THE GEOGRAPHY OF JUSTICE

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

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[2] See www.nsgtmo.navy.mil/gazette/history, Appendix D.

[3] Eg *Al-Odah v. US*, 321 F3d 1134 (DC Cir. 2003); *Gherebi v. Bush* DC No. CV-03-01267-AHM (9th Cir., Dec. 18, 2003)

[4] See the amicus brief of former US diplomats at http://www.kuwaitidetainees.org/gitmo/diplomats.pdf; and of former American POWs at http://www.kuwaitidetainees.org/gitmo/pow.pdf. The attention to the issue in Britain has been relentless; see e.g. "Special Report: Inside Guantanamo," *THE GUARDIAN* (London), Dec 3 2003 (www.guardian.co.uk); and the stunning speech by one of the UK's top law lords, Lord Steyn: Guantanamo: The Legal Black Hole, F.A. Mann Lecture, Lincoln's Inn Old Hall, London, 25 November 2003. On the US Senators see Neil Lewis, Try Detainees or Free Them, Three Senators Urge, NEW YORK TIMES, A11, Dec 13 2003, (quoting Senator McCain, a former POW during the Vietnam War, as stating that "they may not have any Geneva Convention rights as far as I'm concerned, but they have rights under various human rights declarations. And one of them is the right not to be detained

Nonetheless, initially these habeas petitions all failed. And they failed for a deceptively simple reason. The reason was not that the petitioners are enemy aliens or unlawful combatants.[5] Rather, the reason was their geographic location. Enemy combatants detained on American soil are not per se barred from contesting their detention in American courts.[6] But federal courts have generally held that foreigners—enemy or otherwise--detained *outside* the geographic boundaries of US lack constitutional protections.[7] The Supreme Court's decision last June in *Rasul v. Bush*[8] surprised many observers by holding that the federal habeas statute did not bar the Guantanamo petitions. But the majority opinion

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indefinitely."). Several American officials reportedly doubt the utility of the detention strategy in Guantanamo, in particular in light of the adverse public response around the globe. The debate is discussed in David Rose, Guanatanamo Bay on Trial, VANITY FAIR (January 2004)

[5] Indeed, they are not enemy aliens as that phrase is usually understood—they include Australians, Kuwaitis, and British citizens. *Al-Odah v US*, supra. The degree to which the status of enemy alien turns on nationality, and the impact of this status on prior Supreme Court precedent, is contested in the case. The designation as an enemy alien is distinct from that of lawful or unlawful combatant; on the latter see Congressional Research Service, Treatment of Battlefield Detainees in the War on Terrorism, CRS REPORT FOR CONGRESS, Sept 17, 2003

[6] *Ex Parte Quirin*, 317 US 1 (1942)

[7] See eg *Al-Odah*, supra; *Khalid v. Bush & Boumediene et al v. Bush* (memoradum opinion and order, January 19 2005, D. DC). See also *Coalition of Clergy v. Bush*, 2002 WL 272428 (CD Cal Feb 21, 2002); Sean Murphy, Contemporary Practice of the United States Relating to International Law: Ability of Detainees in Cuba to Obtain Habeas Corpus Review, 96 AM J. INT'L L. 481 (2002). As I discuss below, this statement is not quite correct—there are several instances in which, as a doctrinal matter, aliens abroad enjoy constitutional rights. Moreover, I argue they ought to enjoy *more and more complete* constitutional rights in many instances.

[8] Rasul v. Bush, (2004)

rested on a narrow issue of statutory interpretation: did the federal habeas statute apply to aliens as well as citizens abroad? The Court held that the statute did not distinguish aliens from citizens in this regard. Yet the decision said almost nothing about the constitutional rights of aliens outside US territory.[9] And of course Congress can (and may) readily amend the habeas statute to deny access to the writ to aliens held abroad. The decision in *Rasul*, while highly significant for the petitioners, did not in any meaningful sense alter the question of the constitutional rights of aliens abroad.

Why is geographic location thought to be determinative of the constitutional rights of aliens abroad? The supposition that law and legal remedies are connected to, or limited by, territorial location--a concept I term "legal spatiality"--is commonplace and intuitive. Many Americans have watched footage of Cuban refugees swimming ashore in Florida, desperately trying to reach land before US officials can grasp them. Touching the territory of the US—the physical soil itself—is critical to the legal determination of their status: the difference between a life of freedom in the US and forced return to an autocratic Cuba.[10] This is a dramatic example of the power of legal spatiality, but not an unusual one. The

[9] Footnote 15 of *Rasul*, while dicta, implicitly claims that the Constitution applies to aspects of the detention of aliens in Guantanamo (and, again implicitly, other analogous US-controlled territory). This issue is discussed extensively infra.

[10] Cubans receive special treatment under US law. Pursuant to the Cuban Adjustment Act of 1966, Cuban asylum seekers who reach US soil are given "preferential treatment by enabling them to enter the United States and achieve permanent-resident status through a special process not offered to other refugees." Note, The Cuban Adjustment Act of 1966, 114 HARV. L. REV. 902 (2001) at 902; Thomas David Jones, A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited, 9 GEO. IMM. L. J. 479 (1995)

concept is suffused throughout the law. Yet, perhaps precisely *because* it so commonplace, the assumptions embedded in legal spatiality are rarely examined and surprisingly ill-defended.[11]

This Article explores legal spatiality and its contemporary implications. As I will show, there are persuasive reasons to take spatial location into account when interpreting legal rules. Current doctrine, however, does a poor job of accounting for these reasons and provides no coherent and consistent theory of the role of spatiality within our legal order. The last century has witnessed a progressive relaxing of legal spatiality. Yet with regard to noncitizens the federal courts continue to cling to the notion that American law is tethered

[11] For expositional purposes I sometimes refer to territoriality and sometimes to spatiality. For the purposes of this article the two terms are equivalent. The primary exceptions to the dearth of research on these topics in the field of extraterritoriality as a constitutional issue are the pathbreaking works of Gerald Neuman and Alex Aleinikoff. See in particular GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996); Gerald L. Neuman, Anomalous Zones, 48 STAN. L. REV. 1197 (1996); Gerald L. Neuman, Whose Constitution?, YALE L. J. (1991); ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002). Statutory questions of extraterritoriality have received far more attention, much of it devoted to when and where extraterritorial application ought to occur. See e.g. Reuban Avi-Yonah, National Regulation of Multinational Enterprises, 42 COLUM J TRANSNAT'L L 5 (2003); Detlev Vagts, Extraterritoriality and the Corporate Governance Law, 97 AM J. INT'L L. 289 (2003); Stephen Moldof, The Application of US Labor Laws to Activities and Employees Outside the United States, 17 LAB. LAW. 417 (2002); William Dodge, Understanding the Presumption Against Territoriality, Berk Int'l L J (1998); Curtis Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 VA. J INT'L L (1997); Gary Born, A Reappraisal of the Extraterritorial Reach of US Law, 24 L & POL'Y INT'L BUS. (1992); Roger P. Alford, The Extraterritorial Application of Antitrust Laws: the US and EU Approaches, 33 VA. J. INT'L L 1 (1992). Domestic law also has spatial assumptions that I do not pursue here. See eg. Richard Ford [legal geographies]

to territory--that simply by moving an individual around in space the rights that individual enjoys wax and wane.

The Article proceeds as follows. After briefly describing the roots of legal spatiality in the deep structure of the international legal system, I analyze the evolution of legal spatiality across a number of doctrinal areas. These areas are rarely considered together, but all implicate legal spatiality in one way or another. They also demonstrate that legal spatiality has been substantially transformed in the last century. I then look at the particularities of the connection between Guantanamo and the US and critique the position that conceptions of territoriality and sovereignty bar habeas jurisdiction for aliens detained there. Finally, I consider some alternative conceptualizations of legal spatiality that suggest that spatial location does not foreclose the existence of constitutional rights for noncitizens outside the boundaries of the US.

I. The Conceptual Basis of Legal Spatiality

In several recent cases federal courts have faced the question of whether noncitizen detainees held outside US territory by the US government could challenge their detention via the writ of habeas corpus.[12] In *Al-Odah*, the predicate case to *Rasul*, The DC Circuit ruled

[12] *Al-Odah* involved twelve Kuwaiti nationals detained in Guantanamo; *Rasul* involved 2 British and one Australian detained in Guantanamo. The DC Circuit Court of Appeals consolidated the two in 321 F3d 1134. Constitutional as well as international law arguments are discussed in Dianne Amman, Guantanamo, 42 COLUM. J. TRANS. L. (2004). One of the more interesting aspects of the Supreme Court litigation is the amicus brief filed by the military lawyers charged with the defense of Guantanamo detainees before American military tribunals. See Jeffrey Toobin, Inside the Wire, *The New Yorker*, Feb. 9 2004.

the Guantanamo detainees could not. In January of this year Judge Leon of the DC District Court similarly ruled the petitioners "lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo."[13] The reason, in short, is that "non-resident aliens captured and detained outside the United States have no cognizable constitutional rights."[14] The decisions to deny these habeas petitions reflect fundamental ideas about territory and sovereignty. It is critical at the outset to underscore a fundamental idea *not* implicated: that wartime itself blocks enemy aliens' access to US courts.

Wartime plainly provides a very important context to any case involving aliens, friendly or otherwise. The President wields extraordinary powers during war.[15] But whatever the nature of the current conflict, the Supreme Court has previously made clear that enemy aliens detained by the US within American territory may in fact avail themselves of the judicial process.[16] That the petitioners in the Guantanamo cases are enemy aliens is itself unclear. Defining the category of enemy alien in the age of al Qaeda is undoubtedly complex. But the petitioners in *Rasul* , for example, were not enemy aliens as that term is traditionally understood. They are citizens of Australia, the United Kingdom, and Kuwait—all close allies of the US.[17] (The US argues that the Guantanamo detainees nonetheless

[13] Khalid, supra at 21.

[14] Khalid, supra at 14.

[15] See eg, CURTIS BRADLEY AND JACK GOLDSMITH, FOREIGN RELATIONS LAW (2003), CH 4.

[16] *Quirin,* supra, at 25-6. See also Amicus Brief of Legal Historians, supra, at 23-25. (arguing that traditional practice both in England and in the early American republic permitted aliens, enemy or friendly, access to the writ of habeas corpus).

[17] See generally David Cole, Enemy Aliens, 54 STAN L. REV (2002). US officials in Guantanamo have acknowledged that some of the detainees likely have no connection to Al-Qaeda or the Taliban. Katherine

qualify as enemy aliens "because they were seized in the course of active and ongoing hostilities against United States and coalition forces.")[18] Most significantly, however, the precedents upon which the DC Circuit rested its decision in *Al-Odah* make clear that the enemy alien designation is unnecessary. The holding in *Johnson v. Eisentrager*, a World War II era case heavily relied on by the Bush Administration in the Guantanamo litigation, "was not dependent on the alien's status as enemies, but rather on the aliens' lack of presence inside the sovereign territory of the United States."[19] Consequently, while the nature of the current struggle against al Qaeda and in Afghanistan and Iraq provides a very important milieu for these cases, the resolution of the question of habeas corpus—and of the broader question of constitutional rights-- does not wholly or even primarily rest on the exigencies of wartime.

These decisions instead rest on a specific conception of territoriality. This conception can be stated as follows: *the physical location of an individual determines the legal rights that individual possesses*. In this Article I refer to this concept as "legal spatiality." The concept of legal spatiality can readily be generalized: the scope and reach of the law is connected to

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Seelye, A Nation Challenged: Captives: An Uneasy Routine at Cuba Prison Camp, *New York Times*, March 16, 2002, at A8 (quoting Deputy Commander at Guatanamo).

[18] Brief for the Respondents in Opposition at 14, www.findlaw.com/cnn/docs/scotus/rasulodahoct3sgopbrf.html. The petitioners in Khalid, captured in Bosnia and in Pakistan, hail from Algeria, France, and Bosnia. Khalid, supra, at 5.

[19] Brief for the Respondents in Opposition at 13. Judge Leon's decision in *Khalid* echoes this, stating that "nothing in Rasul alters the holding articulated in Eisentrager and its progeny." Khalid, supra, at 18. See also *Gherebi*, supra, at 13: "The dispositive issue, for purposes of this appeal, as the government acknowledges, relates to the legal status of Guantanamo, the site of petitioner's detention…the government does not dispute that if Gherebi is being detained on US territory, jurisdiction over his habeas petition will lie, whether or not he is an 'enemy alien.'"

territory, and therefore spatial location determines the operative legal regime. More plainly, where you sit determines what rules you sit under.

Assumptions of legal spatiality suffuse our legal system. The DC Circuit stated, for example, that "we cannot see how, or why, the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections are not…If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or legality of restraints on their liberty."[20] According to this view, the protections of the Bill of Rights are not untethered from the territory of the US. Rather they are spatially-bound: operative only within the 50 states and other territories unequivocably possessed by the US. Since the petitioners are aliens outside the territorial borders of the US,[21] they lack the Constitutional protections they uncontestedly would enjoy were they within our borders. [22] In deciding in favor of the detainees in *Rasul*, the Supreme Court did not so much as challenge this set of assumptions as sidestep them. The Court's holding rested on the particular language of the federal habeas

[20] *Al-Odah* at 6.

[21] As I describe *infra*, while territoriality is critical to the DC Circuit's decision in *Al-Odah* so is alienage. As even the dissent in *Rasul* notes, federal courts would have habeas jurisdiction over an American citizen imprisoned in Guantanamo as a constitutional as well as a statutory matter.

[22] A flurry of scholarship on the Constitution's territorial reach (discussed further below) occurred in the wake of the Spanish-American War. See eg. Abbott Lowell, The Status of Our New Possessions: A Third View, 13 HARV. L. REV. (1899). The question popped up throughout the 20th century in the law reviews; see e.g. Sedgwick Green, Applicability of American Law to Overseas Areas Controlled by the United States, 68 HARV. L. REV 781 (1955); Fairman, supra. There is an extensive literature devoted to Puerto Rico's status in particular. See e.g. FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Burnett and Burke Marshall, eds, 2001).

statute, which, in the view of the majority, does not distinguish between citizens and aliens. Since citizens can clearly petition for habeas relief from Guantanamo, so—as a matter of statutory right—can aliens.[23] In so ruling the *Rasul* Court distinguished earlier and arguably contrary precedents on the ground that underlying understandings of the reach of the habeas statute had changed in recent years.[24] The result was a victory for the *Rasul* detainees, but one that does not challenge in any fundamental way prevailing conceptions of legal spatiality.[25]

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

[24] Specifically, the majority argued that despite the language of the statute suggesting that a detainee must be within the territorial jurisdiction of the district court receiving the petition, in fact if the custodian is within that district that is sufficient. See Rasul, at 9-11

[25] As evidenced by the flat assertion in *Khalid* that nonresident aliens captured abroad "and detained outside the United States have no cognizable constitutional rights." Khalid, supra at 14. The Supreme Court has left the door open for the claim that *some* constitutional rights may be available to aliens outside the US, though it has not clarified the issue. In *Zavydas v. Davis*, 121 S. Ct. (2001) at 2500, for example, the Court stated that: "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States . . . ." The Court's invocation of "certain constitutional rights" at least suggests that other such rights may be available to aliens outside the borders of the US. For example, in the area of personal jurisdiction extraterritorial rights exist for foreign nationals. *Asahi,* for example, awards some level of due process rights to non-citizens abroad. Asahi, supra. See also *US v. Davis*, 905 F2d 145 (9th Cir 1990) at 248-249: "in order to apply extraterritoriality a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the US…so that such application would not be arbitrary or fundamentally unfair," cited in Bradley and Goldsmith, supra, at 510.

A. *Historical Foundations*

The importance of place to legal rules and protections—the belief that law derives from land--has deep historical roots. Defining law in spatial terms accords with the traditional conception of the Westphalian sovereign state. Legal spatiality concurs as well with commonplace intuitions about the territorial nature of governance, which reflect the continuing dominance of the Westphalian model in contemporary political thinking.[26] The treaty of Westphalia, penned in 1648, ended the Thirty Years' War and is generally credited with ushering out the medieval system of overlapping loyalties and allegiances in Europe and heralding a new system of political rule based on territoriality and absolute secular power.[27] The Westphalian conception of the state represented a break with past because it drew all legitimate power into a single sovereign, who controlled absolutely a defined territory and its associated population.[28] That defined territory demarcated, for most purposes, the reach of the sovereign's law.

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[26] As David Johnson and David Post write, "Territorial borders, generally speaking, delineate areas within which different sets of rules apply. There has until now been a general correspondence between borders drawn in physical space…and borders in 'law space.'" Johnson and Post, Law and Borders--The Rise of Law in Cyberspace, 48 STAN. L. REV. (1996) at 1368.

[27] Leo Gross, The Peace of Westphalia, 1648-1948, 42 AM J INT'L L. 20 (1948); STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); PHILLIP BOBBIT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002) CH 19.

