



---

Where Is Guantánamo?

Author(s): Amy Kaplan

Source: *American Quarterly*, Vol. 57, No. 3, Legal Borderlands: Law and the Construction of American Borders (Sep., 2005), pp. 831-858

Published by: [The Johns Hopkins University Press](http://www.jhu.edu/publishing/)

Stable URL: <http://www.jstor.org/stable/40068318>

Accessed: 28/05/2014 07:16

---

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



The Johns Hopkins University Press is collaborating with JSTOR to digitize, preserve and extend access to *American Quarterly*.

<http://www.jstor.org>

# Where Is Guantánamo?

*Amy Kaplan*

I think Guantánamo, everyone agrees, is an animal, there is no other like it.<sup>1</sup>

—Ruth Bader Ginsburg

Strictly speaking, the written accent on the second syllable (Guantánamo) is required to indicate the proper Spanish pronunciation. To Americans this is unnecessary. In the half century of United States occupancy, the accent has disappeared. Guantánamo Bay is in effect a bit of American territory, and so it will probably remain as long as we have a Navy, for we have a lease in perpetuity to this Naval Reservation and it is inconceivable that we would abandon it.<sup>2</sup>

— *The History of Guantánamo Bay*, 1953

In January 2002, the first shackled and hooded men from Afghanistan were incarcerated behind barbed wire at the U.S. Naval Station, Guantánamo Bay, Cuba. In April 2004, when the case challenging the legality of their detention was argued before the U.S. Supreme Court, Guantánamo still appeared to many as a strange aberration, as an “animal,” with “no other like it,” as Justice Ginsburg stated. Descriptions of Guantánamo as a lawless zone enhanced this image of its exceptional status: a legal black hole, a legal limbo, a prison beyond the law, a “permanent United States penal colony floating in another world.”<sup>3</sup> Yet since the revelations of prisoner abuse at Abu Ghraib in Iraq and the leak of the Washington “torture memos,” it has become increasingly clear that, more than an anomaly, Guantánamo represents the start of the “road to Abu Ghraib,” one island in a global penal archipelago, where the United States indefinitely detains, secretly transports, and tortures uncounted prisoners from all over the world.<sup>4</sup> As a rallying cry against human rights abuses in the U.S. “war on terror,” Guantánamo has come to embody what Amnesty International calls a “gulag for our times.”<sup>5</sup>

The global dimensions of Guantánamo cannot be understood separately from its seemingly bizarre location in Cuba. Prisoners captured in Afghanistan and around the world were transported here, to a country quite close geographically, yet far politically, from the United States, a country with which the United States has no diplomatic relations. Guantánamo occupies a transitional political space, where a prison housed in a communist nation against

whom the U.S. is still fighting the cold war has become an epicenter for the new “war on terror.” It also occupies a liminal national space, in, yet not within, Cuba, but at the same time a “bit of American territory,” as the 1953 history of the naval base proclaimed. Guantánamo is not clearly under the sovereignty of either nation, nor seemingly subject to national or international law. Where in the world is Guantánamo?

Guantánamo lies at the heart of the American Empire, a dominion at once rooted in specific locales and dispersed unevenly all over the world. The United States first acquired the land around Guantánamo Bay in 1898, when it occupied Cuba in the aftermath of the Spanish-American War. At a critical historical juncture, the United States reached the limits of its expansion westward and southward into lands violently dispossessed from Indians and Mexicans. During the height of the global “Age of Empire,” the year 1898 launched the United States onto the world stage as an imperial force in the Caribbean and the Pacific.<sup>6</sup> Ever since, Guantánamo has played a strategic role in the changing exercise of U.S. power in the region, as a coaling station, a naval base, a cold war outpost, and a detention center for unwanted refugees.<sup>7</sup> The use of Guantánamo as a prison camp today demands to be understood in the context of its historical location. Its legal—or lawless—status has a logic grounded in imperialism, whereby coercive state power has been routinely mobilized beyond the sovereignty of national territory and outside the rule of law. Understanding this history can help us decipher how Guantánamo has become critical to the working of empire today. Thus to ask about the location of Guantánamo is to ask: where in the world is the United States?

Given this history, it is not surprising that Guantánamo has become a subject for international debate at the same time that the idea of the American Empire has gained credence across the U.S. political spectrum.<sup>8</sup> Until recently, the notion of American imperialism was considered a contradiction in terms, an accusation hurled only by left-wing critics. Indeed the denial of imperialism still fuels a vision of America as an exceptional nation, one interested in spreading universal values, not in conquest and domination. Yet, since September 11, 2001, neoconservative and liberal interventionists have openly embraced the vision of an ascendant American Empire policing and transforming the world around it through military and political might and economic and cultural power.<sup>9</sup> Other commentators of different political perspectives have viewed the United States as an overstretched empire in chaotic decline.<sup>10</sup> Many have tried to understand the difference between earlier imperial formations based on a nation’s territorial conquest and annexation and today’s more dispersed forms of globalized power unanchored in particular

territorial domains. Some advocates for empire today have in fact turned to the history of U.S. imperialism at the turn of the last century as a model for the present.<sup>11</sup>

The question of empire has rarely entered the important legal debates about the prison camp at Guantánamo, debates about the balance between national security and civil liberties, the rights of the prisoners, the extent of U.S. legal jurisdiction, the domain of international law, and the thorny question of national sovereignty.<sup>12</sup> While Guantánamo's history occasionally provides background for these deliberations, it has remained largely absent from the discussion of Guantánamo as a legal dilemma. This *American Quarterly* volume on "Legal Borderlands" provides the opportunity to bring together the concerns of legal scholars with civil liberties and human rights and those of American studies scholars with the history and culture of imperialism, precisely because it is a phenomenon that does not simply inform foreign policy abroad but, rather, intimately shapes the contours of U.S. national identity.<sup>13</sup> Guantánamo lies at the intersection of these two inquiries.

In this essay, I argue that the legal space of Guantánamo today has been shaped and remains haunted by its imperial history. This complex history helps to explain how Guantánamo has become an ambiguous space both inside and outside different legal systems. Guantánamo's geographic and historical location provides the legal and political groundwork for the current violent penal regime. The first three sections of the essay show that the political, social, and constitutional legacies of U.S. imperialism inform key contemporary debates about Guantánamo: the question of national sovereignty, the codification of the prisoners as "enemy combatants," and the ambiguity about whether the U.S. Constitution holds sway there.

The essay then turns to the 2004 Supreme Court decision in *Rasul v. Bush*, which seems to answer one question about where Guantánamo is as a juridical space. The Court ruled that the federal courts do have jurisdiction over the U.S. naval base, and that the prisoners therefore should have access to the courts to challenge the legality of their detention. The justices were not only interested in restraining executive power to bring Guantánamo within the rule of domestic law; they also showed concern with the scope of U.S. power in the world and the extent to which the judiciary should accompany or limit U.S. military rule abroad. In a close reading of the Supreme Court's decision and dissent, I argue that the logic and rhetoric of *Rasul v. Bush* rely on and perpetuate the imperial history the Court also elides. In concert with its other recent decisions about civil liberties and national security, the Court, in this decision about Guantánamo, is contributing to the global expansion of U.S.

power by reworking the earlier history of imperialism. Its legal decisions respond to the changing demands of empire by creating new categories of persons before the law that extend far beyond Guantánamo Bay, Cuba.

### The Imperial Legacy of Limited Sovereignty

The most outrageous claim of the Bush administration about Guantánamo continues to be that the Republic of Cuba has “ultimate sovereignty” over this territory, that therefore neither the Constitution nor U.S. obligations to international treaties apply, and, as a result, that the prisoners at Guantánamo have no rights.<sup>14</sup> Nor, according to this argument, do Cuban laws hold sway there. In other words, because the U.S. *lacks* formal sovereignty, it can do whatever it wants there, and the military can act with impunity to brutally control every aspect of the prisoners’ lives. While this legal groundwork was carefully prepared by the Justice Department’s legal counsel at the end of 2001, the disavowal of sovereignty over a territory nonetheless controlled by the United States has a long history and was key to U.S. imperial strategy of more than a century ago.

Guantánamo Bay had been a strategic colonial site since the arrival of the Spanish in the fifteenth century. On the southeastern tip of Cuba, it served as a portal for the trade of enslaved Africans, and in the nineteenth century, Caimanera, one of its port cities, became the end point for the railroad that transported sugar and molasses from the plantations of the region to be exported abroad. In 1895, when the Cubans launched their third war for independence against centuries of Spanish rule, the uprising began in the Oriente province, where revolutionary leaders José Martí and General Máximo Gómez landed at a beach near Guantánamo Bay.

