

Chapman University Dale E. Fowler School of Law

From the SelectedWorks of Ernesto A. Hernandez

2010

Guantanamo as a 'Legal Black Hole': A Base for Expanding Space, Markets, and Culture

Ernesto A. Hernandez-Lopez



SELECTEDWORKS™

Available at: http://works.bepress.com/ernesto_hernandez/19/

Guantánamo as a “Legal Black Hole”: A Base for Expanding Space, Markets, and Culture

By ERNESTO HERNÁNDEZ-LÓPEZ*

Introduction

WHY DOES THE U.S. NAVAL Station at Guantánamo Bay, Cuba¹ (“Guantánamo” or “GTMO”) appear as a “legal black hole”?² It’s been labeled a “quirky outpost” with an “unusual jurisdictional status”³ and an anomalous legal zone.⁴ After eight years, nearly 800 persons have

* Associate Professor of Law, Chapman University School of Law, chernand@chapman.edu. Research for this Article was supported by a research stipend from the Chapman University School of Law. The author thanks John Tehranian and Olympia Duhart for reading prior drafts and providing insightful comments; Eric Domínguez, Asal Nadjarzadehshiraz, and Sara Naheedy for their helpful research assistance; participants from conferences and workshops organized by the UCLA Law School, University of Melbourne, University of Wisconsin Law School, American University Washington College of Law, Fordham University Law School, Arizona State University School of Law, University of Denver Sturm College of Law, Law and Society Association, International Studies Association, Latin American Studies Association, American Society of International Law, American Association of Law Schools, and Chapman University for their helpful comments and the staff of the Rinker Law Library for their diligent efforts. Any errors are solely the author’s.

1. The acronyms “GTMO” or “Gitmo” refer to the U.S. Naval Station at Guantánamo Bay, Cuba. For the U.S. Navy’s website, visit U.S. Navy CNIC: Naval Station Guantanamo Bay, <http://www.cnic.navy.mil/guantanamo/index.htm> (last visited July 30, 2010).

2. Lord Johan Steyn, Judicial Member of the House of Lords, Twenty-Seventh F.A. Mann Lecture, *Guantanamo Bay: The Legal Black Hole* (Nov. 25, 2003), <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>; see also Clive Stafford Smith, *America’s Legal Black Hole*, L.A. TIMES, Oct. 5, 2007, <http://articles.latimes.com/2007/oct/05/opinion/oe-smith5>.

3. *Boumediene v. Bush*, 128 S. Ct. 2229, 2279, 2293 (2008) (Roberts, C.J., dissenting).

4. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) [hereinafter Neuman, *Anomalous Zones*] (describing the base as an anomalous legal zone with “legal rules,” fundamental to larger policies, “locally suspended” in a geographic area); see also Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 3–5, 42–44 (2004) [hereinafter Neuman, *Guantanamo Loophole*].

been detained on the base.⁵ Cases from this year show that elemental legal questions about the base still daunt courts.⁶ Uighurs, Turkic Muslims from China, are no longer in the same custody as other War on Terror base detainees but are unable to leave GTMO.⁷ Five Uighurs remain at GTMO, awaiting acceptable offers of resettlement.⁸ District court habeas proceedings illustrate disagreement on basic legal issues such as the scope of detention authority, its legal source, the required nexus between detainee and terrorist groups, and how to treat statements coerced during torture.⁹ This anomaly spreads to Af-

5. *Names of the Detained in Guantanamo Bay, Cuba*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/> (last visited July 30, 2010) [hereinafter *Names of the Detained*, WASH. POST].

6. Written mostly in the spring of 2010, this Article analyzes various evolving policy and litigation developments concerning Guantánamo detentions. The detainee numbers used, reports referred to, and litigation developments presented are undoubtedly not uniform throughout the Article, since they all describe different time periods as changes transpire. While these issues develop on a constant basis, the Article's main argument, that Empire and the law of extraterritorial authority are mutually influential, remains constant. Even if Guantánamo detentions end or new doctrines change the course of detainee and executive litigation strategies, this Article provides significant insights on Empire and law's extraterritorial application.

7. See Robert Barnes, *Supreme Court Dismisses Case Involving Resettlement of Guantanamo Detainees*, WASH. POST, Mar. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030101140.html>. See generally Caprice L. Roberts, *Rights, Remedies, & Habeas Corpus—The Uighurs, Legally Free While Actually Imprisoned*, 24 GEO. IMMIGR. L.J. 1 (2009).

8. See Lyle Denniston, *New Defeat for Detainees: No Fact-Gathering Allowed*, SCOTUS BLOG (May 28, 2010, 11:20 AM), <http://www.scotusblog.com/2010/05/new-defeat-for-detainees/#more-20880>; Marcia Coyle, *Court Deals Uighurs Another Setback in Quest for Release into U.S.*, BLT: BLOG LEGALTIMES (May 28, 2010, 13:11), <http://legaltimes.typepad.com/blt/2010/05/court-deals-uighurs-another-setback-in-quest-for-release-into-us.html>. At this time, the status of these detainees remains in flux. They are not "detained" with persons the Government argues are combatants or waiting relocation, military commissions, or other proceedings, but they remain on the base and cannot leave. See Letter from Elena Kagan, U.S. Solicitor General, to William K. Suter, Clerk of the Supreme Court of the United States (Feb. 19, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/02/SG-Kiyemba-letter-2-19-10.pdf> (reporting five Uighur detainees will remain at the base, once two Uighurs leave GTMO for Switzerland, out of an initial 22 detainees and that the remaining Uighurs should receive resettlement offers). As of October 5, 2010, the five detainees have been at Guantánamo for eight years; they include Yusef Abbas, Hajiakbar Abdulghupur, Saidullah Khalik, Ahmed Mohamed, and Abdul Razak. *The Guantánamo Docket: Citizens of China*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/country/china> (last visited Oct. 12, 2010). For specific information and documents concerning their detention, see *id.*

9. See generally BENJAMIN WITTES ET AL., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* (2010), http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf (examining legal issues developing in detainee habeas corpus proceedings since *Boumediene*).

ghanistan,¹⁰ with the Bagram detention center also characterized as a “black hole.”¹¹ One of the most controversial expressions of American power, GTMO floats as a jurisdictional island in a sea of legal anomaly terrorized by growing legal complexity in one of “the longest wars in American history.”¹² If GTMO detentions end for the 174 remaining detainees,¹³ an event predicted since January 2009,¹⁴ these experiences will inform future extraterritorial authority.

Referring to the concept of Empire, this Article argues that U.S. foreign relations capitalize on the base’s jurisdictional ambiguities. Anomaly on the base is not an aberration but instead manifests Empire’s intended legal objectives.¹⁵ These objectives articulate American assumptions regarding expanding authority, overseas market access, and cultural superiority. These three factors—space, markets, and culture—are essential for empires throughout world history.¹⁶

10. See *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (holding the Suspension Clause does not extend to the Bagram detention facility); see also Kal Raustiala, *Is Bagram the New Guantánamo? Habeas Corpus and Maqaleh v. Gates*, ASIL INSIGHT (June 17, 2009), <http://www.asil.org/insights090618.cfm>. This case is referred to as both “Al Maqaleh” and “Maqaleh.” For the sake of consistency, this Article uses the term “Maqaleh.”

11. See Editorial, *Bagram: A Legal Black Hole?*, L.A. TIMES, May 26, 2010, <http://articles.latimes.com/2010/may/26/opinion/la-ed-bagram-20100526>; Tom Reifer, *Secrecy, Torture & Human Rights: US War Crimes, European Complicity, and International Law*, TRANSNAT’L INST. May 2010, <http://www.tni.org/article/secrecy-torture-human-rights-us-war-crimes-european-complicity-and-international-law>.

12. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (referring to the War on Terror since Sept. 11, 2001).

13. The New York Times reports 174 detainees remain at the base. *The Guantánamo Docket: Detainees Held*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/held> (last visited Oct. 5, 2010) [hereinafter *The Guantánamo Docket: Detainees Held*, N.Y. TIMES]. While this Article highlights demographic and numerical data on the detainees, qualitative and personal narratives of the detainees and attorneys should not be ignored. For examples of these important perspectives, see WITNESS TO GUANTÁNAMO, <http://www.witnesstoguantanamo.com/index.html> (last visited July 30, 2010) (providing a systemic compilation of videotaped interviews of detainees and witnesses) and THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux et al. eds., 2009) (offering narratives from detainee attorneys).

14. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf> (ordering the disposition of all detainees at Guantánamo and prompt closure of base detention facilities as “soon as practicable” but no later than January 22, 2010).

15. For an excellent, concise description of the base’s legal anomaly and its role in informal Empire, the Cold War, refugee detention, and the War on Terror, see Amy Kaplan, *Where is Guantánamo?*, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 239–66 (Mary L. Dudziak & Leti Volpp eds., 2006).

16. Throughout this Article, the idea of Empire as space, markets, and culture refers to Alejandro Colás’s theory on Empire. See ALEJANDRO COLÁS, EMPIRE 5 (2007). Dr. Colás’s book, *Empire*, examines the social and political organization of empires throughout world history. *Id.*

Paraphrasing Alejandro Colás's foci on Empire's material, cultural, and political attributes, this Article defines Empire as metropolitan rule that subordinates overseas populations. Empire can only exist when the following are found: an expanding territory under political rule that lacks any identified limit, a protection of economic markets to sustain consumption and expansion, and an ideology of superiority to legitimize expansion.¹⁷ When examining detainee rights, Guantánamo's anomaly appears as a legal black hole, but in reality, Empire purposefully crafts such ambiguities as part of larger objectives.

As described below, Guantánamo operates as a base for imperial objectives concerning space, markets, and culture. Base occupation since 1898 and detentions since 2002 suggest this.¹⁸ Reflecting "Empire as space," GTMO relies on legal interpretations of extraterritoriality, which facilitate expansion with no defined spatial limit or border. Functional approaches to constitutional protections on GTMO, as seen in *Boumediene v. Bush*,¹⁹ exemplify this flexible expansion.²⁰ Market protection in the Caribbean and Central America were integral to the base's purpose after 1898. Currently, "Empire as markets" refers to GTMO detentions that allow for intelligence gathering and support the geopolitics of energy security in the Persian Gulf and Central Asia.²¹ "Empire as culture" concerns how base detentions discriminate by targeting Middle Eastern, Arab, and Central Asian nationalities.²²

Evident with detentions, base jurisdiction has been excluded from checks in the Constitution and international law by capitalizing on anomalous sovereignty demarcations between Cuba and the United States.²³ As the first U.S. base overseas, GTMO has "legally"

17. *Id.* at 5–7.

18. See discussion *infra* Part II.

19. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

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

21. See discussion *infra* Part II.B.

22. See discussion *infra* Part II.C.

23. See Neuman, *Anomalous Zones*, *supra* note 4, at 1228–33; Neuman, *Guantanamo Loophole*, *supra* note 4, at 1, 3–5, 42–44 (describing how the base was used to detain asylum-seekers and avoid constitutional and international law protections). See also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158–59 (1993) (rejecting challenges to U.S. detention authority by Haitians detained at Guantánamo after attempting to illegally enter the United States); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1430 (11th Cir. 1995) (finding aliens on the base are "without legal rights that are cognizable" in U.S. courts); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1347 n.19 (2d Cir. 1992) (finding constitutional claims for asylum detainees likely succeeding in court); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992) (finding constitutional rights do not apply to asylum detainees). For a description of the international law implicated in

been under American control since a lease agreement in 1903.²⁴ Agreements with Cuba provide the United States with “complete jurisdiction and control” for an indefinite period, while affirming Cuba’s “ultimate sovereignty” over the base.²⁵ GTMO reflects the imperial qualities of space, markets, and culture, through U.S. authority over base territory in Cuba. It has served American foreign relations objectives in a Sphere of Influence (1898–1940), Cold War (1946–1991), and War on Terror (2002–).²⁶ Even though President Obama called for a closure of the GTMO detention center by February 2010, detentions still continue. The Pentagon has spent nearly \$2 billion since

base detentions, see Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263 (2004).

24. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418, [hereinafter U.S.-Cuba Feb. 1903 Lease], available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp; see also Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda, U.S.-Cuba, July 2, 1903, T.S. No. 426, [hereinafter U.S.-Cuba July 1903 Lease], available at http://avalon.law.yale.edu/20th_century/dip_cuba003.asp (specifying tariff, maritime, and remuneration for U.S. occupation). Cuba contests the legality of these agreements and refuses to cash the checks that the United States provides each year in the amount of \$4,085 for the lease. Kaplan, *supra* note 15, at 244; see Kathleen T. Rhem, *Guantanamo Bay Base Has Storied Past*, U.S. DEPARTMENT DEF. (Aug. 24, 2004), <http://www.defense.gov/news/newsarticle.aspx?id=25469>; Michael J. Strauss, *Guantánamo Bay and the Evolution of International Leases and Servitudes*, 10 N.Y. CITY L. REV. 479, 505–06 (2007). For descriptions of Cuba’s legal arguments against base occupation, see Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2539–40 (2005) [hereinafter Raustiala, *The Geography of Justice*]; Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 KY. L.J. 459, 471–75 (1962); Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT’L L. 730 (1968); Gary L. Maris, *Guantanamo: No Rights of Occupancy*, 63 AM. J. INT’L L. 114, 115–16 (1969). See generally Felipe Pérez Roque, Minister of Foreign Affairs of the Republic of Cuba, Statement at the High-Level Segment of the Human Rights Council (June 20, 2006), http://www.cubaminrex.cu/english/Speeches/FPR/2006/FPR_200606i.htm (referring to the base as a “concentration camp”); Felipe Pérez Roque, Minister of Foreign Affairs of the Republic of Cuba, Statement to the Local and Foreign Media, at the Ministry of Foreign Affairs, CUBA OFF. SITE EMBASSY (Dec. 10, 2007), <http://embacu.cubaminrex.cu/Default.aspx?tabid=5604> (demanding that the U.S. government close the “torture center” at Guantánamo because it is “cruel, inhumane and degrading” and occupied illegally).

R

25. U.S.-Cuba Feb. 1903 Lease, *supra* note 24, at art. III; see also Treaty Between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, May 29, 1934, 48 STAT. 1682 [hereinafter U.S.-Cuba 1934 Treaty] (rescinding the Platt Amendment but confirming U.S. occupation of Guantánamo until the United States unilaterally leaves or Cuba and the United States mutually agree to end occupation). See generally Lester H. Woolsey, *The New Cuban Treaty*, 28 AM. J. INT’L L. 530 (1934).

R

26. See generally Ernesto Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba: Does the “Empire Strike Back”?*, 62 SMU L. REV. 117, 153–167 (2009) [hereinafter Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba*] (describing sovereignty’s role in supporting the base’s strategic objectives).

2001 to improve the base,²⁷ while Congress and the American public actively resist any relocation of detainees to the United States.²⁸

Initial interests in the base were expressed in the Platt Amendment, agreements between the United States and Cuba in 1903 and 1934, and Caribbean and Central American geopolitics. Explicit War on Terror interests include detentions for intelligence, situated within American authority but securely distanced from terrorist violence.²⁹ The U.S. government presumed that this location avoided potential legal checks such as detainee access to courts, interference from foreign governments, and protections in constitutional, international, and foreign law.³⁰ Detentions close to terrorist groups in the Persian Gulf and Central Asia³¹ would derail intelligence and war efforts.³² In this context, GTMO plays a vital role in Empire's expanding authority.

Framed by Alejandro Colás's conception of Empire as space, markets, and culture,³³ this Article suggests that GTMO is a legal anomaly

27. Scott Higham & Peter Finn, *At least \$500 Million Has Been Spent Since 9/11 on Renovating Guantanamo Bay*, WASH. POST, June 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/06/AR2010060604093.html>.

28. See KEN GUDE, CTR. FOR AM. PROGRESS, *GETTING BACK ON TRACK TO CLOSE GUANTANAMO: HOW TO GET TO ZERO* 4–5 (2009), http://www.americanprogress.org/issues/2009/11/pdf/closing_guantanamo.pdf (describing Congressional budgetary and policy resistance to relocating detainees within the United States).

29. See discussion *infra* Part II.B.

30. See, e.g., *Boumediene v. Bush*, 476 F.3d 981, 990–93 (D.C. Cir. 2007), *rev'd*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); Memorandum from Patrick F. Philbin and John C. Yoo to William J. Haynes, II, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29–37 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Philbin & Yoo Memo]; JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 142–43 (2006) (explaining how court decisions on rights for refugees detained on the base suggested habeas corpus jurisdiction would not extend to Guantánamo).

31. This Article utilizes geographic indicators to highlight where the War on Terror is being fought, its regional influence, and where terrorists attack civilians, threaten U.S. energy security, or maintain bases of operations. It uses “Persian Gulf” to refer to the region comprised of Saudi Arabia, Bahrain, the United Arab Emirates, Iraq, Iran, Oman, Yemen, Qatar, and Kuwait, which all influence regional foreign relations and thus global access to energy resources. Other terms used include the “Middle East,” “Near East,” and “Arabian Peninsula.” The Article does not use these latter terms as much, in an effort to isolate the specific geographic areas with geopolitical influence. It uses the term “Central Asia” to refer mostly to Afghanistan and Pakistan but also to Turkmenistan, Azerbaijan, Georgia, Armenia, Uzbekistan, Kazakhstan, and Kyrgyzstan. Other classifications could include “South Asia,” “Middle East,” “Near East,” or “Asia” but seem imprecise and do not highlight their proximity to War on Terror fighting and/or energy resources. Ultimately, this Article could use many potential indicators; surely all suffer from imprecision or perhaps over inclusion. Moreover, this Article uses “Persian Gulf” and “Central Asia” for sake of simplicity and internal consistency.

32. See discussion *infra* Part II.B.1.

33. COLÁS, *supra* note 16.

that serves foreign relations objectives of protecting expanding American influence,³⁴ economic interests overseas,³⁵ and perceived cultural superiority.³⁶ This Article provides legal, historical, and social science analysis to begin exploring how anomaly feeds imperial objectives in extraterritorial jurisdiction. These arguments are presented as preliminary hypotheses, as the Supreme Court,³⁷ Court of Appeals for the District of Columbia Circuit,³⁸ the District Court for the District of Columbia,³⁹ the Obama administration,⁴⁰ and Congress⁴¹ address complex legal issues about the base.⁴² The doctrine, theory, and context presented spark larger questions on how War on Terror lawmaking relates to spatial, economic, and cultural assumptions. Imperial objectives created the need for policies to detain nearly 800 persons over an eight-year period (even now as 174 men remain detained).⁴³ The base’s long legal history, coupled with a significant detention pro-

34. See discussion *infra* Part II.

35. See discussion *infra* Part II.B.2.

36. See discussion *infra* Part II.C.1.

37. See discussion *supra* note 7.

R

38. A court of appeals decided its first appeal of a Guantánamo habeas corpus proceeding in *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010). It also recently ruled on a habeas corpus appeal from a detainee held at Bagram in Afghanistan. *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

39. Del Quentin Wilber, *U.S. Appeals Court Wary of Habeas Corpus Challenge by Detainees in Afghanistan*, WASH. POST, Jan. 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/07/AR2010010703205.html>.

40. See generally Robert M. Chesney & Benjamin Wittes, *The Courts’ Shifting Rules on Guantánamo Detainees*, WASH. POST, Feb. 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/04/AR2010020403910.html> (explaining how the courts have had to fill gaps in the substantive law of detention because the Supreme Court has been silent and because Congress and the President provide minimal guidance); GUDE, *supra* note 28 (describing the challenges, created by all three branches, in ending detentions and administering habeas proceedings, criminal trials, and military commissions).

R

41. See GUDE, *supra* note 28.

R

42. Since *Boumediene*, the judiciary finds itself in the position of having to define the substantive norms and procedures to be used in GTMO habeas corpus proceedings. After the 2008 Supreme Court decision, the Executive and Congress have not clarified various legal issues concerning detention authority and the procedures for habeas corpus proceedings. Although the Obama administration began a review of detention practices and announced it would end base detention by the end of January 2010, detentions still continue. The administration explored relocating detainees to a former prison in Illinois, but these plans faced political resistance in Congress and popular discourse. For excellent descriptions of how the law of overseas detention must respond to policy and jurisprudential developments, see GUDE, *supra* note 28 and WITTES ET AL., *supra* note 9.

R

43. See *The Guantánamo Docket: Detainees Held*, N.Y. TIMES, *supra* note 13; see also *Names of the Detained*, WASH. POST, *supra* note 5.

R

R

gram, offers substantial material to start identifying how this legal anomaly—and legal anomalies in general—suits Empire.⁴⁴

While this Article's claims are neither conclusive nor based on extensive empirical analysis, they attempt to spur scholarly inquiry. More research is needed into the theory, doctrine, and context behind Empire, legal anomaly, extraterritorial authority, detention, and foreign relations in the War on Terror. This Article's greatest promise may not be in providing complete answers now. Instead, its value comes from posing larger questions on law and extraterritorial jurisdiction. This Article's conclusions—in Part I and the Conclusion—begin to pose these questions.

This Article makes three initial arguments. First, Guantánamo's anomaly facilitates flexible control of overseas territory by limiting public obligations to protect individual rights. This reflects Empire as space.⁴⁵ Inside the base and evident in detainee challenges, there is a degree of uncertainty or even permitted denial of constitutional and international law obligations. This uncertainty and denial creates a legal black hole.⁴⁶ In *Boumediene v. Bush*, the Court even comments on

44. Empire is intimate to the base's history. Cf. Helmut Rumpf, *Military Bases on Foreign Territory*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 381, 382–83 (Peter MacAlister-Smith ed., 1992) (describing Guantánamo's foundation during U.S. imperialism and explaining that such bases were the start of colonial expansion); Raustiala, *The Geography of Justice*, *supra* note 24, at 2545–46 (describing base creation and the present lease as “remnants of the age of empire”).

R

45. See COLÁS, *supra* note 16, at 31. This Article uses Yi-Fu Tuan's definition of “space.” Space is more abstract than “place.” Space represents “openness, freedom, and threat [of the unfamiliar],” while “place” concerns what “we get to know” and endow with value. YI-FU TUAN, *SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE* 6 (1977). As such, “Empire as space” refers to the potential abstract locations where American authority may rule and that require flexible and adaptable borders.

R

46. See Steyn, *supra* note 2. Smith, *supra* note 2. Hari M. Osofsky offers an elaborate discussion of “justice wormholes,” like black holes, as “governmentally-constructed links between legal spaces devoid of . . . procedural or substantive protection.” Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law*, 53 VILL. L. REV. 117, 117 (2008). For descriptions of black holes and the philosophy behind states of exception to the rule of law, see Noa Ben-Asher, *Legal Holes*, 5 UNBOUND: HARV. J. LEGAL LEFT 1 (2009), <http://www.legaleft.org/?p=188>. For an examination of how human rights treaties apply in extraterritorial settings, see Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739 (2005). For an analysis of how eliminating black holes or “grey holes” is impracticable, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 *passim* (2009). *But see* Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893 (2009) (presenting the danger in reasoning that “necessity” and national security emergencies require judicial deference, by relating War on Terror jurisprudence and policies with jurisprudence and policies during the Japanese-American internment during World War II).