[28] The fullness of the break is generally overstated, but it is nonetheless conventional to refer to the Treaty of Westphalia this way. See Krasner, supra; DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY (2001); Kal Raustiala, Rethinking the Sovereignty Debate in International Economic Law, 6 J INT'L ECON L 841 (2003), Part II.

The Westphalian ideal of statehood is thus fundamentally a spatial conception of sovereignty. Sovereignty and territoriality in turn provided the bedrock principles for the development of international law in the Westphalian era. As John Herz writes,

> from territoriality resulted the concepts and institutions which characterized the interrelations of sovereign units, the modern state system…only to the extent that it reflected their territoriality and took into account their sovereignty could international law develop. For its general rules and principles deal primarily with the delimitation of the jurisdiction of countries.…sovereign units must know in some detail where their jurisdictions end and those of other units begin; without such standards, nations would be involved in constant strife over the implementation of their independence.[29]

Westphalian sovereignty thus creates a system in which legal jurisdiction is congruent with sovereign territorial borders.[30] This territorial form of sovereignty became supreme in Europe and the greater Christian world throughout the 18th and 19th centuries. Broadly

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[29] John Herz, Rise and Demise of the Territorial State, 9 WORLD POLITICS (1957) at 480-1. Likewise Krasner argues that Westphalian sovereignty is "an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures." Krasner, 1999 at 20. One eminent scholar notes that "The original conception of law was personal, and it was only the rise of the modern territorial state that subjected aliens—even when they happened to be resident in a state not their own—to the law of that state." J.L. Brierly, The Lotus Case, 44 L. Q. REV. 154, 156 (1928).

[30] What Miles Kahler calls "jurisdictional congruence." Miles Kahler, Introduction, in TERRITORIALITY AND CONFLICT IN AN AGE OF GLOBALIZATION (MILES KAHLER AND BARBARA WALTER, EDS, CAMBRIDGE UNIVERSITY PRESS, FORTHCOMING 2006).

speaking, by the 19th century each sovereign state[31] was understood to "possess and exercise exclusive sovereignty and jurisdiction throughout the full extent of its territory…No state can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons that do not reside within it, whether they be native-born subjects or not."[32] This understanding of sovereignty and territoriality provided the basis not only for Westphalian international relations, but also for relations among the constituent states of the US. Joseph Story's highly influential approach to jurisdiction drew directly upon Westphalian territorial principles.[33] One need only read Justice Field's opinion in *Pennoyer v. Neff* to see the connection between Westphalian territorial sovereignty as understood in international law and the prevailing jurisdictional principles of 19th century American law.[34]

To be sure, the ideal of Westphalian territorial sovereignty was riddled with exceptions from the beginning.[35] An ancient example, dating to the Renaissance, is the embassy. As Garrett Mattingly recounts, "the late medieval civilians had worked out a pretty consistent theory of diplomatic immunity. While an ambassador was on mission his person

[31] Many political entities were not considered sovereign states under the international law of the time because they were not deemed 'civilized' under the then-prevailing 'standard of civilization.' THE EXPANSION OF INTERNATIONAL SOCIETY (HEDLEY BULL AND ADAM WATSON, EDS, 1984).

[32] WHEATON, ELEMENTS OF INTERNATIONAL LAW, Sec. 78 (8the ed, 1866).

[33] See e.g. Geoffrey C. Hazard, Jr, A General Theory of State Court Jurisdiction, SUP. CT. REV 241 (1965)at 259: "Story borrowed from Huber the idea of the exclusivity of sovereign authority."

[34] Field relied heavily on Story in writing his opinion; see Hazard, supra at 262 ("There is no question, however, that Story influenced *Pennoyer v. Neff* itself"); *Pennoyer v. Neff* at 722: "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "the laws of one State have no operation outside its territory."

[35] Krasner, supra.

was inviolable, and he, his suite and his goods enjoyed a wide immunity from any form of civil or criminal action, either in the country where he was accredited or in any through which he might pass."[36] Ambassadorial residences have traditionally been treated as within the jurisdiction of the ambassador's state, though they physically exist within the host state's borders.[37] Perhaps equally ancient is the notion that sovereigns enjoy universal jurisdiction with regard to piracy on the high seas—which by definition occurs beyond their territory.[38] Another related pre-Westphalian practice was the existence of sanctuaries: zones, such as monasteries, that were plainly within a prince's territorial realm yet into which secular law could not reach. Sanctuary was akin, in a broad sense, to the practice of embassies in that both were physical locations carved out of a larger entity and treated distinctly by the law.[39]

Territorial sovereignty was thus never a hard and fast rule. Numerous exceptions to strict territoriality existed and even thrived.[40] States have long sought to penetrate the territorial sovereignty of other states even as they sought to protect their own territory from

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[36] GARRETT MATTINGLY, RENAISSANCE DIPLOMACY (1988) AT 232:

[37] INTERNATIONAL LAW (DAMROSCH, ET AL, 4TH ED. 2001) at 1284; Vienna Convention on Diplomatic Relations, Article 22 (guaranteeing that embassy land shall be inviolable). Embassies fit within the contours of Neuman's concept of "anomalous zones": geographic areas "in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended." Neuman, supra, at 1201. Neumann offers several examples, of which the naval base at Guantanamo is one. The others include the District of Columbia, and less formally, red light zones such as Storyville in New Orleans.

[38] Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, forthcoming HARV. J. INT'L L. (2004)

[39] See Neuman, Anomalous Zones, supra at 1206-7

[40] This is the primary claim of Krasner, supra.

incursion. Sovereign states after Westphalia also maintained a keen interest in their subjects or citizens who happened to be outside their borders.[41] Most dramatically, prior to World War II Western powers regularly maintained "consular courts" within non-Western nations such as Turkey, Morocco, and China.[42] These courts adjudicated claims among Western citizens abroad as well as between Western citizens and locals, on the theory that the local law was barbaric, unpredictable, and strange. In other words, Westerners in places like Shanghai lived under their home state's laws (or an amalgam of Western laws) rather than Chinese law—a profound violation of Westphalian territorial principles.[43] In the early 20th century Congress even created a special "US District Court for China" which answered to the 9th Circuit.[44] This court lasted well into the 20th century, and it was only in 1956 that the US finally abandoned consular jurisdiction in a foreign state.[45]

B. *Extraterritoriality Today*

Since the close of the Second World War "unequal treaties" have been frowned upon and consular courts no longer exist. While the demise of 19th century extraterritorial jurisdiction is a testament to the enduring power of Westphalian sovereignty, territorial

[41] Indeed one of the five well-accepted heads of jurisdiction to prescribe is the nationality principle; see RESTATEMENT(3RD) OF FOREIGN RELATIONS LAW

[42] ELAINE SCULLY, BARGAINING WITH THE STATE FROM AFAR (1997); Bull and Watson, supra.

[43] Of course, among themselves the Western powers would never permit such an intrusion. It was only permissible because these states were deemed "uncivilized." On the standard of civilization see David Fidler, The Return of the Standard of Civilization, 2 CHI J INT'L L. (2001)

[44] Scully, supra. Congress would later create a similar court for the Panama Canal Zone, answering to the 5th Circuit. See eg Egle v. Egle, 715 F2d 999 (5th C. 1983)

[45] The last American consular court was in Morocco, and was disbanded in 1956.

sovereignty has nonetheless been gradually eroding across many other fronts. States today regularly and increasingly assert prescriptive jurisdiction beyond their territorial limits. This is often done via regulatory statutes (discussed further below) but perhaps most notably in military deployments abroad, which commonly employ "status of forces agreements" that alter host state legal regimes in certain respects with regard to foreign servicemembers. The US, with its far-flung force commitments, relies upon these agreements extensively. (Significantly, the only US military base that does not employ such an agreement is Guantanamo Bay). The US-Japan agreement, for instance, states that "the military authorities of the US shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the US over all persons subject to the military law of the US."[46] Principles of international law limit these varied extraterritorial assertions but do not prohibit them. Territoriality and nationality remain the principal bases of prescriptive jurisdiction, but these bases are subject to contextual considerations such as fairness and reasonableness.[47] It is also now generally accepted that states may regulate extraterritorial acts that have effects within their territory, and, at times, may regulate acts against their nationals who are abroad.[48] States may even assert universal jurisdiction beyond

[46] Article 27, Treaty of Mutual Cooperation and Security Between the US and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan 19 1960, 23 UST 1652. See also US v. Corey, 232 F3d 1166 (9th Cir., 2000) (involving civilian employee of military forces in Japan).

[47] Restatement 3rd at 237-248. See also David Gerber, Beyond Balancing: International Law Restraints on the Reach of National Laws, 10 YALE J INT'L L 185 (1984-5)

[48] Known as passive personality jurisdiction. See the Restatement, supra at 240.

the traditional area of piracy. Some acts, such as genocide, are held to be so heinous that any state may prosecute the perpetrator.[49]

Each of these examples—and there are others--illustrates that while Westphalian territorial sovereignty remains an important ideal, geographic borders in fact coincide quite imperfectly with the reach of national laws. An increasingly interdependent and globalized world has rendered strict territorial limits on jurisdiction increasingly unworkable, just as increasing national unity in the US led to the demise of the 19th century rules of personal jurisdiction. The result of this evolution is that where one sits does not necessarily determine what legal rules one sits under. As the Supreme Court made clear a decade ago in *Hartford Fire*, sitting in London and dutifully abiding by English competition law provides no insulation from the reach of US competition law when effects on US markets can be demonstrated—even if the actors in question are British citizens or corporations.[50] The US has many statutes that explicitly assert extraterritorial jurisdiction, and others that do not but have been so construed by the executive branch and the courts.[51] Other states have done

[49] Traditionally universal jurisdiction was limited to piracy, but its scope has expanded in recent decades, though not uncontroversially. See PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION; Kontorovich, [draft], supra; Steven Ratner, Belgium's War Crimes Statute: A Postmortem, 97 AM. J. INT'L L. (2003); Henry Kissinger, The Pitfalls of Universal Jurisdiction, FOR. AFF. (July-Aug 2001)

[50] Hartford Fire, supra. See generally Kenneth Dam, Extraterritoriality in the Age of Globalization: The Hartford Fire Case, SUP. CT. REV. (1993);

[51] William Dodge, Understanding the Presumption Against Extraterritoriality, 16 BERKELEY J. INT'L L. (1998); Born, supra; Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law, SUP. CT. REV. 179 (1991)

the same.[52] While such assertions of extraterritoriality are ever more common, in some cases spatial location itself becomes hard to determine—as in many recent internet cases.[53] As technology evolves legal spatiality becomes harder to apply and, increasingly, harder to justify as a jurisprudential principle.

In sum, legal spatiality has deep conceptual roots. It is part and parcel of the Westphalian model of sovereignty that undergirds the modern territorial state system. In practice, however, the spatial basis of Westphalian sovereignty has never been absolute and is increasingly compromised. Sovereignty, as I demonstrate below, has become progressively "unbundled" from territoriality.[54] This unbundling, while uneven, can be detected in myriad areas of the law.

II Spatiality in American Law

[52] Though generally less aggressively. See e.g. David Gerber, The Extraterritorial Application of the German Antitrust Laws, 77 AM J. INT'L L. (1983)

[53] Compare Patricia Bellia, Chasing Bits Across Borders with Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-border Searches, in U CHI LEGAL FORUM, 2001 "The Frontiers of Jurisdiction." For an extensive overview of jurisdictional issues and globalization see Paul Schiff Berman, The Globalization of Jurisdiction, [xx]. The problem of locating an act in space was at the heart of choice of law. Before the rise of the governmental interests analysis associated with Brainerd Currie the dominant approach was one of vested rights, in which wrongful conduct in one state would, if adjudicated in another, have to follow the first state's laws. This approach is most famously associated with Joseph Beale; see generally Kramer, supra; LEA BRILMAYER, CONFLICTS OF LAWS (2d ed, 1995), Part I.

[54] I take the unbundling phrase from John Ruggie. See e.g. John Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, INT'L ORG. (1993).

The law has longed looked to spatiality as a principle or guide for decisions.[55] Courts traditionally derived jurisdiction from principles of territoriality (though personality—in the form of citizenship—never went away as a head of jurisdiction.)[56] Consequently in the 19th century assertions of extraterritorial jurisdiction were, outside of the context of pirates and consular courts in 'uncivilized' states, quite uncommon.[57] Courts of the time viewed the notion that that one state could impose its laws within another state's territory as highly dubious and even dangerous. This conception of legal spatiality, in which Westphalian territoriality was the operative principle, was manifested in a number of legal domains.

A. *Statutory Law*

In 1909 the Supreme Court first addressed the spatial limitations of federal regulatory law.[58] The specific question was whether the Sherman Antitrust Act applied to actions overseas that impacted US markets. The American Banana Company sued the United Fruit Company, arguing that it had been injured by actions undertaken at the behest of United Fruit in Panama. *American Banana* provided an early opportunity to consider the nature of the linkage between territory and regulation in the new era of a more economically-

[55] This part tracks and condenses the discussion in Kal Raustiala, The Evolution of Territoriality: International Relations and American Law, forthcoming in KAHLER AND WALTER, SUPRA.

[56] As Justice Jackson notes in Eisentrager, supra, this concept was "old when Peter met Paul".

[57] See the discussion in Part I, supra.

[58] American Banana v. United Fruit, 212 US 347 (1909); See also ANDREAS F. LOWENFELD, PUBLIC LAW IN THE INTERNATIONAL ARENA: CONFLICT OF LAWS, INTERNATIONAL LAW, AND SOME SUGGESTIONS FOR THEIR INTERACTION. 163 RECUEIL DES COURS 311 (1979) at 376-378.

interventionist state. Justice Holmes, writing for the Court, argued that US courts lacked jurisdiction because US law did not reach into the territories of other sovereign states.

Holmes declared that "no doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."[59] Holmes was referring to the consular jurisdiction still common at the start of the 20th century.[60] In such aberrant situations a civilized state like the US could extend its law into the territory of another sovereign. But, he insisted,

> The general and almost universal rule is that the character of act as lawful or unlawful must be determined wholly by the law of the country where the act was done…For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations.[61]

US law did not apply to acts that occurred abroad because the geographic scope of national law was defined by territory. Under the legal spatiality of the time only within a sovereign's territory could the sovereign's law apply, absent very special circumstances, such

[59] American Banana, supra at 356

[60] Scully, supra.

[61] American Banana at 356e.

as activity on the high seas.[62] Over the course of the 20th century, this strict conception of legal spatiality gradually gave way to a more flexible, functional understanding. As early as the 1920s, regulatory cases began to chip away at the spatial assumptions of *American Banana*.[63] At about the same time the Supreme Court also recognized that Westphalian territoriality ought not apply in criminal jurisdiction when the statutes in question are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud wherever perpetrated."[64] And by 1945 Judge Learned Hand, in a landmark opinion, enunciated the so-called effects test, by which acts that had effects within the US but occurred abroad were fair game for US law.[65] In other words, the conception of legal spatiality articulated in *American Banana* radically shifted within a few decades. The doctrinal reversal is now so complete that recently the DC Circuit went so far as to hold that even *foreign* plaintiffs could sue *foreign* defendants under the Sherman Act for harms that occurred

[62] Where, of course, no other sovereign could object. Similar logic was at play in the decision in EDF v. Massey, involving the application of NEPA to Antarctica. There the DC Circuit held that NEPA did apply. *EDF v. Massey*, 986 F2d 528 (DC Circuit 1993); see also Sean Murphy, Contemporary Practice fo the United States Relating to International Law, State Jurisdiction and Immunities: Extraterritorial Application of NEPA, 97 AM J. INT'L L. 962 (2003). Subsequent cases, such as [japan] held that NEPA did not apply to US military bases abroad, in part due to foreign policy concerns raised by the presence of another sovereign.

[63] Eg US v. Sisal Corp, 274 US268 (1927)

[64] US v. Bowman, 260 US 94 (1922) at 98.

[65] US v. Alcoa, 148 F2d 416 (2d Cir, 1945); See also Lowenfeld, supra, Chapter 4.

overseas, as long as some harmful effect was felt within the US.[66] In other areas of regulation the US is equally aggressive in projecting its regulatory powers beyond its borders. In 1985 the Securities and Exchange Commission created a special office solely devoted to international enforcement matters.[67] Many other agencies have done the same.[68] In essence, the federal courts have permitted the US to "set the competitive ground rules for the world economy" even where other major economies have sizeable and perhaps disproportionate stakes.[69] And in the criminal law, the US frequently asserts jurisdiction over a wide range of crimes that occur abroad but, like cartels abroad, have effects on the US. In some cases these extraterritorial assertions pertain to criminal acts that once occurred solely domestically. But in many, the crimes themselves are relatively new: insider trading, money laundering, computer fraud, terrorism, and the like.[70]

Similar moves to decouple law and location were afoot in domestic understandings of jurisdiction during the early 20th century. As the American economy increasingly nationalized in the 1930s and 1940s, and legal realism grew ascendant, "minimum contacts" with a state by an out of state entity became sufficient to justify assertions of jurisdiction.[71]

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[66] This holding was reversed by the Supreme Court in *Hoffman La Roche v. Empagran,* 524 US __ (2004) While the Justice Department has long supported such extraterritorial assertions, it opposed the DC Circuit's holding before the Supreme Court.

