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Journal

Journal of Scholarly Perspectives, 3(01)

Author

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Publication Date

2007

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GEOGRAPHIC LOCATION AND THE RIGHTS OF ALIENS ABROAD[†]

Excerpt from:

Kal Raustiala

The Guantanamo Bay Naval Base (“Guantanamo”) has been under the control of the United States since 1903. Despite its century-long presence, the official position of the U.S. government is that Guantanamo is not American territory. An unusual agreement declares that Cuba retains “ultimate sovereignty” over Guantanamo. The United States, however, exercises “complete jurisdiction and control.”¹ The precise legal status of Guantanamo is no mere historical curiosity. Since the attacks of September 11, 2001, the United States has detained hundreds of foreign nationals at the base. Over the last years, several attempted to challenge their detention via habeas petitions.² These petitions, brought by citizens of friendly states, drew support from many quarters. Former U.S. ambassadors argued that the detentions harm U.S. interests abroad;³ former prisoners of war (“POWs”) stressed the implications for Americans captured abroad;⁴ allied governments brought heavy diplomatic pressure to bear and several senators demanded that the President try or release the detainees.⁵

Nonetheless, initially, these habeas petitions all failed. And they failed for a deceptively simple reason. The reason was not that the petitioners are enemy aliens or unlawful combatants.⁷ Rather, the reason was their geographic location. Enemy combatants detained on American soil are not per se barred from contesting their detention in American courts.⁶ But, federal courts have generally held that foreigners—enemy or otherwise—detained *outside* the geographic boundaries of the United States lack legal protections.⁷ The Supreme Court’s decision last June in *Rasul v. Bush*⁸ surprised many observers by holding that the federal habeas statute encompassed the Guantanamo petitions. But the majority opinion rested on a narrow issue of statutory interpretation: Did the federal habeas statute apply to aliens as well as citizens abroad? The Court held that the statute did so apply. Yet the decision said almost nothing about the constitutional rights of aliens outside U.S. territory.⁹ And, of course, Congress can (and may) amend the habeas statute to deny access to the writ to aliens held abroad. The decision in *Rasul*, while highly significant for the petitioners, did not in any meaningful sense alter the question of the constitutional rights of aliens abroad.

Why is geographic location thought to be determinative of the rights of aliens abroad? The supposition that law and legal remedies are connected to, or limited by, territorial location—a concept I term “legal spatiality”—is commonplace and intuitive. Many Americans have watched footage of Cuban refugees swimming ashore in Florida, desperately trying to reach land before U.S. officials can grasp them. Touching the territory of the United States—the physical soil itself—is critical to the legal determination of their status: the difference between a life of freedom in the United States and forced return to an autocratic Cuba.¹⁰ This is a dramatic example of the power of legal spatiality, but not an unusual one. The concept is suffused throughout the law. Yet, perhaps precisely *because* it is so commonplace, the assumptions embedded in legal spatiality are rarely examined and surprisingly ill-defended. ...¹¹

I. The
Conceptual
Basis Of
Legal
Spatiality

In several recent cases, federal courts have faced the question of whether noncitizen detainees held outside U.S. territory by the U.S. government could challenge their detention via the writ of habeas corpus.¹² In *Al Odah v. United States*, the predicate case to *Rasul*, the D.C. Circuit ruled the Guantanamo detainees could not.¹³ In January of this year, Judge Leon of the D.C. District Court similarly ruled that the petitioners “lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo.”¹⁴ The reason, in short, is that “[n]on-[r]esident [a]liens [c]aptured and [d]etained [o]utside the United States [h]ave [n]o [c]ognizable [c]onstitutional [r]ights.”¹⁵ The decisions to deny these habeas petitions reflect fundamental ideas about territory, sovereignty and constitutionalism. It is critical at the outset to underscore a fundamental idea *not* implicated: that wartime itself blocks enemy aliens’ access to U.S. courts.

Wartime plainly provides a very important context to any case involving aliens, friendly or otherwise. The President wields extraordinary powers during war.¹⁶ But whatever the nature of the current conflict, the Supreme Court has previously made clear that enemy aliens detained by the United States within American territory may, in fact, avail themselves of the judicial process.¹⁷ That the petitioners in the Guantanamo cases are enemy aliens is itself unclear. Defining the category of enemy alien in the age of al-Qaeda is undoubtedly complex. But the petitioners in *Rasul*, for example, were not enemy aliens as that term is traditionally understood. They are citizens of Australia, the United Kingdom and Kuwait—all close allies of the United States.¹⁸ (The United States argues that the Guantanamo detainees nonetheless qualify as enemy aliens “because they were seized in the course of active and ongoing hostilities against United States and coalition forces.”)¹⁹ Most significantly, however, the precedents upon which the

D.C. Circuit rested its decision in *Al Odah* make clear that the enemy alien designation is unnecessary. The holding in *Johnson v. Eisentrager*,²⁰ a World War II era case heavily relied upon by the Bush Administration in the Guantanamo litigation, “was not dependent on the aliens’ status as enemies, but rather on the aliens’ lack of presence inside the sovereign territory of the United States.”²¹ Consequently, while the nature of the current struggle against al-Qaeda and in Afghanistan and Iraq provides a very important milieu for these cases, the resolution of the question of habeas corpus—and of the broader question of constitutional rights—does not wholly or even primarily rest on the exigencies of wartime.

