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OFFSHORING THE WAR ON TERROR

by

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OFFSHORING THE WAR ON TERROR

*The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations . . .*¹

—Justice Hugo Black, dissenting in *Johnson v. Eisentrager* (1950)

A few days before New Year's Day, 2002 John Yoo and Patrick Philbin, two lawyers in the Department of Justice, drafted a memorandum for the Department of Defense. The memo was entitled *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*.² Shortly after the attacks on September 11, 2001, the Bush administration had announced plans to try suspected terrorists by military commission, a kind of military court. As the memo was being completed, the war in Afghanistan was still ongoing. But coalition forces had taken Kabul and other major cities and had already captured many suspected Al Qaeda members. The Bush administration feared detaining these individuals within the United States and generally rejected the criminal justice model of counterterrorism championed by previous presidents.³

The United States naval base at Guantanamo, the subject of the lawyers' memo, was appealing as a long-term site for detention and trial. It was distant from the Middle East, very secure, and, as the Justice Department noted, probably free of the influence of American courts due to its location outside the territory of the United States. In time the detention camp at Guantanamo would become a source of sustained criticism around the world and a major political liability for the United States. But in late 2001,

with the World Trade Center site still a smoking ruin, Guantanamo appeared to be a very attractive option to those formulating the legal response to the 9/11 attacks.

Two years after the Guantanamo memo was written the *New York Times* reported that the CIA and the Pentagon were operating a network of offshore prisons in various foreign locations.⁴ In these overseas prisons, so reported the *Times*, were some of the most high-value detainees in the war on terror. Successive stories in the *Washington Post* revealed that a number of these “black site” prisons were in Europe, and that the CIA had flown individuals there for extensive and coercive interrogation.⁵ As the *Times* reported, the “suggestion that the United States might be operating secret prisons in Europe and the idea that American intelligence officers might be torturing terrorism suspects incarcerated on foreign soil have been incendiary issues across Europe in recent weeks.”⁶

The CIA’s program of extraordinary rendition, in which suspects were covertly flown to other nations for interrogation and detention, often in close coordination with American agents, also received significant media attention in this period. Reports of large American-run military prisons in Afghanistan and in Thailand emerged as well. Taken together, these reports depicted a major initiative on the part of the Bush administration to keep and interrogate suspected terrorists far from American territory. According to leading news reports, at the time more than nine thousand individuals were detained by the United States in overseas facilities, the vast majority by the U.S. military.

Like the decision to sequester and try suspected terrorists in Guantanamo, the revelations of clandestine renditions to a network of offshore prisons produced enormous criticism throughout the world. The decision to conduct critical interrogations beyond the territory of the United States was likewise deliberate and the subject of careful legal analysis. Each of these programs, which would become burning political issues at home as well as abroad, reflected the continuing importance of territorial assumptions about legal rights and duties.

The debate over Guantanamo and offshore interrogation touches on a plethora of issues raised throughout this book. This debate also highlights how, despite a wide range of changes in the territorial doctrines of American law, Westphalian territoriality continues to exhibit vitality, even in the allegedly “flat world” of the twenty-first century. To put this claim in context, it is worth recalling what had transpired in American law in the decades before 9/11.

As the preceding chapters have described, the United States embraced a strict understanding of Westphalian territoriality for much of its history. Extraterritoriality certainly existed in the nineteenth century with regard to so-called uncivilized nations, but was not commonly applied against other sovereign states. Since 1945, however, the United States had increasingly

asserted a much broader form of extraterritoriality under the new effects theory of jurisdiction. It also negotiated, and received, special extraterritorial rights for its armed forces stationed overseas. And it increasingly extended its criminal law offshore and deployed its law enforcement officials abroad.

By contrast, constitutional law exhibited a distinctive pattern. The Supreme Court had long held that constitutional protections do not extend abroad. Moreover, the *Insular Cases*, in the wake of the Spanish-American War, had drawn on a tradition of intraterritorial distinctions to hold that only fundamental legal rights applied in the newly acquired empire of the United States. Then the Cold War brought about a dramatic change. Americans for the first time were held to be protected by the Bill of Rights against federal action even when overseas. By the tail end of the twentieth century tentative steps toward a more universal conception of constitutional rights—one that encompassed aliens as well as citizens—were taken. Yet this trend was soon sharply limited by the Supreme Court's decision, in 1990, to deny the protections of the Fourth Amendment to foreign criminals searched abroad by American agents. This reinforcement of traditional territoriality was welcomed by the executive branch, which was increasingly pursuing criminals and other dangerous actors beyond U.S. borders and preferred to be unshackled from the many legal constraints present in American criminal law.

At least two messages can be distilled from this complex doctrinal evolution. One is that the rising power of the United States over the last century has coincided with a relaxation of many traditional legal doctrines. As a hegemonic power, the United States could and increasingly did extend its law unilaterally to reach and regulate actions anywhere in the world that might cause harm within the United States. Extraterritoriality was no longer limited to weak or peripheral states; it was now used against some of the most powerful states in the international system, including major American allies. Indeed, American allies were *more* likely to be the focus of postwar regulatory and military jurisdiction.

At the same time, however, an countervailing tendency can be traced: in a dangerous world with numerous transboundary threats, American courts frequently accepted the executive branch's claim that constitutional protections were largely territorial, and that the United States—which increasingly acted abroad to neutralize these transboundary threats—ought not be fettered by restrictive principles designed for a more placid domestic setting and a particular political community. In *Reid v. Covert* the Supreme Court had overturned nearly 2 centuries of strict territoriality, forcing the hand of the executive branch with regard to the constitutional rights of overseas American citizens. Yet presidents from both parties continued to seek—and in nearly all cases received—freedom from constitutional restraint when interrogating, arresting, and detaining foreign

nationals offshore. Older, territorial principles supplied that freedom, and were welcomed as a result.

The shocks of September 11 only reinforced the preexisting desire for flexibility held by many in the executive branch. A welter of older precedents, some dusty and discredited, enshrined principles of Westphalian territoriality. Despite their vintage they provided a rich template for contemporary legal argument, particularly concerning Guantanamo. How these varied territorial arguments from the past were deployed to facilitate what became known as the “war on terror,” and how they fared in the twenty-first century, is the topic of this chapter.

A Legal Black Hole

In November 2003 Lord Steyn, a prominent law lord of the United Kingdom, delivered a stinging lecture about U.S. detention practices in the wake of 9/11. In his speech before a London audience Steyn called Guantanamo Bay a “legal black hole.”⁷ This appellation quickly became a favorite of critics of the George W. Bush administration, for it captured an important element of the legal strategy of the United States. Precisely what law—domestic, international, or perhaps foreign—applied to the leased naval base at Guantanamo was the subject of considerable dispute.⁸ At times the American government appeared to argue that no law whatsoever applied, at least with regard to the treatment of the foreign-born detainees held there. Human rights groups and foreign governments strongly contended otherwise, arguing that either U.S. constitutional law or international law applied, and that in any event no legal vacuum could be permitted to exist in a modern democratic society.

For many observers, the Bush administration’s insistence that Guantanamo was beyond the reach of ordinary law became a symbol of a larger American disregard for international law. To the Bush administration, by contrast, Guantanamo was an appropriate and secure site for the detention and trial of highly dangerous terrorists who were intent on doing great harm to innocent civilians. Moreover, the executive branch believed its legal arguments were sound and historically validated in times of war.

Disputes over the reach of American law to Guantanamo are not new. Both current and past controversies have stemmed in large part from disagreement over the odd status of the base. At their core, these controversies turn on a similar question to that which animated the *Insular Cases* a century earlier: is the territory best characterized as foreign or domestic? The *Insular Cases* provided the memorable answer that the American overseas colonies were actually both. They were, the court said enigmatically, “foreign in a domestic sense.”⁹

Unlike the insular possessions at issue in the early 1900s, however, Guantanamo formally remains under Cuban rather than American sovereignty. Yet as chapter 3 detailed, the lease governing the base at Guantanamo grew directly out of victory in the Spanish-American War of 1898. Indeed, the United States has occupied Guantanamo Bay continuously since the end of that war.¹⁰ (The Guantanamo lease was later renewed as part of a treaty with Cuba in 1934.)¹¹ This history, and the reality of American power and control at the base, has led many to question the significance of the distinction between sovereign offshore territory such as Puerto Rico and the ostensibly rented base at Guantanamo Bay.

The decision at the turn of the twentieth century to lease rather than annex Guantanamo reflected a general desire on the part of the American public to grant Cuba independence. The oppression of Cubans by Spain was a major issue in American politics at the time; as one commentator puts it, Cuban freedom “was what the Spanish American War was ostensibly about.” Perhaps more importantly, “an acceptable resolution of Cuban status consistent with the U.S. supremacy in the hemisphere and U.S. commercial interests” did not require annexation.¹² Cuba was nonetheless strategically important, and then-president Theodore Roosevelt conditioned independence on a formal role for the United States.¹³ Hence the new Cuban constitution included the notorious Platt Amendment, which permitted the United States to intervene at any time for “the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty.”

Guantanamo’s unusual legal status is reflected in this history, and is underscored by two factors. One is the lack of any status of forces agreement for American troops at the base. As chapter 5 detailed, the hundreds of thousands of U.S. troops stationed in bases around the world are in turn the subject of dozens of status of forces agreements, or SOFAs. These SOFAs detail the rights and responsibilities of the United States Armed Forces and apportion jurisdiction over bases and associated facilities. Guantanamo is the only major American overseas base without a SOFA. The second, closely related, factor is the unique lease arrangement with Cuba. The lease that was signed by the newly independent Cuba and the United States in 1903 is effectively perpetual: it requires the assent of both parties to terminate it. Moreover, it granted the United States “complete jurisdiction and control” over Guantanamo but, in a critical phrase, left “ultimate sovereignty” in the hands of Cuba.

