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Torture, Extraterritoriality, Terrorism, and International Law

James T. Gathii
Loyola University Chicago, School of Law, jgathii@luc.edu

ARTICLES

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*James Thuo Gathii**

INTRODUCTION

Since September 11th, 2001, there has been a growing debate over the desirability of loosening international and constitutional prohibitions against torture in the "war" against terrorism.[1] This paper critically appraises three justifications that federal courts have invoked to justify abstaining from reviewing the conditions of confinement of prisoners held on suspicion of involvement in trans-continental terrorism, including allegations of torture. The first of these justifications is that international and constitutional constraints, including those against torture and those requiring due

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[1] *See* Dana Priest and Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1, 2002 WL 104308846 (describing potential violations of the Torture Convention in overseas facilities); Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45 (arguing in favor of some forms of torture of terrorism suspects); Stanford Levinson, *The Conduct of War Against Virtual States: The Debate on Torture in the Wake of September 11*, DISSENT, Summer 2003, at 79 (presenting the arguments for various justifications for the use of torture post-September 11th); Richard H. Weisburg, *Response to Sanford Levinson*, DISSENT, Summer 2003 (opposing any purported justification for the use of torture); ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 131–64 (2002) (arguing that torture is justifiable under very narrow and rare circumstances but that in those situations, the legal establishment should be held public accountability for its use). *But see* AMNESTY INTERNATIONAL USA, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS (2002) (arguing that, particularly since September 11th, the United States has participated in or acquiesced to the torture of suspects of terrorism).

process, do not apply to prisoners that are held outside the territory of the United States.[2] The second justification is that the prisoners were captured in the U.S. war against terrorism and the President has designated them "enemy combatants." Further, in light of the "extra-ordinary circumstances" arising as a result of the attacks on the United States on September 11th, 2001, the enhanced authority of the President's War Powers is not subject to judicial review.[3] The third justification is that where the prisoners are aliens, they are not entitled to constitutional and international protections otherwise available to citizens and friendly aliens.[4]

These grounds for abstaining from judicial review are now on

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[2] In *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950), the Supreme Court held there was no habeas jurisdiction where the enemy alien's offense, capture and punishment all took place "beyond the territorial jurisdiction of any court of the United States." Denials of jurisdiction arising from cases of the detainees in Guantanamo Bay on extraterritorial grounds fall into two categories. There are Courts that have argued that there is an absolute bar to jurisdiction in such cases. For example, in *Rasul v. Bush*, 215 F. Supp.2d 55, 56 (D.D.C. 2002), the U.S. District Court for the District of Columbia held that with respect to aliens outside the sovereign territory of the United States "no court would have jurisdiction to hear . . . [such] actions." By contrast, in *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002) the U.S. Court of Appeals for the Ninth Circuit, in reviewing a lower court's finding, held that the case dealt exclusively with the question of whether members of a U.S.-based coalition had a right to assert standing on behalf of detainees. The court stated:

> We also vacate the district court's determination that there was no jurisdiction in the Central District of California and its far-reaching ruling that there is no United States court that may entertain any of the habeas claims of any of the detainees. The district court was without jurisdiction to hold that the constitutionally embedded right of habeas corpus was suspended for all Guantanamo Bay detainees, without regard for their particular circumstances, whether they petitioned individually or through a true next friend on their behalf.

Id. at 1165 (emphasis added).

[3] *See, e.g.*, Al Odah v. United States, 321 F.3d 1134, 1149–50 (D.D.C. 2003) (Randolph, J., concurring) (stating that the functioning of the military would be best served by leaving decisions regarding the detainees to the military itself). According to LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 46–50 (2d ed. 1996), when the President has a congressional declaration of war, he has the power to exercise "full and exclusive control of the conduct of war." *Id.* at 46. *See also* WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (arguing in favor of expanded executive power and the loosening of restraints on prohibitions against violating civil liberties during wartime). *But see*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69 (1990) (arguing that "governmental decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management but bounded by the checks provided by congressional consultation and judicial review").

[4] *See* Johnson v. Eisentrager, 339 U.S. 763 (1950). Johnson was decided on the ground that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Id.* at 785. However, the fact that the prisoners in *Johnson* were held abroad was not controlling. In addition, as I note later in this article, unlike in *Johnson*, the Guantanamo Bay detainees have not been tried and sentenced by a military commission nor have they been shown to have served any government.

appeal before the Supreme Court.[5] This article explores whether extraterritorial torture of foreign citizens in the context of the war on terrorism ought to be subject to judicial review in the United States under the rules of customary international law. In other words, does the extraterritorial location of an alleged violation of rules of customary international law against a foreign citizen preclude judicial review?

I argue that there are no justifiable grounds for denying jurisdiction to a person alleging torture under rules of universal jurisdiction, even if such a person is a foreigner captured in the course of war and is held outside the territory of the United States. To argue otherwise is problematic for at least two reasons. First, by denying jurisdiction, federal courts effectively acquiesce to allegations of torture during interrogations as well as to cruel, inhuman, and degrading imprisonment conditions. Second, denials of jurisdiction that definitively bar judicial scrutiny of the merits of executive decisions in times of war are contrary to the obligations of the United States under international law.[6] Jurisdictional denials also legitimize an international and constitutional doctrine under which there are no limitations on executive power to hold suspects indefinitely, incommunicado, and without due process even if they are tortured.[7]

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[5] Rasul v. Bush, 03-334, (2003); Al Odah v. United States, 03-343 (2003). Both cases have been consolidated and the Supreme Court restricted the question at issue to: "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *See* Supreme Court, Orders in Pending Cases, Monday, November 10, 2003, *available at* http://www.supremecourtus.gov/orders/courtorders/111003pzor.pdf (oral arguments were heard by the Supreme Court on April 20, 2004).

[6] *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) governs situations under which human rights protections may be suspended or varied to accommodate emergencies that threaten the life of the nations—whether caused by war, terrorism, or other extraordinary measures—and does not permit derogation from protections against torture and cruel or degrading treatment. This has been ratified by the United States. U.S. Ratification of International Covenant on Civil and Political Rights, 58 Fed. Reg. 45934 (Dep't of State Aug. 31, 1993). *See also* Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (arguing that under the international law jurisprudence of Article 4 of the ICCPR, there is a right to seek a judicial determination of the lawfulness of detention and that that right cannot be suspended during wartime). *See generally* Jordan J. Paust, Judicial Power to Determine the Status and Rights of Persons Detained Without Trial, 44 HARV. INT'L L.J. 503, (2003) (arguing that the body of international human rights law prohibits arbitrary detention of prisoners, even in times of war).

[7] See *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 319 (1936), in which Justice Sutherland noted that "[I]n this vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to

To demonstrate the sheer limitlessness of this doctrine of unconstrained executive power that, in turn, justifies loosening the prohibitions against extraterritorial torture, I proceed as follows: I begin by examining how best to frame the allegations of torture in a manner that is cognizable for purposes of obtaining federal judicial power with regard to the conditions of confinement of the Guantanamo Bay detainees. I then examine the prohibition against torture under both international and U.S. law and the "extraordinary circumstances" doctrine. This doctrine has guided federal judicial responses to petitions challenging the conditions of confinement including allegations of torture of the Guantanamo Bay detainees by the confining authorities.[8] In the main part of the paper, I compare and contrast the assumption of jurisdiction with respect to extraterritorial commercial conduct with the problems associated with accepting extraterritorial jurisdiction over questions regarding the conditions of confinement of the detainees. By doing so, I show that federal courts are far more willing to assume jurisdiction over remote, extraterritorial commercial conduct[9] than

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speak or listen as a representative of the nation." These extra-constitutional sources of Presidential authority, even in the foreign affairs context, have been contested. *See, e.g.*, Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972) (discussing the constitutionality of unilateral actions taken by the president); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946). However, James Redwood argues that in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court unanimously held that congressional silence in the use of executive agreements "could be construed to create a rule of customary constitutional law legitimizing unilateral presidential agreements." James Redwood, *Dames & Moore v. Regan: Congressional Power Over Foreign Affairs Held Hostage By Executive Agreement with Iran*, 15 LOY. L.A. L. REV. 249, 254 (1982). While *Dames & Moore* suggests expansive presidential authority over foreign affairs, *Curtiss-Wright Export Corp.* is cited for the proposition that there are constitutional limits to the exercise of Presidential authority in foreign affairs. In *Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053, (9th Cir. Dec. 18, 2003), the Ninth Circuit began by stating that they were "fully aware of the unprecedented challenges that affect the United States' national security interests today" and that they "shar[ed] the desire of all Americans to ensure that the Executive enjoys the necessary power and flexibility to prevent future terrorist attacks." The court went on:

> However even in times of national emergency—indeed, particularly in such times—it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement.

Id. at *3.

[8] *See infra* text accompanying notes 34–39.

[9] *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), in which Judge Learned Hand outlined the rule—now termed the "effects doctrine"—of application of the Sherman Act to conduct abroad. Under this rule, conduct intended to affect imports to or

they are to confer jurisdiction and enforce fundamental human and civil rights norms in the context of confinement conditions of non-U.S. nationals held extraterritorially. While it may seem that extraterritorial commercial conduct achieves opposite results from efforts to enforce fundamental rights and freedoms extraterritorially, I show that these outcomes converge in their consistency with the United States' national interest. In this part of the paper, I also show that there is a close symmetry between cases where jurisdiction has been denied to the detainees by federal courts in the United States, on the one hand, with case-law from the British colonial experience, on the other. The underlying similarity between the colonial and Guantanamo Bay cases is their invocation of extraterritoriality and foreign citizenship as rationales for precluding judicial intervention. Further, I refer to a recent European Court of Human Rights case and to the "colonial clause" of the European Covenant on Human Rights with a view to demonstrating that powerful countries have seldom been held accountable for the exercise of powers that are incompatible with basic principles of international law by their own courts. Moreover, such lack of accountability has, under some circumstances, been precluded under treaty law.

Ultimately, it is clear that the manner in which arguments about jurisdiction have been marshaled to justify a particular vision of why enemy aliens and enemy combatants cannot be heard in a federal court reinforces distinctions between those that U.S. law accords rights and those to whom it does not on the basis of race and national origin. After all, it can safely be surmised that the overwhelming majority, if not all, of the Guantanamo Bay prisoners are Muslims of Arabic or Persian descent. Further, jurisdictional denials legitimize a very expansive doctrine of executive power that justifies or acquiesces to the torture of Guantanamo Bay prisoners, which is inconsistent with the obligations of the United States under international law.