In 1898, backed by popular enthusiasm at home, the United States intervened against Spain to aid the anticolonial struggle of *Cuba Libre*. At the outset of the war, U.S. Marines landed at Guantánamo Bay, where they fought a key battle and remained ensconced after the end of the three-month war. Touted as a war of liberation to rescue the Cubans from a brutal Old World empire, the Spanish-American War secured U.S. control over the remnants of Spanish colonialism in the Caribbean and the Pacific. The swift victory against Spain ended in U.S. reluctance to accept the national independence of Cuba, or that of any of the other territories ceded by Spain. While the United States fought to annex the Philippines in a vicious three-year war against Filipino nationalists and turned Puerto Rico and Guam into territorial possessions, the United States occupied Cuba with the professed goal of ceding to Cuban self-



**Figure 1.**  
U.S. Marines raising the American flag.  
“Hoisting the flag at Guantánamo, June 12,  
1898,” photograph by Edward H. Hart.  
Detroit Publishing Company. Courtesy of  
Library of Congress.

government. Yet after three years of military occupation, Washington agreed to withdraw its troops only after forcing a sweeping amendment it wrote onto the new republic’s constitution.

The Platt Amendment reserved to the United States the right to intervene in Cuba militarily and to control its economy and its relations with other countries.<sup>15</sup> It also guaranteed the lease or purchase of coaling and naval stations, a provision that would lead to leasing Guantánamo Bay in 1903. The Platt Amendment legislated U.S. domination of the new republic, as its language perpetuated the paternalistic narrative of rescue. The amendment decreed that “the United States may exercise the right to intervene for the preservation of Cuban independence.”<sup>16</sup> This formulation renders the U.S. military intervention, rather than Cuban self-government, as a “right.” In this logic of equating intervention with protection, Cuba’s independence becomes dependent on the U.S. right to violate its autonomy. Article VII of the amendment guaranteed that the Cuban government would lease or sell lands necessary for coaling or naval stations in order “to enable the United States to maintain the independence of Cuba.”<sup>17</sup> In other words, for the United States to protect

Cuban independence, the new government of Cuba had no choice but to accept measures that drastically curtailed that liberty. As military governor Leonard Wood wrote to President Theodore Roosevelt, "There is, of course, little or no independence left Cuba under the Platt Amendment."<sup>18</sup>

After the United States intervened militarily several times in the early twentieth century, with Cuba drawn solidly into the economic and political orbit of the United States, the two parties abrogated the Platt Amendment in 1934. At the same time, they extended the lease for Guantánamo in perpetuity, that is, until both parties agreed to cancel it, or "so long as the United States of America shall not abandon the said naval station."<sup>19</sup> The United States could stay as long as it wanted, regardless of the desires of the Cubans. The language of the treaty places the United States in the active position of agent with the prerogative to stay or leave, and Cuba in the passive role of accepting either occupation or abandonment. Indeed, after the revolution of 1959, Fidel Castro tried unsuccessfully to revoke the lease, but he succeeded only in cutting off the water supply and surrounding the base with cactus fields. The U.S. treasury still sends a check each year of \$4,085 for "leasing" the land that the Cuban government doesn't cash, because it demands that the United States cease the occupation of its territory. According to the Cuban government, Guantánamo Bay continues to be an illegitimately occupied territory.

Most of today's legal arguments about Guantánamo have hinged on the interpretation of the 1903 lease, which reads: "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas."<sup>20</sup> The language of the lease expresses a hierarchy between recognition and consent, rendering Cuban sovereignty over Guantánamo Bay contingent on the acknowledgment of the United States, in exchange for which Cuba agrees to cede sovereignty over part of the territory it never controlled. The Republic of Cuba had no option but to agree to terms that had already been dictated prior to its independence, terms which founded and undermined its sovereignty as a nation.<sup>21</sup> Although the lease refers to the control of territory, the phrase "the continuance of ultimate sovereignty," key to the government's argument today, implies a strange temporality. "Continuance" is at odds with the fact that Cuba had not yet achieved sovereignty as a nation because it emerged directly from its status as a Spanish colony into the military occupation of the United States. "Ultimate sovereignty" refers to a condi-



tion that never quite existed in the past, yet is assured continuity into some unspecified future. Thus as a territory held by the United States in perpetuity, over which sovereignty is indefinitely deferred, the temporal dimensions of Guantánamo's location make it a chillingly appropriate place for the indefinite detention of unnamed enemies in what the administration calls a perpetual war against terror.

The lease and the attribution of limited sovereignty, which the Platt Amendment exemplifies, formed—and continue to form—an effective technology of imperial rule. The United States was following an established practice of other empires at the turn of the twentieth century, as annexation with high administrative costs became less attractive to colonial regimes around the world.<sup>22</sup> In practice, a lease, as opposed to outright annexation, allowed for greater maneuverability of imperial powers, in part because it enhanced their immunity from political and legal accountability to all forms of governance, both in the colony and the metropolis.

The lease of Guantánamo Bay in 1903 also reflected the reigning U.S. imperial strategy and ideology of the “New Empire” as voiced by prominent figures such as Alfred Thayer Mahan and Theodore Roosevelt.<sup>23</sup> Both advocated building a strong navy to support U.S. economic and political expansion around the world, unfettered by the burden of annexing territories with populations to govern. In 1902, Mahan recognized that “it would be difficult to exaggerate the value of Guantanamo, only fifty miles from Santiago de Cuba, to the American fleet off the latter port, which otherwise had to coal in the open, or depend upon a base many hundred miles away.”<sup>24</sup> According to Mahan, such stations facilitated the mobility of an empire that would foster economic expansion, through military and political domination. Indeed the key strategic value of Guantánamo Bay for most of the century was not only the control of Cuba, but also its access to the rest of the Caribbean, Central and South America, and the Panama Canal Zone, whose “treaty” was negotiated at gunpoint in the same period.<sup>25</sup> Guantánamo was viewed as a stepping-stone to Latin America and across the Pacific, and it was deployed as a launching pad for military interventions in Cuba, the Dominican Republic, Nicaragua, and Guatemala throughout the twentieth century.

Thus the “legal black hole” of Guantánamo did not appear suddenly after September 11, 2001, but is filled with a long imperial history.<sup>26</sup> The government's argument that the United States lacks sovereignty over the territory of Guantánamo has long facilitated rather than limited the actual implementation of sovereign power in the region. In *Rasul v. Bush*, the Court dismissed what Justice Souter called the vague “metaphysics of ultimate



sovereignty” in favor of the prisoners’ claims that the United States has in practice exercised total control and jurisdiction over the base for a century.<sup>27</sup> Yet the Court’s decision still leaves open the question of national sovereignty, and while it supports the prisoners’ claim that divorces jurisdiction from sovereignty over territory, this same open-endedness seems to abet a different kind of sovereignty, the executive power to dictate the violent terms of governance over the lives of the prisoners there.

### The Racialized Legacy of the Colonial Outpost

In establishing Guantánamo as a space removed from the reach of U.S. domestic law, the administration has concomitantly created the category of “enemy combatants” to deny the prisoners the protections and rights of international law and the Geneva conventions, which they would have as prisoners of war. Secretary of Defense Rumsfeld declared the prisoners to be the “most dangerous, best-trained, vicious killers on the face of the earth.”<sup>28</sup> While such statements conjure threatening racist stereotypes of Muslim terrorists as “bad guys” and “evil-doers,” the prisoners’ presence at the U.S. naval base at Guantánamo has also accrued a history of racialized images from the legacy of U.S. intervention in the Caribbean.

