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**HISTORICALLY UNAPPEALING: *BOUMEDIENE v. BUSH*,  
APPELLATE AVOIDANCE MECHANISMS, AND BLACK HOLES  
EXTENDING BEYOND GUANTANAMO BAY**

Dennis Schmelzer\*

Spain professes as high a regard for the principles of liberty as we do. Yet in 1899 we found hundreds of prisoners in the jails of Cuba who had been imprisoned for years without trial for want of some definite and certain way in which they could avail themselves practically of the principle. One of these wretches had been imprisoned for eleven years theoretically awaiting trial. General declarations in favor of fair, impartial and speedy trial for persons accused of crime, are worthless without specific provisions enabling the accused to require that he be brought to trial or set free; that he be acquainted with the evidence against him; that he be confronted with the witnesses against him; that he have process for the production of his own witnesses; that he be protected in refusing to testify against himself, and that he have counsel for his defense.<sup>1</sup>

INTRODUCTION

U.S. Supreme Court Justice Antonin Scalia once observed that, in common law countries, “[t]he law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time.”<sup>2</sup> In this manner, lawyers and jurists rely on judgments in past disputes to distill an understanding of present law. As Americans, we are proud of our common law heritage; but even the most ardent supporters of the system inherited from England can recognize considerable drawbacks to this approach. Justice Scalia has argued, for example, that the judicial tendency to narrow appellate rulings to the specific

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\* Associate, Vinson & Elkins LLP. The views expressed herein are entirely the views of the author and not necessarily the views of Vinson & Elkins LLP or its clients. The author expresses profound thanks to Professor Madeline Morris, Director of the Guantanamo Defense Clinic at Duke University School of Law, for her thoughtful comments on numerous drafts of this Manuscript. Special thanks also go to Professors Ira Katznelson and Robert Jervis of Columbia University and Professor Barak Richman of Duke University School of Law, whose uncited insights have guided this Manuscript, and Wesley Levins for engaging in a series of discussions that formed the basis for this Article.

<sup>1</sup> Elihu Root, *Some Duties of American Lawyers to American Law*, 14 YALE L.J. 63, 71 (1904).

<sup>2</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

circumstances of each dispute hinders the predictability of law and overall perceptions of justice.<sup>3</sup> Other factors complicate judicial reliance on past precedent, including preliminary questions regarding standing, appellate jurisdiction, and justiciability, which often prevent appellate courts from addressing substantive disagreements in a meaningful fashion.

Just as significant, the common law approach at times hides *agreement* on legal principles. Where there has historically been consensus, disputes may simply never have arisen, rendering prior case law a poor guide. The adversarial system in particular encourages consideration of differences, rather than agreements, in opinion. Legal scholars—who thrive on debate—have a similar tendency to focus more on areas of substantive disagreement and dedicate far less time to documenting substantive areas in which all parties agree. Controversy is not only the bread-and-butter of the common law judicial system, but also of the legal academy. Where there is no controversy, the unspoken understandings and assumptions of one generation can easily become the great mysteries of the next.

The U.S. Supreme Court considered one such mystery in *Boumediene v. Bush*.<sup>4</sup> At issue in *Boumediene* was whether foreign enemy nationals detained at the U.S. Naval Station at Guantanamo Bay were entitled under the U.S. Constitution to petition for habeas corpus and, if so, whether the Combatant Status Review Tribunals (CSRTs) created by the Detainee Treatment Act of 2005 amounted to an adequate substitute for habeas proceedings (as intended by Section 7 of the Military Commissions Act (MCA)).<sup>5</sup> In a 5 to 4 vote, the Supreme Court held that the prisoners held at Guantanamo Bay were constitutionally entitled to habeas review, CSRTs were not adequate substitutes for habeas proceedings,<sup>6</sup> and Section 7 of the MCA accordingly “operate[d] as an unconstitutional suspension” of the Great Writ.<sup>7</sup>

To reach this conclusion, Justice Kennedy first looked to historical precedent.<sup>8</sup> Finding no cases directly on point, Kennedy offered the hypothesis that, “given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.”<sup>9</sup> Justice Kennedy nevertheless concluded that the Court could look beyond historical case law, noting that “the lack of a precedent on point is no barrier to our holding.”<sup>10</sup>

In a scathing dissent, Justice Scalia challenged the notion that the lack of precedent on point was not dispositive of the matter.<sup>11</sup> As Justice Scalia argued, “[A]

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<sup>3</sup> *Id.* at 1178–80.