I. FRAMING THE QUESTION OF EXTRATERRITORIAL TORTURE FOR PURPOSES OF OBTAINING JURISDICTION

As noted above, the primary focus of this paper is the emerging jurisprudence surrounding the issue of whether a federal district court has jurisdiction to consider claims of foreign nationals for

exports from the United States and having such an effect may be regulated by U.S. anti-trust law. *Id.* at 443–44. *See also infra*, notes 126–49 and accompanying text.

violations of international law by the U.S. government in Guantanamo Bay, Cuba. One way of framing this question in the context of torture is to distinguish between claims regarding the conditions of prison confinement under international and domestic law, from claims that challenge confinement or that seek release.[10]

The distinction is crucial because cases that challenge confinement—as opposed to those that challenge conditions of confinement—are often construed by federal district courts as interfering with executive branch decisions in matters concerning national security, even with respect to U.S. nationals.[11] By contrast, under *Preiser v. Rodriguez*[12] and its progeny, it is arguable that cases presented by foreign nationals regarding the conditions of their confinement are cognizable in a federal district court with regard to such matters as: requests to meet with their families, allegations of torture,[13] requests to provide notification of their

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[10] I focus on conditions of confinement because it narrows my inquiry to torture, which is the central question of this article. This emphasis should not be construed to suggest that I endorse the view that habeas is not available for non-citizen petitions challenging the legal basis and reasons of indefinite, incommunicado detention.

[11] *See, e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (holding that the detainee, an alleged enemy combatant captured by U.S. troops during military operations in Afghanistan, was not entitled to judicial review of his confinement notwithstanding his status as a U.S. citizen). In making its decision, the court deferred to the war powers of the executive branch, stating:

> The events of September 11 have left their indelible mark. . . . Yet we speak in the end not from sorrow or anger, but from the conviction that separation of powers takes on special significance when the nation itself comes under attack. Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one.

Id. at 477. *But see*, Padilla v. Rumsfeld, __ F.3d __, 2003 WL 22965085 (2d Cir. Dec. 18, 2003). The court stated that,

> Where, as here the President's power as Commander-in-Chief of the armed forces and the domestic rule of law intersect, we conclude that clear congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. § 4001(a)(2000)(the "Non-Detention Act") prohibits such detentions absent specific congressional authorization. Congress's Authorization for Use of Military Force Joint Resolution passed shortly after the attacks of September 11, 2001, is not such an authorization, and no exception to section 4001(a) otherwise exists. In light of this express prohibition, the government must undertake to show that Padilla's detention can nonetheless be grounded in the President's inherent constitutional powers. We conclude that it has not made this showing.

However, as the Second Circuit observed, "In reaching this conclusion, we do not address the detention of an American seized within a zone of combat . . . , such as the court confronted in *Hamdi v Rumsfeld*." *Id.* at __ (internal citations omitted).

[12] 411 U.S. 475, 500 (1973) (Brennan, J., dissenting).

[13] U.S. Rejects Prisoner Torture Allegations as International Concern Mounts, ISLAMONLINE (Jan. 23, 2002). The allegations of torture arose following the publication of a photograph by the FBI showing some of the detainees kneeling, hand-cuffed, wearing dark goggles, earmuffs, mittens, and bright orange jumpsuits. *Id.*

status to their counsel, requests to consult with counsel, and even requests to access an impartial tribunal. In such cases where conditions of confinement are at issue, habeas corpus is not the exclusive remedy. To the extent that courts construe cases challenging conditions of confinement as petitions for writs of habeas corpus, they deviate from a clear line of authority established by the Supreme Court.[14]

A. Torture Under U.S. and International Law

Torture is universally condemned as a violation of international law[15] and jus cogens norms.[16] The jus cogens nature of torture confers upon courts anywhere in the world universal jurisdiction.[17] Furthermore, the United States has ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[18] and has enacted

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[14] *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 107 n.6 (1975) (finding that because the respondents' claimed a constitutional right to a hearing on the issue of probable cause and did not seek release from custody, habeas corpus was not the only remedy available to them); Wilwording v. Swenson, 404 U.S. 249 (1971) (reversing the dismissal of petitioners' habeas corpus petitions, holding that the petitioners' need not have exhausted their civil rights claims based on the conditions of their confinement before bringing the habeas corpus petitions).

[15] *See, e.g.*, Regina v. Bartle & the Comm'r of Police for the Metropolis & others *Ex Parte* Pinochet, 38 I.L.M. 581, 589 (H.L. 1999) (stating that the "nature of . . . torture justifies states in taking universal jurisdiction over torture wherever committed"). Here, universal jurisdiction was invoked by the British House of Lords to deny immunity to Pinochet with regard to torture committed in Chile. *Id.* at 595. *See also* Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002, 1003 ("[a]ffirming that the most serious crimes . . . must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation").

[16] BLACK'S LAW DICTIONARY 864 (7th ed. 1999) defines jus cogens as "[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(n) (1987) (defining jus cogens norms as peremptory and specifying torture as one such norm).

[17] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(o) (stating that "[v]iolations of the rules stated . . . are violations of obligations to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated"). The comments to Section 702(o) cite to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) wherein the Court of Appeals held that torture perpetrated by a citizen of Paraguay under the guise of his authority as a government official was a violation of customary law supporting subject-matter jurisdiction, (between citizens of Paraguay), of the district courts under 28 U.S.C. § 1350. However, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1003 (1985), Judges Bork and Robb wrote individual concurrences disagreeing with *Filartiga* insofar as *Filartiga* allowed such a suit to proceed. Judge Bork opined that the statute was jurisdictional only and did not provide a cause of action. *Id.* at 801 (Bork, J., concurring).

[18] The President signed the treaty on April 19, 1988, and the Senate gave its advice and consent to ratification with certain conditions on October 27, 1990. Pub. L. No. 103-36, § 2340, 108 Stat 463 (1994).

implementing legislation.

In the Torture Convention Implementation Act of 1994,[19] Congress established federal criminal jurisdiction over torture committed or attempted outside the United States regardless of the nationality of the victim, if the alleged offender was a U.S. national or if the alleged offender was present in the United States.[20] This emphasizes the significance of torture as an offense in both international and U.S. law.[21] The United States' legal commitment to punishing torture is also strengthened by the fact that the United States chose, in ratifying the Genocide Convention, not to assert universal jurisdiction outside the United States.[22] This,

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[19] 18 U.S.C. § 2340(A)(b) (2000).

[20] *Id.*

[21] Notwithstanding the significance the United States places on torture, it is noteworthy that the Regulations implementing Article III of the Torture Convention provide for a lawful sanctions exception in the following terms:

> [t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

8 C.F.R. § 208.18(a)(3) (2003).

But see Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427 (2003) (arguing generally that the lawful sanctions exception laid out in 8 C.F.R. § 208.18 is inconsistent with the customary international law obligations of the United States). In addition, this exception is arguably subject to the understanding proposed by the first Bush Administration when it submitted the Treaty, which was accepted by the Senate in the following terms: "The United States understands that 'sanctions' includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law." S. EXEC. REP. NO. 101–30, at 36 (1990). Nonetheless, the United States understands that a State Party could not, through its domestic sanctions, defeat the object and purpose of the Convention to prohibit torture. *See Id.* at 35. This understanding, accepted by the Senate, ought to control the interpretation of the Torture Convention. Thus, while a state has the recognized right to detain and incarcerate those who have committed crimes or are suspected of having done so, it may not exempt all subsequent treatment from the definition of torture simply because the treatment takes place in conjunction with the detention itself. Any form of torture, including systematic beatings and being forced to hold painful postures, even accompanied by legal incarceration, is not immune from protection under the Convention. *See id.* at 9, 14 (citing the Reagan Administration's understanding that torture includes, *inter alia*, "sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain"). Note further that the Reagan administration construed the 'lawful sanctions' provision so as to conform to the standards of international law. *Id.* at 9. Hence, Janet G. Mullins, Assistant Secretary for Legislative Affairs with the Department of State in the Reagan Administration, explained in a letter dated December 10, 1989 to the Senate Committee on Foreign Relations that the U.S. Government "does not regard authorized sanctions that unquestionably violate international law as 'lawful sanctions' exempt from the prohibition on torture." *Id.* at 35.

[22] Genocide Convention Implementation Act, 18 U.S.C. § 1091 (2000) (stating that only genocide allegedly committed in the United States or by a U.S. national is subject to jurisdiction under the Act); *see also* The War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) (limiting jurisdiction to circumstances in which the victim or person committing the war

notwithstanding the fact that the Restatement (Third) includes genocide under its universal jurisdiction umbrella.[23] Therefore, it is clear that eliminating torture has been a priority for the United States.

This is not all the evidence that one could marshal to make the point that torture is treated as an especially heinous crime by the United States. A 1996 amendment to the Foreign Sovereign Immunity Act added a subsection that provides for non-immunity of certain foreign states—those having been designated as state sponsors of terrorism—for acts of torture, extrajudicial killing, aircraft sabotage, or hostage-taking occurring outside the United States.[24]

Finally with regard to jurisdiction, a state has jurisdiction to prescribe law with respect to "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[25] In fact, in *United States v. Bin Laden*,[26] the court responded to the argument that due process requires minimum contacts with the United States by holding that "if the extra-territorial application of a statute is justified by the protective principle, such application accords with due process."[27] The court further articulated the congressional intent of the Anti-Terrorism Act and several other relevant statutes as intending to reach conduct by foreign nationals on foreign soil. Therefore, the court concluded that extraterritorial jurisdiction under the Anti-Terrorism Act was justified by the protective principle under International law.[28]

This stands in contrast to cases brought by the detainees in Guantanamo Bay, whose attempts to seek redress in federal courts

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crime is a member of the Armed Forces or a U.S. national).

[23] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

[24] 28 U.S.C. § 1605(a)(7) (2000).

[25] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3).

[26] 92 F. Supp. 2d 189 (S.D.N.Y. 2000). See also Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), where the United States filed an amicus brief supporting jurisdiction in an action between non-nationals that occurred outside the United States. *Kadic*, 70 F.3d at 235.

[27] *Bin Laden*, 92 F. Supp. 2d at 220. The "protective principle" provides jurisdiction "with respect to 'certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.'" *Id.* at 196 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3)). This principle is one of five bases for jurisdiction in addition to the "subjective territorial principle." *Id.* at 195. The remaining bases for jurisdiction are: the objective territorial principle, the nationality principle, the passive personality principle and the universality principle. *Id.* at 195.

