV. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272951 (examining the Court's "functional approach" to selectively apply constitutional limitations to government action outside the United States and describing ambiguities in application to non-citizens not in U.S. custody and in different foreign locations); David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantánamo Bay*, 2008 CATO SUP. CT. REV. 47, *available at* ssrn.com/abstract=1272202 (arguing *Boumediene* is groundbreaking because of its conceptions of sovereignty, territoriality, and rights evident in finding a law on military policy unconstitutional even though it was passed by Congress and the President during armed conflict, extending extraterritorial constitutional rights to noncitizens during conflict, and finding a law stripping court jurisdiction unconstitutional); Anthony J. Colangelo, *"De Facto Sovereignty":* Boumediene *and Beyond*, GEO. WASH. L. REV. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275413 (arguing the Court's finding of "de facto sovereignty" over the base is a new categorization with separation of powers implications); Eric. A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 47 (arguing that the Court overlooks significant limitations for noncitizens' constitutional status and that separations of powers justifications mask cosmopolitan concerns for human rights and international law); Gregory S. McNeal, *Beyond Guantánamo, Obstacles, and Options*, 103 NW. U. L. REV. 29 (2008) (presenting how the military commissions system used on the base, not changed by *Boumediene*, should be re-structured to be more fair); Daniel R. Williams, *Who Got Game?* Boumediene v. Bush *and the Judicial Gamesmanship of Enemy-Combatant Detention*, NEW ENG. L. REV. (forthcoming 2009), *available at* ssrn.com/abstract=1270765) (arguing that detainee jurisprudence is presented increasingly as a process issue because human rights concerns are too controversial, but this has not stopped executive detention on the base or resulted in a fair adjudication process).

22. Here the post-colonial context is after 1898, when there existed a formal empire over Puerto Rico and the U.S. Virgin Islands and varying degrees of informal empire over Cuba, Caribbean states such as Haiti and Dominican Republic, and Central American states such as Panama, Nicaragua, and Honduras. Foreign relations and legal instruments developed then are still influential today. The law here operates on two general planes: constitutional and international. Constitutional law determines how the U.S. political system has authority over unincorporated territories and overseas possessions. While international law concerns sovereignty over territory, international agreements, protectorate arrangements, and rights individuals may have.

Salman Rushdie explains "the empire writes back with a vengeance."[23] In his book *The Empire Writes Back*, Bill Ashcroft examines how variations in language and representations are central to Eurocentric assumptions in literature.[24] In the movie "*Star Wars V: The Empire Strikes Back*," the Empire hunts down rebel Jedi Luke Skywalker and tries to indefinitely detain his friends Princess Leia and Chewbacca in the protectorate of Cloud City.[25] City administrator Lando Calrissian asks how an agreement with the Empire provides for detention. These examples point to imperial rule's long-term and structural effects, whether it is resisting this power or eliminating this resistance. Law, whether it is constitutional or international, supports this overseas authority, past and present. Focusing on U.S. influence over Cuba and Guantánamo, this Article highlights the significance of post-colonial legal methodologies. It asks whether there is a post-colonial response, i.e., "does the empire strike back," when the law examines detention on overseas non-sovereign territory under U.S. control? Post-colonial inquiry analyzes how legal instruments (doctrine, reasoning, treaties, and adjudication) developed during prior relationships of empire or colonialism and how these instruments influence current legal reasoning.[26]

This Article is not an exhaustive normative, doctrinal, or empirical study of Guantánamo detention litigation, which has been extremely complex and evolving. This litigation includes military commissions, Combatant Status Review Tribunals (CSRTs), appeals to the United States Court of Appeals for the District of Columbia, and district court habeas proceedings. Adding to this, in an Executive Order, President Obama ordered the base detention program to end by January 2010.[27] From a policy perspective some things appear certain, i.e. base detentions will end. Similarly, some legal issues on the base have become clearer, since *Boumediene* affirms base detainees have constitutional habeas rights. Much uncertainty remains regarding what law, whether in terms of individual rights protections or checks on executive authority, actually applies to the base. Litigation since *Boumediene* in response to court orders to release Guantánamo detainees has been the most dramatic.[28] Similarly, the January 2009 Executive Order stopped many military commissions, which had been conducted in response to the *Rasul* and

23. Salman Rushdie, *The Empire Writes Back With a Vengeance*, THE TIMES (London), Jul. 3, 1982.

24. *See generally* BILL ASHCROFT ET AL., THE EMPIRE WRITES BACK: THEORY AND PRACTICE IN POST-COLONIAL LITERATURES (1989).

25. THE EMPIRE STRIKES BACK, *supra* note 1.

26. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3 (2004). *See also infra* discussion Part II.B. For an example of how law's current role in profit maximization, consumption excesses, nativism, and overseas intervention resembles imperial events in U.S. history, see generally Richard Delgado, *Idea: You are Living in a Gold Rush*, 35 HOFSTRA L. REV. 417 (2006).

27. *See* Exec. Order No. 13492, *supra* note 18.

28. *See infra* Part V.B.

Hamdan decisions and provided detainees some rights protections.[29] The Order also claimed that it creates no individual rights. It set a date to end detention but leaves the state of rights protection uncertain. Rights protections on the base remain anomalous, but perhaps judicially moot with detention ending.[30]

With so much uncertainty about the law's present and future, this Article is a limited analysis of habeas corpus jurisdiction on the base, as seen from a post-colonial lens concerning the base's legal history. As such, *Boumediene* is merely one judicial step, beginning in 2002, recognizing that the right of habeas extends to the base and finding procedural substitutes for habeas inadequate. With such uncertain and developing jurisprudence, this Article offers a researched suggestion on post-colonialism's relevance regarding international and constitutional law and how they are intertwined, even when the mix is foreign in a "domestic sense."[31]

This Article describes U.S.-Cuba relations and U.S. foreign relations after the Spanish-American War of 1898 (the War). From these events, legal instruments were developed to extend U.S. influence overseas, avoid U.S. de jure sovereign authority abroad, limit sovereignty for foreign states, and evade constitutional limits in U.S. foreign relations power. After the War, the U.S. occupied Cuba until 1902.[32] Devised during occupation, the Platt Amendment provided that the United States had a "right to intervene" in Cuba, control Cuba's foreign relations, and most importantly (for this inquiry) it provided a right to put U.S. bases on

29. *See* Exec. Order No. 13492, *supra* note 18, § 7 (ordering "immediate review of all Guantánamo detainees" (as provided in Section 4), ordering Military Commission proceedings to stop when charges are "referred" but without judgment rendered, stopping proceedings pending, and barring the swearing of any new charges).

30. The Order ends detention. In Section 2.c, it affirms detainees "have the constitutional privilege of the writ of habeas corpus," and most detainees have filed writ challenges in federal court. *Id.* § 2. In Section 6, it requires "humane standards of confinement," which is described as in conformity with "all applicable laws governing" such confinement and including "Common Article 3 of the Geneva Conventions. *Id.* § 6. But it does not confirm what other constitutional rights may be protected on the base. *See id.*; *see also infra* Part V.

31. *See* Downes v. Bidwell, 182 U.S. 244, 320 (1901). This Article merely attempts to suggest the value of post-colonial analysis to legal debates about Guantánamo detention and overseas U.S. authority by correlating legal instruments supporting base occupation with developing jurisprudence on base detention. Since detention litigation is a complex and evolving process, this Article does not solely provide a doctrinal, normative, or empirical analysis. For the sake of simplicity, this Article merely examines how base occupation history influences what legal norms apply on the base. Central to this inquiry is identifying how legal practices (in foreign relations or Supreme Court jurisprudence) determine what norms do (or do not) apply to non-sovereignty territory under U.S. control. This generally focuses on 'law and territory.' This does not analyze applicable substantive rights in legal doctrines such as due process, alienage law, international humanitarian law, law of war, international human rights law, or prisoner of war protections. Similarly, this does not fully examine the legality of base occupation and international agreements between Cuba and the United States. These issues are important, but beyond this Article's limited scope.

32. *See infra* Part III.

Cuban soil.[33] The Platt Amendment made Cuba a U.S. protectorate.[34] During this period, the United States continually exercised informal imperial influence over Cuba. Reflecting this, a lease agreement in 1903 set the terms of base occupation at Guantánamo.[35]

This Lease begins to frame present legal anomaly.[36] Referring to base territory, it provides Cuba with "ultimate sovereignty" and the United States with "jurisdiction and complete control."[37] This unclearly demarcates which norms apply on the base and whether "ultimate sovereignty" has any significance before U.S. occupation ends.[38] The Lease ambiguously designates legal obligations on the base, but clearly provides the United States indefinite control.[39] This anomaly has facilitated "War on Terror" detention, because the base escapes limits in constitutional and international law. Those who support the current detention policy argue this.[40]

This Article correlates norms in recent base detention with norms developed during prior foreign relations.[41] In both contexts, U.S. law has

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33. Platt Amendment—U.S. appropriations, *supra* note 15, art. III.

34. *See* Rafael Rodriguez Altunaga, *Cuba's Case for the Repeal of the Platt Amendment: The Views of President Machado*, 26 CURRENT HIST. 925, 925–27 (1927) (describing how the international community regards Cuba as an "American Protectorate, a semi-sovereign State"); *see also* Lester H. Woolsey, *The New Cuban Treaty*, 28 AM. J. INT'L L. 531 (1934); *see also infra* Part. III.A.

35. *See* PETER MACALISTER-SMITH, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 382 (1992) (describing Guantánamo's foundation during U.S. imperialism and such bases as the "starting point of colonial expansion"); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2535, 2545 (2005) (describing base creation after 1898 and the current lease terms as "remnants of the age of empire").

36. This Article focuses on legal anomaly on the base regarding detainees, who are foreign nationals. An element not discussed, due to concerns of space, is how various forms of U.S. law apply to the base independent of detainee treatments. This adds to the anomalous legal quality of Guantánamo. On the base, U.S. citizens, endangered species, military operations, and government contracts benefit from protections and rights in U.S. federal law. *See* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1583 (Fed. Cir. 1993) (applying the Takings Clause violation to Naval action on the base); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975) (prosecution for a drug offense of a U.S. citizen-civilian employed on the base); Burtt v. Schick, 23 M.J. 140, 142–43 (C.M.A. 1986) (holding that court martial proceedings on the base would be double jeopardy in violation of 10 U.S.C. § 844(a)); Transcript of Oral Argument at 52-53, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334 & 03-343) (question from Justice Stevens indicating U.S. environmental laws apply on the base). The base had also been argued to be similar to the Panama Canal Zone. *See* Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 HARV. L. REV. 781, 792 (1955).

37. U.S.-Cuba Feb. 1903 Lease, *supra* note 10, art. III.

38. *Id.*

39. A 1934 treaty abrogates the Platt Amendment's intervention provisions. It also makes U.S. base occupation effectively indefinite. For the lease period to end, it provides one of two options. They are: 1) the United States must stop occupying the base; or 2) Cuba and the United States must mutually agree to end occupation. With these two options, base occupation only stops when the United States chooses so. *See* Treaty Between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, May 29, 1934, 48 Stat. 1682 [hereinafter U.S.-Cuba 1934 Treaty].

40. *See supra* note 12.

41. This is heavily inspired by Amy Kaplan's analysis of how Guantánamo's current detention in the "War on Terror" is an extension of ambiguous legal arrangements concerning Cuba. These arrangements have placed the base at the forefront of foreign rela-

endorsed overseas authority, i.e. over the protectorate of Cuba and over the base at Guantánamo. To make these connections, this Article follows insights from post-colonial scholarship. Defining the terms post-colonialism, empire, and informal empire is important to this inquiry. They show analytical links between recent jurisprudence and history. Post-colonialism examines "the effects of colonization on cultures and societies."[42] It assumes that these effects do not require formal colonial relationships; influences may be de facto or informal, and they occur in cultural, economic, political, or social realms. Post-colonial scholarship identifies how Western or European perspectives use discourses, narratives, representations, or language to exclude the non-Western or the less powerful actor, e.g. a state.[43] This Article examines U.S. legal doctrine as such a discourse, with its assumptions and exclusions endorsing Guantánamo detention.

Definitions of empire or imperialism deepen these perspectives. Edward Said defines imperialism as "the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory."[44] Michael Doyle describes empire as "a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, or by economic, social, or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining empire."[45] Informal empire is the practice of overseas control, without formal political control, between politically independent states, often with the dynamics of free-trade economics and superior military power.[46]

Informal imperial control over Cuba from 1898 to 1934 crafted the base's anomalous jurisdiction.[47] Since 2002, Guantánamo detention litigation has addressed this legacy. This situation is intimately post-colonial. First, the base is a remnant from when the United States sought naval superiority in the Caribbean. The post-colonial condition is that a base which served regional geopolitical and economic interests historically now serves detention objectives. Second, U.S. influence over Cuba was imperial, using Said and Doyle's definitions. This created a need for legal anomaly.

As previously mentioned, four objectives frame this anomaly. They are that the United States avoids sovereign control over Cuba, limits Cuba's

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tions in 1898, in Gunboat diplomacy, the Cold War, refugee crisis, and now the "War on Terror." *See* Amy Kaplan, *Where is Guantánamo?*, *in* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 239-266 (Mary L. Dudziak & Leti Volpp eds., 2006).

42. *See* ASHCROFT ET AL., *supra* note 20, at 186.

43. *See infra* discussion Part II.

44. Said distinguishes this from colonialism which is a consequence of empire "implanting settlements in distant territory." EDWARD SAID, CULTURE AND IMPERIALISM 9 (1993).

45. MICHAEL W. DOYLE, EMPIRES 45 (1986).

46. *See infra* discussion Part II.A.

47. *See infra* discussion Part III.C.

sovereign powers, avoids constitutional limits to its overseas authority, and protects strategic interests. These objectives were central to U.S. policy on Cuban independence. The Treaty of Paris of 1898[48] and the Platt Amendment[49] articulate these objectives. The Treaty of Paris secured Cuba's independence from Spain, while the Platt Amendment limited Cuba's sovereignty. These four objectives similarly have influenced Guantánamo litigation since 2002. With these objectives evident in legal reasoning before, during, and after imperial influence, this context is intrinsically post-colonial. This helps explain how the law, by manipulating sovereignty concepts and severing constitutional provisions, facilitates detention. Put differently, legal determinations on sovereignty and constitutional jurisdiction permit U.S. courts to avoid ruling on detention disputes, effectively endorsing detention.

Building on these arguments, this Article contains five parts. Part I introduces the Article's subject. Part II elaborates on post-colonial theory as applied to foreign relations and international and constitutional law. These theories show how legal reasoning endorses overseas authority and rights exclusion, pointing to how the law is central to post-colonial contexts. Generally, narratives in legal doctrine exclude populations from sovereignty, create "ambivalence in the rule of law,"[50] and limit constitutional protections for overseas U.S. territories such as Puerto Rico, Guam, and other locations. Part III, "Guantánamo's Anomalous Past," examines the base's historic anomaly in legal approaches to Cuban independence in 1898, the Platt Amendment in 1901, and agreements for base occupation in 1903.[51] For each period, the mentioned four objec-

48. In the Treaty of Paris, ratified on April 11, 1899, Spain relinquished all sovereign claims over Cuba. *See* Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, at 1755-56 (commonly known as the Treaty of Paris).

49. *See* Platt Amendment—U.S. appropriations, *supra* note 15; *see also infra* Part III.B.

50. *See generally* Peter Fitzpatrick & Eve Darian-Smith, *Laws of the Postcolonial: An Insistent Introduction, in* LAWS OF THE POSTCOLONIAL 1 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

51. Due to concerns for space, this Article does not explain how judicial disputes in the 1990s began to signal how the base could be used to avoid individual rights protections. The anomalous quality of the base first became evident as the United States began detaining asylum seekers there in the early 1990s. Interestingly, this detention started after the Cold War, when the base used to patrol the socialist state of Cuba then acquired a new purpose. These offshore detention practices were litigated with human rights groups arguing that rights protections in international law and constitutional law applied to this territory under U.S. control. These disputes never reached the Supreme Court, but they did result in out-of-court settlements. One Circuit Court of Appeals decision held that the Constitution did not apply to the base. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158-59 (1993) (rejecting challenges to government detention authority). *See also* Cuban-Am. Bar. Ass'n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1236, 1326-29 n.19 (2d Cir. 1992) (finding constitutional claims for base detainees likely to succeed in court); Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028. 1049 (E.D.N.Y 1993) (vacated by order to a settlement agreement); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1506 (11th Cir. 1995) (finding constitutional rights do not apply to base detainees). Gerald Neuman describes this best. *See, e.g.*, Neuman, *Anomalous Zones*, *supra* note 11, at 1197–1201, 1228-33 (describing how anomaly's appearance

tives shaped the legal anomaly. Part IV, "Guantánamo's Anomalous Recent Past," examines how this anomaly and the four objectives shaping it influence recent detention litigation. It describes *Boumediene*'s holding, that the writ of habeas corpus in the Constitution's Suspension Clause applies to base detention, as an example of the law addressing post-colonial anomaly. The decision does not question the legality of base occupation. Importantly, it finds that the United States has de facto sovereignty over the base and that prudential factors determine if the Constitution has extraterritorial application on the base. Part V, "Empire's Anomalous Future," describes how despite *Boumediene*'s holding and an Executive Order to end base detention, individual rights protections on the base continue to be a legal anomaly. Even if base detention ends for the remaining 242 persons, much uncertainty remains for rights protections in extraterritorial contexts. As such, U.S. law may apply similar anomalous reasoning to create other rights-free zones. Given the extensive U.S. network of bases worldwide in over ninety-eight countries[52] and the "War on Terror" presented as global,[53] the Guantánamo experience could be replicated. The Conclusion, Part VI, presents these examples as suggestions for further post-colonial inquiry on constitutional and international law endorsing overseas authority.

II. THE POST-COLONIAL IN GUANTÁNAMO: SOVEREIGNTY DENIED, OVERSEAS AUTHORITY, AND RIGHTS EXCLUSION

For the purposes of this Article, a post-colonial perspective analyzes how prior foreign relations practices of empire or colonialism (with one state controlling an overseas population or territory) resonate in current international affairs.[54] This perspective identifies how imperial practices

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with decisions by the 11th and 2nd Circuit Courts of Appeal, which interpreted U.S. base authority as non-sovereign and not subject to constitutional limitations); Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOYOLA L. REV. 1, 3-5, 42-44 (2004) (describing how refugee detention disputes and their divergent findings on the base's constitutional law and international law status influenced the government's selection of Guantánamo as a detention center in 2001). *See also* Philbin & Yoo Memo, *supra* note 12.

52. Catherine Lutz, *Introduction: Bases, Empire, and Global Response*, *in* THE BASES OF EMPIRE: THE GLOBAL STRUGGLE AGAINST US MILITARY POSTS 2-3 (Catherine Lutz ed., 2008) (citing CHRIS BEST & DAVID VINE, ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA (2009)).

53. At times the Bush Administration presented the "War on Terror" as the "Global War on Terror" or GWOT. *See Language and Terrorism*, ECONOMIST, Jul. 5, 2007. The expanding geographical reach of the War has raised budgetary question. *See* AMY BELASCO, CONG. RESEARCH SERV., THE COST OF IRAQ, AFGHANISTAN AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, Oct. 15, 2008, *available at* http://fas.org/sgp/crs/natsec/RL33110.pdf. The Obama Administration has distanced itself from the presentations of a "global" War on Terror. *See generally* John Ferrer, *GWOT's End?*, WORLD BEAT, Jan. 27, 2009, http://www.fpif.org/fpifzines/wb/5819; Howard LaFranchi & Gordon Lubold, *Obama Redefines War on Terror*, CHRISTIAN SCI. MONITOR, Jan. 29, 2009, at 25.

54. As this Article is a simple and initial suggestion, it uses simple definitions and assumptions which may overlook many post-colonial scholarly debates and positions. Post-colonialism is a highly-diverse scholarly perspective. It has many multi-national and inter-disciplinary applications. There is much debate in the field regarding definitions of "post-

continue and how they presently pose important limits.[55] Post-colonialism examines how political institutions, economic relations, or social constructs in the international system are inherited from imperial or colonial relationships. These legacies influence current circumstances. Post-colonial legacies are often de facto, economic, political, or cultural, not necessarily requiring de jure control.[56] Such control would entail a relationship of a colonizing population and colony, or of one state having formal political control of a colony.[57]

Applied to this Article's subject, a post-colonial perspective generally argues that foreign relations between Cuba, globally powerful states, and the international system developed the legal structures that facilitate current overseas detention by the United States on Guantánamo.[58] The United States would be the most influential state in these relations as Cuba's neighbor, the most powerful regional state, and its former protector, but relations with Spain, the Soviet Union and other socialist states, Europe, and Western Hemispheric states would also be influential. The United States first occupied Guantánamo during the war for Cuba's independence from Spain in 1898.[59] Following four years of occupation, Cuba was made a U.S. protectorate, with the United States seeking a right of

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colonialism," appropriate methodologies, theoretical assumptions, and utility of the term "post-colonial" versus neo-colonial or other terms. For a brief and working set of definitions to key terms, see generally ASHCROFT ET AL., *supra* note 20.

55. This definition of post-colonialism is adapted from Chowdhry and Nair's application of post-colonialism to international relations. *See* G. Chowdhry & S. Nair, *Introduction: Power in a Postcolonial World, in* POSTCOLONIALISM AND INTERNATIONAL RELATIONS: READING RACE, GENDER, AND CLASS 11 (G. Chowdhry & S. Nair eds., 2002).

56. *See infra* part II.A.

57. For elaborate discussions on why U.S. scholars almost innately disregard the notion of empire in U.S. history, see Joseph A. Fry, *Imperialism, American Style 1890-1916, in* AMERICAN FOREIGN RELATIONS, CONSIDERED 1890-1933, at 53 (Gordon Martel ed., 1994) (emphasizing how the United States' formal colonial possessions were limited to Puerto Rico and the Philippines, but informal power control by the U.S. has been far more common, although denied); Louis A. Pérez, Jr., *Review of The War of 1898 and U.S. Interventions, 1898-1934*, 65. PAC. HIST. REV. 313, 314 (1996) (describing the tendency to see U.S. interventions abroad as "isolated" or aberrations, while not making larger connections between these events); Emily S. Rosenberg, *"The Empire" Strikes Back*, 16 REVS. AM. HIST. 585, 589 (1988) (describing the difference in British pride in empire and U.S. denial of empire). For a description of how post-colonial perspectives may enrich understandings of U.S. civil rights and race, see Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691 (2007).

58. For a post-colonial perspective explaining how Cuba's foreign relations history and present Guantánamo detention are inter-related with U.S. foreign relations goals, see Amy Kaplan, *Where is Guantánamo?, in* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 239–266 (Mary L. Dudziak & Leti Volpp eds., 2006). For a post-colonial analysis of the "unlawful enemy combatant" classification, see generally Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's Other, in* INTERNATIONAL LAW AND ITS OTHERS 265–318 (Anne Orford ed., 2006). For a post-colonial analysis of the competing values present in denying the writ of habeas on the base, see generally Nasser Hussain, *Beyond Norm and Exception: Guantánamo*, 33 CRITICAL INQUIRY 734 (2007). For an examination of how the base's anomalous jurisdiction impacted base workers (American, Cuba, and others) in cultural, legal, and foreign relations terms, see generally LIPMAN, *supra* note 4.

59. *See infra* Part III.A.

intervention and significant influence in Cuban affairs.[60] In 1903, base occupation was legally sanctioned with lease agreements between the United States (protector/occupier/lessee) and Cuba (protectorate/host state/lessor).[61] These agreements delineate the terms of Guantánamo's legal anomaly.

To track the historic development of the base's normative anomaly and its present influence, this Article borrows theoretical insights from post-colonial perspectives on foreign relations, international law, and U.S. constitutional law. These perspectives illuminate two applicable points for this Article's central thesis. First, international law is used to control and exclude weaker states (and their populations) in the international system by manipulating the doctrine of sovereignty.[62] Post-colonial scholarship shows how international law, specifically by denying sovereignty to certain populations, facilitates overseas political authority in imperial and post-colonial contexts.[63] Overseas territorial possessions, such as Guantánamo, the historic Panama Canal Zone, or treaty ports in nineteenth and twentieth century China, were acquired by denying sovereign authority to Cuba, Panama, or China, respectively.[64] Likewise, international law engineers ambiguities or anomalous circumstances by both including and excluding states from the benefits of sovereignty.[65] This Article explores how international law, specifically the concept of sovereignty, has been applied to Guantánamo to craft the current anomaly. Such an "anomalous" situation was addressed by the U.S. Supreme Court in finding that the Constitution has extraterritorial application.[66]

Second, U.S. constitutional law has a long history and current practice of denying statehood to territorial possessions overseas, consequently excluding rights protections for their populations.[67] Beginning with the *In-*

60. *See infra* Part III.B.

61. *See infra* Part III.C.

62. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY; Susan Marks *Empire's Law*, 10 IND. J. GLOBAL LEGAL STUD. 449 (2003) (emphasizing the cultural, economic, and political aspects of empire).

63. *See generally id.*

64. *See infra* III.C. (discussing the use of leases for bases and port control by powerful states in the international system); MACALISTER-SMITH, *supra* note 35, at 381-83.

65. *See* Fitzpatrick & Darian-Smith, *supra* note 50, at 2. Legal anomaly also characterized the U.S. Panama Canal Zone and its lease agreement with Panama, which was agreed to almost at the same time as Guantánamo. *See* Neuman, *Closing the Guantánamo Loophole*, *supra* note 51, at 15–23.

66. The *Boumediene* Court held that whether a constitutional provision has extraterritorial application or not depends on if judicial enforcement is "impracticable and anomalous." Boumediene v. Bush, 128 S. Ct. 2229, 2255-56 (2008) (citing Reid v. Covert, 354 U.S. 1, 74-75 (Harlan, J., concurring in the result) and United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)). *See also* David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantánamo Bay*, 2008 CATO SUP. CT. REV. 47, 50.

67. *See generally* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006); Christina Duffy Bur-

sular Cases (1901–1922) and still governing territorial possessions, constitutional law endorses overseas authority while selectively applying constitutional limitations to political authority and individual rights protections on these territories.[68] Territorial examples include insular possessions in the Caribbean Sea and in Asia acquired as a result of the Spanish-American War, and island possessions in the Pacific Ocean acquired during the twentieth century (e.g., the Northern Mariana Islands, American Samoa, Guam, Puerto Rico, and others). With these possessions, the United States values strategic and geopolitical objectives in the Caribbean and Pacific theatres over republican and self-determination goals for these populations. Alternatively, the United States could make these territories states in the Union or relinquish sovereign control over them.

These relationships shed some theoretical light onto Guantánamo's current anomaly. Foreign relations objectives motivated the creation of an anomalous legal zone on the base.[69] Specifically, as a territorial space controlled by the United States, Guantánamo was purposefully excluded from U.S. sovereign authority, territorially classified as exogenous to many constitutional rights, and ambiguously placed between Cuba's sovereignty and U.S. control. This was done to avoid checks on overseas authority in international and constitutional law. This anomaly is a product of early twentieth century foreign relations. These perspectives on international and constitutional law provide theoretical guidance to pose post-colonial questions about present U.S. authority over Guantánamo.