<sup>4</sup> 553 U.S. 723 (2008).

<sup>5</sup> *Id.* at 732–33.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 733.

<sup>8</sup> *Id.* at 752.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 771.

<sup>11</sup> *Id.* at 847–48 (Scalia, J., dissenting).

case standing for the remarkable proposition that the writ could issue to a foreign land would surely have been reported, whereas a case denying such a writ for lack of jurisdiction would likely not.”<sup>12</sup> In light of the petitioners’ failure to name a case “that supports their claim to jurisdiction,” Justice Scalia argued that “all available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown.”<sup>13</sup>

Both opinions should unsettle historians. Justice Kennedy, for example, can be criticized for overstating the “unique status” of Guantanamo Bay as a territory.<sup>14</sup> The legal status of Guantanamo Bay is not necessarily so different from other possessions acquired during the golden years of U.S. imperialism.<sup>15</sup> Justice Scalia, for his part, goes too far in suggesting that all historical evidence points to the conclusion that the writ of habeas corpus was not available at common law for aliens captured and held outside of the “sovereign territory” of the United States.<sup>16</sup> To the contrary, direct historical evidence suggests that the writ of habeas corpus was “available” in these territories, even for foreign prisoners.<sup>17</sup>

Indeed, completely absent from the Court’s majority and dissenting opinions is the fact that the writ was almost uniformly recognized by the political branches by statute or executive order in similar territories, just as the federal habeas statute first codified in 1789 established the scope of the writ within fully incorporated states.<sup>18</sup> These territorial statutes do not provide answers to constitutional questions about the scope of the Suspension Clause, but they do start to explain why disputes over the complete denial of the writ in overseas territories cannot be found in the rulings of Article III courts. In most cases, the availability of some form of habeas was so clear by statute or executive order that the courts simply did not need to address the underlying constitutional questions. This history is completely absent from the Court’s opinion in *Boumediene*, but it is incredibly relevant to understanding why the Court could not find dispositive precedent when considering these issues in 2008.

This Article attempts to fill in some of these gaps in the historical record. Part I sets forward the historical questions framed by the Justices in *Boumediene*. Part II describes the background of the U.S. Naval Station at Guantanamo Bay and compares it to other U.S. territories, most notably the Panama Canal Zone, to dispel notions that the “unique status” of the territory may be to blame for the absence of dispositive precedent. Part III examines evidence that the writ of habeas corpus was widely available to foreign prisoners in the Canal Zone and other territories where the United States did not assert formal sovereignty. Part IV then explores the disconnect

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<sup>12</sup> *Id.* at 847.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 752.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> *Boumediene*, 553 U.S. at 841 (Scalia, J., dissenting).

<sup>17</sup> See *infra* Part III.

<sup>18</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

between this robust habeas practice in unincorporated U.S. territories and the relative absence of related case law from Article III courts. In particular, Part IV offers the hypothesis that the absence of reported precedent was the result of deliberate efforts by the President and Congress to avoid the adjudication of these issues by Article III courts, at first by establishing territorial courts governed by territorial statutes that provided most constitutional rights (including access to the Great Writ) and then by intentionally mooting most disputes that reached Article III courts that might call attention to any exceptions to the rights “voluntarily” granted. In short, the political branches regularly gamed rules of procedure to avoid Article III review. Finally, Part V places this narrative into greater historical context by showing how procedural gamesmanship similarly obscured English case law related to prisoners held in the American colonies prior to independence and other territories in the years that followed, revealing common law deficiencies reaching beyond the broadest boundaries of the U.S. Constitution.

The truth, like an onion, has many layers. It may be true that there is no precedent in Article III reporters concretely establishing that the U.S. Constitution requires the availability of the common law (rather than statutory) writ of habeas corpus to aliens or enemy combatants held in a territory like Guantanamo Bay. Peeling back a layer, it may also be true that the U.S. Supreme Court has denied certiorari on numerous occasions to habeas petitions from foreign prisoners in similar territories. But an onion generally has more than two layers.