[28] *Id.* at 222 (stating that such a limitation would not be "consistent with the purposes the protective principle is designed to serve").

for claims such as torture have been barred.[29] In light of the *Bin Laden* ruling cited above, it may be concluded that federal courts are more willing to assert jurisdiction extraterritorially when the United States is enforcing its national security interests, but that courts are unwilling to acknowledge jurisdiction when those seeking the protection of U.S. law are suspects detained by the United States who have been designated as enemy aliens or enemy combatants. When the detainees are held outside the territorial jurisdiction of the United States, jurisdictional issues are further compounded.

It is also important to mention *United States v. Bowman*,[30] which occasioned the Supreme Court to hold that a statute punishing conspiracy to defraud a United States-owned corporation was applicable to conduct taking place on the high seas.[31] The Court stated that to limit the statute's scope to "strictly territorial jurisdiction" would greatly curtail its usefulness and would leave open "a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."[32] Thus, even absent express congressional intent, it has been argued that extraterritorial jurisdiction is grounded, not only in the power of Congress to regulate conduct of U.S. nationals, but also in the power to protect state interests. Thus, in *Bin Laden*, where the indictment alleged that the defendants—who were all foreign

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[29] In the Memorandum of Law of the petitioners in *Coalition of the Clergy v. Bush*, petitioners argued that Bush and Rumsfeld were subject to the jurisdiction of the court because they had sufficient contacts with California. The petitioner also pointed out that 28 U.S.C. § 1391(e)(3) contemplates jurisdiction over defendants who are officers or employees of the United States in any judicial district in which the plaintiff resides. The petitioners concluded their argument by emphasizing that, "[f]or either Bush or Rumsfeld seriously to contend that they do not have sufficient minimum contacts with California so as to warrant jurisdiction of them in California would be ludicrous." Response to Respondents' Response to Order to Show Cause Regarding Jurisdiction at 20–21, Coalition of the Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) *aff'd in part, rev'd in part*, 310 F.3d 1153 (9th Cir. 2002). This view was affirmed by the Ninth Circuit in *Gherebi v. Bush* in the following terms:

> [T]he activities of Secretary Rumsfeld and the department he heads are substantial, continuous, and systematic throughout the state of California: California has the largest number of military facilities in the nation (sixty-one), including major military installations, Department of Defense laboratories, and testing facilities. . . . Many of these activities are carried out in the Central District of California. Accordingly, we conclude that Secretary Rumsfeld has the requisite "minimum contacts" to satisfy California's long-arm statute, and we hold that the United States District Court for the Central District has jurisdiction over Gherebi's nominal custodian, Secretary Rumsfeld.

Gherebi at ___.

[30] 260 U.S. 94 (1922).

[31] *See id.* at 102–03.

[32] *Id.* at 98. The Court acknowledged that Congress did not make specific provisions in the law regarding the jurisdictional scope of U.S. law in the high seas and foreign countries, but stated that it could be inferred from the nature of the offense. *See id.*

nationals—had conspired to bomb American facilities overseas, the Court rejected the contention that U.S. statutes making it a crime to destroy property belonging to the United States should be construed to apply only to U.S. nationals.[33] It follows that the constraints in granting jurisdiction to claims by the Guantanamo Bay detainees raise issues far beyond mere lack of legal authority to adjudicate. In other words, federal courts are more likely to find they have jurisdiction where a claim of torture is brought against a government other than the United States. However, when the United States is implicated in a torture claim, the odds are against a favorable jurisdictional finding.

B. September 11th, 2001: The Genesis of an "Extra-Ordinary Circumstances" Doctrine

Federal courts have overwhelmingly declined to entertain suits alleging torture and other conditions of confinement in Guantanamo Bay notwithstanding good, albeit arguable, legal authority for assuming jurisdiction. This paper focuses on how Guantanamo Bay has become an important focal point, or as one court referred to it, a "'legal black-hole,'"[34] operating to forestall any claim from being

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[33] *See* 92 F. Supp. 2d at 193–98.

[34] The Queen on the Application of Abbasi & Anor. v. Sec'y of State for Foreign & Commonwealth Affairs & Sec'y of State for the Home Dep't, 2002 WL 31452052, ¶ 64 (C.A. 2002). Abbasi, a British citizen and one of the prisoners being held in Guantanamo Bay, Cuba asked that the Foreign and Commonwealth Office make representations on his behalf to the United States government. *Id.* at ¶ 1. Thus, Abbasi was not challenging his detention. The court held that, although under certain circumstances it can review the extent to which foreign law conforms to international law, a state has no duty, under international law, to intervene—through use of diplomacy—to protect a citizen whose rights have been violated in another country. *Id.* at ¶ 69. The court further held that Abbasi's claims, which were founded on the violation of his rights under the European Convention on Human Rights, were not cognizable. *Id.* at ¶ 67, 70. Abbasi was being held outside the territory of the United Kingdom and not as a result of any act of the British government. *Id.* at ¶ 1. The court opined that the detention was "in apparent contravention of fundamental principles recognised [sic] by both jurisdictions and by international law." *Id.* at ¶ 64. The court further observed, "[i]t is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State." *Id.* at ¶ 69. Furthermore, some third world judiciaries, not known for their independence or record in enforcing human rights, have released people suspected of terrorist activities even though releasing them to the United States would result in a violation of their constitutional rights. *See* JAMES THUO GATHII, THE DREAM OF JUDICIAL SECURITY OF TENURE AND THE REALITY OF EXECUTIVE INVOLVEMENT IN KENYA'S JUDICIAL PROCESS (1994) (examining the deficiency in both the independence and security of Kenya's judiciary); *see also* David Rowan, *Arbitrary Arrests of Muslims in Kenya*, World Socialist Web Site, *at* http://www.wsws.org/articles/2001/nov2001/keny-n21_prn.shtml (Nov. 21, 2001) (reporting on the mass arrests of Kenyans by the United States following September 11th and the consequent international law implications); William Oketch, *Court Orders Release of Terrorism Suspect*, EAST AFRICAN STANDARD (Nairobi, Kenya), August 26,

entertained in federal courts.[35] Guantanamo Bay may best be understood as simply providing a lens through which courts mediate discourses about terrorism purveyed by the executive branch since September 11th. In other words, the denial of jurisdiction has as much to do with the broader context within which the executive branch has responded to the terrorist bombings of September 11th, as it does with applicable domestic and international law.

The "extra-ordinary circumstances" of September 11th have been invoked by courts to preclude petitioners from challenging government action in response to terrorism in the homeland.[36] September 11th marks the point of departure from which the suspension of normal legality may be justified and a new legal paradigm focused on combating terrorism has been created.[37] The Patriot Act I, the new Department of Homeland Security, and the adoption of a pre-emptive doctrine of war represent some examples of this shift.[38] In my view, the federal courts' refusal to adjudicate

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2003 (reporting that the particular intelligence body set up as an anti-terrorism unit had no authority to detain anyone under Kenyan law).

[35] *See* The Queen on the Application of Abbasi & Anor., 2002 WL 31452052, at ¶ 64–65 (finding that the court can provide no direct remedy).

[36] Coalition of Clergy v. Bush, 310 F.3d 1153, 1164 n.4 (9th Cir. 2002) (likening the "extraordinary circumstances" present in Johnson v. Eisentrager, 339 U.S. 763 (1950), to the situation of the Guantanamo detainees); *see also* Gherebi v. Bush, 262 F. Supp. 2d 1064, 1068 (C.D. Cal. 2003) *reversed by* __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003) (noting that several courts—ruling on government action in the wake of September 11th—had cited the "extraordinary circumstances" theory of *Johnson* and *Coalition of Clergy*).

[37] *See* Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, *in* AFTER IDENTITY: A READER IN LAW AND CULTURE, 294, 306–07 (Dan Danielsen & Karen Engle eds., 1995) (discussing the view that terrorism discourse designates terrorists as operating outside the realm of "war or peace"). This in turn designates "terrorists" as illegitimate combatants who are not engaged in war but rather in criminal conduct since they do not abide by the laws of war. *Id.* Consequently,

> [T]hey don't deserve to be given the benefit of law . . . [and] the state . . . is morally relieved from its duty to treat terrorists in accordance with normal rights and entitlements recognized by municipal law or international law. By placing himself voluntarily outside of the law, the terrorist loses his claim on the law.

Id. at 307. *See also* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003). Professor Koh argues that the designation of enemy combatants does not relieve the United Sates of its international legal obligations under the Geneva Convention to afford the Guantanamo Bay prisoners hearings, among other rights. *Id.* at 1509. For example, while Article 5 of the Third Geneva Convention of 1949 obliges the United States to establish a competent military tribunal to determine the status of the Guantanamo-Bay prisoners, the United States has not done so. By contrast, a three military personnel Article 5 tribunal has, since April 2003, begun determining the status of prisoners arrested during the second Iraq war. *See* Order No.1 Section 6 (F) and (G) March 21, 2002, Military Instruction No. 7, April 30, 2003.

[38] *See* USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended at 8 U.S.C.A. § 1226a (West 1999 & Supp. 2003)) (granting the attorney general the power to detain aliens indefinitely if "the alien will threaten the national security of the United

the Guantanamo Bay prisoners' claims cannot be disentangled from the new legal climate that has justified extra-ordinary measures as necessary responses to terrorism. These extra-ordinary measures in turn have effectively become judicially unreviewable. These responses to terrorism have reinvigorated new and longstanding biases, bolstering the ideological association between race and terrorism.[39] This assertion is unfortunately best reflected by the discriminatory treatment of Muslims of Arabic and Persian descent, especially after September 11th, 2001.

The next section discusses the structure and terminology of the legal response to the federal courts' decisions arising in cases dealing with the conditions of the detainees' confinement.

C. The Guantanamo Bay Detainees

There are over six hundred detainees who have been held in Guantanamo Bay, Cuba[40] since January 2002. They were captured against their will in Afghanistan and elsewhere in the course of an ongoing war against terrorism.[41] Those captured in the course of

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States"); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C.A. § 1541 (West 2001 & Supp. 2002)) (delegating power to the president to continue indefinitely a military campaign against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States").

[39] *See* Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 82 (2002) (identifying the way in which "unthinkable" racism routinely becomes "thinkable" in times of crisis).

[40] Neil A. Lewis, *Guantánamo Prisoners Seek To See Families and Lawyers*, N.Y. TIMES, Dec. 3, 2002, at A22 (reporting on the Bush administration's claim that the detainees have no constitutional rights because Guantanamo is not within U.S. territory).