R

turning the Constitution on or off at the base.⁴⁷ This aids expanding U.S. jurisdiction and control, while flexibly evading public limitations. Jurisprudence on extraterritorial authority, such as the *Insular Cases*⁴⁸ (1910–1920) and the Guantánamo cases (2004–2010), points to how overseas control benefits from these limits.⁴⁹ For both periods, American law has perceived extraterritorial authority as avoiding the checks that would apply domestically. In *Boumediene*, the Supreme Court affirmed that the Constitution’s Suspension Clause, including habeas corpus rights, “has full effect” on the base.⁵⁰ Jurisprudence since *Boumediene* solidifies a functional and flexible approach for determining if constitutional protections check authority overseas.⁵¹ This Article describes anomaly’s role in *Kiyemba v. Obama*, concerning Uighur detainees unable to leave the base,⁵² district court habeas proceedings since 2008, with ambiguity clouding issues such as detention authority and evidentiary matters,⁵³ and *Maqaleh v. Gates*, concerning similar proceedings for detainees in Afghanistan.⁵⁴ This evolving doctrine expands anomalies within extraterritorial authority. It functions as Empire as space.

Second, the base protects economic markets abroad. Historically, it bolstered “sphere of influence” objectives regarding Cuba, the Caribbean, and the Panama Canal.⁵⁵ This Article offers preliminary insight into GTMO’s effective role in current overseas market

47. *Boumediene v. Bush*, 128 S. Ct. 2229, 2236, 2259 (2008).

48. See generally Ernesto Hernández-López, *Guantánamo Outside and Inside the U.S.: Why is an American Base a Legal Anomaly?*, 18 AM. U. J. GENDER SOC. POL’Y & L. 471 (2010) (describing the *Insular Cases* as “empire as space”); Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba*, *supra* note 26, at 181–86 (examining how foreign sovereignty is similarly checked in the *Insular Cases* and War on Terror cases).

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

50. *Boumediene*, 128 S. Ct. at 2262 (referring to U.S. CONST. art. I, § 9, cl. 2). See generally Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537 (2010) [hereinafter Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*] (arguing *Boumediene* affirms that the Suspension Clause guarantees some judicial review, for citizens and non-citizens, against unlawful detention).

51. See discussion *infra* Part II.A.1.

52. See discussion *infra* Part II.A.2.

53. See discussion *infra* Part II.A.3.

54. See discussion *infra* Part II.A.4.

55. See generally BARTHOLOMEW H. SPARROW, *THE Insular Cases and the Emergence of American Empire* (2006) (describing the *Insular Cases* as providing a legal framework to support informal Empire, of which overseas military bases were a central component); Robert Freeman Smith, *Latin America, the United States and the European Powers, 1830–1930*, in *THE CAMBRIDGE HISTORY OF LATIN AMERICA: VOLUME IV C. 1870 TO 1930*, at 83–119 (Leslie Bethell ed., 1986) [hereinafter Freeman Smith] (describing the international rivalries and subsequent increase in involvement of the United States in Central America and the Caribbean, especially in planning for and protecting the Canal). Legal anomaly also

protections.⁵⁶ The base supports intelligence gathering needed for War on Terror efforts in the Persian Gulf and Central Asia. These regions are also of vital economic and strategic importance to the United States because of their energy resources or geographic proximity to such resources. Terrorists⁵⁷ threaten these markets directly by attacking the energy industry and indirectly by destabilizing regional states and global markets. Accordingly, terrorists threaten vital resource supplies for global energy demand. GTMO detentions are justified because they obtain intelligence to combat these threats. These threats are of explicit concern to national security, but they also disrupt the geopolitics of energy markets in the region. Government and public discourse contend that terrorism threatens national security and that this threat justifies an American military response and increased executive authority.⁵⁸ This Article does not deny that terrorism kills innocent civilians and threatens national security (both domestically and overseas), but it suggests material interests have enormous influences on U.S. foreign policy in the Persian Gulf and Central Asia.⁵⁹ It may be negligent for scholars to ignore regional geopolitics and resource challenges. The base's legal anomaly effectively subsidizes intelligence gathering—perhaps even outsources torture in its support—aiding economic objectives in the Persian Gulf and Central Asia. With an eye on geopolitics in these regions, GTMO's role in intelligence reflects the idea of Empire as markets.

characterized the U.S. Panama Canal Zone and the lease agreement with Panama. See Neuman, *Guantanamo Loophole*, *supra* note 4, at 15–23.

56. See discussion *infra* Part II.B.

57. President George W. Bush defined “terrorism” as “premeditated, politically motivated violence perpetrated against innocents.” THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/index.html> [hereinafter THE NATIONAL SECURITY STRATEGY].

58. This Article argues that the Bush and Obama administrations share much in common in terms of how the executive branch interprets what limits, if any, check its detention authority and extraterritorial authority. Concerning Afghanistan detentions, see Christopher Weaver, *Obama Administration On Detention Policy: What He Said*, PROPUBLICA, (Feb. 23, 2009, 5:31 PM), <http://www.propublica.org/article/obama-administration-on-detention-policy-what-he-said>. For an analysis of how Obama and Bush have very similar War on Terror policies and legal arguments, see Jack Goldsmith, *The Cheney Fallacy: Why Barack Obama is Waging a More Effective War on Terror than George W. Bush*, NEW REPUBLIC, (May 18, 2009, 12:00 AM), <http://www.tnr.com/article/politics/the-cheney-fallacy?id=1e733cac-c273-48e5-9140-80443ed1f5e2>.

59. See generally Leo Panitch & Sam Gindin, *The Unique American Empire*, in THE WAR ON TERRORISM AND THE AMERICAN ‘EMPIRE’ AFTER THE COLD WAR 24 (Alejandro Colás & Richard Saull eds., 2006) (presenting American Empire's objectives to protect global capitalism and to serve as global police for neo-liberal policies, increasing the importance of overseas military bases and intelligence).

Third, culturally the base promotes an ideology of American superiority with manipulations of sovereignty and consequential racial-based exclusions. American jurisdiction on the base is defined in reference to sovereignty, with Cuba denied full sovereignty.⁶⁰ Historically, international law explicitly used cultural reasoning to exclude certain populations from sovereignty. This is evident in the Treaty of Paris of 1898, ceding Cuba to the United States from Spain, and the Platt Amendment, requiring a U.S.-protector role and base in Cuba.⁶¹ Cubans as a Hispanic, black, and mixed-race population could not be fully sovereign or self-govern. With provisions specifically limiting Cuban sovereignty, the Platt Amendment and base agreements articulate these assumptions. Today, racial implications take the form of the denial of rights protections for detainees, because they are simultaneously outside U.S. and Cuban sovereignty. Some have argued constitutional rights only apply in U.S. sovereign territory and not in GTMO.⁶² Detention is primarily reserved for Central Asian, Middle-Eastern, or Arab identities.⁶³ Guantánamo reflects law’s cultural assumptions that Cuba could not be sovereign, with American superiority justifying a base for over a century. Cultural exclusions produced an overseas base. They now sustain detention inside it, reflecting GTMO’s contribution to Empire as culture.

Following this introduction, Part I of this Article offers a working definition of Empire, emphasizing material and cultural attributes. Colás’s approach of Empire as space, markets, and culture helps explain why the United States sought, kept, and used a base at Guantánamo. Colás’s theory provides material, political, and cultural

60. The Platt Amendment required Cuba to provide a base; GTMO became that base. An Act Making Appropriation for the Support of the Army for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Two, 31 Stat. 895, 897 (1901) [hereinafter Platt Amendment—U.S. Appropriations]. See generally Hernández-López, Boumediene v. Bush and Guantánamo, Cuba, *supra* note 26, at 153–67 (describing how the Platt Amendment began as a letter from Secretary of War Elihu Root, was included in congressional appropriations, an international treaty, and Cuban law, and checked Cuban sovereignty as a U.S. protectorate).

61. See discussion *infra* Part I.B; see also Hernández-López, Boumediene v. Bush and Guantánamo, Cuba, *supra* note 26, at 129–49.

62. See Brief for the Respondents at 14–24, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195 & 06-1196). Cf. *The Legal Basis for Detaining Al Qaida and Taliban Combatants*, U.S. DEPARTMENT DEF. (Nov. 14, 2005), www.defenselink.mil/news/Jul2007/Legal%20basis%20Guantanamo%20Detainees%20OGC%20FINAL.pdf. (reporting that there is “no question that under the law of war” the United States may detain persons “who have engaged in unlawful belligerence for the duration of hostilities, without charges or trial”).

63. See discussion *infra* Part II.C.

R

R

examinations of Empire throughout world history. The base's legal anomaly fits within larger foreign relations objectives.⁶⁴ Part I further presents interpretations of the United States as an empire in Latin American history and in the current War on Terror. Part II suggests that the base's legal anomaly serves current American Empire in terms of space, markets, and culture. Each subsection ends with a question concerning GTMO, law, and Empire. Subsection (A) describes GTMO's role in American expansion, which benefits from no defined limit or border. As such, extraterritorial authority may expand in spatial terms. With Guantánamo as a legal anomaly, the United States avoids constitutional and international checks on state power. Recent detention jurisprudence follows a flexible approach to limiting authority overseas. Subsection (B) explains how market protection was central to the base's purpose after 1898. Now, market protection stems from detention justified by intelligence gathering, which aids the geopolitics of energy security in the Persian Gulf and Central Asia. Subsection (C) offers a cultural reading of the base supporting American superiority. After 1898, Cuban sovereignty was checked by underlying cultural assumptions about the non-Anglo population. These assumptions led to the belief that an American base was required in Cuba. This is then compared with a discussion of de facto exclusions based on the nationalities of War on Terror detainees. This Article concludes by arguing that GTMO exemplifies Empire as space, markets, and culture. It suggests where lawyers, scholars, and policy makers may find Empire in the law's anomaly and evolving extraterritorial authority.

I. Empire in Expanding Authority, Market Protection, and Cultural Superiority

To identify the reasons for establishing and keeping a base in Cuba after 1898, this part describes a theory on Empire and the relevant history of foreign relations with Cuba and the region. This theory and context illuminate three things. First, they explain why an overseas presence was needed militarily, economically, and geopolitically and how this presence required anomaly. Second, this shaped norma-

64. For instance, while Cuba was a protectorate and the Guantánamo base was within Cuban territory, additional early century American protectorates included Haiti, the Dominican Republic, Nicaragua, and Panama. In Panama, the United States also had another base. Guantánamo provided strategic support for American military invasions in these states. *See generally* WALTER LAFEBER, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS VOL. II, THE AMERICAN SEARCH FOR OPPORTUNITY, 1865–1913*, at 150 (1993).

tive reasoning in plural sources of law. This includes international law (e.g., sovereignty and imperial influence for the United States and treaties with the United States, Spain, and Cuba), American constitutional law (e.g., checks or deference for political authority in foreign relations, economic policy, and territorial acquisition), and Cuban law (e.g., a new constitution). Third, this theory and history begin to show how culture, economics, and international politics crafted law’s role in GTMO’s anomaly and American extraterritoriality. These preliminary claims inform this Article’s methodology, used in Part II, of pinpointing law’s imperial role at GTMO. This context, along with the early arguments made, will hopefully inspire future inquiry into legal anomaly, extraterritorial authority, detention, and Empire.

A. Empire as Space, Markets, and Culture

This Article uses Alejandro Colás’s description that empires employ “combination[s] of territorial organization, modes of wealth creation and distribution, and dynamics of cultural self-understanding.”⁶⁵ In *Empire*, Colás provides a comparative analysis of empires, identifying how their social organization provides for a state “that successfully expands from a metropolitan centre across various territories in order to dominate diverse populations”⁶⁶ Colás builds on traditional definitions of empires, by examining how empires organize their political authority over territory, utilize markets in sustaining overseas rule, and develop cultural understandings for these needs.⁶⁷

Studying empires throughout world history (ancient, modern, and contemporary), Colás describes three required features for empires, labeled “Empire as Space,” “Empire as Market,” and “Empire as Culture.”⁶⁸ First, empires require flexible borders that are not closed or limited but rather are boundless.⁶⁹ For this, they use sophisticated notions of what is “inside” and “outside.”⁷⁰ Empires have “frontiers and boundaries, but no external borders,”⁷¹ and these frontiers act as

65. COLÁS, *supra* note 16, at 5.

66. *Id.* at 28.

67. *Id.* at 11.

68. *Id.* at *passim*.

69. *Id.* at 19; *see also* Introduction, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS, *supra* note 15, at 3 (describing how borders function as “contact zones between ideas, as spaces of ideological ambiguity” with potential for repression and liberation); José E. Alvarez, *Contemporary International Law: An ‘Empire of Law’ or the ‘Law of Empire’?*, 24 AM. U. INT’L L. REV. 811, 836 (2009) (emphasizing how Empire increasingly relies on power that is not just territorial).

70. COLÁS, *supra* note 16, at 19.

71. *Id.* at 19.

R

R

R

“fluctuating zone[s] of interaction between the imperial centre and its peripheries.”⁷² Empires require these flexible borders to justify how populations and territory outside the imperial center (metropole) are controlled. Accordingly, empires develop political and legal instruments to delineate with high sophistication what is outside and inside.⁷³ These assumptions in political organization function as Empire as space.

Empire as space develops slowly and incrementally. Historian Lauren Benton offers sophisticated descriptions of how empires use law and the concept of jurisdiction to bolster their power to govern extraterritorially. In *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*, she examines how European empires utilized evolving concepts of law and geography to support their territorial sovereign control.⁷⁴ With myriad examples, Dr. Benton expands upon how European territorial control was often fragmented even though these states claimed sovereignty over large intercontinental stretches of land. To govern these territories, empires developed irregular spaces of law over narrow bands and enclaves. This authority was most pronounced and effective over sea-lanes, rivers, settlement enclaves, trading posts, merchant roads, islands, and mountains.⁷⁵ The legal concepts of shared or partial sovereignty facilitated this kind of extended authority;⁷⁶ they were part of the “anomalies of empire.”⁷⁷ Benton explains how empires developed the legitimacy to govern extraterritorially from legal conflicts over issues such as piracy and martial law.⁷⁸ With protracted litigation in locations near the boundaries of authority overseas, the judiciary acted as a conduit for negotiating the values implicit in overseas authority.⁷⁹

72. *Id.* at 29.

73. Amy Kaplan explains how American Empire and expansion required the “collapse of boundaries between here and there” and “between inside and outside.” AMY KAPLAN, *THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE* 15 (1st Harv. U. Press paperback ed. 2005).

74. LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* (2009).

75. *Id.* at 8.

76. See generally Lauren Benton, *From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900*, 26 *LAW & HIST. REV.* 595 (2008) (analyzing how the challenges that arose from quasi-sovereignty led to imperial constitutional law with examples from late nineteenth century British rule in India and Southern Africa).

77. BENTON, *supra* note 74, at 29–31, 33.

78. *Id.* at 33–35, 112, 165.

79. See generally Lauren Benton, *Constitutions and Empires*, 31 *LAW & SOC. INQUIRY* 177 (2006) (describing an “imperial turn” in socio-legal scholarship and reviewing the following key issues: the ambiguity of territorial status, construction of legal subjecthood, and

With respect to Guantánamo, Empire as space refers to how American interpretations of extraterritorial jurisdiction assist political authority's expansion with minimal checks. Seen from a global lens, current control of the base serves American foreign relations far larger and independent of Cuba, the Caribbean, or regional proximity to the continental United States. In terms of legal conflicts presently arising from GTMO, detention jurisprudence serves to negotiate the legitimacy of extraterritorial authority. The most recent example is the creation and use of functional tests to determine if constitutional rights apply overseas, offering flexible reasoning to expand American control abroad.⁸⁰

Second, empires use the exchange of land, labor, and goods to economically exploit the periphery for the metropole's advantage.⁸¹ These motives and their implementation act as Empire as markets. Empires create administrative, legal, political, and military infrastructure to secure these resources abroad.⁸² As such, the relation between Empire as space and Empire as markets is mutually beneficial, protecting control of territory and resources.⁸³ Empires secure long-distance markets not just by exploitation overseas but also by systems of taxation, custom duties, privateering, and monopolies with particular public policies and private law instruments.⁸⁴ Central to this system is how empires use public institutions, legal relations, and political organization to protect markets in gold, oil, labor, manufactured goods, and for geopolitical control of sea and land. For GTMO, base detentions implicitly serve geopolitical and resource war interests in the Persian Gulf and Central Asia, proximate to or actually where detainees were

importance of imperial legal culture); LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900* (2002) (presenting how litigation in Empires' peripheries was vital to establishing legitimacy within Empire, drawing on examples from the Ottoman Empire, and the British in India, Africa, Oceania, and others); Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, 41 *COMP. STUD. SOC'Y & HIST.* 563 (1999), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=1962&jid=CSS&volumeId=41&issueId=03&aid=1961> (analyzing how colonial jurisdictional disputes helped shape the modern colonial state while, at the same time, responding to boundary conflicts).

80. See *infra* Part II.A.1.

81. COLÁS, *supra* note 16, at 71–72.

82. *Id.*

83. For examples of how the protection of overseas markets and the exercise of military power abroad reinforce each other, see NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

84. COLÁS, *supra* note 16, at 71.

R

R

captured.⁸⁵ Providing vital intelligence, detentions effectively help protect these overseas markets. This relationship between intelligence from detainees and market protection is consistent with arguments that the War on Terror serves American economic interests.⁸⁶

Third, empires develop cultural understandings—often racial, gendered, or religious—to justify why populations are subordinated and controlled by the metropole. This functions as Empire as culture. Empires use culture⁸⁷ and collective identity to reason why one population is subordinated and/or why another has authority. Colás describes how empires use the notion of civilization and the process of racialization to justify authority.⁸⁸ Civilization and racialization make sense of a person's place in the imperial order. Imperial authority classifies and makes detailed and distinct delineations between racial groups. These lead to contradictory norms, such as when legal orders claim universal liberal rights or popular sovereignty while preserving race-based exclusions. Over history, empires foster contradictory cultural understandings, with both exclusion and hybridity reinforcing Empire's ideology. Along these lines, a key feature of empires is collective identities and communal understandings about the larger

85. An Empire as markets argument, not advanced in this Article, is that detentions provide a function for GTMO and that, without detentions, the base may be closed. Under the Base Realignment and Closure (BRAC) program, military bases must serve a function in order to avoid closure. Because European and Cold War threats to the region no longer exist, the base needs a new function to avoid closure. See MICHAEL J. STRAUSS, *THE LEASING OF GUANTANAMO BAY* 124–25 (2009) (describing how, without detentions, the base provides limited military and strategic advantages); *Military: Base Realignment and Closure (BRAC)*, GLOBALSEcurity.ORG, <http://www.globalsecurity.org/military/facility/brac.htm> (last visited Aug. 5, 2010) (describing the BRAC program).

86. See generally GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM* 160–62, 223–37 (2006) (describing the political economics, private interests, foreign policy, and military support of American War on Terror policies); Bob Woodward, *Greenspan: Ouster of Hussein Crucial for Oil Security*, WASH. POST, Sept. 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/16/AR2007091601287.html> (reporting that the removal of Saddam Hussein from power in Iraq was “essential” for oil supply according to the former Chairman of the U.S. Federal Reserve); Michael T. Klare, *For Oil and Empire? Rethinking War with Iraq*, 102 CURRENT HIST. 129 (2003) (arguing that American interests in Iraq were based on the search for oil and are consistent with U.S. foreign policy in the region).

87. This Article uses William Rosberry's focus on culture and politics, economics, and history, examining cultural meanings and inequalities. Rosberry analyzes culture as developing from “social and political actors” having their actions formed “in part by preexisting understandings of the world, of other people, of the self,” and this is influenced by “social and political inequalities” and “historical formation.” WILLIAM ROSEBERRY, *ANTHROPOLOGIES AND HISTORIES: ESSAYS IN CULTURE, HISTORY, AND POLITICAL ECONOMY* 13–14 (3d paperback prt. 1994). Accordingly, history and political economics affect “actors' differential understandings of the world, other people, and themselves.” *Id.*

88. See *id.* at 26.

world. As described below, Empire as culture for GTMO refers to two elements. The base is the product of racially influenced legal reasoning (i.e., American superiority requiring a base in the Cuban protectorate). Then, at this location—produced by cultural exclusion—War on Terror detention discriminates by detainee nationality. Early examinations of detainee databases suggest this.⁸⁹

These theoretical insights on space, markets, and culture complement interdisciplinary definitions of Empire. Postcolonial scholar Edward Said defined imperialism as “the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory.”⁹⁰ Historian, Michael Doyle described Empire as “a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining an empire.”⁹¹ Colás’s approach, like Amy Kaplan’s in *The Anarchy of Empire in the Making of U.S. Culture*,⁹² attempts to examine the interrelations and exchange of ideas, political authority, resources, and culture between Empire’s center and expansion. The benefits of such approaches are twofold. Territorial, economic, and cultural analyses are included, thereby not limiting explanations to just one cause. Next, Empire is examined as a process not solely domestic or foreign but instead significantly created by reactions to what is perceived overseas. Accordingly, Empire’s metropole, the United States, is not divorced from studying events and actors abroad and vice versa.

Colás’s description of Empire as space, market, and culture structures this Article’s inquiry into how GTMO’s legal anomaly is an imperial objective in U.S. foreign relations. Starting in 1898, and without any projected end, the United States has occupied this territory surrounding a deep-water bay patrolling a major entry into the Caribbean. With changing military and political objectives, base occupation has bolstered American expansionary goals in territorial, economic, and ideological terms.

89. See discussion *infra* Part II.C.2.

90. EDWARD W. SAID, *CULTURE AND IMPERIALISM* 9 (1st Vintage Books paperback ed. 1994). Said distinguishes imperialism from colonialism, the latter of which is a consequence of Empire implanting settlements in distant territory. *Id.* at 9.

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

92. Kaplan explains how scholarly definitions of Empire rely on state power deterritorializing authority from political annexation and its inherent ambiguity or ambivalence. KAPLAN, *supra* note 73, at 13–16.

Taking legal analysis beyond doctrinal normativity and the context of base creation, these identifications explain why extraterritorial authority benefits from legal anomaly. This Article broadens a study of Empire and avoids examinations that may be solely material or cultural.⁹³ Stated simply, culture, economics, and political organization over territory are all influential for Empire. Importantly, Colás focuses on three features to highlight how material (i.e., markets and state involvement in), political (i.e., geographic organization of authority), and cultural (i.e., collective understanding of the larger world) factors all contribute to Empire. This identifies how material and cultural factors inspire and sustain Empire.⁹⁴

B. U.S. Empire in the Western Hemisphere and the War on Terror

For the nineteenth and twentieth century, U.S. foreign relations with the Western Hemisphere have been described as the story of Empire-building: first, in the name of Manifest Destiny, the United States exercised continental expansion over Mexican and Native American territory; in the years following 1898, the United States extended its reach beyond the continent with the colonies of Puerto Rico, Guam, Virgin Islands, and the Philippines; finally, during the twentieth century, the United States employed “soft power,” using military interventions and economic dependence.⁹⁵ While a plethora of disciplinary

93. See generally Susan Marks, *Empire's Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 449 (2003) (emphasizing the cultural, economic, and political aspects of Empire).