A. Post-Colonial Theory Sheds Lights on Informal Empire and Its Current Influence

Applied to a range of disciplines, post-colonial perspectives ask how international structures of empire and colonialism influence present circumstances.[70] For the sake of simplicity, the post-colonial school of thought gained popular academic appeal in the United States with Ed-

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nett, Untied States: *American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797 (2005).

68. The *Insular Cases* refer to a series of Supreme Court cases from 1901 to 1922 determining how the U.S. Constitution and international law checked political authority over territorial possessions that were not states in the Union but that lacked international sovereignty, which Spain ceded to the United States in the Treaty of Paris. While including many cases, the most common ones are *Downes v. Bidwell*, 182 U.S. 244 (1901), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See supra* note 60; Bartholomew H. Sparrow, The *Insular Cases* and the Emergence of American Empire (2006) (examining the *Insular Cases*' historical legacy and the legal support for an informal empire).

69. *See infra* Part III.

70. Popular post-colonial theory publications in the English language include: Ashcroft et al., *supra* note 20; Gloria Anzaldúa, Borderlands/La Frontera: The New Mestiza (1987); Homi Bhabha, The Location of Culture (1994); Gaytari Spivak, In Other Worlds (1987); Gaytari Spivak, A Critique of Postcolonial Reason: Toward a History of the Vanishing Present (1999). For a quick description of post-colonial thought before Said's *Orientalism*, such as Albert Memmi and Frantz Fanon and variations of post-colonial thought including subaltern studies and gender and race

ward Said's *Orientalism*, published in 1979.[71] Basically, Said argued that false assumptions held by European and Western academics about the Middle East; painting the foreign as an "Other," exotic, or irrational; sustained a discourse whereby Middle Eastern populations or perspectives were denied, excluded, and/or rejected.[72] These assumptions were central to characterizations by Western academics and policymakers and were self-perpetuating by denying alternative perspectives.[73] European perspectives were able to exclude alternative visions by presenting themselves as a scientific, positivist, or objective voice. Like with many post-colonial scholars, Said suggests examining how this exclusion occurs, what discourse is used to justify it, and what assumptions are needed for this exclusion.[74]

Post-colonial scholars build on these viewpoints by arguing that exclusion or domination of subaltern populations or states occurs by a discourse built on false assumptions or misstated "objective," universal, or scientific conclusions.[75] Said initially examined Western scholarship on the Middle East, but his insights have been applied to other regions, such as Africa, South Asia, Asia, Oceania, and Latin America.[76]

Post-colonial perspectives are quite varied and are not necessarily in agreement on many issues concerning definitions, causations, and future options.[77] This Article does not take a position on detailed debates about the terms "post-colonial" versus "neo-colonial," "empire," or "decolonization."[78] Importantly, many post-colonial perspectives share a methodological appreciation for historical and transnational approaches, which this Article employs. Post-colonialism generally argues that prior events frame how current circumstances develop and what options pres-

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elements, see generally Siba N. Grovogui, *Postcolonialism*, *in* INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY 229–46 (Tim Dunn et al. eds., 2007).

71. EDWARD W. SAID, ORIENTALISM (1979).

72. *See id.*

73. While Said's perspectives on Orientalism have influenced numerous critical and non-Western scholars throughout the world, many of his general arguments and methodologies have been contested. *See generally* ORIENTALISM: A READER (Alexander Lyon Macfie ed., 2001).

74. *See generally* SAID, *supra* note 71.

75. *See generally* ORIENTALISM: A READER, *supra* note 73.

76. For Latin American examples of post-colonial approaches, see Gilbert M. Joseph, *On the Trail of Latin American Bandits: A Reexamination of Peasant Resistance*, 25 LAT. AM. RES. REV. 7 (1990); Latin American Subaltern Studies Group, *Founding Statement in* THE POSTMODERNISM DEBATE IN LATIN AMERICA 135 (John Beverley et al. eds., 1995) (also emphasizing the limits of scholarly focus on the nation-state in Latin American research since migration in the region is so pervasive, resulting in, for instance, populous Puerto Rican and Mexican cities in the United States as opposed to in Puerto Rico or Mexico); Florencia E. Mallon, *The Promise and Dilemma of Subaltern Studies: Perspectives from Latin American History*, 99 AM. HIST. REV. 1491 (1994).

77. For an example of the debates concerning the utility of the term "post-colonial," see ASHCROFT ET AL., *supra* note 20, at 186–92 ("colonialism/postcolonialism").

78. For a description of the debates surrounding the use of the term "post-colonialism," see *id.* For a description of many of the debates (disciplinary, normative, and methodological) concerning post-colonial theory and of the work of theorists Edward Said, Gaytari Spivak, and Homi Bhabha, see BART MOORE-GILBERT, POSTCOLONIAL THEORY: CONTEXTS, PRACTICES, POLITICS (1997).

ently exist to confront these predicaments.[79] This can be labeled as historical appreciation in post-colonial scholarship. Likewise, from a transnational vein, these scholars argue that events and actors abroad heavily influence local contexts.[80] Local or domestic circumstances are not determined solely by local or domestic actors or events. These insights help explain why Guantánamo's present legal anomaly is framed by events and actors influential in Cuba's history.

Applied to international relations, a post-colonial perspective examines how imperial practices continue in the relations between states in the international system; how these practices currently pose critical limits; and how these practices and limits exist in formal, informal, global, regional, national, and local contexts.[81] Informal or de facto imperial control between states in the international system becomes an important assumption for many post-colonial perspectives. Even though a hypothetical state may be independent or not formally a colony or possession of another state, its functional autonomy may be quite limited. Matters of global finance, commerce, governance, ideology, cultural practices, or foreign relations create situations where sovereign states are often dependent, have limited influence, or are powerless to resist the influence exerted by European, Western, or previously metropolitan powers. In this regard, prior events (e.g., military or economic power or access to resources or control of a legal discourse) exert a post-colonial influence in a state's present circumstances. Post-colonial, world-systems, and dependency theory schools of thought present this dynamic as "center-states" influential in "periphery states" and metropolitan power influential over colonies.[82]

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79. *See generally* DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000) (presenting how history is often recorded as favoring European or "modern perspectives" while ignoring voices or impressions from the "periphery"); Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 891–92 (2000) (borrowing insights on history from Chakrabarty to show how international law uses the notion of "good governance" to deny sovereignty in post-colonial contexts).

80. Not all, or even most, post-colonial scholarship may explicitly refer to "transnationalism." The central concern of postcolonialism is to examine the challenges posed by universal/particular, center/periphery, and national/local discourses refers to a transnational perspective because it identifies the significance ideas gain when they cross borders. *See generally* Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525; LINDA BASCH ET AL., NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES (1994); Eve Darian-Smith, *Rabies Rides the Fast Train: Transnational Interactions in Postcolonial Times*, *in* LAWS OF THE POSTCOLONIAL, *supra* note 50, at 287–89.

81. This paraphrases definitions from Chowdhry and Nair, *supra* note 55, at 11. This Article is limited to examining U.S. law's perspective on norms in Guantánamo territory during War on Terror detention. As such, this post-colonial analysis focuses on territory and law. The Chowdhry and Nair volume expands on other post-colonial themes such as power and representation; the intersection of race and gender; global capitalism, class, and postcoloniality; and recovery resistance and agency. *See generally id.*

82. *See generally* IMMANUEL WALLERSTEIN, WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION (2004); IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM I: CAPITALIST

The notion of informal empire becomes central to many post-colonial inquiries. Informal empire refers to a relationship of control, often based on economic and military objectives, between states without requiring formal relationships of colonial administration or without the complete transfer of sovereignty to an imperial power.[83] Informal empire differs from formal empire or colonialism, wherein a foreign population would not have sovereign control over its territory.[84] With informal empire, two states are formally independent, but economic or military power gives one state overwhelming influence.[85]

Debates about the magnitude of informal empire are fueled by comparisons between "free-trade" practices, which are associated with informal empire and mercantilist practices, whereby an empire emphasizes protectionist economic policies.[86] Often, informal empire is seen as a consequence of industrialization, which drives the search for markets overseas for raw materials imports, investments, and exports. Historically, since overseas markets were lucrative, limited in number, and profitable, military and legal protection was needed to ensure access to them. This protection would be less formal than a colony but still substantial enough to protect center-state objectives. By the 1890s, U.S. economic and political leaders found overseas markets, naval power, and bases abroad necessary for further industrialization.[87] This quest for overseas markets, territorial control (not necessarily sovereign control), and naval superiority was particularly accented in the Caribbean and Central American regions in the late nineteenth and early twentieth century. With this, the United States tried to protect its global influence and access to Asian and American markets.[88] With informal empire, powerful states bene-

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AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (1974).

83. *See generally* John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 ECON. HIST. REV. 1 (1953).

84. Warren Kimball explains that "informal empire" allows for the exercise of power without having formal political control, and that the term "hegemony" describes the relationship as well. *See Foreword*, *in* THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM (David Ryan & Victor Pungong eds., 2000).

85. *See generally* Gallagher & Robinson, *supra* note 83 (discounting the idea that formal colonialism is needed for, or that free trade eliminates, imperial power); William Roger Louis & Ronald Robinson, *The Imperialism of Decolonization*, 22 J. IMPERIAL COMMONWEALTH HIST. 462 (1994) (charting the shift in informal empire worldwide from British to U.S. power in the twentieth century).

86. Historians heavily debate whether informal empire achieved the same influence as formal empire. The debate questions whether late-nineteenth and twentieth century Britain had an informal empire in regions where its economic and military presence was substantial, although it lacked formal colonies. *See* Oliver MacDonagh, *The Anti-Imperialism of Free Trade*, 14 ECON. HIST. REV. 489 (1962).

87. *See* Walter LaFeber, *The American View of Decolonization, 1776-1920: An Ironic Legacy*, *in* THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM 30 (David Ryan & Victor Pungong eds., 2000). This need for overseas markets (supply and demand) would help sustain further industrialization and offset limits in domestic purchases. Law, whether constitutional, foreign relations, or international, was central to supporting these efforts to extend U.S. influence abroad.

88. *See generally* THOMAS SCHOONOVER, UNCLE SAM'S WAR OF 1898 AND THE ORIGINS OF GLOBALIZATION (2003).

fited from geopolitical or strategic influence overseas.[89]

One legal instrument used to maintain informal imperial control was the protectorate relationship. With protectorate arrangements, one state would be the protector of a protectorate state.[90] The former was usually a center-state and the latter was peripheral to the locus of economic, military, and political power. In theory, the protector (often a European or Western state) possessed external sovereignty, controlling the protectorate's foreign relations.[91] This was used to control the protectorate state and fend off other imperial powers. The protectorate state retained internal or domestic sovereignty, in theory controlling its own domestic affairs.[92] In most scenarios, the internal/external sovereignty distinction was porous, and protectorate relationships provided informal and flexible imperial control for center-states. International law treatises from the time explain that for protectorate relationships, the terms of a particular treaty determined what state had sovereignty over the protectorate territory.[93] This includes Cuba's protectorate relationship with the United States from 1898 to 1934.[94] Generally, how sovereignty was determined in a protectorate relationship depended on the particular circumstances.[95]

Informal imperial relationships suited powerful states by avoiding the expensive costs of having a colony.[96] Colonies required defending sovereignty over the territory from other imperial powers. A costly administrative presence was needed to rule these societies. Protectorates provided flexibility to exert metropolitan control, especially to counter

89. Sparrow generally shows how the legal doctrine developed in the *Insular Cases* by the U.S. general foreign relations trend of creating an informal empire in the Caribbean, Central America, and Asia. *See* SPARROW, *supra* note 68, at 229–55.

90. Lassa Oppenheim defines the arrangement as "aris[ing] when a weak State surrenders itself by treaty to the protection of a strong State in such as a way that it transfers the management of all its more important international affairs to the protecting State." LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 92 (H. Lauterpacht ed., 8th ed. 1955). This leaves the protectorate as losing its "full sovereignty, and is henceforth only a half sovereign state." *Id.*

91. *See* ANGHIE, *supra* note 26, at 87.

92. *See id.*; WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 30–31 (A. Pearce Higgins ed., 8th ed. 2001); OPPENHEIM, *supra* note 90, § 92.

93. These relationships are also characterized as restricting a state's, "complete liberty of action" "by obligations into which they have entered with other states." These protected states have "imperfect independence" in exchange for protection by the United States. This grants the U.S. "rights for special purposes." *See* HALL, *supra* note 92, at 30–31.

94. *See id.* at 31 (referring to "relinquished or suspended normal rights of political independence" in treaty-making and the right of intervention for the preservation of good or protection, as in Cuba's example). *But see* OPPENHEIM, *supra* note 90, § 94 n.2 (inferring that the United States established "quasi-protectorate" relationships with Cuba, Panama, the Dominican Republic, Nicaragua, and Haiti with a "right of intervention" and restrictions on foreign policy).

95. *See* OPPENHEIM, *supra* note 90, §§ 92-93 (indicating that no "general rule" exists concerning the protectorate's position within the "Family of Nations").

96. *See* Gallagher & Robinson, *supra* note 83, at 13 (arguing that only when informal means of dependency did not function in the second half of the nineteenth century where more formal empires were needed).

other imperial forces with an initial military presence overseas. This was possible without the expense of colonial administration.

A key goal of any informal empire was attaining flexible control in terms of legal commitments and administrative costs. Generally, this flexibility was attained with metropolitan influence based on trade treaties, protectorate relationships, naval power (providing the ability to transport troops and protect trade routes), and strategically located bases overseas. Describing how the United States developed this control, Sparrow highlights informal empire's defining characteristic: powerful economic states controlling the one-sided development of a weaker economy, while avoiding the day-to-day colonial administration of a foreign population.[97] Sparrow describes how American informal empire reflects the normative determinations of the *Insular Cases*, which sanctions overseas authority while escaping significant constitutional limits.[98]

Important facets of the American informal empire included military bases overseas and a strategic foreign policy doctrine.[99] In addition to Guantánamo, overseas bases serving U.S. strategic interests were located in Panama, Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, Hawai'i, and Alaska. With this set of bases, the United States patrolled the major entryways into the Caribbean, protected the Panama Canal and American trade in the region, and deterred European intrusions.[100] Pacific bases served similar goals, protecting the Pacific Coast. Next, the "Roosevelt Corollary" to the 1823 Monroe Doctrine justified intervention in the affairs of Latin American states.[101] The Monroe Doctrine sought to bar European interference in the Western Hemisphere. The Roosevelt Corollary added the element of intervening in regional states. It provided that "[c]hronic wrongdoing or an impotence" by these states ultimately required the United States to act as an "international police power" in the Hemisphere.[102] Through occupations, military interventions, or sending troops abroad, U.S. interference occurred; in Nicaragua in 1908, 1912–1915, and 1926–1933; the Dominican Republic during 1916–1924; Panama in 1918; Honduras in 1919 and 1924; and Mexico during 1913–1916.[103] This Doctrine provided a way to avoid characterization

97. *See* SPARROW, *supra* note 68, at 231 (referring to William Appleman Williams' description of informal empire).

98. *See id.* at 229.

99. *See id.* at 232-34. *See generally* Louis & Robinson, *supra* note 85.

100. *See* Woolsey, *supra* note 34, at 534 (describing protecting the Panama Canal as central to regional U.S. foreign policy objectives).

101. *See* SPARROW, *supra* note 68, at 234.

102. *See id.*

103. *See id.* For a sophisticated analysis of the commonalities in U.S. foreign policies of imperial expansion (with economic, political, and military objectives) from the 1898 to the "War on Terror" period which aggressively begun with these early twentieth century events in the Americas, see generally GREG GRANDIN, EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF NEW IMPERIALISM (2006).

as imperialism.[104] The United States had fought off European imperialism during its independence and sought to limit its penetration with the Monroe Doctrine.[105] To justify intervention, U.S. foreign policy was presented as part of a civilizing mission and to promote superior political virtues.[106]

Sparrow explains Cuba was the "prototype" of informal empire, since the United States did not territorially annex it, although it effectively controlled Cuba.[107] Cuba was a protectorate from 1898, when Spain relinquished sovereignty over the island, until a 1934 treaty with the United States abrogated protectorate arrangements.[108] The United States became involved in Cuban independence as part of a search for economic markets, as opposed to the objective of ending colonial rule.[109] Before the Spanish-American War, Congress passed the Teller Amendment stating Cuba should be independent and that the United States would not exercise sovereignty over it.[110] Later the Platt Amendment legally implemented protectorate status.[111] It secured non-sovereign control of Cuba. It created a protectorate status by limiting Cuba's sovereignty, prohibiting it from entering into a treaty with another state and securing the "right to intervene" in Cuba.[112]

A post-colonial examination of U.S.-Cuba relations suggests that the United States exercised informal imperial control over the island from 1898 to 1934. Cuba was formally independent and the United States did not annex it or make it a colony. U.S.-Cuba relations were part of a regional process to exert authority over the Caribbean and Central America. This history of U.S. involvement is expressed in competing narratives. One perspective generally argues that the United States was seeking free markets, exporting democratic values, promoting regional security, and furthering a civilizing mission and decolonization from European control, while the other viewpoint argues that the United States intervened in foreign states, valued economic or strategic goals over sovereign independence or republicanism, and racial and religious intoler-

104. *See* Laurie Johnston, *The Road to Our America: The United States in Latin America and the Caribbean*, *in* THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM 43 (David Ryan & Victor Pungong eds., 2000).

105. *See id.*

106. *See id.* at 43-44.

107. *See* SPARROW, *supra* note 68, at 235. Examining decisions made by U.S. policymakers, David F. Healy argues that U.S. policy towards Cuba provided indirect control, by way of protectorate status and economic penetration, without the burdens of colonialism. *See* DAVID F. HEALY, THE UNITED STATES IN CUBA 1898-1902: GENERALS, POLITICIANS, AND THE SEARCH FOR POLICY (1963).

108. *See infra* Part III.A and C.

109. WALTER LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION 1860-1898, at 408 (1963).

110. *See* HEALY, *supra* note 107, at 24.

111. *See id.* at 162-63.

112. Other Amendment provisions prohibited Cuba from taking public debts it could not pay interests on; ratified all acts by the United States during military occupation; required Cuba to sanitize its cities; and left title of the Isle of Pines for future determination. *See generally* Platt Amendment—U.S. appropriations, *supra* note 15.

ance excluded populations of Iberian, African, and indigenous descent and Catholic or other religions.

B. International Law Facilitates Overseas Authority by Excluding Territories and Populations from Sovereignty

International law had a central role in extending imperial and post-colonial control around the globe. International law seeks to order the obligations and rights in foreign relations belonging to states and individuals. With states extending their influence overseas, this set of legal doctrines alternatively justified, facilitated, or resisted imperial influence. Post-colonial perspectives critically examine both international law's assumptions and its limitations (past, present, and future).[113] Norms and doctrines in international law are based on previous state practices.[114] These practices are often an outgrowth of European states, or more powerful states, expanding their influence worldwide and seeking economic and territorial gain. From its genesis, international law developed from these contexts of empire, colonization, and protectorates.[115]

In *Imperialism, Sovereignty and the Making of International Law*, Antony Anghie shows how international law, from its sixteenth century origin to the present day multilateral institutions, developed from the imperial encounter initiated by European states.[116] Central to this encounter is how international legal doctrine uses the concept of sovereignty to include or exclude certain populations. He examines the assumptions in international law's reasoning and its cultural currency throughout history.[117] Anghie argues that the discipline and practice of international law possessed a "civilizing mission" in which Western mindsets classified

113. Post-colonial theory has been applied to international law in a variety of contexts. *See generally* Fitzpatrick & Darian-Smith, *supra* note 50; James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 Buff. L. Rev. 1013 (2007). A particular perspective on international law drawing much inspiration from post-colonial theory is "Third World Approaches to International Law" (TWAIL). For summaries of TWAIL perspectives and examples of its scholarship, see The Third World and International Order: Law, Politics, and Globalization (Antony Anghie et al. eds., 2003); Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 Chinese J. Int'l L. 77 (2003); James Thuo Gathii, *International Law and Eurocentricity*, 9 Eur. J. Int'l. L. 184 (1998); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 Wis. Int'l L.J. 353 (1998); Makau Mutua, *What is TWAIL?*, 94 Am. Soc'y Int'l L. Proc. 31 (2000).

114. Anghie and Chimni describe the influence, often overlooked in common jurisprudence and scholarship, of various third world perspectives from leaders, jurists, diplomats, and scholars throughout history, such as Alejandro Alvarez, Georges Abi-Saab, F. Garcia-Amador R.P. Anand, Mohammed Bedjaoui, and Taslim O. Elias. *See* Anghie & Chimni, *supra* note 113, at 77 n.5.

115. Anghie, *supra* note 26, at 3 (presenting colonialism as central to the creation of international law, especially in its basic doctrines such as sovereignty, and to accounting for the relationship between European and non-European worlds).

116. *See generally* Anghie, *supra* note 26.

117. *See id.*

the Orient or non-European as "the Other."[118] Legal determinations of "cultural difference" repeatedly classified societies as "civilized" or "uncivilized." Foreign relations practice claimed that law created by "civilized" perspectives was "universal," while "uncivilized" perspectives on the law were instead particular. Race-based reasoning motivated legal determinations of civilized versus uncivilized persons.[119]

Through this process, native or non-Western populations were denied international sovereignty. Sovereignty provided recognized final authority in the international system, which was vital to protect any state independence from foreign powers.[120] To have influence in this international system, many non-European societies found accommodating Western pressure necessary, which led to relationships as colonies or protectorates. Economically and militarily powerful states extended their governmental authority overseas to attain colonies, extend empires, establish protectorates, and lease territories.

Peter Fitzpatrick and Eve Darian-Smith present another post-colonial insight into international law: the "ambivalence in the rule of law."[121] Fitzpatrick and Darian-Smith examine how law is at the forefront of the West's relations to its "others."[122] They explain how European or Western structures seek to exclude non-Western identities as "others," savages, or barbarians, and even those in the West who are "less occiden-

118. *See id.* at 3-4, 10 (presenting legal reasoning predicated on this "cultural difference," illustrated with examples such as the sixteenth century Spanish encounter with Indians in the Americas, nineteenth century positivist jurisprudence, the League of Nations' mandate system in the early twentieth century, the United Nation and decolonization after World War II, contemporary financial regulation and human rights, and the War on Terror). *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001) (arguing that international law as both a discipline and a practice develops from late-nineteenth century efforts to "civilize" states and societies with significant liberal and cosmopolitan assumptions).

119. *See* ANGHIE, *supra* note 26, at 103 (examining the importance race played in positivist descriptions of international law); Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519, 1531 (2000) (illustrating how race-based assumptions exert significant influence in international law's reasoning). *See generally* Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000) (showing the benefits of applying critical race theory to a series of international law questions); Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000) (presenting how critical race theory and TWAIL perspectives on international law are applicable to current international relations).

120. This Article uses a definition of "sovereignty" as the "final and absolute political authority," taken from F.H. Hinsley's comprehensive historical study of sovereignty. *See* F.H. HINSLEY, SOVEREIGNTY 26 (2d ed. 1986). This Article assumes that sovereignty is a subject that changes in meaning over time, that this meaning is socially constructed, and that it is perpetually contested. *See, e.g.*, Thomas J. Biersteker, *State, Sovereignty, and Territory*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 157, 167 (Walter Carlsnaes et al. eds., 2002); STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1–21 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

121. Fitzpatrick & Darian-Smith, *supra* note 50, at 2.

122. *Id.* at 4. *See generally* INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006) (providing diverse and extensive analysis of how international law treats certain populations as "others").

tal than they should be."[123] This is antithetical to international law's claims of universalism because it rejects while it simultaneously claims to be inclusive or all-encompassing.[124] This produces an "irresolute identity," wherein the West is excluding yet encompassing its "others."[125] Fitzpatrick and Darian-Smith refer to Homi Bhabha's characterization of post-colonialism as "in between" two impossibilities of "ultimate fixity and ultimate responsiveness."[126] Historians examining U.S.-Latin American relations similarly examine this ambivalence. In a cultural study of these histories, Gil Joseph refers to "contact zones" where U.S. and Latin American cultures meet.[127] These exchanges are "multifaceted and multivocal" producing "blurring of boundaries, of who or what is 'local' and 'foreign,' 'inside' or 'outside.'"[128] For Guantánamo, this includes Cuban and third country national base workers traveling between Cuban and American jurisdiction during everyday contexts such as remuneration and commuting and in highly volatile situations such as criminal prosecutions and worker detentions.[129]

Such anomaly clouds the legal ordering supporting U.S. authority in the Caribbean. Christina Duffy Burnett and Burke Marshall describe such ambivalence in current legal doctrine as having developed with the *Insular Cases*. They explain that while no one defends the colonial reasoning of these cases, there is an ambivalent legacy in reasoning of these cases.[130] Specifically, the characterization of Puerto Rico as "foreign in a domestic sense," taken from Justice White's concurring opinion in *Downes v. Bidwell*, describes public sentiment in Puerto Rico regarding its relationship to the United States.[131] Similarly, Amy Kaplan argues that Justice White's characterization of "foreign in a domestic sense" is reflective of the "anarchy of empire," or discord in national identity, felt at home by American expansion abroad.[132]

This Article applies these two general post-colonial suggestions on law and sovereignty and law and ambivalence to make sense of how Guantánamo's legal anomaly frames current detention dispute resolution. This anomaly was purposefully created by legal reasoning in U.S. foreign relations and constitutional law. As such, recent concerns of a "gulag" or "legal black hole"[133] are just contemporary descriptions, possibly lacking

123. Fitzpatrick & Darian-Smith, *supra* note 50, at 1.
124. *Id.* at 1-2.
125. *Id.* at 2.
126. *Id.* at 2 (referring to the Chapter "Signs Taken For Wonders" in Homi K. Bhabha's book, *The Location of Culture*).
127. Gilbert M. Joseph, *Close Encounters, in* CLOSE ENCOUNTERS OF EMPIRE: WRITING THE CULTURAL HISTORY OF U.S.-LATIN AMERICAN RELATIONS 5, 15 (Gilbert M. Joseph, Catherine C. LeGrand & Ricardo D. Salvatore eds., 1998).
128. *Id.* at 16.
129. *See generally* LIPMAN, *supra* note 4.
130. *Id.*
131. FOREIGN IN A DOMESTIC SENSE, *supra* note 67, at 2.
132. AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE 7-8 (2002).
133. *See generally* Khan Speech, *supra* note 7; Steyn, *supra* note 8.

in historical or Cuban appreciation, of the legacies of informal empire. What has actually occurred on Guantánamo, i.e., detention avoiding sovereignty and checks in constitutional or international law, is a legal outgrowth of ambiguity. Narratives of "foreign in a domestic sense" (referring to *Insular Cases* reasoning) and "complete jurisdiction and control" absent "ultimate sovereignty" (referring to text from base agreements) shape this discourse.[134]

C. Constitutional Law Excludes Overseas Territories and Populations from Sovereignty and Individual Rights Protections

Next, in contextualizing Guantánamo's legal anomaly, this Article draws on lessons from U.S. constitutional law concerning overseas authority.[135] Scholarship analyzing the *Insular Cases* and U.S. island territories suggests constitutional law, throughout history and in current practice, sanctions informal imperial arrangements.[136] This research illustrates how assumptions and practices in constitutional law vary once U.S. authority governs overseas territories.[137] These territories are mostly located in the Caribbean Basin and the Pacific Ocean.[138] The legal relationships between the United States and these territories conflict with political theories of democratic or republican government. Specifically, these territories lack sovereignty and full constitutional rights protections. Denying sovereignty for these territories results in their dependence on the United States in foreign relations matters. Importantly, the United States did not incorporate (or ever plan to include) these territories into the union as states. These possessions are not insignificant. Their com-

134. *See* Downes v. Bidwell, 182 U.S. 244, 341-42 (1901); U.S.-Cuba Feb. 1903 Lease, *supra* note 10.