Although Guantánamo was never formally a U.S. colony, the social space of the base has long resembled a colonial outpost. Until the Cuban revolution, the base served as a contact zone of sorts, a site of uneven colonial exchanges between Cubans and Americans, as Cubans entered the base as laborers through a highly regulated passport system, and U.S. sailors used the neighboring towns as an exotic playground for prostitution, drinking, and gambling.<sup>29</sup> In the 1930s through the 1950s, journalists and travelers described the naval station through colonialist discourse as a transplanted Little America and often contrasted its hygienic, well-ordered housing with the reportedly “primitive” and squalid, impoverished conditions of the neighboring Cuban villages. After the revolution, the base became a self-enclosed enclave, where most of the Cuban laborers were replaced with Jamaican and Filipino laborers contracted to work there. The image of the base as small town America, however, continues to circulate today, replete with bowling alleys, video rental shops, golf courses, and McDonald’s restaurants. The naval commander has been quoted as referring to the base as “Mayberry RFD with bad neighbors.”<sup>30</sup> It is unclear which bad neighbors he was referring to—the Cubans kept out by barbed wire fences and military guards or the prisoners encaged by barbed wire inside the base. With unintended irony, a defense department publication elaborated on the

meaning of “Mayberry,” the town in television’s *Andy Griffith Show* of the 1960s. “Like Mayberry, Guantánamo Bay has virtually no crime.”<sup>31</sup>

The current prisoners were not the first to be held in cages in the middle of “Mayberry.” In the last decade of the twentieth century, the role of the naval base at Guantánamo changed dramatically: from a way station for the global reach of military might outward, it became a site of detention camps for blocking Haitian and Cuban refugees from entering the United States. Thus, another trajectory that leads to the camps of Guantánamo today is the long history of U.S. imperial relations with Haiti, a nation it occupied from 1915 to 1934. After a military coup ousted Jean-Bertrand Aristide in 1991, tens of thousands of Haitians sought political asylum in the United States, a status the United States had long refused. The coast guard took the unprecedented step of intercepting Haitians on the high seas, and when, under international pressure, the United States stopped repatriating them to the repressive regime at home, they were taken to the base at Guantánamo for “processing,” where they were denied any rights to appeal for asylum. Many were held up to three years in makeshift barbed wire camps, exposed to heat and rain in spaces infested with rats and scorpions, with inadequate water supplies and sanitary facilities.<sup>32</sup> Furthermore, a separate camp was built for those who, through forced testing, were found to carry HIV, where they received inadequate medical care and where medicine was often used coercively; their health rapidly deteriorated.<sup>33</sup> The rationale for detaining the Haitians relied on racist hysteria that imagined Haiti as the source of the AIDS virus and Haitians as the bearers of contaminated blood. Newspaper articles and speeches in Congress envisioned hordes of Haitians invading Florida, as though they themselves were the viruses they were purported to carry. This assumption that Haitian bodies carried disease has a long history as well. From the Haitian Revolution that began in 1791, black Haitian bodies were viewed from the north as bearing the contagion of black rebellion that could “infect” slaves in other countries and colonies.

In 1994, Washington constructed another tent city surrounded by barbed wire to detain almost thirty thousand Cubans who were attempting to reach the United States by sea. “Miserable conditions led some Cuban detainees to attempt suicide. Their numerous uprisings were met by U.S. troops in riot gear with fixed bayonets.”<sup>34</sup> The Cubans were trapped in a cold war nightmare. Whereas Cubans fleeing from the communist regime long held privileged status as political refugees, the United States viewed these Cubans, whom Castro had released during an economic crisis, as criminals to repatriate. When the detention camps were shut down in 1995, most of those detained were

allowed into the United States, though many were repatriated or sent to third countries. A legacy of Guantánamo's unclear sovereignty, Haitians in the United States who were born in detention there remain "effectively stateless, since the camp authorities would not give them U.S. birth certificates and Haiti has not extended citizenship rights to them either."<sup>35</sup>

It is striking that the current prisoners at Guantánamo, purportedly the most dangerous terrorists in the world, have been brought to the geographic threshold of the United States as though they were aspiring immigrants or would-be refugees who have to be kept out forcibly. If the naval base can still be viewed as a colonial outpost, it is a colony devoid of local inhabitants, and the colonized "others" now comprise a transnational population from forty nations, captured in many places besides Afghanistan, including Pakistan, Bosnia, Turkey, Germany, and Gambia and untold other places around the world. Although the government has lumped them together as terrorists, al Qaeda members, and Islamic extremists, their identities are enormously varied. They speak as many as seventeen different languages; many are immigrants or the children of immigrants to different nations around the world.<sup>36</sup>

The current prisoners not only first literally inhabited the camps built for the Haitian and Cuban refugees, but they also continue to inhabit the racialized images that accrued over the century in the imperial outpost of Guantánamo: images of shackled slaves, infected bodies, revolutionary subjects, and undesirable immigrants. The prisoners fill the vacated space of colonized subjects, in which terrorism is imagined as an infectious disease of racialized bodies in need of quarantine. The category of "enemy combatants" effaces all differences among the detainees and also draws on these older imperial codes. The image of the "enemy combatant" also draws on the conflation increasingly made of immigrants and terrorists, at a time when the Immigration and Naturalization Service (INS) has become part of the Department of Homeland Security, immigrants are detained without legal recourse, and there is an "increased intermingling of immigration law enforcement and criminal law policing."<sup>37</sup> Thus "enemy combatant" is a racialized category, not only because of rampant racism toward Arabs and Muslims, but also because of this history. Stereotypes of the colonized, immigrants, refugees, aliens, criminals, and revolutionaries are intertwined with those of terrorists and identified with racially marked bodies in an imperial system that not only colonizes spaces outside U.S. territories but also regulates the entry of people migrating across the borders of the United States.

The Haitians and Cubans in Guantánamo protested their detention through hunger strikes, riots, and legal suits. While they succeeded in shutting down

the camps, the government ultimately refused to concede them any constitutional rights, and the courts never definitely ruled on this issue. In response to litigation brought by Haitian refugees, two circuit courts divided over whether the Bill of Rights applied to noncitizens there.<sup>38</sup> Legally, the justification for detaining Haitians and Cubans without constitutional or international rights at Guantánamo was the same one used by the government today, involving the absence of U.S. sovereignty. In 2001, the government's choice of Guantánamo relied in part on the 1995 decision by the Eleventh Circuit Court of Appeals that "Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert."<sup>39</sup> The same decision ruled that international human rights treaties "bind the government only when refugees are at or within the borders of the United States."<sup>40</sup> Where then is Guantánamo, if not at the border of the United States?

### The Ambiguous Legacy of the Insular Cases

The question of whether the U.S. Constitution holds sway in Guantánamo remains unresolved by the Supreme Court in *Rasul v. Bush*. Save for a mention in a footnote, the Court carefully avoided the question of whether noncitizens in Guantánamo Bay have access to constitutional protections and rights. This indeterminacy about the extraterritorial reach of the Constitution has long accompanied the expansion of U.S. rule beyond its national borders.

At the turn of the last century, the legal debate about imperialism revolved around the question of whether the "Constitution follows the flag" into the new territories taken from Spain and the recently annexed territory of Hawai'i.<sup>41</sup> At stake in this question, which resonates today, was whether the nation could remain a republic if it ruled over lands and peoples governed by laws not subject to its Constitution. In a series of decisions that came to be known as the Insular Cases (1902–1922), the Court answered that question ambiguously: it decided that parts of the Constitution followed the flag, sometimes, and in certain contexts.<sup>42</sup> In the best-known case, *Downes v. Bidwell*, which concerned whether the uniform clause of the Constitution applied to Puerto Rico, the Court created the new category of "the unincorporated territory," a territory not annexed for the ultimate purpose of statehood. The decision deemed Puerto Rico "foreign to the United States in a domestic sense," a space "belonging to" but "not a part of the United States," whose inhabitants were neither aliens nor citizens.<sup>43</sup> In these liminal spaces, the Insular Cases allowed for a two-tiered, uneven application of the Constitution, claiming that some unspecified fundamental or substantive rights were binding in the

unincorporated territories. Yet there were no consistent guarantees of due process or the right to criminal and civil juries or full protection under the Fourteenth Amendment; in other words, there were no clear rights to be protected against unfair procedures.

This differential application of the Constitution created the legal edifice for imperial rule. The designation of territory as neither quite foreign nor domestic was inseparable from a view of its inhabitants as neither capable of self-government nor civilized enough for U.S. citizenship. The Insular Cases legitimated a colonial space, inherently based on racism, to protect U.S. citizens from an acquired population that might belong to a race, “absolutely unfit to receive” the full responsibilities and protections of the Constitution.<sup>44</sup> In *Downes v. Bidwell*, both the territory of Puerto Rico and its inhabitants were not therefore treated as part of an autonomous foreign nation, but they were left in “limbo,” according to Chief Justice Melville Weston Fuller’s dissent. The “occult meaning” of the “unincorporated territory,” he argued, gave Congress the unrestricted power to keep any newly acquired territory “like a disembodied shade in an intermediate state of ambiguous existence for an indefinite period.”<sup>45</sup> This language uncannily describes Guantánamo today, and the sense of the occult was echoed in Justice Souter’s skepticism about the “metaphysics of ultimate sovereignty.” The Insular Cases have never been overruled, even though the international scope of the Constitution has changed greatly in the twentieth century, for the most part expanding the constitutional rights of American citizens abroad rather than those of noncitizens. The imperial origins of these cases, which often remain unacknowledged, continue to haunt their subsequent use as precedence in later cases throughout the twentieth century.