Sovereignty is normally treated in the Westphalian tradition as having an absolute quality (even if that absolute quality is purely a formal attribute, often violated in practice). As a result, a modifier like *ultimate* is unusual. Why *ultimate* was employed to modify sovereignty, and what significance it has, remain vexed questions. The U.S. government has in practice tended to

interpret the word as superfluous text. In other words, had the lease been drafted using the unadorned term *sovereignty*, the executive branch's theory of the legal rights and powers applicable in Guantanamo would remain exactly the same. The phrase *ultimate sovereignty* can alternatively be interpreted to refer to residual sovereignty, an existing concept in international law.¹⁴ Under this view the United States is a temporary sovereign for the duration of the lease, and at the end of the lease term Cuba reverts to full, "ordinary" sovereignty over the base.

Together, the indefinite nature of the lease, and its division between jurisdiction and sovereignty, give the United States an unusual degree of flexibility and control. The result is untrammelled *de facto* governance by the United States without any necessary claim or pretense of *de jure* sovereignty. As a 1929 memorandum from the Justice Department explained, the naval base is "a mere governmental outpost beyond our borders," a place "subject to the use, occupation and control" of the United States, which is nonetheless not part of the United States.¹⁵

The formal division between sovereignty and jurisdiction in Guantanamo is in many respects a remarkable vestige of nineteenth-century-style extraterritorial jurisdiction. Like the United States District Court for China, Guantanamo is a treaty-based regime of legal control in which a great power asserts complete jurisdiction within a bounded parcel of territory in a foreign nation. That territory nonetheless remains, as a formal matter, under the aegis of the (much weaker) foreign sovereign. This arrangement has proved extremely convenient for the United States, which has on several occasions employed the base as an offshore detention center for unwanted or dangerous individuals. And because Guantanamo is completely controlled by the United States but not possessed by it, the base arguably represents the apotheosis of the intraterritorial distinctions described throughout this book. Like tribal lands or insular possessions, the international community generally recognizes the territory of the Guantanamo base as American territory. Yet for domestic legal purposes the base remains in many important respects foreign terrain. The position of the executive branch in this regard has been consistent: as far as the rights of foreigners are concerned, the naval base is Cuban, not American, territory.

The U.S. position on Guantanamo is not shared by Cuba, which considers the base an illegitimate vestige of Cuba's former colonial status. Castro called it "a base thrust upon us by force, in a territory that is unmistakably ours...imposed by force and a constant threat and a constant source for concern."¹⁶ In the early 1960s Cuban hostility toward Guantanamo was so high that some feared that the Cuban army might invade the base. International lawyers of the era queried whether the United Nations Charter, which guaranteed the right of a member state to

self-defense in the event of an invasion, would apply to an invasion of an American base by the putative host nation. The threatened invasion never occurred, though Cuba did shut off all water supplies and took other hostile actions. As a result, the border between the base and Cuba (or, if the position of the United States is correct, between Cuba and Cuba) was long lined with land mines.¹⁷

Despite the evident hostility between Washington and Havana, the United States continues to adhere to the letter of the century-old accord, claiming that because it does not seek termination of the lease agreement, Cuba cannot unilaterally repatriate Guantanamo Bay. Indeed, the State Department issues an annual rent check to Cuba, which the Castro government refuses to cash.¹⁸ Today, the 45-square mile naval base, in which several thousand Americans reside, is fully self-sufficient, with a movie theater, several fast food outlets, and a shop where visitors can purchase souvenirs emblazoned with phrases like “It don’t GTMO better than this.”¹⁹

Haitians and Cubans

This strange arrangement was largely dormant as a legal matter for most of the twentieth century. To be sure, a variety of low-profile domestic legal disputes raised questions about the legal status of Guantanamo. *Bird v. United States*, for example, was a suit for medical malpractice involving a diagnosis by a Navy physician at the base. Because the Federal Tort Claims Act bars claims arising within a “foreign country,” the case raised the issue of whether Guantanamo was foreign or domestic territory. Referring to the lease of 1903, *Bird* held that Guantanamo was indeed part of a foreign country.²⁰ Other cases from the 1970s and 1980s nonetheless upheld American jurisdiction over the base with regard to most matters.²¹

Guantanamo’s status became more pointed in the aftermath of a coup against Haitian president Jean Bertrand Aristide in 1991. Many Aristide supporters took to the seas in a desperate attempt to flee to the United States. The Coast Guard intercepted many off shore, and the George H. W. Bush administration initiated a policy of summarily returning them to Haiti. After a federal court prohibited this practice, the United States began to hold the Haitians on ships in Guantanamo Bay. Eventually the number of refugees outstripped the ships’ capacity. By December 1991 there were nearly 1,500 Haitians detained at Guantanamo and another 1,000 in the harbor. All told, more than 20,000 Haitians would eventually pass through the Guantanamo base; nearly all were eventually returned to Haiti.²²

The enormous refugee camps constituted the first American use of the base for the detention of unwanted foreigners.²³ And the subsequent litigation foreshadowed several of the debates that would arise in the aftermath

of the 9/11 attacks. For example, the Haitian Refugee Center, a U.S.-based organization, argued to the Eleventh Circuit that it had a First Amendment right of access to the Haitians detained in Guantanamo. The Eleventh Circuit rejected this argument. Most significantly, however, the court declared that the Haitians themselves had “no recognized substantive rights under the laws or the Constitution of the United States.”²⁴ Like the Supreme Court a century earlier in the case of American sailor John Ross, the Eleventh Circuit conceived of the sovereign borders of the United States as sharp lines delimiting the reach of domestic protections. That a local government—in this case Cuba, and in Ross’s case Japan—had consented to extraterritorial American jurisdiction via an international treaty only strengthened this view, for it reinforced the notion that not only was the United States *not* sovereign, but some other government *was* sovereign.

Nonetheless, the effects of a century of legal change are hard to repress, and in the same year the Second Circuit came down in precisely the opposite direction. Holding that detained Haitians did have constitutional rights despite their extraterritorial status, the court argued that

the language of the fifth and fourteenth amendments does not suggest that they apply only to areas fitting a circumscribed definition of the United States. Guantanamo Bay is a military installation that is subject to the *exclusive* control and jurisdiction of the United States. The Supreme Court has recently reaffirmed that fundamental constitutional rights are guaranteed to inhabitants of territory where the United States has sovereign power [citing *United States v. Verdugo-Urquidez*’s invocation of the *Insular Cases*]... 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 detained by such personnel on a land mass exclusively controlled by the United States.²⁵

Here again we see the flexibility of the *Insular Cases*, which have been tweaked to support a wide variety of conclusions. Some courts, including the Supreme Court in *Verdugo*, used them to bolster the claim that outside the constitutional core of the United States some constitutional rights *did not apply*. Others, such as the Second Circuit here, cited them for the proposition that even on distant island possessions, parts of the Bill of Rights *did apply*. The Second Circuit then elided the difference between sovereignty and jurisdiction; because the United States had complete jurisdiction, the court contended, the situation in Guantanamo was just like that in Puerto Rico. The nature of the relationship between sovereignty and jurisdiction would arise again after 9/11.

The story of the Haitians at Guantanamo reflected assumptions about territoriality in other ways as well. The United States was a party to the

Convention Relating to the Status of Refugees, which required signatories to refrain from returning asylum seekers to the country from which they fled. The assumption in the treaty was that refugees would appear at international borders. By intercepting the Haitians at sea, however, the executive branch sought to skirt this no-return rule. The government claimed that the treaty did not have extraterritorial reach, and therefore the United States was not bound by it when it acted on the high seas. The Supreme Court agreed that the Refugee Convention did not extend extraterritorially.²⁶

By intercepting the Haitians outside American borders, U.S. officials successfully shifted the relevant place of contact away from American territory. And by so doing, U.S. officials escaped important legal constraints and gained greater freedom of action. (Interdiction at sea was consistent with the more general shift, noted in the previous chapter, toward “offshoring the border.”) Events in Haiti continued to boil over, however, and the United States eventually intervened militarily in 1994 under UN Security Council auspices. This intervention itself raised questions about whether other human rights treaties to which the United States was a party applied to American action in Haiti.²⁷ Then a mid-1990s wave of Cuban refugees produced similar, if less protracted, litigation as the original Haitian crisis. In *Cuban American Bar Association v. Christopher*, the Eleventh Circuit revisited the question of the extraterritorial constitutional rights of aliens. The court again flatly decreed that “these migrants are without legal rights that are cognizable in the courts of the United States.”²⁸

By April 1996, after 5 years of turmoil in the Caribbean, the detention of all foreigners at Guantanamo Bay came to end. Guantanamo slipped from the courts and the public consciousness until the arrival of handcuffed, orange jumpsuited terrorist suspects nearly 8 years later.