[41] *See* Gherebi v. Bush, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003) *reversed by* __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003) (quoting from the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified as amended at 50 U.S.C.A. § 1541 (West 2003 & Supp. 2003)). The district court prefaced its denial of jurisdiction to the detainees by stating that "Congress authorized the President 'to use all necessary and appropriate force' against those responsible" for the events of September 11th. *Gherebi*, 262 F. Supp. 2d at 1066. The United Nations Security Council authorized this war as well. *See* S.C. Res. 1368, U.N. SCOR, *reprinted in* 40 INT'L LEGAL MATERIALS 1277 (2001). In addition, on September 12th, 2001, the North Atlantic Council stated that "if it is determined that [the September 11th] attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the [1949] Washington Treaty," making an attack on one NATO ally an attack on all allies. Press Release, North Atlantic Treaty Organization (NATO), Statement by North Atlantic Council (Sept. 12, 2001), *reprinted in* 40 INT'L LEGAL MATERIALS 1267 (2001). *See also* Press Release, NATO, Statement by NATO Secretary General, Lord Robertson (Oct. 2, 2001), *reprinted in* 40 INT'L LEGAL MATERIALS 1268 (2001) (announcing that evidence linking Al Qaeda to September 11th provided the factual basis for the invocation of Article 5 of the Washington Treaty). On the whole, these resolutions comported with the view taken by

this war are of many different nationalities. They were brought to the United States "in cargo planes, blindfolded, shackled, and in some cases drugged," before being "held for months in chain link cages."[42] At Guantanamo Bay, detainees suffer indefinite detention in hastily constructed outdoor cages, where their interrogators include both U.S. military and civilian intelligence agencies.[43] Initial reports indicated that amongst the intolerable living conditions, detainees slept on mats exposed to the elements, were allowed as little as fifteen minutes a week outside their cells, and were allowed essentially no contact with the outside world or with each other.[44]

President Bush has designated these prisoners as enemy combatants under a Military Order.[45] In March 2002, Commission

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President Bush that there was no distinction between the terrorists that committed the acts of September 11th and those who harbored them. Hence, in his address to Congress on September 20th, 2001, President Bush stated: "From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 24, 2001). By contrast, the Foreign Ministers of the Organization of the Islamic Conference issued a statement in their eleventh Extraordinary Session "reject[ing] any unilateral action taken against any Islamic country under the pretext of combating international terrorism." Kuala Lumpur Declaration on International Terrorism (Apr. 3, 2002), *available at* http://www.oic-oci.org/english/fm/11_extrordinary/declaration.htm.

[42] Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 10 (2002).

[43] *Id.*

[44] *See Id.* at 10–11 (noting, also, that the U.S. government has rebuffed the efforts of American lawyers wanting to visit the prisoners). A recent exception has been given to an Australian prisoner who was allowed to have his Australian lawyer visit him. *See* Neil A. Lewis, *Taliban Detainee is Depressed, Lawyer Says*, N.Y. TIMES, Dec. 18, 2003, at A39. In the writ for petition for certiorari in *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), the conditions of confinement are described as follows:

> Most live in solitary confinement restricted to 6' by 8' cells for more than 23 hours a day. According to the Pentagon, there have been 32 attempted suicides since the prison opened in January 2002, with most taking place this year. With no legal process, no opportunity to establish their innocence, no human contact with the outside world except censored letters transmitted through the ICRC, and no apparent end to their incarceration, the prisoners: the prisoners held on suspicion of involvement in trans-continental terrorism "drift . . . through life rather than live . . . the prey of aimless days and sterile memories."

Petition for Writ of Certiorari, Rasul v. Bush at 12–13 (2003).

The prisoners are allowed only a one-minute per week shower. *See* Carlotta Gall and Neil A. Lewis, *Threats and Responses: Captives; Tales of Despair from Guantanamõ*, N.Y. TIMES, Jun. 17, 2003, at A1; Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1.

[45] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (authorizing the Secretary of Defense to employ "all necessary measures" to detain those connected to a terrorist organization).

Rules under the order were issued by the Secretary of Defense.[46] Under these rules, enemy combatants enjoy no rights of judicial review, or even habeas applications.[47] The only remedies available are within military commissions which contain minimal due process guarantees.[48] The Department of State has stated that these rules are designed to "ensure that the conduct of U.S. military commissions will provide the fundamental protections found in international law."[49] While this paper does not concern itself with the legality of military commissions,[50] it is noteworthy that the designation of the detainees as enemy combatants effectively denies them the status of prisoners of war—a status which would immunize them from prosecutions for lawful acts of war.[51]

Military commissions provide uncertain protections for detainees—even though the Military Order provides protections for the accused—because these rights are subject to change at the President's will and the detainees do not have the possibility of judicial review by non-military courts.[52] Most of the detainees have not been identified with certainty, and full access to their families has not been facilitated.[53] Also, there are invariable differences in language between the detainees and those holding them.[54] This is further complicated by the fact that even Kuwaiti detainees—who have credibly alleged that they were merely volunteers in Afghanistan doing humanitarian work and were not enemy-

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[46] U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (2002), *available at* http:/www.cnss.gwu.edu/~cnss/commissions/dodregs.pdf.

[47] *Id.* at 13–14.

[48] *Id.*

[49] W. H. TAFT, U.S. DEP'T OF STATE, MILITARY COMMISSIONS: FAIR TRIALS AND JUSTICE (2002), *available at* http://usinfo.state.gov/topical/pol/terror/02032603.htm (explaining that current U.S. military commission regulations remain consistent with those employed in the past).

[50] *See generally,* Daryl A. Mundis et al., *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts,* 96 AM. J. INT'L L. 320 (2002) (commenting on the special military commissions created by George W. Bush in order to try members of Al Qaeda).

[51] *See* Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts,* 9 AM. U. J. INT'L. L. & POL'Y 49, 58–59 (1993) (noting that prisoner of war status offers a captive "immunity from criminal prosecution under the domestic laws of his captor for his hostile acts which do not violate the laws and customs of war").

[52] *See* Mundis, *supra* note 50, at 341–42 (discussing the ways in which military commissions fail).

[53] Associated Press, *Red Cross: Deteriorating Conditions at Guantanamo,* October 10, 2003 (noting that the main way that detainees stay in touch with their families is through the Red Cross' collection and delivery of their letters), *at* http://www.cnn.com/2003/WORLD/americas/10/10/redcross.guantanamo.ap/.

[54] The Red Cross also reports that many of the detainees may have psychological issues as a result of the living conditions at Guantanamo. *See id.*

combatants as designated by the President—have been denied access to U.S. courts.[55] Yet the relief sought was not release from confinement, but rather the ability to speak to their families, since they are being held incommunicado.[56]

1. The Constraints of Territory and Citizenship: The Effect of Guantanamo Bay as a Territory Outside the United States on an Alien's Ability to Enjoy Constitutional Protections

Extraterritorial location is a crucial element unifying all the denials of jurisdiction to the Guantanamo Bay detainees. The importance of this as a basis for declining jurisdiction is illustrated in its application to the less onerous cases concerning conditions of confinement. In addition, the Supreme Court, in granting certiorari to two of the Guantanamo Bay detainee cases, restricted itself to determining whether federal courts have jurisdiction to hear petitions of prisoners captured overseas and held outside the territory of the United States.[57] In *Preiser v. Rodriguez*, the Supreme Court recognized that habeas corpus actions may challenge a prisoner's conditions of confinement independently from a challenge to the confinement itself.[58] While challenging confinement poses almost insuperable separation of power constraints,[59] the detainees' presence in Guantanamo Bay preempts

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[55] *See* Al Odah v. United States, 215 F. Supp. 2d 55, 60–61 (D.D.C. 2002). *See also*, Linda Greenhouse, *Justices to Hear Case of Detainees at Guantanamo*, N.Y. TIMES, Nov. 11, 2003, at A1.

[56] *See Al Odah*, 215 F. Supp. 2d at 60–63 (determining that the detainees' request for communication amounted to an affront on the United States' authority to detain, and thus was in substance a request for a writ of habeas corpus).

[57] Rasul v. Bush, 03-334, (2003) and Al Odah v. United States, 03-343 (2003). Both cases have been consolidated and the Supreme Court restricted the question at issue to: "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba," *See* Supreme Court, Orders in Pending Cases, Monday, November 10. 2003, available at http://www.supremecourtus.gov/orders/courtorders/111003pzor.pdf.

[58] Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) (citing Johnson v. Avery, 393 U.S. 483 (1969); Wilwording v. Swenson, 404 U.S. 249, 251 (1971)).

[59] Hamdi v. Rumsfeld, 316 F.3d 450, 463–64 (4th Cir. 2003) (explaining that courts are bound to defer to executive branch decisions during wartime since the executive branch, rather than the courts, is best equipped to make such decisions). I use the word "almost" above in light of the Justice Story's observations in *Martin v. Hunter's Lessee*. 14 U.S. (1 Wheat.) 304 (1816). Justice Story noted that the full judicial power of the United States must be vested in some federal court, stating that the language in the Constitution was "manifestly designed to be mandatory upon the legislature . . . [that] [t]he judicial power of the United States *shall be vested* . . . [and that] it is a duty of Congress to vest . . . the *whole judicial power* [in such court]." *Id.* at 327–28 (emphasis in original). Thus, since habeas arises under federal law, jurisdiction must exist in some federal court. *See* Akhil Reed Amar, *A Neo-*

jurisdiction otherwise permissible with regard to their conditions of confinement.[60]

The extraterritoriality argument effectively eliminates any distinction between habeas petitions and petitions only concerned with the conditions of confinement of the detainees. These insurmountable obstacles are most acutely presented in Judge A. Howard Matz's order in *Gherebi v. Bush*.[61] Following *Johnson v. Eisentrager*,[62] Judge Matz dismissed the petition in *Gherebi* because he felt constrained by precedent.[63] Judge Matz's concluding statements demonstrate the tension between exacting justice and following precedent:

> More than [fifteen] months have gone by since the United States placed Falen Gherebi and hundreds of other captured individuals into detention in Guantanamo. Not one military tribunal has actually been convened. Not one Guantanamo detainee has been given the opportunity to consult an attorney, has had formal charges filed against him or has been able [to] contest the basis for his detention. It is unclear why it has taken so long for the Executive Branch to implement its stated intention to try these detainees. Putting aside whether these captives have a right to be heard in a federal civilian court—indeed, especially because it appears they have no such right—*this lengthy delay is not consistent with some of the most basic values our legal system has long embodied.*
>
> To compound the problem, recently reports have appeared in the press that *several of the detainees are only juveniles* . . . .
>
> Unfortunately, unless *Johnson* and the other authorities

Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 215, 239–44 (1985) (giving qualified agreement to Justice Story's understanding that U.S. judicial power "'*shall* extend to *all* cases,'" but confining the plenary scope to those involving federal questions, admiralty issues, or public ambassadors). *Id.* at 239 (citing U.S. CONST. art. III, § 2). By comparison, in cases proceeding by habeas, petitioners have argued that lower federal courts exist precisely to review claims arising under the Constitution, and that to hold otherwise would be an absurdity. Response to Respondents' Response to Order to Show Cause Regarding Jurisdiction at 23–25, Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (No. Civ. 02-00570-AHM (JTLX)], (on file with author).