Although Guantánamo Bay, Cuba, was never an “unincorporated territory,” the two-tiered legacy of the Insular Cases helped construct the naval base there as an ambiguous legal space where the extent of constitutional rights remains indeterminate. While *Rasul* does not rely directly on the Insular Cases as precedent, it indirectly evokes them in the sole footnote in the decision that addresses the constitutionality of the detentions. *Rasul* ruled that the prisoners at Guantánamo have the right to challenge their detention in the federal courts according to a federal statute (28 U.S. Code Sec. 2241), not according to the Constitution. Yet, in note 15, the Court holds that the detainees might have constitutional rights they could assert in the United States, indicating that the detainees’ allegations do provide a basis for a constitutional claim. The Court writes that these allegations, namely, “that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have

been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing” do “unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” By relegating this opinion to a footnote, however, rather than incorporating it into the opinion, the Court leaves open the question of constitutional rights, an openness that has led to diametrically opposing positions on the part of the administration and advocates for the prisoners, and between judges in the federal courts.

To trace the lineage of the Insular Cases in *Rasul*, we have to look further at this footnote. Justice Stevens follows this statement by referring to a comparison with a 1990 case that took the opposite direction of denying constitutional protections abroad. In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment was not available to a suspected drug dealer, whose home was searched without warrant in Mexico, when he was captured by U.S. agents and brought to the United States for criminal indictment.<sup>46</sup> The Court in *Verdugo-Urquidez* drew on the precedent of the Insular Cases to hold that not all constitutional provisions pertain to U.S. governmental activity in foreign territories. As in those cases, Chief Justice William Rehnquist’s argument relied not only on the territorial scope of the Constitution but also the extent of its reach to noncitizens. Because the Fourth Amendment used the word “people,” instead of “persons,” he claimed, it refers to a narrower scope of “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>47</sup> He thus read a nationalist hierarchy of rights as already written into the language of the Bill of Rights, only some of which are applicable to the general category of “persons” who are not U.S. citizens.

In *Verdugo-Urquidez*, Justice Anthony Kennedy wrote a concurring opinion, and it is to this opinion that Stevens specifically refers in the *Rasul* note. Kennedy rejected Rehnquist’s distinction between “the people” and “persons,” but he maintained a boundary between foreign and domestic territory: “The Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.”<sup>48</sup> Even though Kennedy insists on this division, he proceeds to cite precedents that blur these boundaries to argue that the Constitution may still apply abroad in particular circumstances. He quotes Justice Harlan in *Reid v. Covert* (1953), a landmark case that involved the right of U.S. citizens abroad to a trial by jury:

The Insular Cases do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution “does not apply” overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. . . . There is no rigid and abstract rule.<sup>49</sup>

In 1990, Kennedy concludes from this reasoning that “just as the Constitution in the Insular Cases did not require Congress to implement all constitutional guarantees in its territories because of their ‘wholly dissimilar traditions and institutions,’ the Constitution does not require U.S. agents to obtain a warrant when searching the foreign home of a nonresident alien.” In pursuing this racially inflected differential logic, he argues that “the absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment’s warrant requirement should not apply in Mexico as it does in this country.”<sup>50</sup> With this reasoning, Kennedy concurred with the majority in denying that the Fourth Amendment should cross the border to Mexico to accompany the actions of U.S. agents.

The import of this reference in *Rasul* is far from clear. Is the Court suggesting that the prisoners in Guantánamo may indeed have constitutional rights in contrast to the prisoner in *Verdugo-Urquidez*? Or is the Court evoking Kennedy’s reasoning in sustaining both limits and flexibility to the extension of constitutional provisions? In *Rasul*, Kennedy concurred with the majority in favor of extending U.S. jurisdiction to the prisoners, but he wrote a separate opinion in order to uphold a dividing line between foreign and domestic territory as he did in *Verdugo-Urquidez*. His reasoning construed Guantánamo in the imperial language of the Insular Cases as “a place that belongs to the United States.”<sup>51</sup> By claiming that “Guantánamo Bay is in every practical respect a United States territory,” as the basis for extending some rights to the prisoners, he implicitly insists that these rights do not necessarily apply to other locations under U.S. control.

Neither Stevens nor Kennedy answers the question, where is Guantánamo?—whether it is located in foreign or a domestic space as far as the Constitution is concerned. For the legacy of the Insular Cases does not lie primarily in delimiting the extraterritorial scope of the Constitution. It lies more powerfully in legislating an ambiguity that gives the U.S. government great leeway in deciding whether, when, and which provisions of the Constitution may apply overseas, and indeed in determining what territories may be considered “foreign to the United States in a domestic sense.”



Because of this historical ambiguity, the Insular Cases have been marshaled both for and against the prisoners. The Justice Department, in its motion to dismiss the prisoners' habeas corpus cases drew on the interpretation of the Insular Cases in *Verdugo-Urquidez* to argue that there is "nothing in the Supreme Court's opinion in *Rasul*" to undermine the conclusion "that aliens, such as petitioners, who are outside the sovereign territory of the United States and lack a sufficient connection to the United States may not assert rights under the Constitution."<sup>52</sup> In January 2005, Federal District Judge Richard J. Leon accepted this argument that no "viable legal theory" accords rights to the prisoners, and he granted the government's motion to dismiss seven of the prisoners' habeas corpus cases.<sup>53</sup>

Two weeks later, however, his counterpart, Federal District Judge Joyce Hens Green, came to the opposite conclusion and relied on the same footnote in *Rasul* to reveal an "implicit, if not express, mandate to uphold the existence of fundamental rights through the application of precedent from the Insular cases."<sup>54</sup> Her decision went farther to declare illegal the Combatant Status Review Tribunals at Guantánamo conducted by the Department of Defense, and she held that the detainees should be treated as prisoners of war. With both decisions still under appeal at the time of this writing, the petitioners remain imprisoned with no change in their status, and the unanswered question may yet return to the Supreme Court to resolve its own ambiguity as to whether the Constitution follows the flag, not only to Guantánamo, but also to other extraterritorial sites under the control of the U.S. military.

The Supreme Court's refusal to squarely rule on the constitutional status of Guantánamo is in part a product of the Insular Cases, which remain doctrinal precedent today. Gerald Neuman, in a brief for the petitioners, wrote that "the *Insular Cases* forged a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the most fundamental constitutional rights would be honored wherever the U.S. rules as sovereign."<sup>55</sup> Judge Green's decision powerfully endorses this view. Yet history has shown that the Insular Cases resolved that conflict by forging a compromise in favor of empire. In not clearly deciding on whether the prisoners at Guantánamo have constitutional rights, the Supreme Court may have implicitly supported the executive's unrestricted power given to Congress by the Insular Cases, to keep any domain, "like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period." This ambiguity increases the range and mobility of the exercise of U.S. power abroad, and this uncertainty legitimates a crushing certainty of dominion over the lives of those imprisoned in Guantánamo and other locations around the world.

## Imperial Spaces in *Rasul v. Bush*

In *Rasul v. Bush*, the Court ruled that the federal courts do have jurisdiction over the U.S. naval base at Guantánamo “to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.” Therefore the Court deemed that the prisoners should have access to the federal courts and the right to bring a petition for habeas corpus to challenge whether they are being unlawfully denied their freedom. This judicial check of excessive executive power is often narrated in spatial terms: the administration placed the prisoners outside the reach of the law in an extraterritorial domain where the courts were unavailable to them, and the Supreme Court decision brought Guantánamo—and executive authority—inside the rule of law and opened the doors of the federal court to the prisoners there. The trajectory of *Rasul*, however, can be seen to move in the opposite direction as well, not only to include the prisoners inside the realm of domestic law, but also to expand the realm of U.S. juridical dominion beyond its national borders.

The Supreme Court ruling in *Rasul* perpetuates the imperial logic of the Insular Cases by contributing to the development of a two-tiered flexible legal system to serve the global reach of a U.S. military penal regime. Important as this decision may be as a curb on unbounded executive power, it is not a decision against empire. Indeed, the majority decision written by Justice Stevens and the dissent by Justice Scalia can be read as supporting two different juridical modes of imperial rule. The Supreme Court ruling in *Rasul* does not directly address the history of Guantánamo, except in its brief reference to the lease. Nonetheless, the language of both the decision and the dissent is suffused with imperial metaphors and references that evoke this absent history and implicitly place the Court rulings in an imperial genealogy.