135. Gerald Neuman generally describes four stages in how U.S. law determined that the Constitution applied to territories within its sovereignty: 1) from 1789 to the early nineteenth century, when the issue was not consistently settled; 2) from the middle to end of the nineteenth century, when constitutional limitations were applied in territories and states; 3) beginning with the *Insular Cases* in 1901 until the 1950s, with distinctions drawn between incorporated and unincorporated territories where in the latter only fundamental constitutional limitations apply; and 4) after 1950s until recently, when in some instances courts recognize constitutional limitations apply outside U.S. boundaries. *See* NEUMAN, *supra* note 67, at 72-94, 104-08 (providing the most detailed analysis of these stages); Neuman, *Closing the Guantánamo Loophole*, *supra* note 51, at 5-15 (summarizing the stages and drawing four categories relevant to Guantánamo's constitutional status).

136. *See* SPARROW, *supra* note 68, at 247 (arguing that the *Insular Cases* facilitated informal empire by permitting the United States to expand territorially without annexing new possessions); Sanford Levinson, *Why the Canon Should be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 246 (2000) (arguing that the importance of the *Insular Cases* is that they permitted the United States to "emulate the European nations and conquer and possess colonial territories").

137. SPARROW, *supra* note 68, at 248-49.

138. These possessions include Puerto Rico and U.S. Virgin Islands in the Caribbean, and American Samoa, Guam, Northern Mariana Islands, Federated States of Micronesia, Marshall Islands, and Republic of Palau in the Pacific Ocean.

bined population is four million, with 3.8 million in Puerto Rico.[139] Importantly, many mainstream or common approaches to constitutional law in the United States overlook the legacy of these cases or the informal imperial ordering.[140]

Developed in two planes, the legal status of these non-state possessions points to an imperial relationship. First, a central state power exerts governmental authority overseas and possesses sovereignty overseas. Simultaneously, individual rights enjoyed under U.S. law are denied there. These two determinations, the former in international law terms and the latter in constitutional law terms, govern many aspects of overseas authority. The Court in *Boumediene*, in both majority and dissenting opinions, refers to doctrine from the *Insular Cases* as evidence for why the constitutional writ of habeas corpus is (or is not) available to detainees on Guantánamo.[141]

Scholarship analyzing this constitutional ordering suggests a series of questions for examining Guantánamo's legal anomaly. This research may not always be labeled "post-colonial," since these possessions remain in U.S. control without political independence. Likewise, this research may not identify post-colonial themes of identity, exclusion, dependence, subordination, or resistance. Regardless, this diverse and engaging scholarship provides an excellent inspiration to identify limits, deference, or rights protections, if any, that apply to U.S. authority on Guantánamo.

For these territories, denial of statehood status and exclusion of rights protections conflicts with the liberal tenets of constitutional law.[142] Basic constitutional law principles regard U.S. political authority as based on popular sovereignty as represented through the states.[143] Citizens of

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139. Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 1-27 (Christina Duffy Burnett & Burke Marshall eds., 2001).

140. For instance in 2000, prominent constitutional law professor Sanford Levinson explained how after two decades of teaching constitutional law he was "sadly underinformed" about the importance of the *Insular Cases*. Levinson, *supra* note 136, at 265. He described how "almost" all contemporary constitutional law casebooks and treatises fail to mention anything about these cases. *Id.* at 245. Importantly, he notes John E. Nowak and Ronald D. Rotunda (my Chapman colleague) do explain the importance of the cases in their treatise. *Id.* at. 245 (referring to JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 210-11 (5th ed. 1995)).

141. 128 S. Ct. 2229, 2254-56 (2008); *id.* at 2301 (Scalia, J., dissenting) (emphasizing that sovereignty is required to extend constitutional protections to overseas territories). *See also* Brief for the Respondents at 69-71, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196); Brief for Petitioners Al Odah et al. at 20-22, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1196); Brief for the Boumediene Petitioners at 46-47, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195). *See also* Pedro A. Malavet, *From* Downes v. Bidwell *to* Boumediene v. Bush: *"The Constitution Follows the Flag . . . But it [Still] Doesn't Quite Catch Up with It"* (Univ. of Fla. Levin College of Law Research Paper No. 2009-03, 2009), *available at* http://ssrn.com/abstract=1333185.

142. ROMÁN, *supra* note 67, at ix-xx.

143. The holdings of the *Insular Cases*—finding that the federal government had unenumerated power to rule over these territories—broke with many prior constitutional law principles which focused on enumerated powers needed for the federal government to have authority. *See* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE

these states and the United States elect their leaders and enjoy individual constitutional rights protections. Applicable to these overseas possessions, legal designations such as territories, commonwealths, and trusts deny these liberal attributes.[144] Traditional impressions in U.S. historiography, political theory, and the law do not label the United States as having an empire or these territories as part of a colonial relationship.[145] Current arrangements, some crafted as early as 1898, suggest a U.S. empire overseas, since there is a separation in political participation and legal protection between a governed population (territorial residents) and governing authority (the Federal Government).[146]

ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 6-16 (1989); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

144. FOREIGN IN A DOMESTIC SENSE, *supra* note 67, at 1-2.

145. Motivated by commercial, territorial, or strategic interests, de facto or informal imperial practices have shaped U.S. foreign relations for over a century. Historians, foreign scholars, and critical researchers provide a variety of reasons for why U.S. public discourse and history adamantly deny the existence of any empire in U.S. foreign relations, despite extensive overseas possessions since 1898. Explanations include: associations of "empire" with the Communist bloc or Soviet Union after 1917 through the Cold War (the "Evil Empire"); associations of "empire" with formal colonies, mercantilism, and limited political participation as referenced by European colonies; a legacy of fighting against imperial rule in the Revolutionary War to achieve political independence; an assumption that constitutional principles of equality under the law, popular sovereignty, and electoral rights apply universally to those governed by the United States (ignoring the unequal treatment of women, Native Americans, slaves, persons of color, foreign nationals, and residents of unincorporated possessions); and a cultural understanding that extending U.S. authority overseas benefited populations abroad by exposing them to "free trade" or republican governance, or that these populations lacked the culture to participate in this project. *See generally* THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM, *supra* note 87 (providing a series of chapters on foreign relations from Independence to the 1960s to argue that the United States supported both decolonization and imperial powers throughout the world, as it maintained an informal empire and protected economic objectives of the world powers); Joseph Fry, *Imperialism, American Style*, *in* AMERICAN FOREIGN RELATIONS, RECONSIDERED 1890-1993 (Gordon Martel ed., 1994) (examining "power, control, and intent" of U.S. foreign policy to argue empire is evidenced by a consistent policy not too distinct from European practices, socio-economic domestic motives to extend influence, and cultural "missions" to spread liberty in a racial context not dissimilar to continental experiences with Native Americans, African-Americans, and Mexican-Americans); Edward P. Crapol, *Coming to Terms with Empire: The Historiography of Late-Nineteenth Century American Foreign Relations*, 16 DIPLOMATIC HIST. 573, 573-97 (1992) (discussing how diplomatic history traditionally has discounted "empire" in U.S. foreign relations); Louis A. Pérez, Jr., *Review: 1898 and Beyond: Historiographical Variations on War and Empire*, 65 PAC. HIST. REV. 313, 314 (1996) (explaining how U.S. history regards interventions and occupations overseas by the United States as isolated events versus within a larger framework of imperialism); Emily S. Rosenberg, *"The Empire" Strikes Back*, 16 REVS. AM. HIST. 585, 585-590 (1988) (illustrating how with extensive efforts U.S. history seeks to distinguish itself from imperialism); John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Stand Up?)*, 120 HARV. L. REV. 754, 756 (2006) (arguing that the "law of empire" has moved front and center in American public discourse . . ." in reviewing books on British imperialism and its influence in U.S. constitutional law (present and historic) by Niall Ferguson, Daniel J. Hulseboch, R. W. Kostal, and John Yoo).

146. Sparrow argues that the *Insular Cases* provided the U.S. with the legal mechanisms in constitutional law to sustain informal empire; a project begun before the cases in 1898 but sustained in larger contexts beyond the immediate islands of Puerto Rico and Hawai'i. *See* SPARROW, *supra* note 68, at 229-32.

In his comprehensive book *The Other American Colonies*, Ediberto Román examines how, for these possessions, constitutional and international law have exclusionary effects.[147] U.S. expansion, initially after 1898 and then later in the Pacific Ocean during the mid-twentieth century, justified judicial and legislative constructs creating a colonized status for these possessions.[148] Román explains the current relevance of the *Insular Cases*, which created the Incorporation Doctrine.[149] This Doctrine generally argues that the United States retains sovereignty over these types of territories, that the political branches have plenary authority to govern these possessions, and that only "fundamental" rights in the Constitution apply there.[150] This last distinction refers to rights derived from natural law.[151] This does not include many of the Constitution's positive rights articulations.[152] Citizens of these territories do not receive many of the public benefits or aid provided by the federal government that "mainlanders" receive. These citizens do not vote for President, Vice President, or members of Congress.[153]

While these territories have different legal relationships with the United States, commonalities in this legal ordering (constitutional and international) suggest an informal empire. Christina Duffy Burnett and Burke Marshall highlight shared elements: Congress governs each under the Constitution's Territorial Clause; international sovereignty is denied for each territory; no territory is a state in the Union; persons born in these territories are U.S. citizens (except for American Samoan U.S. "nationals"); Congress has sole discretion to govern these territories by federal legislation; and no territory has representation on the federal level.[154]

Similarly, political and economic factors suggest an informal empire developing from the *Insular Cases* and governing current overseas territory. First, international sovereignty is denied to these populations but

147. *See generally* ROMÁN, *supra* note 67, at xx-xxv.

148. *Id.*

149. *Id.* at 48-56.

150. Román provides a great summary of the context and holdings of key *Insular Cases* decisions used to govern American colonies. *See id.* at 48-56 (describing Downes v. Bidwell 182 U.S. 244 (1901), Dorr v. United States, 195 U.S. 138 (1903), and Balzac v. Porto Rico, 258 U.S. 298 (1921)). Sparrow offers a detailed analysis of the political and popular contexts surrounding the *Insular Cases*, including a quite expansive list of the *Insular Cases*, and their influence on U.S. foreign relations and Supreme Court jurisprudence. *See generally* SPARROW, *supra* note 68. Sparrow's listing of the *Insular Cases*, a total of thirty-five including disputes involving Cuba, the Philippines, and Alaska in addition to Puerto Rico, is described in "A note on the Insular Cases." *See* SPARROW, *supra* note 68, at 257-58, 259-63.

151. *Downes*, 182 U.S. at 282–83 (listing examples of natural rights as the ability to have: religious freedom; personal liberty and individual property; freedom of speech and press; free access to courts; due process of law; and equal protection of the law; and immunity from unreasonable searches and seizures and cruel and unusual punishments).

152. *Id.*

153. Iguarta De La Rosa v. United States, 32 F.3d 8, 9-10 (1st Cir. 1994) (per curiam) (finding that statehood or a constitutional amendment is required for a Puerto Rican resident to have federal voting rights).

154. FOREIGN IN A DOMESTIC SENSE, *supra* note 67, at 1-2.

retained by the United States.[155] Foreign relations are conducted by the U.S. government as opposed to local territorial authorities.[156] Second, the objectives of the political liberal theory electoral and individual rights do not fully apply there, since these populations do not fully participate in U.S. governance.[157] The federal government's sovereignty over these territories reflects imperial or centralized political goals not immediately associated with the narratives of republican and democratic governance.[158] Popular sovereignty is denied to these populations, with no congressional representation on their behalf.[159] States in the Union have this representation. Third, the initial U.S. interest in these territories was to compete with European imperial powers or global military powers.[160] From before 1898, the United States eyed Caribbean territories with great interest as it tried to enforce the Monroe Doctrine.[161] The Pacific islands were equally appealing as the United States tried to "open" markets in Asia.[162] The Cold War's global scope, especially with accessibility to attacks on the Pacific coast, made these islands strategically appealing.[163] Fourth, critical perspectives in legal studies, race theory, and post-colonial theory and scholarship from these regions highlight the imperial, neo-co-

155. Román explains how the Territorial Clause permitted Congress to acquire new territories, but the Spanish-American War of 1898 introduced the predicament where a "sovereign right" of the United States resulted in acquisitions such as Puerto Rico, the Philippine Islands, and Guam; and the Insular Cases resulted in these populations excluded from many constitutional rights protections. *See* ROMÁN, *supra* note 67, at 28-29, 35-37. Burnett emphasizes "deannexation" in the *Insular Cases* which permitted the United States to relinquish sovereignty over unincorporated territories but gave it the ability to immediately rule them. *See* Burnett, *supra* note 67, at 802.

156. ROMÁN, *supra* note 67, at xx.

157. *Id.* at xix-xxi.

158. *Id.* at xix-xxi.

159. *Id.* at xx.

160. Smith, *supra* note 2, at 84.

161. While this Article focuses on U.S. foreign relations with Cuba and the required legal determinations to implement these policy choices, similar policy and legal contexts were evident generally in foreign policies respecting Latin America and Asia. For summaries of U.S. policies toward Latin America and the legal changes used to implement them, see Smith, *supra* note 2, and Johnston, *supra* note 104, at 41-61. Walter LaFeber examines how U.S. foreign policy objectives changed after the Civil War and how these changes had global targets (including the Caribbean, Central America, and Asia), geopolitical components, material objectives, and cultural motivations in Protestant missionaries or "Anglo-Saxon" superiority. *See* LAFEBER, *supra* note 109, at vii; Walter Lafeber, *The American Search for Opportunity*, *in* HISTORY OF AMERICAN FOREIGN RELATIONS 234-35 (Warren I. Cohen ed., 1993).

162. Simultaneous to events in the Caribbean and Central America, the United States was engaged in similar foreign policies in Asia with goals of opening markets, competing with European powers, and securing strategic territories. For instance, in 1900 President McKinley sent troops as part of multinational coalition into sovereign China. Importantly, this happened without express authorization from Congress and mostly under the executive's initiative. Walter LaFeber, *The "Lion in the Path": The U.S. Emergence as a World Power*, 101 POL. SCI. Q. 705, 714 (1986) (correlating a worldwide foreign policy after 1898 with naval theory from Alfred Thayer Mahan, constitutional reinterpretation, and political centralization of military power). *See generally* Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695 (1987) (presenting the Constitution as a contested barrier to U.S. foreign policy choices for the presidency from Independence onward with relevant foreign policy contests worldwide).

163. *See* ROMÁN, *supra* note 67, at 211-56.

lonial, or colonial relationship still exist for these populations.[164] Important cultural influences shaped U.S. interests overseas and the domestic legal ordering used to sustain them.[165] This includes notions of Manifest Destiny and the "White Man's Burden," justifying a reason to go overseas and, more specifically, concerns of Anglo and/or White superiority, missionary objectives to spread Christianity and convert local populations, emerging ideas of "manhood," and perceived incapability of persons of color or non-Protestant residents in these territories to participate in republican governance.[166]

Viewed historically, this context identifies why the United States occupied a base on the eastern end of the Cuban island. Guantánamo's legal anomaly is an outgrowth of this context. The United States occupied Guantánamo as part of a larger process to exert global influence. Legal determinations implicit in extending authority overseas by the United States, such as limiting rights protections, denying sovereignty to other populations, or protecting strategic geopolitical goals, developed from this context.

The *Insular Cases* provided constitutional law the first opportunity to answer the question: "What rights protections and political deference ex-

164. *See generally* Sylvia R. Lazos Vargas, *History, Legal Scholarship, and Latcrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921 (2001) (presenting the significance of the War and its relevant legal determinations in terms of racial categorizations in the U.S. and its territories). *See also* RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 326 (Juan F. Perea et al. eds., 2000); RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY 1893-1946, at 262 (1972); Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race and the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 67, at 140-63; Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 41-44 (2000); Walter L. Williams, *United States Indian Policy and the Debate Over Philippine Annexation: Implications for the Origins of American Imperialism*, 66 J. AM. HIST. 810, 831 (1980).

165. Efrén Rivera Ramos shows how the *Insular Cases* devised a doctrine to justify the rule of overseas possessions and to make the populations of these territories subjects versus objects in disputes questioning U.S. authority. *See generally* EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 114 (2001); *The Legal Construction of American Colonialism: The* Insular Cases *(1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996).

166. Michael H. Hunt, *Conclusions: The Decolonization Puzzle in US Policy—Promise Versus Performance*, *in* THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM 207–29 (David Ryan & Victor Pungong eds., 2000) (presenting how ideology and tensions in changing national values held by Americans (individually and collectively) characterize why U.S. foreign policy moves between the promises of supporting decolonization and self-determination and objectives of security and material gain). *See also* DAVID HEALY, U.S. EXPANSIONISM: THE IMPERIALIST URGE IN THE 1890S (1970) (presenting a diverse analysis of cultural, economic,and geopolitical intellectual currents pushing the United States to become imperialist after a relatively isolated nineteenth century); KRISTIN L. HOGANSON, FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS (1998) (arguing how redefinition of gender roles, especially notions of chivalry and jingoistic manhood contrasting foreign savages or effeminate modern men, were vital to American impulses for war in the Caribbean and Philippines in 1898).

tend to territories overseas under U.S. sovereignty?"[167] These cases are highly relevant to this Article's examination for two reasons. First, in terms of context, they were argued and determined simultaneously as U.S.-Cuba relations resulted in the Platt Amendment, base occupation, and increased interference in the region. Assumptions and reasoning in U.S.-Cuba relations developed at the same time and were made by many of the same policymakers and justices from the *Insular Cases*. Second, in doctrinal terms, the *Insular Cases* serve as relevant case law, as argued by detainees and the Government, in determining what rights, protections, or political deference applies overseas.[168] This is evident in how the majority and dissenting opinions in *Boumediene* examine extraterritorial application of political deference and rights protections.[169]

The importance of the *Insular Cases* to recent detention practices is related to historic developments in constitutional and international law. Constitutional and international law scholar Gerald Neuman provides some of the most sophisticated analysis on extraterritorial application of the Constitution and the anomalous quality of Guantánamo.[170] He argues that the *Insular Cases* point to a legacy in constitutional law of looking to membership for determining what rights apply and where they apply.[171] International law expert Kal Raustiala characterizes U.S. detention on Guantánamo as reflecting a "legal spatiality" based on strict territorial limits to exerting legal jurisdiction.[172] Historic foreign relations and the accompanying international law doctrine developed a strict territorial approach to "legal spatiality," i.e., an assumption that territorial location limits the law and the legal remedies that can be applied.[173] Most recently, *Boumediene* engaged this doctrine, referring to history and constitutional rights protections, membership, and overseas jurisdiction and territorial demarcation.[174]

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167. Frederic R. Coudert provided a firsthand account, as a litigator in many *Insular Cases* disputes. *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823-24 (1926).

168. Brief for the Respondents at 69-71, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196); Brief for Petitioners Al Odah et al. at 20-22, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1196); Brief for the Boumediene Petitioners at 45-46, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195).

169. *See infra* Part IV D.-E.

170. *See generally* Neuman, *Anomalous Zones*, *supra* note 11; Neuman, *Closing the Guantánamo Loophole*, *supra* note 51; Gerald Neuman, *Extraterritorial Rights and Constitutional Methodology after* Rasul v. Bush, 153 U. PA. L. REV. 2073 (2005).

171. NEUMAN, *supra* note 67, at 6-7; Neuman, *Closing the Guantánamo Loophole*, *supra* note 51, at 6-7.

172. Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION (Miles Kahler & Barbara Walter eds., 2006); Raustiala, *supra* note 35, at 2502-03; *see also* Kal Raustiala, *Does the Constitution Follow the Flag? Territoriality and Extraterritoriality in American Law* (UCLA School of Law Research Paper No. 08-34, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291343) (presenting how U.S. power in foreign relations and economics has helped changed territorial notions of jurisdiction).

173. Raustiala, *supra* note 35, at 2503.

174. *See infra* Part IV.D.

Popular culture of the period presented the *Insular Cases*' constitutional concerns as whether "the Constitution follows the flag," asking if individual right-protections in the Constitution extend to places where the United States governs.[175] The effective answer from the *Insular Cases* was "yes, but not fully." Describing reaction to *Downes v. Bidwell*, newspapers reported Secretary Elihu Root as saying: "as near as I can make out the Constitution follows the flag - but doesn't quite catch up with it."[176] Constitutional application did not miss the territories, nor did it stop at the continental states, but similarly not all rights in the Constitution were protected overseas. Approving overseas authority in a "Constitution-light" fashion, the *Insular Cases* legally endorsed an informal overseas empire in constitutional law.[177] Informal empire and U.S. overseas expansion relied on a legal sensibility denying sovereignty to overseas populations and avoiding constitutional limits.

This Article argues that recent Guantánamo detention cases ask whether limits in constitutional or international law follow U.S. authority on leased overseas territory outside U.S. sovereignty. Colloquially, this asks: "Does the Constitution or international law follow the flag flown over detention camps at Guantánamo?" Referring to legal instruments used to endorse informal empire in the Caribbean, both lease agreements with protectorate-states and the Incorporation Doctrine, these questions are clearly post-colonial.

III. GUANTÁNAMO'S ANOMALOUS PAST: CUBA AS A PROTECTORATE AND A LEASED BASE

Following these theoretical elaborations, this Part argues that Guantánamo's current legal anomaly, i.e., the ambiguity concerning what norms in U.S. or international law govern this territory, was a precise objective of early-twentieth century U.S.-Cuba relations. Legal determinations on sovereignty and the Constitution's applicability overseas characterized U.S. foreign relations history in two relevant contexts.[178] The first is a

175. The reference to the Constitution following the flag comes from Mr. Dooley's comments regarding electoral/political influence on the Supreme Court. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901) ("[N]o matter whether the' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."). *See also* Charles Fairman, *Some New Problems of the Constitution Following the Flag,* 1 STAN. L. REV. 587 (1949).

176. *See generally* PHILLIP C. JESSUP, ELIHU ROOT 348 (1938); SPARROW, *supra* note 68, at 101-02.

177. *See* SPARROW, *supra* note 68, at 229.

178. Historic and foreign relations contexts have intimately characterized the legal status of the base. This became evident in U.S. legal debates about the base after Cuba's revolutionary government came into power in the early 1960s. *See generally* Robert L. Montague, III., *A Brief Study of Some of the International Legal and Political Aspects of the Guantánamo Bay Problem,* 50 KY. L.J. 459, 470-71 (1962) (examining the lease's legality in light of President Fidel Castro's public position on the base and legal understandings from prior U.S.-Cuba relations and international legal practices (e.g., in customary law and the United Nations agreements)); Joseph Lazar, *International Legal Status of Guantánamo Bay*, 62 AM. J. INT'L L. 730, 730-740 (1968) (describing foreign relations history and relevant international legal agreements and practices to argue that the American right to hold

global context in which after 1898, the United States became a world power with economic, military, and territorial objectives in Asia, Europe, and throughout the Western Hemisphere.[179] The second context is specific to U.S.-Cuba relations, wherein the United States helped eliminate Spanish rule in 1898 and then became Cuba's protector until 1934.[180]

Applied in both contexts, four objectives framed U.S. legal approaches to overseas influence.[181] First, the United States tried to avoid de jure sovereign control when exercising authority overseas.[182] Second, it denied many incidents of sovereignty to foreign states.[183] Third, over territorial possessions, it excluded constitutional rights protections and limitations to U.S. political authority.[184] Fourth, it adamantly tried to protect overseas economic and political interests.[185] These four objectives framed how the United States determined its legal obligations, deference, and rights for foreign states and nationals. This Part describes these objectives as they are relevant to Cuba's independence, protectorate status, and the leasing of base territory. These objectives also frame how recent detention disputes have been resolved. This Part describes how these objectives illuminate how Guantánamo's legal anomaly, from its genesis, benefited U.S. foreign relations goals.[186]

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on to the base arises from the right to occupy Cuba provided in the Treaty of Paris of 1898); Gary L. Maris, *Guantánamo: No Rights of Occupancy*, 63 AM. J. INT'L L. 114, 115-16 (1969) (questioning the right of occupation as a basis to have jurisdiction over the base, arguing that agreements and the Platt Amendment provide for base occupation, and doubting that Latin American international lawyers or members of the international community recognize the right of occupation).

179. *See generally* Cleveland, *supra* note 143, at 83-87 (arguing that the development of plenary powers over foreign relations in constitutional law was an effort to make the United States more competitive in global affairs); LaFeber, *The "Lion in the Path," supra* note 162; LaFeber, *The Constitution and United States Foreign Policy*, *supra* note 162; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 649-54 (discussing how constitutional law doctrine was developed for historic foreign relations contexts and how present globalized and inter-dependent foreign relations contexts suggest the need for changing these legal assumptions).

180. *See generally* LOUIS A. PÉREZ JR., CUBA AND THE UNITED STATES: TIES OF SINGULAR INTIMACY 96 (1997); SCHOONOVER, *supra* note 88; LOUIS A. PÉREZ JR., CUBA UNDER THE PLATT AMENDMENT: 1902-1934 (1986); LaFeber, *The American Search for Opportunity*, *supra* note 161.

181. For a description of how the Platt Amendment's intervention provisions were part of a regional policy to minimize security threats to the United States, especially to the Panama Canal after 1902, and to maintain the independence of regional states, see *A Caribbean Policy for the United States*, 8 AM. J. INT'L L. 886, 888-89 (1914).

182. *See infra* Part III.A (describing how the United States avoided sovereign control over Cuba with the Treaty of Paris, that this was domestically confirmed in the Teller Amendment, and that the U.S. policy in the region was to avoid sovereign control abroad).

183. *See infra* Part III.B (describing how the Platt Amendment denied Cuba various sovereign powers and how the U.S. also intervened in or took over custom operations in various Latin American states).

184. *See supra* Part II.C. (discussing how the Incorporation Doctrine excluded many constitutional provisions from application overseas).

185. *See generally* LAFEBER, *supra* note 109; LaFeber, *The American Search for Opportunity*, *supra* note 161; LaFeber, *supra* note 87; Johnston, *supra* note 104.

186. LaFeber argues that the United States regarded its control of Guantánamo as it did its control of Hawai'i or the Philippines, i.e. "as [a] strategic means" to protect economic objectives. *See* LAFEBER, *supra* note 109, at 411.