[67] Nadelmann, supra at 3.

[68] Often these efforts occur with the close assistance of counterpart regulators abroad; see generally Kal Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, VA. J. INT'L L. (2003).

[69] Dam, supra at 294-5

[70] Nadelmann, supra at 1.

[71] George Rutherglen, International Shoe and the Legacy of Legal Realism, 2001 SUP CT. REV 347.

The strict territoriality of *Pennoyer*, based on Story's interpretation of the underlying principles of territorial sovereignty within the law of nations, yielded to the functionalism of *International Shoe*.[72] *International Shoe* replaced "the strict territorial theory" of *Pennoyer* with "a single overriding principle: that a state court can exercise personal jurisdiction over a defendant if he has 'certain minimum contacts with it such that the maintainance of the suit does offend traditional notions of fair play and substantial justice.'".[73] Judges in the mid-20th century increasingly embraced a set of pragmatic, instrumental and contextual considerations that, while not ignoring spatial location, acknowledged the profound changes in the national, and global, economy and the decreasing significance of space to sovereign control.[74]

Similar developments occurred on the international front. By the 1960s the US was routinely asserting extraterritorial prescriptive jurisdiction based on the effects concept under a number of different regulatory statutes.[75] Legal spatiality again yielded to functional

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[72] Hazard, supra, at 272; The court in *Pennoyer* had stated that it was a universal principle that "the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse." Pennoyer at 720. By the 1980s the Supreme Court made clear that foreign defendants with no connection to the US had Fourteenth Amendment rights; see e.g. *Asahi Metal Industry v. Superior Court*, 480 US 102 (1987).

[73] Rutherglen, supra at 347

[74] On the causality behind this shift see Raustiala, supra. Developments in conflicts of laws and in US foreign relations law pertaining to extraterritoriality are discussed in Lea Brilmeyer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 L & CONT. PROB. 11 (1988); LOWENFELD, SUPRA.

[75] E.g Timberlane.

considerations of effects on markets. Courts no longer argued that one sovereign could not invade another's territory with its law, as Holmes had stated so emphatically in 1909. Rather, from the 1950s onward courts simply looked to what Congress intended in a given statute and found--at least in many areas of economic regulation--that Congress intended to regulate globally. A "presumption against extraterritoriality" in ambiguous cases remains, but frequently that presumption is readily rebutted.[76] Foreign states have complained vociferously about the US' aggressive extraterritoriality, but this has had little impact on the trend.[77]

B. *Constitutional Claims*

Much like regulatory law during the era of *American Banana*, legal spatiality was central to considerations of constitutional law in the 19th century. Here too decisions reflected Story's understanding—derived from international law principles--of the spatial limits of sovereignty. Courts of the time viewed the Constitution as operative only within the acknowledged territory of the US.[78] Outside the US, the Constitution had no force. This position was laid out squarely in 1891 in *Ross v. Macintyre*, a case that set the doctrinal pattern

[76] William Dodge, Understanding the Presumption Against Extraterritoriality, 16 BERKELEY J. INT'L L. (1998); Born, supra.

[77] With regard to the Sherman Act, see e.g. ALAN SWAN AND JOHN MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS (2nd ed, 1999) at 905 "Almost without exception our friends are particularly offended by what they consider the readiness of the US to engage in extraterritorial application of what, to many, is a wholly idiosyncratic body of law."

[78] As discussed below, this question of what territory was actually US territory for constitutional purposes was hotly debated but not easily answered.

for nearly 70 years. In *Ross* the Supreme Court faced the question of whether the Constitution applied to trials by US consular courts of American citizens abroad.[79] These consular courts, discussed above, operated extraterritorially and were clearly and uncontestedly an arm of the US government.

Ross involved a sailor who was convicted of murder by a US consular court in Japan. Ross appealed on the grounds that the consular court violated his 6th Amendment right to trial by jury. But the Supreme Court emphatically rejected the idea that a US court located abroad could possibly violate the protections of the Constitution. This was impossible, the court said, because "the Constitution *can have no operation in another country*."[80] As in *American Banana*, territory and sovereignty were declared to be inseparable and coterminous. Since the Constitution was spatially-bound, Ross, regardless of his citizenship, had no constitutional rights outside US territory. (The Supreme Court did not, however, invalidate the existence of the consular court. How a US court acquired the power to operate in Japan, given this conceptualization of legal spatiality, was never adequately explained.)[81]

The Supreme Court's decision in *Ross* defined the legal landscape with regard to spatiality and constitutional rights for decades.[82] Yet by the middle of the 20th century the

[79] In Re Ross, 140 US 453 (1891). In fact, Ross was not a US citizen. But as the decision explains, since he was working on a US ship he was constructively a citizen for the purposes of this case. The decision makes clear that constructive citizenship does not alter the outcome of the case in any way.

[80] *In Re Ross*, 140 US 453 (1891). (emphasis added)

[81] The majority argued essentially that Japan's acquiescence permitted the US to operate there, but that does not directly answer the question of the constitutional power to create and operate an instrumentality of the US abroad. *Ross* at 464

[82] I discuss the Insular Cases, addressing the applicability of the Constitution to overseas possessions of the US, below.

view that the Constitution stopped at the water's edge began to be reconsidered, just as it had been reconsidered in the area of statutory law. A 1953 case, for example, held that the takings clause of the Fifth Amendment applied to takings by the US government of property located abroad, despite the government's claim that the constitutional right to just compensation was spatially-bound.[83] Then *Reid v. Covert,* a 1957 case involving the murder in the UK of a US air force officer by his wife, rejected in a sweeping manner the prevailing spatial theory of constitutional rights. *Reid* established the notion that the protections of the Bill of Rights apply to US government action wherever they occur, so long as the defendant or suspect is a US citizen.[84] In so doing, the Court dramatically altered the prevailing conception of legal spatiality.

In *Reid,* the civilian defendant, pursuant to a status of forces agreement with the UK, was tried and then convicted by a US court martial. As in *Ross*, the defendant challenged her conviction on 6th Amendment grounds. The *Reid* Court unequivocably rejected the legal spatiality of *Ross*. The Court in *Reid* seemed to find the underlying territorial logic of *Ross*, which the Government relied upon in its argument in *Reid*, abhorrent. Indeed, Justice Black called it "a relic from another era."[85] More tellingly, the decision stated emphatically that

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[83] *Turney v. US* 115 F. Supp 457 (Ct. Cl. 1953). *Turney* involved property located in the Philippines. On other aspects of the Fifth Amendment, see Lea Brilmayer and Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 HARV. L. REV. 1217 (1992) (arguing that the due process analysis that applies to personal jurisdiction extend to the extraterritorial application of US law)

[84] 354 US 1 (1957). Emphasis added. *Reid* was in certain limited respects presaged by US v. Belmont, 301 US 324 (1937), in which the court stated that "our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens."

[85] *Reid*, supra at 4.

> we reject the idea that when the United States acts against citizens abroad it can do free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide…should not be stripped away just because he happens to be in another land.*[86]

As a doctrinal matter, this holding was limited to citizens. But the underlying rationale for this limitation was unclear. *Ross* had been based on a particular and strict conception of territoriality, in which law was spatially delimited for citizens and aliens alike. *Both* citizens and aliens enjoyed the rights of the constitution when within the US' sovereign territory, and *both* citizens and aliens lost those rights when outside that territory. Law and spatial location were, according to the *Ross* rule, intrinsically connected. Consequently, by accepting the idea that the Constitution was not in fact spatially-delimited a profound conceptual break occurred.

Why did the Reid Court choose to extend constitutional protections to citizens without regard to territorial location? *Reid* certainly seems reflective of the rising rights consciousness of the 1950s—it was decided just a few years after *Brown* and has a ringing, landmark tone.[87] But it also reflected the realities of the Cold War, which, for the first time, entailed large numbers of US troops and their dependents stationed for long periods in far-

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[86] Reid at 5-6. The holding of *Reid* was extended to civilian employees of the armed services in Kinsella v. US (1960) 361 US 234.

[87] *Brown v. Board of Education,* (1954)

flung corners of the globe.[88] Cognizant of the nearly 1 million US soldiers and 250,000 civilian dependents stationed abroad, who were, under the government's theory, effectively without constitutional rights, the *Reid* court declared the *Ross* version of legal spatiality archaic and wrong.[89] The Constitution was understood in *Reid* to be a global document, untethered from the particular soil of the US. It was declared to be a constitutive text which, while creating a political entity (the federal government) also restrained that entity. These elements--both constitutive and restraining--operated regardless of *where* the federal government acted. From now on, courts would have to justify the residual spatiality of American law—if they chose to justify it--without simple recourse to the strict territorial principles of the past. The key distinction they often relied upon was alienage.

D. Citizens and Aliens

Perhaps the most striking example of such an alienage-based justification of legal spatiality occurred 15 years ago in *Verdugo-Urquidez*. US courts have traditionally held that the Fourth Amendment's restraints on search and seizure applied, within the US, to citizens as well as aliens. In *Verdugo* the Supreme Court held that a Mexican citizen's home in Mexico could be searched by US Drug Enforcement Agency officials without a warrant, and the

[88] Raustiala, supra [draft].

[89] *Reid* Landmark Briefs. Indeed, the language in the decision, read on its own terms, implies a result far more sweeping than the limited holding to citizens: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *Reid*, supra, at 5-6

evidence seized used against that individual in a US court.[90] The defendant challenged the search on Fourth Amendment grounds. The 9th Circuit suppressed the evidence, finding that Mr. Verdugo possessed Fourth Amendment rights. The Supreme Court reversed.

Chief Justice Rehnquist, writing for a plurality in *Verdugo,* acknowledged that US courts extend Fourth Amendment protection to foreigners and their property within our borders. But, the decision argued, it does not follow that they must extend it to an alien's property outside our borders.[91] While *Reid* had established that the Constitution was no longer spatially bound for citizens, the *Verdugo* court asserted that spatial location was still determinative of the rights of aliens. The interesting twist was that in *Verdugo* the defendant was actually on American territory at the time of the search. Having been arrested and detained in San Diego, he was unquestionably within the border.[92] His property, however, was not. For the court this spatial fact was critical. Had the property been in San Diego, but he in Mexico, there is no doubt a warrantless search would have run afoul of the 4th Amendment. It was the location of Verdugo's home, not his person, that seems to have ultimately determined the outcome of the case.[93]

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[90] Verdugo illustrated the rise of international policing by American agents. Just as the internationalization of production led to an increase in extraterritorial application of antitrust law, so too have American police officials increasingly worked with the counterparts abroad. See generally ETHAN NADELMANN, COPS ACROSS BRODERS: THE INTERNATIONALIZATION OF US CRIMINAL JUSTICE ENFORCEMENT (1993).

[91] Verdugo at

[92] Justice Stevens' concurrence in Verdugo argued that the search was governed by the requirements of the Fourth Amendment because respondent was "lawfully present in the United States ... even though he was brought and held here against his will." at 1068. See also Amman, supra at 133-134.

[93] The plurality responded to the fact that the 4th Amendment refers to the "people" by distinguishing Verdugo from the people. According to Rehnquist's opinion, the phrase "the people" in the text of the 4th

This reasoning was significant because US law has long held that aliens in the US enjoy many of the same rights as citizens.[94] As early as 1886, the equal protection clause of the 14th Amendment was held to apply to a Chinese national present in the US.[95] As *Verdugo* shows, however, geography is nonetheless a critical determinant of the rights of aliens. It is true that US law at times looks to formal entry into the US rather than pure spatial location.[96] In *Sale v. Haitian Centers Council*, for example, the Supreme Court noted that under the Immigration and Naturalization Act aliens who were within our territory were treated "as though they had never entered the United States at all; they were within the United States territory but not 'within the United States.'"[97] And the exact location of the territorial borders of the US is occasionally unclear. *Shaughnessy v. U.S. Ex Rel. Mezei*, for example, held that "harborage on Ellis Island is not an entry into the United States," despite the fact that Ellis

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Amendment refers to "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." *Verdugo*, supra at 265. I discuss this idea further below.

[94] Eg *Yick Wo v. Hopkins*, 118 US 356 (1886); But see *Hampton v. Mow Sung Wong*, 426 US (1976) (holding that federal government may enact citizenship requirements that the states may not); Mathews v. Diaz, 426 US (1976) (discussing various constitutional provisions that rest on legitimate distinctions between aliens and citizens). And aliens can of course be deported, whereas citizens cannot. The federal power over immigration is discussed critically in Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 HARV. L. REV. 853 (1987).

[95] Yick Wo v. Hopkins, supra. Wong Wing v. United States. 163 US 228 (1896).

[96] *LENG MAY MA*, 357 US 185 (1958) (holding that an alien physically present within the US was nonetheless not within the US for certain statutory purposes).

[97] *Sale v. Haitian Centers Council*, 509 US 155 (1993) at 175.

Island is incontrovertibly sovereign US territory.[98] These exceptions aside, the general rule is that aliens enjoy the rights of citizens while within the US.[99]

Whether aliens also enjoyed constitutional rights against the US government when abroad received heightened attention after *Reid*. Many commentators at the time suggested they ought to,[100] and some courts agreed.[101] In the 1974 case of *Toscanino*, which like *Verdugo* involved a Fourth Amendment claim, the Second Circuit argued that there is no rationale for "a different rule with respect to aliens who are victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien."[102] Even during this pre-*Verdugo* period, however, the

[98] *Mezei*, 345 U.S. 206, 213. Justice Jackson argued in dissent that the taking of liberty "within the United States or its territorial waters may be done only by proceedings which meet the test of due process of law." Mezei at 227. Insular possessions of the US, discussed further infra, pose another set of problems. See e.g Valmonte v. INS (136 F3d 914 (1998) (holding that birth in the Philippines during the territorial era does not constitute birth in the US under the citizenship clause of the 14th Amendment, despite the US exercising complete sovereignty over the Philippines..)

[99] "[R]elatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation." Cole, supra at 978.

[100] See eg. Lea Brilmayer, The Extraterritorial Application of American Law, 50 L & CONT. PROB 10 (1987)Louis Henkin, The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates, 27 WM & MARY L. REV. (1985); John Ragosta, Aliens Abroad, 17 NYU J INT'L L & POL 287 (1984), Note, The Extraterritorial Application of the Constitution—Unalienable Rights? 72 Va. L. Rev. (1986)

[101] *US v. Toscanino*, 500 F2d 267 (2nd Circ. 1974). See also *US v. Tiede*, 86 FRD 227 (US Ct. for Berlin, 1979); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp 144 (D. DC 1976)

[102] Id at 280.

constitutional rights of aliens abroad did not receive the same vigorous level of protection as those of citizens.[103] Post-*Verdugo*, the distinction between citizen and alien became much sharper. For example, in *US v. Davis* the 9th Circuit extended the *Verdugo* test to searches on the high seas, holding that nonresident aliens on ships in international waters have no Fourth Amendment protections either.[104] More dramatically, in 2003 *US v. Esparza-Mendoza* held that an excludable criminal alien in the US illegally also lacks Fourth Amendment protections.[105] The court argued that such an individual, while clearly within US territory, was not one of the people as that term was interpreted by the *Verdugo* court. Verdugo was on US territory *legally* but *involuntarily*. Esparza-Mendoza was here *illegally* but *voluntarily*. The court held that in both cases there was no constitutional protection against unreasonable search and seizure. This decision, like *Verdugo* itself, evinces a move away from a purely spatial understanding of the Fourth Amendment's scope and toward one that is status-based, regardless of the locus of the search. Nonetheless, this particular approach has not (yet) been picked up by other federal courts.[106]

The rationale for the continuing commitment to legal spatiality in the area of alienage is hazy at best given the despatialized vision of the Constitution announced in *Reid.* But it is perhaps best understood as a combination of two ideas: a vestigial notion of legal spatiality--held over from the 19th century era of strict territoriality--coupled to the idea that the alien is

[103] Note, (Va L Rev) supra at 669.

[104] US v. Davis, 905 F2d 245 (9th Cir. 1990).

[105] 265 F. Supp. 2d 1254 (D. Utah 2003).

[106] US v. Gorshkov, 2001 WL 1024026, held that the Fourth Amendment did not apply to the defendant aliens' property located abroad because the alien's single voluntary entry into the US for criminal purposes did not establish the voluntary community connection demanded by the *Verdugo* decision.

a guest within the borders of the US. Prior to *Reid* the guest theory made more sense, since for all individuals—citizen or alien-- the Constitution was spatially-delimited. Today, however, continued adherence to a guest theory rests on an uncertain foundation. It is difficult to discern a coherent underlying theory that can both cast the Constitution as a document that controls the exercise of government power wherever that power is exercised, while at the same time construing it as a document that limits those controls—which are facially-neutral as to citizenship—only to citizens when power is exercised outside the territory of the US. How, in other words, can spatial location both matter to the reach of the Constitution and yet not matter? Possible answers exist, of course,[107] and I address these further below. But the question is not easy to answer.