Peeling to the next layer, this Article shows how territorial courts operating outside of the scope of Article III regularly heard habeas petitions arising in those territories. Some scholars or jurists may dismiss those cases as irrelevant because most turned on statutory enactments or executive orders rather than judicial divination of underlying common law principles. But removing yet another layer, this Article exposes the shared understandings and uncertainties underlying those enactments: a genuine conviction that the U.S. Supreme Court *might* find that the Constitution required the U.S. government to provide the writ of habeas corpus and other constitutional protections in overseas territories not formally incorporated into the United States (but under its complete control). Because of these uncertainties, the President and Congress often actively worked to moot or minimize disputes so as to avoid the constitutional question in the few cases that arose over the availability of habeas and other constitutional rights in those territories. Their avoidance of the question speaks volumes about the answers that the President and Congress thought that the Supreme Court *might* provide.

Much has been made of the degree to which the Insular Cases definitively settled these types of constitutional questions.<sup>19</sup> But matters that are settled tend to go away. Instead, the record shows that dozens of Insular Cases were heard and decided by the Supreme Court involving constitutional questions arising in unincorporated

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<sup>19</sup> See generally Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 IOWA L. REV. 101 (2011).

U.S. territories in the early years after the Spanish-American War.<sup>20</sup> Even more cases were never granted certiorari.<sup>21</sup> This pattern does not suggest that the Supreme Court had adopted any kind of bright-line rule for the application of the Constitution in those territories. To the contrary, it suggests a deliberate and carefully-scripted attempt to avoid definitively deciding such difficult questions.

When it came to territorial governance, the political branches made judicial avoidance of constitutional questions all too easy. Rather than take the extreme position that overseas territories were zones free of constitutional rights, the political branches made most constitutional rights available in acquired territories, hastened by an early proliferation of legal challenges.<sup>22</sup> These enactments did not provide *quite* the same rights as the Constitution—some territorial habeas statutes were notably narrower than the text of the Suspension Clause—but they were close enough to claim *some* fealty to constitutional principles.

Judicial avoidance of unnecessary constitutional questions is an often-studied doctrine. Less studied are the ways in which the President and Congress regularly maneuver to manipulate that doctrine (to the detriment of our understanding of the law). Contrary to popular perceptions, this process did not leave unincorporated U.S. territories a black hole devoid of legal process. Instead, our territories were characterized by an abundance of law and legal institutions. But this rich history is entirely absent from Article III reporters, a fact made evident in the Supreme Court’s majority and dissenting opinions in *Boumediene v. Bush*. This black hole pervades our common law system and should cause legal scholars and jurists to think twice before drawing sweeping legal conclusions from the mere absence of reported precedent.

## I. THE HISTORICAL QUESTIONS

The central question underlying the dispute in *Boumediene*—whether the Constitution requires that the writ of habeas corpus be made available to enemy combatants held by the U.S. military at Guantanamo Bay—is at its core grounded in the interpretation of the Suspension Clause, which states that “[t]he Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>23</sup> Since the Constitution is silent as to the nature and reach of the writ protected against suspension, the Court has consistently looked to the history of the writ of habeas corpus as applied in both England and the United States to inform what privilege the Suspension Clause was, at a minimum, intended to protect.<sup>24</sup> Thus, questions about whether habeas corpus is available to

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<sup>20</sup> See *id.* at 107–09.

<sup>21</sup> See *id.* at 139–41.

<sup>22</sup> See *id.* at 108–09.

<sup>23</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>24</sup> See, e.g., *Rasul v. Bush*, 542 U.S. 466, 473–75 (2004); *INS v. St. Cyr*, 533 U.S. 289, 336–38 (2001) (Scalia, J., dissenting).

prisoners held by the U.S. military at Guantanamo Bay inevitably turn towards historical questions about whether the writ would have been available to similar prisoners in similar territories at the time that the Constitution was written.<sup>25</sup> In *Boumediene*, the Justices accordingly embarked on a journey through historical case law to find the holy grail of common law jurisprudence: binding precedent. Not only did the Justices not find what they were looking for, the majority and dissenting opinions reveal that they were even divided on what elements would qualify a case as dispositive precedent.