[60] *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003) (declining to extend constitutional and habeas corpus protections to non-resident aliens being held outside the sovereign territory of the United States).

[61] 262 F. Supp. 2d 1064 (C.D. Cal. 2003) *reversed by* __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003) (dismissing a habeas petition despite the apparent injustice of the detainment).

[62] 339 U.S. 763 (1950).

[63] In his words, "[T]he Supreme Court's *Johnson* opinion compels dismissal of this petition . . . ." *Gherebi*, 262 F. Supp. 2d. at 1066.

> cited above are either disregarded or rejected, this Court lacks the power and the right to provide such a remedy. Perhaps a higher court will find a principled way to do so.[64]

Judge Matz appears to suggest that but for the binding *Johnson* precedent, the relief sought by the petitioner would be granted because the delays in prosecution are inconsistent with basic American legal values.[65] Press reports that the detainees at Guantanamo Bay have been tortured and that detainees held in Afghanistan have been tortured to death compound these reports.[66] I will now examine *Johnson* and the extent to which it is an overwhelming constraint for assuming jurisdiction.

In *Johnson*, a habeas petition was brought on behalf of twenty-one German enemy prisoners captured by the United States for assisting the Japanese during World War II.[67] An American military commission in Nanking, China tried, convicted, and sentenced them to a fixed term of imprisonment for violating the laws of war by continuing to help the Japanese after Germany's unconditional surrender and before Japan's surrender.[68] They were subsequently detained in U.S.-controlled Germany. The Supreme Court reversed the United States Court of Appeals for the District of Columbia, holding that the privilege of litigation did not extend to the German prisoners because:

> these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.[69]

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[64] *Id.* at 1073 (emphasis added).

[65] *Id.* In reversing the district court, the Ninth Circuit, in *Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003) observed that: "In our view, the government's position [in favor of indefinite, incommunicado detention without judicial review] is inconsistent with fundamental tenets of American jurisprudence."

[66] *Prisoners 'Killed' at U.S. Base*, BBC NEWS, Mar. 6, 2003, *at* http://news.bbc.co.uk/1/hi/world/south_asia/2825575.stm. The lack of any constitutional or international legal restraints for extraterritorial torture of foreigners may have encouraged the United States to fly suspects to countries that are known to practice torture. *See U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1. At Guantanamo Bay, the indefinite detentions without legal process have adversely affected the mental health of the detainees. *See* Associated Press, *Guantanamo Suicide Attempts Rise to 31*, Aug. 20, 2003 (quoting a Pentagon official and noting that the attempts have been attributed to the effects of indefinite detention on prisoner morale).

[67] *Johnson*, 339 U.S. at 765–66.

[68] *Id.* at 766.

[69] *Id.* at 778–79 (reasoning that entertaining enemy habeas corpus petitions during war time would create judicial inefficiency, burden both "the war effort" and its generals, and create conflicts between military and civilian law).

Guantanamo Bay prisoner courts have argued that *Johnson* is controlling precedent for the detainees in Guantanamo because, as the prisoners in *Johnson*, they were aliens captured during military operations in a foreign country, incarcerated in a U.S.-controlled foreign facility, and "have never had any presence in the United States."[70] Thus, because Judge Matz found that alien enemy status and the location of arrest and detainment are controlling elements in *Johnson,* he argued that he had no choice but to recognize the similarity and submit to *Johnson's* precedential stranglehold.[71]

However, on appeal, the Ninth Circuit did not find *Johnson* to be such a stranglehold precedent barring habeas jurisdiction in favor of the Guantanamo prisoners.[72] Instead, the Ninth Circuit argued that *Johnson* established three preconditions to a foreclosure of jurisdiction: overseas detention, the commission of an offense overseas, and a trial overseas.[73]

In *Johnson*, the Supreme Court rejected another basis upon which habeas jurisdiction would have been available to the German prisoners. That is, that the Fifth Amendment was available to anyone, irrespective of their nationality and physical location.[74] The *Johnson* court reasoned that to hold otherwise would confer civil rights to enemies of the United States in the course of a war with the United States, resulting in an "absurdity."[75] In essence, under the most restrictive reading of *Johnson* and related precedents, one

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[70] Al Odah v. United States, 321 F.3d 1134, 1140 (D.C. Cir. 2003).

[71] Notably, the lower court in *Johnson, Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), seemed to share Judge Matz's ideas about the nature of basic American legal values, stating: "any person who is deprived of his liberty by officials of the United States, acting under the purported authority of that Government . . . has a right to the [habeas] writ." *Eisentrager,* 174 F.2d at 963.

[72] *Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003).

[73] *Id.*

[74] *Johnson*, 339 U.S. at 782–83.

[75] *See id.* at 784 (questioning whether enemies would have the right to free speech, to bear arms, and to be free from unreasonable searches and seizures); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (emphasizing that there was no extraterritorial application of the Fifth Amendment with respect to aliens because to do so "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries . . . [especially because the government] frequently employs Armed Forces outside this country . . ."). Furthermore, there is an endless concern that if habeas were granted to aliens, they would have more rights than U.S. citizens. *See, e.g.*, Rasul v. Bush, 215 F. Supp. 2d 55, 64 n.11 (D.C. Cir. 2002) (holding that giving petitioners relief under §702 of the Administrative Procedure Act (waiving sovereign immunity for the government; however the language of 5 U.S.C. §701(b)(1)(G) provides an exemption to such waiver) "would produce a bizarre anomaly: United States soldiers . . . [couldn't] sue . . . [in U.S. courts over] events arising on the battlefield, while aliens, with no connection to the United States, could sue their . . . military captors while hostilities continued. Such an outcome defies common sense").

has to secure antecedent federal jurisdiction through physical presence in the United States to enforce rights under the Constitution.[76] According to Judge Matz:

> The consequence is that no court in this country has jurisdiction to grant habeas . . . to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. . . . [*Johnson*] itself directly tied jurisdiction to the extension of constitutional provisions.[77]

Thus, despite the fact that the Guantanamo detainees have not been tried, convicted, and sentenced by a military tribunal, as the *Johnson* detainees were, district courts have overwhelmingly found that it is binding, notwithstanding the dissimilar situation of the Guantanamo and German prisoners. Hence it is curious that Guantanamo courts have relied on *Johnson's* third prong: that enemy aliens captured incident to war do not have "qualified access" to U.S. courts—since no determination of the status of these prisoners has been made, unlike in *Johnson*.[78] If the detainees had been tried and sentenced, perhaps *Johnson* might be less problematic as a binding precedent. However, since this was not the case, the courts deciding the Guantanamo Bay detainee cases have the alien status and their extraterritorial location as the only rationales for holding that they cannot successfully file habeas petitions.

Before delving further into incongruities produced by the *Johnson* opinion—especially those arising from the extraterritoriality issue—it must be noted that Part IV of the Supreme Court's *Johnson* opinion exemplifies an additional inconvenience, in that it addressed the merits of the petitions, despite supposed lack of jurisdiction. The Guantanamo detainee courts, therefore, have had to rationalize, post-hoc,[79] their departure from the *Johnson* court's method of analysis, which addressed the petition's merits, despite the lack of jurisdiction. This is the case notwithstanding the fact

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[76] But as we shall see below, U.S. courts have held that aliens or even citizens who take arms against the United States are not entitled to jurisdiction.

[77] *Al Odah*, 321 F.3d at 1141.

[78] *Johnson*, 339 U.S. at 776 (noting that allowing enemies access to American courts would only help them in their endeavors against the United States); *see also, Rasul*, 215 F. Supp. 2d at 67 (interpreting the *Johnson* Court's denial of jurisdiction as stemming from the detainees location extraterritoriality, not enemy combatant status).

[79] *Al Odah*, 321 F.3d at 1142 (noting that the earlier Supreme and federal courts were "not always punctilious in treating jurisdiction as an antecedent question to the merits").

that the Supreme Court *has* exercised criminal jurisdiction over aliens on the island.[80]

In addition to rationalizing the inconsistency of their jurisdictional denials with *Johnson*, these courts dismiss the fact that the United State's sole occupation of Guantanamo Bay amounts to complete jurisdiction and control over the base—especially since its perpetual lease can be terminated only by abandonment or mutual agreement with the Cuban government.[81]

The ultimate question in this respect is whether the extraterritorial basis for precluding jurisdiction under *Johnson* "turn[s] on technical definitions of sovereignty or territory."[82] Since the United States effectively governs Guantanamo Bay, the lease's recognition of Cuba's "ultimate sovereignty" merely functions as a technical definition.[83] To avoid this technical sovereignty, the court in *Al Odah* followed dicta noting that sovereignty delineations are best left to "'the legislative and executive departments.'"[84]

The detainees attacked the precedent that the *Al Odah* court relied on to deny jurisdiction by claiming that the precedent "interchanged 'territorial jurisdiction' with 'sovereignty,' without attaching any particular significance to either term."[85] The court, however, restated its characterization of Guantanamo Bay as neither within the territorial jurisdiction nor the sovereignty of the United States. Therefore, "the privilege of litigation" does not extend to the detainees, whether for amelioration of the conditions of confinement, or solely for habeas corpus.[86]

Finally, lawyers arguing on behalf of the Guantanamo Bay detainees have reasoned that even if the American military base on Guantanamo is not technically within the territorial limits of the United States, the United States is a de facto sovereign by virtue of its complete jurisdiction and control over the base and by its

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[80] *See id.* at 1142–43 (noting that the United States' previous exercise of jurisdiction at Guantanamo was pursuant to special maritime provisions and that "[e]xtension of federal criminal law pursuant to these provisions does not give the United States sovereignty over Guantanamo Bay").