Variations on the guest theory appear frequently in cases involving aliens. A canonical statement is Justice Jackson's in *Johnson v. Eisentrager*: "the alien, to whom the US has traditionally been hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."[108] Mere presence grants some rights; these rights grow as the relationship deepens.[109] This conception of rights is frequently cited, but in fact it is not especially consistent with American practice. It does not take numerous years of legal, documented residence, or even an intent to naturalize, to enjoy many constitutional rights.[110] Aliens who have spent almost no time in the US are treated, for most purposes, the same as those who have lived in the US for years.

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[107] See e.g Paul B. Stephan, Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens, 19 CONN. L. REV (1987)

[108] *Johnson v. Eisentrager*, supra, at 770.

[109] *Verdugo*, supra; *Landon v. Plascencia* 459 US 21, 32 (1982)

[110] See the discussion infra.

In short, while spatial location is now irrelevant to the constitutional rights of American citizens, that principle has been only unevenly extended to non-citizens. It has long been true, for instance, that foreign firms with no presence in the US have due process rights, such as the Fourteenth Amendment right to be free of the jurisdiction of American courts when they lack sufficient minimum contacts with the forum state.[111] And, as noted above, a handful of unusual cases over the last forty years have argued that non-citizens abroad enjoy certain protections of the Constitution.[112] The Restatement of Foreign Relations (Third), published in 1986--before the Supreme Court's decision in *Verdugo*--even went so far as to state that "at least some actions by the United States in respect of foreign nationals outside the country are also subject to constitutional limitations."[113] But, the Restatement notes, this has "not been authoritatively adjudicated," having been neither endorsed by the Supreme Court nor aggregated to any appreciable pattern.[114] *Verdugo*

[111] See eg. *Asahi Metal Industry v. Superior Court*, 480 US 102 (1987): "The strictures of the due process clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend 'traditional notions of fair play and substantial justice.'" Asahi at IIb. Indeed, the Asahi court found that the defendant's location in Japan was in fact part of the reason the assertion of jurisdiction was "unreasonable and unfair."

[112] Eg. Toscanino; Tiede; *Cardenas v. Smith*, 733 F2d 909 (DC cir 1984). See the discussion in Stephan, supra.

[113] RESTATMENT (3RD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec 722 comment M. The Chief Reporter was Columbia Law School Professor Louis Henkin, who has long championed this idea.

[114] As one commentator noted with regard to the constitutional rights cases, these decisions "form a curious mosaic." Note, The Extraterritorial Application of the Constitution--Unalienable Rights? 72 VA. L. REV. 649 (1986).

weakened this statement further. Yet while *Verdugo* may well stand for the proposition that spatial location remains essential to the rights of aliens against the US government, that decision offered no coherent theory for why this was true—when territoriality so demonstrably no longer applied to citizens—nor what might explain the various anomalies in the case law.

C. *Indian Country & Insular Possessions*

I have discussed the various cases relating to legal spatiality as if the territorial borders of the US were clearly demarcated--which in a sense they are. Yet not all American territory is the same. For example, since the founding of the Republic the US has treated some areas of its territory as "Indian country": land partially under the control of Indian tribes. Since John Marshall's famous opinion in *Cherokee Nation,* tribes were understood to be semi-sovereign entities; "domestic dependent nations," in his artful, if confusing, phrase.[115] The tribes possess inherent sovereignty,[116] Marshall said, but that sovereignty is subject to the sovereignty of the US. What this exactly means is a mystery. Though congressional power over the tribes is plenary, the tribes retain (an increasingly depleted) degree of jurisdiction over certain internal matters.[117] Until 1924 even birthright citizenship was not extended to Indians born on reservations, despite the language of the Fourteenth

[115] Cherokee Nation v. Georgia 30 US 1, 15 (1831).

[116] Id at 17. A core principle of federal Indian law is "that those power which are lawfully vested in an Indian tribe are not, in general, delegated powers…but rather inherent powers of a limited sovereignty which has never been extinguished." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 122, cited in Aleinikoff, supra at 97.

[117] See generally WILLIAM CANBY, JR., AMERICAN INDIAN LAW (3d ed., 1998).

Amendment.[118] Thus Indian Country is distinctive legally even though it is wholly and unquestionably within the geographic borders of the US.

Similarly, despite the significant moves away from legal spatiality in cases such as *Reid* and *Hartford Fire*, the Supreme Court has never retreated from the differential treatment of territory that is ruled by the US yet not granted statehood.[119] These territories—such as Hawaii until 1957 and Puerto Rico today—are constitutionally distinct from "normal" American territory: the territory of the fifty states.[120]

This geographic distinction between states and territories—found in the Constitution itself[121]--first emerged as the US expanded westward.[122] But it is most famously associated with *The Insular Cases*, involving the imperial possessions acquired by the US in the wake of

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[118] PAUL BREST AND SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (3RD ED, 1992) at 1355.

[119] The District of Columbia is another example of a constitutional "anomalous zone," to use Neuman's term. Neuman, (Stanford) supra. Both Indian country and the territories of the US fall also within the congressional plenary power doctrine; see Aleinikoff, supra, ch 2; and Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power over Foreign Relations, 81 TEX. L. REV. 1 (2002).

[120] FOREIGN IN A DOMESTIC SENSE (Burke Marshall and Christina Burnett, eds, 2001); Harry Scheiber and Jane Scheiber, Bayonets in Paradise: A Half Century Retrospect on Martial Law in Hawai'i, 19 U. HAW. L. REV. 477 (1991)

[121] The Territories Clause reads: The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. Constitution, Article IV, Sec 3(2).

[122] Gary Lawson, Territorial Governments and the Limits of Formalism, 78 CAL L REV 853 (1990). The interesting story of the military rule of California before statehood is told in Gary Lawson and Guy Seidman, The Hobbesian Constitution: Governing Without Authority, 95 NW. L. REV. 581 (2001).

the Spanish-American War.[123] That war marked the emergence of the US as a great military and imperial power.[124] In victory the US acquired several overseas possessions of Spain, in particular the Philippines. The question of whether "the Constitution followed the flag" was hotly debated at the time.[125] Incorporating the former colonies of Spain meant, in practice, the unprecedented act of infusing distant, blue water colonies and a large number of non-whites into the US.[126]

The Supreme Court answered the question of whether the Constitution followed the flag in the various *Insular Cases*, which held that Puerto Rico, the Philippines, and the other new territories, though sovereign US possessions, were distinct from other American territory. Some fundamental constitutional rights applied in these regions. But others, such as the 6th Amendment right to trial by jury, did not. In so declaring, the Supreme Court drew a clear distinction between types of sovereign territory (as well as between types of rights). The US is sovereign in both the states and in its colonies. But the Constitution does not

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[123] This phrase refers to several cases involving overseas possessions, beginning with De Lima v. Bidwell, 182 US 1 (1901) and ending with Balzac v. Porto Rico, 258 US 298 (1922).

[124] "Abroad as well as at home…1898-99 marked the emergence of the United States as a great power." ERNEST MAY, AMERICAN IMPERIALISM, 1991 at ix.

[125] Frederick Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 COLUM. L. REV. (1926) at 823; Abbott Lowell, The Status of Our New Possessions: A Third View, 13 HARV. L. REV. (1899). See also Charles Fairman, Some New Problems of the Constitution Following the Flag, 1 STAN L. REV. 587 (1948-1949)

[126] I use the term incorporate colloquially here; the term incorporate acquired a quite specific and momentous meaning due to its use in the Insular Cases. Hawaii raised many of the same issues, and became a US state in 1957. See generally Schreiber and Schreiber, supra; MERZE TATE, THE UNITED STATES AND THE HAWAI'IAN KINGDOM: A POLITICAL HISTORY (1965).

apply fully in the latter. As Elihu Root famously quipped, in response to the question of whether the Constitution follows the flag, "near as I can tell, the Constitution follows the flag, but it doesn't quite catch up."[127] Imperial possessions of the sort at issue in the *Insular Cases* are today rarely sought: since the mid-20th century formal empire has been devalorized, though many would contend that the US continues to maintain—in part through its extraterritorial legal assertions—an informal empire, an empire, in Samuel Huntington's words, "of functions, not territory…characterized not by the acquisition of new territory but by their penetration."[128]

The US nonetheless retains a vestigial empire: Puerto Rico, Guam, the Virgin Islands, and so forth. Congress retains plenary powers in insular territories just as it does in Indian Country.[129] For example, Congress has extended the full protections of the Bill of Rights to Puerto Rico by statute. But it can rescind that extension at any time.[130] Puerto Ricans do not vote for President, nor do they have voting representation in Congress. These distinctions all reflect a conception of legal spatiality in which the core territory of the sovereign state is distinguishable from the periphery. The *Insular Cases* continue to be cited as good authority for the notion that the US can constitutionally distinguish different types of territory.[131]

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[127] Phillip C. Jessup, *Elihu Root* vol. 1(1938) at 348

[128] Samuel Huntington, Transnational Organizations in World Politics, 25 WORLD POL. (1973). See also ANDREW BACEVICH, AMERICAN EMPIRE (2003); NIALL FERGUSON, COLOSSUS (2003).

[129] Cleveland, supra.

[130] Aleinikoff, supra at 89.

[131] Eg. US v. Ntreh, 279 F3d 255 (2002); Romeu v. Cohen, 265 F3d 118 (2001)

In short, the odd--or oxymoronic--phrases that US courts have fashioned to describe Indian Country and insular possessions--"foreign in a domestic sense;" "domestic dependent nations"[132]--starkly highlight the uneasy fit between the Westphalian conception of absolute territorial sovereignty and the reality of a more multilayered connection between law and territory. The *Insular Cases* have never been repudiated. The ironic—even absurd—result is that post-*Reid*, an American citizen is more firmly protected against government action by the Bill of Rights when in Japan than when in Puerto Rico.[133]

E. *The Uneven Demise of Territoriality*

A century ago, when Guantanamo was first acquired by the US, Westphalian territoriality was robust. Exceptions existed, but they were limited. Today, Westphalian territoriality persists in many areas, but both constitutional doctrine and statutory interpretation evidence a marked transformation in legal spatiality. Territorial location is no longer a bar to constitutional protections for American citizens. And it is now routine for US statutes to apply to actions that occur entirely abroad, as long as these actions have effects in the US. These changes illustrate how legal doctrine can evolve to accommodate exogenous changes in context.[134] Yet this transformation in legal spatiality is decidedly partial. American courts maintain and occasionally deploy a presumption against extraterritoriality when interpreting statutes. Insular possessions and other "anomalous zones" are constitutionally-

[132] Downes v. Bidwell, supra; Cherokee, supra.

[133] "It is hard to see the coherence of an approach that leads to the conclusion that American citizens cannot be tried by the federal government for capital offenses without jury trial in Japan, but can be so tried in Puerto Rico." Neuman, book, supra at 101

[134] Raustiala, supra.

distinct from the fifty states.[135] And aliens, as discussed above, continue to face geographic limits to their legal rights.

No one seriously argues that the reach of domestic law ought to be coterminous with the territorial borders of the sovereign. The implications are far too radical and frequently unsustainable—as conflicts scholars in the US long ago recognized.[136] But while the norm of Westphalian territoriality has endured, in practice Westphalian territoriality is increasingly compromised and anachronistic, and lacks a coherent underlying theory to justify its continued use as a conclusive jurisdictional principle. There is wide variation in the treatment of legal spatiality, and this variation sometimes rests on pragmatic principles. But it frequently rests on little more than accidents of history and sheer inertia, since the doctrine has evolved in a haphazard and undertheorized manner over many decades. The rarity of cases addressing geographical location leads to a bumpy doctrinal path at best, schizophrenia at worst.[137]

Given this ambivalent relationship between law and territory, the choice to rely on principles of legal spatiality in contemporary judicial decisionmaking is not self-evident in any particular case. While perhaps reasonable in the 19th century, when legal spatiality was treated more coherently, it is insufficient for a court today to simply point to spatial location as determinative of legal outcomes.[138] Spatiality has a role to play in legal decisions, but that

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[135] Neuman, supra [anomalous zones]

[136] As the transition from the approach of Beale to that of Currie makes clear; see Kramer, supra; Brilmayer, supra.

[137] Some areas of the law have had many cases involving spatiality; antitrust is an excellent example. See Lowenfeld, supra, Chapter 4; Born supra.

[138] *Al-Odah*, supra; *Khalid*, supra.

role must be justified. I explore these issues more fully after turning to the particularities of the American presence in Guantanamo.

III. Habeas and the Question of Guantanamo

Legal spatiality has received little systematic scholarly attention. The connection between law and land has come into sharp focus, however, over the issue of the detention of suspected Al-Qaeda and Taliban members in Guantanamo as well as in other, less well-known facilities in Afghanistan and other foreign locations.[139] In this part I briefly survey the history of wartime habeas corpus petitions and their connection to territory. I then examine the history of the Guantanamo Naval base and the complex questions of sovereignty it raises. All of the overseas American detention facilities implicate questions of legal spatiality.[140] But because of its unique history, distinctive prominence, and unusual legal basis, Guantanamo is the most important and most interesting case.

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[139] See Risen and Shanker, supra. Guantanamo has played a key role in debates over legal spatiality before; see e.g. *Haitian Centers Council v. McNary*, 969 F2d 1326 (2nd. Cir. 1992) at 1343: ("It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States."); Cuban Amer. Bar. Assoc. v. Christopher, 43 F3d 1412 (11th Circ. 1995) at 1425. (Stating that "the district court erred in concluding that Guantanamo Bay was a "United States territory." We disagree that control and jurisdiction are equivalent to sovereignty.")

[140] The facility at Guantanamo is not the only such detention center. Though it appears to be the largest and is the best-known, in the wake of the September 11 attacks the US has reportedly created a network of overseas detention centers. In addition, some individuals are detained by friendly nations, such as Egypt.

A. War, Habeas, and Spatiality

The litigation over the Guanatanamo detainees has largely turned on their ability to invoke the writ of habeas corpus in American courts. In *Rasul*, the Supreme Court declared the writ available to the detainees as a matter of statutory law without reaching directly the question of whether aliens abroad have, as a constitutional matter, a right to the writ. Yet habeas corpus has significant constitutional underpinnings. Of ancient lineage in English law, the writ of habeas corpus is aimed at ensuring that the government does not deprive a person of liberty without providing an adequate legal basis to a court of law.[141] On its face that idea seems unconnected to geographical location.[142] Since the aim of habeas is to constrain

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See James Risen and Thom Shanker, Hussein Enters Post-9/11 Web of US Prisons, NY TIMES, National Ed. December 18, 2003, p. A1 (describing network of prisons run by the Pentagon and the Central Intelligence Agency in Afghanistan, Thailand, and other undisclosed locations.). The Bush Administration's stated intent is to try many of these detainees via military commissions. See Dept of Defense Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-US Citizens in the War Against Terrorism*, at www.defenselink.mil/news/May2003/b0502203_bt297-03.html. These trials have recently begun. Scott Higham, Hearings Open with a Challenge to the Tribunals, WASHINGTON POST, A 12, Sunday, August 29, 2004.

[141] "The origins of the writ of habeas corpus may be found in England and the Commonwealth in the Magna Carta." Amicus brief of the Commonwealth Lawyers Association at 3; http://www.kuwaitidetainees.org/gitmo/rasul.pdf. See also Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV (1970).

[142] As the commonwealth lawyers' brief in the cert petition in *Al-Odah* explains, "As a matter of English law jurisdiction for the purposes of the writ of habeas corpus is established when the detained person is placed under the control of the Crown or enters territory under the Crown's control whether or not the Crown exercises sovereignty over that territory." Commonwealth Lawyers' Brief, supra, at 8.

executive power, it is not obvious why it ought to matter where that power is exercised. Indeed, many scholars contend that English law has long held that habeas does *not* turn on the petitioners' locality, but simply on the exercise of state power.[143]

Wartime is nonetheless a special context. [144] The Constitution states in Article I that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or Invasion the public Safety may require it."[145] Consistent with English practice, in the founding era non-citizens—even enemy aliens--- enjoyed the protections of habeas corpus.[146] Lincoln (in)famously suspended the writ during the Civil War.[147] The usual

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[143] The writ of habeas corpus was available under the common law whenever the place in question was "under the subjection of the Crown of England." Amicus Brief of Legal Historians at 18 (citing Lord Mansfield.). For example, habeas was available in India well before Britain declared formal sovereignty over parts of India: "Importantly, judicial power to issue writs of habeas corpus in India did *not* turn on the existence of formal sovereignty. To the contrary, Britain intentionally delayed assertions of formal sovereignty over the range of territories controlled by the [British] East India Company until 1813—nearly *four decades* after judges had begun issuing writs of habeas corpus on behalf of individuals detained by Company officials in those same lands." Id at 14 (emphasis in original).

[144] Eg Michal R. Belknap, Alarm Bells from the Past: The Troubling History of American Military Commissions, 28 J. SUP. CT. HIST. 300 (2003).

[145] Article I, Sec. 9. The writ stands, the Supreme Court has declared, as "the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 US 19, 26 (1939).