94. Material and cultural explanations of Empire and the War on Terror are also explored in Alejandro Colás & Richard Saull, *Introduction*, in *THE WAR ON TERRORISM AND AMERICAN 'EMPIRE' AFTER THE COLD WAR*, *supra* note 59, at 1.

95. See generally *EMPIRE AND DISSENT: THE UNITED STATES AND LATIN AMERICA* (2008) (describing how the history of U.S.-Latin American relations, with formal and informal Empire, provides a base for current “soft power”); Joshua Gedacht, *Mohammedan Religion Made it Necessary to Fire: Massacres on the American Imperial Frontier from South Dakota to the Southern Philippines*, in *COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE* 397–409 (Alfred W. McCoy & Francisco A. Scarano eds., 2009) (explaining how U.S. Army leadership from the 1890s to 1920s drew inspiration for war efforts in the Philippines from the American West struggle against “savages”); GRANDIN, *supra* note 86 (describing how American Empire, informal Empire, and “soft power” characterize U.S.-Latin America relations); Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 139 (Richard Delgado & Jean Stefancic eds., 1997) (presenting how after the 1850s, arrogance, sense of duty, and racism fueled American expansion ideals); Freeman Smith, *supra* note 55, at 93–98 (presenting increasing American influence in political, economic, and legal terms in the region); Walter L. Williams, *United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism*, 66 *J. AM. HIST.* 810 (1980) (relating the concepts of American duty and the depiction of native cultures as savage to the continental expansion westward, the War of 1898, and Philippine resistance).

R

R

R

approaches present sophisticated analytical tools, the simple claim that this foreign relations history represents Empire remains easily discounted in American political, public, and scholarly discourses.⁹⁶ Historical views of the American Revolutionary War combating old world empires, two centuries of constitutionalism, military involvement overseas in wars of liberation and decolonization (at times), Cold War framing of the Soviet Union as “the empire,” and faith in the neutrality of free trade economics, capitalism, multilateralism, and treaties explain this doubt. Despite this, American foreign relations history has spawned legal doctrine, institutions, territorial control, military power, economic capacities, and ideologies of democratization consistently supporting overseas involvement for American self-interest.⁹⁷ GTMO’s role in the War of 1898, gunboat and dollar diplomacies (1900s-1930s), Cold War, 1990s refugee crisis, and War on Terror affirm this.

Interdisciplinary scholarship on U.S. foreign relations provides rich and varied analytical frameworks, inspiring questions about how law and empire-building are mutually reinforcing. Historian William Appleman Williams’s *Tragedy of American Diplomacy* explains how economic objectives, accompanied by military means to enforce them and the willingness to impose American ideals abroad, masked as foreign policies’ “neutrality,” initiated with the “Open Door” policy of the 1890s.⁹⁸ The idea that economic frontiers were not coextensive with territorial frontiers encapsulated Williams’s perspective on American Empire’s expansion during the fall of formal European colonialism and consequent decolonization, two world wars, and the Cold War.⁹⁹

96. See Edward P. Crapol, *Coming to Terms with Empire: The Historiography of Late-Nineteenth Century American Foreign Relations*, 16 *DIPLOMATIC HIST.* 573, 573–97 (1992); Amy Kaplan, *Violent Belongings and the Question of Empire Today*, *Presidential Address to the American Studies Association, October 17, 2003*, 56 *AM. Q.* 1 (2004); Emily S. Rosenberg, “The Empire” Strikes Back, 16 *REVS. AM. HIST.* 585 (1988); Louis A. Pérez, Jr., *1898 and Beyond: Historical Variations on War and Empire*, 65 *PAC. HIST. REV.* 313, 314 (1996) (book review); John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 *HARV. L. REV.* 754, 756 (2006) (book review).

97. See generally NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW* (2010) (examining how American interpretations of international and constitutional law, since independence to the present War on Terror, seek to exclude American power from rights protections and limits and capitalize on fear mongering and cultural exclusions).

98. WILLIAM APPLEMAN WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* 191 (3d ed. 1972).

99. Lloyd C. Gardner, *Foreword* to WILLIAM APPLEMAN WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY*, at ix, x (paperback ed. 2009).

Cultural analysis has deepened Empire studies by presenting the influence of ideology, negotiation, resistance, gender, race, and by explaining how these concepts are not solely binary in nature (i.e., insider/outsider, domestic/foreign, or elite/popular).¹⁰⁰ The cultural turn and interdisciplinary suggestions from Gilbert Joseph, Laura Stoler, Emily Rosenberg, Amy Kaplan, Donald Pease, and others become particularly illuminating, since social sciences, area studies, and international law disciplines were byproducts of prior imperial efforts.¹⁰¹ Analytical tools of these disciplines may either ignore Empire's negative effects or, instead, justify them.

Empire heavily characterizes U.S. relations with Latin America. This is extremely relevant to GTMO, since the base was the result of American foreign policies applied throughout the region. Historian Louis A. Pérez, Jr. provides myriad descriptions of U.S.-Cuba relations as imperial, examining policy developments for the pre- and post-1898 period, Americans' cultural assumptions about Cuba and their influence on foreign policy, and the same for Cubans and the Cuba-U.S.

100. Gilbert Joseph suggests thinking of foreign relations not solely as dichotomies that are either "local" or "foreign" but instead blurring boundaries in U.S.-Latin American "contact zones." Gilbert M. Joseph, *Close Encounters: Toward a New Cultural History of U.S.-Latin American Relations*, in *CLOSE ENCOUNTERS OF EMPIRE: WRITING THE CULTURAL HISTORY OF U.S.-LATIN AMERICAN RELATIONS* 3, 15–16 (Gilbert M. Joseph et. al. eds., 1998). Influenced by microhistory, race analysis, and gender and cultural studies approaches, this is achieved by restoring the agency of actors in "history from the bottom up." *Id.* at 15.

101. Cf. Courtney Johnson, *Understanding the American Empire: Colonialism, Latin Americanism, and Professional Social Science, 1898–1920*, in *COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE*, *supra* note 95, at 175. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 3–4 (2005) (describing a "civilizing mission" focused on finding "cultural difference" that animated international law since its inception); EMILY S. ROSENBERG, *FINANCIAL MISSIONARIES TO THE WORLD: THE POLITICS AND CULTURE OF DOLLAR DIPLOMACY, 1900–1930* (2003) (analyzing U.S. strategies related to managing foreign states' financial and economic policies, spreading American values, avoiding military interventions, and creating a conceptual base for the Bretton Woods system); EMILY S. ROSENBERG, *SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC AND CULTURAL EXPANSION, 1890–1945* (1982) (presenting how American economic values and culture inspired both overseas expansion and conformity abroad from 1890 through 1945); *CULTURES OF UNITED STATES IMPERIALISM* (Amy Kaplan & Donald E. Pease eds., 1993) (presenting how Empire characterizes, and more importantly, is absent in the traditional study of American foreign relations); *HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY* (Ann Laura Stoler ed., 2006) (emphasizing the intimate instances of Empire in U.S. history); Edgardo Lander, *Ciencias Sociales: Saberes coloniales y eurocéntricos*, in *LA COLONIALIDAD DEL SABER: EUROCENTRISMO Y CIENCIAS SOCIALES PERSPECTIVAS LATINOAMERICANAS* 11 (Edgardo Lander ed., 2005) (describing how the social sciences have presented objective, neutral, and scientific positions in support of eurocentric power).

foreign policy.¹⁰² Before the Cold War, U.S. foreign relations with Latin America included legal mechanisms such as military interventions, occupation, protectorates, fomenting secession, and forced treaties under the international law guise of the Monroe Doctrine and the Roosevelt Corollary.¹⁰³ In the 1960s and 1970s, Latin American social scientists the *dependencistas* (dependency school) argued that center or metropolitan powers, such as the United States, exploited the resources, labor, and political regimes of the periphery, like in Latin America.¹⁰⁴ The mechanisms mentioned helped this exploitation. Lars Schoultz presents how from the early nineteenth century to the post-Cold War, U.S. foreign policies assume Latin Americans are beneath the United States.¹⁰⁵ While these assumptions have existed since American independence, they are articulated in evolving terms. Historically in U.S.-Latin American relations, assumptions of superiority-inferiority are expressed in terms of Catholicism, Anglo-Saxonism, racial make-up, democratic governance, and economic instability.¹⁰⁶ In this history, U.S. foreign policies have consistently protected self-interest in terms of American security, domestic politics, and economic gain.¹⁰⁷

102. See LOUIS A. PÉREZ, JR., *CUBA IN THE AMERICAN IMAGINATION: METAPHOR AND THE IMPERIAL ETHOS* (2008) (arguing that U.S.-Cuba policy is consistently shaped by an imperial ethos, viewing Cuba as childlike, female, weak, racialized, and ungrateful); LOUIS A. PÉREZ, JR., *CUBA AND THE UNITED STATES: TIES OF SINGULAR INTIMACY* (3d ed. 2003) (using President William McKinley’s reference to the “ties of singular intimacy,” between U.S. and Cuban destinies, to examine the diplomatic challenges posed by the two neighbors); LOUIS A. PÉREZ, JR., *ON BECOMING CUBAN: IDENTITY, NATIONALITY, AND CULTURE* (1999) (presenting how the United States played a significant role in the formation of Cuban national identity for the 1850–1959 period); LOUIS A. PÉREZ, JR., *CUBA UNDER THE PLATT AMENDMENT, 1902–1934* (1986) (presenting how the Platt Amendment checked Cuban sovereignty and independence maintaining many colonial attributes after 1898).

103. See Freeman Smith, *supra* note 55, at 83–119.

104. See generally FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (Marjory Mattingly Urquidí trans., 1979) (presenting the dependency theory, comprised of historic, economic, political, and foreign relations analysis, to explain why Latin America is underdeveloped). While the “center” and “periphery” categories were introduced by Raul Prebisch, who was not a *dependecista*, such theorists include Fernando Henrique Cardoso, André Gunder Frank, and Theotonio dos Santos. For summaries of the dependency theory in terms of U.S. foreign relations, world systems, and imperial theory, respectively, see Joseph, *supra* note 100, at 3–46; Steve J. Stern, *Feudalism, Capitalism, and the World-System in the Perspective of Latin America and the Caribbean*, 93 AM. HIST. REV. 829, 834–37 (1988); Patrick Wolfe, *History and Imperialism: A Century of Theory, from Marx to Postcolonialism*, 102 AM. HIST. REV. 388, 393–97 (1997).

105. LARS SCHOULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* (1998).

106. See *id.* at xv, 5.

107. See *id.* at xv.

R

R

The United States retains an imperial influence over its neighbors.¹⁰⁸ Greg Grandin identifies the powerful relation between the War on Terror in the Middle East and Central Asia and U.S.-Latin American policy from the late nineteenth century to the present.¹⁰⁹ Latin America is the United State” testing ground for later policies. Grandin charts American support of free trade, military interventionism, corporate interests, death squads, and missionary idealism. Substantial commonality exists in what was done first in the twentieth century in the Caribbean and Central America and throughout the hemisphere during the Cold War and post-Cold War with the Washington Consensus. They serve as blueprints for what was done later in Vietnam, Iraq, and Afghanistan. I have argued that U.S. occupation of GTMO and historic foreign policies in the region have much in common with current War on Terror jurisprudence.¹¹⁰

More globally, scholars argue that the American role in the War on Terror reflects an Empire. Public discourse raises this claim when referring to combat in Iraq and Afghanistan, superpower status, economic size, overseas influence, and American exceptionalism regarding multilateral obligations, international law, and human rights.¹¹¹ Historian and former U.S. Army Colonel Andrew J. Bacevich makes this argument after examining foreign, military, and economic policies and their domestic cultural influence.¹¹² He argues that Empire is based on American objectives of “openness” seeking to remove barriers for the “movement of goods, capital, people, and ideas” and “fostering an integrated international order conducive to American interests, governed by American norms, regulated by American

108. For a comparative analysis of Empire in U.S.-Latin American relations, see *EMPIRE AND DISSENT: THE UNITED STATES AND LATIN AMERICA*, *supra* note 95. Of particular appeal is the “Reader’s Guide” and “Timeline of Key Events,” which starts with the 1823 proclamation by President James Monroe, spans the hemisphere, and last lists the 2007 developments in Venezuelan constitutional reforms. *Id.* at ix–xvii.

109. GRANDIN, *supra* note 86, at 6–9.

110. Hernández-López, Boumediene v. Bush *and* Guantánamo, Cuba, *supra* note 26, at 129–49.

111. See generally *EMPIRE’S LAW: THE AMERICAN IMPERIAL PROJECT AND THE “WAR TO REMAKE THE WORLD”* (Amy Bartholomew ed., 2006) (critiquing U.S. unilateralism in the War on Terror as a demonstration of Empire); Tony Judt, *Dreams of Empire*, 51 N.Y. REV. BOOKS, Nov. 4, 2004, available at <http://www.nybooks.com/articles/archives/2004/nov/04/dreams-of-empire/> (reviewing nine books on American Empire, global power, and the War on Terror); Paul Krugman, *White Man’s Burden*, N.Y. TIMES, Sept. 24, 2002, <http://www.nytimes.com/2002/09/24/opinion/white-man-s-burden.html>. For a sympathetic view of Empire, see Niall Ferguson, *Hegemony or Empire?*, FOREIGN AFF., Sept.–Oct. 2003 (book review) (presenting the difference between American and British views of Empire).

112. ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY* 3 (2002) [hereinafter BACEVICH, *AMERICAN EMPIRE*].

R

R

R

power, and, above all, satisfying the expectations of the American people for ever greater abundance.”¹¹³ Consistently since World War I, these objectives are presented as security for capitalism and democracy but more realistically represent the American need to influence and dominate. Military policies support these objectives by seeking international order and promoting U.S. interests with technical and logistic superiority stretched across the globe. Domestically, Americans are seduced by militarism and interventions overseas, remaking the world safe for free trade and democratic values.¹¹⁴ Military leadership, neoconservatives, popular culture, evangelical Protestants, and policy analysts foster this militarism with utopian justifications, downplaying strategic motives.¹¹⁵ Cultural notions of the good life and freedom—easy credit, abundant oil, and cheap goods—create a need for U.S. empire building in foreign, military, and economic terms.¹¹⁶

Following these theoretical suggestions on Empire as space, markets, and culture and the history of Empire in American foreign relations, this Article describes the base at Guantánamo as a manifestation of Empire. Empire’s main elements—spatial expansion, market protection, and cultural superiority—intimately relate to Guantánamo’s creation and current detentions. Imperial motives created the need for a detention program. Similarly, imperial approaches in the law’s extraterritorial application supplement the base’s legal anomaly. This anomaly is not an aberration but a traditional and persistent objective of American foreign relations. The base’s history plus eight years of detention elucidate these points. With suggestions from social theory and history, the law is examined as an instrument to justify overseas authority. Law as applied to GTMO suggests that anomaly sustains extraterritorial expansion. This expansion relies on spatial, economic, and cultural assumptions. Part II relates this general claim to more specific historic and current examples of GTMO’s role in Empire’s space, markets, and culture.

113. *Id.* at 88.

114. *See generally* ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005) [hereinafter BACEVICH, *THE NEW AMERICAN MILITARISM*].

115. *See generally* ANDREW J. BACEVICH, *THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM* 6, 9 (2008) [hereinafter BACEVICH, *THE LIMITS OF POWER*] (presenting the crisis of American Empire as one of “profligacy,” characterized by three interlocking crises: economic and cultural, political, and military).

116. *See generally id.*

II. GTMO’s Anomaly: In the Service of Space, Markets, and Culture

This Article expands upon Guantánamo’s legal anomaly, often referred to as a legal black hole.¹¹⁷ News accounts, policymakers, legal disputes, and legal scholarship on GTMO comment on how detainees have individual rights protections and/or how the executive’s detention authority benefits from deference that is unchecked by any rights protections. The base’s legal anomaly produces these issues.¹¹⁸ This anomaly is historic, intentionally crafted, and sustained by U.S. foreign relations.¹¹⁹ Incidents of Empire produced the United States’ first base overseas—located within the sovereign territory of Cuba as a U.S. protectorate. Amidst a new informal Empire in the Caribbean, Central America, and the Pacific Ocean, imperial motives regarding the spatial expansion of American authority, market protection overseas, and cultural superiority resulted in the establishment of this base after the War of 1898.¹²⁰ This part elaborates on similar imperial motives and approaches to Guantánamo’s current detentions.¹²¹

A. Expanding Space and Flexible Borders in *Boumediene* and Beyond

Extraterritorial jurisprudence on base detention effectively affirms that political authority may expand overseas with limited checks.

117. See Steyn, *supra* note 2.

118. See generally Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba*, *supra* note 26; Raustiala, *The Geography of Justice*, *supra* note 24; Neuman, *Guantanamo Loophole*, *supra* note 4.

119. See generally Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba*, *supra* note 26.

120. See generally COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE, *supra* note 95 (describing how the experiences of informal Empire in Cuba, Puerto Rico, Philippines, and Guam contributed to governance methods domestically and overseas).

121. The Alabama Law Review published a series of articles on Empire’s influence on law, as part of the Meador Lectures on Empire 2007–2008. For this, Daniel Hulsebosch describes Empire, Anglo legal concepts, and book circulation in the late eighteenth century. Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009). José Alvarez presents the similarities between Empire and modern international investment law. José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?*, 60 ALA. L. REV. 943 (2009). Herbert Hovenkamp examines Empire and law supporting innovation and intellectual property. Herbert Hovenkamp, *Innovation and the Domain of Competition Policy*, 60 ALA. L. REV. 103 (2008). Michele Goodwin analyzes Empire and law’s treatment of human organs for donation and sale. Michele Goodwin, *Empires of the Flesh: Tissue and Organ Taboos*, 60 ALA. L. REV. 1219 (2009). For an introduction, see Michael S. Pardo, *Empire*, 60 ALA. L. REV. 1209 (2009).

R
R
R
R
R

Profiting from expanding authority, Guantánamo reflects Empire as space.¹²² With the legal doctrine on extraterritorial jurisdiction that developed historically in the *Insular Cases* and recently with *Boumediene*, military authority and political deference on the base benefit from functional approaches to determining how to limit political authority at GTMO. As such, checks on base authority exist only if they are practically applicable or easily implemented.¹²³ Like Empire

122. For more sophisticated examinations of the mutual influences between law and space, see Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 *YALE J. INT'L LAW* 421 (2007), which argues that international law should incorporate geographic analysis on the scale of decision-making and relevance of space, place, and time; Keith Aoki, *Space Invaders: Critical Geography, the “Third World” in International Law and Critical Race Theory*, 45 *VILL. L. REV.* 913 (2000) (presenting how geography and critical race theory illustrate that space and place are not neutrally determined before the law); Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 *SANTA CLARA J. INT'L L.* 525 (2007) (presenting how Empire's history is critical to development of international law and geography as disciplines); Tayyab Mahmud, *Colonial Cartographies and Postcolonial Borders: The Unending War In and Around Afghanistan*, 20 *BROOK. J. INT'L L.* (forthcoming 2010) (presenting the current Afghanistan conflict and the Durand line between Pakistan and Afghanistan, a contested border devised by imperial rivalries in the nineteenth century, as benefiting from exclusionary constructs in international law, geography, and geopolitics); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* 200–18 (Nicholas Blomley et. al., eds., 2001) (describing how the concept of jurisdiction, by creating territorial identities and territorializing social relations, serves institutional purposes such as promoting or legitimizing social injustice, illegitimate hierarchy, and economic inequality).

123. In *Boumediene*, the Court explained that extending constitutional habeas corpus to the base depended on whether administering proceedings were “impracticable or anomalous.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)). To make this determination six factors were relevant: (1) the detainee's status as an “enemy alien”; (2) whether the detainee has been in or resided in the United States; (3) whether the detainee was captured outside U.S. territory and held in military custody as a prisoner of war; (4) whether the detainee was tried and convicted by a Military Commission outside U.S. territory; (5) whether the detainee committed offenses outside the United States against the laws of war; and (6) whether the detainee is at all times imprisoned outside the United States. *Id.* at 2259. The Court found three factors relevant to detainees at Guantánamo: (1) detainee's citizenship and status, coupled with the “adequacy of the process” regarding status determination; (2) nature of the apprehension and detention sites; and (3) “practical obstacles inherent” in the detainee benefiting from the writ. *Id.* This has been labeled as a functional test. Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009); Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 *S. CAL. L. REV.* 259, 259–60 (2009) [hereinafter Neuman, *The Extraterritorial Constitution*] (arguing *Boumediene* confirms the “functional approach” to extraterritorial application of constitutional rights); Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 *IOWA L. REV.* 445 (2010) (describing *Boumediene* as presenting a new separations of power theory to increase judicial review and providing force to a new common law of habeas corpus); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 *COLUM. L. REV.* 579, 579 (2010) (arguing the Court's use of habeas corpus in the War on Terror cases represents “timeless” questions about the role of courts in constitutional ordering).

as space, as described by Colás, this permits a metropole power to rule abroad without precise limits or definite borders. For GTMO, extra-territorial jurisprudence permits American authority to expand beyond domestic borders.¹²⁴ Kal Raustiala describes debates about detentions in Guantánamo as questioning a “legal spatiality,” which is the supposition that law and legal remedies are tied to territorial location.¹²⁵ Since 2004, Supreme Court decisions reflect this condition of legal anomaly on the base.¹²⁶ Anomaly was initially articulated in the 1903 lease agreement with Cuba affirming American control and jurisdiction without sovereignty, confirming Empire as space. Though called a legal black hole, GTMO is more precisely a black hole when constitutional rights on the base are “impracticable and anomalous.”¹²⁷ As such, GTMO benefits from implicit Empire as space in American jurisprudence on extraterritorial detention.¹²⁸

This subsection argues two points. First, anomaly provides Empire a way to avoid limits for overseas authority, effectively approving expanding territorial control. Second, legal developments since *Boumediene*, which affirmed that constitutional habeas corpus rights apply on the base,¹²⁹ suggest anomaly still clouds extraterritorial ap-

124. Stephen I. Vladeck describes the opinion of the Court in *Boumediene* as relying on a separation of powers analysis, but the question before the Court regarded the geographic scope of the Suspension Clause. Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009).

125. Raustiala, *The Geography of Justice*, *supra* note 24, at 2502–03. See generally KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 5 (2009) (relating GTMO debates to questions about whether U.S. law is congruent with U.S. sovereign territory). R

126. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 480–84 (2004) (finding the federal habeas corpus statute applies to the base because it is, for practical purposes, within U.S. jurisdiction); see also *id.* at 487 (Kennedy, J., concurring) (arguing the base is “in every practical respect a United States territory”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84 (2006) (finding base specific jurisdiction-stripping provisions from the Detainee Treatment Act of 2005 as inapplicable). But see *Rasul*, 542 U.S. at 500–01 (Scalia, J., dissenting) (stating Cuba’s sovereignty is a bar to extraterritorial application of habeas rights on the base).