[81] *Id.* at 1142 (citing the 1934 treaty between the U.S. and Cuba, which provides that the U.S. has a right to occupy the naval base at Guantanamo Bay indefinitely, until the United States unilaterally abandons it, or until both the United States and Cuba agree to modify the terms of the existing treaty).

[82] *Id.*

[83] *Id.* (referring to the term "ultimate sovereignty" from the 1903 treaty between the United States and Cuba, the court further holds that the term establishes that Cuba, and not the United States has sovereignty over Guantanamo Bay).

[84] *Id.* at 1143 (quoting Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948)).

[85] *Id.*

[86] *Id.* at 1144 (quoting Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950)).

longstanding display of sovereignty on the base. It would therefore be absurd to deny aliens on the base recourse to U.S. courts.[87] In *Rasul v. Bush*, the court dismissed such a de facto sovereignty theory, holding that "'control and jurisdiction'" were not "equivalent to sovereignty."[88] Furthermore, it dismissed the argument that "leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functional[ly] equivalent' to being land borders or ports of entry of the United States."[89]

In *Gherebi v. Bush*,[90] the Ninth Circuit found that *Johnson* was exclusively based on whether the United States had extraterritorial jurisdiction, rather than whether the situs of the prisoners' detention was within the sovereignty of the United States.[91] Having made the distinction between territorial jurisdiction and sovereignty, the court found a way out of reading *Johnson* as merely requiring territorial jurisdiction. As a result, the United States' sole and complete control and jurisdiction over Guantanamo Bay made habeas jurisdiction available. This is unlike in *Johnson*, where the prisoners were held in a country under a foreign sovereign where the United States did not have territorial jurisdiction.[92] Notably, when the United States held the *Johnson* petitioners in Landsberg, Germany, it had limited and shared authority over the prison for a temporary period. However, the *Gherebi* court found that such limited and shared control nowhere approaches the United States' potentially permanent exercise of complete control and jurisdiction over Guantanamo Bay.[93]

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[87] *Rasul v. Bush*, 215 F. Supp. 2d 55, 71 (D.D.C. 2002) (citing Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996), which held that the express terms of the 1903 treaty forbade any judicial delineation of the United States as a "*de facto* sovereign" over Guantanamo).

[88] *Id.* at 72 (quoting Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995).

[89] *Id.*

[90] *Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003).

[91] *Id.*

[92] Neal K. Katyal and Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1306 n.174 (2002) (arguing that the *Johnson* court was unclear as to which of the two rationales—territorial sovereignty or sovereignty— justified its holding that habeas was not available).

[93] According to the *Gherebi* court, "for more than one century now, 'with the right to acquire . . . any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof'" demonstrates that the United States has "treated Guantanamo as if it were subject to American sovereignty: we have acted as if we intend to retain the Base permanently, and have exercised the exclusive, unlimited right to use it as we wish, regardless of any restrictions contained in the Lease or continuing Treaty." *Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053 (Dec. 18, 2003).

2. The Striking Similarity of the Jurisdictional Denials with Colonial and Analogous Contemporary Jurisprudence

The territorial limits that U.S. courts have used to forestall judicial review of the conditions of confinement of the detainees in Guantanamo Bay are not new. For example, when Haitian President Jean-Bertrand Aristide was ousted in a military coup, thousands of Haitians fled the resulting political turmoil for the United States to avoid political persecution.[94] Rather than allow the fleeing refugees into the United States, federal authorities set up detention camps for them at Guantanamo Bay. The Haitian refugees filed petitions from Guantanamo Bay alleging that, inter alia, U.S. authorities had violated international norms of nonrefoulement by refusing to give them refugee status in the United States.[95] The nonrefoulement principle precludes countries that have ratified the Refugee Convention, such as the United States, from returning fleeing refugees back to their persecutors.[96] A primary rationale of the Supreme Court's opinion rejecting the refugees' attempt to enforce their right of nonrefoulement, was that the United States could not enforce the refugees' rights extraterritorially.[97] Professor Harold Koh, lead counsel for the Haitians in the *Sale* case, later wrote that by this outcome, the Court had implicitly endorsed the anti-immigrant sentiment in the country whose image of "the archetypal 'good' alien . . . is a white, European, healthy, heterosexual, self-sufficient refugee, arriving alone in search of political asylum . . . [I]t hardly surprises that black, poor Caribbean migrants arriving in large numbers, many afflicted with HIV . . . should fare poorly in our courts."[98]

In fact, perhaps because U.S. citizens and courts are indifferent to the plight of refugees, asylums, and immigrants from poor countries like Haiti,[99] there has been relatively little public outrage at the

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[94] Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2394 (1994).

[95] *Id.*

[96] *Id.* at 2393.

[97] *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993); *but see id.* at 188–207 (Blackmun, J., dissenting) (stating that this reasoning was flawed because it altered the plain meaning of the treaty and it didn't support the rest of the majority's opinion).

[98] Koh, *supra* note 94, at 2422. *See also*, Creola Johnson, *Quarantining HIV-Infected Haitians: United States' Violatons of International Law at Guantanamo Bay*, 37 HOW. L.J. 305, 305 (1994) (noting that Haitian refugees were confined to Guantanamo Bay not because they had violated any law, but because they had contracted HIV or had a relative who had contracted it).

[99] *See* Rupert Colville, *Resettlement Still Vital after All These Years*, *in* INTERNATIONAL REFUGEE LAW: A READER 341 (B.S. Chimni, ed., 2000) (arguing that since the end of the Cold

difference in treatment between U.S. and non-U.S. citizens held as a result of the events of September 11th, 2001.[100] The importance of the Haitian example is in showing how territoriality becomes one of the primary means by which courts perpetrate racial prejudice. Although the Supreme Court in *Sale* was effectively producing an outcome based on race, it justified the denial of fundamental refugee protection to a largely non-white community in the facially neutral discourse of the constraints of extraterritoriality.

United States courts are not alone in using arguments about territoriality to preclude outcomes that would hold their government accountable. For example, the European Court of Human Rights, in December of 2001, based its decision in the *Bankovic* case on the basis of extraterritoriality.[101] In *Bankovic*, six Yugoslavian nationals sought orders against the seventeen NATO member states concerning the bombing of the Serbian Radio and Television Headquarters in Belgrade during the course of the NATO air strike campaign in the Kosovo conflict.[102] The applicants alleged that their rights to life and to freedom of expression, as well as their right to an effective remedy, guaranteed under the European Convention on Human Rights, were infringed.[103]

The European Court of Human Rights dismissed the application, holding that it lacked jurisdiction because the European Convention was territorial in scope, and does not apply to the territory of non-contracting states, such as Yugoslavia, unless it can be established that the affected individuals or territory were within the "effective control" of contracting states.[104] This rationale is analogous to the finding in *Rasul v. Bush*, where the District Court for the District of Columbia held that the United States does not have de facto sovereignty over Guantanamo Bay.[105] In other words, just as the

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War, western countries have given priority to repatriation over third country resettlement of refugees). This policy, the book argues, is part of the development of aggressive containment policies such as visa restrictions and restricted access to asylum procedures.

[100] DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 4–5 (2003).

[101] Bankovic v. Belgium, App. No. 52207/99 (European Court of Human Rights 2001), *reprinted in* 123 INT'L LAW REPORTS 94 (2001).

[102] *Id.* at 98–99. *See also* Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned From it*, 25 FORDHAM INT'L L. J. 95 (2001) (discussing the failed attempt to commence an investigation of illegal aerial bombardments by U.S. led NATO allies in the Kosovo intervention).

[103] *Bankovic*, 123 INT'L LAW REPORTS at 102.

[104] *Id.* at 110.

[105] *See* Rasul v. Bush, 215 F. Supp. 2d 55, 71–73 (D.D.C. 2002) (characterizing the United States' position with respect to Guantanamo Bay as merely that of a leasee of property, and the detainees status as merely that of migrants).

allied NATO powers were responsible for the damage to the radio and television stations in Yugoslavia, so was the United States with respect to its detention of the prisoners at Guantanamo. Both instances, however, rely upon notions of extraterritoriality to limit accountability for acts indisputably attributable to either the United States, in the case of Guantanamo Bay, or the allied NATO powers, in the case of the bombing. The extraterritoriality argument employs a technical defense to circumvent responsibility.

Such technical defenses, in effect, immunize the conduct of western powers and the United States outside their geographic limits.[106] Notably, it would appear that the "effective control" doctrine announced in the European Convention context would render the actions of the United States government at Guantanamo Bay amenable to the jurisdiction of the United States federal courts.

Article 63 of the European Convention on Human Rights of 1950 provided that a contracting party to the Convention had the discretion to apply its rules within its own borders and to (colonial) territories under its control.[107] Article 63 met stiff resistance from states desiring unqualified protection of human rights, since by "adopting Article 63, the Assembly would transform the European Declaration of Human Rights into the declaration of European Human Rights[,]" and thus exclude rights to people outside its realm but subject to the complete jurisdiction and control of those European countries.[108] Specifically, a French member of parliament from Senegal objected to the inclusion of Article 63 and instead proposed that the Convention should automatically apply in colonial Africa.[109] This member noted that "[t]oday, Africa cleaves more to the ideal of equality than to that of independence[,] . . . [it] is the Continent where sensitiveness and honour are paramount . . . [and] Article 63 would be regarded as an affront to the dignity of the overseas peoples."[110] Undoubtedly, former colonial peoples regarded the geographical limitations of human rights protections under the

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[106] In a similar context, *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002), *cert. denied* 537 U.S. 1038 (2002), affirmed a district court ruling that U.S. Drug Administration Enforcement Agents do not have a duty to comply with the International Covenant on Civil and Political Rights when they act outside the United States and within the boundaries of another country.

[107] *See* Karel Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe*, 12 INT'L & COMP. L.Q. 1206, 1207–08 (1963); Christof Heyns, *African Human Rights Law and the European Convention*, 11 S. AFR. J. ON HUM. RIGHTS 252, 254 (1995).

[108] Vasak, *supra* note 107, at 1208.

[109] *See id.* at 1207–08 (noting that to deny human rights to men outside of Europe would "betray [] the spirit of the European civilization . . .").

[110] See Heyns, *supra* note 107, at 255 n.13.