*A. The Majority's Approach*

As framed by Justice Kennedy, the dispute in *Boumediene* boiled down to “whether petitioners are *barred* from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners’ designation by the executive branch as enemy combatants, *or* their physical location, for example, their presence at Guantanamo Bay.”<sup>26</sup> On its face, this question appears to be a simple two-part inquiry into whether the petitioners were unable to apply for a writ of habeas corpus because of *either*: (1) their status as enemy combatants; *or* (2) their physical presence at Guantanamo Bay. To resolve this question, Justice Kennedy first looked to the history and origins of the writ of habeas corpus.<sup>27</sup> After a brief survey of the cases presented by the government and the petitioners, Justice Kennedy found the judicial record unavailing:

In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, *and* when held in a territory, like Guantanamo, over which the Government has total military and civil control.<sup>28</sup>

The Court consequently concluded that, “given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.”<sup>29</sup>

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<sup>25</sup> Questions could be raised about whether this focus on historical practice, rather than underlying principles, is appropriate.

<sup>26</sup> *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (emphasis added). Curiously, the Court focused entirely on what would *bar* access to the Great Writ, and it did not ask, or answer, what would *entitle* prisoners to seek the writ’s protection.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 746–47 (emphasis added).

<sup>29</sup> *Id.* at 752.

There is at least one noticeable disconnect between the question framed by Justice Kennedy and the historical answer that his opinion offers: while the question asked whether *either* petitioners' status *or* petitioners' physical location would bar their applications for a writ of habeas corpus, his answer suggests that the cases presented offered little guidance because none of those cases involved *both* elements. Kennedy did not explain why separate cases could not be presented to show that neither petitioners' status nor petitioners' physical location have separately been bars to habeas applicants. Kennedy also did not explain why, if separate cases could demonstrate that these elements of status and location did not bar petitioners from seeking habeas review, those cases were not *collectively* sufficient to show that a combination of these factors *also* should not bar habeas review.<sup>30</sup>

### *B. Justice Scalia's Alternative*

Justice Scalia framed the issues somewhat differently than Justice Kennedy, focusing his inquiry around a central question directed at the Petitioners during oral arguments:

Do you have a single case in the 220 years of our country or, for that matter, in the five centuries of the English empire in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England?<sup>31</sup>

Justice Scalia apparently was not satisfied by the Petitioners' response, as his subsequent dissent rejected each of the cases presented by the Petitioners and emphasized that "*all* available historical evidence points to the conclusion that the writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown."<sup>32</sup>

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<sup>30</sup> The combined nature of this inquiry has been informally described as the "red suspenders on Tuesday" problem. As the analogy goes, the court first asks: "Have courts in the United States or Great Britain ever issued a writ of habeas corpus to a detainee wearing red suspenders?" Searching through the case law, the court concludes that a detainee's use of red suspenders has never barred a detainee from applying for habeas review. Next, the court asks: "Have courts in the United States or Great Britain ever issued a writ of habeas corpus to a detainee who filed his application on a Tuesday?" Searching through the law books again, the court concludes that courts have accepted habeas petitions filed on that day of the week. But the court is still not satisfied, because the petition before the court was sought by a detainee who *both* wears red suspenders and applied on a Tuesday. As a result, the court faces a considerable dilemma: "In light of these combined circumstances, do any past cases *really* answer this question?" Though, or perhaps because, this hypothetical inquiry borders on the absurd, it emphasizes a significant logical flaw in Justice Kennedy's historical two-part test—a flaw that equally tarnishes Justice Scalia's alternative.

<sup>31</sup> Transcript of Oral Argument at 10, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195).

<sup>32</sup> *Boumediene*, 553 U.S. at 847 (Scalia, J., dissenting).

From both Justice Scalia's question and his subsequent answer, it is clear that Justice Scalia—like Justice Kennedy—frames the dispute in *Boumediene* in terms of the Petitioners' status and location. Scalia focuses on the Petitioners' status as *aliens* (rather than *enemy combatants*) and their location *outside the sovereign territory* of the United States (rather than *within the total military and civil control* of the U.S. government).<sup>33</sup>

### C. Two Tests, No Answers

Because they focus on different aspects of status and location, Justices Kennedy and Scalia presumably examined the historical case law presented by the parties with different questions in mind. These questions can be summarized in the following matrix.

	Justice Kennedy	Justice Scalia
Status	Was the prisoner an “enemy combatant”?	Was the prisoner an “alien”?
Location	Was the territory within the “total military and civil control” of the U.S. government?	Was the territory outside of U.S. “sovereign territory”?