127. *Boumediene*, 128 S. Ct. at 2255–56 (citing *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

128. Importantly, the United States does not have a Status of Forces Agreement (SOFA) regarding Guantánamo, as it does with most overseas bases. Instead, U.S. base occupation is a legal legacy from the Platt Amendment and the War of 1898. In theory, many of the jurisdictional disputes regarding detention may have been resolved by referring to host state and U.S. agreements in a SOFA. As such, other overseas bases may present jurisdiction issues less anomalous than GTMO. See Neuman, *Guantanamo Loophole*, *supra* note 4, at 39; Raustiala, *The Geography of Justice*, *supra* note 24, at 2511–12 (describing the base at Guantánamo and the bases in Iraq as the only U.S. bases in foreign territories without SOFAs). R

129. *Boumediene*, 128 S. Ct. at 2262, 2274.

proaches to detention. This first argument is made in subsection (1) showing how *Boumediene*'s functional test—determining when habeas corpus rights apply overseas—provides a flexible way to extend American authority overseas. Subsections (2), (3), and (4) describe the second argument. Subsection (2) presents how litigation in *Kiyemba v. Obama*—remanded by the Supreme Court to the court of appeals—addresses legal anomaly regarding court powers to release GTMO detainees. Subsection (3) describes how anomaly pervades district court habeas proceedings since *Boumediene*, especially regarding essential legal matters such as the scope of detention authority and what evidence is permissible. As suggested in *Maqaleh v. Gates*,¹³⁰ subsection (4) describes how flexible approaches to constitutional checks on extraterritorial authority also apply to detentions in Afghanistan.

The base, plus legal interpretations of extraterritorial authority, provides flexibility vital for military control of an overseas location. Guantánamo becomes a space outside the domestic continent but within American control. Historically, expansion and flexible control were needed for this overseas base to protect regional influence, territorial acquisitions, and regional investments. Since 2002, this flexible control supports detention, distanced from checks known to apply domestically and in third states. Base anomaly is expressed in American law on extraterritoriality.¹³¹ Kal Raustiala explains how extraterritoriality, through colonialism or state consent and with military or regulatory objectives, seeks to manage legal differences between sovereignties.¹³² Amy Kaplan describes how American Empire and its overseas expansion relied on “ambiguous spaces that were not quite foreign nor domestic,” and deterritorialization—permitting “military, economic, and cultural power divorced from political annexation.”¹³³

Judicial interpretations of the Constitution and international law in the *Insular Cases* and the War on Terror cases point to this flexibility in extraterritorial authority.¹³⁴ These cases affirm flexible control

130. *Maqaleh v. Gates*, 605 F.3d 84, 93–96 (D.C. Cir. 2010).

131. Using a comparative analysis of U.S., Canadian, and United Kingdom jurisprudence on extraterritorial rights in detention and interrogation of terrorism suspects, Chimène I. Keitner characterizes legal approaches as: (1) “country-based,” which uses a strict territorial reasoning; (2) “compact-based,” which emphasizes an individual’s entitlement to a right; and (3) “conscience-based,” which seeks to limit a state’s actions in light of national values. Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480886.

132. RAUSTIALA, *supra* note 125, at 6–7.

133. KAPLAN, *supra* note 73, at 15.

134. Before *Boumediene*, Gerald L. Neuman described four stages for how American law determined if the Constitution applied to territories within its sovereignty: (1) from 1789

overseas in two ways. First, they endorse overseas authority. The locations in question are not part of any state within the United States. This severs popular sovereignty and constitutional authority from territorial control and supports political authority with limited rights protection. Second, these cases clarify that when governing overseas, the political branches are less encumbered. As such, the Executive—the military in GTMO cases and customs collection in the *Insular Cases*—may operate free from many domestic constitutional checks. The *Insular Cases* concern the spoils of the War of 1898—extraterritorial governance of Guam, Puerto Rico, and the Philippines. The United States occupied Cuba from 1898 to 1902.¹³⁵ Then, the Platt Amendment checked Cuban sovereignty and facilitated American interference in Cuban sovereign powers.¹³⁶ The Platt Amendment required Cuba sell or lease lands to the United States for a base, which resulted in GTMO.¹³⁷ Avoiding constitutional checks and tempering foreign sovereignty, the Platt Amendment like the *Insular Cases* justified and supported Empire as space by providing flexible and adaptable legal reasoning to geographically expand authority.¹³⁸

1. *Boumediene’s* Functional Test Flexibly Extends Empire’s Space

A century later in *Boumediene*, the Court similarly characterizes constitutional authority over GTMO as flexible, requiring base detention be subject to habeas proceedings, as long as they are not “imprac-

to the early nineteenth century, when the issue was not consistently settled; (2) from the middle to the end of the nineteenth century, when constitutional limitations were applied in territories and states; (3) beginning with the *Insular Cases* in 1901 until the 1950s, with distinctions drawn between incorporated and unincorporated territories, where in the latter only fundamental constitutional limitations apply; and (4) from the 1950s until recently, when in some instances courts recognized constitutional limitations apply outside U.S. boundaries. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 72–94 (1996); Neuman, *Guantanamo Loophole*, *supra* note 4, at 5–15.

135. SPARROW, *supra* note 55, at 34.

136. See Platt Amendment—U.S. Appropriations, *supra* note 60; see generally Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba*, *supra* note 26, at 129–49.

137. Platt Amendment—U.S. Appropriations, *supra* note 60, art. VII.

138. See generally EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES’ NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006) (examining how the *Insular Cases* provided American law the constitutional and international legal authority to expand during the twentieth century in the Pacific with colonies in Guam, American Samoa, the U.S. Virgin Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Northern Mariana Islands); SPARROW, *supra* note 55 (examining the *Insular Cases* individually, their historical legacy, national socio-economic context, and consequential importance in supporting an informal Empire).

R

R

R

R

R

R

licable and anomalous.”¹³⁹ The Court fashioned a functional test to determine which constitutional provisions apply to this overseas location under American control.¹⁴⁰ It affirmed many doctrinal points regarding habeas developing since the 2001 decision, *INS v. St. Cyr*.¹⁴¹ In *Boumediene*, the provision was the writ of habeas corpus part of the Suspension Clause, used to contest illegal detention.¹⁴² The functional test examines three things: (1) the detainee’s citizenship, the detainee’s status, and the adequacy of the process through which that status determination was made; (2) the nature of the apprehension and detention sites; and (3) the practical obstacles inherent in resolving the detainee’s entitlement to the writ.¹⁴³ Citing *Insular Cases* precedent and following their reasoning, the Court held that the Constitution applies overseas but that not all of its provisions extend.¹⁴⁴ The Court says this despite the fact that the United States lacks de jure sovereignty over base territory. The Court explains that for all practical purposes the United States has de facto sovereignty and that no other sovereign controls the base.¹⁴⁵ It reasons that neither Congress nor the Executive has the power to turn off the Constitution.¹⁴⁶

While the decision was a fourth Supreme Court victory for detainees and limited detention options, it continues anomalous trends in determining Guantánamo’s legal status. Moreover, it does the same for American law on extraterritorial authority. The Court affirms that detainees have full access to the writ but that it “does not address the content of the law that governs” detention.¹⁴⁷ In other words, the Court remains quiet about what kind of, if any, due process, interna-

139. *Boumediene v. Bush*, 128 S. Ct. 2229, 2255–56 (2008) (citing *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

140. *Id.* at 2259. Gerald L. Neuman presents the *Boumediene* holding as rejecting “formalistic reliance” on factors such as nationality and location and presenting functionalism as the “standard methodology.” Neuman, *The Extraterritorial Constitution*, *supra* note 123, at 261.

141. *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that, at a minimum, the Suspension Clause protects the writ of habeas corpus and includes, at a minimum, habeas corpus practices in 1789). Gerald L. Neuman explains these developments, which generally relate to the Suspension Clause implicating a mixture of rights protections and separation of powers, the Clause’s effect extraterritorially, the courts’ power to order release, and a balancing test. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, *supra* note 50, at 540–56.

142. *Boumediene*, 128 S. Ct. at 2262.

143. *Id.* at 2259.

144. *Id.* at 2254–56.

145. *Id.* at 2251–53.

146. *Id.* at 2258–59.

147. *Id.* at 2277.

R

R

tional humanitarian law, or human rights law applies on the base. Likewise, legislative inaction from the President and Congress supplement the base's legal anomaly. These developments suggest this anomaly will impact future detainee releases and relocations, the end of the detention program, and litigation in courts and military commissions.¹⁴⁸ Nine months after President Obama ordered Guantánamo detentions to end, ninety percent of the 240 detainees remained at the base.¹⁴⁹ Detainees may contest their detention, but the Court leaves unclear what substantive constitutional rights or international legal rights apply to this determination. This adds to the legal ambiguity of overseas detentions.

Authored by Justice Anthony Kennedy, *Boumediene's* functional test prioritizes what is practical and possible.¹⁵⁰ The Court developed the test from precedents¹⁵¹ such as the *Insular Cases*,¹⁵² *Reid v. Covert*,¹⁵³ *Johnson v. Eisentrager*¹⁵⁴ (reading more into its approach than its holding), and Justice Kennedy's own concurrence in *United States v. Verdugo-Urquidez*.¹⁵⁵ The emphasis is that it would not be practical to enforce all constitutional provisions abroad. The flexible and functional approach of examining "whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'"¹⁵⁶

This functional test becomes difficult to later apply. This approach does not fully explain the purpose for extending the writ overseas or not. In *Boumediene*, the justification is the prolonged detention, for which detainees are entitled to the writ, but when the test is used

148. See WITTES ET. AL., *supra* note 9, at 5 (describing how Congress and the President did not seek legislation on detention authority, leaving courts with the role as lawmakers); GUDE, *supra* note 28, at 4–5 (describing congressional resistance to funding the end of detentions and to allowing detainees entrance into the United States, Executive inefficiency in reviewing detention methods and the status of detainees, and how all of this stalls progress in detainee litigation).

149. GUDE, *supra* note 28, at 5.

150. *Boumediene*, 128 S. Ct. at 2259, 2261–62 (discussing costs, friction with the host state, shared military and judicial authority, and court orders implemented on the base).

151. *Id.* at 2255–57.

152. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Downes v. Bidwell*, 182 U.S. 244 (1901).

153. *Reid v. Covert*, 354 U.S. 1 (1957).

154. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

155. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

156. *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J. concurring)).

R

R

R

in later cases, litigants and courts have less guidance.¹⁵⁷ Similarly, the myriad ways to classify overseas locations suggests extraterritorial constitutional rights will be unclear or ambiguous.¹⁵⁸ The test also risks making practical concerns of enforcement more important than actually recognizing that constitutional rights exist overseas.¹⁵⁹ Given the fragmented, arguably temporary nature, or non-sovereign status of American governance abroad, practical concerns may effectively deny many extraterritorial rights protections.

2. *Kiyemba* Cases Illustrate Legal Anomaly in Judicial Power to Release Detainees

The most dramatic example of how legal anomaly at Guantánamo develops and expands concerns the five remaining Uighurs at the base. In two cases, both titled *Kiyemba v. Obama*, the detainees and the Government dispute the role of the courts, if any, in ordering the detainees' release.¹⁶⁰ In *Kiyemba I*¹⁶¹ and *Kiyemba II*,¹⁶² the U.S. Circuit Court of Appeals and the Supreme Court examine whether the judiciary may order the release of the detainees into the United States or bar their relocation to a state that will likely torture them, respectively. *Kiyemba I* and *II* raise important separation of powers questions. The detainees in these cases, whom the government has not classified as enemy combatants since 2008, fear that if relocated to China, they will be tortured and/or persecuted for being a part of a religious minority regarded as terrorists by the Chinese government. They have never taken up arms against the United States or its allies, nor do they plan to. The American military captured them in Afghanistan, near an Al Qaeda training center. It has proven extremely difficult to find third-party states to agree to their resettlement and to find resettlement locations acceptable to the detainees. Uighurs, formerly detained at

157. See Neuman, *The Extraterritorial Constitution*, *supra* note 123, at 271–72 (arguing a baseline value or priority should guide the test from the outset).

158. See *id.* at 273–74, 286–90.

159. See generally Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009) (arguing for a different extraterritorial approach, examining first if a constitutional guarantee applies in a given circumstance and, second, how it may be enforced).

160. See *infra* notes 177–79.

161. *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *remanded to* 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) (granting the Government's motion to reinstate the original circuit court opinion and agreeing with the Government that “no legally relevant facts are now in dispute”).

162. *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

GTMO and now relocated in Palau or Bermuda, describe their current status as in limbo, since they are out of GTMO but remain without passports, refugee status, and the right to travel internationally.¹⁶³ Because the five Uighurs remaining at GTMO do not fall within the Executive's detention authority for enemy combatants and a district court ordered their release into the United States in October 2009, courts must decide if there is a remedy for their release.¹⁶⁴

For both disputes the legal arguments fall into two basic camps. The detainees argue that constitutional habeas corpus rights, extended to Guantánamo in *Boumediene*, require judicial review of the Executive's authority to relocate them.¹⁶⁵ Since they have not been relocated and habeas release has not been fulfilled, courts may review their case and order their release.¹⁶⁶ If this review does not happen, then the *Boumediene* holding and habeas corpus rights are rendered powerless.¹⁶⁷ The government avers that relocation authority stems from foreign relations powers and that the decision to permit entry into the United States belongs to the political branches. Accordingly, courts must defer to plenary authority in foreign relations and immigration, as opposed to checking the Executive's authority here.¹⁶⁸

On March 1, 2010, the Supreme Court issued an order to vacate the judgment and remand *Kiyemba I* to the Court of Appeals for the District of Columbia Circuit.¹⁶⁹ The Court found that because all of the detainees had received at least one offer of resettlement, the circuit court should determine if further proceedings were needed in light of these resettlement offers. On May 28, the circuit court decided not to remand the case back to the district court for a new evi-

163. Bernadette Carreon, *Uighur Refugees Plead to Leave Pacific Island*, AFP, GOOGLE HOSTED NEWS (June 14, 2010), <http://www.google.com/hostednews/afp/article/ALeqM5iz5PF3FdBzhDualGoRn6IYV5haFQ>; Sam Strangeways, *UK Will Not Issue Passports to the Uighur Four—Gozney*, ROYAL GAZETTE (BERMUDA), June 11, 2010, <http://www.royalgazette.com/rg/Article/article.jsp?articleId=7da65bb30030000§ionId=60>.

164. See generally Roberts, *supra* note 7.

165. See, e.g., Petition for Rehearing En Banc at 1–2, *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429).

166. *Id.*

167. *Id.* at 4 (arguing that, in the habeas remedies for the Uighurs, the court has lost the power to fashion “the quintessential habeas remedy” (quoting *Munaf v. Geren*, 128 S. Ct. 2207, 2223 (2008))).

168. See, e.g., Appellants' Response to Petition for Rehearing En Banc at 9–11, *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429) (arguing that the panel was correct in deferring to the political branches, the political branches have the power to admit or exclude aliens, and the detainee's theory “would undermine fundamental interests” of the political branch's “exclusive control”).

169. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

dentiary hearing.¹⁷⁰ It reinstated its initial 2009 decision with additional facts concerning resettlement offers.¹⁷¹ The 2009 decision found that the judiciary had no authority to order alien detainees released into the United States and that this immigration authority belonged to the political branches.¹⁷² The Supreme Court initially granted certiorari in October 2009.¹⁷³

Although not classified as enemy combatants, the Uighur detainees remain on the base with both an initial habeas order to be released and a circuit court decision holding that resettlement authority cannot be reviewed by the judiciary. While future doctrinal and/or political determinations promise to clarify these matters, the ambiguity of what roles courts have in this extraterritorial matter reflects Empire as space. As Colás describes, empires use ornate and sophisticated processes to figure out who is inside or outside political protections.¹⁷⁴ *Kiyemba I* presents this complexity by questioning both whether the judiciary may order the release of detainees, in light of the diplomatic inability to relocate detainees, and whether the Executive may challenge such judicial review.¹⁷⁵ By constructively affirming the Executive’s overseas detention authority, with or without judicial review, this doctrine permits American authority to expand with no finite border.

In *Kiyemba II*, the circuit court overturned a district court order that would have required the Government to provide thirty days’ notice before transferring detainees.¹⁷⁶ The detainees argued their relocation would likely result in their torture or further detention abroad.¹⁷⁷ The Supreme Court initially granted writ of certiorari for this case just a few weeks after granting certiorari for *Kiyemba I* in October 2009, but it then denied certiorari with no further elaboration.¹⁷⁸

The general legal issue raised in this case—whether a court may stop the Executive from relocating a detainee due to fear of torture, further detention upon relocation, or human rights abuse—has devel-

170. *Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010).

171. *Id.* at 1047–48.

172. *Kiyemba v. Obama*, 555 F.3d 1022, 1025–26 (D.C. Cir. 2009).

173. *Kiyemba v. Obama*, 130 S. Ct. 458 (2009).

174. COLÁS, *supra* note 16 at 19, 31–32.

175. *Kiyemba*, 605 F.3d at 1047–48; *Kiyemba*, 555 F.3d at 1029.

176. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

177. *Id.* at 513–16.

178. *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010).

oped beyond the Uighur detainees. For example, in a recent case, Ahmed Belbacha, an Algerian detainee held at Guantánamo, argued that the Algerian government would torture him if he returned to Algeria.¹⁷⁹ The Convention Against Torture bars the United States from removing or relocating individuals to states where they will be tortured.¹⁸⁰ Similarly, percolating between the anomalies of judicial oversight of detainee release and executive power to transfer detainees is *Mohammed v. Obama*.¹⁸¹ In *Mohammed*, a district court made multiple attempts to prevent the transfer of a detainee to Algeria.¹⁸² The court feared the Algerian government would torture the detainee. Meanwhile, the court of appeals has issued orders to the district court to resolve all motions consistent with decisions that defer to the Executive on issues of detainee relocation, torture, and abuse. The court has sealed the greater part of these proceedings and briefings. Those monitoring the case believe that a court of appeals panel will eventually hold oral arguments in *Mohammed*, after the Government filed an appeal.

Kiyemba I presents the question of whether American extraterritorial authority may be checked by court-ordered release into the United States. *Kiyemba II* asks whether the judiciary may stop a relocation when it fears that relocation places the detainee at risk of torture. These matters present complex separation of powers and judicial review questions. This Article argues that both legal issues are part of larger questions concerning how American law facilitates Empire as space, whether by checking executive authority with judicial review and constitutional rights or by deferring to political powers. These determinations effectively permit Empire to expand or to pose a spatial barrier.

179. *In re Guantanamo Bay Detainee Litig.*, 2010 WL 1539845, at *1 (D.D.C. Apr. 19, 2010); Lyle Denniston, “Kiyemba II,” *Back Again?*, SCOTUS BLOG (Apr. 28, 2010, 8:37 PM), <http://www.scotusblog.com/2010/04/kiyemba-ii-back-again/>.

180. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 3, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113, 114. The Convention is incorporated into U.S. law by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note (2006) (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)).

181. *Mohammed v. Obama*, No. 10A52, 2010 WL 2795602 (U.S. July 16, 2010). *See generally* Lyle Denniston, *Analysis: Major Fight Brews on Munaf*, SCOTUS BLOG (July 1, 2010, 8:23 PM), <http://www.scotusblog.com/2010/07/analysis-major-fight-brews-on-munaf/> (describing the series of district court orders barring relocation to Algeria).

182. *See generally* Denniston, *supra* note 181.

The five detainees’ fates and this specific constitutional aspect of extraterritorial authority remains in flux between the Executive’s diplomatic negotiations, litigation revolving between the circuit court and Supreme Court, congressional efforts to bar entry of detainees into the United States, and the choices of non-combatant detainees. As of July 2010, this Article merely attempts to present how this doctrinal obfuscation fits within the larger legal anomaly implicit in American extraterritorial authority. Whatever political or judicial developments transpire in the upcoming months or years, legal anomaly concerning checks for overseas authority stems from Empire as space. While evident on the base since its creation, this anomaly is most recently apparent with long-term detentions. Presently, the five Uighur detainees face jurisdictional issues similar to that faced by detainees classified as enemy combatants since 2002 and by Haitian asylum seekers a decade earlier.

3. District Courts Find Increasing Anomaly when Reviewing Detention’s Legality

Anomaly has influenced habeas proceedings before the District Court for the District of Columbia, which was confirmed as a litigation course in *Boumediene*.¹⁸³ The Center for Constitutional Rights reports that as of May 6, 2010, the district court has decided forty-eight habeas cases for base detainees, resulting in thirty-four granted and fourteen denied habeas petitions.¹⁸⁴ Of the thirty-four detainees with granted habeas petitions, the government has released twenty-three, leaving eleven still detained.¹⁸⁵ As of June 2, 2010, the U.S. Court of Appeals for the District of Columbia Circuit has decided *Al-Bihani v. Obama*¹⁸⁶ and *Awad v. Obama*.¹⁸⁷ Courts have become the source of lawmaking on detention matters. After the Bush and Obama administrations did

183. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008) (stating there is “no jurisdictional bar to the District Court’s” entertainment of habeas corpus review).

184. See *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2010-05-26%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated May 26, 2010).

185. *Id.*

186. *Al-Bihani v. Obama*, 590 F.3d 866, 870–71, 881 (D.C. Cir. 2010) (denying habeas corpus relief, affirming detention authority for anyone who was “part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” and finding the Executive’s detention authority not limited by international laws of war).

187. *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010) (upholding the Government’s authority to detain someone who was part of Al Qaeda when captured and confirming that the Government must establish its case by a preponderance of the evidence).

not seek legislative authority on detentions, Congress refused to entertain the matter in any serious manner, and the Supreme Court in *Boumediene* left these substantive issues undecided.¹⁸⁸ The Brookings Institution provides an elaborate examination of these habeas proceedings in *The Emerging Law of Detention: Guantánamo Habeas Cases as Lawmaking* (“The Emerging Law of Detention”).¹⁸⁹ Distributed exactly a year after an executive order requiring base detentions to end within a year,¹⁹⁰ this report describes how habeas proceedings illustrate a host of unclear legal issues. It reports that the law of detention is “unsettled,”¹⁹¹ that judges “fundamentally” disagree on “the basic design elements” of detention law, and that there is a “lack of clarity” on the government’s detention power and “how far the courts’ jurisdiction extends.”¹⁹² For the nearly 200 remaining detainees, judges “do not agree on what the rules should be,” resulting in disagreement about “the most basic architectural features” of detention.¹⁹³

This lack of clarity is a direct and predictable outgrowth of legal anomaly on the base. The Brookings Institution report does not make the correlation with either Empire or with historic anomaly. While anomaly has existed since the base’s creation, its most obvious affirmation came with *Boumediene*’s flexible approach to extraterritorial jurisdiction. This approach functions as Empire as space because it permits political authority on the base to avoid rights protections that would exist domestically or possibly within other jurisdictions. Effectively, base occupation has been flexible and unchecked by norms in international, domestic, and municipal law. The Platt Amendment, base lease agreements, and American foreign relations affirmed this space early on. Jurisprudence on War on Terror detention merely feeds off these flexible and adaptable assumptions. Initially these assumptions concerned the reach of constitutional habeas corpus; however, jurisprudence has subsequently identified the actual law of detention and the process to determine its unlawfulness. District court judges have generally agreed that the Government has the burden to prove, by a preponderance of the evidence, that detainees satisfy the

188. *Boumediene*, 128 S. Ct. at 2277 (stating the opinion “does not address the content of the law that governs petitioners’ detention”).