[146] Amicus Brief of Legal Historians, supra, at 25. ("similarly, alleged "enemy aliens" have been able to seek review of their legal status on habeas corpus").

[147] MARK NEELY, JR, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991), p 9. News accounts indicate that the Bush Administration tried, in the USA Patriot Act, to suspend habeas corpus. Early drafts of the Patriot Act "included a provision entitled 'Suspension of the Writ of

starting point for discussion on the meaning of the suspension clause is *Ex parte Milligan*, a Civil War case holding that the military trial of a noncombatant citizen was unconstitutional while the civilian courts were open and functioning.[148] The next major milestone occurred during the Second World War, in the *Quirin* decision.[149] *Ex Parte Quirin* involved an unusual set of protagonists: German saboteurs who 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.[150] After one of the participants had a change of heart and alerted the FBI, the saboteurs were imprisoned in Washington DC and tried by military commission.[151]

The Supreme Court declared that although the Nazi saboteurs were avowedly enemy aliens, that status did not foreclose jurisdiction by US courts. The Roosevelt Administration had argued that the saboteurs lacked access to American courts. As the Supreme Court put it

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Habeas Corpus'. Representative James Sensenbrenner, Chairman of the House Judiciary Committee, later told reporters, "that stuck out like a sore thumb. It was the first thing I crossed out." Petitioners' Brief on the Merits, supra, at 14, note 12, citing Roland Watson, Bush Law Chief Tried to Drop Habeas Corpus, THE TIMES (LONDON), Dec. 3 2001, at 14. As the petitioners' brief notes, there is no indication that Congress ever intended to suspend habeas in the war on terror and indeed this story suggests that it resisted any such effort by the Executive.

[148] Neely, supra, at 179-182

[149] David Danelski, The Saboteurs' Case 1 J. SUP. CT. HIST (1996); Louis Fisher, Military Tribunals: The Quirin Precedent, CRS 2002 at http://www.fas.org/irp/crs/RL31340.pdf; LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003).

[150] Quirin, supra.

[151] The Supreme Court issued a terse per curiam decision, followed by a fuller decision after several of the saboteurs had been executed. Fisher, 2002, supra supplies the details.

(referring to a executive proclamation about the saboteurs issued by Roosevelt) the US government,

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...It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing…*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 US constitutionally enacted forbid their trial by military commission*."[152]

The *Quirin* decision was not aberrational. In *Yamashita v. Styer* the Supreme Court similarly reviewed on the merits a habeas petition brought by a Japanese general who was detained and sentenced to death by a military commission during World War II. The detention and trial occurred in the Philippines, still American territory at the time of the detention.[153]

In 1950 the Supreme Court faced a broadly similar question about the scope of habeas jurisdiction in *Johnson v. Eisentrager.*[154] Like *Quirin, Eisentrager* involved German belligerents. But this time the defendants were detained, prosecuted, and convicted not on the Eastern Seaboard or in a US colonial outpost but in China, by American forces.[155] The Court in *Eisentrager* acknowledged, as *Quirin* and *Yamashita* had earlier held, that enemy aliens

[152] Quirin at 24-5. Emphasis added.

[153] 327 US 1 (1946)

[154] 339 US 763 (1950)

[155] Id.

do not necessarily lose the right to avail themselves of a US court.[156] In *Yamashita* the Court stated that Congress "has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."[157] *Eisentrager* nonetheless held that the prisoners had no right to the writ of habeas corpus.[158] The decision in *Eisentrager* thus firmly and unequivocably rested on Westphalian territoriality.

The *Eisentrager* Court distinguished *Quirin* (and *Yamashita),* both of which had entertained habeas petitions on the merits, on territorial grounds. As the Court noted, the petitioners in those cases were plainly captured, imprisoned, and tried within US territory. In *Eisentrager,* by contrast, the petitioners never set foot in the US: they were captured, tried, and convicted abroad. Previous judgments had emphasized that when the judiciary extends constitutional protections beyond the citizenry, "it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[159] Presence on US soil "implied protection."[160] Since no such protective relationship existed for the defendants in *Eisentrager*, no correlative duty existed either. Not guests in our collective home, even impliedly so, the Court held that the defendants lacked any constitutional protections.

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[156] *Quirin*, supra.

[157] Yamashita, supra, at 9.

[158] Nonetheless the Court did examine the claims of the petitioners in detail. Hence the petitioners in *Al-Odah* argued that "Johnson, therefore, is best understood as a restraint on the *exercise* of habeas, rather than a limitation on the *power* of the federal courts." Petitioners' Brief on the Merits, at 9 (emphasis in original).

[159] Eisentrager at 771

[160] Eisentrager At 777-8

Eisentrager served as the basis of the Bush Administration's position in *Rasul*.[161] *Eisentrager*, the Bush Administration has consistently argued, stands for the proposition that, as far as aliens are concerned, habeas jurisdiction only lies where the US is sovereign. Because the Guantanamo lease declares Cuba sovereign, the detainees cannot bring a habeas petition in US courts while they remain in Guantanamo.[162] The DC Circuit agreed, stating in *Al-Odah* that they could not see how the "the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections were not."[163] Similar views were expressed in *Khalid*.[164] In *Rasul* the Supreme Court sidestepped this constitutional question, holding instead that the federal habeas statute provided access to the writ.[165] This year, the sharply conflicting decisions on what habeas actually entailed came out of the DC District. *Khalid* held that *Rasul* simply established jurisdiction, and that, because of their location, the petitioners lack any substantive rights that run to the merits of their claims.[166] Yet a mere ten days later a different judge of the DC district stated that "there is nothing impracticable or anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment."[167]

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[161] Brief for Respondents in Opposition at 10.

[162] Al-Odah; see also Gherebi, 19-20.

[163] Id. See also *Pauling v. McElroy*, 278 F2d 252 (DC Cir 1960) at 254 ("non-resident aliens….plainly cannot appeal to the protection of the Constitution or laws of the United States."); *People's Mojahedin Org. v. Dept of State* 182 F3d (DC Cir 1999) at 22 ("a foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.")(citing *Verdugo*)

[164] Khalid, supra.

[165] Rasul, supra.

[166] Khalid, pg20.

[167] In re Guantanamo Detainee Cases, Jan 31 2005, pg 36

Of course, whether Guantanamo is unambiguously foreign territory is itself unclear. In *Rasul*, the Supreme Court implied it was not—or at least was somehow distinctive. At the same time, the majority's holding did not rest on any special qualities attributed to Guantanamo—as Justice Scalia's heated dissent points out. Lower courts have been divided on this question. The 9th Circuit, in *US v. Gherebi*, had earlier argued that Guantanamo was US territory for the purposes of habeas jurisdiction and, in the alternative, that the base was US sovereign territory as well.[168] By contrast, the DC Circuit in *Al-Odah* held that Guanatanamo was unequivocably foreign territory. The confusion in the lower courts about the status of Guantanamo was no accident.

B. *Leases and Litigation*

Given a century of control by the US it is not surprising that litigation over the status of Guantanamo has arisen before. Federal courts have previously been asked to determine whether the forty-five square mile base is foreign territory for statutory and constitutional purposes. The Haitian refugee litigation of the 1990s raised this issue squarely—with mixed

[168] *Gherebi v. Bush*, supra. The 9th Circuit interpreted Johnson v. Eisentrager differently than did the DC Circuit. *Gherebi* argues that the Supreme Court's holding in *Eisentrager* does not rest on sovereignty: "The Court nowhere suggested that 'sovereignty,' as opposed to 'territorial jurisdiction,' was a necessary factor…in short, we do not believe that Johnson may properly be read to require 'sovereignty' as an essential prerequisite of habeas jurisdiction." Gherebi at 19-20. The DC district in *In Re Guantanamo Detainees* likewise held that "in light of the Supreme Court's decision in Rasul, it is clear that Guantanamo Bay must be considered the equivalent of a US territory in which fundamental rights apply…accordingly, the respondent's contention that the Guantanamo detainees have no constitutional rights is rejected." In Re Guan. at 38.

results—and a raft of other cases have likewise considered Guantanamo's legal status.[169] Relying on language in the lease purporting to retain ultimate sovereignty in Cuba, the majority of these cases have maintained that the base is Cuban, not American, soil.[170]

Bird v. U.S. [171], for example, involved a Navy physician at the base who allegedly misdiagnosed a civilian's cancer. The patient sued the U.S. for medical malpractice under the Federal Tort Claims Act. Since the Claims Act has a spatial limitation built it—it bars claims arising from a "foreign country"--the issue was whether Guantanamo was U.S. territory or rather part of a "foreign country." The Supreme Court had, in *U.S. v. Spelar*, previously defined "foreign country" as a "territory subject to the sovereignty of another nation".[172] Referring to the lease, the court held that Cuba retained ultimate sovereignty and thus Guantanamo was a foreign country for purposes of the statute. In *Colon v. U.S.,*[173] a federal district court faced a similar claim arising from a personal injury on Guantanamo. The court likewise concluded that Cuba retained sovereignty, making the base a foreign country for purposes of the Federal Tort Claims Act.[174] And in *Cuban American Bar Association v. Christopher,* the 11th Circuit had to determine whether aliens detained in Guantanamo could assert various statutory and constitutional rights. The 11th Circuit held

[169] Eg. Haitian Centers, supra; Harold H. Koh, America's Offshore Refugee Camps, 29 U. RICH. L. REV. 139 (1994); Harold H. Koh, The Haitian Centers Council Case: Reflections on Refoulement and Haitian Cneters Council, 35 HARV. INT'L L. J 1 (1994).

[170] But see Gherebi, supra; In Re Guantanamo Detainees, supra; Rasul (Kennedy concurrence).

[171] *Bird v. United States,* 923 F. Supp. 338 (D. Conn. 1996).

[172] *United States v. Spelar*, 338 U.S. 217 (1949).

[173] Colon v. United States, 1982 US. Dist. LEXIS 16071

[174] However, the court held that injury sustained on Guantanamo may not be dismissed if a product made in the United States proximately caused the plaintiff's injury.

that jurisdiction and control were not equivalent to sovereignty, and that military bases abroad therefore remain under the sovereignty of the host state.[175]

Guantanamo is nonetheless an unusual place.[176] For several reasons it strains credulity to argue that Guantanamo is foreign soil, no different than Al Udeid Air Base in Qatar or Ramstein Air Base in Germany. For every American military base abroad there is an international legal agreement governing the relationship with the host state, known as a "Status of Forces Agreement."[177] Uniquely, there is no such agreement with Cuba. Moreover, the circumstances of the lease's genesis, as well as the precise provisions, are quite unusual. Most strikingly, the "lease" is effectively permanent, since Cuba cannot unilaterally terminate it.

C. Sovereignty and Spatiality in Cuba

The US government's claim of exclusive Cuban sovereignty raises several related and difficult questions. These questions are not mooted by the decision in *Rasul*—as the recent split in the DC district court decisions make strikingly clear. Can Guantanamo reasonably be analogized to ordinary military bases and thus treated legally as foreign territory? Is Cuban sovereignty necessarily exclusive of US sovereignty? Is the lease valid under international law? Even if as a formal matter the base *is* clearly Cuban but not American sovereign territory, what bearing ought this have on the constitutional rights of individuals detained there by the US government? Below I sketch the history of

[175] 43 F3d 1412, 1425 (1995)

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

[177] See the description of these agreements on www.globalsecurity.org/military/facility/sofa.htm

Guantanamo and US control over Cuba. In light of that history I offer three arguments about the lease, the most compelling of which interprets the lease language to accord Cuba a form of reversionary sovereignty and accords the US sovereignty for the duration of the lease.

1. American Empire

The genesis of the US base in Guantanamo lies in the American victory in the Spanish-American War of 1898.[178] While the US had long asserted a strong measure of control over Latin America—as evidenced by the Monroe Doctrine—the acquisition of Spain's colonies marked the emergence of the US as an imperial power.[179] Americans had mixed reactions to this imperial episode. A blue water empire was considered by many to be the birthright of a great power. But others thought imperialism inconsistent with republican government, and sought to grant independence to the former Spanish colonies as soon as practicable.[180] In some cases, such as Puerto Rico, independence was never granted; the US continues to rule these territories as colonies to the present day.[181] In others, such as Cuba, independence arrived after a short period of American rule. The US nonetheless maintained a powerful presence in Cuba right up to the Cuban Revolution.

[178] See generally JULES ROBERT BENJAMIN, THE UNITED STATES AND CUBA: HEGEMONY AND DEVELOPMENT, 1880-1934 (1977); Lazar, supra.

[179] Spain's colonies notably included the Philippines, which, though not in Latin America, where the largest and most heavily populated of the US imperial possessions. The Philippines were granted independence after World War II.

[180] ROBERT BEISNER, TWELVE AGAINST EMPIRE (1973)

[181] See the various discussions in Burnett and Marshall, supra

The Guantanamo lease grew directly out of US sovereignty over Cuba.[182] US occupation and military government ended in 1902 when Cuba was granted nominal independence.[183] Independence was conditioned, however, on a formal role for the US in the future of Cuba.[184] This role was manifested in several ways. For one, the new Cuban constitution included the notorious "Platt Amendment," which permitted the US to intervene in Cuba at any time for "the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty."[185] The lease for Guantanamo was linked to the Platt Amendment and reflected the relationship--one of highly compromised Cuban sovereignty—that the Platt Amendment reflected and sustained.[186] Two, the US expressly retained control of the strategic harbor at Guantanamo after ceasing to occupy the remainder of Cuba. The terms of the Guantanamo lease were originally drafted as an act of Congress in 1901, while the US still controlled Cuba. Language concerning the lease was then incorporated into the draft Cuban constitution.[187] The agreement was signed by the new President of independent Cuba and President Roosevelt in early 1903. [Independent Cuba consequently never has controlled

[182] Lazar, 1968, supra at 739: "The United States' rights of occupancy, at the level of international law, became established prior to the birth of the state of Cuba."

[183] Robert Montague, A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem, 50 KY. L. J. 459 (1962)

[184] See 35 OP ATT'Y GEN 536 (1929) at 537.

[185] http://www.ourdocuments.gov/doc.php?flash=old&doc=55

[186] Lazar 1968, supra at 734: "Thus, the agreement for the lease, by its own terms as well as by admission of the Cuban executive, was anchored in the legal relationships evidenced by the Platt Amendment incorporated into the Cuban fundamental law."

[187] The History of Guantanamo Bay, at www.nsgtmo.navy.mil, chapter 3.

Guanatanamo; it has remained in US hands continuously since Cuba's capture in the Spanish-War of 1898.] In short, Guantanamo Bay became a American possession (along with the rest of Cuba) as a spoil of war, and was then immediately leased to the US upon the granting of Cuban independence. The lease, with its clause providing for termination only by the will of both parties, was renewed as part of a treaty with Cuba in 1934.

While the Platt Amendment was ultimately stripped out of the Cuban constitution, the US continues to occupy the base and to issue an annual rent check for it. The Castro government, which forcibly took power from the Bautista regime in 1959 and considers the base a fraudulent and illegitimate vestige of Cuba's former colonial status, does not cash these checks.[188] In 1960 Fidel Castro called Guantanamo "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."[189] In the early 1960s Cuban hostility was such that there was significant attention to the idea that Cuba might forcibly invade Guantanamo.[190] Invasion never occurred, though Cuba did shut off all water supplies the base, which now employs it own water source. And the border between the base and Cuba (or, if the US position is correct, between Cuba and Cuba) is lined with landmines.[191] Despite the evident hostility between Washington and Havana the US continues to adhere to the letter of the accord, claiming that since the US does not seek termination of the agreement, Cuba cannot unilaterally repatriate

[188] The annual rent is $4085. See Toobin, supra.

[189] Montague, supra, at 472

[190] Montague, supra.

[191] Toobin, supra.

Guantanamo. Today, the 45 square mile naval base, in which about 2500 Americans serve, is fully self-sufficient, with a movie theater, several fast food outlets, and a souvenir shop.[192]

As this history reflects, the nature of US jurisdiction in Guantanamo is different than that in *Johnson v. Eisentrager*, the precedent upon which the Bush Administration most heavily relied in *Al-Odah* and *Rasul*. In *Eisentrager*, as one of the *Rasul* petitioners argued, "The Executive could not convene a military commission to try the *Johnson* petitioners unless it first secured permission from the Chinese Government…The same is true for Landsberg prison [in Allied-occupied Germany] where the *Johnson* petitioners were detained."[193] In Guantanamo, by contrast, Cuba exercises no effective control over the US or its use of the naval base, and the US is in no way constrained as it pursues, as it now has begun to, trials of some detainees by military commission.[194]

The US has made use of Guantanamo as a detention facility in the past. In the 1980s and 1990s the US housed Haitian refugees there, spawning litigation addressing both the legality of the detention and the status of the base.[195] After the attacks of September 11, and the subsequent war in Afghanistan, the Pentagon sought to use the base as a holding pen for alleged Al-Qaeda and Taliban fighters. The first detention facility, dubbed "Camp X-Ray",

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[192] Rose, supra at 91. These establishments may violate the Guantanamo lease itself, which provides that no commercial or industrial enterprises can be established on the base.