These decisions instead rest on a specific conception of territoriality. This conception can be stated as follows: *The physical location of a individual determines the legal rules applicable and the legal rights that individual possesses.* In this Article, I refer to this concept as “legal spatiality.” The concept of legal spatiality can readily be generalized: The scope and reach of the law is connected to territory, and therefore, spatial location determines the operative legal regime. More plainly, where you sit determines what rules you sit under.

Assumptions of legal spatiality suffuse our legal system. The D.C. Circuit stated, for example:

We cannot see why, or how, the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections are not. . . . If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.²²

According to this view, the protections of the Bill of Rights are not untethered from the territory of the United States. Rather, they are spatially bound: operative only within the 50 states and other territories unequivocally possessed by the United States. Since the petitioners are aliens outside the territorial borders of the United States,²³ they lack the constitutional protections they uncontestedly would enjoy were they within our borders.²⁴ In deciding in favor of the detainees in *Rasul*, the Supreme Court did not so much as challenge this set of assumptions as sidestep them. The Court’s holding rested on the particular language of the federal habeas statute, which, said the majority, does not distinguish between citizens and aliens. Since citizens can clearly petition for habeas relief from Guantanamo, so—as a matter of statutory right—can aliens.²⁵ In so ruling, the *Rasul* Court distinguished earlier and arguably contrary precedents on the ground that underlying understandings of the reach of the habeas statute had changed

in recent years.²⁶ The result was a victory for the *Rasul* detainees, but one that does not challenge in any fundamental way prevailing conceptions of legal spatiality.²⁷

II. Habeas And The Question Of Guantanamo

Legal spatiality has received little systematic scholarly attention. The connection between law and land has come into sharp focus, however, over the issue of the detention of suspected al-Qaeda and Taliban members in Guantanamo as well as in other, less well-known facilities in Afghanistan and other foreign locations.²⁸...

A. Leases and Litigation

Given a century of control by the United States, it is not surprising that litigation over the status of Guantanamo has arisen before. Federal courts have previously been asked to determine whether the 45-square-mile base is foreign territory for statutory and constitutional purposes. The Haitian refugee litigation of the 1990s raised this issue squarely—with mixed results—and a raft of other cases have likewise considered Guantanamo's legal status.²⁹ Relying on language in the lease purporting to retain ultimate sovereignty in Cuba, the majority of these cases have maintained that the base is Cuban, not American, soil.³⁰

Bird v. United States,³¹ for example, involved a Navy physician at the base who allegedly misdiagnosed a civilian's cancer. The patient sued the United States for medical malpractice under the Federal Tort Claims Act. Since the Claims Act has a spatial limitation built in—it bars claims arising from a “foreign country”—the issue was whether Guantanamo was U.S. territory or rather, part of a “foreign country.” The Supreme Court held that Cuba retained ultimate sovereignty and thus, Guantanamo was a foreign country for purposes of the statute. In *Colon v. United States*,³² a federal district court faced a similar claim arising from a personal injury on Guantanamo. The Court likewise concluded that Cuba retained sovereignty, making the base a foreign country for purposes of the Federal Tort Claims Act. And in *Cuban American Bar Association v. Christopher*, the Eleventh Circuit had to determine whether aliens detained in Guantanamo could assert various statutory and constitutional rights.³³ It held that jurisdiction and control were not equivalent to sovereignty, and that military bases abroad therefore remain under the sovereignty of the host state.³⁴

Guantanamo is nonetheless an unusual place.³⁵ For several reasons, it strains credulity to argue that Guantanamo is foreign soil, no different than Al Udeid Air Base in Qatar or Ramstein Air Base in Germany. For every American military base abroad, there is an international legal agreement governing the relationship with the host state, known as a “Status of Forces Agreement.” Uniquely, there is no such agreement with Cuba.

Moreover, the circumstances of the Guantanamo lease's genesis, as well as the precise provisions, are quite unusual. Most strikingly, the "lease" is effectively permanent, since Cuba cannot unilaterally terminate it.

B. Sovereignty and Spatiality in Cuba

The U.S. government's claim of exclusive Cuban sovereignty raises several difficult questions. Can Guantanamo reasonably be analogized to ordinary military bases and thus treated legally as foreign territory? Is Cuban sovereignty necessarily exclusive of U.S. sovereignty? Is the lease valid under international law? Even if, as a formal matter, the base *is* clearly Cuban territory, what bearing ought this have on the constitutional rights of individuals detained there by the U.S. government? ...