189. WITTES ET AL., *supra* note 9.

190. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

191. WITTES ET AL., *supra* note 9, at 1.

192. *Id.* at 3.

193. Chesney & Wittes, *supra* note 40.

R

R

R

grounds for detention.¹⁹⁴ In *Al-Bihani*, the court of appeals rejected higher burdens for the Government.¹⁹⁵ On June 2, 2010 in *Awad v. Obama*, the court confirmed it found the preponderance of the evidence standard constitutional.¹⁹⁶

The Emerging Law of Detention lists five “elemental matters” where judges often disagree.¹⁹⁷ The first elemental disagreement concerns the “substantive scope” of detention authority.¹⁹⁸ The scope of authority relates to who the Government may detain in a war against Al Qaeda and the Taliban.¹⁹⁹ Disagreements occur as to whether detainees must actually be members of a terrorist group or simply support a group. Judges also disagree as to how dangerous the alleged member or supporter must be. Much of this stems from how the Bush and Obama administrations differed in presenting this detention authority and the limited guidance from the Supreme Court. The Bush administration argued that Article II of the Constitution and the Authorization for the Use of Military Force (“AUMF”) provided this power.²⁰⁰ In *Hamdi*, a plurality of the Court affirmed that the AUMF provided the basis to detain enemy fighters, which included persons bearing arms for the Taliban in Afghanistan.²⁰¹ This power was an important “incident of waging war.”²⁰² This opinion did not explain what level of affiliation or membership was included within the Executive’s detention authority. In fact, when the Court decided *Hamdi*, critics observed that the decision left many detention matters unanswered;²⁰³ courts continue to grapple with these matters today.

194. See *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008); see also WITTES ET. AL., *supra* note 9, at 13 (describing how other proceedings have followed this determination). R

195. *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010) (rejecting “clear and convincing” and “beyond a reasonable doubt” standards).

196. *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010). The court also stated it was not holding that the preponderance of the evidence standard is “the constitutionally-required minimum evidentiary standard.” *Id.* at 11, n.2.

197. WITTES ET. AL., *supra* note 9, at 2. R

198. *Id.* at 2.

199. *Id.* at 16–22.

200. *Id.* at 16 (referring to the *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

201. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–18 (2004). *Hamdi* affirmed the Executive may detain persons who were “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict [there] against the United States.” *Id.* at 516.

202. *Id.* at 519.

203. Jenny S. Martinez, *International Decision*, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), 98 AM. J. INT’L L. 782, 785 (2004) (describing doctrinal ambiguity regarding detention duration and the process to contest it).

The Obama administration rested its detention-authority interpretation on the AUMF and laws of war, dropped the Article II justification, stopped use of the enemy combatant classification, and included members and substantial supporters of Al Qaeda, the Taliban, and associated forces within the scope of its detention authority.²⁰⁴ *The Emerging Law of Detention* describes two judicial trends regarding the substantive scope of detention authority: (1) judicial disagreement over what constitutes “membership” in a terrorist organization as opposed to an independent, supportive role; (2) judicial disagreement over whether the laws of war inform this analysis.²⁰⁵ The court of appeals’ majority in *Al Bihani* appears to discount any laws of war or customary international law.²⁰⁶ In litigation since this January 2010 decision, the Obama administration has averred that the laws of war inform the AUMF²⁰⁷ and that this position is consistent with *Hamdi* and other Supreme Court precedents.²⁰⁸

The second elemental disagreement, presented by *The Emerging Law of Detention*, concerns how judicial determinations vary with respect to whether a detainee can eliminate his relationship with these groups, rendering his detention illegal.²⁰⁹ The question arises: Is detainability permanent once established? The report presents two potential disagreements over this issue: (1) whether the Government bears a greater evidentiary burden as time progresses; and (2) whether a detainee may cease affiliation with the group thereby eliminating a detention justification. District courts have not directly addressed these matters. Judges have not challenged the initial decision to capture and detain detainees, but as time passes, the evidence needed to support continued detention will likely increase.²¹⁰

The third elemental discrepancy concerns the disagreement between judges as to whether war operations provide the government with evidentiary presumptions. This evidentiary concern derives from

204. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 66 n.1, 67 (D.D.C. 2009) (reporting that the Government no longer justifies its detention authority by reference to Commander in Chief powers and that the Government has changed its definition of the term “enemy combatant”).

205. WITTES ET. AL., *supra* note 9, at 2, 17–18. R

206. *Id.* at 18.

207. Response to Petition for Rehearing and Rehearing En Banc at 1, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051).

208. *Id.* at 1–2, 6–9.

209. WITTES ET. AL., *supra* note 9, at 2, 23–31. R

210. *Id.* at 23.

the danger and immediacy of operations and the inability to later authenticate or probe the accuracy of evidence.²¹¹

The fourth elemental disagreement relates to the role of hearsay evidence resulting from the government’s inability to identify sources or from detainees providing information on one another.²¹²

The fifth elemental disagreement revolves around what to do with statements from detainees or witnesses derived from involuntary interrogation or abuse.²¹³ It is unclear whether the government or detainee must prove this, how long coercion “lasts” so that a judge may find a statement to have resulted from the coercion, and what level of coercion colors the evidence.

4. *Maqaleh* Suggests that Empire Expands to Afghanistan

Closer to the actual War on Terror, detentions in Afghanistan offer the latest suggestion that Empire as space may expand beyond Guantánamo. The United States detains 645 persons²¹⁴ in a prison at Bagram Airfield, north of Kabul in Afghanistan.²¹⁵ Some detainees

211. *Id.* at 2, 32–34.

212. *Id.* at 2, 35–50.

213. *Id.* at 2, 51–60. *See generally* Abdah v. Obama, No. 04-1254(HHK), 2010 WL 1626073, at *3–5, *8 (D.D.C. Apr. 21, 2010) (finding the Government’s evidence tainted because the detainee’s statements were the product of torture); Salahi v. Obama, No. 05-CV-0569, 2010 WL 1443543, at *4, *10 (D.D.C. Apr. 9, 2010) (finding the Government’s proof that the detainee supported terrorists “tainted by coercion and mistreatment” while at Guantánamo); Dywer Arce, *Guantanamo Habeas Rulings Made Public*, JURIST (Apr. 11, 2010, 11:41 AM ET), <http://jurist.law.pitt.edu/paperchase/2010/04/guantanamo-habeas-rulings-made-public.php> (reporting that the district court made public a ruling to release Slahi); Scott Horton, *Slahi: Another Habeas Defeat for the Justice Department*, HARPER’S MAG. (Mar. 29, 2010, 1:17 PM), <http://harpers.org/archive/2010/03/hbc-90006796> (describing the torture and litigation controversies surrounding Salahi’s dispute); Andy Jones, *Federal Judge Grants Habeas Writ Due to Torture Issues*, BLT: BLOG LEGALTIMES (Apr. 21, 2010), <http://legaltimes.typepad.com/blt/2010/04/federal-judge-grants-habeas-writ-due-to-torture-issues.html> (reporting that a district court approved detainee Uthman Abdul Rahim Mohammed Uthman’s habeas petition and that the Government’s evidence was not credible because it was coerced by torture).

214. A Freedom of Information Act (FOIA) request made by the ACLU prompted the Department of Defense to issue a list of the 645 prisoners held at Bagram. The list includes prisoner names but leaves out or redacts information such as their citizenship, length of detention, where they were captured, and the circumstances of capture. *Bagram FOIA*, ACLU (June 9, 2010), <http://www.aclu.org/national-security/bagram-foia> [hereinafter *Bagram FOIA*]. For the actual list itself, see *Redacted List of Detainees Held at Bagram Air Base*, ACLU (Jan. 15, 2010), <http://www.aclu.org/national-security/redacted-list-detainees-held-bagram-air-base>.

215. Daphne Eviatar, *Bagram’s Black Hole: Guantánamo Bay Was Bad Enough—Bagram Is Worse*, Law.com (Nov. 13, 2008), <http://www.law.com/jsp/article.jsp?id=1202425976702>; William Fisher, *Bagram: The Other Gitmo*, ASIA TIMES ONLINE (Jan. 16, 2008), http://www.atimes.com/atimes/South_Asia/JA16Df02.html; Richard A. Oppel Jr., *U.S. Captain*

have been there for six years without any charge or possibility of release.²¹⁶ With important information redacted and/or not provided, it has been increasingly difficult to provide Bagram detainees any legal representation.²¹⁷ A small number of them are under the age of sixteen.²¹⁸ Like with GTMO, the government is extremely secretive about the detention operations and the names of those detained at Bagram.²¹⁹ The government recently relocated the detainees to a new prison at Bagram, since the prior facility was not a permanent structure.²²⁰ Similar to initial GTMO litigation, the government implemented a military review policy after detainees succeeded in district court habeas challenges.²²¹ In April 2009, district court Judge John D. Bates ruled that three Bagram detainees could contest their detentions through habeas corpus proceedings in U.S. district courts.²²² The court found that detainees captured elsewhere but taken to Bagram, in Afghanistan, did have habeas corpus rights, while detainees captured near the theater of war in Afghanistan did not.²²³

Judge Bates applied *Boumediene's* functional approach to determine if detainees in Afghanistan could invoke constitutional habeas corpus rights.²²⁴ He explained that this was the same question addressed in *Boumediene*, with the only difference being “where they [were] held” (i.e., GTMO or Bagram).²²⁵ In essence, the matter considers the “objective degree of control” the United States has over Bagram.²²⁶ The court examined the detainees’ citizenship and status, the adequacy of the process for determining status, the site of apprehension and detention, and the practical obstacles involved in ad-

Hears Pleas for Afghan Detainee, N.Y. TIMES, May 24, 2009, <http://www.nytimes.com/2009/05/25/world/asia/25detain.html>; Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. TIMES, Feb. 21, 2009, <http://www.nytimes.com/2009/02/22/washington/22bagram.html?hp>.

216. See *Bagram FOIA*, *supra* note 214.

217. See Alissa J. Rubin & Sangar Rahimi, *Bagram Detainees Named by U.S.*, N.Y. TIMES, Jan. 16, 2010, <http://www.nytimes.com/2010/01/17/world/asia/17afghan.html>.

218. *US Releases Names of Prisoners at Bagram, Afghanistan*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8462894.stm> (last updated Jan. 16, 2010, 4:36 GMT).

219. See *Bagram FOIA*, *supra* note 214 (stating that “very little information is publically available about the secrecy-shrouded facility or the prisoners held there”).

220. See Rubin & Rahimi, *supra* note 217.

221. See Karen DeYoung & Peter Finn, *U.S. Gives New Rights to Afghan Prisoners: Indefinite Detention Can Be Challenged*, WASH. POST., Sept. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/12/AR2009091202798.html?hpid=topnews>.

222. *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009).

223. *Id.* at 235.

224. *Id.* at 207.

225. *Id.* at 214.

226. *Id.* at 221.

R

R

R

ministering habeas corpus relief.²²⁷ The court held that while the three non-Afghan detainees could invoke habeas rights, the Afghan detainee could not. Friction with Afghanistan, the host state, was a practical obstacle sufficient enough to prevent invocation of habeas corpus rights.²²⁸

On May 21, 2010, the Court of Appeals for the District of Columbia Circuit overturned the habeas corpus release order, deciding unanimously that the Suspension Clause did “not extend to aliens held in executive detention in the Bagram detention facility in the Afghan theater of war.”²²⁹ Drawing inspiration from *Boumediene* and *Eisentrager*, the court found “‘the practical obstacles inherent in resolving the prisoner’s entitlement to the writ,’” part of the third element in the *Boumediene* test, as key to its decision.²³⁰ It described Bagram and all of Afghanistan as undisputedly in a “theater of war.”²³¹ Here, the Government’s position was stronger than in *Eisentrager*, since by the time the Court decided *Eisentrager*, World War II combat had ended.²³² Bagram is also presented as different than Guantánamo since the United States has maintained total control over Guantánamo for over a century even as a “hostile government maintain[s] *de jure* sovereignty over the property.”²³³ The United States has the option to remain at the Bagram base, but it does not appear to have a permanent intent to do so, and there is no hostility with the host country, Afghanistan.²³⁴ Citing *Boumediene* and *Eisentrager*, the court describes the practical obstacles of how commanders lose prestige when called into civil courts and how such action diverts their attention from the “military offensive abroad to the legal defensive at home.”²³⁵ The court

227. *Id.* at 214–15.

228. *Id.* at 209.

229. *Maqaleh v. Gates*, 605 F.3d 84, 98–99 (D.C. Cir. 2010) (holding that the Suspension Clause does not extend to “confinement in an active theater of war” in a territory where the United States is neither *de facto* nor *de jure* sovereign and within territory of another *de jure* sovereign). *See generally* Faiza Patel, *The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan*, ASIL INSIGHT (June 3 2010), <http://www.asil.org/insights100603.cfm> (describing the *Maqaleh* decision and highlighting how the court relied less upon a separations of powers analysis and more upon *Eisentrager*).

230. *Maqaleh*, 605 F.3d at 97 (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008)).

231. *Id.*

232. *Id.* at 97–98.

233. *Id.* at 97.

234. *Id.*

235. *Id.* at 98 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

noted that extending habeas corpus protections “within the sovereign territory of another nation” also served as a practical obstacle.²³⁶

This decision is consistent with Empire as space, because, with this reasoning, overseas American authority capitalizes on the ambiguities implicit in sovereignty. The court does not question military authority over the base and what power it has to detain incident to war, even if these are extraterritorial exercises in Afghanistan. However, American authority over this territory in Afghanistan, despite having the consent of the host state and its limited duration, is insufficient to warrant extending habeas jurisdiction and its rights protections. The court uses factual determinations about habeas and sovereignty in *Eisentrager*, post-World War II detentions, and *Boumediene* and War on Terror detentions, to hold that constitutional jurisdiction does not follow American military authority. For now, these three detainees do not benefit from an extraterritorial application of the writ in Bagram.

Importantly, the court of appeals does not fully close the door on the extraterritorial extension of constitutional habeas corpus. Three points support this. First, it rejects the government’s argument that the writ does not apply to territories outside de jure sovereignty.²³⁷ It points to *Boumediene* expressly repudiating a “formalistic, sovereignty-based test” for determining the extraterritorial reach of constitutional habeas.²³⁸ The Supreme Court instead adopted a three-factor functional test.²³⁹ According to the court of appeals, if the Supreme Court intended de facto sovereignty to be the test, the three factors would not “be considered either generally or in the detail which [the Court] in fact adopted.”²⁴⁰ This suggests that sovereignty over territory will not be a litmus test for whether constitutional habeas applies extraterritorially. The notion of sovereignty, whether de jure or de facto, becomes less dispositive for extraterritorial habeas. Instead, practical and process matters may be more influential when deciding whether constitutional habeas applies overseas. This emphasis on practical matters likely refers to administrative, expense, and wartime issues for proceedings and to procedural protections provided to detainees.

Second, the court finds that the first factor—detainee citizenship, detainee status, and the adequacy of the process to determine status—favors the Bagram detainees even more so than Guantánamo detain-

236. *Id.* at 99.

237. *Id.* at 94 (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2257 (2008)).

238. *Id.*

239. *Id.* at 94–95.

240. *Id.* at 95.

ees.²⁴¹ Without much detail, it states that the GTMO Combatant Status Review Tribunal (“CSRT”) provided more protections than Bagram detainees received from Unlawful Enemy Combatant Review Boards (“UECRBs”).²⁴² Accordingly, the court does not quickly and easily defer to executive detention justifications. Its comparison of the CSRT and UECRB suggests that the Executive should provide detainees some procedural protections. Military²⁴³ and human rights groups²⁴⁴ have criticized these Bagram procedures, suggesting detainee status review procedures will be contested in the future.

Third, the court seems unable to make sense of the detainee arguments that Bagram was chosen as a detention location to evade judicial review. The detainees assert that executive detention decisions to transfer them to conflict zones are examples of the Executive’s power to turn the Constitution on and off.²⁴⁵ In response, the court says these claims are unsupported by evidence or reason.²⁴⁶ It elaborates that the decision to avoid the Constitution by choosing the Bagram detention location would require military and executive officials to “anticipate the complex litigation history” and “predict the

241. *Id.* at 96.

242. *Id.*

243. NATO commanders in Afghanistan report that Afghans see U.S. detentions as secretive and lacking procedural protections and stress the need for the Afghan government to conduct detention operations. Memorandum from Stanley A. McChrystal, U.S. Army Gen., Commander of the U.S. Forces, Afghanistan, to Robert M. Gates, U.S. Sec’y of Def. (Aug. 30, 2009), http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf.

244. Human rights groups and detainee advocates highlight how American detentions in Afghanistan appear secretive, procedural protections remain unclear, and status determinations benefit from secret evidence and the lack of access to counsel, *See* Press Release, Human Rights First, Bagram Decision Highlights Need for Due Process, Transparency (May 21, 2010), <http://www.humanrightsfirst.org/media/usls/2010/alert/615/index.htm>; SAHR MUHAMMEDALLY, HUMAN RIGHTS FIRST, FIXING BAGRAM: STRENGTHENING DETENTION REFORMS TO ALIGN WITH U.S. STRATEGIC PRIORITIES (2009), <http://www.humanrightsfirst.info/pdf/Fixing-Bagram-110409.pdf>; SAHR MUHAMMEDALLY, HUMAN RIGHTS FIRST, UNDUE PROCESS: AN EXAMINATION OF DETENTION AND TRIALS OF BAGRAM DETAINEES IN APRIL 2009 (2009), <http://www.humanrightsfirst.info/pdf/HRF-Undue-Process-Afghanistan-web.pdf>.

245. *Maqaleh*, 605 F.3d at 98.

246. New reports state that the majority of Bagram detainees are from and/or were captured in Afghanistan but that the three involved in *Maqaleh v. Gates* were not. *E.g.*, Warren Richey, *Detainees Held by US in Afghanistan Can’t Contest Custody, Court Finds*, CHRISTIAN SCI. MONITOR (May 21, 2010), <http://www.csmonitor.com/USA/Justice/2010/0521/Detainees-held-by-US-in-Afghanistan-can-t-contest-custody-court-finds>. Each has been detained for at least seven years and was captured outside Afghanistan. *Id.* They are: Fadi al-Maqaleh, a Yemeni captured beyond Afghanistan; Redha al-Najar, a Tunisian captured in Pakistan; and Amin al-Bakri, a Yemeni captured in Thailand. *Id.*

Boumediene decision long before it came down.”²⁴⁷ While the executive branch may not have predicted the doctrinal specifics of *Boumediene*, it did worry about habeas jurisdiction early on in the War on Terror overseas detention program.²⁴⁸ This suggests that the Executive worried about detainee rights and checks on its authority when it chose detention locations overseas.

Despite this evidence, the court of appeals does not apply this detainee argument into any of the functional test’s three factors. The court avoids the argument by asserting that this analysis could easily be part of *Boumediene*’s second factor concerning the location of detention.²⁴⁹ In *Boumediene*, the Supreme Court was implicitly motivated by the injustice of detention in Cuba because it was so far from the War on Terror. Although the court of appeals suggests that perhaps in the future “manipulation by the Executive” may be an additional factor for determining the writ’s extraterritorial reach,²⁵⁰ it entirely fails to examine why the government has relocated these detainees to Afghanistan.

As these recent examples suggest, with adaptable checks, American extraterritorial jurisprudence functions like Empire as space. It sets flexible limits and avoids clear prohibitions on American authority abroad. This supports American power, militarily and economically, overseas. When the Executive implements or Congress legislates this authority, American law uses functional tests to isolate what practical reasons are relevant.

Jurisprudence that provides for functional tests and adaptable borders reflects foreign policy goals to expand American influence beyond domestic borders, secure markets, promote free trade abroad, and mold political cultures overseas with American assumptions on democracy and free trade. With these doctrinal developments and the foreign relations described throughout the Article, this subsection inspires the scholarly question: does American law pose any spatial or geographic limits for extraterritorial authority in the War on Terror or does this authority benefit from Empire as space, lacking any boundaries?

Providing a thematic transition to “markets” and “culture,” presidential pronouncements on foreign policy reflect these assumptions

247. *Maqaleh*, 605 F.3d at 99.

248. *Cf.* Philbin & Yoo Memo, *supra* note 30, at 29–37.

249. *Maqaleh*, 605 F.3d at 98–99.

250. *Id.* at 98–99 (stating that “at least three factors” are relevant (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008))).

on American expansion. In *The National Security Strategy of the United States of America*, President Bush stressed achieving the strategic and moral imperative of peace by bringing “the hope of democracy, . . . free markets, and free trade to every corner of the world.”²⁵¹ As “humanity” holds this opportunity, the United States welcomes the “responsibility to lead in this great mission.”²⁵²

B. GTMO Intelligence Protects Markets in the War on Terror and a Resource War

Close to the continental United States, GTMO’s location explains how a military outpost instrumentally protects market interests overseas, serving hemispheric hegemony historically and War on Terror intelligence gathering and resource wars currently. GTMO’s strategic support in security and intelligence illustrates its role in Empire as markets. Initial protection was regional and naval, serving foreign policy and business interests in the Caribbean and Central America.²⁵³ Without such a base providing vital coal refueling for steam ships, the U.S. Navy could not patrol the Caribbean during the early twentieth century. During gunboat and dollar diplomacy periods, economic goals included finding and protecting overseas markets—in terms of supply for domestic consumption and demand for American goods and financial services. The base helped protect the Caribbean basin from European and regional threats. It provided military support for interventions in Cuba, the Dominican Republic, Haiti, and Nicaragua. Protection of overseas markets increased in significance with a 1903 lease to occupy the Panama Canal Zone.²⁵⁴ Not only was the Zone lease agreed to almost at the same time as GTMO’s lease, it also reflected a legal anomaly.²⁵⁵

More recently, as a detention center emphasizing intelligence gathering from terror suspects, Guantánamo supports economic pros-

251. THE NATIONAL SECURITY STRATEGY, *supra* note 57, at Introduction by George W. Bush preceding vii. R

252. *Id.*

253. *See generally* Panitch & Gindin, *supra* note 59 (presenting American foreign policy’s historic role in protecting global capitalism and its police-power role for global neoliberal economic policies). R

254. Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, U.S.-Pan., Nov. 18, 1903, 33 Stat. 2234.