In carefully crafting the question before the Court, Stevens maps Guantánamo in the ambiguous space of the Insular Cases, as a location that is neither foreign nor domestic:

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba.<sup>56</sup>

This formulation delineates four interrelated spaces. It opens with the domestic legal space of the U.S. courts and poses the question of their territorial jurisdiction as an absence, a “lack.” It then moves to unnamed places “abroad,”

where “foreign nationals” were captured, using phrases that can include any place in the world outside the United States. In contrast to this global arena of unspecified “hostilities,” there is the confined space of incarceration at the Guantánamo Bay Naval Base, for which Cuba serves as mere backdrop. In dropping “the United States” from the name of the base, Stevens implicitly conflates “bay” and “base,” as many do in common parlance, as though no distinction exists between a U.S. military installation and Cuban geography. Cuba then recedes into the background, divorced from the arena of foreign nations “abroad” while it also stands outside the United States. The majority opinion then proceeds to answer its own question with a double negative, that is, the U.S. courts do not lack jurisdiction. The question and answer, however, do not thereby remap Guantánamo as a space inside the law, but as an indefinite legal borderland between the domestic and the foreign.<sup>57</sup> Even though the Court deems this as a space where the right to habeas corpus is equally available to noncitizens and citizens, the unresolved question of Guantánamo’s legal status maintains the prisoners in a limbo between military rule and civil rights.

Justice Stevens expresses his support of the principle of habeas corpus as a narrative of historical and territorial expansion. Stevens’s rhetorical power stems from the sweeping scope of habeas corpus, as though it were the main agent in this drama, marching across time and space. He notes its “explicit recognition” in the Constitution and the Judiciary Act of 1789, and traces the expansion of courts’ power to review applications for habeas relief throughout U.S. history in war and peace from the Civil War to World War II, on U.S. soil and in “its insular possessions.”<sup>58</sup> In stressing its increasing inviolability over time, he does not note Lincoln’s suspension of habeas corpus during the Civil War. However, he does refer to this possibility by quoting the Constitution, “which forbids suspension of ‘[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.’”<sup>59</sup> These possible exceptions still shadow the space of Guantánamo, where the prisoners are figured both as rebels within and invaders from without, and where their imprisonment is represented by the administration as the protection of public safety.<sup>60</sup>

As if to shore up the principle of habeas corpus against its potential suspension, Stevens quotes earlier cases to stress its “ancestry,” which long precedes the founding of the nation, “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.”<sup>61</sup> Arising with the Magna Carta centuries ago, the Great Writ’s venerable “ancestry” receives more historical emphasis when Stevens quotes Justice Jackson in a dissenting opinion: “Ex-

ecutive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”<sup>62</sup> An unintended irony informs Stevens’s narrative. The phrase *habeas corpus*, from the Latin “you shall have the body,” refers to the act of actually bringing a person physically before a court or a judge to determine whether that person is being unlawfully denied his or her freedom. Yet the writ of habeas corpus itself becomes the protagonist in Steven’s narrative, standing in for the bodies of the prisoners while the violence of their captivity and incarceration remains invisible throughout the case.

To the venerable lineage of habeas corpus, Stevens joins its “extraordinary territorial ambit.”<sup>63</sup> To demonstrate this expansiveness, he includes Ellis Island, Guam, and the Philippines, but he refers primarily to examples from the British Empire. His examples range widely from Scotland and the Channel Islands to Jamaica, India, Kenya, and China, from 1759 through 1960. He stresses that the sovereign crown of England extended habeas corpus across its dominions: “At common law, courts exercised habeas jurisdiction” over “all other dominions under the sovereign’s control.”<sup>64</sup> In addition, when he concludes that “application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus,” this consistency relies primarily on the history of the British Empire.<sup>65</sup> Although he avoids mention of the American Empire, its presence is implied by analogy: just as the United States inherits the “genius of our common law,” it also inherits the imperial scope of the British Empire’s legal system. While Stevens rejects the administration’s claim that Cuba’s nominal sovereignty constitutes Guantánamo as a space outside the purview of habeas corpus, he does not thereby claim that the United States has sovereignty over Guantánamo. By historical analogy, however, he renders Guantánamo as “a dominion under the sovereign’s control.” In Stevens’s argument, the British Empire serves implicitly as a model for the expansion of U.S. law, while permitting an elision of the history of U.S. imperial rule as an aspect of law that bears on the present. Stephens thus maintains a view of American exceptionalism by defining the United States as a nation that embodies the values of liberty inherited from England but abjures its path of colonial conquest.

In a scathing dissent, Justice Scalia explicitly rejects the analogies with the British Empire, while he offers his own version of the imperial role of the judicial branch. U.S. rule over Guantánamo, he argues, does not resemble the dominance of the British Empire: “All of the dominions in the cases the Court cites—and all of the territories Blackstone lists as dominions . . . are the sover-

eign territory of the Crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.”<sup>66</sup> Divorcing U.S. actions in Guantánamo from the history of colonial conquest, Scalia accuses the Court of judicial imperialism and condemns “the unheralded expansion of federal-court jurisdiction.”<sup>67</sup> He declaims: “In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth.”<sup>68</sup> Thus, what Stevens maps as the narrow scope of the ruling, Scalia finds to have global proportions. He expresses outrage that the Court has blurred inviolable lines between aliens and citizens, between foreign and domestic territory, and between the executive power to wage war and the judicial power of review. These are lines he claims the Supreme Court held as doctrinal precedence in *Johnson v. Eisentrager*, a 1950 decision about German “alien enemies” in World War II, “the position that United States citizens throughout the world may be entitled to habeas corpus rights . . . even while holding that aliens abroad *did not have* habeas corpus rights.”<sup>69</sup> Scalia envisions a different “territorial ambit” of habeas corpus—a concept he derides in the majority, one that protects the mobility of U.S. citizens around the world, while simultaneously excluding aliens from its reach.

Scalia excoriates Stevens for placing aliens and citizens on a continuum when Stevens concludes that if the habeas corpus statute applies to U.S. citizens at the base, then it should apply to aliens held in U.S. custody there.<sup>70</sup> Scalia criticizes the Court for not explaining how “‘complete jurisdiction and control’ without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws.”<sup>71</sup> He emphasizes the word *domestic* several times to point out the danger of eroding the boundaries between home and abroad: “The habeas statute is (according to the Court) being applied *domestically*, to ‘petitioners’ custodians,’ and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application.”<sup>72</sup> For Scalia this erosion of boundaries leads to several nightmare scenarios. According to the logic of the majority, he argues, because “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.”<sup>73</sup> Thus, with the images of Abu Ghraib before the world’s eyes, he imagines that any person subject to U.S. military rule would also have unfettered access to a hearing in the U.S. court, that the federal courts will entertain petitions from “around the world.” While Scalia is primarily concerned that the courts will thereby tie the hands of the

executive's ability to wage war, he expresses the concomitant fear that the decision in *Rasul v. Bush* will spread domestic law to foreign spaces and give aliens the rights of citizens.

Scalia is by no means an isolationist, but he does present a different model of empire from that of Stevens, one in which the executive power rules abroad unhindered by judicial checks, and a strict boundary similarly exists between domestic and foreign territories, and between citizens (who are governed by the Constitution) and aliens (who are ruled by the force of executive authority and its military arm). For him there is no compromise between the forces of constitutionalism and empire, for no conflict exists in the first place.

If Scalia accuses the majority of extending domestic law to foreign places that should remain under military rule alone, his rhetorical overkill expresses anxiety about the opposite direction as well. He concludes with an image of lowering floodgates, as Guantánamo detainees, like unwanted Haitian refugees or illegal aliens, storm the courts of the ninety-four federal judicial districts. Worse than the image of the teeming hordes, these aliens would not break down the doors of the court; rather, they would work the system to "forum shop" for the most favorable conditions.<sup>74</sup> Thus to Scalia, "judicial adventurism of the worst sort" threatens to expand domestic law outward beyond its proper limits and risks incorporating undesirable aliens inward in a "monstrous scheme in a time of war." While he means that the Court's decision will unnecessarily tie the hands of the military leaders and the executive, the word "monstrous" also conjures the image of a grotesque body composed of threatening intermixtures: bodies of aliens and citizens, foreign and domestic spaces, and civil, martial, and international laws.<sup>75</sup>

Scalia is reiterating a long-standing fear that imperial expansion will be accompanied by the invasion or incorporation of those unwanted aliens inhabiting conquered territories. In *Downes v. Bidwell*, for example, Justice Edward Douglass White raised the specter that "millions of inhabitants of alien territory . . . if acquired by treaty, can . . . be immediately and irrevocably incorporated in the United States and the whole structure of the government overthrown."<sup>76</sup> Scalia's critique combines fantasy with reality in the sense that an expanded legal terrain may indeed be a consequence of the government's tactic in not labeling the detainees on Guantánamo as prisoners of war, which would have shored up the legal and spatial boundaries between international treaties and domestic law. If the Department of Defense had done so, the Justice Department would not be now in the situation of facing potential federal lawsuits from Afghanistan to Iraq.<sup>77</sup>

## Guantánamo Is Everywhere

Although Scalia's dissent may sound characteristically extreme, it does shed light on the majority opinion: the constraints imposed on executive power by the Court also may abet the juridical expansion of empire. Though it is too soon to tell, the Court's decision in *Rasul*, in conjunction with their decisions on the same day about citizen enemy combatants in the *Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla* cases, may together facilitate the global reach of U.S. power by creating a shadowy hybrid legal system coextensive with the changing needs of empire.