1. Validity

The Guantanamo lease is not a reciprocal agreement between sovereigns. It is a direct legacy of a colonial relationship.³⁶ Guantanamo Bay fell into U.S. hands as a spoil of war. Then, as a condition of Cuban independence, the United States leased the base in perpetuity.³⁷ Previous cases regarding Guantanamo have relied heavily on the literal text of the lease and its language concerning sovereignty. But given its history and structure, the lease's continuing validity is not above question. International legal doctrine presents at least two arguments that the lease may no longer be valid. While both are tenable, neither is especially strong.

The first argument turns on the origins of the lease. Does the lease's genesis in a colonial relationship somehow vitiate its legality? The Vienna Convention on the Law of Treaties, which codifies the customary international law of treaties, holds that if a new peremptory norm of international law emerges, any existing treaty in conflict with that norm is void.³⁸ Peremptory or *jus cogens* norms are legal norms that are so significant that they cannot be altered or contradicted by international agreement. If the lease violates such a norm, it is no longer valid under international law. The problem with this argument is that the content of the category of peremptory norms is highly disputed. Aside from a few very well-established norms, such as genocide, there is little agreement among states or jurists on what falls within the bounds of *jus cogens*. Consequently, it is hard to see precisely what norm the Guantanamo lease violates that reasonably has the status of *jus cogens*.³⁹ The lease is undoubtedly in deep tension with certain structural principles of the international order—sovereign equality, disfavor for colonialism and nonintervention in the domestic affairs of sovereign states, among others. Yet these are not generally thought to be *jus cogens* norms, and so this argument is unpersuasive.

A second possible doctrinal argument rests on the concept of *rebus sic stantibus*. Under the customary international law of treaties, as well as the Vienna Convention on the Law of Treaties, an agreement may be terminated if a fundamental change of circumstances occurs which (1) was an essential basis of the consent of the parties to the treaty and (2) radically transforms the extent of the obligations to be performed.⁴⁰ A change in government is not sufficient in and of itself to terminate a treaty under this doctrine. But the shift in Cuba after Castro took power is not mere change of government; rather, Cuba became a state with an ideology and political system completely oppositional to that of the United States. This hostility is manifested in the landmines that ring the base. With such outward hostility, the continued existence of a foreign military base is unusual indeed. Like the *jus cogens* argument, however, this argument ultimately lacks force. Whether the dramatic shift in Cuban-American relations after the revolution is sufficient to meet the test of the Vienna Convention for treaty termination is unclear. Previous cases have set quite a high bar for invoking the doctrine of *rebus sic stantibus*. In a recent International Court of Justice case involving a treaty between two Warsaw Pact states (relating to the construction of a dam), the momentous fall of communism in Eastern Europe was held insufficient to justify the invocation of *rebus sic stantibus*.⁴¹ While the change at stake in the Guantanamo case is clearly quite significant, it by no means is plainly sufficient to meet the doctrinal standard. Even if it were, moreover, the political significance of such a ruling is highly uncertain.

2. Interpretation

A more compelling argument does not involve any challenge to the lease's validity per se but rather, the interpretation of it. The critical language of the lease states that Cuba retains "ultimate sovereignty," whereas the United States exercises "complete jurisdiction and control." Most federal courts have interpreted this language to mean that Cuba is the sole sovereign in Guantanamo and have held that sovereignty was the touchstone under prior precedents such as *Eisenstrager*.⁴² The Bush Administration argued that jurisdiction is distinct from sovereignty—an accurate statement—but that sovereignty is the key to habeas jurisdiction. It was this latter claim that the Supreme Court rejected as a statutory matter in *Rasul*.⁴³ Since the Guantanamo lease specifies that Cuba retains "ultimate sovereignty," the U.S. position was and remains that this fact disposes of any constitutional claims of the detainees.⁴⁴

Yet traditional canons of construction suggest a different reading of the lease, one more faithful to the history of the base and to the realities of the American presence in Guantanamo. This reading turns on the meaning of the phrase "ultimate sovereignty."

Under the Bush Administration's interpretation, the word "ultimate" in the lease is surplusage. The lease could simply read "Cuba remains sovereign" with no change in the legal outcome. "Ultimate sovereignty" can alternatively, and more reasonably, be interpreted to refer to reversion. Cuba retains a reversionary right over Guantanamo if and when the lease is terminated by mutual assent of the parties.⁴⁵ In this reading, Cuba is the reversionary sovereign and the United States the temporary sovereign. The United States cannot cede Guantanamo to any state other than Cuba, and if the United States exits Guantanamo, the base reverts completely to Cuba.