Early twentieth century U.S. foreign policy in the Caribbean and Central America included military intervention, territorial acquisition, territorial lease agreements, and commercial treaties, and involved controlling foreign states' customs operations, settling sovereign debts (diplomatically and militarily), seeking a Pacific-Atlantic Ocean canal, protecting geopolitical and economic interests from European and host country interests, establishing protectorate relationships, and acquiring naval and coaling stations overseas.[187] States as diverse as Colombia, Costa Rica, the Dominican Republic, Haiti, Honduras, Nicaragua, Panama, and Venezuela, the U.S. territories of Puerto Rico, and the (previously Danish) Virgin Islands faced these legal practices.[188] Important to this context, Guantánamo served as a starting point or support station for military interventions in Cuba, Nicaragua, and the Dominican Republic.[189] In the mid-nineteenth century, U.S. interests in the region were to counter European colonization or intervention.[190] Later, and quite obviously by 1898, the United States developed tangible economic objectives in the region, inspiring increased overseas activity.[191]

In international law terms, these policies interfered in the sovereign affairs of foreign states. The most egregious were multiple military interventions overseas. U.S. policy also included various protectorate relationships and the taking over of customs collection operations, which tempered another state's sovereignty.[192] In terms of U.S. law, these policies tried to avoid limits to executive power and individual rights protections overseas.[193] During this period, the executive branch gained increasing deference, at the expense of congressional influence, in foreign relations.[194] Protectorate and base arrangements characterized U.S.-Cuba relations with the Platt Amendment and Guantánamo with lease

187. *See* Johnston, *supra* note 104, at 45; Smith, *supra* note 2, at 96-97; GRANDIN *supra* note 103.

188. *See* Smith, *supra* note 2, at 92-94.

189. *See* MARION E. MURPHY, THE HISTORY OF GUANTÁNAMO BAY 1494-1964, at chs. 4, 8 (U.S. Navy 1964) (1953), *available at* https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1 index (follow hyperlink to Chapters 4 and 8).

190. LaFeber, *The American Search for Opportunity*, *supra* note 161, at 15.

191. As early as 1846, the United States had negotiated a treaty with Colombia seeking to guarantee rights of transit across the Panamanian isthmus. Smith, *supra* note 2, at 86.

192. In addition to being the Cuban protector (1902-1934) and possessing Puerto Rico since 1898, U.S. presence (with varying legal justifications and legal arrangements) in Central American and the Caribbean included: occupying Haiti from 1915 to 1934; occupying the Dominican Republic from 1916 to 1924 and controlling customs operations from 1905 to 1940; purchasing the U.S. Virgin Island from Denmark in 1916; making Panama a protectorate from 1903 to 1939; leasing the Panama Canal Zone in 1903; occupying Nicaragua from 1912 to 1933 and obtaining right for a canal 1916; intervening in Honduras in 1907, 1911, and 1924; and occupying Mexico of Veracruz in 1914 and the Pershing interventionary expedition of 1916 to 1917. *See* LaFeber, *The American Search for Opportunity*, *supra* note 161, at 150; Smith, *supra* note 2, at 94.

193. LaFeber, *The "Lion in the Path," supra* note 162, at 711; LeFeber, *The Constitution and United States Foreign Policy*, *supra* note 162, at 699; Spiro, *supra* note 179, at 675, 714.

194. *Id.*

agreements, respectively.[195]

The base is not only located on Cuban soil, but its legal anomaly is a product of determinations made in U.S. law concerning Cuba since 1898. This starts with Cuba's independence from Spain and proceeds to the current state of suspended diplomatic recognition between Cuba and the United States since 1961.[196] This Part describes how these factors developed during: a) Cuba's independence from Spain in 1898 and America's late military involvement in this; b) a protectorate relationship between the United States and Cuba from 1902 to 1934, legally crafted by the Platt Amendment in 1901; and c) lease agreements for the naval station at Guantánamo, providing the United States "complete jurisdiction and control," but non-sovereign control, in 1903;[197] and indefinite occupation

195. *See infra* part III.B.

196. The U.S. occupation of the base, pursuant to the 1903 Lease and the 1934 Treaty, continues to be contested by Cuba. Since 1960, Cuba does not cash the checks that the United States provides each year in the amount of $4,085 for the lease. *See* Kaplan, *supra* note 41, at 244; Kathleen T. Rhem, *Guantánamo Bay Base Has Storied Past*, ARMED FORCES PRESS SERVICES (Aug. 24, 2004), www.defenselink.mil/news/newsarticle.aspx?id=25469; Michael Strauss, *Guantánamo Bay and the Evolution of International Leases and Servitudes*, 10 N.Y. CITY L. REV. 479, 505-06 (2006) (describing how the lease payments increased in amount after 1934, how the United States continues to send checks each year from its interests section in Havana that are not cashed and which state that the checks are only valid for one year). Since ruptures in U.S.-Cuban relations, the base has been surrounded by the "largest mine field in the world," cut off from Cuban water treatment services, and faces stationed Cuban guards. *See* Wayne S. Smith, *The Base from the U.S. Perspective*, *in* SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS, at 97, 98-99 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988). Both currently and during the Cold War, the base serves a symbolic, political, and spying purpose, as opposed to having any real military purpose, since most strategic operations have been moved away from this base and Cuba's military could not realistically withstand U.S. military power in the Caribbean or from the mainland. *See, e.g.*, Rafael Hernández Rodriguez, *Cuba's National Security and the Question of the Guantánamo Naval Base*, *in* SUBJECT TO SOLUTION, *supra*, at 102, 107-08. Cuba, both historically and currently, continues to voice its protest, stating that the base is illegally on Cuban territory and that prior agreements are void. *See generally* Smith, *supra*, at 97 (stating the Cuban case that the Platt Amendment and 1934 Treaty were forced on Cuba and the base is on Cuban sovereign territory and is a possible site to launch an attack against Cuba). Rodriguez, *supra*, at 108-10 (arguing that the base is an outgrowth of the interventionistic Platt Amendment process and contradicts Cuba's sovereignty); Montague, *supra* note 178, at 471-75; Lazar, *supra* note 178, at 730; Maris, *supra* note 178, at 115 (presenting the international law concerns of base occupation in light of Cuba's revolution in 1959); Cubanembassy.net, Cuba-U.S. Relations: The Modern Version of David and Goliath, www.cubanembassy.net/documents/421ED7DCE04B653B73642071F896650B2BC8B238.html (last visited Jan. 23, 2009) (presenting the argument that the base violates Articles 4 and 52 of the 1969 Vienna Convention of the Law of Treaties); Strauss, *supra*, at 504 (stating that the Cuban policy of publicly claiming the base is illegal but not initiating any legal proceedings or making return a high priority is due to diplomatic concerns and limited legal arguments); Felipe Pérez Roque, Minister of Foreign Affairs of the Republic of Cuba, Statement at the High-Level Segment of U.N. Human Rights Council (June 20, 2006), www.cubaminrex.cu/english/Speeches/FPR/2006/FPR_200606i.htm (referring to the base as "concentration camp" and "an act of war and propaganda"); Felipe Pérez Roque, Minister of Foreign Affairs of the Republic of Cuba, Statement to the Local and Foreign media, at the Ministry of Foreign Affairs, (Dec. 10, 2007), embacu.cubaminrex.cu/Default.aspx?tabid=5604 (demanding the "torture center" at Guantánamo immediately close since it is "cruel, inhumane and degrading" and occupied illegally). *See also infra* Part III.C.

197. U.S.-Cuba Feb. 1903 Lease, *supra* note 10.

with a 1934 treaty.[198]

These developments occurred in history, but they frame the conceptual boundaries of the base's current legal anomaly. This anomaly rests between determinations in international and constitutional law that sovereignty is flexibly interpreted, constitutional rights protections may be excluded, and the United States exercises overwhelming, if not complete, authority at this overseas location.[199] These developments illustrate the post-colonial legal condition that prior practices of informal empire (i.e., limited state independence, protectorate arrangements, and overseas bases) influence how the law is currently applied and conceived. Put simply, legal doctrine established as the United States became a foreign relations power in the Western Hemisphere after 1898 provided the United States, as argued by the Bush Administration, with the flexibility to detain and interrogate enemy combatants from mostly non-Western countries on Cuban soil for an indefinite period.

A. Dancing Around Cuban Sovereignty, the United States Enters War and Peace in 1898

The American occupation of Guantánamo is a by-product of the long and complex process of Cuba's independence from Spanish rule. United States Marines first landed on Guantánamo on June 10, 1898, to fight Spanish troops for one month.[200] Guiding the campaign against Spain, U.S. objectives were to avoid sovereign control but retain influence over Cuba, while protecting strategic and economic interests on the island and in the Caribbean.[201] U.S. interests in the region were expanding in intensity and scope with diplomacy and overseas investments. By 1902, Congress eagerly supported prospects for an Atlantic-Pacific Ocean Canal in

198. Agreement Between the United States of America and Cuba for the Lease of Coaling or Naval Stations, U.S.-Cuba, July 2, 1903, *available at* avalon.law.yale.edu/20th_century/dip_cuba003.asp [hereinafter, U.S.-Cuba July 1903 Lease]; *see also* Smith, *supra* note 196, at 97.

199. The anomalous quality of the base, between Cuban sovereignty and U.S. control and jurisdiction, became evident during refugee detention in the early 1990s. *See also* John Yoo, War by Other Means: An Insider's Account of the War on Terror 142–43 (2006) (explaining how court decisions on rights for refugees detained on the base suggested habeas jurisdiction would not extend to Guantánamo); *see also* Philbin & Yoo Memo, *supra* note 12 (presenting how jurisdictional determinations from earlier refugee detention policy were vital to War on Terror detention policies).

200. Library of Congress: American Memory, Today in History: June 10, http://memory.loc.gov/ammem/today/jun10.html (last visited Jun. 30, 2008). Former base Commander Marion E. Murphy describes the U.S.-Spain battle over Guantánamo and how U.S. troops invaded Puerto Rico from there. *See* Murphy, *supra* note 189, at ch. 2.

201. *See* Joint Resolution for the Recognition of the Independence of the People of Cuba, Demanding That the Government of Spain Relinquish Its Authority and Government in the Island of Cuba, and to Withdraw Its Land and Naval Forces from Cuba and Cuban Waters, and Directing the President of the United States to Use the Land and Naval Forces of the United States to Carry These Resolutions into Effect, J. Res 24, 55th Cong, 2d Sess. (Apr. 20, 1898), *in* 30 Stat. 738, 739 (1899) [hereinafter Teller Amendment]; Pérez, Ties of Singular Intimacy, *supra* note 180, at 96; Pérez, Cuba under the Platt Amendment, *supra* note 180, at 42.

Panama, which became a prime regional concern for the United States.[202] It could protect access to a canal and regional markets with influence over Cuba and a base on the eastern end of the island.

The U.S. military campaign of the "Spanish-American War," with Cubans and Americans fighting against Spain, started in April of 1898 and ended quickly by August. These five months provide the chronology of U.S. military involvement in Cuban independence.[203] Cubans, though, had been involved in resilient, highly violent, and fractured military contests against Spain since the 1860s.[204] These movements sought political and economic reforms and/or independence from Spain, amid a context where many elites feared an end to slavery and its consequential animosity and economic ruptures.[205] Cubans were nearly victorious in attaining independence in the "Ten Years' War" (1868–1878).[206] This severely disrupted Cuba's economy, eliminating a great deal of the landed aristocracy's power which opened opportunities for U.S. investments.[207] A second war for independence began in 1895, during which the United States provided military and diplomatic leverage in the last five months to secure Cuba's independence from Spain in 1898.[208] Historians have more appropriately called it the "Spanish-American-Cuban-Filipino War," suggesting the multinational participation and global scope of the War and rejecting its bilateral characterization of a "Spanish-American" war.[209] In Spain, it is called "*el desastre del 98*" (disaster of '98) or "*la Guerra de Cuba*" (War for Cuba).[210]

Congressional debates leading to the declaration of war and a peace treaty with Spain illustrate the U.S. goal of avoiding sovereign control over Cuba. Despite this hands-off approach to de jure sovereignty, the United States carved legal space for itself to heavily influence events in Cuba.[211] In foreign relations terms, the War elucidated an obvious shift away from U.S. neutrality in global affairs, which had characterized a great deal of its foreign policy regarding European and Western Hemi-

202. *See* Woolsey, *supra* note 34, at 534; SMITH, *supra* note 2, at 86.

203. During most of the Cuban independence struggle, the United States maintained a policy of strict neutrality that benefited Spain and denied diplomatic recognition to Cuban leadership. *See* Luis E. Aguilar, *Cuba c. 1860-1940*, *in* V THE CAMBRIDGE HISTORY OF LATIN AMERICA 229, 234 (Leslie Bethell ed., 1984).

204. *Id.*

205. *Id.* at 233.

206. *Id.*

207. LaFeber, *The American Search for Opportunity*, *supra* note 161, at 129–130.

208. *See* Aguilar, *supra* note 203, at 242–246; LaFeber, *The American Search for Opportunity*, *supra* note 161, at 140-44.

209. Thomas G. Paterson, *U.S. Intervention in Cuba, 1898: Interpreting the Spanish-American-Cuban-Filipino War*, 12 OAH MAG. HIST. 5 (1998).

210. For a description of how Spanish historiography interprets the War, see generally Sylvia L. Hilton, *Democracy Beats the "Disaster" Complex: Spanish Interpretations of the Colonial Crisis*, 12 OAH MAG. HIST, 11-17 (1998).

211. This is evidenced by the 1903 Reciprocal Treaty, U.S. occupation, and the Platt Amendment.

sphere events.[212] Out of this history of neutrality, the United States was reluctant to have sovereign control over Cuba.[213]

After years of debate to declare war or not, with the last months being the most intense following failed attempts to purchase Cuba from Spain, President McKinley, in April 1898, asked Congress to declare war on Spain.[214] Dim domestic economic prospects, insufficient market demand for industrialized products, high sugar prices, and investments in the previously profitable Spanish colony of Cuba motivated U.S. involvement.[215] Congress included President McKinley's objective to not recognize an independent Cuban state and to disclaim any sovereignty over Cuba.[216] The United States would participate in the war and peace process, as opposed to recognizing an independent Cuban nation first. In a resolution introduced by Representative Henry M. Teller (called the Teller Amendment), Congress declared that the United States "disclaims any disposition to exercise sovereignty, or control" over Cuba "when that is accomplished, to leave the government and control of the island to its people" and that "the people of the island of Cuba are, and of right ought to be, free and independent."[217] After suffering a humiliating defeat on July third in Cuba and similar losses in the Philippines, Spanish forces surrendered to the United States.[218]

On December 10, 1898 in Paris, Spanish and U.S. representatives signed a peace treaty, providing the United States with territories in either sovereign control or in military occupation.[219] Cuban representatives did not participate in discussion of the treaty terms.[220] In Article I, the Treaty provided that "Spain relinquishes all claim of sovereignty over and title to Cuba" and the United States shall occupy the island with obligations under international law "for the protection of life and property."[221] In Article II and III, it ceded the Philippines, Puerto Rico, Guam, and the Mariana Islands to the United States.[222]

This cessation resulted in the United States having territorial possessions over which it maintained sovereignty but of which it did not intend

212. *See generally* LaFeber, *The American Search for Opportunity*, *supra* note 161; Johnston, *supra* note 104.

213. Aguilar, *supra* note 203, at 234.

214. PÉREZ, TIES OF SINGULAR INTIMACY, *supra* note 180, at 94.

215. *Id.*

216. *Id.* at 95-96.

217. Representative Teller intended to protect the beet-sugar industry in his constituency, thus favoring not annexing or incorporating Cuba. *See* LaFeber, *The American Search for Opportunity*, *supra* note 161. The Teller Amendment was added to the resolution declaring Spanish-American War. *See* Teller Amendment, *supra* note 201.

218. Aguilar, *supra* note 203, at 244.

219. *Id.*

220. *Id.* For an analysis of how by denying citizenship this treaty differed from the Treaty of Guadalupe Hidalgo, made with Mexico in 1848, and prior territorial expansions, see RICHARD DELGADO ET AL., LATINOS AND THE LAW: CASES AND MATERIALS 49-51 (2008).

221. *See* Treaty of Peace Between the United States of America and the Kingdom of Spain, *supra* note 48, art. I.

222. *Id.* art. II-III.

to make states in the Union. Because these possessions had sovereign authority but not statehood, the legal controversies in the *Insular Cases* arose, which attempted to generally resolve questions about what legal norms applied to territories within U.S. sovereignty but not incorporated as states into the Union.[223] Cuba, though, was firmly regarded under U.S. law as independent, not to be annexed or incorporated. Congressional resolution, executive objectives, international treaty negotiation, and even the Supreme Court affirmed Cuba's formal independence.[224]

B. Avoiding Sovereignty, the Platt Amendment Makes Cuba a Protectorate and Provides a Base at Guantánamo

The American occupation of the base at Guantánamo began with the Platt Amendment, which was initially conceptualized in 1901 by U.S. Secretary of War Elihu Root.[225] It was included in congressional military appropriations for 1902.[226] Senator Orville Platt of Connecticut introduced the bill, providing for its common reference as the "Platt Amendment."[227] The Amendment has been extremely controversial in Cuban, Latin American, and international law debates, because it secured for the United States a "right to intervene" in the independent state of Cuba.[228] It also initiated the United States move to legally occupy bases in Cuba.[229] The Amendment was not limited to just military appropriations; instead its provisions were also included in Cuba's Constitution of 1901 and in a 1902 Treaty between Cuba and the United States.[230] For this reason, this Article refers to it as the "Amendment" (for the sake of simplicity) or as the "Amendment process" (to highlight its inclusion in American, Cuban, and international law). Importantly, the Amendment served U.S. goals by avoiding sovereignty over Cuba (i.e., it was not annexed or made a colony) and providing Cubans formal independence from Spain. It secured naval bases to patrol U.S. interests in the Carib-

223. *See supra* Part II.C.

224. *See* Neely v. Henkel, 180 U.S. 109, 120-25 (1901) (holding that Cuba was a foreign state even under U.S. occupation and approving extradition from Cuba).

225. Pérez, Cuba Under the Platt Amendment, *supra* note 180, at 45.

226. Platt Amendment – U.S appropriations, *supra* note 15, at 898.

227. Pérez, Cuba Under the Platt Amendment, *supra* note 180, at 47.

228. James H. Hictman, *The Platt Amendment Revisited: A Bibliographical Survey*, 33 Americas 343, 344 (1967) (providing a thorough, but now dated, review of historical and scholarly treatments of the Amendment from both U.S. and Cuban perspectives).

229. Specifically, Article III of the military appropriations bill stated "Cuba consents that the United States may exercise a right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty. . . ." Article VII stated so that the United States could maintain Cuban independence, protect the people of Cuba, and for American defense, "Cuba [would] sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States." Platt Amendment—U.S appropriations, *supra* note 15, § VII.

230. See David Healy, Drive to Hegemony 54 (1988); Pérez, Cuba Under the Platt Amendment, *supra* note 180, at 42-47; Pedro Capó-Rodríguez, *The Platt Amendment*, 17 Am. J. Int'l L. 761 (1923); *The Origin and Purpose of the Platt Amendment*, 8 Am. J. Int'l Law 565, 586 (1914).

bean and recognized a "right of [ ] intervention" in case the Cuban government could not fully protect U.S. investments.[231] Because base occupation developed from the Amendment process and because the Amendment's normative objectives (in American, international, and Cuban law) permitted U.S. foreign policy flexibility, an examination of the Amendment's legacy illuminates how anomaly influences current detention on the base.

Central to this comparison between current legal anomaly and events in legal history is the identification of the importance the Amendment played in the early Cuban republic. Here, historian Louis Pérez's extensive work on Cuba-U.S relations, the Platt Amendment, and Cuban national identity is extremely illuminating. In his book *Cuba Under the Platt Amendment: 1902–1934*, Pérez shows how the Amendment renewed elements of a colonial system between the United States and Cuba, while Cuba remained formally independent.[232] Serving as effective conditions for this independence, these elements include ceding territory for U.S. bases, limiting Cuba's sovereign power over foreign relations, and authorizing a right of intervention for the United States.[233] The Amendment explicitly articulated these control measures. It provided a substitute for a formal colonial arrangement.[234] These elements set public legal obligations for the United States and Cuba while opening a path for massive U.S. investment in Cuba's economy. Pérez builds on these insights in *Cuba and the United States: Ties of Singular Intimacy* to show how the United States considered Cuba essential to its political and military security after 1898 and how, for Cuba, the United States was vital to its independence.[235] This "singular intimacy" was institutionalized with the Amendment measures, which protected U.S. control and economic interests and Cuban independence in its "truncated" form.[236] Their long-term effect was a "duality of pervasive ambivalence" between the United States and Cuba, but especially amongst Cubans.[237] This facilitated a long-term negotiation of competing political values between the United States and Cuba regarding the rights of intervention and state independence, respectively.[238] Pérez argues that this created "dilemmas of proximity" to the United States for Cuban identity.[239] From these insights, this Article builds on the historic ambiguity and anomaly regarding U.S. control, sovereignty over Cuban territory, and Cuban independence.

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231. LAFEBER, *supra* note 109, at 416.
232. PÉREZ, CUBA UNDER THE PLATT AMENDMENT, *supra* note 180, at 45.
233. *Id.*
234. *See generally* LAFEBER, *supra* note 109; Johnston, *supra* note 104; Smith, *supra* note 2, at 17.
235. PÉREZ, TIES OF SINGULAR INTIMACY, *supra* note 180, at xvi.
236. The terms "singular intimacy" refer to President William McKinley's State of the Union from December 5, 1899, where he stated that "new Cuba" is bound to the United States by "ties of singular intimacy" and that Cuba's destiny is "irrevocably linked" to U.S. destiny. *Id.* at ix, xvii.
237. *Id.*
238. *Id.* at xviii.
239. *Id.*

The Amendment was conceptualized in 1901, three years after occupation had become a "burden and annoyance," costing over half a million dollars a month.[240] Occupation became an increasing political liability in Washington.[241] The Amendment was devised to create circumstances and legal guarantees to end occupation.[242] Its goals provided the United States influence over Cuba and protected investments without annexing Cuba or retaining sovereignty.[243] Secretary Root outlined the majority of the Amendment's provisions in a letter to Secretary of State John Hay on January 21, 1901.[244] He presented the Amendment as an extension of the Monroe Doctrine, i.e. as justified by international law.[245] This decision was to have an "international basis for stepping in to protect Cuba without appearing to be the state which was butting in."[246] Root took inspiration from England's protectorate relationship with Egypt, with England able "to retire and still maintain her moral control."[247]

The Amendment provided the United States with flexible control, or what this Article refers to as "ambivalence[ ] in the rule of law."[248] It provided more flexibility and control for U.S. foreign policy than the alternatives of negotiating a treaty with Cuba after occupation (which would be subject to the Senate's two-thirds approval and Cuban influence) or continuing with congressional approvals via resolutions or appropriation bills.[249] Instead, the Amendment was imposed on Cuba.[250] Root's letter suggested four provisions. He emphasized that the United States must have a right of intervention in Cuba; deny Cuba the power to enter into treaties with other states; acquire land for bases on Cuban soil; and preserve all rights and actions of the occupation.[251]

Senator Platt introduced it as an amendment to the Army Appropriations Act of March 2, 1901.[252] Congress approved it. It contained eight articles and referred to the declaration of war seeking Cuba's independence from Spain.[253] Amendment Articles I, II, and III limited Cuba's

240. PÉREZ, CUBA UNDER THE PLATT AMENDMENT, *supra* note 180, at 44.
241. *Id.*
242. *Id.*
243. Cuba was formally independent, as opposed to Puerto Rico or the Philippines which were within U.S. sovereign control. *Id.*
244. *Id. See also The Origin and Purpose of the Platt Amendment*, *supra* note 230.
245. PÉREZ, CUBA UNDER THE PLATT AMENDMENT, *supra* note 180, at 45; *see also* Altunaga, *supra* note 34, at 925–926 (describing the Amendment as "embrac[ing]" the Monroe Doctrine).
246. PÉREZ, CUBA UNDER THE PLATT AMENDMENT, *supra* note 180, at 45 (quoting Mr. Root from correspondence with Philip Jessup from October 28, 1935).
247. *Id.* at 46 (referring to the January 11, 1901 letter from Secretary Root to Secretary Hay); *see also* Lejune Cummins, *The Formulation of the "Platt Amendment,"* 23 AMERICAS, 370, 381 (1967) (describing Secretary Root's inspiration for the Amendment from English intervention in Egypt).
248. *See supra* Part II.A. (referring to Fiztpatrick and Darian-Smith's "ambivalences in the rule of law").
249. PÉREZ, CUBA UNDER THE PLATT AMENDMENT, *supra* note 180, at 46.
250. *Id.*
251. *Id.* at 45-46.
252. *See generally* Platt Amendment—U.S. appropriations, *supra* note 15.
253. *Id.*

international sovereignty as an independent state.[254] Most political and international controversy of the period focused on these provisions. Article I stated Cuba "shall never" enter into a treaty or agreement with "any foreign power" which will "impair" Cuban independence, nor may Cuba permit any foreign power to colonize, control, or occupy any portion of the island for military, naval, or other purposes.[255] Article II limited Cuba from assuming public debt for which "ordinary revenues of the island" after expense would be "inadequate."[256] In Article III, Cuba consented that the United States "may exercise the right to intervene" to preserve Cuban independence, maintain a government able to protect "life, property and individual liberty," and discharge Treaty of Paris obligations.[257] All three of these curtailed Cuba's sovereign powers of foreign relations and self-defense.[258]

Article IV maintained rights and acts of the U.S. military occupation since 1898.[259] Article V and VI (not included in the Root letter) required that Cuba implement sanitation and infectious disease prevention plans and put off for future determination whether the Isle of Pines would be part of Cuba, respectively.[260] Eventually leading to the base at Guantánamo, Article VII required that Cuba "sell or lease" to the United States lands necessary for coaling or naval stations.[261] Article VIII stipulated the prior provisions be included in a "permanent treaty" with the United States.[262]

These Amendment provisions provided the United States with overwhelming influence over Cuba without having a formal colonial relationship. Most visible was the right of intervention and limitations on Cuba's foreign relations. In terms of solidifying these U.S. objectives, the Amendment required that these terms be included in a treaty which would govern relations between the two states.[263] The provisions regarding the bases and public debt provided the United States with security in a context beyond Cuba. A fear was that if Cuba were to default on its debt, a European force may invade Cuba, which would threaten U.S. security.[264] It would also protect Cuban independence from European

254. *See id.* art. II–III.
255. *Id.* art. I.
256. *Id.* art. II.
257. *Id.* art. III.
258. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (defining a "state" under international law as an entity that "has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities").
259. *See* Platt Amendment—U.S. appropriations, *supra* note 15, art. IV.
260. *Id.* art. VI-VII.
261. *Id.* art. VII.
262. *Id.* art. VIII.
263. *Id.* art. VIII. This treaty became Treaty Between the United States and Cuba Embodying the Provisions Defining the Future Relations of the United States with Cuba, U.S.-Cuba, May 22, 1903, 33 Stat. 2248.
264. *See generally* Capó-Rodríguez, *supra* note 230, at 761-65 (describing the Cuban need for the Amendment and providing Secretary Root's descriptions of its strategic importance for the U.S.).

powers. During the nineteenth century, on multiple occasions French, English, and/or Spanish forces invaded various Caribbean, Central American, and South American states to collect debts, protect investments, or protect their nationals.[265] This aspect of the Amendment can be seen as the United States seeking to protect Cuban independence and/or its economic interests in Cuba.