[193] Petitioners' Brief on the Merits, supra, at 45.

[194] See eg. Neal Katyal and Laurence Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals 111 YALE L J 1259 (2002); Jordan Paust, Antiterrorism Military Commissions: Courting Illegality, 23 MICH J INT'L L. (2001); Aryeh Neier, The Military Tribunals on Trial, NEW YORK REV. BOOKS (Feb 14 2002); Curtis Bradley and Jack Goldsmith, The Constitutional Validity of the Military Commissions, 5 GREEN BAG 2d (Spring 2002).

[195] Koh, supra.

gave way to a second, more permanent structure known as Camp Delta.[196] The approximately 600 Guantanamo detainees are, by several accounts, largely low level figures. The most significant suspects are reportedly held in interrogation centers established elsewhere around the globe: at Bagram Air Base in Afghanistan, by the Thai government in Thailand, and in some cases on US naval ships at sea.[197] Indeed, some American officials question the wisdom of the Guantanamo detentions, which have incurred markedly negative responses both here and abroad.[198] Whether wise or not, however, the detention of foreigners there raises many intriguing questions about legal spatiality in American law as well as the peculiar status of Guantanamo. One such question is the validity of the lease itself.

2. Validity

The Guantanamo lease is not a reciprocal agreement between sovereign entities. It is a direct legacy of a colonial relationship.[199] Guantanamo Bay fell into US hands as a spoil of

[196] Still further buildings are under construction; see Toobin, supra; Charles Savage, Camp Expansion Indication of US Stance on Military Detainees, MIAMI HERALD, Aug 26, 2003.

[197] Risen and Shanker, Hussein Enters Post-9/11 Web of US Prisons, NY TIMES, National Ed. December 18, 2003, p. A1 (describing network of prisons run by the Pentagon and the Central Intelligence Agency in Afghanistan, Thailand, and other undisclosed locations.); Rose, supra.

[198] Rose, supra. Much of the debate has revolved around the denial of POW status to the detainees, but there has also been substantial attention to the arguments of the Bush Administration that it is not bound by law—international or national—in the detention of these individuals.

[199] Lazar 1968, supra at 739

war. Then, as a condition of Cuban independence, the US leased the base in perpetuity.[200] Previous cases regarding Guanatanamo have relied heavily on the literal text of the lease and its language concerning sovereignty. But given its history and structure, the lease's continuing validity is not above question. International legal doctrine presents at least two arguments that the lease may no longer be valid. While both are tenable, neither is especially strong.

The first argument turns on the origins of the lease. Does the lease's genesis in a colonial relationship somehow vitiate its legality? The Vienna Convention on the Law of Treaties, which codifies the customary international law of treaties, holds that if a new peremptory norm of international law emerges any existing treaty in conflict with that norm is void.[201] Peremptory or *jus cogens* norms are legal norms that are so significant that they cannot be altered or contradicted by international agreement. If the lease violates such a norm, it is no longer valid under international law. The problem with this argument is that the content of the category of peremptory norms is highly disputed. Aside from a few very well-established norms, such as genocide, there is little agreement among states or jurists on what falls within the bounds of *jus cogens*. Consequently, it is hard to see precisely what norm

[200] There are of course other such leases. Most prominently, the now-historical lease between China and Great Britain extending control to the UK over the Hong Kong territory. That lease expired in 1997 and was not renewed. The Hong Kong lease is terse and simply states that "Great Britain shall have sole jurisdiction" in the new area and makes no express mention of sovereignty. Convention between China and Great Britain respecting an Extension of Hong Kong Territory, 1898, Consolidated Treaty Series Volume 186. The UK Foreign Office nonetheless treated the lease as granting the UK sovereignty for 99 years. Email correspondence, Anthony Aust, former Deputy Legal Advisor, Foreign Office UK.

[201] Vienna Convention, Article 64

the Guanatanamo lease violates that reasonably has the status of *jus cogens*.[202] The lease is undoubtedly in deep tension with certain structural principles of the international order--sovereign equality, disfavor for colonialism, and non-intervention in the domestic affairs of sovereign states, among others. Yet these are not generally thought to be *jus cogens* norms, and so this argument is unpersuasive.

A second possible doctrinal argument rests on the concept of *rebus sic stantibus*. Under the customary international law of treaties, as well as the Vienna Convention on the Law of Treaties, an agreement may be terminated if a fundamental change of circumstances occurs which 1] was an essential basis of the consent of the parties to the treaty and 2] radically transforms the extent of the obligations to be performed.[203] A change in government is not sufficient in and of itself to terminate a treaty under this doctrine. But the shift in Cuba after Castro took power is not mere change of government; rather, Cuba became a state with an ideology and political system completely oppositional to that of the US. This hostility is manifested in the landmines that ring the base. With such outward hostility the continued existence of a foreign military base is unusual indeed. Like the *jus cogens* argument, however, this argument ultimately lacks force. Whether the dramatic shift in Cuban-American relations after the revolution is sufficient to meet the test of the Vienna Convention for treaty termination is unclear. Previous cases have set quite a high bar for invoking the doctrine of *rebus sic stantibus*. In a recent International Court of Justice case involving a treaty between two Warsaw Pact states (relating to the construction of a dam) the

[202] Restatement sec 102 note 6. "although the concept of jus cogens is now accepted, its content is not agreed." IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW, 5TH ED AT 515-517

[203] Vienna Convention, Article 62. See also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000) at 240-242

momentous fall of communism in Eastern Europe was held insufficient to justify the invocation of re*bus sic stantibus*.[204] While the change at stake in the Guanatanamo case is arguably more significant in the context of the case at bar, it by no means is plainly sufficient to meet the doctrinal standard. Even if it were, moreover, the political significance of such a ruling is highly uncertain.

3. Interpretation.

A more compelling argument does not involve any challenge to the lease's validity per se but rather the interpretation of it. The critical language of the lease states that Cuba retains "ultimate sovereignty," whereas the US exercises "complete jurisdiction and control." Most courts, such as the DC Circuit in *Al-Odah,* have interpreted this language to mean that Cuba, and not the US, is sovereign in Guantanamo and have held that sovereignty was the touchstone under prior precedents such as *Eisentrager*.[205] The Bush Administration has repeatedly taken this position, both before *Rasul* and after. The US continues to argue that jurisdiction is distinct from sovereignty--an accurate statement--and that sovereignty is the key to habeas jurisdiction. It was this latter claim that the Supreme Court rejected as a statutory matter in *Rasul*.[206] The *Rasul* Court consequently did not reach the question of whether some constitutional right might require aliens detained abroad to have access have to the writ, as is the case for American citizens detained abroad. Since the Guantanamo

[204] Gabcikovo-Nagymoros Dam Case, International Court of Justice (25 Sept 1997)

[205] *Al-Odah,* supra. *Eisentrager* in fact is inconsistent on this point, referring at times to territorial jurisdiction and at times to sovereignty. The 9th Circuit seized on this in its decision in *Gherebi*, supra, (at 18-19).

[206] Rasul, supra at __

lease specifies that Cuba retains "ultimate sovereignty," the US position was and remains that this fact disposes of any constitutional claims of the detainees to the writ.[207]

Yet traditional canons of construction suggest a different reading of the lease, one more faithful to the history of the base and to the realities of the American presence in Guantanamo. This reading turns on the meaning of the phrase "ultimate sovereignty." Under the Bush Administration's interpretation, the word "ultimate" in the lease is surplusage. The lease could simply read "Cuba remains sovereign" with no change in the legal outcome.[208] "Ultimate sovereignty" can alternatively, and more reasonably, be interpreted to refer to reversion. Cuba retains a reversionary right over Guanatanamo if and when the lease is terminated by mutual assent of the parties.[209] In this reading Cuba is the reversionary sovereign and the US the temporary sovereign. The US cannot cede Guantanamo to any state other than Cuba, and if the US exits Guantanamo the base reverts completely to Cuba.

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[207] See also *Gherebi*, supra at 16: "In other words, in the government's view, whatever the Lease and continuing treaty say about the United States' complete *territorial jurisdiction*, Guantanamo falls outside US *sovereign* territory--a distinction it asserts is controlling under *Johnson*." (emphasis in original).

[208] It is possible to read "ultimate" as meaning fundamental or basic, but again the word becomes surplusage under the government's interpretation.

[209] In *Gherebi* the 9th Circuit argued similarly, concluding that the 1903 Lease's use of "ultimate sovereignty" means that "during the unlimited and potentially permanent period of US possession and control over Guantanamo, the US possesses and exercises all of the attributes of sovereignty, while Cuba retains only a residual or reversionary sovereignty interest, contingent on a possible future United States' decision to surrender its complete jurisdiction and control." *Gherebi*, supra, at 26.

In this alternative reading the word "ultimate" actually performs interpretive work. It refers to residual sovereignty, a concept well known in international law.[210] This reversionary reading is consistent with both the plain meaning of the text and with the realities of the subsequent behavior of the parties—two central considerations when interpreting the texts of international agreements.[211] This interpretation is strengthened further by consideration of the language of "complete control and jurisdiction," rather than merely "control and jurisdiction." Why did the drafters add the term "complete"? The use of the modifier "complete" suggests that the US is exercising a special sort of control and jurisdiction, a view consistent with the preceding interpretation that the US is a temporary sovereign for the duration of the lease. This reversionary theory suggests that Guantanamo is broadly analogous to US insular possessions such as Guam. An even closer parallel is the former Canal Zone in Panama. The Canal Zone was carved out of Panamanian territory via

[210] See e.g. BROWNLIE, SUPRA at 110-111

[211] The Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), codifies the customary law of treaty interpretation. The Convention declares that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in light of their context and in the light of its object and purpose." Context is to be derived from further agreements between the parties and "subsequent practice" of the parties. Vienna Convention, Article 31. The object and purpose, particularly when read in light of the contemporaneous Platt Amendment to the Cuban Constitution, is relatively clear: to ensure that the US maintained control over Guantanamo as a coaling station and to keep US forces within Cuba as a means of asserting hegemony. The subsequent practice of the US includes extensive use of Guantanamo for a host of commercial activities and the creation of a self-sustaining city there. On Cuba's part, Cuba has renounced the agreement and cut off the water and other supplies in retaliation for what, in Cuban eyes, is the manifest unfairness of the lease, especially its termination provision. On these facts see Neuman, Anomalous Zones, supra.

a treaty with the US, also dating from 1903.[212] That treaty grants to the US "all the rights, power and authority…which the [US] would possess and exercise if it were the sovereign."[213]

This reversionary reading is bolstered by consideration of the factual circumstances of the base. Since negotiating the extraordinary lease terms with the newly independent but thoroughly subservient Cuban government, the US has never relinquished its occupation of Guantanamo.[214] Guanatanamo was in US hands after the Spanish-American War, at a time when the US occupied all of Cuba, and the base remains in American hands today.[215] This unusual history accords well with a revised interpretation of the phrase "ultimate sovereignty." And it accords well with the realities of US power in Guantanamo, which is, in practical terms, total. Cuba, whatever the lease may say as a formal matter, is a wholly ineffective "lessor" and poses no threat to the US base whatsoever. Cuban law is uncontestedly unavailable to the detainees, and Cuban courts play no part in this—or any

[212] Hays-Bunau Varilla Convention with Panama, Nov. 18, 1903, TS no 431.

[213] Article 3, supra. A later treaty reduced these rights and powers. See Green, supra at Part III.

[214] Indeed, it would not be surprising if the US negotiated favorable lease terms with the newly independent but quite subservient Iraqi government. Even then, however, a lease in perpetuity is highly unlikely--a sign both of how views about intervention have changed and how extraordinary the Guantanamo lease is.

[215] This view is not wholly novel. See eg Joseph Lazar, "Cession in Lease" of the Guantanamo Bay Naval Station and Cuba's "Ultimate Sovereignty," 63 AM J. INT'L L. 116 (1969): "The international legal record thus speaks for itself as to the occupation rights of the United States over the territory of the Guantamao Naval Station. This record also clarifies the meaning of "ultimate sovereignty"…Thus, when [the lease] provided that "the US recognizes the continunance of the ultimate sovereignty of the Republic of Cuba over the described areas of land and water," it presumably was understood that the cession in lease over the territory either recognized the sovereignty over the territory to be in the US for the duration of the period of occupation, or simply recognized the suspension of sovereignty pending the vesting of ultimate sovereignty on conclusion of the period of occupation."

previous—litigation. US jurisdiction over both American civilians and foreign nationals present in Guantanamo is total.[216] In sum, for all intents and purposes, the reality is that Guantanamo is as American a territory as Puerto Rico or Guam.[217]

4. The Atom of Sovereignty

Whether one agrees or disagrees with this reading of the lease is perhaps not dispositive of the question of whether the Constitution somehow applies to aliens in Guantanamo. The question of who—the US or Cuba--has sovereignty over Guantanamo presupposes that sovereignty is indivisible and cannot be concurrently held. If it is Cuba that is sovereign, the Bush Administration asserts, then the US ipso facto is not sovereign. Yet this is not at all clear as a conceptual matter. Indeed, "the American experience belies the notion that the atom of sovereignty cannot be split."[218]

The crux of the decisions in *Al-Odah* and *Khalid* was the contention that the naval base is "outside the sovereignty of the United States."[219] Implicit in this is the idea that sovereignty is absolute, bounded, and exclusive. These notions are all derived from the Westphalian ideal of sovereignty discussed above, which became entrenched in American jurisprudence and law in the 19th century. In practice, as I have shown, that ideal only

[216] *US v. Rogers*, 388 F. Supp. 298, 301 (ED Va., 1975) (prosecution of a US civilian employed in Guantanamo for drug offense committed on the base site); *US v. Lee*, 906 F. 2d 117 (4th Circuit 1990) (Appeal from dismissal of indictment of Jamaican national charged with sexual abuse on Guantanamo).

[217] Cf. The Insular Cases, supra.

[218] *Corey v. US* at 1180 (Opinion of Judge Kozinski). The "split atom" trope is drawn from *US Term Limits Inc. v. Thornton,* 514 US (1995). In his concurring opinion, Justice Kennedy wrote that "the Framers split the atom of sovereignty." Id at 838.

[219] *Al-Odah, supra.*

loosely accords with reality.[220] Sovereignty has never been fully aligned with the Westphalian territorial ideal.[221] More pertinently, the thrust of the doctrinal evolution described in Part II illustrates that legal spatiality has, in a number of key areas of the law, been increasingly decoupled from sovereignty. The result is that today US law, both statutory and constitutional, is routinely held to apply beyond the sovereign borders of the US.[222]

More significantly, sovereignty need not, and has frequently not been, conceptualized as mutually exclusive--as the history of the US and other federal states make clear. Federalism is a system of shared sovereignty in which territory is divided for some purposes but not for others. American federalism is one of dual, or triple sovereignties: federal, state, and tribal sovereignty all co-exist, though the last is more vestigial than vital.[223] As the 9th Circuit recognized in *Corey v. US*, two sovereignties may, as in our federal system, exercise concurrent jurisdiction domestically, and this principle "applies no less in the international domain."[224] Our own federal structure is one of "dueling sovereignties,"[225] in which the states and the federal government often battle over power and control. Clearly the federal government is sovereign. But as the Supreme Court stated in *Alden v. Maine*, the Constitution

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[220] See Part II, supra.

[221] Krasner, supra; Philpott, supra; MICHAEL FOWLER AND JULIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND ADAPTATION OF THE CONCEPT OF SOVEREIGNTY (1995) at 49: sovereignty "is a matter of degree, not of bright lines."

[222] Part II, supra.

[223] The states retain "the dignity and essential attributes inhering" in sovereignty. *Alden v. Maine,* 527 US 706 (1999). See also Akhil Amar, Of Sovereignty and Federalism, 97 YALE L. J. (1987);

[224] *Corey v. US*, supra, at 1180. The decision in *Corey* goes on to note that this is true for lease agreements with foreign sovereigns as well, with the terms of the lease governing the concurrent authority.

[225] Kathleen Sullivan, Dueling Sovereignties: US Term Limits v. Thornton 109 HARV. L. REV. (1995)

"preserves the sovereign status of the states" and "reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."[226] The states thus retain, in the words of James Madison, a residual and inviolable sovereignty, a sovereignty that co-exists with that possessed by the federal government.[227]

Sovereignty is hence not an all or nothing proposition. Consequently, there is no necessary conceptual or constitutional reason to believe that whatever sovereignty Cuba enjoys in Guanatanamo effectively and necessarily strips the US of sovereignty.[228] In other words, one need not accept the idea that Cuba retains only a reversionary sovereignty in Guantanamo to conclude that the US is sovereign in Guantanamo. Both states may be

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[226] Alden v. Maine, 527 US 706 714 (1999).

[227] Federalist 39 at 248 (Modern Library College Ed).