In this alternative reading, the word "ultimate" actually performs interpretive work. It refers to residual sovereignty, a concept well known in international law.⁴⁶ This reversionary reading is consistent with both the plain meaning of the text and with the realities of the subsequent behavior of the parties—two central considerations when interpreting the texts of international agreements.⁴⁷ This interpretation is strengthened further by consideration of the language of "complete control and jurisdiction," rather than merely "control and jurisdiction." Why did the drafters add the term "complete"? The use of the modifier "complete" suggests that the United States is exercising a special sort of control and jurisdiction, a view consistent with the preceding interpretation that the United States is a temporary sovereign for the duration of the lease. This reversionary theory suggests that Guantanamo is broadly analogous to U.S. insular possessions such as Guam. An even closer parallel is the former Canal Zone in Panama. The Canal Zone was carved out of Panamanian territory via a treaty with the United States, also dating from 1903.⁴⁸ That treaty grants to the United States "all the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign."⁴⁹

This reading is bolstered by consideration of the factual circumstances of the base. Since negotiating the extraordinary lease terms with the newly independent but thoroughly subservient Cuban government, the United States has never relinquished its occupation of Guantanamo.⁵⁰ Guantanamo was in U.S. hands after the Spanish-American War, and the base remains in American hands today.⁵¹ This unusual history accords well with a revised interpretation of the phrase "ultimate sovereignty." And it accords well with the realities of U.S. power in Guantanamo, which is, in practical terms, total. Cuba, whatever the lease may say as a formal matter, is a wholly ineffective "lessor" and poses no threat to the U.S. base whatsoever. Cuban law is uncontestedly unavailable to the detainees, and Cuban courts play no part in this—or any previous—litigation. U.S. jurisdiction over both American civilians and foreign nationals present in Guantanamo is total.⁵² In sum, for all intents and purposes, the reality is that Guantanamo is as American a territory as Puerto Rico.

3. The Atom of Sovereignty

Whether one agrees or disagrees with this reading of the lease is perhaps not dispositive of the question of whether the Constitution somehow applies to aliens in Guantanamo. The question of who—the United States or Cuba—has sovereignty over Guantanamo presupposes that sovereignty is indivisible and cannot be concurrently held. If it is Cuba that is sovereign, the Bush Administration asserts, then the United States ipso facto is not sovereign. Yet this is not at all clear as a conceptual matter. Indeed, “the American experience belies the notion that the atom of sovereignty cannot be split.”⁵³ The crux of the lower court decisions in *Al Odah* and *Khalid* was the contention that the naval base is “outside the sovereignty of the United States.”⁵⁴ Implicit in this is the idea that sovereignty is absolute, bounded, and exclusive....

More significantly, sovereignty need not, and has frequently not been, conceptualized as mutually exclusive—as the history of the United States and other federal states make clear. Federalism is a system of shared sovereignty in which territory is divided for some purposes but not for others. American federalism is one of dual, or triple, sovereignties: Federal, state and tribal sovereignty all co-exist in a complex system, though the last is more vestigial than vital.⁵⁵ As the Supreme Court stated in *Alden v. Maine*, the Constitution “preserves the sovereign status of the States” and “reserves to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”⁵⁶ The states thus retain, in the words of James Madison, “a residuary and inviolable sovereignty,” a sovereignty that co-exists with that possessed by the federal government.⁵⁷ Thus our own federal structure is one of “dueling sovereignties,”⁵⁸ in which the states and the federal government (and occasionally the tribes) battle over power and control. As the Ninth Circuit recognized in *United States v. Corey*, two sovereignties may, as in our federal system, exercise concurrent jurisdiction, and this “principle applies no less in the international domain.”⁵⁹

Sovereignty is hence not an all-or-nothing proposition. Consequently, there is no necessary conceptual, constitutional or practical reason to believe that whatever sovereignty Cuba enjoys in Guantanamo necessarily strips the United States of sovereignty. In other words, one need not accept the lease-based idea that Cuba retains only a reversionary sovereignty in Guantanamo to conclude that the United States is partially sovereign in Guantanamo. Both states may be sovereign concurrently, with the particular sovereignty of each dependent on the precise issue at hand. This view tracks our own theories of sovereignty as embodied in federalism, while also yielding a result—constitutional application to Guantanamo o—that fits with the best tradition of American constitutionalism.

Finally, even if concurrent or reversionary notions of sovereignty are rejected, sovereignty and jurisdiction are distinct concepts and one need not entail the other—as *Rasul* made plain, and as a host of extraterritoriality cases over the last sixty years demonstrate. As the historical practice of habeas corpus shows, courts may have jurisdiction to hear habeas petitions even if the petitioners are held outside the sovereign territory of the government.⁶⁰ Clearly, American citizens can bring habeas petitions if detained in Guantanamo. Sovereign control of the territory upon which they sit is not necessary for the federal courts to have jurisdiction. Why then should sovereign control be necessary—as the Bush Administration argues—for jurisdiction over non-citizens? In *Rasul*, and in the current post-*Rasul* litigation, the United States rested their claim of the necessity of sovereign power upon *Eisentrager*. Yet *Eisentrager* did not expressly hold that all non-citizen detainees held outside the territory of the United States cannot bring petitions of habeas corpus. Rather, it more narrowly held that enemy aliens, tried and convicted abroad by military tribunal, cannot review their convictions in U.S. civil courts.⁶¹