255. *See generally* Gherebi v. Bush, 352 F.3d 1278, 1296–99 (9th Cir. 2003) (drawing a similarity between the base and the Panama Canal Zone); Neuman, *Anomalous Zones*, *supra* note 4, at 1200, 1227 (describing how, before the 1990s, the Panama Canal Zone and Guantánamo were viewed as having similar jurisdiction given their history). R

pects overseas. Attaining vital intelligence, GTMO detentions indirectly serve geopolitical goals, specifically U.S. foreign policy on energy security.²⁵⁶ A major objective of the detention program has been to obtain intelligence for efforts in the War on Terror in central Asia and the Persian Gulf. With many goals, the War on Terror combats threats to American access to energy resources in these regions.²⁵⁷ While increasing in intensity after September 2001, the War on Terror contributes to a resource war's longer-term goals. Such wars refer to resource scarcity and violent conflicts, in this case fighting terrorism in these regions, in an effort to secure American energy interests in oil and natural gas.²⁵⁸ The *National Energy Policy*, presented by then Vice President Dick Cheney to the President in May of 2001, best explains U.S. energy goals.²⁵⁹ It recommends supporting initiatives by Saudi Arabia, Kuwait, Algeria, Qatar, and the United Arab Emirates to open their energy sectors for foreign investment.²⁶⁰ The Persian Gulf and Caspian Sea represent seventy percent of the known

256. Michael Klare defines "geopolitics" as the "contention between great powers and aspiring great powers for control over territory, resources, and important geographical positions" and provides the examples of ports, harbors, canals, river systems, oases, and other sources of "wealth and influence." Michael Klare, *The New Geopolitics*, 55 MONTHLY REV. 51, 51 (2003), available at <http://www.monthlyreview.org/0703klare.htm> [hereinafter Klare, *The New Geopolitics*]. Colin S. Gray defines "geopolitics" as "'the relation of international political power to the geographical setting.'" Colin S. Gray, *The Continued Primacy of Geography*, 40 ORBIS 247, 247 (1996) (quoting SAUL B. COHEN, GEOGRAPHY AND POLITICS IN A DIVIDED WORLD 24 (1964)).

257. Simon Bromley describes how American military power is used in the War on Terror to exert U.S. influence in regions of extreme geopolitical significance. U.S. military operations in places such as Iraq and Afghanistan are part of efforts to gain access to vital energy resources that are limited in supply and competitively eyed by China, India, and Russia. Simon Bromley, *The Logic of American Power in the International Capitalist Order, in THE WAR ON TERRORISM AND AMERICAN 'EMPIRE' AFTER THE COLD WAR*, *supra* note 59, at 44.

258. Susanne Peters describes resource wars as "triggered by a dispute over access to renewable and non-renewable sources." Susanne Peters, *Coercive Western Energy Security Strategies: 'Resource Wars' as a New Threat to Global Security*, in *THE GEOPOLITICS OF RESOURCE WARS: RESOURCE DEPENDENCE, GOVERNANCE AND VIOLENCE* 187, 188 (Philippe Le Billon ed., 2005). Arthur Westing adds how wars over resources develop from economic deficiencies, resource degradation, and uneven distribution and how this leads to alliance, national rivalries, and then conflict. Arthur H. Westing, *Environmental Factors in Strategic Policy and Action: An Overview*, in *GLOBAL RESOURCES AND INTERNATIONAL CONFLICT: ENVIRONMENTAL FACTORS IN STRATEGIC POLICY AND ACTION* 3 (1986). Michael T. Klare defines resource wars as "conflicts that revolve, to a significant degree, over the pursuit or possession of critical materials." MICHAEL T. KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* 25 (2002) [hereinafter KLARE, *RESOURCE WARS*].

259. NAT'L ENERGY POL'Y DEV. GROUP, *NATIONAL ENERGY POLICY* (2001), <http://www.wtrg.com/EnergyReport/National-Energy-Policy.pdf>.

260. *Id.* at 8-4, 8-5, 8-18.

petroleum reserves in the world,²⁶¹ with the Persian Gulf expected to supply over one quarter of U.S. oil demand by 2025.²⁶² By 2020, the *National Energy Policy* projects that the Gulf will account for fifty-four to sixty-seven percent of the world’s oil, making the region “vital to U.S. interests.”²⁶³ It explains that Middle East oil producers “will remain central to world oil security,” that “[t]he Gulf will be a primary focus of U.S. international energy policy,” and that concentrating oil production in any one region fosters market instability.²⁶⁴ Whether it is Al Qaeda’s global network or Taliban safe havens, terrorists threaten political, economic, and basic security in these regions. Terrorists also threaten U.S. energy supply markets.²⁶⁵

Logistically close but removed from domestic jurisdiction, GTMO detentions facilitate prolonged intelligence gathering. Detentions distance Al Qaeda, Taliban, and other detainees from terrorist networks and foreign state protection while allowing U.S. intelligence personnel access to the detainees after a short plane ride from the United States. The United States may use information obtained to combat market threats, both to oil and natural gas supply and to shipping and pipelines for transport, posed by terrorism. A War on Terror objective is to eliminate regional threats, usually presented by radical Islamists, to friendly states. Left alone, terrorists make the Middle East insecure, threaten political stability in the region, and develop capacities to attack civilians across the globe. Terrorist attacks in the United States, Spain, Indonesia, Turkey, and other places illustrate this. Intelligence gathered from GTMO detentions helps combat this. While terrorists kill innocent civilians abroad and in the United States, they also destabilize governments. Their violence and effective political influence disrupts strategic markets for the United States. Humanitarian and regional security objectives serve as War on Terror justifications, but the United States has had clearly defined long-term goals to keep

261. See Klare, *The New Geopolitics*, *supra* note 256, at 55.

262. See Paul A. Williams, *Projections for the Geopolitical Economy of Oil After War in Iraq*, 38 FUTURES 1074, 1076 (2006).

263. NAT’L ENERGY POL’Y DEV. GROUP, *supra* note 259, at 8–4.

264. *Id.* at 8–5, 8–6.

265. See generally E. Alshech, “The Battle. . . Is Economic Rather than Military”—An Economically Oriented Concept of Jihad Emerges in Islamist Discourse, MIDDLE EAST MEDIA RESEARCH INST. (2007), <http://www.memrijttm.org/content/en/report.htm?report=2371> (providing a wide, perhaps hyperbolic and factually weak, reading of the economic threats of jihad); Michael T. Klare, *The Deadly Nexus: Oil, Terrorism, and America’s National Security*, 101 CURRENT HIST. 414 (2002) [hereinafter Klare, *The Deadly Nexus*] (describing how American troops stationed in Saudi Arabia during and after the 1991 Gulf War provided inspiration for Al Qaeda recruitment in the 1990s).

R

R

access to these markets open.²⁶⁶ The September 2001 attacks by no means put the region on the American geopolitical radar. Before the Bush administration, the Clinton administration had increased U.S. military presence throughout the Persian Gulf and Caspian Sea by building U.S. bases or providing military aid in Qatar, Georgia, Kyrgyzstan, Pakistan, Uzbekistan, and Azerbaijan.²⁶⁷ Since the oil shocks of the 1970s, the United States has used foreign policies and military strategies to secure energy sources in the region.²⁶⁸ This need is simultaneously economic and geopolitical, meaning the motives for market protections and for spatial control reinforce each other.

1. Intelligence's Vital Role in Guantánamo Detentions

By supporting counterterrorism and war, GTMO's intelligence gathering implicitly protects vital markets for the United States in the Persian Gulf and central Asia. The *National Intelligence Strategy of the United States of America* ("National Intelligence Strategy") describes "[v]iolent extremist groups" using terrorism to attack the United States, challenge interests worldwide, and "destabilize vulnerable states in regions of strategic interest to the United States."²⁶⁹ It lists two of the intelligence community's six goals ("Mission Objectives" or "MO"), specifically related to terrorism—"Combat Violent Extremism" (MO1) and "Provide Strategic Intelligence and Warning" (MO3).²⁷⁰ MO1 regards "[v]iolent extremist groups," being "primarily" Al Qaeda and "its regional affiliates, supporters, and the local terrorist cells it inspires."²⁷¹ As stated, perhaps the most immediate goal of intelligence is security, but there is an economic subtext in countering terrorism in regions vital to American energy markets.²⁷²

266. See NAT'L ENERGY POL'Y DEV. GROUP, *supra* note 259, at 8–4 (stating that the Persian Gulf "remain[s] vital to U.S. interests").

267. See Michael T. Klare, *The Empire's New Frontiers*, 102 CURRENT HIST. 383, 384–85 (2003) [hereinafter Klare, *The Empire's New Frontiers*]; see also Klare, *The New Geopolitics*, *supra* note 256, at 55.

268. KLARE, RESOURCE WARS, *supra* note 258, at 33, 80.

269. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NATIONAL INTELLIGENCE STRATEGY OF THE UNITED STATES OF AMERICA 3 (2009), www.dni.gov/reports/2009_NIS.pdf.

270. *Id.* at 5. MO6 ("Support Current Operations") also includes a substantial anti-terrorism element. *Id.* This includes "defeating the Taliban in Afghanistan" and "stabilizing Iraq." *Id.* at 10.

271. *Id.* at 6. MO1 aims to protect the homeland, counter the spread of violent extremism, and prevent terrorists from using weapons of mass destruction. *Id.* To do so, the intelligence community identifies terrorist groups, warns of attacks, tries to cut their financial support, and attempts to disrupt, dismantle, and defeat their operations. *Id.*

272. See Philippe Le Billon & Fouad El Khatib, *From Free Oil to 'Freedom Oil': Terrorism, War and US Geopolitics in the Persian Gulf*, 9 GEOPOLITICS 109, 110 (2004) (arguing that

R

R

R

This Article’s arguments are quite hypothetical, perhaps anecdotal or premature, due to a lack of empirical proof resulting from the protection of sensitive national security information. These arguments on Empire and markets are made to relate American lawmaking on extraterritorial jurisdiction to a foreign relations context. Ideally these contentions, whether empirically limited or conceptually overreaching, encourage legal scholarship that examines the role of extraterritorial laws in space, markets, and culture.

The GTMO detention program is an important intelligence-gathering instrument for the War on Terror. Detention for intelligence is distinct from detention to incapacitate combatants, limit enemy efforts, seek justice, or exchange prisoners of war, all of which could be done (and are done) in other locations. The Joint Task Force Guantanamo (JTF-GTMO) describes its operations as “intelligence collection, analysis and dissemination” in the global War on Terror.²⁷³ It reports that information attained from detainees consists of the following: information regarding “terrorist recruitment, training, financing, planning and command and control”; information that supports “U.S. combatant commanders in the field”; and information that supports allies and “U.S. and international law enforcement agencies.”²⁷⁴ Military sources often describe these intelligence gains to the media.²⁷⁵

Public reports, announcements, and court examinations of the detention program repeatedly highlight detention’s role in intelligence gathering. In a January 22, 2009 executive order, President Obama revoked prior interrogation policies on the base “to improve the effectiveness of human intelligence gathering.”²⁷⁶ Previous meth-

despite states and movements portrayed as “hostile to western ‘security interests,’” such as Iran, Iraq, and Al Qaeda, what remains “at stake” is “access to the world’s largest oil reserves”).

273. See U.S. Navy, JOINT TASK FORCE GUANTANAMO, www.jtftgmo.southcom.mil/ (last visited Aug. 8, 2010).

274. U.S. Navy, JOINT TASK FORCE GUANTANAMO, <http://www.jtftgmo.southcom.mil/index/sept%202010%20pdfs/PG6%20Intelligence.pdf> (last visited Oct. 1, 2010). Importantly, JTF-GTMO describes its interrogations as in “strict compliance” with the Army Field Manual 2-22.3. *Id.*

275. See *News Release, Guantanamo Provides Valuable Intelligence Information (No. 592-05)*, U.S. DEPARTMENT DEF., (June 12, 2005), <http://www.defense.gov/releases/release.aspx?releaseid=8583>; Neil A. Lewis, *U.S. Military Describes Findings at Guantánamo*, N.Y. TIMES, Mar. 21, 2004, <http://www.nytimes.com/2004/03/21/world/us-military-describes-findings-at-guantanamo.html>; Kathleen T. Rhem, *Guantanamo Detainees Still Yielding Valuable Intelligence*, U.S. DEPARTMENT DEF. (Mar. 4, 2005), <http://www.defense.gov/news/newsarticle.aspx?id=31279>.

276. Exec. Order No. 13,491, 74 Fed. Reg. 4,893, (Jan. 27, 2009), available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

ods, often described as torture and abuse, did not comply with Army Field Manual 2-22.3.²⁷⁷ Former Bush administration officials criticize this decision, along with the plan to end GTMO detentions, as “seriously handicap[ping] our intelligence agencies from preventing future terrorist attacks” and “drying up the most valuable sources of intelligence on al Qaeda.”²⁷⁸ With the start of the base detention program in 2002, detainees were screened for “intelligence value” and “possible intelligence that may be gained” from them.²⁷⁹ “Immediately upon [a detainee’s] arrival at GTMO,” intelligence assessments were made with support from detainee interviews, “U.S. intelligence and law enforcement sources, and information supplied by foreign governments.”²⁸⁰ Later, in 2004, the Administrative Reviews Procedures required intelligence personnel to review detainee status determinations in an effort to identify enemy combatants.²⁸¹ These Procedures required reviews to be consistent with ongoing intelligence efforts.²⁸² In a 2006 report on the *Situation of the Detainees at Guantánamo*, United Nations officials reported that the “objective of the ongoing detention is not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaeda network.”²⁸³ In its deci-

277. Cf. *Background: President Obama Signs Executive Orders on Detention and Interrogation Policy*, WHITE HOUSE (Jan. 22, 2009), <http://www.whitehouse.gov/the-press-office/background-president-obama-signs-executive-orders-detention-and-interrogation-polic> (last visited Aug. 8, 2010) (describing how the Order revokes prior interpretations of Common Article 3 of the Geneva Conventions, requires government agencies to follow the Army Field Manual interrogation guidelines, prohibits reliance on any legal advice concerning interrogation that was “issued between September 11, 2001 and January 20, 2009,” and creates a Special Task Force to review whether Army Field Manual interrogation guidelines will be used by the CIA). See generally Vanessa Buschschluter, *The Obama Approach to Interrogation*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/7847405.stm> (last updated Jan. 29, 2009, 14:45 GMT) (detailing what practices the Order outlawed).

278. John Yoo, *Obama Made a Rash Decision on Gitmo*, WALL ST. J., Jan. 29, 2009, <http://online.wsj.com/article/SB123318955345726797.html>.

279. Order from Paul Wolfowitz, Deputy Secretary of Defense, Regarding Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba, at 2, (May 11, 2004), <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

280. *Id.*

281. *Id.* at 1.

282. See *id.* at 3, 6–7 (requiring “[a]t least one member of a Review Board panel [to] be experienced in the field of intelligence” and requiring notice of the proceedings to the Central Intelligence Agency).

283. Chairperson of the Working Group on Arbitrary Detention, *Situation of the Detainees at Guantánamo*, ¶ 23, U.N. Commission on Human Rights, 62d Sess., U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (by Leila Zerrougui et al.), available at <http://www1.umn.edu/humanrts/guantanamo2006.html>. The U.S. government did not allow in-

sions on military commission procedures, due process, and habeas corpus rights for base detainees, the Supreme Court refers to the possible deference required for intelligence-gathering efforts on the base.²⁸⁴ Legal scholar Peyton Cooke argues that base detention cases, such as *Hamdan* and *Boumediene*, represent significant steps towards bringing intelligence activities within the scope of domestic and international law’s regulation.²⁸⁵ Traditionally, domestic and international law provided little constraints to intelligence efforts.²⁸⁶

2. Resource Wars Fought with Intelligence on Terrorism

As a source of intelligence on terrorism, Guantánamo detentions function as an American instrument in a global resource war.²⁸⁷ While a key objective of American foreign policy in the Middle East, central

investigators for this report to interview detainees and denied other investigators access to the base completely. Because of these cooperation problems with U.S. authorities, the U.N. group cancelled the visit to the base detention center. *Id.* § 3.

284. In *Hamdan*, Justice Thomas explains that military commission proceedings and government positions in them should not compromise intelligence: “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 723 (2006) (Thomas, J., dissenting) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). In *Hamdi*, Justice O’Connor notes “interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004). Justice Thomas states that additional process for detainees “will destroy the intelligence gathering function” and will lead to the release of “highly classified information to the purported enemy combatant,” who upon release can fight with “our most closely held secrets.” *Id.* at 595; *Boumediene v. Bush*, 128 S. Ct. 2229, 2276–77 (2008) (recognizing the Government’s “legitimate interest in protecting sources and methods of intelligence gathering” and urging district court discretion “to accommodate this interest to the greatest extent possible”).

285. Peyton Cooke, *Bringing the Spies in from the Cold: Legal Cosmopolitanism and Intelligence Under the Laws of War*, 44 U.S.F. L. REV. 601, 626–35 (2010).

286. *Id.*

287. See generally KLARE, RESOURCE WARS, *supra* note 258. Klare explains these wars have become more likely because certain resources have increased in economic value over time, added demand with industrialization and population growth, become scarce or finite in their supply, and become the subject of disputes about states’ rights over resources. Klare describes the following territorial disputes in areas that contain oil or natural gas: the Warba and Bubiyan Islands in the Northwestern corner of the Persian Gulf, disputed by Iraq and Kuwait; Abua Musa in the Eastern corner of the Persian Gulf, disputed by Iran and the United Arab Emirates; Hawar Island and the Dibala and Jarada shoals in the Persian Gulf, disputed by Bahrain and Qatar; the border between Saudi Arabia and Yemen, Saudi Arabia and Qatar, and Saudi Arabia and the United Arab Emirates; the Hanish Islands in the Southern Red Sea, disputed by Eritrea and Yemen; the Halayeb Triangle on the Red Sea, disputed by Egypt and Sudan; offshore drilling rights in the Caspian Sea, disputed by Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan; and the Serdar/Kyapz field, disputed by Azerbaijan and Turkmenistan. *Id.* at 227–29.

R

Asia, and south Asia is to eliminate terrorism and its state support, even greater goals exist in these regions. These goals include securing oil and natural gas supplies.²⁸⁸ Analysts describe rising global demand for energy sources, increasing costs in exploration and production, and finite sourcing of non-renewable resources as fueling a resource war.²⁸⁹ The 2001 *National Energy Policy* reported that, over the next twenty years, U.S. demand for energy sources will increase by thirty-three percent for oil, more than fifty percent for natural gas, and forty-five percent for electricity, while the United States consumes over twenty-five percent of the oil produced worldwide.²⁹⁰ Foreign policies (i.e., diplomacy, investments, military positioning, trade relations, and aid) contribute to cooperative state-state relations and directly and indirectly secure these resources.²⁹¹ For this reason, foreign policy goals are long-term and reminiscent of historic geopolitics between world powers for territorial and economic control. Regional wars, foreign investment, contests for sea and overland transport routes, shifting territorial control, and nuanced balance of powers between states characterize resource wars.²⁹²

Thus, intelligence on violent threats by non-state actors (e.g., groups such as Al Qaeda or the Taliban) becomes vital to the realization of American objectives. Given the limited political and legal developments since 2002 with respect to releasing or trying detainees in military commissions or courts, intelligence may have higher policy importance than seeking justice for terrorist violence. Terrorism and energy challenges are not solely an American concern. The *National Energy Policy* expects China's demand for oil to increase by five to eight times from 2001 levels by 2020, while depending on the Middle East for seventy percent of its oil.²⁹³ Russia regards Islamic terrorists as a

288. Susanne Peters describes the "geopolitics of energy" as when states secure energy resources by use of military deployment to energy-rich areas, with and without the consent of host states. Peters, *supra* note 258, at 202. R

289. Energy security pressures are by no means only a U.S. concern. They are concerns for highly industrialized, middle-power, and developing states. *See generally* Daniel Yergin, *Ensuring Energy Security*, 85 FOREIGN AFF. 69 (2006).

290. NAT'L ENERGY POL'Y DEV. GROUP, *supra* note 259, at x, 8–3. R

291. Philippe Le Billon and Fouad El Khatib describe how after the fall or weakening of regional allies, U.S. policy has increased regional tensions by containing regional powers and precluding any effective cooperative alliance. Le Billon & El Khatib, *supra* note 272, at 116–18. R

292. *See generally* Klare, *The Empire's New Frontiers*, *supra* note 267, at 386 (describing the Caspian Sea's geopolitical challenges as its five littoral states disagree on off-shore boundaries). R

293. NAT'L ENERGY POL'Y DEV. GROUP, *supra* note 259, at 8–14. R

threat to energy supplies from the Grozny region (i.e., Chechnya).²⁹⁴ It cooperates with central Asian states to fight terrorists who threaten access to energy sources²⁹⁵ and collaborates with China to put down Uighur separatists in the oil-rich Xinjiang region.²⁹⁶ Not by coincidence, GTMO detainees include Russian Muslims²⁹⁷ and Uighurs.²⁹⁸

Al Qaeda’s attacks occur around the globe.²⁹⁹ Operating mostly in the Persian Gulf and Central Asia,³⁰⁰ Al Qaeda terrorists disrupt, directly and indirectly, resource markets. Direct disruptions and threats include armed attacks on oil and natural gas fields and transportation routes. Attacks in Saudi Arabia, Yemen, and Iraq demonstrate terrorist capabilities and objectives.³⁰¹ These attacks threaten the security of global investments in oil exploration, mining, refining, and shipment.³⁰² While the United States has detained important alleged Al Qaeda leaders in GTMO and destroyed Al Qaeda’s safe haven in Afghanistan, Al Qaeda remains the United States’ “greatest terrorist threat.”³⁰³ Al Qaeda maintains significant strength in the Gulf States, North Africa, and autonomous underground cells in nearly 100 countries.³⁰⁴ Recently, Al Qaeda’s central control has been

294. See Klare, *The Deadly Nexus*, *supra* note 265, at 414.

295. See *id.* at 414, 416–17 (explaining that Russia, China, Kazakhstan, Kyrgyzstan, Uzbekistan, and Tajikistan formed the Shanghai Cooperation in 2001 for this purpose).

296. See *id.* at 414.

297. *The Guantánamo Docket: Citizens of Russia*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/country/russia> (last visited Aug. 1, 2010) (reporting that nine Russians have been detained at GTMO).

298. See, e.g., *The Guantánamo Docket: Yusef Abbas*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/275-yusef-abbas> (last visited Aug. 1, 2010).

299. See Klare, *The Deadly Nexus*, *supra* note 265, at 417–19 (describing Al Qaeda’s creation after the Afghanistan-Soviet Union War).

300. See Klare, *The Empire’s New Frontiers*, *supra* note 267, at 385 (reporting that Al Qaeda is firmly rooted in the Persian Gulf and Caspian Sea areas and that these regions provide its primary source of support).

301. See generally OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2008, at 135 (2009), <http://www.state.gov/documents/organization/122599.pdf> (reporting that the Saudi Arabian government recently arrested 701 militants who were planning to attack oil fields and other installations).

302. Some of Al Qaeda’s attacks include attacks on the following: the Abqaiq petroleum processing facility in Saudi Arabia in February 2006; a residential compound in Riyadh, Saudi Arabia in May 2003; a French tanker off the coast of Yemen in October 2002; a fuel tanker in Tunisia in April 2002; and the USS *Cole* in October 2000. Jayshree Bajoria & Greg Bruno, *Al-Qaeda (a.k.a. Al-Qaida, Al-Qa’ida)*, COUNCIL ON FOREIGN REL., http://www.cfr.org/publication/9126/alqaeda_aka_alqaida_alqaida.html (last updated Dec. 30, 2009).

303. OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 301, at 8.

304. See Bajoria & Bruno, *supra* note 302. Although Al Qaeda is reported to be less capable than in prior years, regrouping efforts are under way between the Afghanistan and Pakistan border. *Id.* GTMO detainees include purported Al Qaeda leaders Abu Zubaydah,

R

R

R

R

R

operating in Pakistan's Federally Administered Tribal Areas (FATA) and on the border with Afghanistan.³⁰⁵

Since the 2001 attacks and the U.S. invasion of Iraq in 2003, the greatest threat from Al Qaeda occurs in Iraq and the Persian Gulf. Often seen as a response to recent and historic U.S. policies in the region, this threat directly puts oil supply markets at risk. The group "Al-Qaeda in Iraq" or "al-Qaeda in Mesopotamia"³⁰⁶ has been characterized by U.S. military leadership in Iraq as "probably public enemy number one."³⁰⁷ Most recently, the group Al Qaeda in the Arabian Peninsula (AQAP) has gained attention for mounting attacks in Saudi Arabia and the Gulf states.³⁰⁸ It claims to be behind the 2009 Christmas Day bomb attempt of a Northwest Airlines flight and pronounces intent to attack oil facilities, foreigners, and security forces.³⁰⁹ Its 2003–2004 attacks in Saudi Arabia, of relevant western or energy industry interests, included attacks on a housing complex in Riyadh in May 2003, western oil workers and nationals in Yanbu and al-Khobar in May 2004, an American aerospace worker in June 2004, and the U.S. Consulate in Jeddah in December 2004.³¹⁰ In February 2006, it led a direct attack on an Abqaiq oil facility, resulting in a 3.4% increase in crude oil prices on the New York Mercantile Exchange.³¹¹ Recent attention on AQAP focuses on Yemen, where AQAP attacked western tourists and the U.S. embassy and organized attacks in Saudi Arabia.³¹²

Abd al-Hadi al-Iraqi, Khalid Sheikh Mohammed, and Mustafa Ahmed al-Hawsawi. *Id.* They were charged with murder, terrorism, and violations of the laws of war in February 2008. *Id.*

305. OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 301, at 199.

306. Greg Bruno & Julia Jeffrey, *Profile: Al-Qaeda in Iraq (a.k.a. Al-Qaeda in Mesopotamia)*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/publication/14811/> (last updated April 26, 2010).

307. News Transcript, *DoD News Briefing with Gen. Petraeus from the Pentagon*, U.S. DEPARTMENT DEF. (Apr. 26, 2007 10:00 AM), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3951>.

308. See generally Bruce Riedel, *Fighting Al Qaeda in Yemen is an Important Battle of a Broader War*, BROOKINGS INST. (Jan. 7, 2010), http://www.brookings.edu/opinions/2010/0107_yemen_riedel.aspx (describing the connection between Al Qaeda in Yemen with the Christmas Day 2009 bomb attempt, Fort Hood killings in November 2009, and "lawless spaces" in the Arabian peninsula).

309. See *Profile: Al-Qaeda in the Arabian Peninsula*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8437724.stm> (last updated Jan. 3, 2010, 8:00 GMT).

310. *Id.*

311. *Saudis Foil Oil Facility Attack*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/4747488.stm (last updated Feb. 24, 2006, 19:56 GMT).

312. See *Profile: Al-Qaeda in the Arabian Peninsula*, *supra* note 309.

R

R

In resource war terms, Al Qaeda terrorists threaten production and access to energy sources from the Persian Gulf. They directly threaten the energy industry and global supplies by attacking infrastructure, workers, and foreign consulates. They also indirectly threaten markets with attacks and armed resistance that increase political instability in the region. The uncertainty caused by terrorist activities becomes a political risk for the energy industry. The geopolitical significance of the Gulf region heightens the impact of any violence. This region provides the largest known reserves and easiest access with the sea transport of oil from Gulf states (i.e., Iraq, Kuwait, Saudi Arabia, and the United Arab Emirates). Geopolitical interest is particularly high at ocean entryways such as the Strait of Hormuz and Gulf of Aden. Accordingly, Al Qaeda operations in Somalia, Pakistan, and Yemen attract much global attention.

Moving east, the military campaign in Afghanistan has the goal of preventing Al Qaeda from developing another base or safe haven in Taliban-controlled areas in Afghanistan and Pakistan.³¹³ Since being dislodged by the U.S. campaign, the Taliban operates between Pakistan and southern and eastern parts of Afghanistan.³¹⁴ This U.S. campaign benefits American energy markets by eliminating or checking Al Qaeda, which directly threatens supply markets. Recently worried about persistent insecurity, foreign investors have started seeing Afghanistan as a lucrative opportunity for natural resources such as lithium, iron, copper, gold, niobium, mercury, cobalt, and natural gas.³¹⁵ The campaign inserts U.S. influence in a region sensitively close to myriad geopolitical challenges.

Afghanistan's geopolitical significance so close to so many global contests, literally in the middle of multiple potential wars, cannot be overstated. American presence there provides military, economic, and diplomatic power directly influencing central Asian affairs. It is adjacent to Iran's eastern border, in a territorial path east of Caspian Sea energy resources, on China's western border, south of resource-rich

313. See Transcript, President Barack Obama, Strategy for Afghanistan and Pakistan, March 2009 (Mar. 27, 2009), <http://www.cfr.org/publication/18952/>.

314. See OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 301, at 141.

315. See James Melik, *Afghan Wealth Stifled by Security Fears*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/10411587.stm> (last updated June 25, 2010, 7:00 AM); *Afghan President Cautions About Mineral Windfall*, AFP, GOOGLE HOSTED NEWS (June 26, 2010), http://www.google.com/hostednews/afp/article/ALeqM5h_3ZkCo_wA-XL3GjdnGdNW7baUOQ; Jesse Riseborough, *Afghans Talk to ArcelorMittal, Rio, Total on Projects*, BLOOMBERG BUSINESSWEEK (June 25, 2010, 12:29 PM), <http://www.businessweek.com/news/2010-06-25/afghans-talk-to-arcelormittal-rio-total-on-projects.html>.

Turkmenistan and Kazakhstan, and northeast of nuclear powers Pakistan and India dueling for Jammu and Kashmir. Afghanistan's potential as a pipeline route for the Caspian Sea's natural resources, transporting oil and gas from Turkmenistan and Kazakhstan, highlights its resource significance.³¹⁶ Landlocked, the Caspian Sea provides abundant natural gas and oil sources, with minimal exploration and foreign investment compared to the Persian Gulf.³¹⁷ As a consequence, it is regarded as having great geopolitical significance and is the subject of economic speculation. Already from the Caspian, pipelines to the Mediterranean and Black Seas traverse multiple ethnic conflicts in Georgia, Azerbaijan, and Turkey (e.g., Baku-Tbilisi-Ceyhan (BTC) and South Caucasus Pipeline pipelines).³¹⁸ The United States believes that future pipelines passing through Russia or Iran and pipelines established with Chinese participation would threaten American energy security.³¹⁹ Growing energy demand, diplomatic and political tensions, and military capacities (with varying degrees) for each of these powers, motivate U.S. priorities in Afghanistan. The *National Intelligence Strategy* lists each of these countries as having "the ability to challenge U.S. interests in traditional . . . and emerging . . . ways."³²⁰

In addition to directly threatening energy supplies, indirect threats exist when terrorists destabilize regional governments with violence and by questioning the legitimacy of national leaders. When non-state actors violently contest state authority by attacking civilians, the military infrastructure, and public institutions, they explicitly contest sovereign authority. This impacts sovereign control over territory,

316. See generally Le Billon & El Khatib, *supra* note 272, at 120 (describing UNOCAL interest in a pipeline in Afghanistan). R

317. See generally Klare, *The Empire's New Frontiers*, *supra* note 267, at 385 (explaining that, in an effort to hedge risks of over-dependence, the United States wants to increase energy imports from the Caspian Sea region because the Middle East is unstable); NAT'L ENERGY POL'Y DEV. GROUP, *supra* note 259, at 8–12 (describing the landlock problem and the need for additional exploration and investment). R

318. The BTC pipeline was a major Clinton and Bush administration objective. See Klare, *The Deadly Nexus*, *supra* note 265, at 416. It passes through six areas of political and ethnic strife—Nagorno-Karabakh in Azerbaijan, Chechnya and Ingushetia in Russia, South Ossetia and Abkhazia in Georgia, and Kurdish regions in Turkey. *Id.* R

319. See Le Billon & El Khatib, *supra* note 272, at 124–25 (describing U.S. objectives as competing with Russia's and China's interest in oil in the Persian Gulf and Caspian Sea); Klare, *The Empire's New Frontiers*, *supra* note 267, at 387. R

320. See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *supra* note 269, at 3. These threats stem from the following: Iran's weapons programs, support for terrorism, and aid to U.S. adversaries; China's increasing "resource-focused diplomacy" and "military modernization"; and Russia's assertion of power and influence. *Id.* R

resources, and political, legal, and military power. By effectively eroding legal, military, or actual protection of a resource supply, terrorism threatens Empire as markets. As this progresses, foreign investments (i.e., global demand for oil from the Persian Gulf and Central Asia) can only absorb so much of these risks.³²¹ Imperial market reasoning works to reduce these risks (i.e., to eliminate terrorist groups and state support of terrorism and to aid states supporting American interests).

These resource-focused goals are central to U.S. foreign policy concerning the Middle East and Central Asia.³²² Susanne Peters argues that the “coercive character” of Western energy strategies (e.g., two invasions of Iraq) exacerbate tensions and make armed conflicts more likely.³²³ Even though state and non-state actors may vary, the need to fuel modern economies energizes these objectives, guiding foreign, military, cultural, and counter-terrorism policies. American motives and their results, in this regard, are not easily reduced to single causes, isolated policy goals, or a centralized effort in U.S. foreign policy. The context supporting terrorism is complex and rarely has one sole cause. For many states, limited popular participation, authoritarian leaders, and economic inequality fuel armed insurgency. Popular sectors may not look to or are frustrated with national leadership, representing weak regimes, monarchies, single party, or military rule

321. Calls by terrorists to attack oil facilities quickly result in increases in crude oil market prices. These threats, the geopolitics of territorial control and transportation access, and energy speculation dramatically increases the price volatility beyond traditional supply and demand pressures. See Jennifer Giroux & Caroline Hilpert, *The Relationship Between Energy Infrastructure Attacks and Crude Oil Prices*, IAGS J. ENERGY SECURITY (OCT. 27, 2009), http://www.ensec.org/index.php?option=com_content&view=article&id=216; Toni Johnson, *Oil Market Volatility*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/publication/15017> (last updated Sept. 24, 2008).

322. See generally Klare, *The New Geopolitics*, *supra* note 256 (describing how Cold War policies, defense planning after the Cold War, and the 2002 national security strategy illustrate the geopolitical emphasis on oil and these regions in U.S. foreign policy); Peters, *supra* note 258, at 202–04 (offering a brief history of U.S. energy geopolitics before 2001, including: a 1953 coup d'état in Iran; the threat of military intervention during the 1973 oil crisis; support for creating the International Energy Agency in response to OPEC supply pressures; the 1980 Carter Doctrine declaring the Persian Gulf as of vital interest; the 1991 Gulf War against Iraq, in response to Iraq's occupation of Kuwait; the diversification of oil sources in Alaska, the North Sea, and Mexico; the declaration of Colombia and Venezuela as of vital interest; and military cooperation with states bordering the Caspian Sea); Williams, *supra* note 262 (arguing the United States consistently sees its military power as a means of ensuring access to Gulf Oil and providing the following examples: Nixon's contingency plan to seize oilfields during the 1973–74 oil embargo, Reagan's deployment of naval forces to the Strait of Hormuz during the Iran-Iraq War, the 1991 war to end Iraq's occupation of Kuwait; and the 2003 invasion of Iraq).

323. Peters, *supra* note 258, at 187.

R

R

R

R

political systems.³²⁴ In this light, terrorist discourses take on global and transnational inspiration. Islam and imperial histories influence how these local contests play out in international relations. In terrorists' proclamations, religion is the reasoning behind violence, whether it promises personal salvation, provides a justification for an action, or provides a greater sense of justice, virtue, and duty. Prior rule by British, French, Ottoman, and Russian empires delineated many of the present national borders and left political leadership to their liking. Political leaders and insurgents voice present injustices as the product of prior Western, European, and American involvement. Here the most obvious legacies are U.S. bases formerly in Saudi Arabia and currently in Iraq, Afghanistan, and in the Gulf states, along with the Palestine and Israel disputes.

State support or sanctuary for terrorism is another significant threat to resource markets. Afghanistan serves as the recent example providing sanctuary and training locations for Al Qaeda members from around the globe. State support allows terrorists to train, benefit from protection and financing within a state's borders, and then attack elsewhere. In this light, terrorists export, source, and target their acts in a transnational manner. Terrorist attacks may be political, symbolic, or economic, but they emanate from organizational support. The real concern with Al Qaeda, of course, is that its members will export the training and protection provided by Afghanistan to resource-rich regions nearby (e.g., oil rich states of the Caspian Sea, Persian Gulf, Middle East, South China Sea, and North Africa).

In summation, this subsection has presented energy security and the geopolitics of the Persian Gulf and Central Asia as the overseas markets that Guantánamo detentions help protect. Detentions help attain vital intelligence to combat foreign policy threats in these regions, which helps domestic energy security demand. Terrorists attack energy supplies and destabilize these regions as suppliers of oil and natural gas. Guantánamo's role in Empire as markets is implicit and more removed than prior strategic support or patrolling security during the Cold War or Sphere of Influence. Regardless, the detention program has been long-term (since 2002), economically expensive, diplomatically costly, domestically contested, and perhaps has even become a recruiting tool for Al Qaeda.

324. See Le Billon & El Khatib, *supra* note 272, at 118–19 (offering the example of Arab fighters returning home after the Soviet withdrawal from Afghanistan in 1989).

Program goals include obtaining intelligence in the War on Terror, which combats armed groups and assists Persian Gulf and Central Asian states in these efforts. These regions are also vital to American energy needs and, more so, the domestic economy. Combating terrorism accomplishes two relevant things. It checks or ends violent attacks of energy resource supplies and their transport in these regions. It also importantly inserts an American presence in economic, diplomatic, military, and political terms in regions where terrorism destabilizes foreign states and their ability to protect foreign economic interests. Given these links between the regional location of terrorism and energy resource supplies, on the one hand, and intelligence gathering and War on Terror detention, on the other hand, this subsection poses one question. How do the War on Terror and Guantánamo detentions protect overseas markets?

C. GTMO's Cultural Assumptions in Checked Sovereignty and Discriminatory Detentions

1. Cultural Superiority Provides the Base at Guantánamo

Situated at the periphery of the North American continent, yet instrumental to U.S. foreign relations, GTMO reflects Empire as culture. This is a product of historical legacy and contemporary foreign relations since its establishment in 1903. The base's location and its mission benefit from ideologies of superiority, with legal and cultural justifications for checking Cuban sovereignty.³²⁵ These values frame current legal anomaly. Foreign relations and legal history intentionally produced this anomaly. As Colás explains, empires use cultural understandings, usually distinguishing with classifications based on race or between the civilized and non-civilized, to justify why metropolitan power subordinates and controls a population. For example, late nineteenth and early twentieth century notions of cultural superi-

325. For sophisticated examinations of law, race, culture, and location, see John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995) (illustrating how location and community frame racial identity and its legal treatment); Reginald Oh, *Re-mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305 (2004) (presenting how national, state, and local narratives frame approaches to civil rights jurisprudence); Tom I. Romero, II, *Bound Between & Beyond the Borderlands: Region, Race, Scale and a Subnational Legal History*, 9 OR. REV. INT'L L. 301 (2007) (presenting how geographic and scalar perspectives frame legal issues regarding racial exclusion and property in the American West); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (arguing the law is not neutral in creating racially identified space).

ority fueled an emerging American identity as a world power and consequential interventions in neighboring states.³²⁶ These interventions relied on assumptions that American values were needed or that self-interest required American action. These assumptions framed U.S. influence over Cuba, creating a protectorate in 1903 and guaranteeing a base in effective perpetuity since then. As a result, the United States checked Cuban sovereignty, evident in the Platt Amendment and subsequent treaties between Cuba and the United States. Cultural assumptions about American superiority and Cuban inferiority produced the base. These assumptions have fueled American Empire overseas since 1898 with economic motivations and persistent military involvement abroad.³²⁷ Now, similar notions implicit in the War on Terror facilitate detentions on the base.

These cultural assumptions in Guantánamo's legal history provide a conceptual base for current American superiority. This is manifested in eight years of detentions in the War on Terror. The United States has presented the War on Terror as a war for civilization, fighting an irrational and lawless enemy.³²⁸ Early in 2002 when news broke about the detention program, the White House presented the detainees as Al Qaeda murderers, the "worst of the worst," and because of their suicidal nature, willingness, and training, individuals who will "go out and kill and destroy and engage in suicide."³²⁹ President Bush presented terrorists as hating "our freedoms: our freedom of religion, our freedom of speech, our freedom to vote and assemble and disa-

326. See generally DAVID HEALY, *US EXPANSIONISM: THE IMPERIALIST URGE IN THE 1890S* (1970) (describing how ideas on markets, China, virtue, civilization, race, barbarism, and commerce inspired public and political discourse seeking an Empire); SCHOULTZ, *supra* note 105 (explaining that U.S.-Latin America policy has been motivated by national security, domestic politics, economic motives, and a belief that Latin Americans are inferior human beings). R

327. For descriptions of American foreign relations during the twentieth century as Empire, see BACEVICH, *AMERICAN EMPIRE*, *supra* note 112; BACEVICH, *THE NEW AMERICAN MILITARISM*, *supra* note 114; BACEVICH, *THE LIMITS OF POWER*, *supra* note 115; CHARLES S. MAIER, *AMONG EMPIRES: AMERICAN ASCENDANCY AND ITS PREDECESSORS* (2006). R
R

328. Natsu Taylor Saito presents five premises for the War on Terror: (1) The enemy is evil; (2) Evil is embodied in the terrorist and rogue state; (3) Enemies will not act rationally and normal rules of war do not apply; (4) Western civilization, representing universal values of freedom and democracy, is being defended; and (5) "[T]he United States embodies the highest stage of . . . civilization." Natsu Taylor Saito, *Colonial Presumptions: the War on Terror and the Roots of American Exceptionalism*, 1 *GEORGETOWN J. L. & MODERN CRITICAL RACE PERSP.* 67, 69 (2008).

329. Ari Fleischer, White House Press Sec'y, White House Briefing (Jan. 23, 2002), available at <http://transcripts.cnn.com/TRANSCRIPTS/0201/23/se.01.html>.

gree with each other.”³³⁰ America’s preeminence on the global stage and unrivaled power creates its duty to save civilization. *The National Security Strategy of the United States of America* described the United States as:

Possess[ing] unprecedented—and unequalled—strength and influence in the world. Sustained by faith in the principles of liberty, and the value of a free society, this position comes with unparalleled responsibilities, obligations, and opportunity. The great strength of this nation must be used to promote a balance of power that favors freedom.³³¹

American values and its goals for the War on Terror became universal objectives for the whole world.³³² Specific to base detainees, initial White House justifications that unlawful enemy combatants did not enjoy protections in international law resembled historic denials of similar rights for savages or barbarians in colonial wars.³³³ Historically, international legal doctrine reasoned that civilization and culture determined who did or did not benefit from legal protections (i.e., the laws of war, sovereign protection, and non-intervention principles).³³⁴ GTMO detainees were presented as not understanding these obligations, irrational, and/or not parties to international treaties such as the Geneva Conventions.³³⁵

330. See President George W. Bush, Presidential Address to a Joint Session of Congress (Sept. 20, 2001), available at <http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/>.

331. THE NATIONAL SECURITY STRATEGY, *supra* note 57, at 1. While later National Security Strategies issued by Presidents Bush and Obama distance themselves from unilateralism, preemptive force, and insecurity focused primarily on Islamic terrorism, they still highlight American superiority and a duty to lead. See, e.g., THE NATIONAL SECURITY STRATEGY MAY 2010, at 1 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (presenting military superiority as underpinning global security and explaining that, after decades of leadership, the United States will “continue to underwrite global security,” is “focused on renewing American leadership” and “recognizes the fundamental connection between our national security, our national competitiveness, resilience, and moral example”).

332. See Susanne Soederberg, *The War on Terrorism and American Empire*, in THE WAR ON TERRORISM AND THE AMERICAN ‘EMPIRE’ AFTER THE COLD WAR, *supra* note 59, at 165.

333. See generally Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’*, in INTERNATIONAL LAW AND ITS OTHERS 298–301 (Anne Orford ed., 2006).

334. See generally ANGHIE, *supra* note 101 (presenting how international law, from its foundation to the War on Terror, uses culture and civilization in deciding which populations should benefit from legal protections).

335. See generally Mégret, *supra* note 333 (examining how War on Terror justifications to exclude combatants from Geneva Conventions protections are very similar to historic imperial legal reasoning that excluded populations from protections in international law).

R

R

R

R

2. Concentrated Trends in Detainee Nationalities

GTMO's role in Empire as culture is consistent with preliminary analysis of detainee demographics. This analysis suggests that detention is reserved mostly for specific nationalities; the majority of detainees are nationals from Afghanistan, Saudi Arabia, Yemen, or Pakistan. The War on Terror articulates American values of cultural superiority and duty. Base detainee nationality patterns are consistent with these cultural assumptions. Here, the early argument is that base detentions overwhelmingly focus on specific nationalities. While detentions may not have explicit racist or national origin motives, their result is de facto discriminatory. GTMO detention appears to be more likely for certain nationalities. The total detainee population has included over forty-seven nationalities, including European, Canadian, and Australian nationals.³³⁶ But when these numbers are sorted by nationality, the most represented groups point to detention-nationality patterns. As such, a detention program at a specific location lasting at least eight years with detainees distanced from American and foreign law inspires asking: Who is or has been detained there?

We can draw only preliminary inferences, because since 2002 detainee population information has been incomplete, imperfect, controlled for security reasons, and has changed with transfers, releases, and litigation. This Article works with three databases accessible online from the Brookings Institution, Washington Post, and New York Times, developed since Pentagon disclosures in the spring of 2006. The Brookings Institution notes that the Pentagon has "consistently refused to comprehensively identify" the detainees, and despite information releases, it "always maintained ambiguity" and declines to give a precise number of those actually held.³³⁷ Despite these compilations, information is "strangely obscure" with changes to the population's makeup remaining "fuzzy."³³⁸ The Brookings Institution

336. *Names of the Detained*, WASH. POST, *supra* note 5.

337. BENJAMIN WITTES, ZAAHIRA WYNE, ERIN MILLER, JULIA PILCER, & GEORGINA DRUCE, BROOKINGS INST., THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY 1, 3 (2008), http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx?rssid=wittesb (follow "Full Report" hyperlink) [hereinafter WITTES & WYNE].