Offshoring the War on Terror

The 2001 invasion of Afghanistan was aimed at both ending a terrorist sanctuary and capturing those who participated in or supported the 9/11 attacks. In a relatively short amount of time the United States detained a large number of suspected Al Qaeda and Taliban fighters. Unlike traditional prisoners of war, many wore no uniforms and did not have an obvious chain of command. They often resisted their detention vigorously and violently. Tommy Franks, the American general in charge of the Afghan invasion, told Pentagon officials he couldn’t maintain adequate security for their detention, and wanted them moved elsewhere fast.²⁹

The Bush administration, intent on trying many of the detainees by military commission for crimes of war, considered several options. These

included military bases within the United States and on the island of Guam, one of the insular possessions remaining from the Spanish-American War. Each of these options was rejected in favor of Guantanamo Bay. As one former Bush administration official later wrote, military bases within the United States

were relatively easy targets for terrorists to attack. They would frighten and possibly endanger U.S. civilians. And detentions there were more likely to be subject to legal challenges since they were on U.S. soil. GTMO, by contrast, was isolated and well defended. And because it was technically not a part of U.S. sovereign soil, it seemed like a good bet to minimize judicial scrutiny.³⁰

The first post-9/11 detainees arrived at the base in January 2002, and were housed in a simple, spartan detention facility. Reactions to the detention camp from abroad soon grew quite negative, with many criticizing not only the conditions the detainees lived under, but the unwillingness of the United States to commit to applying international human rights and humanitarian law in Guantanamo. And the Bush administration did resist the reach of international law to Guantanamo. Even the International Red Cross, which has a special role in policing the laws of war, was at times barred from visiting the detainees.³¹

These actions fed the perception that Guantanamo Bay was indeed a legal black hole, and that the United States had deliberately sought to place suspected terrorists beyond the reach of any legal system. That many detainees were citizens of allies, including the United Kingdom and Australia, only served to ratchet up the criticism even higher. By 2007 Guantanamo had become a commonplace theme in books, films, and plays, often portrayed as a contemporary gulag and a stain on American honor.

Nonetheless, the legal issues at stake with regard to the Al Qaeda and Taliban detainees were complex. At the core of many of the legal disputes over the Guantanamo detainees was the availability of what the Anglo-American legal tradition calls the “writ of habeas corpus.” As described in earlier chapters, habeas corpus is aimed at ensuring that the government does not deprive a person of liberty without providing an adequate basis to a court of law.³² The habeas process consequently presupposes a separation between the courts and the executive, and injects the judiciary into the fray in order to ensure that detentions by the executive are supported as a matter of domestic law.

Because it is grounded in the common law, debates over the scope of habeas often turn on ancient precedents, and the Guantanamo litigation was no different. In the post-9/11 era American courts and lawyers frequently sparred over the meaning of obscure and musty decisions involving

imperial India and the Cinque Ports. Despite its common law roots, habeas is protected in the United States both by statute and the Constitution. To underscore its significance, the Constitution singles out the writ and provides that it cannot be suspended absent a situation of invasion or rebellion, and even then only by Congress.

Habeas quickly became central to the legal debates over offshore detention of suspected terrorists because many of the detainees argued that in fact they were not Al Qaeda or Taliban fighters. Instead, they had been accidentally swept up by American forces in the chaotic battles that ensued in the rough terrain of Afghanistan. Because the purpose of habeas is to constrain unjust executive power, advocates for the detainees argued that habeas review ought to be available wherever the executive engages in detention. Indeed, some observers feared that the idea that there are geographic no-habeas zones would foster the creation of other offshore detention camps.

This incentive-based fear was one source of resistance to the Bush administration's claim that habeas did not apply to foreigners held overseas. Another was moral, or principled: The United States government, proponents suggested, ought not to possess unfettered power over any individual. Autocratic power of that sort was inconsistent with American traditions and ideals. A third source of resistance to the executive branch's claim was historical. Many scholars contended that English law had long held that the right of habeas does not turn on the petitioners' location, but simply on the exercise of state power.³³ These varied issues were at the core of a series of cases before the Supreme Court in the first decade of the twenty-first century.

Fighting the Last War

Part of the complexity raised by the question of what rights the Guantánamo detainees possessed stemmed from the claim that the United States was in a state of war. On September 18, 2001, Congress authorized the use of military force by the United States, triggering a series of legal consequences involving the law of armed conflict. This authorization did not mean that enemy aliens were wholly barred from using the habeas process. That even enemy aliens in wartime can protest their detention before a judge is a principle of long standing in American law, and was the central message of the famous 1942 decision in *Ex parte Quirin*. *Quirin* involved German saboteurs who, under cover of night and emerging from offshore submarines, landed on beaches in Florida and Long Island, changed into civilian clothes, and proceeded to infiltrate American cities. At least one of the would-be saboteurs was actually an American citizen.³⁴ After one of the

participants had a change of heart and alerted the FBI, the saboteurs were imprisoned in Washington D.C. and tried by military commission. The saboteurs then appealed to the Supreme Court using the writ of habeas corpus.

The Roosevelt administration argued vociferously that the Nazi saboteurs lacked any access to American courts. As the Supreme Court put it (referring to a executive proclamation issued by Roosevelt) the president “insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President’s Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation.” The Supreme Court rejected this contention. “Neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and the laws of the U.S. constitutionally enacted forbid their trial by military commission.”³⁵ Both *Quirin* and the contemporaneous case of General Yamashita of Japan established that enemy aliens had a right to habeas jurisdiction, at least if they were held on American territory.³⁶ Whether the same was true for enemy aliens (or any aliens) held beyond American territory, however, was unclear. Add in the unusual status of Guantanamo Bay, and the legal questions become very hard indeed.³⁷

As a result, when the Justice Department endeavored in December 2001 to draft a memo assessing the legal rights of enemy aliens held in Guantanamo, it faced a challenging task. The memo was the first major analysis of the issue in the wake of 9/11, and it looked back at a wide range of precedents. The early 1990s litigation over Guantanamo’s Cuban and Haitian refugees clearly influenced the authors, both because it directly addressed the unusual status of the naval base and because it was somewhat ambiguous in its ultimate message. The executive branch lawyers nonetheless concluded that although the question was not free from doubt, “the great weight” of legal authority indicated that federal courts could not entertain habeas petitions from enemy alien detainees held in Guantanamo. This conclusion reflected one major difference between *Quirin* and the post 9/11 situation: in *Quirin* the trial took place on U.S. territory. And it reflected one major difference between the Clinton-era cases concerning Guantanamo and the post-9/11 situation: the former did not implicate war, and federal courts are generally more deferential to the executive branch in wartime.

The Justice Department lawyers noted that in an ordinary war prisoners are governed by the international law of war. They were not traditionally afforded the right to petition domestic courts for relief. The war against Al Qaeda certainly differed from prior wars in that there was no state or organized army as the adversary. Rather, there were shadowy actors

loosely affiliated in a network, and these actors were often, if not typically, nationals of friendly states. But the Bush administration consistently argued that this was nonetheless a war. The Justice Department lawyers consequently rested much of their conclusion on another case from the Second World War, *Johnson v. Eisentrager*. As noted in chapter 5, *Eisentrager* involved the habeas pleas of several German soldiers captured by American forces in China after the end of the Second World War. The Germans were tried by an U.S. military commission for war crimes and then detained in a U.S. prison in occupied Germany.

In hearing the claims of the German soldiers, the *Eisentrager* court acknowledged that the “privilege of litigation” had historically been granted to enemy aliens in the past. But, the court said, this privilege had been extended only “because permitting their presence in the country implied protection.” The opinion then distinguished *Quirin* and *Yamashita*. The petitioners in those cases were plainly captured, imprisoned, or tried within U.S. territory. The petitioners in *Eisentrager*, by contrast, were never “within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.”³⁸ Consequently, said the Supreme Court, they lacked any right to habeas jurisdiction. But precisely why this was true, and which factual elements were essential, was never made plain in this somewhat opaque decision.³⁹

Though more than 50 years old at the time of the 9/11 attacks, *Eisentrager* suggested an appealing approach for addressing captured Al Qaeda members. If the suspected terrorists were captured abroad and kept away from American territory at all times, they, too, could be kept out of the federal court system. From 2002 onward the case was used repeatedly to bolster executive branch arguments that the legal rights of foreign detainees were sharply delimited by their geographic location. The Bush administration lawyers who drafted the Guantanamo memo in late December of 2001 nonetheless were careful to point to a potential pitfall in this approach. In *Eisentrager* the Supreme Court seemed to have used the concepts of sovereignty and jurisdiction interchangeably, even carelessly. At one point the opinion refers to the importance of sovereignty, but a few sentences later the opinion switches to “territorial jurisdiction.”

Traditionally, as this book has made clear, territorial jurisdiction and sovereign control were understood to go in hand in hand. That is the core of the Westphalian model of territorial sovereignty. Yet practice and precedent have made clear that sovereignty and jurisdiction are not in fact coterminous, and thus the Westphalian model has long been understood to be an ideal type—a formal and abstract conception of sovereign statehood that reality often deviates from. The United States District Court for China had exercised jurisdiction over Americans in China, for example, but the United

States was never sovereign over China or parts of China. The same was true for all the consular courts that had operated in “uncivilized” places around the world. Even the law governing the Panama Canal Zone did not technically rest on American sovereignty over the Canal Zone, though American territorial jurisdiction there was total. And of course the many status of forces agreements negotiated in the postwar era granted jurisdiction to the United States over important aspects of military bases and deployed troops. The United States was not sovereign over these offshore bases either.