In sum, I have critiqued the prevailing interpretation of the Guantanamo lease agreement for failing to read meaning into all the key terms in the text, and have argued that a better reading is that Cuba is the reversionary sovereign in Guantanamo, whereas the United States is de jure sovereign—as it unequivocally is sovereign in a de facto sense. Moreover, I have argued, our own federal structure demonstrates that there is no necessary barrier to American sovereignty in Guantanamo co-existing with Cuban sovereignty, with each sovereign authoritatively controlling a delimited set of powers and issues. Even if, in other words, one rejects the concept of reversionary Cuban sovereignty, it does not follow that the U.S. wields no sovereign powers at the base. Thus, between the two diametrically-opposed positions taken in the D.C. District Court decisions of January 2005—by Judge Green and by Judge Leon—my argument unequivocally supports Judge Green's statement that "Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply."⁶²

Guantanamo and the terms of the lease granting the United States control over it are vestigial remnants of the age of empire. Throwbacks to an earlier and quite different time, they are difficult to defend on any principled basis.⁶³ The only reason the 45-square-miles of Guantanamo remain in U.S. hands is America's "full spectrum dominance" over Cuba.⁶⁴ Distinguishing Guantanamo from other American military bases is not difficult. A more profound critique of the legal treatment of Guantanamo focuses on the concept of legal spatiality itself, however. Why does moving individuals

from one geographic location to another fundamentally alter the scope of their constitutional and statutory rights vis-a-vis the U.S. government? What is the legal magic of American soil?

In this regard, it is instructive to compare the decision in *Al Odah* to that of the Supreme Court in *In re Ross*⁶⁵ in the late nineteenth century. *Ross* involved an enclave of overseas American power—the consular court system in Japan—that, like Guantanamo, grew out of the fundamental inequalities of the time. Like the Guantanamo base, it too was sanctioned by treaty. *Ross* held that the Constitution could not apply to U.S. government actions within the territory of another sovereign because sovereignty was exclusive; hence, the defendant possessed no constitutional rights that could be violated by the U.S. government.⁶⁶ The logic of *Al Odah* is strikingly similar. Because Cuba is sovereign, the United States is not sovereign and therefore, the detainees lack any constitutional rights against the U.S. government. Just as the consular courts of the imperial era were untrammelled by either U.S. constitutional or local municipal law, so is Guantanamo unaffected and indeed unreachable—as far as foreigners are concerned—by our fundamental law *and* by Cuban law. A more pure—and anachronistic—statement of legal spatiality can hardly be imagined.

[†]Excerpt from the full article "The Geography of Justice," 73 *FORDHAM L. REV.* 2501 (2005).

¹ Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, 6 *BEVANS* 1113, 1114, available at http://www.nsgtmo.navy.mil/gazette/History_98-64/hisapxd.htm.

² See, e.g., *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

³ See Brief of Diego C. Asencio et al. as Amici Curiae in Support of the Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) (filed by former U.S. diplomats).

⁴ See Brief of Former American Prisoners of War as Amici Curiae in Support of Petitioners, *Rasul* (Nos. 03-334, 03-343).

⁵ See Neil A. Lewis, *Try Detainees or Free Them, 3 Senators Urge*, N.Y. TIMES, Dec. 13, 2003, at A14 (quoting Senator John McCain, a former POW during the Vietnam War, as stating that "[t]hey may not have any rights under the Geneva Conventions as far as I'm concerned . . . but they have rights under various human rights declarations. And one of them is the right not to be detained indefinitely"). Several American officials reportedly doubt the utility of the detention strategy in Guantanamo, in particular in light of the adverse public response around the globe. See David Rose, *Operation Take Away My Freedom: Inside Guantanamo Bay on Trial*, VANITY FAIR, Jan. 2004, at 88, 136 (discussing the debate).

⁶ See *Ex parte Quirin*, 317 U.S. 1 (1942).

⁷ See, e.g., *Al Odah*, 321 F.3d at 1140-41; *Khalid v. Bush*, Nos. 1:04-1142, 1:04-1166, 2005 U.S. Dist. LEXIS 749, at *21-*30 (D.D.C. Jan. 19, 2005); see also *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law: Ability of Detainees in Cuba to Obtain Habeas Corpus Review*, 96 AM J. INT'L L. 481 (2002).

⁸ 124 S. Ct. 2686 (2004).

⁹ Footnote fifteen of *Rasul*, while dicta, implicitly claims that the Constitution applies to aspects of the detention of aliens in Guantanamo (and, again implicitly, other analogous U.S.-controlled territory). See *id.* at 2698 n.15.