Reviewing all of the case law presented in voluminous filings to the Court, neither Justice could identify a case decided by a “common-law court” that met both elements of their criteria.<sup>34</sup>

Kennedy found that the absence of historical cases with “close parallels” to the situation of detainees at Guantanamo Bay to be inconclusive.<sup>35</sup> Scalia, by contrast, argued that the absence of a close parallel was a sufficient basis for the Court to conclude that the writ would not have been available to similarly situated prisoners.<sup>36</sup>

### D. Beyond *Boumediene*

Justice Scalia appeared confident that his investigation in *Boumediene* covered “all available historical evidence,”<sup>37</sup> but Justice Kennedy was less certain, explaining that “[r]ecent scholarship points to the inherent shortcomings in the historical record” and referencing findings by Professors Halliday and White indicating that “most reports of 18th-century habeas proceedings were not printed.”<sup>38</sup> Kennedy also

<sup>33</sup> See generally *id.* at 826–50 (Scalia, J., dissenting).

<sup>34</sup> Compare *id.* at 752 (majority opinion), with *id.* at 847–48 (Scalia, J., dissenting).

<sup>35</sup> *Id.* at 752 (majority opinion).

<sup>36</sup> See *id.* at 841, 847–48 (Scalia, J., dissenting).

<sup>37</sup> *Id.* at 847.

<sup>38</sup> *Id.* at 752 (majority opinion).

doubted that “the common law, if properly understood, yields a definite answer to the questions before us,” but did not elaborate on why.<sup>39</sup>

Since the Court decided *Boumediene*, legal scholars have continued to probe these questions. Professor Kent, for example, has argued that a number of “non-canonical” Insular Cases decided by the Supreme Court were ignored by the Court in *Boumediene*.<sup>40</sup> Kent asserts that these cases demonstrate “earlier understandings [that] the Constitution and laws of the United States did not provide protections to, or create obligations for, most noncitizens, including any who remained outside the sovereignty of the United States.”<sup>41</sup> Thus, Kent concludes that the full historical record confirms that Guantanamo Bay should not be considered sovereign territory and would be beyond the reach of the writ of habeas corpus under long forgotten precedent.<sup>42</sup>

Professor Kent’s research is appealing, but it only touches the visible tip of a much larger iceberg. Investigating beneath the surface reveals a more complicated dynamic in those territories—and a much different debate about those territories back at home.

## II. THE “UNIQUE” STATUS OF THE U.S. NAVAL STATION AT GUANTANAMO BAY

When the Supreme Court investigates the meaning of the Suspension Clause, the first question that the Court naturally turns to is what the constitutional text meant to the Framers. Like Professor Kent’s research, this Article begins in a different place with the Insular Cases. Admittedly, it may seem strange to look at legal practices in territories acquired in the early twentieth century to determine the scope of a common law writ enshrined in the Constitution more than a century earlier. Indeed, other scholars have primarily looked to the British habeas practice in the seventeenth and eighteenth centuries to understand the scope of the writ as understood by the Founders, whose understandings were derived from that earlier practice.<sup>43</sup> While that British history is a crucial baseline, such analysis often presumes that the concept of habeas as understood by English readers before independence was the same as the concept of habeas as understood by the American colonists. There are good reasons to question that assumption.<sup>44</sup>

Relying on U.S. courts to answer these questions, of course, poses historical challenges. While the British Empire controlled dozens of overseas possessions at the time of American independence, the United States effectively controlled none.

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<sup>39</sup> *Id.*

<sup>40</sup> Kent, *supra* note 19, at 112.

<sup>41</sup> *Id.* Kent explains that the Court may have missed these precedents, in part, because “[t]he military and political events of 1898 and thereafter were varied and complicated and, more than 100 years later, the historical details are not fresh in many lawyers’ minds.” *Id.* at 113.

<sup>42</sup> *Id.* at 103.

<sup>43</sup> See generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

<sup>44</sup> See *infra* Part V.