This complex history threw a wrench into the (perhaps inadvertent) locution of the Supreme Court in *Eisentrager*. The Justice Department memo alluded to this history obliquely, stating that “a nation . . . can retain its sovereignty over its territory, yet at the same time allow another nation to exercise limited jurisdiction within it.”⁴⁰ This was precisely the scenario in Guantanamo, at least according to the executive branch’s own theory of the lease. And it troubled the Justice Department lawyers. Moreover, at least one case from the earlier wave of Haitian litigation had held that because Guantanamo was subject to the complete jurisdiction and control of the United States, some constitutional rights applied to the Haitians detained there.⁴¹

The Justice Department lawyers consequently feared that a similar logic might drive a federal court to decide that Guantanamo was not in fact like the German prison in *Eisentrager*. A judge might be persuaded that Guantanamo was actually more like the Panama Canal Zone or even Puerto Rico. At the same time, the Bush administration lawyers took solace in the fact that the Haitian cases had not directly addressed habeas jurisdiction. Indeed, no decision of the federal courts had, at that time, ever upheld habeas rights for foreigners in Guantanamo.

Litigating Guantanamo

A great contrast between the Second World War cases such as *Quirin* and *Eisentrager* that were suddenly dusted off after 9/11 and the world of the twenty-first century was the degree to which legal considerations and arguments loomed large in debates, both public and within the government, over the treatment of enemy aliens.⁴² Thus it was unsurprising that the federal courts did not simply take the Bush administration’s word about the extraterritorial rights of enemy aliens. Indeed, several courts were quick to address the question of precisely what rights were possessed by detainees held offshore. For their part, the Bush administration consistently argued that aliens held outside the sovereign territory of the United States “have no basis to challenge the constitutionality of their detentions.” To make things perfectly clear, the administration added that even if they could challenge their detention, the detainees “have no cognizable constitutional rights.”⁴³

The federal courts were at times quite uneasy with these expansive claims, which not only defined a class of persons without apparent rights, but also sidelined the judiciary from playing any supervisory role. Several courts nonetheless accepted this position. The 2003 decision of the D.C. Circuit in *Al Odah v. United States*, for example, noted that there were some differences between the Guantanamo detainees and those 50 years earlier in *Eisentrager*. The postwar German detainees were acknowledged enemy soldiers, whereas the Guantanamo detainees were challenging that status. Indeed, many of the Guantanamo detainees were nationals of friendly states.

But these distinctions were deemed insufficient to alter the result. The D.C. Circuit reasoned that despite these differences, “the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They, too, are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States.”⁴⁴ It followed that the detainees similarly lacked the right of habeas corpus. Undergirding this was a relatively simple idea that went back much further than the Second World War: “We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not.”⁴⁵

Similar views were expressed in other cases at the time. But the federal courts were hardly undivided on this issue. In 2003 a brother of a Guantanamo detainee, Belaid Gherebi, filed a habeas petition before the Ninth Circuit Court of Appeals. Unlike *Al Odah*, the court in *United States v. Gherebi* rejected the government’s territorial approach. The Ninth Circuit held that that Guantanamo was American territory for the purposes of habeas jurisdiction and, in the alternative, that the base was American sovereign territory as well.⁴⁶ Relying on the ambiguity in *Eisentrager* between sovereignty and jurisdiction, the court agreed with the fundamental premise of the government that the rights possessed by the detainees turned on the nature of their location. But the majority argued that the *Eisentrager* did not in fact rest on sovereignty: “The [Supreme] Court nowhere suggested that ‘sovereignty,’ as opposed to ‘territorial jurisdiction,’ was a necessary factor.” Consequently, “we do not believe that [Eisentrager] may properly be read to require ‘sovereignty’ as an essential prerequisite of habeas jurisdiction.”⁴⁷ Territorial jurisdiction, in short, was all that was needed. And as the lease for Guantanamo made clear, the United States possessed complete territorial jurisdiction.

More sweepingly, the reliably liberal Ninth Circuit rejected the Bush administration’s contention on grounds of deep principle, and in a manner that seemed on some level to reflect the widely voiced charge that Guantanamo constituted a legal black hole:

We simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum . . . We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure, and that, contrary to the government's contention, *Johnson* [v. *Eisentrager*] neither requires nor authorizes it. In our view, the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law.⁴⁸

It was a surprise to no one that the struggle over what rights foreigners held in Guantanamo eventually reached the Supreme Court. In the 2004 case of *Rasul v. Bush* the Supreme Court was able—temporarily at least—to square the circle by finding a very narrow basis for decision. In doing so, the court sidestepped the thorny constitutional questions. *Rasul* did so by distinguishing between the constitutional right to appeal to a judge for release and the similar statutory right. Congress had previously granted federal courts the ability to hear applications for habeas corpus by any person who claims to be in violation of U.S. law. The majority in *Rasul* argued that prior decisions about the Guantanamo detainees did not actually address this statutory right. Whether the habeas statute was meant to apply to foreign nationals held in Guantanamo was a new question.

The interpretation of a statute with regard to its geographic reach would ordinarily be thought to raise questions of extraterritoriality, and therefore would be subject to the judicial “presumption against extraterritoriality.” As chapter 4 described, this presumption, a judge-made interpretive principle, has a long history. But the Supreme Court stressed that the presumption did not apply in these circumstances. Because the lease with Cuba established that Guantanamo was under the complete U.S. jurisdiction and control, Guantanamo was within the territorial jurisdiction of the United States.

Consequently, the court reasoned, there was no issue of extraterritoriality. And because the Bush administration itself conceded that an American citizen held in Guantanamo would be able to appeal to a federal judge for release, so, too, could an alien. “Considering that the statute draws no distinction between Americans and aliens held in federal custody,” wrote the majority, “there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.” As a result, *Rasul* was entitled to bring a claim under the habeas statute.⁴⁹ The statute was intended to apply wherever the United States possessed jurisdiction, and to apply equally to citizens and aliens. *Ipso facto*, it applied to the Guantanamo detainees.

The deeper constitutional question of whether aliens in Guantanamo possess any constitutional rights was carefully avoided. The only hint was a

short footnote, which contended that the detainee's allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"⁵⁰ Advocates and legal scholars lit upon this footnote as a guidepost to the future, should the judicial branch again be asked to weigh in on the constitutional rights of the Guantanamo detainees. (The court indeed chose to do so in 2008, in the case of *Boumediene v. Bush*, discussed below, and found that the constitutional right to habeas likewise extended to aliens held in Guantanamo.) In a separate concurrence, Justice Kennedy, the now-critical swing vote on the Supreme Court, stepped out of the lawyerly mode of the majority and more pointedly noted the unusual attributes of Guantanamo. The base, he wrote, "is in every practical respect a United States territory . . . from a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it."⁵¹ Kennedy's focus on assessing practicalities in extraterritorial cases would later prove very significant.

This moment of realism aside, the decision in *Rasul* did not actually appear to rest on any unique qualities of Guantanamo, as the dissenters heatedly pointed out. Declaring that the majority's decision "boldly extends the scope of the habeas statute to the four corners of the earth," a move of "breathhtaking" consequence, the dissenters contended that the court's decision would inject the judiciary into the conduct of an ongoing war and overturn a venerable line of precedent.⁵² More powerfully, the dissenters rejected the majority's reasoning concerning the presumption against extraterritoriality. If a lease granting jurisdiction and control is sufficient to render the naval base American territory for purposes of domestic statutes, then why stop at Guantanamo?

The Court does not explain how "complete jurisdiction and control" without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws.⁵³

This riposte underscored the appeal of a simple territorial rule keyed to sovereignty. Who was sovereign over a particular spot on earth was rarely difficult to determine. Sovereignty was a formal attribute. And for American courts it was even easier to determine sovereignty than one might imagine, because existing precedent established that the determination is for the political branches to decide.⁵⁴ If legal rights flowed only to the sovereign borders of the nation, disputes such as that in *Rasul* were easy to resolve.

The majority's approach, by contrast, offered no similar limiting principle. Jurisdictions could overlap; control was hard to assess. Once jurisdiction

was unbundled from claims of sovereignty, the determination of legal rights and duties grew much more complicated. To be sure, the United States had in some respects crossed this particular Rubicon long ago. The United States had exercised power extraterritorially throughout its history without any concomitant claim of sovereignty. Consular courts of the kind that tried John Ross in 1880s Japan were one example. The phenomenon appeared again with the rise of postwar effects-based extraterritoriality, the extensive use of status of forces agreements, and the dramatic increase in extraterritorial law enforcement. But because many older decisions grounded in strict territoriality had never been directly overruled, and because only a few cases in the 1970s and 1980s had ever held that constitutional rights applied extraterritoriality with regard to aliens, it was still possible to trace a line back to the Westphalian territoriality of the past—as the executive branch consistently urged and as the Supreme Court had done in 1990 in *United States v. Verdugo*. Territoriality remained a powerful and appealing default assumption.

Given this history, it was no surprise that in the aftermath of the *Rasul* decision the Bush administration argued that sovereignty provided “an administrable bright-line rule” for the application of constitutional rights. Moreover, it was a line that was “deeply entrenched” in U.S. precedent. By contrast, to make decisions about the reach of constitutional rights turn on concepts of jurisdiction or control “would involve the courts in sensitive foreign affairs questions...and implicate a variety of sensitive foreign policy and military considerations.”⁵⁵ In short, for the executive branch Westphalian territoriality was attractively straightforward, even if it seemed to many increasingly anachronistic. Most significantly, it gave the executive branch the powers and freedom it desired in a complex and dangerous world.