¹⁰ Cubans receive special treatment under U.S. law. Pursuant to the Cuban Adjustment Act of 1966, Cuban asylum seekers who reach U.S. soil are given "preferential treatment by enabling them to enter the United States and achieve permanent-resident status through a special process not offered to other refugees." Note, *The Cuban Adjustment Act of 1966: ¿Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 902 (2001); see also Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIGR. L.J. 479 (1995).

¹¹ The primary exceptions to the dearth of research on these topics in the field of extraterritoriality as a constitutional issue are the pathbreaking works of Gerald Neuman and Alex Aleinikoff. See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* (2002); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996) [hereinafter *Strangers to the Constitution*]; Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197 (1996) [hereinafter Neuman, *Anomalous Zones*]; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991). Statutory questions of extraterritoriality have received far more attention, much of it devoted to when and where extraterritorial application of U.S. statutes ought to occur. See, e.g., Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1 (1992); Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998); Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and*

Employees Outside the United States, 17 LAB. LAW. 417 (2002); Detlev F. Vagts, Editorial Comment, *Extraterritoriality and the Corporate Governance Law*, 97 AM. J. INT'L L. 289 (2003). Domestic law also has spatial assumptions that I do not pursue here. See, e.g., THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas Blomley et al. eds., 2001).

¹² *Al Odah* involved twelve Kuwaiti nationals detained in Guantanamo. *Al Odah*, 321 F.3d at 1136. *Rasul* involved two British and one Australian detained in Guantanamo. *Id.* at 1136-37. The D.C. Circuit Court of Appeals consolidated the two in 321 F.3d 1134. See Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004) (discussing constitutional as well as international law arguments). One of the more interesting aspects of the Supreme Court litigation is the amicus brief filed by the military lawyers charged with the defense of Guantanamo detainees before American military tribunals. See Jeffrey Toobin, *Inside the Wire: Can an Air Force Colonel Help the Detainees at Guantanamo?*, NEW YORKER, Feb. 9, 2004, at 36, 39.

¹³ *Al Odah*, 321 F.3d at 1145.

¹⁴ *Khalid v. Bush*, Nos. 1:04-1142, 1:04-1166, 2005 U.S. Dist. LEXIS 749, at *30 (D.D.C. Jan. 19, 2005).

¹⁵ *Id.* at *21.

¹⁶ See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 161-273 (2003).

¹⁷ *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942); see also Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 20-26, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) (arguing that traditional practice both in England and in the early American republic permitted aliens, enemy or friendly, access to the writ of habeas corpus).

¹⁸ See generally David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002). U.S. officials in Guantanamo have acknowledged that some of the detainees likely have no connection to al-Qaeda or the Taliban. Katherine Q. Seelye, *An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002, at A8 (quoting deputy commander at Guantanamo).

¹⁹ Brief for the Respondents in Opposition at 14, *Rasul* (Nos. 03-334, 03-343). The petitioners in *Khalid*, captured in Bosnia and in Pakistan, hail from Algeria, France, and Bosnia. *Khalid*, 2005 U.S. Dist. LEXIS 749, at *6.

²⁰ 339 U.S. 763 (1950).

²¹ Brief for the Respondents in Opposition at 13, *Rasul* (Nos. 03-334, 03-343). Judge Leon's decision in *Khalid* echoes this, stating that "nothing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny." *Khalid*, 2005 U.S. Dist. LEXIS 749, at *27. See also the Ninth Circuit's statement in *Gherebi*:

The dispositive issue, for purposes of this appeal, as the government acknowledges, relates to the legal status of Guantanamo, the site of petitioner's detention. . . .

. . . [T]he government does not dispute that if Gherebi is being detained on U.S. territory, jurisdiction over his habeas petition will lie, whether or not he is an "enemy alien."

Gherebi v. Bush, 352 F.3d 1278, 1285 (9th Cir. 2003).

²² *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003).

²³ As I describe below, while territoriality is critical to the D.C. Circuit's decision in *Al Odah*, so is alienage. See *infra* Part III.A. As even the dissent in *Rasul* notes, federal courts would have habeas jurisdiction over an American citizen imprisoned in Guantanamo as a constitutional as well as a statutory matter. See *Rasul v. Bush*, 124 S. Ct. 2686, 2708 (2004) (Scalia, J., dissenting).

²⁴ A flurry of scholarship on the Constitution's territorial reach occurred in the wake of the Spanish-American War. See, e.g., Abbott Lawrence Lowell, *The Status of Our New*

Possessions—A Third View, 13 Harv. L. Rev. 155 (1899); see also *infra* Part II.B (discussing the Constitution's territorial reach). The question popped up throughout the twentieth century in the law reviews. See, e.g., Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 (1949); Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781 (1955). There is an extensive literature devoted to Puerto Rico's status in particular. See, e.g., Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter Foreign in a Domestic Sense].

²⁵ Implicit in this is the notion that the default assumption in interpreting a statute silent on the distinction between citizens and aliens is to assume no distinction.