The Court never fully answers the question of where Guantánamo is. It extends and legitimates the ambiguous legacy of the Insular Cases by ruling that Guantánamo is domestic for some purposes and foreign for others. *Hamdi* blurs the distinctions between aliens and citizen, not by giving them shared rights, but by giving judicial legitimacy to the figure of the "enemy combatant," a designation by executive fiat.<sup>78</sup> Many critics today are outraged that the administration has been ignoring these legal decisions and "treating a historic loss in the Supreme Court as though it were a suggestion slip."<sup>79</sup> But perhaps the administration has not been defeated by these rulings. *Rasul*, read alongside *Hamdi* and *Padilla*, suggests that the Court is not extending the protections of domestic law to the "four corners of the earth," but rather that it is legitimating a second-tier legal structure that can extend the government's penal regime, all the while keeping itself immune from accountability and keeping prisoners from the safeguards of any of these systems. This penal regime cuts a wide swathe across national borders, from Guantánamo to detention centers in Iraq and Afghanistan, to undisclosed military prisons around the world, and to immigrant detention centers and prisons within the United States.<sup>80</sup>

To follow this reasoning, it is necessary to turn briefly to the *Hamdi* decision, the one most heralded by the press as the victory of judicial restraint against unbounded executive power. Yet, in this case, Justice O'Connor, writing for the plurality, accepted Bush's position that the nation is at war and that this open-ended "war on terror" gives the president and the executive branch sweeping powers to jail anyone they accuse of being an "enemy combatant"—citizens and noncitizens alike—without the approval of Congress. The ruling accepted the administration's position that such "enemy combatants" are not entitled to the protections either of the Geneva Conventions on prisoners of war or to full due process rights accorded to criminal defendants in the U.S. courts. This decision thus legitimated an evolving category of persons before



the law, who are not defined primarily by citizenship or their relation to national or international law but by their designation by the executive. While the Court upheld Hamdi's right to counsel and to petition for habeas corpus, it also endorsed a legal process skirting both constitutional restrictions and international law, with a weakened adherence to due process, with an assumption of guilt until proven innocent, and with the admission of hearsay as evidence. The Court's decision allows for an unspecified military tribunal in lieu of a civilian trial or a military court-martial, itself a kind of parody of the Geneva Convention provisions for prisoners captured on the battlefield.<sup>81</sup>

In *Rasul*, the Court made clear that it would not specify any procedures or venues for addressing the petitioners' claims. In its response to the Supreme Court's decision, the Justice Department capitalized on this by quickly adopting part of the Court's logic in the *Hamdi* case to argue that aliens in foreign territory (Guantánamo detainees) would certainly not be afforded more constitutional protections than those deemed appropriate for citizens within the United States, such as José Padilla and Yaser Hamdi. To argue for denying due process to the Guantánamo prisoners, the government, in its response, quotes from the Hamdi decision, "that the full protection that accompanies challenges to detentions in other settings may prove unworkable and inappropriate in the enemy combatant setting."<sup>82</sup> Thus, the government relies on *Hamdi* specifically to claim that the Guantánamo detainees have no protections under the Fifth Amendment, and they use the district court's ruling in *Padilla* to claim that the detainees have no constitutional rights to counsel unmonitored by military security.<sup>83</sup>

Although these issues remain unresolved, the Justice Department has been consistent in arguing that the detainees in Guantánamo have no constitutional protections. And it has been aided here by the gaps in the Court's decision. It left mainly unanswered the century-old question of whether the Constitution follows the flag, and the government has called on both the Insular Cases and *Verdugo-Urquidez* to argue that the inmates at Guantánamo have no constitutional protections whatsoever. Although the arguments may sound staggeringly cynical, nothing in the Supreme Court decision really works against them. The Justice Department argues against the Sixth Amendment right for the accused in a criminal proceeding to have "assistance of counsel for his defense" because "petitioners are being detained solely because of their status as enemy combatants, not for any other criminal or punitive purpose."<sup>84</sup> The counsel claims that *Verdugo-Urquidez* established that "aliens receive constitutional protections when they have come within the territory of the U.S. and developed substantial connections with this country."<sup>85</sup> Beyond its ongoing insis-

tence that Guantánamo is not “within the territory of the U.S.,” the government argues that the detainees do not have “voluntary connections” to the United States, because they were captured involuntarily by the military, and therefore—like slaves—they do not have sufficient connection with the United States to warrant constitutional protection. In other words, the act of imposing arbitrary power—the forced transport to Guantánamo, the lack of criminal charges—tautologically justifies the imposition of arbitrary power immune from constitutional restrictions and international treaties.

Outrage has rightfully been expressed at the government’s dismissive response to the Supreme Court’s decision, and military and civilian lawyers have persistently challenged these practices and even succeeded in halting them before lower court reviews.<sup>86</sup> Since *Rasul* in June 2004, however, the administration continues its effort to block the access of the prisoners to the lower courts. Despite its many legal defeats, it continues to ignore the courts and to treat the prisoners according to its own rules: by staging farcical administrative hearings to determine the enemy combatant status of prisoners who have already been labeled enemy combatants, by planning military tribunals to judge war crimes run by officers with little training who have the power to condemn the accused to death, by releasing some prisoners at its whim, and by building two maximum security prisons for the indefinite detention of others.<sup>87</sup>

By understanding the long imperial history that fills the black hole of Guantánamo, we can see how the Court decision in *Rasul v. Bush* does not simply rein in executive power or bring Guantánamo inside the rule of law. In perpetuating the differential logic of the Insular Cases, the Court remaps an arena only partially and indiscriminately subject to constitutional restraints, wherein the executive can still exert power with impunity. In creating this ambiguous territory, the Court contributes to reclassifying persons as “enemy combatants,” a category that erodes the distinctions among citizens and aliens, immigrants and criminals, prisoners and detainees, terrorists and refugees. Yet this erosion is not moving toward granting more rights to noncitizens. On the contrary, it moves both citizens and noncitizens further toward the lowest possible rung of diminished liberties. Ultimately, these persons are codified as less than human and less deserving of human, international, or constitutional rights. This dehumanization is shaped by racial, national, and religious typologies and shored up by revamped historical imperial taxonomies, which rebound across national borders. The blurring of legal boundaries between domestic and foreign, and aliens and citizens, does not weaken executive and military authority, as Scalia fears. Instead it creates ever-widening spheres to

the “four corners of the earth,” where the U.S. administration, abetted by the courts, might manipulate habeas corpus to conceal rather than to “show the bodies” that have been indefinitely detained, sexually humiliated, and medically and psychologically abused and tortured. Haunted by the ghosts of empire, Guantánamo Bay, Cuba, remains an imperial location today. From here the borders of the law are redrawn to create a world in which Guantánamo is everywhere.