[228] The Bush Administration argued in its brief opposing certiorari in *Al-Odah* that the determination of sovereignty is in essence a political question, citing *Vermilya-Brown v. Connell*, 335 US 377 (1948). Vermilya addressed a US base in Bermuda and also involved the interpretation of that lease's language. As a matter of simple precedent, the Administration's position is arguably on firm footing. But Guantanamo's anomalies render that simplicity problematic. Is it really the case that the courts must turn a blind eye to the realities of permanent and effectively total American control? The 9th Circuit, in *Gherebi*, made clear that they need not. As the 9th Circuit argued, "if 'sovereignty' is 'the supreme, absolute, and uncontrollable power by which any independent state is governed,' 'the power to do everything in a state without accountability,' or 'freedom from external control: autonomy, independence,' it would appear that there is no stronger example of the United States' exercise of 'supreme power' or the adverse nature of its occupying power, than this country's purposeful actions contrary to the terms of the lease and over the vigorous objections of a powerless 'lessor.'…Any honest assessment of the nature of the United States' authority and control in Guantanamo today allows only one conclusion: the US exercises all of the 'basic attributes of full territorial sovereignty.'" *Gherebi*, supra, at 37-38.

sovereign concurrently, with the sovereignty of each dependent on the precise issue at hand. This view tracks our own theories of federalism, while also yielding a result—constitutional application to Guantanamo—that fits with the best tradition of American constitutionalism.

Even if concurrent or reversionary notions of sovereignty are rejected, sovereignty and jurisdiction are plainly distinct concepts and one need not entail the other—as *Rasul* made plain. As the historical practice of habeas corpus demonstrates, courts may have jurisdiction to hear habeas petitions even if the petitioners are held outside the sovereign territory of the government.[229] Clearly American citizens can bring habeas petitions if detained in Guantanamo. Sovereign control of the territory upon which they sit is not necessary for the federal courts to have jurisdiction. Why then should sovereign control be necessary—as the Bush Administration argues--for jurisdiction over non-citizens? In *Rasul*, and in the current post-*Rasul* litigation, the US rested this claim upon *Eisentrager*. Yet *Eisentrager* does not expressly hold that all non-citizen detainees held outside the territory of the US cannot bring petitions of habeas corpus. Rather, it more narrowly holds that enemy aliens, tried and convicted abroad by military tribunal, cannot review their convictions in US civil courts.[230]

I have critiqued the prevailing interpretation of the Guanatanamo lease for failing to read meaning into all the key terms in the text, and have argued that a better reading is that the US is de jure sovereign in Guantanamo—as it unequivocably is sovereign in a de facto sense. Between the two diametrically-opposed positions taken in the DC district court decisions of January 2005—by Judge Hens Green and by Judge Leon—my argument unequivocably supports Judge Hens Green's statement that "Guantanamo Bay must be

[229] Historians Brief, supra.

[230] Rasul, majority opinion at

considered the equivalent of a US territory in which fundamental constitutional rights apply."[231] Guantanamo, and the terms of the lease granting the US control over it, are vestigial remnants of the age of empire. Throwbacks to an earlier and quite different time, they are difficult to defend on any principled basis.[232] The only reason the forty-five square miles of Guanatanamo remain in US hands is America's "full spectrum dominance" over Cuba.[233] Distinguishing Guantanamo from other American military bases is not difficult. A more profound critique of the legal treatment of Guantanamo focuses on the concept of legal spatiality itself, however. Why does moving individuals from one geographic location to another fundamentally alter the scope of their constitutional and statutory rights vis-à-vis the US government? What is the legal magic of American soil?

In this regard it is instructive to compare the decision in *Al-Odah* to that of the Supreme Court in *Ross v. MacIntyre* in the late 19th century. *Ross* involved an enclave of overseas American power—the consular court system in Japan—that, like Guantanamo, grew out of the fundamental inequalities of the time and was sanctioned by treaty. *Ross* held that the Constitution did not and could not apply within the territory of another sovereign because sovereignty was exclusive; hence the defendant possessed no constitutional rights that could be violated by the US government. The logic of *Al-Odah* is strikingly similar. Because Cuba is sovereign, the DC Circuit held, US is not sovereign and therefore the detainees lack any constitutional rights against the US government. Just as the consular

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[231] at 38.

[232] This is not to deny that all these practices seem to be enjoying a resurgence in both political commentary and political practice.

[233] This phrase is from the US Dept of Defense's Joint Vision 2020. See the press release at www.defenselink.mil/news/Jun2000/N06022000_20006025.html.

courts of the imperial era were untrammeled by either US constitutional or local municipal law, so is Guantanamo unaffected and indeed unreachable—as far as foreigners are concerned--by our fundamental law *and* by Cuban law. A more pure—and more anachronistic—statement of legal spatiality can hardly be imagined.

IV Rethinking Legal Spatiality

Does legal spatiality--the idea that geographic location determines legal rules--make sense in an increasingly globalized world? Can the US, a nation committed to constitutional government--a "government of laws, not of men"--in fact govern unfettered by law as long it acts outside certain spaces?[234] These questions, one consequentalist, the other deontological, were for decades arcane. But they are now once again at the forefront of American law and politics.[235] Suspected Al-Qaeda and Taliban detainees were deliberately housed at Guantanamo for reasons of security, but also to ensure that judicial processes did not interfere with the detention and interrogation of the prisoners. One of Britain's top Law Lords called Guantanamo "a legal black hole."[236] Can the Constitution accommodate such black holes?

[234] *Marbury v. Madison,* 5 US (1 Cranch) 137 (1803).

[235] As they were during the era of the Insular Cases. "It is difficult to realize how fervent a controversy raged…over the question of whether the Constitution follows the flag…The election of 1900 largely turned upon the so-called issue of imperialism." Frederick Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Colum. L. Rev. (1926) at 823

[236] Lord Steyn lecture, supra.

Perhaps an easier way to begin the analysis is to try to defend, from a principled stance, the reverse proposition. What principled reason is there to believe that US law, in particular any constitutional right, is spatially-bound? The strongest argument in favor of legal spatiality starts from Westphalian principles. The modern state is built on a spatial framework of political rule. This framework of territorial sovereignty ensures order in an anarchic world system.[237] Under traditional Westphalian principles, the extension of any law into another sovereign's physical domain inherently subverts territorial sovereignty. This strict spatial conception of sovereignty was, as this Article has demonstrated, deeply favored in the 19th century. [238] It continues to be a central part of international law, prominently reflected, for example, in the United Nations Charter of 1945.

But it is decreasingly relevant today. The erosion of legal spatiality in a host of doctrinal areas, and the embrace of extraterritorial claims by many other states, represents a marked, if uneven and incomplete, break with the past. The Supreme Court has rejected pure spatiality in a wide variety of cases-- *Hartford Fire, Reid*, *Asahi, Rasul,* to name some of the more prominent decisions—and has done so in often emphatic terms.[239] While the sources of this evolution in conceptions of legal spatiality are murky, it appears that underlying changes in economics, politics, and society have nudged Congress, the executive

[237] Herz, supra.

[238] Indeed, the existence of a liberal peace and the general move toward democracy around the world arguably render the normative arguments in favor of strict territoriality are less profound today. On the democratic or liberal peace see Michael Doyle, Kant, Liberal Legacies , PHIL & PUB. AFF. (1983, two parts); Anne-Marie Slaughter, International Law in a World of Liberal States 6 EUR. J. INT'L L. 503 (1995); Cf. Jose Alvarez, Do Liberal States Behave Better? 12 EUR. J. INT'L L. 183 (2001).

[239] See the discussion in Part X, supra.

and the courts toward a more functional and pragmatic approach to jurisdiction.[240] Hence it is uncontested that were American citizens held in Guantanamo the federal courts would have habeas jurisdiction over them.[241] And, under longstanding precedent, so too would any American detainees held there possess fundamental constitutional rights.

Though it perhaps had the virtue of conceptual coherence, there is little reason to expect or to prefer a return to 19th century strict territoriality.[242] The evolution of American law has been a process in which formalistic categories based on spatial location and geographic borders were rejected in favor of more supple, contextual concepts such as "effects" and "minimum contacts."[243] Just as fundamental changes in the American economy led to the demise of the approach of *Pennoyer v. Neff,*[244] the evolution and increasing interdependence of the international system—in both economic and security terms—has encouraged courts, legislatures, and executives around the world to break the link between law and land. Yet aspects of strict territoriality remain, persisting even as the underlying conceptual approach that birthed them has long fallen into desuetude. This discontinuity

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[240] Raustiala, supra.

[241] Even the government conceded this in the oral argument in *Padilla v. Rumsfeld;* see Transcript Of Nov 17, 2003 Oral Argument at 16:25-19:8, *Padilla v. Rumsfeld*, Lexis 25616, cited in Brief for the Petitioners on the Merits, supra, at 16.

[242] In the realm of personal jurisdiction the problems of strict territoriality were legion, and Beale's vested rights approach did little to solve them. See generally Rutherglen, supra; Kramer, supra.

[243] See Part III, supra.

[244] The nationalization of the American economy was central to this process. See e.g Virginia Postrel, Economic Scene: US is a Case Study in Free Trade, NEW YORK TIMES, Feb 26 2004 (showing data on the convergence of incomes across regions in the US over the past century, with an acceleration in the 1930-1950 period). The connection between globalization and jurisdiction is developed in Bermann, supra.

places tension on the remaining spatial doctrines, underscoring inconsistencies that cannot be logically reconciled. One result has been a tendency to invoke earlier cases, such as *Eisentrager*, in an incantatory and conclusory manner, with little justification offered for the underlying premises of spatiality. In part this is because a coherent and consistent approach to legal spatiality no longer exists. In 1909, Justice Holmes could straightforwardly lay out a theory of legal spatiality to support his conclusion that the Sherman Act was territorially-limited and could not reach actions that occurred abroad.[245] Today, courts no longer provide such a theory because they cannot. Rather, courts assess effects and consider context, often en route to declaring that the US law in question has global--or at least extraterritorial--reach.[246] If courts instead seek to restrain extraterritorial assertions, they often woodenly invoke the "presumption against extraterritoriality"[247] or, if the addresses individual rights

[245] Id. As Kramer, supra, argues at 187, "To understand the decision in American Banana, it is important also to understand the legal environment in which Holmes was writing. Territoriality was the cornerstone of a framework developed to regulate sovereign relations in a number of areas, of which choice of law was merely one."

[246] My discussion here complements that of Neuman, supra (Zones). Neuman provides a set of functional concerns that might lead a government official or judicial actor to differentiate legal rules based on location. For example, zoning rules that permitted sex clubs to operate in some parts of a municipality but barred them from school zones exhibit what he terms spatial variation. Among the considerations Neuman proffers are objective local conditions; subjective local preferences; desire for experimentation; and mere political power. Supra, 1201-1206.

[247] In some areas the presumption is rebutted much more easily than in others. On occasion the courts treat it seriously; see e.g *EEOC v. Aramco*, 499 US 244 (1991). According to Jonathan Turley, "in the interpretation of ambiguous antitrust and securities laws, the presumption [against extraterritoriality] has proven little impediment to extraterritorial application. This is not, however, true in other areas. Unlike extraterritorial antitrust and securities cases, extraterritorial employment discrimination and environmental

against the government, trot out a handful of increasingly antiquated cases—the *Insular Cases, Eisentrager, Duncan v. Kahanamoku*—and declare the question closed.[248] The progessive abandonment over the course of the last century of strict territoriality starkly raises the question of what role ought spatiality play in American law. This question is not easily answered. My claim here is that simple spatial assumptions are unconvincing, anachronistic, and out of step with our constitutional principles. The clear trend in American law and in international law—and the more coherent and just reading of the Constitution—suggests that a despatialized approach ought to be the default position, subject to exceptions based on functional and practical concerns.

The implications of this proposition are not academic, nor are they limited to the war on terror. American regulators have in a number of key areas—antitrust, securities law, environmental protection, and more--plainly extended their jurisdiction beyond our borders. And throughout the 1980s and 1990s, and continuing today, American criminal justice officials have increasingly worked overseas. During the 1970s and 1980s, for example, as

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claims have been roundly rejected, making the presumption an almost complete barrier to victims of extraterritorial employment or environmental misconduct." Jonathan Turley, When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW L. REV. (1990) at 599-600. See also Bradley and Goldsmith, supra, at 526 "In the 1970s and 1980s, lower courts applied the effects test aggressively to regulate extraterritorial conduct, spawning controversy with some of the United States' closest trading partners."

[248] As Neuman argues, "to find that aliens have extraterritorial constitutional rights would be an extension of prior law. Reid v. Covert does not require such an extension as a matter of precedent, because Reid v. Covert involved citizens. But that does not suffice to explain why the recognition of extraterritorial constitutional rights in Reid v. Covert does not destroy the persuasive power of the earlier precedents." Neuman, supra, (book) at 106.

global drug trafficking proliferated the Drug Enforcement Agency pursued traffickers not only in Miami and San Diego but also in Tijuana and Cali.[249] The number of DEA agents stationed abroad rose dramatically during this period, from about 12 in 1967 to over 300 by 1991.[250] Just as the globalization of economic production in the postwar era led the Department of Justice to increasingly pursue cartels abroad—and to cooperate with foreign antitrust regulators in the process—so too has the globalization of crime led the FBI, the Customs Service, the DEA, and federal other agencies to aggressively work abroad, in an effort to stanch the flow of cross-border narcotics, people, weapons, and money. These extraterritorial projections of American law enforcement power inevitably raise questions of the extraterritorial scope of American legal protections.

A. *A Global Constitution*

The most sweeping approach to legal spatiality is to embrace the notion that--as a presumptive matter--our legal system operates globally: that when the government exercises power, that exercise is presumed to operate with regard to territorial location and is always

[249] Globalization has enhanced the movement of illicit goods just as it has the movement of licit goods. Kal Raustiala, Law, Liberalization, and International Drug Trafficking, NYU J INT'L L & POL'Y (1999); [Richard Friman and Peter Andreas, The Illicit Global Economy (2000)]

[250] Nadelmann, supra at 3. This is not to imply that there is no precedent for the extraterritorial extension of American criminal law; as *Bowman* itself shows, the issue hit the Supreme Court as early as 1920, and of course long before then American agents had been concerned with fugitive slaves and smuggling schemes. The onset of Prohibition dramatically increased the amount of cross-smuggling and concomintantly increased the extent of extraterritorial American police action. See generally Nadelmann, supra.

subject to constitutional restrictions. [251] This approach can be moderated through a practicality standard, in which the lack of American sovereignty in extraterritorial assertions is taken in account, but treated as dispostive, in considering the scope of legal protection. A different phrasing of this position is that there is no inherent spatial dimension to the law, though spatial restrictions may, in particular cases and under particular circumstances, be adduced that would trump this default position. This is the claim I will lay out and defend here.[252] The alternative stance is to cling to the notion that American law is tethered to territory--that simply by moving an individual around in space the duties that apply—and most significantly, the rights that individual enjoys--wax and wane.

This view that the Constitution is not spatially-delimited is radical but not fanciful. The framers of the Constitution plainly envisioned a territory; the Westphalian territorial state was the template they worked with in creating a new state. Yet the language, and the underlying concepts, of the constitutional order they forged are not inherently spatially-delimited. The Constitution creates a government of limited powers and places further restrictions on the use of those powers. These federal powers are not thought to be spatially-delimited. For example, there is no spatial limitation to the Commander-in-Chief power. The President is Commander-in-Chief not just when the President or the troops are present within the borders of the US, but wherever he or the troops may go. Nor does the Vice-President cease wielding the powers of the Vice-Presidency when he or she leaves the borders of the US. And US courts have long held, as demonstrated above, that Congress can

[251] See eg US v. Cadena, 585 F2d 1252 (5th cir 1978) at 1262: "once we subject foreign vessels or aliens to criminal prosecution they are entitlted to the equal protection of all our laws, including the Fourth Amendment."

[252] As in much of this Article, here I am deeply indebted to the ideas and arguments of Gerald Neuman.

legislate globally. American citizens and foreigners alike are subject to some American laws wherever they may go on the planet. The understanding of the spatial scope of federal powers is thus read functionally: Commander-in-Chief power would be severely hobbled if it only applied within American borders, as it would essentially limit US military action to self-defense in the event of invasion. Likewise, as the Supreme Court declared in 1920 in *Bowman*,[253] some criminal statutes, and some regulatory statutes, cannot function if held to apply only within the spatial confines of American territorial jurisdiction.

There is no a priori reason to believe that the spatial restrictions the Framers placed on the powers of the federal government cannot or should not be read functionally as well. When a constitutional or statutory provision is clearly and textually subject to a territorial limitation, or reasonably may be thought to contain such a limitation, a spatial reading of its scope is likely to be justified. Likewise, if a legal rule would be nullified in its effect if did not contain a territorial limitation, or would violate principles of international law and comity if it lacked such a limitation, a spatially-limited reading of its scope may also be justified.[254] But under this approach to the law-geography nexus such a justification must be offered and defended before any spatial delimitation can be said to exist. For example, a presumptively-despatialized approach to American law broadly accords with the Court's general approach to personal jurisdiction, where the doctrine has long been that the Fourteenth Amendment forbids jurisdiction, even over aliens abroad, unless there is some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum

[253] Bowman, supra.