²⁶ Specifically, the majority argued that despite the language of the statute suggesting that a detainee must be within the territorial jurisdiction of the district court receiving the petition, in fact, if the custodian is within that district, that is sufficient. *Rasul*, 124 S. Ct. at 2695.

²⁷ This is evidenced by the flat assertion in *Khalid* that “[n]on-[r]esident [a]liens [c]aptured and [d]etained [o]utside the United States [h]ave [n]o [c]ognizable [c]onstitutional [r]ights.” *Khalid v. Bush*, Nos. 1:04-1142, 1:04-1166, 2005 U.S. Dist. LEXIS 749, at *21 (D.D.C. Jan. 19, 2005). The Supreme Court has left the door open for the claim that *some* constitutional rights may be available to aliens outside the United States, though it has not clarified the issue. In *Zadydas v. Davis*, for example, the Court stated: “It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States” *Zadydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted). The Court’s invocation of “certain constitutional protections” at least suggests that other such rights may be available to aliens outside the borders of the United States. For example, in the area of personal jurisdiction, extraterritorial rights exist for foreign nationals. *Asahi Metal Industry Co. v. Superior Court*, for example, awards some level of due process rights to non-citizens abroad. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Consider also the holding of the Ninth Circuit in *United States v. Davis*: “In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.” *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990) (citation omitted).

²⁸ See James Risen & Thom Shanker, *Hussein Enters Post-9/11 Web of U.S. Prisons*, N.Y. TIMES, Dec. 18, 2003, at A1. Guantanamo has played a key role in debates over legal spatiality before. See, for example, the discussion in *Haitian Centers Council, Inc. v. McNary*.

It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States.

Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1343 (2d Cir. 1992); see also *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (“The district court here erred in concluding that Guantanamo Bay was a ‘United States territory.’ . . . We disagree that ‘control and jurisdiction’ is equivalent to sovereignty”).

²⁹ See, e.g., *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992); Harold Hongju Koh, *America’s Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1995) [hereinafter Koh, *Refugee Camps*]; Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT’L L.J. 1 (1994) [hereinafter Koh, *Reflections*].

³⁰ But see *Rasul v. Bush*, 124 S. Ct. 2686, 2699-701 (2004) (Kennedy, J., concurring); *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003); *In re Guantanamo Detainee Cases*, 2005 U.S. Dist. LEXIS 1236.

31 923 F. Supp. 338 (D. Conn. 1996).

32 No. 82 Civ. 34-CSH, 1982 U.S. Dist. LEXIS 16071 (S.D.N.Y. Nov. 24, 1982)

33 Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1417 (11th Cir. 1995).

34 *Id.* at 1425.

35 "The legal status of Guantanamo Bay, both in international law and in municipal law, is peculiar and unique." Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 730 (1968).

36 "The legal status of Guantanamo Bay, both in international law and in municipal law, is peculiar and unique." Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 739 (1968).

37 There are, of course, other such leases—most prominently, the now-historical lease between China and Great Britain extending control to the United Kingdom over the Hong Kong territory. That lease expired in 1997 and was not renewed. The Hong Kong lease is terse and simply states that "Great Britain shall have sole jurisdiction" in the new area and makes no express mention of sovereignty. Convention Between China and Great Britain Respecting an Extension of Hong Kong Territory, June 9, 1898, P.R.C.-Gr. Brit., 186 Consol. T.S. 310. The U.K. Foreign Office nonetheless treated the lease as granting the United Kingdom sovereignty for ninety-nine years. This fact is derived from an email correspondence between the author and Anthony Aust, former Deputy Legal Advisor in the United Kingdom's Foreign Office.

38 Vienna Convention on the Law of Treaties, May 23, 1969, art. 64, 1155 U.N.T.S. 331, 343.

39 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.6 (1987) ("Although the concept of *jus cogens* is now accepted, its content is not agreed."); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 514-17 (5th ed. 1998).

40 Vienna Convention on the Law of Treaties, *supra* note 38, 1155 U.N.T.S. at 347; see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 240-42 (2000).

41 Gab ikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25), available at http://www.icj.cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_jjudgment_970925_frame.htm.

42 See *Al Odah v. United States*, 321 F.3d 1134, 1142-43 (D.C. Cir. 2003). *Eisenrager*, in fact, is inconsistent on this point, referring at times to territorial jurisdiction and at times to sovereignty. The Ninth Circuit seized on this in its decision in *Gherebi*. *Gherebi v. Bush*, 352 F.3d 1278, 1287 (9th Cir. 2003).

43 *Rasul v. Bush*, 124 S. Ct. 2686, 2693, 2696-98 (2004).

44 See also *Gherebi*, 352 F.3d at 1286 ("In other words, in the government's view, whatever the Lease and continuing Treaty say about the United States' complete *territorial jurisdiction*, Guantanamo falls outside U.S. *sovereign* territory—a distinction it asserts is controlling under *Johnson*").