European Convention with suspicion.[111]

The European Court of Human Rights' restriction of the reach of international human rights obligations based on a geographical criteria parallels the geographical limitations placed on constitutional protections for the Guantanamo detainees. Acting under enhanced wartime powers, powerful western governments freely abridge individual rights without a remedy, both in the case of the detainees in Guantanamo and the Yugoslavian Radio Station, in the *Bankovic* case. It would appear, therefore, that both as a matter of law and policy of powerful states, actions undertaken during wartime are much less stringently subjected to judicial review, even where they involve limiting the rights of aliens inconsistently with international legal obligations and domestic constitutional norms.[112] Thus, extraterritoriality acts as a pretext for xenophobic, racial, and ethnic discrimination.

Indeed, colonial courts held that colonial powers were not bound by considerations of humanity, human rights, or even the rule of law when acting extraterritorially. For example, British courts consistently held that natives in protectorates did not have enforceable rights "in respect of any kind of tortious act committed upon the orders of or subsequently ratified by the Government."[113] These courts, like those ruling on the claims of the Guantanamo detainees, suggested that the only remedies available exist beyond

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[111] I have argued that since Hegel, Africa has largely been viewed as an "unconscious" geographical entity where sovereignty over territory has been uneven and inconsistent within and among many countries. *See* James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 LEIDEN J. INT'L L. 581 (2002); James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000).

[112] Here the examples are innumerable with reference to the United States. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (upholding a ban on the entry of Chinese laborers in peacetime but noting "[t]he existence of war would render the necessity of the proceeding only more obvious and pressing"); Fong Yue Ting v. United States, 149 U.S. 698, 718 (1893) (stating that the mere "coming of Chinese laborers to this country endangers the good order of certain localities," and therefore validating a statute seeking to exclude Chinese laborers from entering the United States); Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943) (stating that the executive order issued pursuant to a statute authorizing a curfew during wartime was "without constitutional infirmity"); Yasui v. United States, 320 U.S. 115, 117 (1943) (reaffirming the holding in *Hirabayashi* and stating that the curfew imposed on American citizens of Japanese descent was valid). *But see* Ex Parte Mitsuye Endo, 323 U.S. 283, 302 (1944) (stating that "[w]hen the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized").

[113] Ol le Njogo v. Attorney General, 5 EAST AFRICAN L. REPT. 70, 96 (1913) (citing Buron v. Denman).

the scope of judicial review.[114] British colonial courts observed that beyond the "*remedies of diplomacy and war* . . . available to [such] . . . foreigner[s]" the only avenue of potential justice was an appeal to the consideration of the Government. [115] As one colonial Justice stated in a case brought for relief by such a foreigner:

> The idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers. *It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous.*[116]

Thus, while Guantanamo courts have by and large abstained from judicial review of executive detention without explicitly grounding the denials on explicitly racist premises, colonial courts, unlike their modern counterparts, candidly attributed their rationale to the perceived cultural inferiority of non-European peoples. However, while today's courts use territoriality, military necessity, or the status of the petitioners as legal justifications in the cases of the prisoners in Guantanomo Bay and the *Bankovic* decision, the justifications used in these cases do not seem different from those decided by British colonial courts. Ultimately, territoriality is simply a guise for the same racial arrogance of the classical colonial period that in turn serves to summarily close the doors on the detainees in Guantanamo Bay.[117]

II. OF WAR AND MILITARY NECESSITY: THE FIELD OF WAR AS "TERRITORY" OUTSIDE THE JUDICIAL JURISDICTION

Petitions concerned with the detainees' conditions have also been denied because the detainees were being held "'in the field in time of war.'"[118] In *Al Odah v. United States*, Judge Randolph's concurring opinion argued that the meaning of "in the field" has historically referred to "'organized camps stationed in remote places where civil

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[114] *Id.*

[115] *Id.* at 97.

[116] *Id.* (emphasis added) (citing Justice Vaughan in *Rex v. Earl of Crewe*).

[117] Response to Respondents' Response to Order to Show Cause Regarding Jurisdiction at 22–25, Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (No. Civ. 02-00570-AHM (JTLX)), (on file with author).

[118] Al Odah v. United States, 321 F.3d 1134, 1149–50 (D.D.C. 2003) (Randolph, J., concurring) (noting the purpose of the detention is for ongoing military operations).

courts did not exist,'"[119] suggesting the incompatibility of normal legality and war—for war, according to this logic knows no rules and courts are not available on the front lines.

Judge Randolph, however, fortified the detainees' "remote" wartime incarcerations with further justifications. He opined that the military's special realm of expertise precludes judicial inquiry, and, as such, courts: "have no meaningful standard against which to judge . . . [t]he military's judgment about how to confine the detainees [since such a judgment] necessarily depends upon 'a complicated balancing of a number of factors which are particularly within . . . [the military's] expertise.'"[120] Thus, concludes Judge Randolph:

> The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause—these types of judgments *have traditionally been left to the exclusive discretion of the Executive branch, and there they should remain.*[121]

In short, Judge Randolph states that the conditions of a detainee's confinement are matters beyond the scope of the court's power. War, in and of itself, precludes judicial inquiry into the decisions of the executive branch with regard to detainee treatment. *Hamdi v. Rumsfeld* further held that the executive branch may even abridge the rights of an *American citizen* if the concerted war effort necessitates such action.[122] The court stated:

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[119] *Id.* at 1150 (citing Kinsella v. United States, 361 U.S. 234, 274 (1960)).

[120] *Id.* (citing Lincoln v. Vigil, 508 U.S. 182, 193 (1993)). Judge Randolph stated that "provisions of the APA, including the waiver of sovereign immunity, do not apply . . ." to military decisions. *Id.*

[121] *Id.* (emphasis added). Note, however, that in *Coalition of the Clergy,* the court observed that:

> [A]lthough the hastily-prepared petition is far from a model of precision or clarity, it does at least allege that the Guantanamo detainees "appear to be held incommunicado and have been denied access to legal counsel." . . . This is tantamount to alleging lack of access to the court. But standing alone, conclusory allegations such as these are not sufficient to establish standing. . . . In this case, petitioners' assertions that the detainees are totally incommunicado are not supported by the news articles they attached to the petition. Indeed, as respondents point out, the news articles actually contradict the assertions. Some of the articles reflect that the detainees were given the opportunity to write to friends or relatives . . .; others state that some detainees had already been in contact with diplomats from their home countries . . . .

189 F.Supp.2d at 1041 (*internal citations omitted*).

[122] 316 F.3d 450, 465–68 (2003) (explaining Hamdi's capture and detention by the United States Military). *But see,* Padilla v. Rumsfeld, __ F.3d __, 2003 WL 22965085 (2d Cir. Dec. 18,

> [H]e is an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces. Cases such as Hamdi's raise serious questions which the courts will continue to treat as such. The nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot thrive. The judiciary was meant to respect the delicacy of the balance, and we have endeavored to do so . . . *Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one.*[123]

Even if war entitles the executive branch to considerable discretion in combating threats of terrorism, this does not mean federal courts need abdicate their role entirely. Merely because executive conduct occurs overseas and involves issues of war does not mean the courts automatically shed their constitutional role—especially when an American citizen—assuming, which I strenuously contest, that there is a valid justification for treating aliens differently—who is clearly protected under the Constitution, is involved. If anything, war emphasizes the importance of jurisdiction. To hold otherwise strips the judiciary of its authority, and effectively confers untrammeled, unchecked power to the executive branch.

To conceptualize the theater of war as outside the province of judicial power is analogous to the idea that judicial power cannot reach extraterritorially. That courts have even denied jurisdiction to petitions by American citizens, deferring to the exclusive province of the executive branch, points to the vastly over-expansive discretion courts have conferred to the executive branch.[124] This outcome suggests that the various hodgepodge of incoherent justifications enunciated for precluding jurisdiction[125]—including arguments about extraterritoriality—are merely post-hoc

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[123] *Hamdi v. Rumsfeld*, 316 F.3d 450 at 476–77 (emphasis added).

[124] *See, e.g., id.* at 477.

[125] *See, e.g.*, Coalition of Clergy, 310 F.3d at 1165 (noting that the petitioners bringing suit on behalf of the detainees lacked standing as next-friends, and thus jurisdiction was precluded on grounds other than territoriality).

rationalizations for expanding executive power, rather than coherently reasoned and constitutionally supported interpretive doctrines, in so far as they bar judicial scrutiny of the merits of executive decisions in times of war.

IV. THE COMMERCIAL "CONTRAST" ON ASSUMPTION OF EXTRATERRITORIAL JURISDICTION

To further demonstrate the inconsistency and inconclusiveness of jurisprudence surrounding extraterritorial jurisdictional denials, in this section I will contrast the relative ease with which extraterritorial commercial conduct falls within the jurisdiction of U.S. federal courts. It is conceded, of course, that commercial issues raise no questions of war and peace and are thus a category discrete from the concerns arising out of the theatre of war against terrorism. Yet, it is precisely because of this apparent incongruity that jurisdiction over extraterritorial commercial conduct must be examined. The motivations for barring extraterritorial jurisdiction to enemy aliens and finding jurisdiction over extraterritorial commercial conduct reflect perfect symmetry, because both advance the interests of the United States—one its global commercial interests, the other its domestic and global security interests.

The basic rule of extraterritorial application of U.S. commercial laws, otherwise referred to as the "effects doctrine," was formulated by Judge Learned Hand in *United States v. Aluminum Company of America*.[126] Here, Learned Hand applied U.S. antitrust laws to extraterritorial commercial events, despite a lack of any express Congressional intent to make the statute applicable extra-territorially.[127] Under the effects doctrine, the Sherman Act subjects extraterritorial commercial conduct that has a substantial, direct, and foreseeable effect on U.S. domestic or foreign commerce to liability in federal courts.[128] The Supreme Court's decision in *Hartford Fire Insurance Company v. California* is the modern judicial endorsement of this doctrine.[129] While an earlier Supreme Court case had held that legislation is territorial in scope unless

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[126] 148 F.2d 416 (2d Cir. 1945).

[127] *Id.* at 443–44 (holding that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . .").

[128] *Id.* at 444.