The Amendment's Article VII explicitly mentions territories for bases, eventually resulting in occupation of the naval station at Guantánamo.[266] This was implemented with lease agreements in 1903.[267] The Amendment, though, taken as a whole, was an effort to exert non-sovereign control over Cuba and protect U.S. interests. American interests were economic and immediate in Cuba and were concerned with both European intervention in the Western Hemisphere and increasing U.S. influence in the Hemisphere.

The Amendment denied Cuba important incidents to sovereignty that a free state or fully-sovereign state would enjoy.[268] U.S. pressure proceeded to include the Amendment provisions in the Cuban Constitution and the 1903 Lease between the United States and Cuba.[269] Cuba's Constitutional Assembly convened on June 5, 1900, before the Amendment was conceived by U.S. authorities.[270] The Constitution went into force on May 20, 1902, with the Platt Amendment provisions included in its appendix.[271] On May 22, 1903, the United States and Cuba agreed to a treaty which also included the Platt Amendment provisions.[272]

Cubans resisted adapting U.S. law on military occupation, i.e., the Amendment, into Cuban law.[273] For many Cubans, independence in the international system meant not having Cuban sovereignty mitigated by U.S. objectives. In this case, the United States interfered with sovereign power regarding Cuba's public debt; Cuban domestic affairs, with a "right of intervention;" Cuba's foreign relations power, with limitations on treaty making; and U.S. bases on Cuban soil. Basic notions of sover-

265. For a description of how these repeated intervention experiences were influential in the development of the norm of non-intervention in international law, for example, the Calvo, Drago, and other doctrines, see generally ANN VAN WYNEN THOMAS & AARON J. THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 10 (1956).

266. Platt Amendment—U.S. Appropriations, *supra* note 15, art. VII.

267. U.S.-Cuba Feb. 1903 Lease, *supra* note 10; U.S.-Cuba July 1903 Lease, *supra* note 198.

268. *See* Altunaga, *supra* note 34, at 925-27 (presenting how the Amendment conflicts with Cuba's independence and reviewing Cuba's stable politics to date).

269. *See* Platt Amendment—U.S. Appropriations, *supra* note 15, art VIII; *see also* Treaty Establishing Relations with Cuba, U.S-Cuba, May 22, 1903-July 2, 1904, 6 Bevans 1116, 1116-19 (abrogated June 9, 1934, by Treaty of May 29, 1934).

270. Cosme de la Torriente, *The Platt Amendment*, 8 FOREIGN AFFAIRS 364, 366 (1930).

271. *The Origin and Purpose of the Platt Amendment*, *supra* note 230, at 586.

272. *Id.*

273. Cuba was able to resist some of the American impositions in exchange for some of its independent objectives. For instance, the United States relinquished claims to the Isle of Pines, which had been left legally unsettled with respect to claims by the United States or Cuba in 1898 and 1901, in exchange for Cuba providing leases for coaling and naval stations. *See* James Brown Scott, *The Isle of Pines*, 17 AM. J. INT'L L. 102, 103 (1923).

eignty means that a state controls its own foreign relations and domestic affairs, without foreign military on domestic soil and without foreign powers legally permitted to intervene. Cuban concerns about full sovereignty stemmed from the violent struggle for independence for forty years before U.S. entry and by U.S. notions of cultural superiority to Cuba's mixed-race, non-Protestant population.

In charge of the military occupation of Cuba, U.S. Military Governor Leonard Wood had the difficult task of presenting the Amendment requirements to the Constitutional Assembly.[274] Delegates did not like the initial descriptions of the provisions. Wood reported that they were "emotional and hysterical" and felt the provisions were "reflections upon their ability to govern themselves, and what they regard as limitation on sovereignty."[275]

On April 3, Governor Wood explained to the Assembly the purpose of the Platt Amendment provisions.[276] Many delegates did not want to include the provisions on public debt, right of intervention, the Isle of Pines, or the bases in the Constitution.[277] These provisions limited Cuba's sovereignty and guaranteed these limitations would be law. Faced with this criticism, Secretary Root provided Governor Wood with the explanation that the intervention was not "intermeddling or interference" in Cuban government, but that it was to preserve Cuban independence, maintain an adequate government to protect "life, property and individual liberty," and to discharge obligations imposed on the United States by the Treaty of Paris.[278] Later that month, a group of Assembly delegates traveled to Washington and met with President Theodore Roosevelt, Secretary Root, members of the Cabinet, and Congress.[279] U.S. officials provided a narrow interpretation, stressing the limited nature of intervention as not meddling in Cuban affairs and protecting Cuba from European aggression.[280] On June 12, the Assembly voted seventeen to eleven to incorporate the Amendment as an appendix to the Constitution.[281] Viewed simply, with determinations in American, Cuban, and international law, the Amendment sanctioned the United States' occupation of bases on Cuban soil.

Historical analysis of Cuban politics shows the Amendment was an enormous destabilizing force for Cuban democracy.[282] It created a constant threat of U.S. intervention. Likewise it created an incentive for Cubans to see the United States as an overseer or guardian.[283] Domestic

274. *Id.*
275. *Id.* at 101 (detailing communications between Governor Wood and Secretary Root during February and March of 1901).
276. *See* de la Torriente, *supra* note 270, at 368.
277. *Id.*
278. *See id.* (quoting a telegram from Secretary Root to Wood).
279. *Id.* at 368.
280. *Id.* at 370.
281. *Id.* at 369.
282. PÉREZ, CUBA UNDER THE PLATT AMENDMENT, *supra* note 180, at 53.
283. *See* Woolsey, *supra* note 34, at 533.

decisions on Cuban debt and foreign relations were legally tied to the objectives of partisan U.S. politics in Congress, foreign policy lead by the U.S. President, and a foreign country representing different cultural attitudes on religion, "civilization," and expanding international economic interests.[284] Ultimately, the United States did intervene in Cuba with military occupation from 1906 to 1909,[285] with troops combating domestic insurrection in 1912 and 1917, troops stationed in Cuba during World War I, and a military presence seeking financial and political reforms during 1921 to 1923.[286] Guantánamo was used by U.S. troops for the 1906 occupation.[287]

The Amendment offered a legal basis in American, Cuban, and international law, for base occupation on Cuban soil. It directly led to the United States occupying the base at Guantánamo. But more conceptually, the Amendment reflected American legal objectives regarding sovereignty. The United States avoided sovereignty over Cuba, but Cuba's sovereignty was also mitigated. It applied key foreign relations objectives to the base's legal context. This sowed the doctrinal seed for the current legal anomaly. The Amendment reflected four objectives concerning legal approaches to U.S.-Cuban relations. These are that the United States avoids sovereign control, denies incidents of this control for foreign states, avoids constitutional limitations in this overseas authority, and protects strategic interests overseas. The Amendment provided the United States with non-sovereign control over Cuba. Cuba remained formally independent, but with its sovereignty checked. The Amendment mitigated Cuba's sovereignty by taking away key foreign relations powers, such as the power to enter into treaties and to allow another state to intervene militarily. The Amendment protected U.S. investments by providing the "right of intervention" and minimizing the risk of Cuban public debt default.

Incidentally, the Platt Amendment avoided the complex constitutional debates regarding U.S. territories such as Puerto Rico, where the United States retained sovereignty, but did not incorporate the territories into the Union. In other words, the Amendment provided control, but it did not result in the protracted constitutional law debates evident in the *Insular Cases*.

284. *Id.* at 531-32.

285. *See id.* This intervention was legally defended by referring to the "right to intervene" for "certain clear and well-defined purposes" in the Platt Amendment, similar provisions in the Cuban Constitution of 1901, and the 1903 bilateral treaty. *The Nature of the Government of Cuba*, 1 AM. J. INT'L L. 149, 149-50 (1907).

286. *See generally* Woolsey, *supra* note 34.

287. MURPHY, *supra* note 189, at ch. 4.

C. Agreements Frame Guantánamo's Legal Anomaly, Providing the United States Complete but Non-Sovereign Control

Focusing on non-sovereign, but nearly unlimited, control for the United States, three specific agreements detail the terms of occupancy for the U.S. naval station at Guantánamo.[288] These agreements still govern U.S. occupation.[289] Products of early U.S.-Cuba relations, they paint how jurisdiction and sovereignty are currently characterized on the base. As "agreed to" by the United States and Cuba, these agreements include two leases from 1903 and a treaty from 1934.[290] The February 1903 Lease was the United States' first venture into having an agreement on foreign territory to be used for U.S. military purposes.[291] Put generally, the 1903 Lease concerns two bases, the present one at Guantánamo and one that never came to fruition at Bahia Honda, and it describes both Cuba's "ultimate sovereignty" and the United States' "complete jurisdiction and control" over the base territory.[292] The agreement from July 1903 more specifically addresses annual lease payments of "two thousand dollars, in gold coin" by the United States and legal issues on the base regarding custom duties and obligations to return fugitives to Cuban or to base jurisdiction.[293] Reflecting the "good neighbor policy" towards Latin American states, the 1934 Treaty broadly abrogates the Reciprocal Treaty from 1903, containing the Platt Amendment's intervention, foreign relations, and public debt provisions.[294] Article III of the 1934 Treaty states that the two lease agreements from 1903 regarding Guantánamo "shall continue in the same form and on the same conditions."[295] It then effectively makes these lease terms indefinite by requiring one of two things to end or modify occupation: (1) mutual agreement or (2) the United States abandoning the base.[296]

These agreements carve out for the United States an anomalous legal zone at Guantánamo, which originally served foreign relations goals for the early twentieth century, but now serves overseas detention goals. The initial agreement states the United States has "complete jurisdiction and control" and Cuba has "ultimate sovereignty."[297] Importantly, Article III

288. U.S.-Cuba Feb. 1903 Lease, *supra* note 10; U.S.-Cuba July 1903 Lease, *supra* note 198; U.S.-Cuba 1934 Treaty, *supra* note 39.

289. Murphy provides a detailed history of lease negotiations and their relation to the Platt Amendment process. *See* Murphy, *supra* note 189, at ch. 3.

290. Cuba has contested the validity of the agreements and the 1934 Treaty, referring to the doctrine of "unequal treaties." *See* discussion Part III.B.

291. *See* Gary L. Maris, *International Law and Guantánamo*, 29 J. Pol. 261, 263 (1967).

292. U.S.-Cuba Feb. 1903 Lease, *supra* note 10, art. III. The United States quit pursuing a base at Bahia Honda in exchange for an increase in the size of Guantánamo's leased territory. *See* de la Torriente, *supra* note 270, at 371; Strauss, *supra* note 196, at 497–98.

293. Lease to the United States by Cuba of Land and Water for Naval or Coaling Stations in Guantánamo and Bahia Honda, U.S-Cuba, Oct. 2, 1903, T.S. No. 426.

294. *See* Woolsey, *supra* note 34, at 530-34.

295. U.S.-Cuba 1934 Treaty, *supra* note 39, art. III.

296. *Id.*

297. *Id.*

is drafted so that the United States "recognizes the continuance of the ultimate sovereignty" belonging to Cuba.[298] As such, the United States is acknowledging Cuba's ultimate sovereignty and that Cuba's claim existed then in 1903. Cuba is presented as having eventual sovereignty, and this claim to what is eventual presently exists. The Article is far more specific and speaks to present requirements regarding U.S. rights on the base. The Article changes to describe what Cuba acknowledges. For these, Cuba "consents," describing how it, as host, understands the rights belonging to the United States.[299] Article III changes its reference to U.S. rights and Cuban understanding with "on the other hand Cuba consents" that during U.S. occupation under this agreement.[300] Accordingly, what Cuba understands is the United States "shall exercise complete jurisdiction and control" over the base territory.[301] In sum, the United States "recognizes" Cuba's future sovereignty and that Cuba presently holds this claim to something eventual while Cuba "consents" to what the United States "shall exercise."[302]

Recent jurisprudence on base detention refers to both "jurisdiction" and "sovereignty," illustrating how contemporary legal reasoning addresses historically created "ambivalences in the rule of law."[303] These disputes decide whether U.S. jurisdiction permits or requires constitutional limitations on the base.[304] Similarly, these inquiries examine if sovereignty, belonging to Cuba and/or denied to the United States, precludes the base from limitations in constitutional or international law. These two doctrinal concepts, jurisdiction versus sovereignty, cloud detention litigation and reify the base's anomalous legal quality.

Taken in their entirety, the 1903 agreements are simple and do not address many issues. They definitely do not refer to the controversies regarding individual rights protections in American or international law, which have basically been at issue since the detentions began in 2002.

Importantly, the United States does not have a Status of Forces Agreement (SOFA) regarding Guantánamo, as it does with most overseas bases.[305] These agreements serve as references for courts to determine what obligations and rights protections—in American, international, or municipal law—apply on a base. With other overseas bases, the United States and a host-state positively articulate in a SOFA what law governs the actions of base employees, stationed military personnel, and host-

298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *See supra* Part II.B (referring to Fitzpatrick and Darian-Smith's "ambivalences in the rule of law").
304. *See supra* notes 12–13 (describing how *Rasul* and *Hamdan* determine if the Constitution applies on Guantánamo).
305. Neuman, *Closing the Guantánamo Loophole*, *supra* note 51, at 39; Raustiala *supra* note 35, at 2511–12 (describing the base at Guantánamo and until recently the bases in Iraq as the only U.S. bases on foreign territory without a SOFA).

state nationals.[306] A unique aspect of Guantánamo occupation is the absence of a SOFA.[307] The United States occupied the base with informal imperial control, when Cuba's consent or conditions were less important to the United States. Interestingly, until recently the only other U.S. overseas bases without a SOFA were in Iraq, which the United States occupied from March 2003 to June 2004.[308]

The lack of a SOFA with Cuba coupled with the lack of diplomatic relations between America and Cuba creates a complex situation wherein occupation and a legal anomaly persist. Specifically, many of the legal concerns of an overseas base (or of having a foreign base on domestic territory) are left unanswered by any agreement. In a different scenario, a SOFA may provide more guidance between lessor (Cuba) and lessee (United States) and on how jurisdiction is characterized between Cuban, American, and international law.

The February 1903 Lease first refers to the Platt Amendment provisions, in U.S. appropriations and the Cuban Constitution, requiring Cuba to "sell or lease lands necessary for coaling or naval stations."[309] It mentions that the base provides for the maintenance of Cuban independence, protection for Cubans, and the United States' own defense.[310] In Article I, it states that the duration of the lease is "for the time required for the purposes."[311] There is no further elaboration on this in either 1903 agreement. In fact, the duration of base occupation is not addressed until the 1934 Treaty.[312] The February 1903 agreement reports on the base's exact location and coordinates.[313] Article II refers to the use of water adjacent to the land.[314] The July agreement requires fences or enclosures to mark base boundaries.[315] It states the United States will not permit any "commercial, industrial, or other enterprise" on the base.[316] Lastly, Article V

306. The online security database Global Security describes SOFAs as defining "the legal status of U.S. personnel and property in the territory of another nation" and setting "forth rights and responsibilities" between the United States and the host state. The designations include criminal and civil jurisdiction, matters of diplomatic privileges. GlobeSecurity.org, Military Status of Force Agreement, http://www.globalsecurity.org/military/facility/sofa.htm (last visited January 30, 2009).

307. *See* Neuman, *Closing the Guantánamo Loophole*, *supra* note 51, at 39; Raustiala, *supra* note 35, at 2512.

308. Peter Graff, *Iraq, US Sign Pact on Troops Withdrawal Deadline*, REUTERS, Nov 17, 2008, http://www.reuters.com/article/vcCandidateFeed7/idUSLH492272. The SOFA was criticized in the United States and Iraq for issues similar to Guantánamo detention disputes, i.e., what is the jurisdiction of overseas U.S. bases and are military or civilian contractor activities governed by international or municipal law. *Cf.* Bruce Ackerman & Oona Hathaway, *An Agreement Without Agreement*, WASH. POST, Feb. 15, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021502539.html; Greg Bruno, *U.S. Security Agreements and Iraq*, COUNCIL OF FOREIGN RELATIONS: BACKGROUNDER, Dec. 23, 2008, http://www.cfr.org/publication/16448/.

309. U.S.-Cuba Feb. 1903 Lease, *supra* note 10, at preamble.

310. *Id.*

311. *Id.* art. I.

312. *See* U.S.-Cuba 1934 Treaty, *supra* note 39.

313. U.S.-Cuba Feb. 1903 Lease, *supra* note 10, art. I.

314. *Id.* art. II.

315. U.S.-Cuba July 1903 Lease, *supra* note 198, art. II.

316. *Id.* art. III.

regards vessels entering the bay as "subject exclusively to Cuban laws," except for vessels carrying materials for base use.[317] The 1934 Treaty makes base occupation effectively indefinite by requiring the United States either to stop occupation unilaterally or to agree to end the lease terms.[318]

The United States has continued to occupy the base pursuant to these three agreements.[319] However, U.S.-Cuba relations changed after the 1959 revolution, and with the intensification of American fear of states becoming socialist, especially for those states in close proximity to the United States, Cuba questioned the legality of the lease agreements.[320] After 1961, Cuban civilians and American military personnel ceased to move freely between the base and non-occupied Cuban soil.[321] Ultimately, Cuba stopped providing water treatment services after 1961, forcing the base to become self-sufficient.[322]

At times, academics have challenged the validity of the lease on international law grounds such as *rebus sic stantibus*.[323] This principle in international law permits an agreement to be terminated if there has been a fundamental change in circumstances which were essential to the agreement-consent or which radically transforms agreement obligations.[324] It is doubtful that changed circumstances may be sufficiently claimed to nullify the treaty. A court may easily see that the 1934 Treaty theoretically provides a method to change the lease terms and that changes since 1961 still permit the base to be used by the United States for defense purposes and Cuba to be remunerated. Creatively, Kal Raustiala argues that the lease text of "ultimate sovereignty" may be interpreted as providing Cuba with reversionary or residual sovereignty.[325] This, coupled with the "complete jurisdiction and control" and practical understanding of the authority exercised by the United States on the base, makes this territory "American territory as Puerto Rico."[326]

Despite academic or diplomatic claims that the 1903 Lease and 1934 Treaty are inconsistent with international law, states have traditionally used such leases to exercise indirect control over foreign territories.[327]

317. *Id.* arts. VI, V.
318. U.S.-Cuba 1934 Treaty, *supra* note 39, art. III.
319. *See* Raustiala, *supra* note 35, at 2501.
320. U.S.-Cuba 1934 Treaty, *supra* note 39, art. III.
321. *See* Raustiala, *supra* note 35, at 2537.
322. *See id.*
323. *See id.* at 2539.
324. Vienna Convention on the Law of Treaties, art. 64, May 23, 1964, 1155 U.N.T.S. 331, 347. For descriptions of these arguments see Raustiala, *supra* note 35, at 2539, and Montague, *supra* note 178, at 470–75 (examining the issue of the lease's legality in light of Cuba's public position on the base after the 1959 revolution).
325. Raustiala, *supra* note 35, at 2540–42.
326. *Id.* at 2542.
327. Leases and servitudes provide states with less rights than they would have with sovereign control, but they provide legal rights to exercise over territories belonging to other states. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 366 (4th ed. 1997). These rights exist *in rem*, meaning they are attached to the land versus to a juridical person. *Id.*; MACALISTER-SMITH, *supra* note 35, at 387.

After 1898, a consistent U.S. foreign policy goal for the Caribbean and Central American region was to exercise indirect control.[328] This was not only specific to Cuba, but generally exercised in the region.[329] Leases or servitudes provided the United States a legal instrument to control the strategically valuable bay at Guantánamo. Relevant to Guantánamo's history and current legal anomaly, leases provided two significant benefits for lessee-states. First, they conferred a way to control territory without annexing it. Second, sovereignty would remain in the lessor/host-state. This restriction for the lessee made these agreements a servitude, because the restriction was tied to the territory.[330] Leases developed in international law after prior common practices of attaining bases by simple occupation and flying a national flag.[331]

Lease agreements commonly laid out two important sets of rights. First, for the lessee, there was a grant of authority to occupy and use the delineated area.[332] Second, there was a description of jurisdictional rights and duties between the host/lessor and lessee states.[333] Within the second set of stipulations, the agreement would describe how the host/lessor's sovereignty was restricted.[334] This was invariably determined by the specific relations and contexts of the two states at that period in time.[335] This includes history, relative political power, and domestic politics.[336]

IV. GUANTÁNAMO'S ANOMALOUS RECENT PAST: QUESTIONS INSPIRED FROM THE WRIT'S PATH OVERSEAS

This Part describes how in *Boumediene* the Supreme Court addressed Guantánamo's legal anomaly and how objectives historically shaping this anomaly framed the Court's reasoning. These two developments, the legal anomaly and the objectives shaping it, inspire this Article's post-colonial questions regarding U.S. authority on Guantánamo.[337] Similarly, as

328. *See* C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the Gatt and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 288-91 (1999).

329. *See generally* HEALY, *supra* note 107 (describing how the goal of indirect control over Cuba was pragmatically reached by the U.S.); *see also supra* note 162 (detailing myriad methods of indirect and/or non-sovereign control used by the United States in the region).

330. SHAW, *supra* note 327, at 367.

331. MACALISTER-SMITH, *supra* note 35, at 383.

332. *Id.*

333. *Id.*

334. *Id. See also* George Grafton Wilson, *Leased Territories*, 34 AM. J. INT'L L. 703-04 (1940) (describing the basic point that in leases "sovereignty was too important a matter to pass thus with a lease," giving U.S. examples of leases in Cuba, Panama, and Nicaragua and leases of other states in Asia and Africa).

335. MACALISTER-SMITH, *supra* note 35, at 383-84.

336. *Id.* at 384.

337. This Article provides a researched-suggestion on how post-colonial legal themes influence base detention litigation. This suggestion is based on finding similarities in base occupation and base detention and then relating this with the *Boumediene* holding that the constitutional writ of habeas corpus does apply on the base. As such, *Boumediene* serves

base detention is programmed to end by January 2010, its becomes important to identify how anomaly, a product of history and a normative force for checks on detention authority, may result in similar extraterritorial detention programs.

With an initial doctrinal glance, *Boumediene* addressed whether base detainees benefit from the writ of habeas corpus in the Constitution's Suspension Clause, whether the Military Commissions Act of 2006 (MCA) and Detainee Treatment Act of 2005 (DTA) legally suspend the writ, and if the MCA and DTA offer an adequate substitute for habeas proceedings.[338] The Court found that the constitutional writ of habeas corpus did apply to the base, the MCA and DTA unconstitutionally suspended the writ, and the DTA and MCA provided an inadequate substitute for habeas proceedings.[339] Correlated to the law supporting base occupation, these findings suggest that American law continues to shape Guantánamo's legal anomaly with four objectives from U.S.-Cuba foreign relations; concerning American and Cuban sovereignty, extraterritorial constitutional limits, and strategic interests.

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as one example, regarding the writ, to spur further scholarly examination of base detention. The main inquiry concerns: what legal norms extend (or not) to the base at Guantánamo, that is, a non-sovereign territory under U.S. control. This inquiry does not include various relevant Guantánamo themes in U.S. and international law. For examples of diverse analysis of what law applies on the base, see Neuman, *Anomalous Zones*, *supra* note 11; Neuman, *Closing the Guantánamo Loophole*, *supra* note 51; Neuman *Extraterritorial Rights, supra* note 21; Raustiala, *supra* note 172; Raustiala, *supra* note 35, at 2501. *See also* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNT'L L. 263 (2004) (describing how international law doctrine applies to base detention); Fiona De Londras, *Guantánamo Bay: Towards Legality?*, 71 MOD. L. REV. 36 (2008) (arguing for an extraterritorial application of the Constitution to preserve the rule of law); David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001 (2008) (explaining how detention litigation fits within separations of powers debates between the three branches of government); Kristine A. Huskey, *Standards and Procedures for Classifying "Enemy Combatants": Congress, What Have You Done?*, 43 TEX. INT'L L.J. 41 (2007) (detailing the procedural shortfalls in CSRT proceedings and Administrative Review Boards for base detainees); Neal K. Katyal, *Executive and Judicial Overreaction in Guantánamo Cases*, 2004 CATO SUP. CT. REV. 49 (presenting the problems with finding aliens outside the U.S. as having access to the writ of habeas corpus); Kermit Roosevelt III, *Application of the Constitution to Guantánamo Bay*, 153 U. PA. L. REV. 2017 (2005) (suggesting a conflict of laws approach to determine if the Constitution applies on the base); Joseph C. Sweeney, *Guantánamo and U.S. Law*, 30 FORDHAM INT'L L.J. 673 (2007) (presenting how U.S. law has treated the base from 1898 to the present); Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006) (examining how *Rasul's* statutory holding suggests how to extraterritorially apply the Constitution, especially Due Process rights, to the base). For examinations of how Guantánamo detention reflects changes in legal reasoning in domestic national security and criminal procedure contexts, see generally CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD (M. Katherine B. Darmer et al. eds., 2004), and M. Katherine B. Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631-654 (2007).

338. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2234-38 (2008) (referring to the Suspension Clause in the Constitution, art. I, § 9, cl. 2; Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600 (to be codified at 28 U.S.C. § 2241(e)); Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

339. *See id.*

Boumediene made significant legal determinations regarding sovereignty on the base territory. Doing this, the Court pointed to how base authority is an outgrowth of legal instruments derived from an informal imperial influence over Cuba.[340] Since 2002, Guantánamo detention litigation has confronted these legal issues regarding jurisdiction and sovereignty on the base.[341] These issues stem from legal determinations made when Cuba was a U.S. protectorate and when U.S. bases were established overseas.[342]

To explain how Guantánamo's legal anomalous status heavily influenced *Boumediene*'s reasoning, this section makes five arguments. The first argument regards how the decision correlates the base's anomalous status with legal history regarding the writ of habeas corpus, while the next four arguments concern the four legal objectives used in this Article to describe U.S. influence overseas. First, because of the base's legally anomalous status, the Court was reluctant to find legal history and common law regarding the writ dispositive when determining whether these rights apply (or not) on the base.[343] The Court found that the abundant legal history examples, regarding the writ in overseas and non-sovereign territories, to be dissimilar, and only informative, when examining detentions on Guantánamo.[344] Second, the Court tempered the objective of avoiding U.S. sovereignty overseas by finding that the U.S. has de facto sovereignty on Guantánamo.[345] The United States, though, lacks de jure sovereignty.[346] This finding is inconsistent with political determinations, in the MCA and DTA, that Guantánamo is not part of the United States.[347] Third, the Court did not find that Cuban sovereignty over the base bars extending rights protections in constitutional or international law.[348] Cuba's "ultimate sovereignty" was found to be nearly irrelevant and lacking "practical influence" to deciding if the Constitution has extraterritorial effect there.[349] Fourth, the Court explained that limited constitutional rights protections apply to the base, referring to the *Insular Cases* and their fundamental rights distinctions.[350] While this promises to check political authority abroad, it still avoids full constitutional protections when the United States has "complete jurisdiction and control" over-

340. *See e.g.*, *id.* at 2252, 2254 (referring to the U.S.-Cuba Feb. 1903 Lease); *supra* note 10; U.S. Cuba 1934 Treaty, *supra* note 39; SPARROW, *supra* note 68.