[254] Neuman, Anomalous Zones, offers several such justifications.

state, thus invoking the benefits and protections of its laws."[255] The inquiry is guided by the functional and principled concerns that undergird the law of personal jurisdiction, not by simple locational analysis.

My proposed approach, therefore, often will yield spatial distinctions. But this differentiation must be justified and reasonable under the circumstances, rather than simply reflexive. This approach lies somewhere between what Gerald Neuman calls "global due process" and "mutuality of obligation."[256] Mutuality of obligation, for Neuman, "affords the express protection of fundamental law, to the extent that their terms permit, as a condition for subjecting a person to the nation's law."[257] Global due process aims in the same direction, but more cautiously. It is chary of holding of that constitutional rights are presumptively applicable to all persons and seeks to narrow the range of rights that might apply to non-citizens abroad.[258] As Justice Harlan stated in *Reid* with regard to constitutional protections,

> 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…The question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can

[255] Hanson v. Denckla, 357 US 235 (1958) at 253. See Wendy Purdue, Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction, 98 NW U L. Rev. 455 (2004); Gary Haugen, Personal Jurisdiction and Due Process Rights for Alien Defendants, 11 BU Int'l L J 109 (1993)

[256] Neuman, [book], chapter 6.

[257] Id at 108.

[258] Id at 109.

be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.[259]

No comprehensive theory of legal spatiality has ever been articulated by the Supreme Court. But the Court has on occasion tried to justify a territorial approach to constitutional protections that, as a facial matter, lack express geographic limitations.[260] *Verdugo* is the most prominent example of an implied territorial limitation. The availability of constitutional rights to aliens within US territory is a constitutional fact of long-standing, and is most commonly based on an assumed protection rationale. This guest theory is itself rooted in territoriality. Since the US is sovereign within its territory—and no other state is likewise sovereign—only the US can protect visitors within its borders. In *Verdugo* the Supreme Court faced two facts that could have suggested a despatialized reading of the Amendment's protections. The first was the text of the 4th Amendment itself, which refers to "the people" rather than to American citizens and makes no mention of American territory. The invocation of the "people" is ambiguous, however, since people could be read as a term addressing a group tied to a particular territory—rooted in a particular place. The second was that Verdugo was in fact physically within the US at the time of the search. Though in detention in San Diego—having been arrested--he was nonetheless well within our territorial borders and was, in a sense, a kind of guest.[261] Had Verdugo's residence also been in San

[259] Reid, supra at 354 US 1, 74-5 (1957), Justice Harlan, concurring.

[260] Verdugo

[261] Justice Stevens' concurrence in *Verdugo* argued that the search was governed by the requirements of the Fourth Amendment because respondent was "lawfully present in the United States ... even though he was brought and held here against his will." at 1068.

Diego, there is no doubt a warrantless search would have run afoul of the 4th Amendment. Why then did the Court hold that the Constitution offered no protection against the warrantless search of his home?

The majority was not unaware of the complex geography of the case. Indeed, they noted Verdugo's forced presence within the US, but used this as evidence that he had not developed the sort of consensual ties that they argued justified protection by the 4th Amendment. Earlier cases such as *Eisentrager* had suggested that mere geographic presence might not be sufficient to trigger constitutional protections. This logic suggested that as ties to the US deepen, constitutional protections deepen as well.[262] The *Verdugo* majority deployed this concept of deepening ties, plus an historical exegesis into the original intent behind the word "people," to keep the defendant outside the circle of rights-holders.

Yet as a doctrinal matter the connection between deepening ties on the part of aliens and the level of constitutional protection has little support. The deepening ties principle plainly predicts that a first-time visitor, in the US only briefly, would enjoy the barest minimum of protection against unreasonable search and seizure. Yet that is not the result: a Japanese tourist stopping over in Seattle for a couple of days en route to Canada would in fact enjoy the full protections of the 4th Amendment.[263] The rationale for this protection is simply spatial: location within the US is deemed fully sufficient to invoke the amendment's protections. A pure spatiality principle--rather than a substantial connection principle-- is also reflected in *Eisentrager* and *Quirin*. Both suggest that even enemy aliens captured abroad

[262] *Eisentrager,* supra.

[263] Unless she was at the border or its functional equivalent, where a general "border exception" to aspects of the Fourth Amendment is well-established. *Almeida Sanchez v. US,* 413 US 266 (1973). The border exception applies to citizens and aliens alike.

but brought back to the US for detention and trial would enjoy access to US courts on territorial principles alone.[264] Likewise, aliens captured abroad and forcibly brought back to the US for trial in federal court are fully protected by the Constitution's right to a trial by jury, among others.[265] Even the most generous reading of the deepening ties notion, in short, suggests that it applied inconsistently at best.[266] Courts do not systematically evaluate the depth of ties on a case-by-case basis and apply constitutional protections accordingly.

Here too a more compelling approach dispenses with notions of deepening ties and spatial location and instead focuses simply on the exercise of government power and the reasonable accommodations to location that might be justified by practicality. This approach is, despite cases like *Verdugo*, not without precedential support. The Supreme Court in *Reid* declared that the US government is "a creature of the Constitution" whose power "knows no other source" and "can only act in accordance with all the limitations imposed by the Constitution." The Constitution itself contains no textually-demonstrable spatial limitation. If *Reid* is to be taken seriously, then where that government acts ought to be largely

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[264] In other words, it is not the place of the capture but rather the place of *detention* that seems germane to the habeas claim.

[265] They may also be protected by international human rights law, as the 9th Circuit's recent en banc decision in *Alvarez-Machain* held. Alvarez-Machain had been forcibly abducted from Mexico by US DEA agents. Though the original challenge to the abduction—that it violated the US-Mexico extradition agreement and was thus illegal—failed under a *Ker*-type ruling, the en banc decision concerned his attempt to use the Alien Tort Claims Act against the US. This aspect of the decision was overturned by the Supreme Court in Sosa v. Alvarez-Machain (2004).

[266] As Alex Aleinikoff points out, we treat the question of initial entry to the US much more seriously than naturalization. This suggests that citizenship as membership is not in fact the guiding principle underlying our immigration law and practice. Aleinikoff, Semblances, at 172-3.

irrelevant to an inquiry of what rights might restrain that power.[267] At a minimum, location *vel non* should not be dispositive of legal outcomes.

This position also has the virtue of being rooted in elemental aspects of American constitutionalism. The US claims commitment to the rule of law, limited government, inherent natural rights, and the proposition that a government derives its just powers from the consent of the governed. Commitment to these principles does not entail habeas petitions for every prisoner of war, nor does it demand the abolition of the legal distinctions that follow from wartime. But it does counsel that courts ought to treat any person that comes within the power of the US as at least presumptively in possession of the full gamut of protections reasonably applicable under the circumstances. Spatial location can help determine what is reasonable, but it should not be used to formalistically dichotomize the availability of rights. That simple claim is all that is advanced here. It ought to be uncontroversial, but as the foregoing has illustrated it plainly is not.

An example of how a despatialized default assumption would work in practice can be gleaned from a 2001 case, *US v. Bin-Laden* (the case involved pre-9/11 incidents).[268] *Bin-Laden* involved the interrogation by FBI agents in Kenya of several suspected Al-Qaeda members. These individuals were believed to be perpetrators of the 1998 attacks on the American embassies in Kenya and Tanzania.[269] The question presented to the district court was whether the self-incrimination provision of the 5th Amendment applied to the overseas interrogations. The FBI had in fact offered the suspects a reasonably-modified version of the

[267] *Reid*, supra.

[268] *Bin-Laden*, supra.

[269] [nyt story on attack]

Miranda[270] warning before commencing the interrogation. Relying on *Verdugo* and *Eisentrager*, the government claimed in court, however, that the *Miranda* warnings that were given were entirely discretionary due to the foreign location of the interrogation.[271]

The court asserted first that the alleged extraterritoriality of the self-incrimination clause of the Fifth Amendment was "beside the point."[272] Violations of the privilege against self- incrimination, it said, occur not at the moment law enforcement officials coerce statements, but when a defendant's involuntary statements are actually used against him in a criminal proceeding. This claim uncritically assumes that there is a spatial limitation to constitutional rights but further assumes that such a criminal proceeding would occur on American territory, vitiating any extraterritorial aspect. This was indeed the factual situation in *Bin Laden.*[273] But it need not be the case: it is easy to imagine American civil courts set up abroad, as was commonly the case in the 19th century consular jurisdiction era--and which may be true of future US courts, military or civil. The opinion then noted the capacious

[270] *Miranda v. Arizona* 384 US 436 (1966)

[271] Bin Laden, at.

[272] *Bin Laden* at 182

[273] See also Mark Godsey, Miranda's Final Frontier--The International Arena, 51 DUKE L J 1703 (2003). Godsey explores and supports the application of the 5th Amendment privilege against self-incrimination to interrogations abroad. But he, like the Bin Laden court, uncritically accepts the premises of legal spatiality found in cases such as *Al-Odah*, and finds that the privilege does not involve extraterritorial assertions of rights since any violation of the Fifth Amendment occurs at trial rather than during interrogation: "Because of the unique nature of the privilege against self-incrimination, the Miranda doctrine is one of the few--if not the only--constitutional doctrines that can apply in some circumstances to non-Americans outside the borders of the United States." Godsey at 1780. Godsey assumes as well that the trial itself will take place within American territory.

language of the 5th Amendment's text, which refers, like several other provisions in the Constitution, simply to persons rather than to citizens.[274] Given the inclination of the Supreme Court to construe this right expansively, the district court found no compelling reason to imply an atextual spatial limitation.[275] It consequently held that "a defendant's statements, if extracted by U.S. agents acting abroad, should be admitted as evidence at trial only if the Government demonstrates that the defendant was first advised of his rights and that he validly waived those rights." [276] The US government called this result perverse since, it argued, non-Fourth Amendment compliant statements extracted by foreign police acting abroad remained admissible in American courts.[277] But the court reasonably replied that it saw "nothing at all anomalous in requiring *our own* Government to abide by the strictures of *our own* Constitution whenever it seeks to convict an accused, in *our own* courts, on the basis of admissions culled via an inherently coercive interrogation conducted by *our own* law enforcement."[278]

While the *Bin Laden* opinion fundamentally rested on the premise that the self-incrimination clause operated at trial (and hence within American territory in the case at bar), its tenor and approach provide a useful window on what in practice a despatialized view of the Constitution would entail. In a globalized world, where perpetrators of crime or acts of terror will often be apprehended abroad, American officials will and do frequently engage in

[274] Bin Laden at 183

[275] id.

[276] Id at 186

[277] Id.

[278] id.

criminal justice activities beyond our borders.[279] Often they will collaborate with foreign law enforcement officials in this process. When American officials interrogate an individual suspected of a crime under American law, the limitations the Fourth Amendment places on our criminal justice officials ought to apply, as a presumptive matter, wherever that interrogation occurs.

The simplest aspect involves the "right to silence" aspect of *Miranda* warnings. As the *Bin-Laden* decision argued, such warnings are not overly burdensome on law enforcement and serve the same functional purpose wherever the interrogation by criminal justice officials may take place.[280] But an additional issue in giving a *Miranda* warning is its provision to supply a lawyer. Here the *Bin Laden* court's announced requirements fail a reasonableness test, in that the district court held that the American agents were required to make serious efforts in conjunction with local personnel to secure a lawyer and to investigate local law on the matter.[281] The availability of a lawyer and the requirements or restraints of local law are clearly not within the purview of the US agents operating abroad. It is a reasonable accommodation of the extraterritorial location of the interrogation to waive this

[279] Nadelmann, supra; Mark Gibney, Policing the World: The Long Reach of US Law and the Short Arm of the Constitution, 6 Conn. J Int'l L. 103 (1990). The US has many mutual legal assistance treaties, or MLATs, in place in an effort to bolster cooperation with foreign governments when pursuing criminals extraterritorially. See eg Mutual Legal Assistance Treaty Between the US and Mexico, 27 I.L.M. 443 (1988); Bruce Zagaris, Developments in International Judicial Assistance and Related Matters, 18 Denver J Int'l L & Pol'y 339 (1990).

[280] I want to underscore that this particular claim is limited to criminal justice-related interrogations; clearly the Miranda warning does not apply to interrogations undertaken by American military officials acting in an armed conflict situation.

[281] Bin Laden, supra.

requirement when US agents act abroad. Thus the *Miranda* warning would remain constitutionally-required, yet would not operate identically outside the confines of US territory as it would inside our borders. But the substantial purpose of the requirement—to inform suspects of their rights, and to ensure that interrogations are minimally coercive—can be secured outside our borders as well as within them.

Likewise, when US law enforcement agents work with foreign law enforcement agents abroad--as they increasingly do—the approach advanced here counsels that, subject to consideration of the degree of connection between the foreign and American agents, constitutional protections ought to apply when the fruits of the investigation are used in US courts. This view accords with our current doctrine, at least with regard to searches of citizen's property located abroad. For example, federal courts generally apply a "joint venture" test in the context of the Fourth Amendment. The joint venture test compares the US agent's acts to the "totality of the acts done in the search and seizure."[282] *Powell v. Zuckert*, for instance, involved Air Force investigators joined by Japanese police officials who in tandem searched an off-base dwelling of a civilian Air Force employee.[283] The search warrant was requested by the US Air Force; Japanese officials only participated pursuant to their agreement to do so under the Status of Forces Agreement for US military forces stationed in Japan. The DC Circuit held that the Fourth Amendment applied to the search despite the participation of the Japanese officials; the US could not, in essence, wash away the Fourth

[282] *Stonehill v. US*, 405 F. 2d 738, 744 (9th Cir., 1968). Even without a joint venture, evidence may be surpressed if it would "shock the conscience." Rosado v. Civellitti, 621 F2d 1179 (2d Cir. 1980). See generally WAYNE LAFAVE, SEARCH AND SEIZURE, VOLUME 1, SEC 8.

[283] Powell v. Zuckert, 366 F 2d 634 (DC Cir. 1966).

Amendment simply by having Japanese police participate in a ride-along. As one commentator explains

> …[I]t is not inconsistent with *Powell* to suggest that the practicalities of international law enforcement cooperation are such that a rigid all-or-nothing approach is not feasible…This means, for one thing, that the degree of American participation is relevant…In P*owell*, where no Japanese interest was being served except compliance with the treaty obligation to assist American investigators, the American officials could more likely have influenced Japanese authorities to conform to unfamiliar external requirements than in a case where the foreign authorities were vigorously pursuing the investigation for their own purposes.[284]

Whether one agrees or disagrees with my proposed line-drawing (or with that of the Southern District or the DC Circuit) is not the critical point. Rather, it is the mode of analysis that is important. Simple locational analysis ought not be the basis of our jurisprudence on constitutional rights. In a globalizing and ever-shrinking world, courts need to think functionally, not formalistically, about the spatial scope the restraints on government power, just as they have long thought functionally and not formalistically when addressing the spatial scope of the exercise of sovereign power itself. That simple proposition will go a long way toward decoupling geography from justice.

V **Conclusion**

[284] WAYNE LAFAVE, SEARCH AND SEIZURE, VOLUME 1, SEC 8

What is the connection between law and land? The supposition that the scope of the law is determined by territorial location--what I have termed legal spatiality--suffuses our intuitions about the law. Yet the last century has witnessed a progressive relaxing of legal spatiality across a range of legal doctrines. With rare exception, it is only with regard to non-citizens, and even then not in all circumstances, that the federal courts continue to cling to the notion that American law is tethered to territory--that individual rights ebb and flow based on where that individual is physically located.[285]

In this Article I have described the origins of legal spatiality and illustrated its evolution. While it is difficult to discern a coherent trend in the various lines of cases related to spatiality, the general thrust has been a move away from strict territoriality and toward an embrace of contextual, functional considerations of jurisdiction.[286] The US government's current stance with regard to Guantanamo reflects a countervailing thread in the doctrinal skein, in which a dangerous world necessitates sharp distinctions between citizen and alien.[287] But this countervailing thread is, I have argued, largely founded upon anachronistic assumptions of spatiality. Particularly in the case of Guantanamo it is at odds with the plain fact that the US controls Guantanamo thoroughly and, should it desire, in perpetuity. As Justice Kennedy argued in *Rasul*, this fact is clear and ought to inform our understanding of the law.[288]

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[285] The continued strength of the *Insular Cases* provides an exception to this statement: citizens' rights vary based on geography when they leave the 50 states and enter our colonies.

[286] Raustiala, [draft], supra.

[287] As presaged in *Verdugo*, supra.

[288] Kennedy concurrence in Rasul, supra.

Rethinking our approach to territoriality--the basis of the Westphalian state, the model of the last 400 years--is no easy task. This Article does not provide a comprehensive new model of legal spatiality. It does, however, clarify the questions and assumptions at stake and proposes that we at least abandon the formalistic, static, and anachronistic approach to spatiality that appears far too frequently in both the Federal Reports and government briefs. In an increasingly interconnected world simple spatial distinctions cannot provide us with helpful, or just, guidance in understanding the scope of our legal order.