338. *Id.* at 3.

reported that as of October 21, 2009, 221 detainees remained,³³⁹ while recent reports say 174 remain.³⁴⁰

The interagency Guantanamo Review Task Force Final Report provides several important numbers on the detainee population from January of 2010.³⁴¹ These include: 240 detainees remained on the base,³⁴² 44 were referred for prosecution,³⁴³ and “48 detainees were determined to be too dangerous to transfer but not feasible for prosecution.”³⁴⁴ The total number detained since detentions began in 2002 is 779.³⁴⁵ In 2002, there were 632 detainees on the base.³⁴⁶ The military brought another 117 detainees in 2003, 10 in 2004, 14 in 2006, 5 in 2007, and 1 in 2008.³⁴⁷ The government has repatriated 530, “almost 70 percent” of the 779 ever detained, to their home countries or third party countries.³⁴⁸

Made public over three months after its completion, the Final Report is consistent with many suggestions,³⁴⁹ made since 2002, that

339. BENJAMIN WITTES, ZAAHIRA WYNE, ERIN MILLER, JULIA PILCER, & GEORGINA DRUCE, BROOKINGS INST., *THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY I* (2008), http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx?rssid=wittesb (follow “View Updates as of October 21, 2009” hyperlink).

340. *The Guantánamo Docket: Detainees Held*, N.Y. TIMES, *supra* note 13.

341. GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (2010), http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf. The Task Force completed the report by January 22, 2010 but it was not immediately sent to relevant congressional committees because there was (and remains) significant political opposition to closing the detention center. Peter Finn, *Most Guantanamo Detainees Low-Level Fighters, Task Force Report Says*, WASH. POST., MAY 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052803873.html>.

342. GUANTANAMO REVIEW TASK FORCE, *supra* note 341, at ii.

343. *Id.*

344. *Id.* It states these 48 will continue in detention “based on a finding that they pose a national security threat” and that this could not be mitigated by transfer from U.S. custody. *Id.* at 12. For them, prosecution in federal court or the military commission system is not feasible. *Id.* The administration argues their detention is lawful under the AUMF. *Id.*

345. *Id.* at 1.

346. *Id.*

347. *Id.*

348. *Id.* Detainees were transferred to Afghanistan, Albania, Algeria, Australia, Bahrain, Bangladesh, Belgium, Bosnia, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Somalia, Spain, Sudan, Sweden, Tajikistan, Tunisia, Turkey, Uganda, the United Arab Emirates, the United Kingdom, and Yemen. *Id.*

349. The majority of detainees have not committed hostile acts against the United States or its allies, are not members or leaders of Al Qaeda or the Taliban, and/or are innocent. See BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008); WITTES & WYNE, *supra* note 337; Tim Reid, *George W. Bush ‘Knew Guantanamo Prisoners Were Innocent,’* TIMES ONLINE (U.K.), (Apr. 9, 2010), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7092435.ece.

R

R

R

the detainee population does not represent the most dangerous threats. Of the 240 detainees remaining in January 2010, it states “[r]oughly 10 percent . . . played a direct role in plotting, executing, or facilitating” attacks on September 11, the USS *Cole*, and U.S. embassies in Kenya and Tanzania.³⁵⁰ Approximately 20% had “significant organizational roles within al-Qaida or associated terrorist organizations,” including logistical supporters, bodyguards, well-trained operatives, and those who moved money for terrorist organizations.³⁵¹ Fewer than 10% are Taliban leaders or members of anti-coalition militia groups.³⁵² The majority are “[l]ow-level foreign fighters” lacking any leadership or specialized role in Al Qaeda, the Taliban, or associated groups.³⁵³ They were captured during early U.S. military operations in Afghanistan, “without being specifically targeted for capture by (or even known to) the U.S. military in advance.”³⁵⁴ Approximately 5% do not fit into any of the four mentioned categories.³⁵⁵

The Washington Post’s *Names of the Detained in Guantanamo Bay, Cuba* reports that there have been 779 detainees at the base since 2002 (charting the total population including releases, transfers, and deaths).³⁵⁶ The database sorts detainees by those who have been released versus those still detained, combatants versus non-combatants, those charged versus those who haven’t been charged, nationality, and age. Both the New York Times *Guantánamo Docket*³⁵⁷ and the Brookings Institution³⁵⁸ report 779 men have been detained on GTMO as enemy combatants since 2002.

350. GUANTANAMO REVIEW TASK FORCE, *supra* 341, at 13.

351. *Id.*

352. *Id.* at 14.

353. *Id.*

354. *Id.*

355. *Id.*

356. See *Names of the Detained*, WASH. POST, *supra* note 5. It reports that there are 779 names in the database, but the current full list of detainees shows 778 results. *Names of the Detained: Results*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/search/> (last visited Aug. 1, 2010) [hereinafter *Names of the Detained: Results*, WASH. POST]. The database is based on the 2006 list released by the Pentagon, unofficial sources, news accounts, legal documents, interviews with attorneys and relatives, and online sources. *Names of the Detained*, WASH. POST, *supra* note 5.

357. *The Guantánamo Docket: About*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/about> (last visited Aug. 1, 2010). This database includes documents from Combatant Status Review Tribunals (CSRTs), Administrative Review Boards, military review panels, court records, and media reports. It describes detainee processing and dates of their transportation. *Id.*

358. WITTES & WYNE, *supra* note 337, at 1. The Brookings Institution also reports on detainee demographics, government allegations, and detainee statements. *Id.* at 6–22. It bases its information mostly on habeas litigation, a 2006 Pentagon list, records from

R

R

R

R

The Brookings Institution reports that of the 248 detainees on the base as of December 16, 2008, 94 detainees (more than 33%) were Yemeni and that at least 173 detainees (more than 70%) were citizens from Middle Eastern or North African nations.³⁵⁹ Thirty-six detainees (approximately 14.5%) came from areas surrounding the “South Asian theater of war”—Afghanistan, Pakistan, Uzbekistan, and Tajikistan.³⁶⁰ Of the detainees transferred or released, the vast majority were from Saudi Arabia and Afghanistan, suggesting sufficient American trust and cooperation with these states to release detainees.³⁶¹ The government has not released some detainees due to concerns over detention treatment and poor surveillance by foreign states.³⁶² It also refuses to transfer Yemeni detainees because of concerns over prison breaks and the Yemeni authorities’ capacity and intent to detain them.³⁶³ News of the 2009 Christmas bomber’s affiliation to Al Qaeda groups in Yemen has dramatically heightened the concerns about future disposition of these detainees.³⁶⁴ The only remaining detainee from a Western nation is Omar Ahmed Khadr, from Canada,³⁶⁵ captured in Afghanistan at the age of 15.³⁶⁶

Countries with 70 or more detainees include Afghanistan, Saudi Arabia, Yemen, and Pakistan.³⁶⁷ Two hundred nineteen detainees are of Afghan nationality, 140 detainees are of Saudi Arabian nationality, 109 detainees are of Yemeni nationality, and 70 detainees are of Pakistani nationality.³⁶⁸ Countries with the next largest number of detainees include Algeria and China, having 25 and 22 nationals detained

CSRTs, and detainee Internment Serial Numbers (ISN). *Id.* at 23–27. It provides detainee numbers for those who represent Al Qaeda leadership, Al Qaeda operatives, Taliban leadership, Taliban operatives, foreign fighters, and mixtures of these categories. *Id.* at 2. Similar numbers quantify detainees who traveled to Afghanistan for jihad, were caught in guesthouses or safe houses, received training in Afghanistan, fought for the Taliban, and were in the Tora Bora training center. *Id.* at 1.

359. *Id.* at 6–7.

360. *Id.* at 7.

361. *Id.*

362. *Id.*

363. *Id.*

364. Josh Gerstein, *Xmas Bomb Bid Complicates Gitmo Plan*, POLITICO, Dec. 26, 2009, <http://www.politico.com/news/stories/1209/30982.html>; *White House: No Detainees to Yemen for Now*, ASSOCIATED PRESS, Jan. 5, 2010, available at <http://www.cbsnews.com/stories/2010/01/05/national/main6059217.shtml>.

365. WITTES & WYNE, *supra* note 337, at 7.

366. The Case of Omar Ahmed Khadr, Canada, Human Rights First, http://www.humanrightsfirst.org/us_law/detainees/cases/khadr.aspx (last visited Sept. 20, 2010).

367. *Names of the Detained: Results*, WASH. POST, *supra* note 356.

368. *Id.*

R

R

respectively.³⁶⁹ The third largest set consists of countries that have had between 10 and 20 nationals detained: Morocco, Kuwait, Sudan, Tajikistan, and Tunisia.³⁷⁰ Iraq, Syria, and Russia each have 9 detainees.³⁷¹ Countries with less than 10 detainees include: Jordan, the United Kingdom, France, Bahrain, Egypt, Uzbekistan, Turkey, Somalia, Iran, Kazakhstan, Mauritania, West Bank, Australia, Belgium, Canada, Malaysia, United Arab Emirates, Palestine, Bangladesh, Denmark, Azerbaijan, Sweden, Spain, Chad, Qatar, Turkmenistan, Uganda, Maldives, Ethiopia, Tanzania, Indonesia, and Kenya.³⁷² The New York Times *Guantánamo Docket* reports similar trends regarding the citizenship of detainees.³⁷³

Drawing inferences from the law's cultural assumptions and its consequential racial exclusions for this population is difficult.³⁷⁴ Detainee nationalities suggest they are from the Persian Gulf or Central Asia, regions vital to American security in terms of the War on Terror and energy supplies. One place to start is by ordering the population by geographic origin based on nationality. Broken up, using U.S. Department of State geographic categories,³⁷⁵ detainees represent 18 Near Eastern states, 8 South and Central Asian states, 7 African states, 4 East Asian and Pacific states, and 10 European and Eurasia states.³⁷⁶ This provides for 377 detainees from the Near East and 319 from South and Central Asia. These two regions' combined result equals 696 of the 779 detainees, constituting 89.4% from the Near East and South or Central Asia. Put simply, detainees seem to overwhelmingly be from these regions.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *The Guantánamo Docket: Countries of Citizenship*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/by-country/page/1> (last visited July 23, 2010).

374. The numeric data presented in this subsection is imperfect, for a variety of methodological and sourcing reasons. This Article does not pretend to offer a thorough statistical analysis. This early and rudimentary demographic analysis is offered only to spur more thorough examinations and to motivate questions about detention trends and their influence on extraterritorial jurisdiction and Empire. The data provided is quite limited and far from conclusive. Any examination of detainee demographics is hindered by concerns about the ramifications of disclosure, the developing nature of numbers due to relocations and litigation, and databases that use different reporting criteria.

375. The U.S. State Department groups countries into the following regions: Africa (Sub-Saharan), East Asia and the Pacific, Europe and Eurasia, the Near East (North Africa and the Middle East), South and Central Asia, and the Western Hemisphere. *Countries & Regions*, U.S. DEPARTMENT ST., <http://www.state.gov/countries/> (last visited July 20, 2010).

376. These figures use the Washington Post database. *Names of the Detained*, WASH. POST, *supra* note 5.

3. Critical Race Questions Raised by Nationalities

Localizing racial categories for detainees under U.S. law is quite complex. For this, the Article emphasizes critical race approaches.³⁷⁷ Base detainees’ shared nationalities and geographic origin point to Empire as culture, with detention being de facto discriminatory. Because American law reserves detentions primarily for Arabs and South and Central Asians, detention practices are discriminatory. They bolster goals of American superiority by excluding certain populations from protections. Critical race legal theory offers various analytical tools explaining how racially neutral or color-blind legal policies, such as base detentions for enemy combatants and intelligence gathering, discriminate against populations of color.³⁷⁸ Here, the idea is that race is socially constructed and not necessarily something biological or static.³⁷⁹ Social thoughts, political contests, and assumptions create racial categories.³⁸⁰ By designating categories, excluding rights protections, or affirming certain privileges, the law may racialize certain populations. Base detentions and classifications as “unlawful enemy combatants” create proxies in American law to exclude persons from rights protections.³⁸¹

Referring to American law’s racialization of foreigners and the War on Terror, critical race legal scholarship inspires similar inquiries

377. It can be argued that many of the detainee identities are white for domestic U.S. law purposes, yet the law perpetually discriminates against detainees by classifying them as enemy aliens, disloyal, or passionately violent. *See generally* JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* (2009).

378. Liberal theory’s assumptions regarding “formal equality” and meritocracy overlook where de facto discrimination exists. *See Introduction, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiv–xvii (Kimberlé Crenshaw et al. eds., 1995). With GTMO, liberal assumptions operate on two general planes. First, an American base was obtained by the consent of two sovereign states. In reality, the negotiation was grossly unequal and was an exercise of imperial power. This created an anomalous space in American and international law at Guantánamo. Second, the objectives of the detention program have no racial intent or impact. Detention is for security and intelligence-gathering purposes. Detainee nationalities and the neo-savagery tropes implicit in the “unlawful enemy combatant” classification suggest that detention racializes Arab and South and Central Asians. *See generally* Mégret, *supra* note 333. R

379. *See* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1980s*, at 68 (1st ed. 1986).

380. *See, e.g.*, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan F. Perea et al. eds., 2000) (illustrating the historical process of how various groups are treated as “different” by American history and the law).

381. When incorporated by the Court in *Hamdi*, the “unlawful enemy combatant” classification did not enjoy firm doctrinal support. *Cf.* Martinez, *supra* note 203, at 785–87 (explaining that no statute had defined or used the term and that the laws of war and international humanitarian law do not frequently use the term). R

on base detentions, race, and notions of American superiority. Natsu Taylor Saito explains how, historically with Chinese Americans, Japanese Americans, Asian Americans, and Native Americans, U.S. law has categorized “foreigners,” “others,” or non-citizens to then exclude them from rights protections in domestic and international law.³⁸² These exclusions are interdependent on legal normativity in U.S. foreign relations and domestic civil rights.³⁸³ Highlighting how the notion of sovereignty contains exclusionary assumptions on territory and collective identity, Tayyab Mahmud explains how this process naturally characterizes migrants as permanent outsiders and threats.³⁸⁴ Accordingly, these examples inspire asking how American superiority and notions of Arabs and Central Asians as outsiders frame jurisprudence to exclude detainees from rights protections. Guantánamo’s legal anomaly, effectively excluding rights protections, provides the instruments to affirm imperial power.

Critical race theory similarly elucidates how immigration and alienage law stems from, and never fully breaks with, social mechanisms to exclude certain races from American rights protections. Importantly, the *Boumediene* Court found that alien detainees did have habeas corpus rights on the base.³⁸⁵ This holding has not been without controversy, since it was argued aliens did not have these constitutional rights on non-sovereign territory, and aliens generally enjoy less constitutional rights than citizens.³⁸⁶

Kevin Johnson describes how alienage serves as a proxy for race in U.S. law. He ties in history, social, legal, foreign, and domestic analyses. Immigration law, with explicit intent or ignored effect, discriminates against citizens and non-citizens of color. From the late nineteenth century to the present, this includes Chinese exclusion, Japanese internment, national origin quotas, war on illegal aliens (i.e., Mexican immigrants), and Haitian interdiction.³⁸⁷ Johnson explains not only how social biases feed lawmaking but how racism provided

382. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 263–66, 289–92 (1997); Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 56 (1998).

383. NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 6 (2007).

384. Tayyab Mahmud, *Migration, Identity, & the Colonial Encounter*, 76 OR. L. REV. 633, 634 (1997).

385. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259–60 (2008).

386. *Id.* at 2293–307 (Scalia, J., dissenting).

387. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: a “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1119–44 (1998).

the initial reasoning for sovereignty-based immigration doctrine.³⁸⁸ This doctrine, known as the plenary power doctrine, justifies why Congress and the Executive have plenary powers in foreign relations, overseas territories, and immigration matters.³⁸⁹ This frames how American law approaches base detention, by focusing jurisprudence on national security, base location, and detainee alienage. Following these insights, this Article starts posing larger questions on how Empire (as space, markets, and culture) creates the need for these doctrines.

Lastly, critical race theory illuminates how domestic War on Terror policies inherently discriminate against Arabs, Muslims, and those who appear as such.³⁹⁰ As a result, base detainees share much in common culturally and racially with the domestic victims of the War. Susan Akram and Kevin Johnson show how immigration law, building on notions of “otherness” in race, national origin, religion, culture, and political ideology, plays a key role in government attacks on Arabs and Muslims.³⁹¹ September 11, 2001 permitted American law to add to exclusionary assumptions of foreigners as disloyal, engrained in social attitudes, policy, and legal precedent.³⁹² The social effect of the law’s discrimination has been to foster public targeting of those who appear Middle Eastern, Arab, or Muslim,³⁹³ tolerate “[r]acial [v]iolence as [c]rimes of [p]assion,”³⁹⁴ or mix religion and race into “terror-profiling.”³⁹⁵

In summation, this subsection illustrates how cultural assumptions of American superiority and Cuban inferiority produced an

388. See Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response To Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 291 (2000).

389. See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 10–13 (2002); SAITO, *supra* note 383, at 6.

390. David Cole explains the process of sacrificing non-citizen rights for national security is not limited to this War and provides numerous examples of such occurrences in American history; he explains that the elimination of non-citizens’ rights is the first step to eliminating citizens’ rights. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955, 959 (2002).

391. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002).

392. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002).

393. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577 (2002); See also Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 581–82 (2007).

394. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1302 (2004).

395. Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 218 (2005).

American base within Cuban territory. These cultural assumptions helped craft base occupation of effectively indefinite duration with a jurisdiction anomalously between Cuban and American sovereignty. Ironically, current detainees argue their detention is indefinite, and they suffer from anomalous jurisdiction between branches of U.S. government and between sovereign states. Legal approaches in several treaties, the Platt Amendment, and contemporary foreign relations confirm how cultural assumptions shaped extraterritorial authority. For the United States, this power represented an Anglo and civilized population in a hemisphere of inferior communities with de jure sovereignty and an inability to self-govern. The base and the corresponding legal anomaly were the product of Empire as culture.

Since the detention location is the product of cultural assumptions and detentions tend to concentrate on certain nationalities, this subsection poses one question: Does detention authority rely on cultural assumptions regarding detainees who are primarily Arab, Middle Eastern, or Central Asian?

Conclusion

This Article has offered preliminary suggestions as to why Empire purposefully creates Guantánamo's jurisdictional anomalies. For the past eight years, legal contests and public discourse worldwide have debated whether the plight of nearly 800 detainees³⁹⁶ really makes the base a legal black hole. Despite four Supreme Court decisions, endless diplomatic efforts, congressional debates, executive policy, and multiple litigation efforts, a substantial number of men remain detained on the base, effectively for an indefinite period. Two years after the Supreme Court in *Boumediene* held that detainees may contest the legality of their detention in district court habeas proceedings, anomaly still clouds this litigation in myriad ways.³⁹⁷

This anomaly is the product of Empire. It is crafted for the benefit of American foreign relations, since base occupation started in 1903 but most apparent with ongoing detention. Detainee rights, or lack thereof, are just one aspect of the base's anomaly. To open the general question of how Empire profits from jurisdictional anomalies, this Article explores the base's role in serving an American Empire. Since its creation a century ago, legal anomaly on the base furthers foreign relations objectives regarding expanding authority, overseas

396. See *Names of the Detained*, WASH. POST, *supra* note 5.

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

market access, and cultural superiority. This Article provides a contextual picture of how Guantánamo influences and is influenced by Empire. With this, the Article’s ultimate objective is to pose questions about Guantánamo’s law and Empire’s space, markets, and culture.

As Alejandro Colás describes, three factors—space, markets, and culture—are essential and required for empires throughout world history. Analyzing a series of examples in world history, he demonstrates that empires need expanding territory under political rule, lacking any identified limit, protection of overseas resource markets, and ideologies of superiority.³⁹⁸ These factors refer to Empire as space, markets, and culture, respectively. This Article uses this framework to examine how American foreign relations profit from the base’s legal anomaly and how the law contributes to this.

Suggesting Empire as space, functional approaches to constitutional protections on GTMO result in a flexible expansion of American power, possibly without limits. Detention jurisprudence since 2008 elucidates these doctrinal developments. These include: a functional test for constitutional protections overseas fashioned by the Supreme Court in *Boumediene*,³⁹⁹ an anomalous judicial power to order a detainee’s release, suggested in *Kiyemba*,⁴⁰⁰ district court habeas proceedings illustrating abundant legal confusion concerning the scope and source of detention authority and what evidence is permitted;⁴⁰¹ and similar approaches in Afghanistan, as suggested in *Maqaleh*.⁴⁰² This developing doctrine inspires asking: Is it Empire as space, with flexible borders or no boundaries, when extraterritorial jurisprudence poses no spatial or geographic limits to American authority?

Current Empire as markets refers to detention’s implicit role in supporting American geopolitics of energy security in the Persian Gulf and Central Asia. With bases and operations in these regions, terrorists—mostly Al Qaeda and Taliban—attack civilian populations worldwide, including the U.S. homeland but especially in the Persian Gulf and Central Asia. Simultaneously, the United States views these regions as strategically important to its energy security. Intelligence gained through Guantánamo detentions and by other methods helps counter terrorist operations abroad. Targeting these regions, terrorists directly attack the energy industry and indirectly destabilize ac-

398. COLÁS, *supra* note 16, at 18.

399. See discussion *supra* Part II.A.1.

400. See discussion *supra* Part II.A.2.

401. See discussion *supra* Part II.A.3.

402. See discussion *supra* Part II.A.4.

cess to these markets. Recent violence in Saudi Arabia, Iraq, and Yemen suggests this. Afghanistan's location, adjacent to Caspian Sea energy sources, Iran, China, Russia, India, and Pakistan, points to its unique geopolitical significance. American economic and geopolitical interest in these regions goes far beyond the War on Terror. Detentions for intelligence help protect these energy markets and bolster American geopolitical power in these regions. With these early hypotheses, this Article asks: Are overseas markets effectively protected with Guantánamo detentions and corresponding intelligence, suggesting the base supports Empire as markets?

The base's role in Empire as culture concerns how detentions discriminate by focusing on certain nationalities (e.g., Middle Eastern, Arab, or Central Asian). Detention occurs on base territory acquired with justifications of American superiority and Cuban inferiority, after the War of 1898 and with the Platt Amendment. The executive branch and courts determine American jurisdiction on the base in reference to sovereignty, with Cuba denied full sovereignty. Current racial implications concern the denial of rights protections for detainees, because they are simultaneously outside U.S. and Cuban sovereignty. It was argued that constitutional rights require presence in U.S. sovereign territory (i.e., not in GTMO). Guantánamo reflects the law's cultural assumptions that Cuba could not be sovereign and the United States was superior. These cultural exclusions produced an overseas base. They now sustain detention inside it. Cultural assumptions embedded in the base's legal history plus current detention patterns suggest asking: Does detention authority rely on cultural assumptions regarding detainees who are primarily of Arab, Middle Eastern, or Central Asian nationalities?

In conclusion, the preceding paragraphs described how American Empire produced legal anomaly on the base and how this anomaly contributes to Empire. Recent detentions suggest the base appears like a legal black hole. Global assumptions—broader than individual rights or executive authority to detain—motivate this anomaly. If the War on Terror ever ends or base detentions cease, Guantánamo detention cases will inform future approaches to American extraterritorial authority. This law shapes current and future approaches to individual rights, foreign relations, war, national security, interrogations/torture/intelligence, and military deference. Scholars, lawyers, and policymakers should explore the motivations and effects of these legal instruments. Accordingly, this Article briefly examines relevant

doctrine, sheds light on foreign relations history, and applies theory on Empire to ask: What is Guantánamo’s role in Empire as space, markets, and culture?