341. *See* James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and the International Law*, 67 ALB. L. REV. 335, 347 (2003).

342. *See supra* Part III.A-C.

343. *See Boumediene*, 128 S. Ct. at 2249.

344. *Id.*

345. *See id.* 2252-53 (explaining the United States does not "maintain[ ] sovereignty in the legal and technical sense" but "by virtue of its complete jurisdiction and control . . . maintains de facto sovereignty") (citing Rasul v. Bush, 542 U.S. 466, 480, 487 (Kennedy, J., concurring)).

346. *See id.* at 2253.

347. *See id.* at 2252 (citing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(g), 119 Stat. 2739, 2743).

348. *See infra* Part IV.C.

349. *See id.*

350. *See id.*

seas.[351] Fifth, the Court identified important overseas interests to justify its findings.[352]

Majority and dissenting opinions argue these points, while their justifications are normatively different.[353] The majority opinion referred to detention on Guantánamo as lasting too long, sometimes six years with no judicial review.[354] The dissenting opinions explain how *Boumediene*'s holdings threaten national security and separation of powers.[355]

These preliminary arguments, regarding one Supreme Court decision, serve as post-colonial reference points for examining extraterritorial legal anomaly beyond the writ of habeas corpus or beyond Guantánamo. This five-point analysis of *Boumediene* suggests how to pose post-colonial legal questions concerning overseas authority. Sample questions include: how does current jurisprudence incorporate legal history; how does this jurisprudence characterize the sovereignty of the United States and foreign states; does the Constitution limit U.S. authority overseas; and what foreign relations objectives justify legal determinations supporting this authority? Illustrating how the law evades individual rights protections by manipulating sovereignty determinations and severing the Constitution, these questions contextualize legal issues for future overseas detention.[356] *Boumediene*'s holding is limited to the Suspension Clause and the inadequate substitutes for habeas proceedings in the MCA and DTA.[357] When these findings are contextualized with foreign relations history and the law supporting overseas authority, a post-colonial understanding of base authority begins to emerge. In this light, these questions importantly relate current legal contests with informal imperial influence and Cuba's subaltern position. Accordingly, *Boumediene* provides an example of how post-colonial research methodologies describe the United States' overseas influence. With this, significant connections begin to appear between legal mechanisms used for overseas detention, the denial of individual rights protections, and foreign relations authority. Studying these three issues together illuminates an important context, which may be lost by solely examining legal issues raised in litigation. As this post-colonial focus suggests, doctrinal narratives in constitutional law and sovereignty determinations result in the law endorsing detention, rights exclusion, and plenary authority over foreign relations.

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351. U.S.-Cuba Feb. 1903 Lease, *supra* note 10. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2257-59 (distinguishing formal or territorial sovereignty from its holding and arguing against the government's position that the political branches have "the power to switch the Constitution on or off at will").

352. *See Boumediene*, 128 S. Ct. at 2275.

353. *See generally id.* at 2229.

354. *See id.* at 2262 (describing the length of detention with no real judicial review).

355. *See id.* at 2294-95 (Scalia, J., dissenting).

356. *See* Neuman, *The Extraterritorial Constitution*, *supra* note 21 (describing how this decision unclearly settles detention issues regarding non-citizens not in U.S. custody or held in foreign locations other than Guantánamo).

357. *See Boumediene*, 128 S. Ct. at 2240, 2271-74.

It is important to highlight that on the *Boumediene* decision, this Article offers a limited perspective on what law governs detention on Guantánamo. As briefly explained below, Guantánamo detention litigation represents a complicated and multi-issue set of legal problems, far larger than what *Boumediene*'s holdings and international agreements in 1903 and 1934 clarify.[358] This Article examines how *Boumediene* provides limited clarification on what norms, in this case constitutional habeas corpus rights, apply on base territory. Contextualized with foreign relations history, this limited clarification points to how the law endorses detention and evades rights protections. Other issues concerning detainee rights and political authority, in alienage, constitutional, international, international human rights, and international humanitarian law (also known as law of war) surely influence current detention policy and litigation. Many issues have not been examined by the courts or executive agency tribunals.[359] Similarly, a complex, limited, and evolving set of procedures have contested military authority, slowly affirming what legal norms apply to the base.[360] These procedures have slowly developed since detention began in 2002, with varied input from the three branches of government.[361] They include CSRTs, the United States Court of Appeals for the District of Columbia reviewing appeals of CSRT determinations, military commissions (most recently), and district court habeas proceedings (after *Boumediene*).[362] These procedures have had the potential to further determine which sources of law (American, international, plural, and most likely not Cuban) and which norms apply to base detention.[363]

With these two points in mind, this Article offers the example of how the base's historic legal anomaly shapes current lawmaking on constitutional habeas corpus rights on the base. Perhaps in another security context, authorities may seek to detain persons overseas without clearly explaining what rights they have. Accordingly, these points elaborate how detention tries to escape individual rights checks. This Article sug-

358. Recent books on Guantánamo from attorneys representing detainees and the government present a series of political and administrative issues far more complex than what recent litigation elucidates, suggesting that the law at play on the base is unsettled. *See generally* KYNDRA MILLER ROTUNDA, HONOR BOUND: INSIDE THE GUANTÁNAMO TRIALS (2008) (offering a firsthand description of experiences as a legal advisor to the base commander, liaison to the International Committee of the Red Cross, member of the Criminal Investigations Task Force, and Office of the Chief Prosecutor to present how soldiers in these legal and military contexts are "honor bound to protect freedom"); JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006) (presenting legal contests about detention as testing the rule of law and unchecked executive authority); STEVEN T. WAX, KAFKA COMES TO AMERICA: FIGHTING FOR JUSTICE IN THE WAR ON TERROR—A PUBLIC DEFENDER'S INSIDE ACCOUNT (2008) (presenting the story of two persons detained by the United States, one a foreign national detained in Guantánamo and one U.S. citizen, to suggest how fragile individual rights are).

359. *See supra* note 31 (indicating how many issues regarding Guantánamo detentions, military commissions, and habeas proceedings remain unclear)

360. *See* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus and the Geneva Convention*, 101 AM. J. INT'L 322, 323-27 (2007).

361. *See id.*

362. *See id.*; *see generally* Boumediene v. Bush, 128 S. Ct. 2229 (2008).

363. *See* Bradley, *supra* note 360.

gests how legal instruments, historically used to extend informal imperial influence, currently help endorse base detention. This one scholarly example has the goal of inspiring post-colonial inquiry regarding legal determinations in future overseas detention disputes.

A. GUANTÁNAMO'S ANOMALY MAKES THE WRIT'S HISTORY INAPPLICABLE TO DETENTION ISSUES

The Court's examination of the writ of habeas corpus's legal history provides a clear example of how Guantánamo's legally anomalous status clouds detention litigation.[364] Detainees and the Government offer many examples from English common law history, explaining how the writ did or did not apply to overseas territories.[365] Both sides use these historical examples to argue that when the Constitution was written in 1789, its framers intended, or not, to apply the writ overseas.[366] The Court found these examples inconclusive because they do not comment on Guantánamo's particular legal issues, primarily that habeas is denied for lack of jurisdiction on a territory where the United States has total military and civil control.[367] Importantly, the Court found a prisoner's alienage in common law was not a "categorical bar" to relief from the writ.[368]

This inconsistency between the writ's history and Guantánamo's legal status highlights the influence this legal anomaly has had on detention litigation. At play are how a geographic territory fits within a central political authority's sovereignty and jurisdiction.[369] Legal history argumentation shows the writ applying or not applying to locations such as Scotland, colonial India, or the Isle of Hanover.[370] This argumentation

364. Seeking guidance from "founding-era authorities," the Court presented this legal question as whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection. *See Boumediene*, 128 S. Ct. at 2248.

365. Petitioner-detainees argued that the writ followed the King's officers and the Respondent-government argued that the writ only extended to territories where the Crown was sovereign. *See id.* at 2248.

366. This argument follows the standard created in *INS v. St. Cyr* that "at the absolute minimum," the Constitution protects the "writ as it existed when the Constitution was drafted and ratified," 533 U.S. 289, 300-301 (2001). But the Court also noted that it has been "careful not to foreclose the possibility" that these protections have expanded with post-1789 developments. *See Boumediene*, 128 S. Ct. at 2248.

367. The Court also referred to the denial of the writ because a prisoner is deemed an enemy combatant under Department of Defense standards. *Id.*

368. *Id.* at 2248.

369. The preliminary suggestions raised by this Article on the territorial location of Guantánamo and legal norms will be developed in future projects. For this, "law and geography" scholars have been extremely influential. For examples of this scholarship see Keith Aoki, *Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000) (presenting the value political geography provides in critical examination of race and law); Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. 421, 422 (2007) (presenting the underappreciated value of geography, and describing how "time, space, place, and scale" influence policy and lawmaking).

370. In *Boumediene*, the detainees argued that their detention was analogous to two territories, the Channel Islands and colonial India, described as "exempt jurisdictions" to which the writ *did* run. *Boumediene*, 128 S. Ct. at 2249. The Court noted that although

stresses the writ's application (or not) and then refers to sovereignty and jurisdiction as similar (or not) to the Guantánamo example.[371]

Ultimately, the Court found these historic examples inconclusive and not dispositive because the situation at Guantánamo is quite different, with habeas being denied due to a lack of jurisdiction on a territory under U.S. control.[372] While these examples are different, more importantly, Guantánamo was legally crafted, in the Platt Amendment Process and in a 1934 treaty, to specifically create uncertainty regarding Cuban sovereignty and American sovereignty.[373] As stated by policy makers of the time the motivation for creating this anomaly was to avoid formal sovereignty and constitutional checks overseas.[374] Seeking overseas influence, these motivations, in a sense, are U.S. legal responses to formal colonialism.[375] Litigants provided common law examples from periods in history much earlier than when international law positively endorsed flexible control over periphery states, e.g., the United States and Cuba after 1898.[376]

In reality it is not that the common law history is incomplete, but that during that time in history leased territories or informal imperial rule were not common or did not exist.[377] Overlooking this legal history specific to overseas bases and instead focusing on eighteenth century practices results in the Court painting Guantánamo as having a "unique status."[378] Non-sovereign base territories are not unique. Protectorates relationships or occupied territories producing overseas were also not unique. Guantánamo is an outgrowth of U.S.-Cuba relations during the

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these jurisdictions were "exempt," they were under England's colonial control. *Id.* This makes them quite different from Guantánamo where the U.S. lacks formal sovereignty. *Id.* Next, the Court referred to the government's examples of Scotland and Hanover, not included as part of England but where the English Crown controlled. *Id.* It highlighted that the writ was not applied there because of "prudential concerns," not because of "formal legal constructs" where sovereignty was determined. *Id.* at 2250. The Court noted that "in the end a categorical or formal conception of sovereignty" does not explain why the writ ran to Ireland but not Scotland. *Id.* at 2251. This analysis of prudential concerns, that is, conflicts with another court or practical inability to enforce a court's ruling, leads to two important findings later in the opinion. First, the Court distinguished case law denying the writ to enemy alien prisoners held on non-sovereign territory. *Id.* at 2259-60 (distinguishing Johnson v. Eisentrager, 339 U.S. 763 (1950)). Second, this permitted the Court to discount the present practical significance of Cuba's sovereignty. *Id.* at 2252.

371. *Id.* at 2249.

372. *Id.* (stating "evidence as to the geographic scope of the writ at common law informative, but . . . not dispositive").

373. *See supra* discussion Part III.

374. *Id.*

375. *Id.*

376. *See Boumediene*, 128 S. Ct. at 2251.

377. *See id.* (doubting assumptions held by both sides that the "historical record is complete and that the common law, if properly understood, yields a definite answer"). The Court was highly hesitant to draw too much, if any, precedential authority from this incomplete history. It then noted similar analysis from *Brown v. Board of Education* and *Reid v. Covert* that constitutional findings should not be limited to inconclusive or episodic history. *Id.*; *see also supra* Part III.C (discussing the use of historic use of leases and servitudes in international law).

378. *See Boumediene*, 128 S. Ct. at 2251.

early twentieth century. More germane to what law may currently apply on the base, Guantánamo's and Cuba's legal history includes significant deviations from the concept of formal sovereignty. By the end of the nineteenth century, treaties and international agreements between states devised legal territories like Guantánamo, where one power clearly affirms jurisdiction and control and the other power retains ultimate or titular sovereignty.[379] In sum, in *Boumediene*, the Court's finding that the writ's legal history (concerning pre-1789 situations) is inconclusive suggests Guantánamo's legally anomalous status (created in 1903) shapes how American courts tried to recently resolve detention disputes.

B. "De Facto Sovereignty" Tempers U.S. Objectives of Avoiding Sovereignty

In *Boumediene*, the Court found that the United States has de facto sovereignty over base territory, which was relevant to finding the Constitution's Suspension Clause applies to detention on the base.[380] It acknowledged and did not try to contradict U.S. policy of avoiding sovereignty over Guantánamo.[381] Importantly, it found that the United States lacks de jure sovereignty over the territory.[382] Focusing less on formal sovereignty concerns, the Court made a note of the United States' policy of avoiding sovereignty over the base.[383] It made three points confirming this historic policy.[384] The Court observed that the base is not formally part of the United States, referring to the DTA provisions stating the base is not within the United States;[385] that Cuba retains "ultimate sovereignty" referring to the February 1903 lease[386] and *Rasul v. Bush*;[387] and that under the 1934 Treaty, Cuba "effectively has no rights as a sovereign" until the United States and Cuba agree to modify the 1903 Lease.[388]

To find de facto sovereignty, the Court noted it is not "improper for [it] to inquire into the objective degree of control the Nation asserts over foreign territory."[389] It stated a territory may be "under the de jure sovereignty of one nation, while under the plenary control or practical sover-

379. *See supra* Part III.C; Neuman, *Closing the Guantánamo Loophole*, *supra* note 51.
380. *Boumediene*, 128 S. Ct. at 2252 (stating that the Court "do[es] not question the Government's position that Cuba, not the United States, maintains sovereignty in the legal and technical sense of the term"); *id.* at 2251 (indicating that when the Court finds that sovereignty is a political question it refers to sovereignty in the "narrow, legal sense of the term, meaning a claim of right" and referring to this definition in Restatement (Third) of Foreign Relations § 206, comment b); *see also supra* Part III.C.
381. *See Boumediene*, 128 S. Ct. at 2252.
382. *Id.* at 2253.
383. *Id.* at 2252.
384. *Id.* at 2251-52.
385. *Id.* at 2252 (referring to the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(g), 119 Stat. 2739, 2743).
386. *Id.* (referring to U.S.-Cuba February 1903 Lease, *supra* note 10, art. III).
387. *Id.* (referring to *Rasul v. Bush*, 542 U.S. 466, 471 (2004)).
388. *See id.* (referring to U.S.-Cuba 1934 Treaty, *supra* note 39, art. III).
389. *See id.*

eignty of another."[390] Historic examples of such territory include Guantánamo, which was "seized during" the Spanish-American War, U.S. control of the port of Tampico during the Mexican-American War, and the United Kingdom's control of the Bechuanaland Protectorate in South Africa.[391]

These examples serve as a way to conceptually separate formal or de jure sovereignty from control (actual or practical) a state may have over a territory. This actual control may exist even though the state lacks actual sovereignty. This becomes highly significant to the dispute at hand for two reasons. First, as expressed in policies specific to Guantánamo and Cuba (historically), the United States does not have sovereignty over the base territory.[392] As such, in making these distinctions, the Court is seeking to distance itself from formal interpretations of sovereignty to find that a check on political power exists. Second, by focusing on practical control and not formal sovereignty as key reference points, the Court is able to relate U.S. control over the base with the prudential concerns relevant to the writ of habeas corpus. As described previously, the Court presents the common law history of the writ as emphasizing prudential concerns or effective control to determine when to extend the writ overseas or not. These practical concerns significantly make sense given the writ's long history. They are particularly relevant to territory such as Guantánamo, which is undoubtedly under American control, but not formally within its sovereignty.

Focusing on practical control, the Court does not hold that the issue of whether habeas applies on Guantánamo is a political question.[393] It finds to do so would be finding that de jure sovereignty is the "touchstone of habeas jurisdiction."[394] Instead, it finds that prudential concerns are more central to determining if habeas applies or not. The United States maintains "obvious and uncontested" de facto sovereignty over the base by virtue of its "complete jurisdiction and control."[395] In sum, highlighting prudential concerns and finding the United States has de facto sovereignty over the base, *Boumediene,* in a limited fashion, steps away from the objective of avoiding sovereignty overseas.

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390. *See id.* at 2252.

391. *Id.* (referring to Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850), and King v. Earl of Crewe, [1910] 2 K.B. 576, 603-604 (C.A.) (opinion of Williams, L.J.)).

392. *See supra* Part III.C; *Boumediene*, 128 S. Ct. at 2251-52.

393. *Boumediene*, 128 S. Ct. at 2235, 2253. *See also* Colangelo, *supra* note 21, at 3 (describing how the Court's use of de facto, de jure, and practical sovereignty classifications implies important separations of powers and judicial review determinations).

394. *Boumediene*, 128 S. Ct. at 2235, 2253. *See also* Colangelo, *supra* note 21, at 3 (describing how the Court's use of de facto, de jure, and practical sovereignty classifications implies important separations of powers and judicial review determinations).

395. *Id.* at 2252-53 (using the terms "complete jurisdiction and control" from the U.S.-Cuba Feb. 1903 lease, *supra* note 10).

C. Formal Sovereignty (Belonging to Cuba) Is Irrelevant to "Practical" Considerations Governing the Base

In *Boumediene*, the Court discounted the importance of Cuba's "ultimate sovereignty"[396] over Guantánamo by emphasizing "practical considerations" to determine when base authority is subject to constitutional checks such as the writ of habeas corpus.[397] This is a significant judicial step away from the U.S. objective of denying incidents of sovereignty for foreign states. Here, the Court does not avoid checking U.S. authority on the base because Cuba, another state, has formal sovereignty over the territory.[398] Instead, it regards practical or prudential concerns as significant to determining when habeas jurisdiction may be applied abroad.[399] Consequently, it does not regard Cuba's formal sovereignty as excluding the application of checks in American constitutional law. This effectively minimizes the normative significance of the U.S. objective of denying incidents of sovereignty for foreign states, when exercising extraterritorial authority.

Lease agreements from 1903 and a treaty from 1934 limit Cuba's sovereignty over base territory.[400] They state or affirm that the United States has "complete jurisdiction and control" over the base and that Cuba has "ultimate sovereignty."[401] The agreements cover a small range of issues, such as tariffs, fugitives from justice, and vessel use on the bay, but they do not elaborate on what Cuban sovereignty or American "jurisdiction and control" entail.[402] This ambiguity becomes more acute with recent concerns about detention and potential limits to military authority on the base. A basic reading of these agreements and the history of U.S.-Cuba relations of the period indicate Cuba was denied incidents of sovereignty.[403]

This denial provided a space for a U.S. policy to detain persons far from checks in domestic law,[404] clearly within U.S. control and jurisdiction, and theoretically within Cuba's sovereignty. Focusing on just formal or de jure sovereignty, it can be argued that constitutional checks do not

396. *Id.* at 2252.

397. *Id.* at 2301.

398. *Id.* at 2251-52. The four justices in the dissenting opinions essentially argue that Cuba's sovereignty over the base bars applying checks in U.S. constitutional law. *Id.* at 2279-92 (Roberts, C.J., dissenting); *id.* at 2293-2307 (Scalia, J., dissenting).

399. *See* Colangelo, *supra* note 21, at 3-4.

400. *See supra* Part III.C.

401. U.S.-Cuba Feb. 1903 Lease, *supra* note 10.

402. *See id.*

403. *See supra* Part III.

404. *See Boumediene*, 128 S. Ct. at 2258-59 (describing the Government's argument that Cuba's disclaiming sovereignty and granting the U.S. "total control" make it possible for "the political branches to govern without legal constraint"); *see also* Yoo, *supra* note 199, at 142-43 (explaining how court decisions on refugees detained on the base suggested that habeas jurisdiction would not extend to Guantánamo).

apply to the base because the territory is not within U.S. sovereignty.[405] Cuba has sovereignty and the United States is just leasing the territory. To apply checks in domestic American law would be to interfere with Cuban sovereignty.[406]

In *Boumediene*, the majority of the Court stepped away from this perspective to examine the prudential concerns, which weigh into determining if the writ can be applied or not. This effectively discounts the significance of Cuban sovereignty to detention concerns. The Court explained that the United States has exercised "plenary control" over the territory since 1898,[407] without any foreseeable change or limitation, and Cuba exercises no influence over the territory.[408]

The Government's formal perspectives on sovereignty and constraints to political authority are argued to be inconsistent with the Constitution's separation of powers.[409] The Court described a formal reading of sovereignty in this case as "a striking anomaly" in a three-branch form of government, where Congress and the President, and not the Court, say "what the law is."[410] The Court highlighted that Congress and the President have the power "to acquire, dispose of, and govern territory," but they do not have the power to "decide when and where" the Constitution's terms apply.[411]

Next, the Court directly addressed this legal anomaly (between Cuban sovereignty and U.S. control) by emphasizing the significance of prudential concerns to applying the writ on the base.[412] This is done in two respects: (1) the history of writ applied overseas in the common law, and (2) American case law regarding the writ extended to overseas enemy combatants. As detailed earlier, Guantánamo's legally anomalous status does not fit neatly within the legal history of the writ. To resolve this, the Court emphasized how prudential or practical concerns determined when

405. *See Boumediene*, 128 S. Ct. at 2258-59 (The government argued that "the Constitution had no effect [on the base], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term.").

406. *See id.* at 2298-99, 2299 n.3 (Scalia, J. dissenting) (presenting the *Eisentrager* holding that the Constitution does not protect habeas to aliens held by the U.S. "in areas over which our Government is not sovereign" and citing Johnson v. Eisentrager, 339 U.S. 763 (1950)), *see also* Rasul v. Bush, 542 U.S. 466, 500-01 (2004) (Scalia, J. dissenting) (emphasizing that Cuba's ultimate sovereignty precludes U.S. sovereignty on the base).

407. *See Boumediene*, 128 S. Ct. at 2258.

408. *See id.* at 2252, 2261 (explaining that "no Cuban court has jurisdiction" over U.S. military on the base; there is no indication of friction from Cuba if writ jurisdiction were applied on the base, and "for all practical purposes, the United States is answerable to no other sovereign for its acts on the base").

409. *See id.* at 2258.

410. *See id.* at 2259 (citing Marbury v. Madison, 1 Cranch, 137, 177 (1803)).

411. *See id.*

412. *Id.* at 2255-56 (discussing whether enforcing the writ would be "impracticable and anomalous" (quoting Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J. concurring in result), and United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring))).

the writ did or did not apply overseas.[413] This was done instead of a formal or doctrinal analysis of sovereignty determining when the writ applied or not.[414] Prudential concerns include avoiding conflicting judgments by two courts or the practical inability, because of distance, to enforce a judgment.[415] Applied to Guantánamo, these concerns do not exist. First, there is no reason for a federal court order to be disobeyed on the base.[416] Second, no Cuban court has jurisdiction over these issues.[417] Third, no laws, other than those of the United States, apply to the base.[418]

Next, to emphasize these practical concerns in American case law regarding overseas authority and constitutional protections, the Court applied analysis from *Reid v. Covert*.[419] In this 1956 case, answering whether jury rights could be evoked by spouses of American military personnel living in England and Japan, the Court emphasized practical concerns.[420] The test developed from this case was whether a court enforcing a constitutional provision would be "impracticable and anomalous."[421] Likewise, Justice Kennedy applied this test in his concurring opinion, needed for a majority in judgment, in *United States v. Verdugo-Urquidez*,[422] concerning extraterritorial examinations of the Fourth Amendment.

Stressing that "practical considerations" determine when habeas rights apply overseas, the Court distinguished *Johnson v. Eisentrager*, precedent viewed by the Government and the dissenting opinions as prohibiting the writ's application in non-sovereign territory.[423] In *Eisentrager*, the Court determined that enemy aliens detained in Germany had no access to the writ because the detainees were never within "territory over which the United States is sovereign" and their capture, punishment, and the location of their offences were "all beyond the territorial jurisdiction" of any U.S. court.[424] The respondent Government used this language from *Eisentrager* to argue for a "formalistic sovereignty-based test" to decide

413. *Id.* at 2249-51 (describing how "prudential concerns" limited applying the writ in historic Scotland or Hanover versus a "categorical or formal" sovereignty conception explaining this).

414. *Id.* at 2251 (explaining that prudential concerns evident in Scotland or Hanover do not exist on Guantánamo).

415. *Id.* at 2250 (referring to concerns of "comity and orderly administration" in habeas jurisdiction from Munaf v. Geren, 128 S. Ct. 2207, 2220 (2008)).

416. *Id.* at 2251.

417. *Id.*

418. *Id.*

419. *Id.* at 2255-56.

420. *See id.* at 2255 (describing how *Reid* emphasized the "specific circumstances of each particular case" and how it rejected a "rigid and abstract rule" when determining where constitutional protections extend).

421. *Id.* at 2255-56 (citing *Reid*, 354 U.S. at 74-75 (Harlan, J. concurring in the result)).

422. *Id.* (citing United States v. Verdugo Urguidez, 494 U.S. 259, 277-78 (1990)).

423. *Id.* at 2257 (citing Johnson v. Eisentrager, 399 U.S. 763 (1950)).