The Black-Site Prisons

An important consequence of jurisdictional bright lines is that variations in rules across jurisdictions create conflict, or the potential for conflict, as actors seek to arbitrage those differences for competitive advantage. This is one reason that effects-based extraterritoriality was so appealing to the postwar United States. In a world of increasing regulatory complexity, extraterritorial jurisdiction provided a means by which the American government could create some semblance of a level legal playing field for its increasingly active multinational firms. Extraterritoriality, as well, served to protect American markets from unwanted foreign influence; it allowed regulators, for instance, to target firms that price-fixed abroad in ways that harmed American consumers. In a world of global markets but

strictly territorial jurisdiction, foreign firms could take advantage of legal difference by colluding in some offshore locale where such collusion was lawful. Extraterritorial jurisdiction curbs that tendency.

But the same incentive to seek advantage by shifting jurisdiction—to “jurisdiction shop”—exists for governments as well. Hugo Black’s admonition in *Johnson v. Eisentrager*, which opened this chapter, proved quite prescient in this regard. Black asked whether “a prisoner’s right to test the legality of a sentence [rests] on where the Government chooses to imprison him.” He declared that the court was “fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations.”⁵⁶ In saying this, Black anticipated many of the issues at stake in the post-9/11 offshore prison program. The *Washington Post* noted when breaking the story that “it is illegal for the government to hold prisoners in such isolation in secret prisons in the United States.” This existence of this domestic legal constraint, said the *Post*, “is why the CIA placed them overseas, according to several former and current intelligence officials and other U.S. government officials.”⁵⁷

The exact details of the CIA program remain unclear even now because so much of the program is classified. Some reports claim that the use of offshore prisons began in 2002, though in its 2007 report on the matter the Council of Europe suggested that the program dates back to the weeks immediately after 9/11.⁵⁸ Either way, the existence of the CIA-run overseas prisons, sometimes called “black sites,” was first revealed by a series of stories in prominent American newspapers. According to these reports the CIA established secret prisons in Afghanistan (known by unusual monikers such as the “Salt Pit” and the “Dark Prison”) and Thailand before shifting to undisclosed locations in Eastern Europe, most likely Poland and Romania.⁵⁹ The Eastern European facilities apparently were shut down in 2005 after the prisons received media coverage throughout the world.⁶⁰ Prisoners were typically flown to the detention sites in a series of unmarked planes owned by shell companies.⁶¹

President Bush acknowledged the existence of the offshore prisons for the first time in 2006, but declared that the secret sites had closed. At the time, U.S. officials suggested that fewer than 100 individuals had ever been held in these foreign locations.⁶² In late 2006, the few remaining prisoners, 14 in total, were transferred to Guantanamo to await trial. Among them was Khalid Shaikh Mohammed, a purported mastermind of the 9/11 attacks. Whether the offshore prisons are really closed remains unclear, however. In July 2007, the *New York Times* reported that officials speaking on background claimed that the CIA again was holding prisoners in black sites overseas.⁶³

Some of the critical media coverage about the prisons dovetailed with coverage of the CIA extraordinary rendition program. *Rendition* refers to the

practice of flying suspected terrorists covertly to foreign governments for interrogation, presumably in some cases by means, or with intensities, that would be illegal if pursued by agents of the United States. Rendition by the United States dates back well before 2001. But it grew much more common after the terrorist attacks. Like the eventually acknowledged offshore prisons, the extraordinary rendition program was described by executive branch officials as a necessary response to a very dangerous enemy. Vice President Cheney suggested on *Meet the Press* shortly after the attacks that the U.S. government needed to “work through, sort of, the dark side. . . . [A] lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we are going to be successful.”⁶⁴ Rendition, as well as offshore prisons, was a part of this dark side approach.

The offshore prisons and the extraordinary rendition program were distinct, though they were sometimes muddled in the public debate. Rendition was, as *New Yorker* writer Jane Mayer provocatively put it, a strategy of “outsourcing torture.”⁶⁵ The black-site prisons were instead a strategy of offshoring, in which the interrogators remained American but the interrogation (and perhaps torture) occurred within another jurisdiction. But both the offshore prisons and the extraordinary rendition program reflected a common aversion: the reach of American courts and American law to acts of interrogation and to the interrogators themselves. Both were also highly classified and politically volatile programs. Only in 2008, for example, did the British government concede that its earlier repeated denials about the use of British territory for “rendition flights” were incorrect, and that the CIA had in fact used the British-controlled Indian Ocean island of Diego Garcia for refueling—a result for which Foreign Secretary David Miliband characterized himself as “very sorry indeed.”⁶⁶

The offshore prisons program illustrates at least two important points. One is central to the argument of this book: the persistence of doctrines of territoriality in the twenty-first century. Just as Guantanamo was not chosen as a detention site simply for its security, the CIA did not choose interrogation facilities in Eastern Europe or Afghanistan for convenience. By operating offshore, the CIA believed it was insulating its operatives from the risk of prosecution within the United States. As in the past, the U.S. government strategically deployed arguments about the territorial nature of the law to further its perceived vision of the national interest.

The second, related point is the importance of law for American officials. Although the Bush administration was widely branded as lawless, in fact the executive branch’s actions can be seen as highly motivated by and solicitous of legal rules. Why create a complex program thousands of miles away in unfamiliar terrain, which requires the creation of a network of front companies to fly suspects halfway around the world under false

pretenses? The U.S. government did so because it was motivated by concerns over the legal impact of its actions, yet also under intense political pressure to act aggressively against terrorists. At the same time, the tremendous expansion of lawyers throughout the national security apparatus, as well as the existence of federal statutes such as the War Crimes Act of 1996, created powerful incentives to seek legal means by which to take action.⁶⁷

The result was a significant effort to keep what was perceived as critical intelligence gathering and detention outside the reach of American law. The favorable precedents under U.S. law with regard to the extraterritorial rights of aliens provided a strong inducement to move as much counter-terrorism as possible offshore.

In short, Justice Black was right to be worried in *Johnson v. Eisentrager*. The incentives to relocate detention and interrogation to a more favorable legal climate ultimately proved irresistible to the executive branch. To be sure, the idea of offshoring detention did not begin on September 11, 2001. Imperial Britain maintained a distant prison system in the Antipodes as far back as the late eighteenth century.⁶⁸ But the journey to Australia took months and was fraught with peril. As the CIA's creation of an offshore prison program demonstrated, modern jet travel has made offshore prison locations far more accessible and useful. Globalization's "death of distance" was surely declared prematurely, but it is impossible to ignore the advances in transportation and infrastructure that now allow governments (and others) to easily reach distant shores. This effective shrinking of space creates deep tensions with jurisdictional principles that still rest on geographic borders. And it strengthens incentives to seek legal advantage by shifting location to some other jurisdiction. Thus in the more globalized world of the twenty-first century this sort of reverse forum shopping by governments is much easier than it would have been in the past.

The offshoring of detention and interrogation by the United States has also been facilitated by other, less obvious factors. The Cold War bequeathed the United States a vast network of overseas military bases, many of which are large, secure, and suitable for offshore detention sites. And the Cold War gave the United States some very indebted friends in distant places. These nations proved willing to buck the highly negative views that prevailed elsewhere of the Bush administration's war on terror, and provide the U.S. government with hidden sites for the most valuable suspected terrorists.

The Constitution in Iraq

The controversial invasion of Iraq in 2003 was one important source of these negative views. Shortly after the defeat of Saddam Hussein's forces the United States, in conjunction with other coalition states, created the

Coalition Provisional Authority. The CPA's role was to govern Iraq until a viable Iraqi government could be formed. It did so until the formal restoration of Iraqi sovereignty in June 2004.

Under the leadership of L. Paul Bremer, the CPA quickly took a series of controversial actions, including disbanding the Iraqi Army and engaging in "de-Baathification." Although the CPA was nominally a coalition entity, it was overwhelmingly funded and supported by the U.S. government. Indeed, Bremer was a government employee with the title of presidential envoy. He was, according to the Justice Department, "under the supervision of the President and Secretary of Defense" and his salary was paid by the United States Army.⁶⁹ Nine out of ten CPA staffers were U.S. citizens.⁷⁰ For all intents and purposes, then, the CPA was an American operation. Did this mean American law governed the CPA's actions in Iraq?

Iraq was hardly the first belligerent occupation undertaken by the United States. The nation had occupied considerable foreign territory before, most notably Germany and Japan but also Haiti, Cuba, and even parts of Mexico. Whether the Constitution followed the flag in military occupations was a question upon which there were few precedents, however. Most suggested that there were few if any domestic legal restraints on an American occupation. As described in chapter 2, whether the occupied Mexican city of Tampico fell within the tariff rules of the Constitution had arisen in *Fleming v. Page*. (The answer was no.) *Neely v. Henkel* in 1901 had similarly held that laws enforced by the United States in occupied Cuba were not subject to the Constitution. And during the Civil War even the occupation of New Orleans was held to be governed by international law, not constitutional law.

These precedents were both more than a century old, however, and much had changed in constitutional law. More recently, the unusual 1979 *Tiede* decision, stemming from the dramatic landing of East German hijackers in the American sector of postwar occupied Berlin, had come down in the opposite direction, granting constitutional rights to the foreign defendants tried by U.S. officials. *Tiede* was of course anomalous in many respects, not least that, unlike the relatively fleeting Cuban or Mexican occupations, the occupation of Berlin lasted decades.