45 In *Gherebi*, the Ninth Circuit argued similarly, concluding that the 1903 lease's use of "ultimate sovereignty" means that during the unlimited and potentially permanent period of U.S. possession and control over Guantanamo, the United States possesses and exercises all of the attributes of sovereignty, while Cuba retains only a residual or reversionary sovereignty interest, contingent on a possible future United States' decision to surrender its complete jurisdiction and control. *Gherebi*, 352 F.3d at 1291.

46 See, e.g., BROWNLIE, *supra* note 39, at 110-11.

47 The Vienna Convention on the Law of Treaties codifies the customary law of treaty interpretation. The Convention declares that "[a] treaty shall be interpreted in good

faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, *supra* note 38, 1155 U.N.T.S. at 340. Context is to be derived from further agreements between the parties and “subsequent practice” of the parties. *Id.* The object and purpose, particularly when read in light of the contemporaneous Platt Amendment to the Cuban Constitution, is relatively clear: to ensure that the United States maintained control over Guantanamo as a coaling station and to keep U.S. forces within Cuba as a means of asserting hegemony. The subsequent practice of the United States includes extensive use of Guantanamo for a host of commercial activities and the creation of a self-sustaining city there. Cuba has renounced the agreement and cut off the water and other supplies in retaliation for what, in Cuban eyes, is the manifest unfairness of the lease. *See* Neuman, *Anomalous Zones*, *supra* note 11 (discussing these facts).

⁴⁸ Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, Nov. 18, 1903, U.S.-Pan., 33 Stat. 2234.

⁴⁹ *Id.* at 2235. A later treaty reduced these rights and powers. *See* Green, *supra* note 24, at 789-93.

⁵⁰ Indeed, it would not be surprising if the United States negotiated favorable military base lease terms with the newly independent but quite subservient Iraqi government. Even then, however, a lease in perpetuity is highly unlikely—a sign both of how views about intervention have changed and how extraordinary the Guantanamo lease is.

⁵¹ This view is not wholly novel. For example, Joseph Lazar has stated:

The international legal record thus speaks for itself as to the occupation rights of the United States over the territory of the Guantanamo Naval Station. This record also clarifies the meaning of “ultimate sovereignty.” . . . Thus, when [the lease] provided that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the described areas of land and water,” it presumably was understood that the cession in lease over the territory either recognized the sovereignty over the territory to be in the United States for the duration of the period of occupation, or simply recognized the suspension of sovereignty pending the vesting of ultimate sovereignty on conclusion of the period of occupation.

Joseph Lazar, “*Cession in Lease of the Guantanamo Bay Naval Station and Cuba’s “Ultimate Sovereignty,”* 63 AM. J. INT’L L. 116, 117-18 (1969).

⁵² *See* United States v. Lee, 906 F.2d 117 (4th Cir. 1990) (appeal from dismissal of indictment of Jamaican national charged with sexual abuse on Guantanamo); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975) (prosecution of a United States civilian employed in Guantanamo for drug offense committed on the base site).

⁵³ United States v. Corey, 232 F.3d 1166, 1180 (9th Cir. 2000). The “split atom” trope is drawn from *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In his concurring opinion, Justice Kennedy wrote that “[t]he Framers split the atom of sovereignty.” *Id.* at 838 (Kennedy, J., concurring).

⁵⁴ *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003).

⁵⁵ The states retain “the dignity and essential attributes inhering” in sovereignty. *Alden v. Maine*, 527 U.S. 706, 714 (1999); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

⁵⁶ *Alden*, 527 U.S. at 714.

⁵⁷ THE FEDERALIST NO. 39, at 198 (James Madison) (George W. Carey & James McClellan eds., 2001).

⁵⁸ Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995).

⁵⁹ *United States v. Corey*, 232 F.3d 1166, 1180 (9th Cir. 2000). The decision in *Corey* goes on to note that this is true for lease agreements with foreign sovereigns as well, with the terms of the lease governing the concurrent authority.

⁶⁰ Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 19, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343).

⁶¹ *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

⁶² *In re Guantanamo Detainee Cases*, Nos. 02-CV-0299, 02-CV-0828, 02-CV-1130, 04-CV-1135, 04-CV-1136, 04-CV-1137, 04-CV-1144, 04-CV-1164, 04-CV-1194, 04-CV-1227, 04-CV-1254, 2005 U.S. Dist. LEXIS 1236, at *63 (D.D.C. Jan. 31, 2005).

⁶³ This is not to deny that all these practices seem to be enjoying a resurgence.

⁶⁴ This phrase is from the U.S. Department of Defense's Joint Vision 2020. See U.S. Dep't of Def., Joint Vision 2020, *available at* <http://www.dtic.mil/jointvision/jv2020.doc> (last visited Mar. 15, 2005).

⁶⁵ 140 U.S. 453 (1891).

⁶⁶ *Id.* at 464.