### Notes

- I am grateful to the following colleagues for their helpful responses to different versions of this essay: Muneer Ahmad, Mary Dudziak, Katherine Franke, Carla Kaplan, Mary Renda, Teemu Ruskola, Rogers Smith, Marita Sturken, Paul Statt, Priscilla Wald, and Leti Volpp.
1. Justice Ruth Bader Ginsburg, Oral Arguments, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 51. Oral arguments (April 20, 2004) are available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-334.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf) (accessed July 11, 2005).
  2. Rear Admiral M. E. Murphy, *The History of Guantanamo Bay, 1494–1964*, chap. 1, “Under the Spanish Flag” (U.S. Naval Base, 1953), available at [http://www.nsgtmo.navy.mil/gazette/History\\_98-64/hischp1.htm](http://www.nsgtmo.navy.mil/gazette/History_98-64/hischp1.htm) (accessed July 11, 2005).
  3. Many of these phrases have become commonplace. “Legal black hole” was first used in the British Supreme Court in *Abbasi v. Secretary of State for Foreign & Commonwealth Affairs* (2002); see also Joseph Margulies, “A Prison Beyond the Law,” *Virginia Quarterly Review* 80.4 (fall 2004): 37–55; for “legal limbo,” see Neil A. Lewis, “Red Cross Criticizes Indefinite Detention in Guantánamo Bay,” *New York Times*, October 10, 2003, 1; for “penal colony” see Michael Ratner, “The War on Terrorism: The Guantánamo Prisoners, Military Commissions, and Torture,” January 14, 2003, <http://www.humanrightsnow.org/guantanamoprisoners.htm>. (accessed July 11, 2005).
  4. “The Military Archipelago,” editorial, *New York Times*, May 7, 2004, A24. Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005).
  5. “Amnesty International Report 2005,” speech by Irene Khanat, Foreign Press Association, May 25, 2005, at <http://web.amnesty.org/library/index/ENGPOL10014200> (accessed July 11, 2005).
  6. Eric Hobsbawm, *The Age of Empire, 1875–1914* (New York: Random House, 1987).
  7. See Murphy, *The History of Guantanamo Bay*.
  8. For a brief review of these changing attitudes toward American imperialism, see Amy Kaplan, “Violent Belongings and the Question of Empire Today—Presidential Address to the American Studies Association, October 17, 2003,” *American Quarterly* 56.1 (March 2004): 1–7. For recent books on the subject of diverse political perspectives, see Andrew Bacevich, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge, Mass.: Harvard University Press, 2002); Bacevich, *The Imperial Tense: Prospects and Problems of American Empire* (Chicago: Ivan R. Dee, 2003); Patrick J. Buchanan, *A Republic, Not an Empire: Reclaiming America's Destiny* (Washington, D.C.: Regency, 1999/2002); David Harvey, *The New Imperialism* (New York: Oxford University Press, 2003); Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (New York: Metropolitan Books, 2004); John Newhouse, *Imperial America: The Bush Assault on the World Order* (New York: Knopf, 2003); Joseph S. Nye, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (New York: Oxford University Press, 2002). One of the major intellectual proponents of American Empire is Niall Ferguson. See, for example, his *Colossus: The Price of America's Empire* (New York: Penguin, 2004).
  9. This vision was propounded before 9/11 by the neoconservative Project for the New American Century in their 2000 report “Rebuilding America's Defenses: Strategy, Forces, and Resources for a New

- Century," available at <http://www.newamericancentury.org/RebuildingAmericasDefenses.pdf> (accessed July 12, 2005). For a recent essay bringing together U.S. imperialism and universalism, see Michael Ignatieff, "Who Are Americans to Think That Freedom Is Theirs to Spread?" *New York Times Magazine*, June 26, 2005.
10. See Charles A. Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-First Century* (New York: Knopf, 2002); Michael Mann, *Incoherent Empire* (London: Verso, 2003); Emmanuel Todd, *After the Empire: The Breakdown of the American Order* (New York: Columbia University Press, 2003); Immanuel Wallerstein, *The Decline of American Power* (New York: New Press, 2003).
  11. Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002), 341–42. See Robert Kaplan, "Rule No. 7: Remember the Philippines," in "Supremacy by Stealth: Ten Rules for Managing the World," *Atlantic Monthly*, July–August 2003, 80; and Michael Ignatieff, "Why Are We in Iraq? (And Liberia? And Afghanistan?)," *New York Times Magazine*, September 7, 2003. Imperial sites conquered in 1898, such as the Philippines and Guam, are being retooled by the military to support the current wars. See James Brooke, "Threats and Responses: U.S. Bases: Guam Hurt by Slump, Hopes for Economic Help From Military," *New York Times Magazine*, March 10, 2003, A14.
  12. See, for example, Diane Marie Amann, "Guantánamo," *Columbia Journal of Transnational Law* 42.1 (2004): 263–349; Ronald Dworkin, "What the Court Really Said," *New York Review of Books*, 51.13, August 12, 2004; Neal K. Katyal, "Executive and Judicial Overreaction in the Guantanamo Cases," in *Cato Supreme Court Review*, 2003–2004, at <http://www.cato.org/pubs/scr/docs/2004/executiveandjudicial.pdf> (accessed July 11, 2005); Gerald L. Neuman, "Closing the Guantánamo Loop-hole," *Loyola Law Review* 50.1 (spring 2004): 1–66; Kal Raustiala, "The Geography of Justice," *Fordham Law Review*, 73.6 (May 2005): 2501–2560; Michael Ratner and Ellen Ray, *Guantánamo: What the World Should Know* (White River Junction, Vt.: Chelsea Green, 2004); Kermit Roosevelt III, "Guantánamo and the Conflict of Laws: *Rasul* and Beyond," *University of Pennsylvania Law Review*, 153 (June 2005): 2017–71. Neuman has long written of Guantánamo in the context of its imperial history, and for my understanding of its legal status, I am indebted to him. Raustiala identifies Guantánamo's imperial history as evidence of an outdated anachronistic attachment to legal spatiality.
  13. See, for example, Matthew Jacobson, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876–1917* (New York: Hill and Wang, 2000); Amy Kaplan, *The Anarchy of Empire in the Making of U.S. Culture* (Cambridge, Mass.: Harvard University Press, 2002); Melanie McAlister, *Epic Encounters: Culture, Media, and U.S. Interests in the Middle East, 1945–2000* (Berkeley: University of California Press, 2001); Mary Renda, *Taking Haiti: Military Occupation and the Culture of U.S. Imperialism, 1915–1940* (Chapel Hill: University of North Carolina Press, 2001); Neil Smith, *American Empire: Roosevelt's Geographer and the Prelude to Globalization* (Berkeley: University of California Press, 2003); Penny Von Eschen, *Race Against Empire: Black Americans and Anticolonialism, 1937–1957* (Ithaca, N.Y.: Cornell University Press, 1997).
  14. This argument was prepared in "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," U.S. Justice Department memo to the Department of Defense concerning the applicability of International Humanitarian Law to the prisoners in the war on terrorism, written by Deputy Assistant Attorney Generals Patrick F. Philbin and John C. Yoo, December 28, 2001, from "The Philbin/Yoo Memo," *Newsweek*, accessible at [http://www.yirmeyahureview.com/archive/documents/prisoner\\_abuse/011228\\_philbinmemo.pdf](http://www.yirmeyahureview.com/archive/documents/prisoner_abuse/011228_philbinmemo.pdf) (accessed July 11, 2005). See also Brief for the Respondents, *Rasul v. Bush*.
  15. The Platt Amendment, 1901, Modern History Sourcebook available at <http://www.fordham.edu/halsall/mod/1901platt.html> (accessed July 11, 2005).
  16. Ibid.
  17. Ibid.
  18. Philip Sheldon Foner, *The Spanish-Cuban-American War and the Birth of American Imperialism, 1895–1902*, vol. 2 (New York: Monthly Review Press, 1972), 632.
  19. Treaty Defining Relations with Cuba, May 29, 1934, U.S.–Cuba, Art. III, 48 Stat. 1683, T. S. No. 866 at [http://www.nsgtmo.navy.mil/gazette/History\\_98-64/hisapxd.htm](http://www.nsgtmo.navy.mil/gazette/History_98-64/hisapxd.htm) (accessed July 11, 2005).
  20. Lease of Lands for Coaling and Naval Stations, February 23, 1903, U.S.–Cuba, Art. III, T. S. No. 418 at [http://www.nsgtmo.navy.mil/gazette/History\\_98-64/hisapxd.htm](http://www.nsgtmo.navy.mil/gazette/History_98-64/hisapxd.htm) (accessed July 11, 2005).
  21. The Platt Amendment was approved by the U.S. Congress in 1901, two years before its adoption in the Cuban constitution.