Perhaps the most striking discussion of the constitutional restraints on occupation can be found in *Eisentrager*. In his remarkable dissent in that case, Justice Black queried whether American military occupation was controlled by the Constitution. If the United States occupies another nation, it assumes responsibility for governing, Black thought. This responsibility "immediately raises questions concerning the extent to which our domestic laws, constitutional or statutory, are transplanted abroad." He continued:

Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitutional provision of

the Bill of Rights in controlling temporarily occupied countries. But that does not mean that Constitution is wholly inapplicable in foreign territories that we occupy and govern . . . Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies.⁷¹

Here again, we see the constitutional tradition of the United States squared off against its global ambitions. To Black's way of thinking, constitutional rights were always applicable to actions of the American government—even to foreign military adventures—even if they did not necessarily apply in the precise way they did at home. To take decisive action and topple a foreign regime was plainly within the power of the United States. But whether the United States faced special restraints when exercising its awesome military power, restraints that were grounded in its fundamental legal and political commitments, as Black believed, was far less clear.

Black's view was that ordinary constitutional fetters did not fall away when the United States acted abroad; the Bill of Rights always and everywhere constrained the government. Conquest by the United States, "unlike conquest by many other nations, does not mean tyranny," he opined.⁷² When the United States governed, it necessarily did so subject to its fundamental law. In stating this view, he echoed a long line of American elites who had feared the effects of international power politics on the United States, and who had urged that the federal government could not necessarily act as other sovereign states did. This restrained view of American power even predated the Civil War. The "peculiar character of the Government of the United States," the Supreme Court had declared in the antebellum case of *Dred Scott*, "is that although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation." Most pertinently, it cannot ever assume "despotic powers," even in an overseas colony.⁷³

The restrained view was hardly universal, however, as previous chapters have made clear. Many presidential administrations have understood the federal government to be unfettered by the Constitution when it acts beyond American borders. The executive branch has steadfastly adhered to the view that no constitutional rights apply to foreign nationals abroad—and many courts have agreed. This approach implies that the only legal constraints the United States faces when it acts outside American borders, or occupies a foreign nation, are international legal constraints.

What did this backdrop mean for American action in Iraq? International law provided some limits on the occupying power, but these limits were not particularly tight. Did U.S. law provide further limits? Consider the question of whether the CPA could have engaged in religious discrimination in

Iraq—favoring Shiites over Sunnis, for instance. Only a few cases have ever considered the extraterritorial reach of the First Amendment, and none involved the Supreme Court. Certainly none involved belligerent occupation.

A 1989 case asked whether the federal government could restrict aid to private family planning organizations overseas if those groups did not renounce abortion as an option. The district court held that the government could do so—that the “interests in free speech and freedom of association of foreign nationals acting outside the borders, jurisdiction, and control of the United States do not fall within the interests protected by the First Amendment.”⁷⁴ A later case came to the opposite conclusion. The Second Circuit employed the “headquarters” rationale to hold that when the U.S. government funds overseas religious activities, any First Amendment harm occurs inside American territory, where the funding decision is actually made.⁷⁵ That decision took place in an office in Washington. Whatever the merits of this latter approach, because the CPA sat not in Washington but in Baghdad, it has little purchase.

In any event, the constitutionality of the CPA’s actions in Iraq appears to have remained an academic question. And although earlier precedents such as *Neely v. Henkel* provide an easy answer to such a question, the geographic limits of the Constitution were far less sharp in the opening years of the twenty-first century than they had been in the opening years of the twentieth century. *Reid v. Covert* had in the 1950s overturned the idea that constitutional protections were strictly territorial; later courts had divided over what this new rule really entailed. The resulting confusion has perplexed many knowledgeable observers. Faced with a direct question about the geographic scope of the Constitution, American judges have tended to deny its extraterritorial reach. Yet they sometimes hedge and suggest that perhaps, in some circumstance not precisely before them at the moment, an overseas alien might have constitutional protection. The full implications of the blanket view—that there is simply no constitutional restraint whatsoever when the government acts abroad against noncitizens—seem hard to swallow.

The executive branch has on occasion conceded as much, though usually under duress. At one point in oral argument in *Verdugo*, for example, Justice Kennedy pressed the government’s lawyer to explain what constitutional limits did in fact exist: “Does the Constitution control what United States officials do when they’re abroad generally? Or never? Or sometimes?” The executive branch lawyer replied, “I think the answer is sometimes, and the answer is it depends.”⁷⁶ Similarly statements had slipped from the lips of lawyers representing the executive branch before when they faced skeptical questioning from the bench.⁷⁷ But this was never a position reliably put forward by the United States in those disputes.

Instead, the executive branch persistently argued that the Constitution simply does not reach aliens abroad at all.

Whose Flag?

Whether the Constitution followed the flag to Iraq was further complicated by the multilateral character of the CPA and the occupying forces. Were the coalition forces American forces, or some kind of international force that happened to comprise a vast number of Americans? In litigation stemming from the Iraq War, the Bush administration has referred to the multilateral nature of the military forces to claim that U.S. troops are acting not simply as Americans, but as part of a larger international entity. The significance of this claim turns largely on its implications for the role of federal courts. If U.S. forces are in some sense operating subject to a multilateral effort, they are less likely to be subject to supervision by American judges.

The idea that multilateralism can serve as a domestic law-blocking (or court-blocking) device is drawn from an old dispute over the war crimes trials held in Japan. In a terse 1948 opinion (only two sentences long, and unsigned), the Supreme Court in *Hirota v. MacArthur* denied to review the detention of a defeated Japanese general on the grounds that the International Military Tribunal for the Far East that tried the general was not an American court.⁷⁸ The tribunal was therefore outside the Supreme Court's purview. *Hirota's* legacy became central to two important cases in Iraq. In each, U.S. forces detained American citizens within Iraqi territory.⁷⁹ The detained Americans then sued in U.S. courts for release. The question before the Supreme Court was whether they indeed possessed the right to bring a habeas plea before a U.S. court, and whether the military had to release them if the plea was successful.

The Bush administration followed the logic of *Hirota*. It argued that the U.S. troops were in Iraq under United Nations auspices and consequently were part of a multilateral force. (The executive branch conceded, however, that the troops remained subject to U.S. command.) As a result, the federal courts could not hear their habeas petitions. Moreover, said the Bush administration, the exigencies of foreign affairs made deference to the executive by the courts essential. Granting habeas rights to the imprisoned Americans would interfere "with the Executive Branch's solemn international commitments and its ability to carry out its foreign policy and military objectives. Other nations would inevitably take offense if American courts were to assume the authority to review the determinations of international bodies in which United States forces or personnel may participate abroad..."⁸⁰ This argument also had roots in the Second World War. In an influential survey of post-1945 extraterritorial cases,

eminent constitutional lawyer Charles Fairman had argued that to have American courts supervise allied occupations abroad would impede collaborative efforts. "Ours is not the only nation that might insist upon the extraterritorial application of its national legal conceptions," noted Fairman in 1949.⁸¹

Lawyers for the American detainees in Iraq challenged both positions of the Bush administration, asserting that the right of a U.S. citizen to habeas review could not be eliminated by the nominal creation of a multilateral military force. To do so would vest the power to deny habeas review in the executive's hands, because the executive had the ability to enter into international agreements single-handedly. (Although some international agreements require congressional action, many accords are the product of presidential action alone.)

The detainees echoed a critique of the *Hirota* principle put forward by Justice William Douglas, who some months after *Hirota* issued a concurring opinion featuring markedly different reasoning. Douglas saw a distinction between reviewing the actions of a multilateral body and reviewing the actions of American officials participating in that body. "If an American General holds a prisoner," wrote Douglas, "our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers."⁸² Douglas's approach is familiar: it is the same view later held by the dissenters in *Verdugo*, by Justice Black in *Eisentrager* (whose dissent Douglas joined), and by a host of lower courts: when U.S. officials act, they are always governed by and subject to the Constitution. Where they act, and with whom, cannot change this fundamental fact.

To underscore the importance of this position, lawyers for the American detainees in Iraq stressed that there was no territorial limitation to the Bush administration's *Hirota*-based argument. In other words, the insulating effects of multilateralism did not, in the *Hirota* paradigm, seem to turn on foreign location. The same could be true for actions *within* the United States.

For instance, the Bush administration had in 2001 captured suspected terrorist Jose Padilla in O'Hare Airport, declaring that the war on terror did not have a traditional front line safely resting overseas. After much courtroom maneuvering Padilla eventually received habeas review. The government's multilateralism argument, said the detainees, would give even more flexibility to the executive, for it "brooks no geographic limit: Invoking 'international authority,' Executive officials could seize and detain citizens in the United States without judicial review."⁸³ To permit Americans to be held on U.S. soil without any judicial review, simply because other states were involved in the war effort, would eviscerate the very point of habeas corpus.

The Supreme Court ultimately rejected the Bush administration's reliance on *Hirota* and embraced Douglas's minority view. In a unanimous

decision, the court held that habeas “extends to American citizens held overseas by American forces operating subject to an American chain of command.” However, the Court also held that the detainees could not be released from captivity. Harking back to the many earlier cases in which the ordinary legal restrictions applicable to the U.S. government were held to have changed because the United States was acting in place of, or at the behest of, another sovereign, the Supreme Court looked to the relationship between the now-sovereign Iraq and the United States. Because the American detainees were held at the behest of Iraq for crimes committed within Iraqi territory, their release, said the court, “would interfere with the sovereign authority” of Iraq.⁸⁴ Like the Americans in occupied Berlin after the *Tiede* decision, they had rights but no remedies.