[129] 509 U.S. 764, 796–99 (1993) (asserting that the United States antitrust laws will apply "even where the foreign state has a strong policy to permit or encourage such conduct").

there is an express intention to the contrary,[130] subsequent case law has eroded this principle, replacing it with the effects doctrine.[131] Congress has also enacted statutes with an explicit extraterritorial mandate, often leading to controversies with its trading partners. For example, the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act, also know as the Helms-Burton Act, imposed penalties upon business managers, (irrespective of their territorial location), for "trafficking"' in properties belonging to U.S. citizens expropriated by Cuba.[132] After protests by Canadians and Europeans about the propriety and legality of these extraterritorial penalties, and the attendant secondary boycotts under international law, the President of the United States suspended their application.[133] In addition, France and Great Britain enacted blocking legislation to impede the provisions of the Helms-Burton Act.[134] Such expansive extraterritorial applications of U.S. laws have therefore not been without fallout from U.S. trading partners.[135]

However, there have been some inexplicable examples of judicial abstention from the general trend of applying U.S. law extraterritorially in commercial cases. In one such case, the Nuclear Regulatory Commission voted to issue a permit for the sale of a nuclear power reactor by a U.S. corporation to the Philippines.[136] Uncontroverted evidence showed that the plant was to be situated above an earthquake fault line which overlay an active volcano,[137] and that the plant's technical design failed to meet

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[130] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909) (expressing "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act [was] done," and characterizing the question of the extraterritorial jurisdiction of legislation to U.S. citizens abroad as one of judicial construction, and not of legislative intent).

[131] *See, e.g.*, United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 106 (1913) (applying American antitrust laws against a Canadian company's conspiracy to monopolize rail transportation between the United States and Canada based on a reasoning that failure to do so "would put the transportation route . . . out of the control of either Canada or the United States").

[132] 22 U.S.C. §§ 6021–6091 (2000).

[133] Detlev F. Vagts, *Extraterritoriality and the Corporate Governance Law*, 97 AM. J. INT'L L. 289, 291 (2003) (arguing that following international condemnation, the six-month moratorium on enforcement has been invoked by subsequent presidents, resulting in a law that, while on the books, is not enforced).

[134] *Id.* at 292.

[135] *See id.* (highlighting instances of international disputes regarding the application of antitrust laws extraterritorially; such disputes include foreign legislation that has met U.S. disapproval).

[136] *In re* Westinghouse Elec. Corp., 11 N.R.C. 631 (1980).

[137] *See id.* at 632 (citing allegations that the site is unreasonably close to volcanic formations, as well as two U.S. military bases).

U.S. safety standards.[138] The circuit court upheld the decision of the Nuclear Regulatory Commission, on the ground that because of constraints of extraterritoriality, it lacked jurisdiction to consider the effects of an exported reactor on citizens of a recipient country, or even U.S. citizens residing in that country.[139] In another infamous case that resulted in a congressional reversal, the Supreme Court held that Title VII of the Civil Rights Act did not apply to an American citizen employed by an American corporation abroad.[140] Hence, while courts have construed commercial legislation in the securities and trademark area rather liberally abroad, environmental, civil, and labor rights legislation even for U.S. citizens—not to mention non-citizens abroad—have been construed narrowly.[141] This pattern is consistent with promoting U.S. commercial interests abroad, uninhibited by countervailing public policy considerations with respect to non-U.S.—and at times even with respect to U.S.—citizens.[142]

One of the most recent examples of extraterritorial extensions of U.S. commercial law is *United States v. Nippon Paper Industries,* where the court applied the criminal penalties of Section 1 of the Sherman Act to a foreign defendant for conduct occurring entirely within a foreign country.[143] The court did this notwithstanding well-established international legal authority previously accepted in the United States constraining such an outcome in the criminal extraterritorial context.[144] Judge Lynch's concurring opinion captured these constraints, but noted that, in determining whether the criminal sanctions of the Sherman Act were coextensive with

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[138] *See* Anthony D'Amato & Kirsten Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA L. REV. 1011, 1021 (1988) (addressing concerns that were raised by the Union of Concerned Scientists regarding the safety of the proposed nuclear site, concerns that were ignored by the NRC).

[139] Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1352 (D.C. Circ. 1981) (agreeing with the Commission's assessment of jurisdictional mandates).

[140] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991) (concluding that, had congress desired extraterritorial reach of Title VII, it certainly knew how to do so).

[141] *See* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 298–300 (1996) (labeling purported congressional intent as the genesis of extraterritorial jurisdiction for legislation, an intent that is read into statutes with some irregularity).

[142] *See id.* at 304 (reducing the complexity of when and why extraterritoriality will be read into legislation to the simple notion of when it serves the interest of the United States or its corporate actors).

[143] 109 F.3d 1, 9 (1st Cir. 1997) (applying Section 1 of the Sherman Act to a criminal case).

[144] *See id.* at 8 (rationalizing its holding by averring that "[w]e live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale").

Section 1 in the civil context:

> [C]ourts must be careful to determine whether this construction . . . conforms with principles of international law. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy,* that "'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'"[145]

Thus, it appears that Judge Lynch differed with the majority's holding that globalization compelled the long-held comity constraints of applying criminal sanctions extraterritorially. Judge Lynch's concurrence also seemed concerned with the extent to which the majority deviated from a clear line of authority reflected in the Restatement.[146] Specifically, the legislative intent necessary to apply the criminal sanctions of Section 1 of the Sherman Act extraterritorially would require either an "express statement" or "clear implication" of Congress to that effect.[147] The strategic goals of extending U.S. commercial legislation extraterritorially, while simultaneously limiting the extraterritoriality of laws that are inconsistent with this overall mission, is best captured by former Assistant Secretary of State of the Reagan Administration, Kenneth Dam,[148] in his address to the American Society of International Law:

> When these disputes over jurisdiction turn out to be grounded in disputes over policy, the most effective solution is a major effort to harmonize our policies. This may not make the legal disputes go away, but it will surely make them less divisive. The democratic nations have an even deeper interest in resolving these policy conflicts—not only to make lawyers' lives easier but to preserve the political unity of the Western alliance. And that alliance is, without exaggeration, the foundation of the legal, economic, and political system of the democratic West. . . . In the early years of the postwar period, American power was so preponderant within the alliance that our prescriptions often received ready acceptance from allies weakened by the war and dependent on American economic aid and military

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[145] *Id.* at 9 (Lynch, J., concurring) (internal citations omitted).

[146] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 403 cmt. f (1987).

[147] *Id.; see also* Elliott Sulcove, *The Extraterritorial Reach of the Criminal Provisions of U.S. Antitrust Laws: The Impact of* United States v. Nippon Paper Industries, 19 U. PA. J. INT'L ECON. L. 1067, 1090–94 (1998) (arguing the *Nippon* decision will, in the end, lead to greater conflict over the extraterritorial reach of U.S. laws).

[148] Kenneth Dam is currently the Assistant Secretary of Commerce in the George W. Bush Administration.

> protection. Today, our allies are strong, self-confident, and independent minded. . . . The United States still has the responsibility to state its convictions, and act on them, on matters of vital importance to free world security.[149]

Extraterritoriality for policy-makers in Washington is not simply a question of conflicting legal regimes, but rather a question of foreign policy. While Mr. Dam was justifying U.S. interests as Western prescriptions for a free world in the cold war context, the court in *Nippon* was being no less strategic, only this time employing globalization as the pretext for expanding American laws to conduct abroad in connection with a foreign defendant.

Finally, my claim is relatively straightforward. Although it may seem that the denial of jurisdiction over cases by Guantanamo Bay detainees based on the constraints of extraterritoriality produces opposite results to the strikingly similar extraterritorial questions in commercial cases, a closer look reveals that both expand U.S. interests abroad.

CONCLUSION

I conclude that territoriality—as used by the courts to summarily foreclose judicial intervention on behalf of the Guantanamo Bay detainees—is simply a façade for an anti-alien prejudice that is neither new to American nor colonial jurisprudence. The limitations of territory are supplemented by doctrines such as that of extraordinary circumstances, which rationalize the suspension of the Bill of Rights and constitutional and international legal guarantees during war time. While responding to threats to national security may warrant enhanced measures, it does not follow that the rule of law has to be suspended or that courts have to surrender their jurisdiction with respect to aliens, even those suspected of involvement in terrorism.[150] That such persons may be

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[149] Kenneth W. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, Annual Dinner (1983), *reprinted in* 77 AM. SOC'Y OF INT'L L., 370, 375 (1983).

[150] *See* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002). Koh notes,

> I do not deny the need for vigorous law enforcement in the face of an unprecedented terrorist threat. But neither can I escape the feeling that by creating such laws [denying aliens due process and other constitutional guarantees], we are helping the terrorists to take our freedoms. When the media calls this [September 11, 2001] the "second Pearl Harbor," as an Asian American, I cannot forget that the first Pearl Harbor triggered the internment of tens of thousands of loyal Americans based solely on their Asian ethnicity. What too few recall is that this was the only time that the Supreme Court applied the test of strict scrutiny to a racial classification, but nevertheless upheld the restrictive law. . . . Nor can I forget Justice Jackson's haunting words in his Korematsu dissent:

tortured without recourse to any form of due process of the law is a violation of the United States' obligations under customary international law.

This paper also demonstrates that federal courts are more likely to find they have jurisdiction where a claim of torture is brought against a government other than the United States. However, when the United States is implicated in a torture claim, the odds are against a favorable jurisdictional finding. Such an outcome is inconsistent with the customary international law principle of universal jurisdiction.

Further, the doctrine of state responsibility under international law is not strictly confined to territory in its application.[151] As such, the United States' invocation of extraterritoriality, foreign citizenship, and extra-ordinary circumstances as conditions precedent to the enjoyment of rights established under international law is inconsistent with the international legal obligations of the United States.

Ultimately, the hodgepodge of rationales invoked by courts to refrain from providing any form of relief to the Guantanamo Bay detainees overlaps with the anti-Muslim Arab sentiment in the United States. The attacks on the U.S. on September 11th, 2001 only accentuated this animus.[152] It is therefore plausible to argue that by denying habeas jurisdiction to the Guantanamo prisoners, U.S. courts are effectively acquiescing to treating individuals differently because of their race and religion and supposed guilt by association. These discriminatory consequences, including indefinite and incommunicado detention, have fallen on these prisoners without affording them an opportunity for individualized establishment of their links to terrorism or even a determination of their status under the Third Geneva Convention. Needless to note in conclusion, such conduct on the part of the United States is both inconsistent with its international legal obligations and undermines the moral authority of the safeguards and fundamental values of the U.S. Constitution against abuse of governmental power. It is these safeguards and values that have often inspired struggles against indefinite and incommunicado executive detention across

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that that precedent 'lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim to an urgent need.'"
Id. at 37–38.

[151] D'Amato and Engle, *supra* note 138, at 1035.

[152] *See* Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT'L BLACK L.J. 1 (2003) (questioning the role of race in U.S. foreign policy and decision-making in international law).

the world that the United States is now widely seen as disregarding at Guantanamo.