424. *Eisentrager*, 339 U.S. at 778; *see also* Posner, *supra* note 21, at 4 (emphasizing that the Court overlooks the limited constitutional rights noncitizens have especially outside of the United States).

where the writ extends.[425] The *Boumediene* Court rejected this analysis, emphasizing three factors in the *Eisentrager* decision. First, *Eisentrager's* relevance is not limited to just the sovereignty-based language, and Part II of the opinion stresses "practical considerations" to explain its holding.[426] Second, *Eisentrager* regards different sovereignty circumstances than Guantánamo, making it inapplicable as a precedent for a formal-sovereignty test. Under the facts in *Eisentrager*, the United States lacked both de jure sovereignty and plenary control over Landsberg Prison in Germany.[427] On Guantánamo, the United States exercises de facto sovereignty and has "complete jurisdiction and control," as affirmed by a series of U.S-Cuba agreements.[428] Third, such a rigid sovereignty-based test would require "a complete repudiation of the *Insular Cases*' (and later *Reid*'s) functional approach" to legal questions about the extraterritorial reach of the Constitution.[429] The Court highlighted that the *Eisentrager* decision barely mentioned concerns over territorial sovereignty, suggesting the Government overstated the requirement of formal sovereignty for the writ.[430] Instead it stressed that prudential concerns for the military, such as shipping space, guard personnel, and "billeting and rations" motivate *Eisentrager*'s reasoning.[431] The Court explained that these concerns require balancing "the constraints of military occupation with constitutional necessities."[432]

Next, building on factors the *Eisentrager* Court found relevant, and previously recognized in *Rasul*, the Court offered a six-point framework for "determining the reach of the Suspension Clause."[433] The factors are as follows: (1) the detainee's status is as an "enemy alien"; (2) whether the detainee has been in or resided in the U.S.; (3) whether the detainee was captured outside U.S. territory and held in military custody as a prisoner of war; (4) whether the detainee was tried and convicted by a Military Commission outside U.S. territory; (5) whether the detainee committed offenses outside the United States against the laws of war; and (6) whether the detainee is at all times imprisoned outside the United States.[434] Three factors are relevant to the question of whether Guantánamo detainees benefit from the writ in the Constitution's Suspension Clause: (1) the detainee's citizenship and status, coupled with the "adequacy of the process" regarding how this status was determined; (2) the nature of the apprehension and detention sites; and (3) "practical obsta-

425. *See Boumediene*, 128 S. Ct. at 2257 (referring to Brief for Respondents 18-20, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196)).
426. *See id.*
427. *See id.*
428. *Id.* at 2252.
429. *See id.* at 2258.
430. *See id.* at 2258 (stating *Eisenstrager* only mentions "territorial sovereignty" twice).
431. *See id.* at 2257 (quoting *Eisenstrager*, 339 U.S. at 779).
432. *See id.* (quoting *Eisenstrager*, 339 U.S. at 769-79, and referring to Rasul v. Bush, 542 U.S. 466, 475-76, 486 (2004) (Kennedy, J., concurring in the judgment)).
433. *See id.* at 2259 (referring to *Rasul*, 542 U.S. at 476, 487 (Kennedy, J., concurring in the judgment).
434. *Id.* at 2259.

cles inherent" in the detainee benefiting from the writ.[435]

Applying these factors, the Court first found the process of determining detainees as "enemy combatants" quite different in *Eisentrager* and Guantánamo. In *Eisentrager*, the prisoners did not deny their status as German military personnel during World War II. Additionally, they had been through military commissions where the prisoners were entitled to rebut accusations, retain representative counsel, and introduce and rebut both evidence and witnesses.[436] In Guantánamo, the detainees contest their status as "enemy combatants" or "unlawful enemy combatants."[437] Before any military commission or potential habeas proceeding, the CSRT determined this status.[438] Here, the Court explained this process was far more limited than the *Eisentrager* process and did not eliminate the need for a habeas corpus review.[439] These deficiencies include no counsel representation during a CSRT proceeding, Government evidence enjoying a presumption of validity, and a detainee's inability to rebut this evidence because of their confinement and because they have no legal counsel.[440] CSRT determinations can be appealed to the United States Court of Appeals for the D.C. Circuit, but this review cannot cure the CSRT defects.[441]

Second, significant distinctions are made between the *Eisentrager* and Guantánamo apprehension and detention sites. In *Eisentrager*, the detainees were in a prison in Germany where the United States lacked sovereignty or control and instead was operating under jurisdiction of the combined Allied Forces.[442] Consequently, the United States was answerable to the Allied Forces, and American military occupation was temporary.[443] Guantánamo presents a different scenario, as "no transient possession" exists and in "every practical sense" it is not abroad, but is "within the constant jurisdiction of the United States."[444]

Third, the Court stated there are "few practical barriers" to applying the writ on Guantánamo. It found none of the threats, which had existed for the U.S. military in 1950s Germany in *Eisentrager*.[445] Back then, the United States had the enormous task of occupying large sections of Germany and working to rebuild Germany, often with defeated enemy populations. The Court acknowledged additional expenditures and resources would be needed to comply with habeas proceedings, but military forces

435. *Id.*
436. *See id.* at 2259-60 (referring to UNITED NATIONS WAR CRIMES COMMISSION, 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 8-10 (reprint 1997) (1949) and Memorandum by Command of Lt. Gen. Wedemeyer, Jan. 21, 1946, *in* Transcript of Record at 33-40, Johnson v. Eisentrager, 339 U.S. 763 (1950) (No. 306)).
437. *Id.* at 2259-60.
438. *Id.* at 2241.
439. *Id.* at 2260.
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *See id.* at 2261 (quoting Rasul v. Bush, 542 U.S. 466, 480, 487 (2004)).
445. *Id.* at 2261.

and civil courts have functioned simultaneously. Likewise, the base has served various functions beyond military operations, such as housing migrants, refugees, long-term residents, and workers. The base offers a secure prison in an isolated and fortified military base.[446]

At this point, the Court referred to the base's legally anomalous status. The Court also observed how the base's status is a legacy of foreign relations history. While complying with the 1903 Lease, the United States is "for all practical purpose, answerable to no other sovereign for its acts on the base."[447] With this, extending the writ to the base does not pose an "impracticable or anomalous" problem.[448] Since the United States has such historical and ample control, is answerable to no other sovereign there, and faces no practical barrier, the Court held the Suspension Clause does apply to non-citizens overseas on the base. It acknowledged that this was a novel holding, with Cuba maintaining de jure sovereignty, but that the circumstances of the base merited this result.[449] These circumstances include detainees held by Executive Order during "the longest wars in American history" on territory technically not part of the United States but "under complete and total control" of the United States.[450] Prior cases do not offer "precise historical parallel," and this "lack of precedent on point is not barrier" to the constitutional holding.[451]

D. With Insular Case Examples, a Constitution-Light Is Suggested for the Base

The base's historic anomalous status and the *Boumediene* Court's search for "impracticable or anomalous"[452] circumstances when applying constitutional provisions point to conceptual similarities between an imperial past and the status quo. Seen in terms of which legal norms apply to a specific overseas territorial location like Guantánamo, the Court's use of the *Insular Cases* illustrates how this legal anomaly is a legacy from historic informal imperial control and how this anomaly frames legal resolution in detention litigation. The United States occupied the base in 1898 after it started a war with Spain.[453] The *Insular Cases* and the Incorporation Doctrine are contemporary legacies from legal determinations made after 1898, specifically when Spain ceded Puerto Rico and other islands to the United States and when the United States occupied Cuba. Two examples of legal anomalies developed from these events in 1898:

446. *Id.*
447. *See id.* at 2261.
448. *Id.* at 2261-62 (referring to the test in Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J. concurring in the result)).
449. *Id.*
450. *Id.* at 2262 (referring to the length of the "War on Terror" since Sept. 11, 2001, and the Oxford Companion to American Military History 849 (John Whiteclay Chambers ed., 1999)).
451. *See id.*
452. *Id.* (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring in the result)).
453. *Id.* at 2258.

the Incorporation Doctrine and the base lease.[454] The Court referred to the *Insular Cases* to powerfully show that the Constitution does extend to non-citizens in non-sovereign territory.[455] Pointing to congressional proclamations and precedent, it refuted the Government's argument that "the Constitution necessarily stops where de jure sovereignty ends."[456]

The *Insular Cases* references provide the Court two important judicial tools. First, it can rely on established and affirmed case law to demonstrate the Constitution has extra-territorial force.[457] This happened six years after detention began and after prior Government losses on Guantánamo issues before the Court.[458] Observers can refute, with clear Court holdings, the existence of a rights-free zone or black hole because now the Constitution guarantees habeas rights on the base. Second, the Incorporation Doctrine provides the United States with the flexibility to determine what constitutional provisions do or do not apply. This is achieved with functional or prudential-based tests.[459] This approach fits nicely with how the Court presented the writ of habeas, extraterritorial history, and how it characterizes de facto sovereignty over the base. As such, this decision makes a big push in affirming a functional approach to deciding how the Constitution's provisions limit government authority overseas.

This Article argues the flexibility in such a functional approach continues the ambiguity, "ambivalences in the rule of law," and simultaneous inclusion and exclusion evident in post-colonial examinations of international law.[460] Similarly, the functional test leaves many observers wondering how it can be applied in the future, or if it instead reflects a more global or interdependent world.[461] Prior foreign relations contexts

454. *Id.* at 2253-54.

455. *Id.* at 2254.

456. *Id.* at 2253-54 (referring to the determinations outside of the *Insular Cases* of an extraterritorial Constitution such as American Insurance Co v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828); An Act: to Establish a Territorial Government for Utah, 9 Stat. 458 (1850); and the Northwest Ordinance, 1 Stat. 52 (1789)).

457. *Id.* at 2254. Here, the applicability of the extraterritorial Constitution from the *Insular Cases* can be mitigated by arguing that the United States is not sovereign over the base, but it was clearly sovereign over the insular possessions or that the residents in insular possessions were not noncitizens. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2298-99 (Scalia, J. dissenting); Posner, *supra* note 21, at 10, 15.

458. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 574-76 (2006); Rasul v. Bush, 542 U.S. 466, 480-81 (2004).

459. Neuman presents the *Boumediene* holding as rejecting "formalistic reliance" on factors such as nationality or location and presenting functionalism as the "standard methodology." *See* Neuman, *supra* note 21, at 3.

460. *See supra* Part II.B (referring to law's ambivalence in overseas authority).

461. *Cf.* Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008 (stating that the functional test depends on whether conservative justices cooperate and that it must allow the government to try those guilty of war crimes, prevent dangerous terrorists from returning, and free those wrongly imprisoned). *But see* Cole, *supra* note 21, at 51 (arguing that the decision is similar to the transnational trend of invalidating security measures, favoring individual rights, and suggesting new conceptions of sovereignty, territory, and rights in a globalized world).

viewed it necessary to have strict legal determinations of sovereign borders between states and deferential state authority domestically.

In the majority opinion for *Boumediene*, the Court referred to the *Insular Cases* when reasoning that the Constitution's Suspension Clause, which bars suspension of the writ of habeas corpus except for in times of war or rebellion, does apply to Guantánamo.[462] The references argue that the Constitution's provisions do have extraterritorial application.[463] The *Insular Cases* generally held that the "Constitution has independent force in these territories, a force not contingent upon acts of legislative grace."[464]

With this doctrine developed in the *Insular Cases* and applied since then, the real legal concern is not if the Constitution applies, but which provisions are applicable to limit executive and legislative power.[465] With the former Spanish colonies previously under a different legal system, and with "differences of race, habits, laws, and customs of the people, and from differences of soil, climate and production," the Court has been reluctant in these cases to apply the Constitution fully in these territories.[466] As the Court recently reported, the Incorporation Doctrine addressed these "considerations," which states the Constitution applies in "full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."[467]

Analyzing which provisions do or do not apply, the Court suggested a functional-based approach. This involves "inquiry into the situation of the territory and its relations to the United States."[468] It explained that there would be "inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere.'"[469] For these reasons, the Court described the doctrine as "century-old" and influential in limited situations, such as this one, where "it would be most needed."[470]

To these inquiries, the Court added the practical considerations from *Reid* to decide how "specific circumstances of each particular case" pertain to determining the "geographic scope of the Constitution."[471] This inquiry was suggested to be territory and situation specific.[472] The standard is whether a court enforcing a hypothetical constitutional provision would be "impracticable and anomalous."[473] This places an emphasis on

462. *Boumediene,* 128 S. Ct. at 2254-58, 2662.
463. *Id.* at 2254.
464. *Id.*
465. *Id.* at 2254-55 (citing Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)).
466. *Id.* at 2254 (quoting Downes v. Bidwell, 182 U.S. 244, 282 (1901)).
467. *Id.* (citing Dorr v. United States, 195 U.S. 138, 143 (1904, and *Downes*, 182 U.S. at 293 (White, J., concurring)).
468. *Id.* at 2254 (quoting *Downes*, 182 U.S. at 293 (White, J., concurring)).
469. *Id.* (quoting *Balzac*, 258 U.S. at 312).
470. *Id.*
471. *Id.* (quoting Reid v. Covert, 354 U.S. 1, 54 (1957)).
472. *Id.* at 2259 (explaining that the political branches have the power to "acquire, dispose of, and govern territory" but not the power to "decide when and where" the Constitution's terms apply; the Constitution expresses these limits).
473. *Id.* at 2255 (quoting *Reid*, 354 U.S. at 74-75).

a court's examination of what is practical and necessary. This is done to reject "rigid and abstract rule[s]" regarding sovereignty.[474] The Court summarized its approach to questions about extraterritoriality, presented as a common thread in the *Insular Cases*, *Eisentrager*, and *Reid*, as turning "on objective factors and practical concerns, not formalism."[475]

As Neuman argued, the decision firmly backs a functional approach, but leaves important ambiguities regarding non-citizens not in American custody and how to make sense of what provisions apply in different foreign locations, that is, not on this base.[476] While the functional approach rejects the formal perspective, which effectively created a rights-free zone, it still endorses a "Constitution-light" for overseas authority. This is a legal legacy from informal imperial control, created after 1898, and prominent in the early twentieth century.

The Court does not mention the significant racial, cultural, and religious reasons the *Insular Cases* denied full constitutional protections overseas. Those Justices were motivated by notions of Anglo-superiority, and this influenced their decision that not all right protections in the Constitution applied to overseas possessions. Universal and liberal claims from the Constitution are that individual rights protections extend to all. But the *Insular Cases* limited this with important distinctions between fundamental and non-fundamental rights and incorporated and unincorporated territories.

Comparing these overlooked concerns in *Insular Cases* jurisprudence with present post-colonial examinations points to how legal instruments needed for imperial rule shape lawmaking today. Generally, as Fitzpatrick and Darian-Smith explained, these situations create "ambivalence in the rule of law."[477] The law includes for some aspects, such as whether the Constitution and writ apply, but excludes for others like maybe due process or international human rights do not apply.[478] Applying practical tests may lead to significant exclusions in areas such as humanitarian law or emergency-justified exceptions to rights protections.[479]

While these issues remain to be determined by American courts and military commissions, we possess the analytical tools to suggest where they occur and how they mimic historic exclusions. Legal scholars of international law's imperial legacy describe how legal determinations in the "War on Terror" resemble prior legal choices made when central powers

474. *Id.* (quoting *Reid*, 354 U.S. at 74).

475. *Id.* at 2258.

476. Neuman, *supra* note 21, at 1.

477. *See* Fitzpatrick & Darian-Smith, *supra* note 50, at 2; *see also* Neuman, *supra* note 21, at 19-20 (describing how the functional test treats Guantánamo as a "dual status space[ ]").

478. *See* Fitzpatrick & Darian-Smith, *supra* note 50, at 2.

479. *See* Posner, *supra* note 21, at 16 (finding conceptual weakness in the Court not clearly stating if individual rights derive from global or national sources of law). *But see* Cole, *supra* note 21, at 52, 60 (arguing that extending the writ to the base reflects important individual rights protections that many courts around the world have recently found in transnational, security, and international law contexts).

expanded their colonial influence during the nineteenth century. James Gathii described the Government's arguments in Guantánamo detention litigation as the product of legal mindsets "embedded in the jurisdictional power map" or empire, not unlike British legal distinctions applied to protectorates in East Africa.[480] Here, state authority escapes liberal rights protections as power extends overseas. Antony Anghie described how the U.S. occupation of Iraq in the War on Terror is similar to prior occupations of the Philippines and Puerto Rico.[481] In these cases, individual rights, despite universal claims in international law or constitutional law, lose their application in periphery settings.[482]

The exclusionary results of a functional approach to individual constitutional rights are particularly relevant to Guantánamo detention. For instance, Frédéric Mégret showed how the "enemy combatant" classification echoes the savage or uncivilized in the nineteenth century, to exclude protections from the law of war.[483] Despite the law of war governing the treatment of prisoners since the early nineteenth century in European conflicts, this legal doctrine was excluded in armed conflict used to expand European colonization. This exclusion was conditioned on classifying certain populations as savages or unclassified.[484] Until recently, the "unlawful enemy combatant" classification was used by the United States.[485] Despite *Boumediene*'s holding that the writ and the Constitution apply[486] and *Hamdan*'s holding that military commissions are required, American policy has essentially applied the "enemy combatant" classification to avoid Geneva Convention protections for detainees.[487] Perhaps these exclusions based on functional tests will be contested in future habeas proceedings, but at this time the exclusion is possible despite *Boumediene*'s holding. Exclusions from these rights protections may be applied by a court using an "impracticable" standard.

From another perspective, judicial tests of what is "practical" may create enormous loopholes from the substantive individual rights protections sourced in the Constitution or international law. Referring to Carl Schmitt's theories, Nasser Hussain describes sovereignty as the power to

480. *See* Gathii, *Imperialism, Colonialism, and International Law*, *supra* note 113, at 1057-59.

481. ANGHIE, *supra* note 26, at 279-90.

482. *Id.* at 289.

483. Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's Other*, *in* INTERNATIONAL LAW AND ITS OTHERS 265-318 (Anne Orford ed., 2006).

484. *Id.* at 278.

485. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

486. *Id.* at 2277.

487. *See generally* Mégret, *supra* note 483. *Cf.* Press Release, Dep't of Justice, *supra* note 12 (explaining the President's authority to detain persons at Guantánamo Bay complies with international Laws of War); *see also* Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantánamo Bay, *In re* Guantanamo Bay Detainee Litig., No. 08-442 (TFH) (D.D.C. Mar. 13, 2009), *available at* http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf (referring to this authority based on Supreme Court precedent, U.N. and N.A.T.O. treaties, while averring for the government in recent district court habeas proceedings).

determine exceptions to the rule.[488] Regarding substantive rights for detainees or procedural rights, a military or security determination may exclude detainees from important rights protections, e.g., rights protections in habeas, CSRT, or military commission proceedings.[489]

E. Strategic Overseas Interests Justify Checking (or Not) Authority on Guantánamo

Taken as a whole, the *Boumediene* majority and dissenting opinions pointed to the legal anomaly surrounding how American law supports overseas authority. This is evident in their different policy justifications. Applied to non-domestic base jurisdiction, the law in *Boumediene* both includes and excludes individual rights protections and deference to political authority.[490] With such nebulous jurisdiction, the opinions reach their holdings based on strategic objectives. The most obvious for the majority is applying individual rights protections to base detention, which at its longest has lasted over six years with no trial or charges.[491] For the dissenting opinions, the most important strategic objective is to provide the political branches deference and authority to fight a "War on Terror."[492]

Similar to legal choices made after 1898, strategic objectives guide how to determine when constitutional limits check foreign relations authority. In the past, limits were specifically about individual rights in the *Insular Cases* and generally how separation of powers limited military action, territorial acquisition, treaty powers, and diplomacy. Now, the question is whether detention on an overseas territory is at all limited by individual rights protections. This force—objectives influencing legal determinations—shapes this legal anomaly's normativity. While prior objectives were different, the dynamic of strategy shaping this legal anomaly is similarly influential after 1898 and after 2001.

Historically, courts deferred to the Executive Branch on foreign relations issues[493] so the United States could compete with global powers, unencumbered by the Judiciary and less encumbered by Congress. The value of overseas territories motivated legal reasoning, which justified overseas authority and this deference.[494] Acquiring territory beyond the continent was needed for naval, commercial, and geopolitical pur-

488. Hussain, *supra* note 58, at 740; *see also* Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU Law Rev. 221, 229 (2008).

489. *See* Hussain, *supra* note 58, at 741-42.

490. *See Boumediene*, 128 S. Ct. at 2275-76.

491. *Id.* at 2275.

492. *See id.* at 2294, (Scalia, J. dissenting) (describing the need to defer to the political branches because the U.S. "is at war with radical Islamists," which began with Marine deaths in Lebanon in 1983, and the Court's holding will "cause more Americans to be killed").

493. *See, e.g.*, United States v. Curtiss Wright Export Corp., 299 U.S. 304, 319-21 (1936); *see generally* Spiro, *supra* note 179.

494. *See* Neuman, *supra* note 21, at 16-17.

poses.[495] In this period, the United States gained territorial possessions or control in Asia, the Caribbean, the North Pacific, and Central America.[496] Meeting these objectives helped the American economy and provided a sphere of influence to offset European intrusion.[497] The Incorporation Doctrine provided a jurisprudential sanction for the United States' increased territorial expansion, foreign relations, and international economic relations. Accordingly, jurisprudence which did not fully do away with constitutional guarantees and separations of power helped preserve the republican experiment in its second century. In terms of "legal spatiality," referring to Raustiala's analysis, the law obsessively protected rigid and formal demarcations of authority, deference, and territory with sovereignty.[498] The Court used cultural and racial concerns to decide what individual rights protections, in this case fundamental rights, applied overseas.

Strategic goals implicit in overseas authority likewise shape the current legal anomaly between "complete jurisdiction and control" for the United States and "ultimate sovereignty" for Cuba.[499] Theoretically, protecting individual rights and/or deferential authority seeks doctrinal force in this legal anomaly. Overseas authority is once again the repeat subject of these legal questions. In finding the writ applies on the base and that Congress has provided insufficient substitutes in the MCA and DTA, the *Boumediene* majority's justification is that detention potentially violates individual rights guarantees in constitutional and international law and that detention has lasted too long.[500] The remedy is to not permit the political branches to turn the Constitution on or off depending on the geographic location of the detention center.[501] Specifically, the Court reasoned the writ of habeas is an essential individual right, with a historic purpose to check executive power.[502] It is one of the few individual rights included by the Framers in the Constitution.[503] Valuing the protection of individual rights and checks to excessive political authority, it suggests impracticable and prudential examinations guide when to extraterritorially apply the constitutional limitations or not. Here, the majority's perspective reflects transnational interpretations of sovereignty, increased judicial participation in foreign affairs, and increased human rights and individual rights protections in international and constitutional law. Put simply, the Court values its interference to check excessive state power.

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495. *See* SPARROW, *supra* note 68, at 232.
496. *See id.*
497. *See id.*
498. *See* Raustiala, *supra* note 35, at 250.
499. *Boumediene*, 128 S. Ct. at 2252.
500. *Id.* at 2275. Initial suggestions of these motivations to overturn the decision of the United States Court of Appeals for the D.C. Circuit that appeared in the dissenting opinions from the Court's initial denial of writ of certiorari. *See generally* Boumediene v. Bush, 127 S. Ct. 1478, 1479-81 (2007) (denying certiorari) (Breyer, J, dissenting).
501. *Boumediene*, 128 S. Ct. at 2259.
502. *Id.* at 2244.
503. *Id.*

The dissenting opinions instead place a higher value on protecting state authority, even if the Constitution may apply extraterritorially. This authority benefits from more deference on non-sovereign territory. Noting that DTA and MCA remedies have not been tested and that the writ does not apply on non-sovereign territory, the dissenting opinions referred to threats to our national security efforts to combat terrorism and judicial interference in political affairs.[504] There is no explicit cultural or racial justification given to not applying the writ to detainees.[505] Instead, it is argued non-citizens and unlawful combatants do not enjoy this privilege.[506] To extend these privileges in the Constitution would be to disrupt separations of powers.[507] Here, territory is treated as clearly demarcating where sovereignty is exclusive.[508] The lack of de jure sovereignty on the base for the United States, referring to lease agreements and treaties, excludes the application of constitutional rights protections for non-citizens.[509] More so because it is a matter regarding foreign relations and sovereignty, the political branches have plenary power, where judicial review is inappropriate.[510]

V. EMPIRE'S ANOMALOUS FUTURE: ARE THERE OVERSEAS RIGHTS WHEN GUANTÁNAMO DETENTION ENDS?

Rebel spaceships, striking from a hidden base, have won their first victory against the evil Galactic Empire . . .

—*Star Wars Episode IV: A New Hope*[511]

The evil lord Darth Vader, obsessed with finding young Skywalker, has dispatched thousands of remote probes into the far reaches of space. . .

—*Star Wars Episode V: The Empire Strikes Back*[512]

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504. *Id.* at 2279-80 (Roberts, C.J., dissenting) (detailing how the CSRT procedures and appeal measure in the DTA have not tested the evidentiary and procedural faults claimed by the detainees).

505. Interestingly, the dissent makes broad and oblique references to Islamists, the detainees, and far off events such as the Lebanon events from 1982. The detainees in these cases were captured in Bosnia and Guinea. These factors suggest de facto categorization of "Muslims" to detainee in the "War on Terror." *Id.* at 2294.

506. *Id.* at 2305.

507. *See id.* at 2295-96, (Scalia, J. dissenting) (emphasizing the Court in *Hamdan* affirmed Congress' authority pass the MCA and its limits on the writ).

508. *Id.* at 2296-98 (highlighting Cuba's sovereignty and the fact that the detainees are located within this territorial sovereignty); *id.* at 2300 (presenting the *Eisentrager* holding as emphasizing the location of U.S. jurisdiction).

509. *Id.* at 2299.

510. *Id.* at 2302 (averring an "inflated notion of judicial supremacy" drives the Court to deny "formal notions of sovereignty").

511. STAR WARS EPISODE IV: A NEW HOPE (20th Century Fox & Lucasfilm 1977), http://www.starwars.com/movies/episode-iv/.

512. STAR WARS EPISODE V: THE EMPIRE STRIKES BACK (20th Century Fox & Lucasfilm 1980), http://www.starwars.com/movies/episode-v/.

Little does Luke know that the GALACTIC EMPIRE has secretly begun construction of a new armored space station even more powerful than the first dreaded Death Star . . .

—*Star Wars Episode VI: Return of the Jedi*[513]

This Part describes developments since *Boumediene* in June of 2008, suggesting that legal anomaly continues to cloud overseas detention. A brief reference to the *Star Wars* trilogy's narrative on empire's expansion highlights the post-colonial insight of examining overseas authority in broad strokes, historically and geographically. For these fictional movies the value is that three stories show how the "empire strikes back," despite isolated gains made by resistance. For the present "War on Terror," a similar significance lies in examining what law checks overseas authority after *Boumediene* and beyond a base in Cuba. This Part argues that the danger is viewing isolated events from a hidden base, in Cuba or a galaxy far away, as conclusive. To minimize this legal myopia, a post-colonial approach focuses on historical appreciation of how norms developed. In a highly preliminary fashion, this Part extends this Article's analysis to post-*Boumediene* events.

While a recent Executive Order ends Guantánamo detentions by January 22, 2010 and *Boumediene* affirms significant constitutional rights protections, legal anomaly appears to characterize the release of Guantánamo detainees and judicial review for detainees under U.S. control in Afghanistan. These two facts, legal challenges for release and alternative detention locations, point to this Article's three central claims. Specifically for these detention developments anomaly is not an aberration but a precise objective, post-colonial analysis of foreign relations history describe how the law creates and facilitates anomaly, and four objectives characterize anomaly, i.e., the United States avoids sovereign authority overseas, limits sovereign authority for other states, seeks to avoid constitutional limitation abroad, and protects strategic interests. Accordingly, this Part proceeds with preliminary identifications of anomaly in the January 22, 2009 Executive Order, habeas corpus efforts to release base detainees, and recent legal challenges to detentions in the U.S. Bagram Airfield in Afghanistan.

A. Guantánamo Detention Ends, Avoiding New Rights and Spurring Relocation

In his first week in office, President Obama issued an Executive Order ending the Guantánamo detention program by January 22, 2010.[514] It

513. Star Wars Episode VI: Return of the Jedi (20th Century Fox & Lucasfilm 1983), http://www.starwars.com/movies/episode-vi/.