The Jurisdictional Gap, Part II

The Iraq War is striking for its use of private military contractors. Although the turn to contractors is not entirely new, the levels seen in Iraq are unprecedented. Military contractors fall into an ambiguous legal zone overseas. An early act of the CPA in Iraq, “Order 17,” immunized contractors from Iraqi law. The order was in many respects akin to other extraterritoriality arrangements discussed in this book. These arrangements, ranging from consular courts to status of forces agreements, share the common goal of insulating American citizens from what the United States considered primitive, corrupt or unreliable legal systems. Yet the CPA order was far more sweeping than typical American status of forces agreements. Order 17 states that coalition forces, the CPA staff, and consultants are generally immune from Iraqi law. Specifically, contractors “are immune from Iraqi legal process with respect to acts performed by them pursuant to” their contracts.⁸⁵

The legal status of contractors in Iraq became headline news around the world in the wake of an incident in Baghdad in 2007 that left seventeen civilians dead. A convoy of Blackwater USA guards shot an Iraqi man behind the wheel of the car in Nisour Square. The car’s continued movement apparently triggered a barrage of gunfire and mayhem in the streets.⁸⁶ In the aftermath, many questions emerged about the use of private contractors as well as the legal liability they might face for killing Iraqi civilians. The Iraqi government, facing a domestic uproar, threatened to prosecute the shooters, but was stymied by the still-extant CPA order.

Strikingly, the United States government faced prosecutorial hurdles of its own. After *Reid v. Covert* it was clear that American civilians overseas could no longer be tried by court-martial. The resulting “jurisdictional gap,” as chapter 5 described, lasted until the passage in 2000 of the Military

Extraterritorial Jurisdiction Act (MEJA). MEJA was aimed at ensuring that civilians working for the American military could not escape punishment for crimes that occurred overseas, as had frequently happened in the decades after *Reid*. However, MEJA's extraterritorial reach was limited to those who worked for the Department of Defense. Many of the private military contractors in Iraq, including Blackwater, instead worked for the State Department or the CIA.⁸⁷

This structure of employment created a second jurisdictional gap, one that protected many contractors from legal liability for extraterritorial crimes. A proposed statutory fix, titled the "MEJA Expansion and Enforcement Act," passed the House of Representatives but remains stalled in the Senate.⁸⁸ As of 2008 this issue was still unresolved, though the removal of immunity for contractors was a central demand of the Iraqi government in the negotiations over a future status of forces agreement. This agreement, just negotiated at the time of this writing, is set to take force in 2009 when the existing United Nations Security Council authority lapses.

As the Blackwater story suggests, there are many extraterritorial questions raised by the Iraq War beyond the question of whether the Constitution constrains the U.S. government when it occupies foreign territory. The incremental evolution of territoriality has left some holes, and these holes are not easy to fix. It took Congress over 40 years to fix the jurisdictional gap created by *Reid v. Covert*. And as the Blackwater story shows, that fix was not perfect.

The Constitution in Guantanamo

The territorial questions raised by the Iraq War are interesting, but they have rarely grabbed the attention of the larger world. The central front in the battle over the geographic scope of constitutional rights has remained Guantanamo. As the first decade of the twenty-first century unfolded, the drumbeat of criticism over Guantanamo grew rather than abated. The position of the United States—that the base was simply leased foreign land, free of the Constitution's reach—absorbed increasing attacks.

As noted earlier in this chapter, the Supreme Court avoided consideration of Guantanamo's constitutional status for several years after the first suspected terrorists arrived in 2001. When the Court ruled in *Rasul v. Bush* that the federal habeas statute permitted foreign detainees to contest their detention before an American judge, Congress and the executive quickly amended the statute. The issue continued to bubble up from the lower courts, however. Many of the Guantanamo detainees claimed to be innocent men, accidentally swept up in a raid or turned in maliciously for a bounty. Eventually the question of their constitutional rights returned to the Supreme Court.

In *Boumediene v. Bush*, the Court for the first time endorsed the principle that the detainees had a constitutionally protected right to challenge their detention before a federal court. The decision was hailed on the left as a constitutional landmark. But it caused a firestorm of criticism from the right, inspiring an unusually bitter dissent from Justice Scalia, who predicted that it would “almost certainly cause more Americans to be killed.”⁸⁹

The case arose when Lakhdar Boumediene, a Bosnian seized in Bosnia by American forces and transferred to Guantanamo, sought to challenge his status as an enemy combatant. The question before the Supreme Court was whether Boumediene could bring such a claim despite the aforementioned change in the habeas statute. The Supreme Court began by noting the central importance of the writ of habeas corpus and reviewing the complex history of its geographic scope. Unlike the Bill of Rights, which was the product of amendments, the significance of the right to habeas review is signaled by its inclusion in the original 1789 Constitution. Surveying what was known about ancient British practice in places such as India and the Channel Islands, the Court found the history of habeas murky and inconclusive on the question of extraterritoriality.

The justices then considered whether the lack of American sovereignty over Guantanamo decided the question. Reviewing obscure cases from the nineteenth-century American occupation of Mexico, as well as many other early decisions, the majority declared that sovereignty was not a clear-cut status, nor was it dispositive for purposes of judicial review of detention. Territory could be under the formal sovereignty of one state and the “practical sovereignty” of another. Moreover, the history of the United States illustrated that constitutional rights are not, in any event, coterminous with sovereign borders.

So what did determine the geographic scope of habeas rights? The opinion stressed the central importance of functional and practical considerations when evaluating the reach of the Constitution. In a brief history, the majority argued that practicality and reasonableness had influenced a welter of prior territorial decisions, ranging from the *In re Ross*, the late nineteenth-century case involving a consular American trial in Japan, to the *Insular Cases*, involving the new American empire gained in 1898, to the postwar cases of *Reid v. Covert* and *Johnson v. Eisentrager*, granting constitutional rights to American dependents at overseas military bases and denying habeas to German soldiers captured in China, respectively. In each of these landmark decisions, said the Court, “practical considerations weighed heavily.” There was “a common thread” uniting them: “the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”⁹⁰

This focus on practicality rather formalism can directly be traced back to the case of Rene Verdugo-Urquidez, in which Justice Anthony Kennedy, the

author of *Boumediene*, penned a concurring opinion holding the extraterritorial application of the Fourth Amendment to be “impracticable.” Kennedy’s concurrence foreshadowed his approach to Lakhdar Boumediene’s habeas plea, with its focus not on abstract categories but instead on practicalities and function.

With regard to Guantanamo, however, the practicality calculus swung the opposite direction. Kennedy noted the unbroken control of the United States over the base, which dated to Spain’s repudiation of sovereignty over a century ago. As a result, Guantanamo was “in every practical sense . . . not abroad.” Nor was it in an active war zone. In such a situation it was hardly impractical to adhere to normal constitutional rules. If sovereignty rather than practicality were dispositive, moreover, the government could easily evade the Constitution by ceding land to another sovereign and then leasing it back. Such expediency would make a mockery of the separation of powers. To allow a situation in which the executive could “switch the Constitution on or off at will” was unacceptable. “Our basic charter cannot be contracted away like this.”⁹¹

In reality, there was little in *Boumediene* that truly stopped by the executive branch from switching the Constitution on or off at will. The Bush administration could have held the same detainees in Iraq, or Afghanistan, or a military base elsewhere in the world. (Though unlike in Guantanamo, permission from the host nation would likely be needed.) Indeed, the detainees could be moved to such places now. In these situations the practicality calculus would be very different; few would consider Bagram Air Base to be essentially American territory. On the other hand, there was nothing in the Supreme Court’s decision that necessarily precluded the reach of habeas corpus to offshore bases such as these. But in its careful attention to practicality, and to function rather than form, it suggested that there was something quite special, even unique, about Guantanamo. No other American base could be said to be formally within another sovereign state but “in every practical sense . . . not abroad.”

That said, the focus on practicality in *Boumediene* also suggested that the constitutional test for habeas rights was not written in stone. It was instead subject to change given technological and political developments. What was impractical one day might become practical in a future day. During the Cold War it seemed very impractical to fly Americans back to the United States to stand trial. Few probably imagined that, several decades later, the United States would readily fly detainees outside the United States to stand trial. Practicality was a moving target, and one whose measure was in the eye of beholder.

Although practicality was a touchstone of the majority, it is clear that for at least some justices the duration of the detention at issue in *Boumediene* was significant as well. Some of the prisoners in the case had been locked up

in Guantanamo for 6 years. Yet at the time of the decision no trial had been held for any prisoner at the base. (Later that summer Salim Hamdan, Osama bin Laden's driver, was convicted of several counts by a military commission and sentenced to time served plus a few extra few months.)⁹² In this context, Guantanamo seemed like an almost permanent purgatory.

The dissenters on the court had a very hostile reaction to this analysis. Justice Scalia pithily summarized their most fundamental objection: "The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*."⁹³ Taking a different page from *Verdugo* than had Justice Kennedy, Scalia went on to stress the dire national security implications of the majority's decision. "America," he wrote, "is at war with radical Islamists." The principles laid out in *Boumediene* would yield more deaths for the United States and "make the war harder on us." On its own, he claimed, the sheer fact that bad outcomes might flow from the decision would not be dispositive; if they were necessary to preserve a time-honored constitutional principle they would be tolerable. But here, Scalia declared, the Supreme Court was instead *abandoning* a time-honored principle. The "Nation will live to regret what the Court has done today."⁹⁴

Quoting directly from the Justice Department memo that opened this chapter, Scalia argued that the Court had perpetrated a bait and switch on the Bush administration. Had the executive branch known that the Supreme Court would extend habeas rights extraterritorially, they surely would not have transported prisoners halfway around the world to Guantanamo. Instead, they "would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention."⁹⁵ Hence although the majority decision was "devastating" to the United States in the short run, in the long run it would accomplish little. The executive branch would simply scour the globe to find a new offshore detention site—one that was more distant, where the United States had fewer formal measures of control, where constitutional rights were more "impractical."