22. Thank you to Teemu Ruskola for pointing this out to me in the case, for example, of the Hong Kong lease of 1862. See Martti Koskenniemi, chap. 2, "Sovereignty: A Gift of Civilization: International Lawyers and Imperialism, 1870–1914," in *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001).
23. Walter LaFeber, *The New Empire: An Interpretation of American Expansion, 1860–1898* (Ithaca, N.Y.: Cornell University Press, 1963).
24. Alfred Thayer Mahan, "Conditions Determining the Naval Expansion of the United States," in *Retro-spect and Prospect: Studies in International Relations Naval and Political* (Boston: Little, Brown, 1902), 48.
25. The opening epigraph by Justice Ginsburg is followed by: "The closest would be the Canal Zone, I suppose." Although the government counsel rejected this analogy, the reference implicitly evokes another space colonized by the New Empire at the turn of the last century.
26. While the phrase "black hole" evokes its most immediate connotations from astronomy, it also has a prior imperial history. The "black hole of Calcutta" refers to the barracks in Fort William, Calcutta, where in 1756, the Nawab of Bengal allegedly imprisoned more than a hundred Europeans who died overnight, an incident that became a cause celebre in the idealization of British imperialism in India.
27. Oral Arguments, *Rasul v. Bush*, 52.
28. *Newsweek*, July 8, 2002.
29. Louis A. Perez, *On Becoming Cuban: Identity, Nationality, and Culture* (New York: HarperCollins, 1999), 238–42; Jana Lipman, "Guantanamo: Cubans, Marines, and Migrants, 1955–1965," paper presented at Global Studies Association, Brandeis University, April 2004.
30. "Cuban Base Has American Flavor," *Morning Call Online*, January 2, 2004.
31. Kathleen T. Rhem, "From Mayberry to Metropolis: Guantanamo Bay Changes," *American Forces Press Service*, March 3, 2005, at [http://www.dod.mil/news/Mar2005/20050303\\_77.html](http://www.dod.mil/news/Mar2005/20050303_77.html) (accessed July 11, 2005).
32. Paul Farmer, "Pestilence and Restraint: Guantánamo, AIDS, and the Logic of Quarantine," in *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (Berkeley: University of California Press, 2003), 51–59; Lizzy Ratner, "The Legacy of Guantánamo," *The Nation*, July 16, 2003, at <http://www.thenation.com/doc.mhtml?i=20030721&s=ratner> (accessed July 11, 2005); Jane Franklin, "How Did Guantánamo Become a Prison?" *History News Network*, April 11, 2005, at <http://hnn.us/articles/11000.html> (accessed July 11, 2005).
33. Medicine is again being used coercively in Guantánamo. The Red Cross has asserted that currently "some doctors and other medical workers at Guantánamo were participating in planning for interrogations," in what the report called "a flagrant violation of medical ethics." Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," *New York Times*, November 30, 2004, 1; Neil A. Lewis, "Interrogators Cite Doctors' Aid at Guantánamo Prison Camp," *New York Times*, June 24, 2005.
34. Franklin, "How Did Guantánamo Become a Prison?"
35. Ratner, "The Legacy of Guantánamo."
36. The administration has not released the names or exact numbers of prisoners at Guantánamo. For the most comprehensive record, see the Web site Cageprisoners.com at <http://www.cageprisoners.com/index.php> (accessed July 11, 2005).
37. Rogers Smith, "Citizenship Rights, Alien Rights, and the New American Empire," forthcoming in *Radical History Review*. See also Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (Berkeley: University of California Press, 2004).
38. Neuman, "Closing the Guantánamo Loophole," 42.
39. *Ibid.*; *Cuban Am. Car Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir.1995).
40. *Ibid.*
41. See Brook Thomas, "A Constitution Led by the Flag: The *Insular Cases* and the Metaphor of Incorporation," in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, ed. Christina Duffy Burnett and Burke Marshall (Durham, N.C.: Duke University Press, 2001), 82–103.
42. For the most comprehensive examination of the *Insular Cases* from different perspectives, see Burnett and Marshall, eds., *Foreign in a Domestic Sense*.
43. *Downes v. Bidwell*, 182 U.S. 244, 341 (1901); Efrén Rivera Ramos, "The Legal Construction of American Colonialism: The *Insular Cases*, 1902–1922," *Revista Jurídica de la Universidad de Puerto Rico* 65 (1996): 227–328.
44. *Downes*, 306.

45. *Ibid.*, 373.
46. *Rasul*, 564, n. 15.
47. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).
48. *Ibid.*, 275.
49. *Ibid.*, 278.
50. *Ibid.*
51. *Rasul*, 565 (Kennedy concurring).
52. Response to Complaint in Accordance with the Court's Order of July 25, 2004, *Odah v. United States*, 355 F. Supp. 2d 482 (D.D.C. 2005) (No. 02-CV-0828).
53. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).
54. Memorandum Opinion Denying in Part and Granting in Part Respondent's Motion to Dismiss or For Judgment as a Matter of Law, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (No. 02-CV0299).
55. Neuman, "Closing the Guantánamo Loophole," 19. The argument of this article is based on his contribution to Brief Amici Curiae of Former Government U.S. Government Officials in Support of Petitioners, *Rasul v. Bush*.
56. *Rasul*, 554.
57. In posing the question this narrowly in the passive voice, the Court does not narrate how the prisoners were transported to Guantánamo from horrendous conditions in the prison of Khandahar, Afghanistan, where many were beaten and tortured, and others died of suffocation, cold, and the lack of medical care and food. They also do not mention how, in scenes evocative of the middle passage of slavery, they were tied together and blindfolded in the belly of a transport jet, seated below an American flag.
58. *Rasul*, 557.
59. *Ibid.*, 556.
60. On the relation of habeas corpus to the possibility of its suspension in British colonial rule, see Nasser Hussain, chap. 3, "'The Writ of Liberty' in a Regime of Conquest," in Hussain's *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan, 2003). On Guantánamo as an exception and its relation to the U.S. Civil War, see Scott Michaelsen and Scott Cutler Shershow, "The Guantánamo 'Black Hole': The Law of War and the Sovereign Exception," *Middle East Report Online*, January 11, 2004, at <http://www.mcrip.org/mero/mero011104.html> (accessed July 11, 2005).
61. *Rasul*, 556.
62. Jackson in *Shaughnessy v. United States ex. Rel. Mezei*, 345 U.S. 206, 218–19, quoted in *Rasul v. Bush*, 557.
63. *Rasul*, Stevens, 562, n. 12.
64. *Ibid.*, 561–62.
65. *Ibid.*, 561.
66. *Ibid.*, 575 (Scalia dissenting).
67. *Ibid.*, 572.
68. *Ibid.*, 571–72.
69. *Ibid.*, 574.
70. *Ibid.*, 561.
71. *Ibid.*, 574 (Scalia dissenting).
72. *Ibid.*, 573 (Scalia's emphasis).
73. *Ibid.*, 574.
74. *Ibid.*, 577.
75. This dissent is consistent with what may seem like a surprisingly "progressive" position on *Hamdi* (see n. 79, following). There he also upheld the absolute dividing line between citizen and alien by arguing that as a citizen, Hamdi should either be criminally charged with treason or released, unless the government exercised its constitutional right to suspend habeas corpus. For Scalia, in the case of the aliens in foreign territory, no domestic laws apply, but for the citizen, the laws of the land are clear.
76. *Downes*, 313.
77. Thank you to Muneer Ahmad for pointing this out; see Katyal, "Executive and Judicial Overreaction."
78. On the Department of Defense's definition of "enemy combatant," see William J. Haynes II, General Counsel of the Department of Defense, "Enemy Combatants," presentation to Council on Foreign Relations, at <http://www.cfr.org/publication.php?id=5312> (accessed July 11, 2005). For an analysis of this designation by executive fiat (see Amann, "Guantánamo").

79. Quoted in Adam Liptak, "In First Rulings, Military Tribunals Uphold Detentions of 4," *New York Times*, August 14, 2004, 11.
80. On the relation of the torture of prisoners at Guantánamo and Abu Ghraib to the treatment of prisoners in the U.S. prisons, see Joan Dayan, "Cruel and Unusual: The End of the Eighth Amendment," *Boston Review*, October/November 2004, at <http://bostonreview.net/BR29.5/dayan.html> (accessed July 11, 2005).
81. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).
82. Response to Complaint, July 2004, 19.
83. *Ibid.*, 23.
84. *Ibid.*, 17.
85. *Ibid.*, 13.
86. Prior to Judge Joyce Green's ruling declaring the Combatant Status Review Tribunals unconstitutional and that the prisoners should be treated as prisoners of war, in October 2004 U.S. District Judge Colleen Kollar-Kotelly ordered the Pentagon to stop intelligence eavesdropping on lawyer-client conversations at Guantánamo; Carol D. Leonnig, "U.S. Loses Ruling on Monitoring of Detainees," *Washington Post*, October 21, 2004, 4. In November, U.S. District Judge James Robertson ordered the Pentagon to halt the war crimes trial of a Yemeni who allegedly worked as Osama bin Laden's driver, saying the Military Commissions are flawed, and likewise called the Pentagon's Combatant Status Review Tribunals (CRSTs) an inadequate, nonjudicial alternative to habeas proceedings in federal courts; Warren Richey, "Court Puts off Guantánamo War-Crimes Case," *The Christian Science Monitor*, January 19, 2005, 2. On July 15, 2005, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit ruled unanimously to reverse Judge Robertson's decision and to resume military tribunals. Neil A. Lewis, "Ruling Lets U.S. Restart Trials at Guantanamo," *New York Times*, July 16, 2005, 1.
87. In the case of *Hamdi*, rather than abide by the Court's decision, the Department of Justice released Yaser Hamdi to return to Saudi Arabia on the condition that he relinquish his U.S. citizenship.