514. *See* Exec. Order No. 13492, *supra* note 18. Two additional Executive Orders were issued the same day. One orders a review of "lawful options for the disposition of individuals captured or apprehended in connections with armed conflicts and counterterrorism operations." *See* Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 22, 2009). Another revokes interrogations techniques previously used and requires that interrogations for "indi-

requires that all remaining detentions be subject to reviews, coordinated by the Attorney General with cooperation and participation from foreign relations, defense, homeland security, intelligence, and counter-terrorism agencies.[515] Regarding these detainees, it stays military commission proceedings which have not reached judgment and bars any new charges from being sworn.[516] Similarly, it requires detainee custody be under humane standards, described as confirming with "all applicable laws governing such confinement, including Common Article 3 of the Geneva Conventions."[517] The Secretary of Defense will review these conditions to ensure full compliance by February 22.[518]

While it is barely a month old and much policy remains to be implemented, the Order disposing detainees and closing the detention facilities points to elements of anomaly on two fronts. Specifically, the Order states: 1) it does not create any rights, and 2) detainees may be transferred to other U.S. detention facilities or third countries.[519] The Order does affirm that these detentions are governed by the Geneva Conventions and that detainees have the constitutional writ of habeas corpus.[520] But it does not give any indication whether detainees in Guantánamo or in other locations have constitutional rights beyond habeas challenges of unlawful detention. For instance, due process rights are not mentioned. Accordingly, the Order potentially leaves detainees on the base with district court jurisdiction to claim unlawful detention, but without any clear determination of what substantive rights do or do not apply to this non-sovereign space. This anomaly is compounded with the prudential concerns and Constitution-light approaches affirmed by the slim *Boumediene* majority.[521]

This anomaly, i.e., unclear state of what rights check detention authority, is reified in the Order's last subsection. After announcing dramatic changes in detention policy, the Order states it does not intend to and "does not, create any right or benefit, substantive or procedural, enforceable at law or in equity . . . ."[522] As such in legal terms, the Order leaves things as they were after *Boumediene*, but clearly states that no right (procedural, substantive, or in equity) exists to seek the Order's objectives.

Second, the Order opens the door for detainees to be transferred to locations where Constitutional habeas and/or other individual rights do not extend. For remaining Guantánamo detainees, it provides they may be "returned to their home country, released, transferred to a third coun-

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viduals in custody or effective control of the US" be "authorized and listed in Army Field Manual." Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

515. Exec. Order No. 13492, supra note 18, § 2b.
516. *Id.* § 7.
517. *Id.* § 6.
518. *Id.*
519. *Id.* §§ 3, 8c.
520. *Id.* § 2c, 6.
521. *See supra* Part IV.C.
522. Exec. Order No. 13492, *supra* note 18, § 8c.

try, or transferred to another" U.S. detention facility.[523] Here, the concern is detainees may be relocated to third countries where they may tortured.[524] Alternatively, they may be placed in U.S. detention facilities with even less jurisdiction or constitutional rights than Guantánamo. As explained below, the detention example in Afghanistan has quickly developed.

B. Anomaly Amidst Habeas Proceedings For Detainees

Habeas proceedings since *Boumediene* suggest anomaly appears when courts start examining what makes detention unlawful. Anomaly exists because the location of detention produces a situation where it is unclear what legal norms, sources of law, or jurisdiction apply. This develops from situations created by U.S. foreign relations to have control of base territory without de jure sovereignty.[525] Here, the puzzle develops from constitutional habeas rights affirmed by *Boumediene*, providing a judicial method to contest detention, but it is not entirely clear what makes detention illegal. Many substantive rights in constitutional or international law remain unconfirmed if they extend, by case law or statute, to the base or to non-citizens there. In theory, a clear determination that these rights exist or apply would ease the release of Guantánamo detainees after *Boumediene*. Meanwhile some detainees remain in custody seven years after detentions began.

While habeas proceedings since June 2008 have been numerous and their full examination beyond this Article's scope, preliminary developments suggest anomaly may cloud these proceedings. On January 21, 2009, one proceeding in the U.S. District Court for the District of Columbia found the offered definition of "enemy combatant" lacking clarity to determine whether a detainee was lawfully held.[526] In the newest development on March 13, 2009 in similar habeas proceedings, the Government quit using the "unlawful enemy combatant" classification as a justification for base detention and argued that the President's detention authority stems from the AUMF and complies with international laws of war.[527] The Government argues that the standard for detention is for

523. *Id.* § 3.

524. Many scholars and advocates point to the controversies of these "renditions," i.e., the transfer of individuals across international borders without extradition or deportation proceedings. *See, e.g.*, Marjorie Cohn, *A Call to End All Renditions*, Jurist, Feb. 10, 2009, *available at* http://jurist.law.pitt.edu/forumy/2009/02/call-to-end-all-renditions.php; Margaret L. Satterthwaite, *From Rendition to Justice to Rendition to Torture* (Jul. 9. 2009), http://ssrn.com/abstract=1157583.

525. *See supra* Part III.

526. See Order, All Ali Bin Ali Ahmed, et al. v. George W. Bush, et al., No. 05-1678 (D.D.C. Jan. 21, 2009); Order, Mohammed Ahmed Tahrer v. George W. Bush, et al., No. 06-1684 (D.D.C. Jan. 22, 2009),

527. Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In Re* Guantanamo Bay Detainee Litig., *supra* note 487; *see also* Press Release, U.S. Dep't of Justice, *supra* note 12; Declaration of Attorney General Eric H. Holder, *In Re* Guantanamo Bay Detainee Litig., No. 08-442 (TFH) (D.D.C. Mar. 13, 2009), *available at* http://www.usdoj.gov/opa/documents/ag-decla-

persons who "substantially supported . . . Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners," including those who aid such enemy forces by "commit[ing] a belligerent act" or "directly support[ing] hostilities.[528] Accordingly, the substantive legal determination of what is (or not) the standard for Guantánamo detention remains anomalously stuck between prior claims of complete executive authority, limited Supreme Court holdings since 2004, planned detention facility closure, limited military commissions, and the newest standard that detention authority complies with international law, all without any practical effect in releasing the current 200 plus detainees.

Additionally, on February 18, 2009, the U.S. Court of Appeals for the District of Columbia Circuit ruled that it lacked the authority to release seventeen Uighars (Turkic Muslim minorities from China) detainees from Guantánamo.[529] The Court argued it lacked the sovereign authority, which belongs to the political branches, to decide who may or may not enter the United States. Such a determination requires congressional or executive determinations.[530] In U.S. law, this plenary authority has been rooted in international sovereignty, since the *Chinese Exclusion Case* in 1889.[531] The Court of Appeals overturned an October 8, 2008 district court order to release the seventeen detainees.[532] They are not enemies of the United States, were captured in Afghanistan, and their return to China is problematic given China's resistance and/or potential human rights abuse upon return.[533] According to the Court, these detainees are not within the United States.[534] They require determinations in immigration law to enter the territorial United States from a location within the United States' complete control and jurisdiction. It effectively reasoned that courts lack this authority. Despite *Boumediene's* constitutional holding, these detainees effectively remain in a jurisdictionally anomalous lo-

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ration.pdf (presenting how the Department of Justice along with other agencies is conductiong a "comprehensive review of the lawful options" regarding "apprehension, detention, trial, transfer, release, or other disposition" in connection with armed conflicts and counterterrorism operations" following the *Boumediene* decision and Executive Orders 13492 and 13493).

528. Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *supra* note 487, at 2.

529. See Jamal Kiyemba et al. v. Obama, No. 08-5424, (D.C. Cir. Feb. 18, 2009), http://pacer.cadc.uscourts.gov/docs/common/opinions/200902/08-5424-1165428.pdf.

530. *See id.*

531. *See generally* Ernesto Hernández-López, *Sovereignty migrates in U.S. and Mexican law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANS'L L. 1345-1424 (2007).

532. *In re* Guantanamo Bay Detainee Litig., Memorandum Opinion, Nos. 05-1509, 05-1602, 05-1704, 05-2379, 05-2398, 08-1310 (D.D.C. Oct. 8, 2008), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv1310-45.

533. WITTES, *supra* note 3, at 82.

534. *In re Guantanamo Bay Detainee Litig*, No. 05-1509, at 8 (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(g), 119 Stat. 2739, 2743, and 8 U.S.C. § 1101(a)(38) (2006)).

cation. Events confronting anomaly continue to develop.[535]

C. Detentions in Afghanistan Suggest Similar Anomaly

As explained above, the January 22 Executive Order confirms remaining Guantánamo detainees may be transferred to other U.S. detention facilities. For this, a likely location is the detention facility at the Bagram Airfield or other detention centers in Afghanistan. Commentators have noted how the closing of Guantánamo detention facilities and/or constitutional checks affirmed there create incentives for detention efforts to move elsewhere especially Afghanistan.[536] Reports indicate that over 600 detainees are at Bagram and there are likely plans to build larger detention facilities at the base and in Afghanistan. Detentions in Afghanistan will become increasingly important to U.S. policy as military efforts increase there.

Two important facts concerning what law may check detention authority distinguish these detentions from Guantánamo. First, the government may claim to be detaining in the theatre or war and this precludes any habeas jurisdiction. Close to the conflict, it also arguably escapes many of the prudential limits suggested in the *Boumediene* majority opinion. It affirms many of *Boumediene's* reading of *Eisentrager's* limits, which found habeas did not extend to post-World War II Germany. From a practical standpoint, U.S. presence in Guantánamo is more established, removed from conflict zones, and is closer to the United States. Perhaps applying *Boumediene* reasoning to Afghanistan will prove more difficult. Second from a sovereignty standpoint, any lease agreements or troop presence authority in Afghanistan may provide more guidance as to what law applies (or not) on detention centers. It may be difficult to find de facto sovereignty for the United States in Afghanistan, as the *Boumediene* court did. Guantánamo's anomaly was explicit in the January 1903 lease stating Cuba has "ultimate sovereignty" but the United States has "complete control and jurisdiction."[537] It was also accented by the absence of any SOFA, which would delineate facility jurisdiction and immunities for military abroad. The United States' long-term presence at

535. Most recently, attorneys for the detainees have directly requested that the President order their release, given the legal determinations in the October district court order, the *Boumediene* decision, and the President's January 22, 2009 Executive Order. *See* Letter from Counsels for Huzaifa Parhat, Five Uighar Detainees, Mohammed el Ghrani, Lakhdar Bomediene, and Saber Lahmer to President Barack Obama (Feb. 26, 2009), http://www.scotusblog.com/wp/wp-content/uploads/2009/02/detainee-counsel-to-obama-2-26-09.pdf.

536. *Voila! Ship Gitmo Detainees to Afghanistan*, Editorial, Wash. Times, Feb. 24, 2009, *available at* http://www.washingtontimes.com/news/2009/feb/24/voila-ship-gitmo-detainees-to-afghanistan/; Charlie Savage, *Obama Upholds Detainees Policy in Afghanistan*, N.Y. Times, Feb. 22, 2009, *available at* http://www.nytimes.com/2009/02/22/washington/22bagram.html?hp; Daphne Eviatar, *Bagram's Black Hole: Guantánamo Bay Was Bad Enough – Bagram Is Worse*, Am. Law., Nov. 13, 2008; William Fisher, *Bagram: The Other Gitmo*, Asia Times Online, Jan. 16, 2008, http://www.atimes.com/atimes/South_Asia/JA16Df02.html.

537. *See supra* Part III.C

Guantánamo without any SOFA and in light of Cuban protests since 1961 created a jurisdictionally peculiar situation, which required the Court to re-visit issues of the Constitution's extraterritoriality. Anomaly in Afghanistan may be more implicit, floating between agreements for troop presence or base leases and immunities for troops, executive military authority, private contractors, and Afghani authority. In this light, positive law such as international agreements recently reached may be tailored for the necessities of the War on Terror. Different than in 2002, the experience of Supreme Court precedents since 2004 and more current international agreements minimize constitutional and international law liabilities for the administration.

So far, at the time of writing in February 2009, two developments suggest legal anomaly will be a barrier for detainee release in Afghanistan. First, on February 20, 2009 in district court proceedings, government attorneys for the Obama Administration argued habeas corpus does not extend to the Bagram base in Afghanistan, continuing the prior administration's position.[538] This is just an early Government position and not necessarily a sustained or judicially affirmed claim. It suggests, though, that Afghanistan may be presented as different, for the variety of reasons explained above, for habeas corpus and other constitutional rights, even though many of the detainees are the same or similarly captured. Second, the Supreme Court decision in *Munaf v. Geren* concerning U.S. citizens detained in Iraq implies habeas corpus rights may be difficult to affirm for non-citizens in Afghanistan.[539] Reported the same day as *Boumediene* in a unanimous opinion, the Court found detained U.S. citizens in Iraq do have access to habeas corpus jurisdiction.[540] Citing the sensitivity of military operations in Iraq, it quickly reviewed the merits of the claims to find it could not affirm the release because to do so would intrude on Iraq's sovereignty.[541] *Munaf* points to the importance a court will place on finding a foreign state's sovereignty dispositive for habeas jurisdiction, even though the United States is detaining someone in that territory. This is different than on Guantánamo when it was unlikely that Cuban law would influence detention at all. Similarly, the Court's quick decision on the merits versus remanding the case to the lower courts indicates a likely deference to military necessity.

In sum, the law of overseas detention possibly has an anomalous future, as these quick identifications suggest. This Article's three major claims about how U.S. law checks detention authority on Guantánamo

538. *U.S.: No habeas rights at Bagram*, SCOTUS BLOG, Feb. 20, 2009, http://www.scotusblog.com/wp/?s=bagram; ProPublica, *Obama Admin. On Detention Policy: "What He Said,"* HUFFINGTON POST, http://www.huffingtonpost.com/propublica/obama-admin-on-detention_b_169448.html; *see, e.g.*, Al Maqaleh v. Gates, Government's Response to This Court's Order of January 22, 2009, 1:06-cv-01669-JDB (D.D.C., Feb. 20, 2009), http://www.scotusblog.com/wp/wp-content/uploads/2009/02/us-reply-re-bagram-2-20-09.pdf.

539. Munaf v. Geren, 128 S. Ct. 2207 (2008)

540. *Id.* at 2217 (finding "actual custody by the United States" is sufficient despites the multinational forces in Iraq).

541. *Id.* at 2220, 2223-24.

are highly relevant to overseas detention authority in a post-*Boumediene* world. First, anomaly is not an aberration but a precise objective for Guantánamo detention between 2002 and 2009, decisions in habeas proceedings since 2008, and detentions in Afghanistan. It suits political and military needs to keep detainees far from individual rights, which may clearly project individuals in the territorial United States or in fully sovereign spaces. For detention, location matters. It confirms or avoids legal anomaly. Second, post-colonial appreciation of how history and informal imperial influence shape legal doctrine proves extremely illuminating for Guantánamo, Cuba and Afghanistan. Geopolitical, security, and economic interests inspired U.S. activities in the Caribbean after 1898 and 2002, similarly in Afghanistan since 2001, not to mention the U.S. support of anti-Soviet forces after 1979. The rise of the Taliban and its support of Al-Qaeda is not isolated from the effects of Afghani devastation and disorder, which for American audiences has been painted as first a Cold War struggle and now a War on Terror struggle. Third, strategic interests guide U.S. interpretations of law, whether that was securing geopolitical influence over the Caribbean and Cuba or more recently avoiding individual rights in constitutional and international law to gain intelligence from detainees. Fourth, sovereignty and the Constitution become malleable sources of public obligations when the United States extends it overseas influence. Here, U.S. objectives shape, historically and currently, this anomaly for courts to then interpret. For Guantánamo the concerns focused on lease agreements and an extra-territorial constitution via the Incorporation doctrine. Post-*Boumediene* events will examine how sovereignty, whether in plenary power over immigration or Afghani authority, apply to detentions.

VI. CONCLUSION

In conclusion, this Article has described how Guantánamo's legally anomalous status exerted enormous influence in recent determinations made by the Supreme Court in *Boumediene*. Legal anomaly is evident as an unclear state of what rights check detention authority. Legal anomaly exists because the base's territory is not clearly within American or Cuban sovereignty. This ambiguity unclearly guides what law (if any) checks detention authority on the base. This is apparent when litigation confronts how detention location produces a situation where it is unclear what legal norms, sources of law, or jurisdiction exists.

Historic agreements with Cuba in 1903 specifically created Guantánamo's legal anomaly, while American foreign relations practices, at the time and since, perpetuate it. This decision continues a discourse of normative anomaly on the base. This legal anomaly has facilitated detention policies in which the United States tries to avoid individual rights protections for "War on Terror" detainees on the base since 2002. Just in June of 2008, after a second Supreme Court case on the writ and the base, may

habeas proceedings possibly release persons from detention.[542] Trying to paint this legal anomaly as an accident or unintended, recent Supreme Court opinions refer to this anomaly by labeling base jurisdiction as "quirky" or "unusual."[543]

An analysis of U.S.-Cuba relations since 1898 shows that the base's legally anomalous status was a precise U.S. foreign policy objective.[544] This legal anomaly develops from the United States avoiding sovereignty overseas while reserving the authority to exercise significant influence abroad.[545] Specific to the base at Guantánamo, U.S.-Cuba agreements in 1903 and 1934 crafted this legal anomaly.[546] They affirm that the U.S. lacks sovereignty over Guantánamo, but retains "complete jurisdiction and control" for an indefinite period, while Cuba has "ultimate sovereignty" with no ability to end U.S. occupation.[547] Wavering between the concepts of sovereignty and jurisdiction, this legal anomaly clouds legal challenges to base detention. This is achieved by arguing that the base is not within U.S. sovereignty, thus the Constitution cannot check base authority, and by arguing that Cuban sovereignty prohibits extending constitutional protections in American law.[548]

Boumediene addressed this legal anomaly with its examination concerning whether the Constitution's Suspension Clause applies on the base.[549] By a slim majority, the Court held that it does apply to this non-sovereign territory under U.S control.[550] Importantly, this holding extends the privilege of the writ of habeas corpus to base detainees.[551] To do this, the Court found that the United States has de facto sovereignty on the base and the Constitution applies extraterritorially.[552] Highlighting these findings, this Article raises two general points regarding the legal analysis of base detention.

First, while the base's legally anomalous status effectively endorses detention, four legal objectives in U.S. foreign relations shape this anomalous status. Any legal continuation or limitation to this overseas authority must address these objectives. These objectives are that the United States avoids sovereignty abroad, limits incidents of sovereignty

542. *See supra* note 31 and discussion Part IV.

543. *Boumediene*, 128 S. Ct. at 2279, 2293 (Roberts C.J., dissenting).

544. *See supra* discussion Part II.B-C.

545. The Platt Amendment of 1901, included in U.S. military appropriations, Cuba's Constitution, and a bilateral treaty, affirms this anomaly in U.S-Cuban relations. It permitted the U.S. to avoid sovereignty over Cuba, but also provided the United States with significant influence over Cuba by limiting its sovereignty. Specifically, the Amendment provided that the United States had a "right to intervene" in Cuba, control its foreign relations, and place bases on Cuban soil. *See supra* discussion Part III.B.

546. *See id.*

547. U.S.-Cuba Feb. 1903 Lease, *supra* note 10; *supra* discussion Part III.B.

548. *See supra* discussion and notes 356, 409, 425, 504-10 (describing government's arguments and Scalia's dissent in *Boumediene*).

549. *See supra* discussion Part IV.A-C.

550. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

551. *Id.*

552. *See id.*

for foreign states, avoids constitutional limits for its overseas authority, and protects strategic overseas interests (geopolitical, economic, and legal). These objectives craft the legal anomaly evident in base occupation since 1898 and in base detention litigation since 2002. Specific to the base, lease agreements in 1903 and a bilateral treaty in 1934 provide the United States with non-sovereign control and protection of overseas interests, such as a strategically placed base, an effectively indefinite term of occupation, and military authority free from constitutional restraints.[553] These objectives also appear in the Treaty of Paris of 1898[554] and in the Platt Amendment of 1901.[555] The Platt Amendment is significant to the base for two reasons. It required that Cuba lease or sell lands to the United States for coaling or naval stations. This provides the United States legal occupancy of Guantánamo, which it had physically occupied since 1898. Also, the Amendment set the terms for the United States to avoid sovereignty over Cuba, but to retain enormous influence over the island state. The Amendment limited Cuban sovereignty with a "right of intervention" for the United States, limitations on Cuban foreign relations and economic powers, and a base for the U.S. military on Cuban soil.[556] The United States moved to include these Amendment provisions in military appropriations, the Cuban Constitution of 1901, and a bilateral treaty in 1902.[557]

These legal objectives similarly characterize how the Court in *Boumediene* recently addressed this legal anomaly regarding detainee access to the writ of habeas corpus. The Court addressed whether base detainees benefit from the writ in the Constitution's Suspension Clause, whether the MCA and DTA legally suspend the writ, and whether the MCA and DTA offer an adequate substitute for habeas proceedings.[558] The Court found that the constitutional writ extends to the base and to alien detainees, the MCA and DTA unconstitutionally suspend the writ, and the DTA and MCA provide an inadequate substitute for habeas proceedings.

To reach these holdings, the Court confronted each of the four legal objectives regarding this legal anomaly. For instance, its finding that the United States exercises de facto sovereignty over the base tempers the objective of avoiding sovereignty for the United States.[559] Next, the Court regarded formal or de jure sovereignty over the base, belonging to Cuba, as irrelevant to "practical" considerations governing the base.[560] In this regard, the Court does not find a formal determination of Cuban sovereignty, termed "ultimate sovereignty" in the agreements, as a bar to

553. *See supra* discussion Part III.C.
554. *See supra* note 48.
555. *See* Platt Amendment—U.S. appropriations, *supra* note 15; *see supra* discussion Part III.B.
556. *See supra* discussion Part III.B.
557. *See id.*
558. *See supra* discussion Part IV.
559. *See supra* discussion Part IV.B.
560. *See supra* discussion Part IV.C.

finding the writ is applicable. These sovereignty findings essentially provide a slight and nuanced distancing from the two objectives of avoiding U.S. sovereignty and limiting Cuban sovereignty. This is achieved by the Court focusing less on sovereignty as a categorical determination, but more on prudential or practical concerns regarding base authority. Here, the Court is motivated by practical concerns, for example, that U.S. authority on the base is over a century-old, capable of following court orders, and answerable to no other sovereign. The next two objectives, avoiding constitutional limitations overseas and protecting strategic overseas interests, appear in the *Boumediene* opinions as well.[561] With examples from the *Insular Cases*, the Court suggests a Constitution-light for the base. It affirms the doctrine that not all of the Constitution's provisions apply to overseas authority under U.S. sovereignty. This doctrine historically endorsed an informal empire for the United States. Similarly, the opinions identify strategic overseas interests, such as national security, deference to the political branches in foreign relations, and the ability to hold individual detainees for six years without any court proceedings

Second, *Boumediene* provides an example of how the law addresses post-colonial circumstances. In identifying history's present influence, this Article contextualizes future and deeper examinations of what legal checks (if any) apply to U.S. authority overseas. The law used to supporting historic imperial control, such as the Incorporation Doctrine and base agreements, currently governs overseas authority. Specific to Guantánamo, base occupation and legal anomaly on the base are products from U.S. influence over Cuba since its independence from Spain in 1898. Here, the relevant legal instruments are the Treaty of Paris from 1898, the Platt Amendment process initiated in 1901, base lease agreements in 1903, and a bilateral treaty in 1934. This Article highlighted the following three points from post-colonial legal analysis relevant to Guantánamo: (1) that legal narratives deny sovereignty to certain populations in order to exert overseas control; (2) that American constitutional law excludes various individual rights protections overseas; and (3) that American constitutional law creates ambiguities and ambivalences in the rule of law overseas.

Sovereignty continues to be the reference point for legal approaches to overseas authority. This is obvious whether sovereignty is checked in the Platt Amendment in 1901 or found to be de facto by the *Boumediene* Court. Likewise, individual rights protections are potentially excluded when U.S. authority extends abroad. This occurs whether in the fundamental rights distinction of the *Insular Cases* (1901–1920) or more recently in MCA and DTA efforts to deny the writ to Guantánamo detainees. Developed from informal and formal colonial encounters, American law regarding overseas authority purposefully created ambivalences and ambiguities in the law. These legal anomalies currently have normative and doctrinal impacts. The most vivid and applicable example

561. *See supra* discussion Part IV.D-E.

exists in the United States having "complete jurisdiction and control" over the base and Cuba having "ultimate sovereignty."[562] This lack of clarity suited U.S. needs to occupy a base over a century ago, but it has been used for over seventeen years to detain foreign civilians.[563] This legal anomaly also permits U.S. authority to escape limits in constitutional and international law because detention occurs on territory that is neither fully within a foreign sovereign jurisdiction nor clearly within domestic U.S. jurisdiction.

A preliminary analysis of developments since *Boumediene* suggests similar anomalous situations are emerging. Briefly, this Article has examined a recent Executive Order to end the Guantánamo detentions and dispose detainees to other locations, initial habeas proceedings to release detainees, and legal challenges to detention by the United States in Afghanistan. In each of these situations, individual rights are clouded by anomaly. The parameters of detention authority get lost amidst determinations of sovereignty and territorial distinctions of foreign versus domestic. Similar to Guantánamo, anomaly is shaped by policy objectives seeking to avoid sovereign authority overseas, limit sovereignty authority for other states, avoid constitutional limitation abroad, and protect strategic interests. Here, the interests are intelligence gathering and detention during the War on Terror. Checks to detention authority are avoided by mitigating sovereign authority with agreements to lease bases, transfers of custody authority, or claims of judicial immunity over immigration authority. While this analysis is extremely preliminary, it does suggests post-colonial approaches to examining the law of overseas authority should not be limited to habeas rights and a base in Cuba.

Taking these suggestions on the doctrine and theory of overseas detention at Guantánamo, it appears that the "empire strikes back." The legal legacy of imperial influence is not limited to history in 1898, old European practices, or "a long time ago in a galaxy far, far away. . . ." (as the *Star Wars* movies explain).[564] Instead, these legacies have current legal currency in base occupation and base detention on Guantánamo, Cuba. Post-colonial legal theory suggests that the "empire strikes back" with legal ambivalences shaped by objectives to avoid sovereignty, limit sovereign powers for foreign states, avoid constitutional protections abroad, and protect strategic overseas interests. With doctrinal narratives, we see sovereignty is manipulated and the Constitution is severed to endorse overseas authority. The narratives are both historic and present. Within this discourse, legal goals of indefinite detention and protecting individual rights ambiguously co-exist. Whether these goals belong to Lord Darth Vader in a fictional story,[565] U.S. General Leonard Wood in Cuba

562. *See supra* discussion Part III.A, B, C.

563. While "War on Terror" detention began in 2002, detention for asylum-seekers began in 1991. *See supra* note 51.

564. THE EMPIRE STRIKES BACK, *supra* note 1.

565. *See supra* note 1.

in 1902,[566] Guantánamo detainees since 2002, or U.S. base authority since 1898, they seek normative doctrinal force.

566. *See supra* note 2.