Boumediene generally received a rapturous reception from the left. A spokesman for Senator Edward Kennedy declared that the Supreme Court had thankfully rejected the Bush administration's "blatant attempt to create a legal black hole beyond the reach of the rule of law." Liberal commentators cast the decision as a "nail in Guantanamo's coffin" and a victory for individual rights and the rule of law.⁹⁶ On the right, *Boumediene* was blasted as "a blatant power grab" by an "imperial court" eager to micromanage the war on terror and hamstringing the president while "inventing rights for foreign jihadists."⁹⁷

As another landmark in the history of extraterritoriality, however, the decision was significant less for its wartime context and more for its

willingness to further extend a functional approach to the geographic reach of American law. Although the opinion was somewhat tendentious in its reading of history—as this book has detailed, there were major shifts in ideas about territoriality that occurred over the past 150 years, not merely an evolving calculus of practicality—it was the first time that the Supreme Court itself had held that a constitutional right applied to an alien held outside the United States. And as Justice Scalia noted, probably correctly, the functional/practical test employed in *Boumediene* would, in time, likely be applied to other constitutional protections as well.

Executive Power Overseas

The end of the Cold War transformed world politics, but it did not bring about a dramatic retreat of American forces from around the globe. New security threats quickly rose to the fore, or at least were perceived as such, and old threats, such as conflict on the Korean peninsula, kept many troops in forward positions. The new threats included transnational criminal networks, resource scarcity, failed states, and, increasingly, terrorism. The 1960s and 1970s were certainly plagued by hijackings and acts of terror in Italy, Ireland, and elsewhere. But at the time terrorism was generally not viewed by the United States as a leading security threat. By the 1990s, however, President Clinton had begun noting terrorism in his State of the Union addresses, and by 1998 terrorism was placed in the top tier of threats in executive branch reports to Congress.⁹⁸

That the *existence* of external threats to the United States has not changed, even if the *source* of these threats has, is reflected in the continued deployment of law enforcement agents overseas as well as the reactions of the courts and the executive branch alike to disputes over the extraterritorial reach of American law. The ratio of overseas cops to soldiers certainly shifted markedly from the 1950s to the 1990s. Yet the general approach to dealing with security threats—to extend American power abroad in an effort to protect the American homeland—was consistent from the Cold War through today. The recent efforts at “off-shoring the border” described in the preceding chapter are only the latest instance of this strategy.

Consistency can also be discerned in terms of legal doctrine. One of the persistent themes in post-9/11 judicial decisions and government briefs alike is the executive branch’s need to retain flexibility in the face of external threats and to preserve the ability to act, as much as possible, without the slow and often intrusive supervision of the judiciary. The extraterritorial application of basic legal rights to aliens has long been seen as impeding that flexibility. Cumbersome but essential protections designed for peacetime

use at home, many have argued, ought not to be blindly applied to the far more complex and dangerous arena beyond our borders.

This is not simply a post-9/11 mindset, however. Even in 1990, in the case of *Rene Verdugo-Urquidez*, the Supreme Court pointed to the perils that the extraterritorial extension of constitutional rights would pose. To extend legal rights abroad to aliens “would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries . . . For better or for worse, we live in a world of nation-states in which our Government must be able to ‘functio[n] effectively in the company of sovereign nations.’”⁹⁹ The Supreme Court understood the external world to be a dangerous place with manifold risks. The United States was not going to retreat from external threats; hence the executive branch must retain the ability to cooperate with other sovereigns to maintain the security of the United States. And to do so, it must not be unduly fettered by restraints designed for the internal, domestic protection of civil liberties. This view still has a powerful sway.

And the Supreme Court was not alone in thinking that traditional legal rules could not be safely exported from the domestic realm to the international realm. Many in Washington believed these liberties, although valuable and time honored at home, exacted a real cost in a world in which groups like Al Qaeda could target American cities and civilians with planes or dirty bombs. Doctrines of territoriality were helpful in this context, for they markedly limited the impact of these valuable rights and liberties.

Yet in some instances traditional territorial assumptions had the reverse effect, hampering—in the view of many executive branch officials—their ability to defend the United States against future attack. Part of the problem stemmed from the fact that the forces of interdependence that have so transformed the world over the last few decades have, on occasion, also served to render the line between domestic and international invisible, or at least convoluted. As a result, courts have sometimes applied domestic rules to what might be characterized as international behavior.

The Foreign Intelligence Surveillance Act, for example, was passed in 1978 to rein in government eavesdropping on American citizens. After 9/11 the Bush administration found the FISA law constraining as it tried to spy on suspected terrorists abroad. A 2008 *New Yorker* profile of Director of National Intelligence Mike McConnell tellingly described the challenge from the perspective of the executive branch. During a lunch interview with the author, McConnell

put down his sandwich and walked over to a world map on his wall. “Terrorist on a cell phone, right here”—he pointed at Iraq—“talking to a tower, happens all the time, no warrant. Goes up to a satellite, back to the

ground station, no warrant. Now, let us suppose that it goes up to a satellite, and in the process it does this”—his finger darted to the U.S. before angling back to Pakistan. “Gotta have a warrant! So it was crazy.”¹⁰⁰

Because the hypothetical phone call was routed through a node in the United States, McConnell was saying, U.S. judges believed that it “touched” American territory and was consequently subject to the strict rules of FISA. A call between two international actors had effectively become domestic because the signal crossed the U.S. border. Had the call instead been routed through France, no such problem would exist and no warrant would be required. These kinds of geographic quandaries highlight the enduring appeal, but also the frequent anachronism, of territorial legal reasoning. A rigid divide between the rules of international spying and domestic spying seemed to make decreasing sense in a world in which so many forms of communication crisscrossed the globe, and sovereign borders, at the speed of light.

The FISA example also shows how leading U.S. government officials chafed at certain territorial assumptions (and the laws that were built upon them) while freely availing themselves of other, more helpful assumptions, such as the belief that constitutional rights lacked extraterritorial effect. Like the interpretation of FISA, the use of Guantanamo and the CIA black-site prisons reflected the persistence of territoriality in the contemporary world. But in these instances, unlike in FISA, traditional territoriality proved very useful. Restrained at home by a skein of legal doctrines, the Bush administration sought to slip those legal bounds by operating as much as possible overseas. The *Insular Cases*, with their holding that fundamental rights apply to unincorporated American territories, made the remaining American colonies less than ideal for this purpose. The use of foreign territory required the permission of the host government. In some cases, this was obtainable, as the CIA overseas prison program demonstrates. Yet it was not always easy to obtain, given the passionate opposition to U.S. foreign policy in so many other nations. Consequently, the sole major U.S. overseas military base without a status of forces agreement—Guantanamo Bay—appeared to be the most attractive choice for a large-scale detention center.

Guantanamo had been used for foreign detentions before. With surprising ease, the twenty-first-century executive branch could move detainees around the globe in an effort to find the most secure and legally friendly location available. And from the vantage point of 2001 there was substantial support from the federal courts for the position that the base was not American territory. As a result, although executive branch lawyers never said so directly, they plainly believed that Guantanamo was indeed, in Lord Steyn’s words, a kind of legal black hole. The geographic premises of American law encouraged this decision. Territoriality, as Justice Black

warned in 1950 in *Johnson v. Eisentrager*, incentivized the executive to seek offshore locations for actions that might run afoul of the Bill of Rights.

Efforts by the U.S. judiciary to restrain executive branch power within the United States, however laudable, may only exacerbate this tendency to go off shore. As noted conservative judge J. Harvie Wilkinson argued in another recent decision,

[T]he difference between the elaborate procedural protections required [by some decisions] in the United States and those required elsewhere will give the executive branch the incentive to pursue more extraterritorial detentions and more acts of rendition—not because these actions are necessarily dictated by the struggle against terror but because of the disparities between refined procedural regimes at home and more rudimentary ones abroad.¹⁰¹

The same basic point was made by Justice Scalia in *Boumediene*. Whatever the defined territorial scope of the Constitution, the executive will seek to move just beyond it. Yet as *Boumediene* suggests, the federal judiciary may have an increasingly difficult time swallowing a legal argument that, in so many ways, seems formalistic and drawn from ancient notions of Westphalian territoriality. In a world in which suspects, soldiers, and special agents can be flown around the world in a matter of hours, the idea that legal rights would still be tethered to territory is likely to strike at least some members of the federal judiciary as highly problematic.

If nothing else, this approach would seem to disturb the balance of power between the branches of the U.S. government. The supple and footloose executive branch would surely gain in such a world, and the more rooted judiciary would lose. The essence of the more conventional offshoring debate—footloose multinational firms versus slow, territorial states—seems replicated, in short, in the emerging struggle between the executive and judicial branches over the role of the Constitution in the so-called war on terror.

Indeed, just 2 years after *Eisentrager* was decided the Supreme Court had recognized the dangerous incentives created by strictly territorial conceptions of legal rules. In a case involving the comparatively very mild threat of extraterritorial trademark infringement, the Court declared, “[W]e do not think that petitioner by so simple a device [as selling in Mexico] can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders.”¹⁰² Yet the same Court laid the groundwork for precisely such a “privileged sanctuary beyond our borders” when it had held, 2 years earlier, that the German soldiers captured by American forces abroad had no right to habeas corpus. The offshore sanctuary of Guantanamo ultimately proved irresistible to an executive desperate to halt the next attack.