Indeed, the United States would not acquire overseas outposts like the U.S. Naval Station at Guantanamo Bay until more than a century later, rendering early American case law a poor guide for questions about the “extraterritorial” application of the Great Writ.<sup>45</sup>

The Spanish-American War changed everything. Suddenly, the United States held an abundance of overseas possessions, and the U.S. government then continued to take on dependencies for the next half a century.<sup>46</sup> Suddenly U.S. courts (and political leaders) were forced to consider questions about the Constitution’s reach that had not arisen earlier.<sup>47</sup>

While the legal framework underlying some of those territories was undoubtedly “unique” compared to earlier territorial acquisitions, the Government acquiring these new possessions was not acting in a vacuum. Instead, the legal framework underlying the U.S. assumption of control over Guantanamo Bay was not so different from similar arrangements through which the United States acquired control of the Panama Canal Zone and other possessions in the same period. Understanding these parallels is a critical first step when evaluating the notion that no precedent could be found answering the Supreme Court’s questions in *Boumediene v. Bush*.

#### *A. The U.S. Naval Station at Guantanamo Bay*

The basic history of the U.S. Naval Station at Guantanamo Bay is a pretty short story. U.S. Marines first occupied and established a base at Guantanamo Bay during the Spanish-American War in 1898,<sup>48</sup> an act that followed a Joint Resolution of Congress demanding that Spain relinquish its control over the island of Cuba.<sup>49</sup> Specifically, forces were deployed to the area to capture the city and province of Santiago—a significant strategic target.<sup>50</sup> It is doubtful that many expected that the make-shift

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<sup>45</sup> The author admits this description overlooks considerable debates about the reach of the Constitution to western territories acquired contiguous to the borders of United States beginning with the Louisiana Purchase, which were closely studied by the executive branch when considering the constitutional questions arising from the acquisition of overseas territories. See generally CHARLES E. MAGOON, U.S. DEP’T OF WAR, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 121–71 (1902) (summarizing the extent to which prior administrations had asserted that the Constitution applied *ex proprio vigore* to newly acquired territories between the Louisiana Purchase in 1803 and the purchase of Alaska in 1867).

<sup>46</sup> See Kent, *supra* note 19, at 118.

<sup>47</sup> See C. M. A. McCauliff, *The Reach of the Constitution: American Peace-Time Court in West Berlin*, 55 NOTRE DAME LAW. 682, 683 (1980).

<sup>48</sup> Robert D. Powers, Jr., *Caribbean Leased Bases Jurisdiction*, 15 JAG J. 161, 161 (1961).

<sup>49</sup> Act of Apr. 20, 1898, ch. 24, 30 Stat. 738. The Joint Resolution also directed and empowered the President to use all military forces “necessary to carry these resolutions into effect.” 30 Stat. at 739. Five days later, Congress officially issued a Declaration of War against Spain. Act of Apr. 25, 1898, ch. 189, 30 Stat. 364.

<sup>50</sup> Powers, *supra* note 48, at 161.

encampment would be a lasting fixture. To the contrary, the U.S. Senate had specifically disclaimed any intention to acquire territory in Cuba, pledging that all American forces would leave Cuba once stability returned to the island.<sup>51</sup>

Less than four months after hostilities began, Spain tentatively agreed to cede control (but not formal sovereignty) over Cuba to the United States.<sup>52</sup> A permanent agreement was reached with the Treaty of Paris signed on December 10, 1898.<sup>53</sup> Even in peace, U.S. forces remained stationed at Guantanamo Bay “as a guarantee of the independence of the new nation.”<sup>54</sup> This continued even after the United States formally transferred full sovereignty over the island to the new Cuban government.<sup>55</sup> While Congress had disclaimed any intention to obtain territory before the war with Spain, negotiations over the final transfer of sovereignty coincided with negotiations to secure several potential locations on the island for U.S. naval facilities.<sup>56</sup>

Far from hidden from the public eye, proposals for naval stations on Cuban soil were openly discussed—and a source of considerable controversy. Discussions began with plans for four naval stations, including a coaling station at Havana.<sup>57</sup> The plans were subsequently scaled back when the U.S. government encountered “a growing disinclination on the part of the Cubans to the idea of surrendering coaling stations to the United States,” which led the United States to abandon plans for a

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<sup>51</sup> The Teller Amendment specifically provided that the United States “hereby disclaims any disposition of intention to exercise sovereignty, jurisdiction, or control over said island except for pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people.” 31 CONG. REC. 4040 (1898).

<sup>52</sup> Act of Aug. 12, 1898, 30 Stat. 1742.

<sup>53</sup> Treaty of Peace, U.S.-Spain, Dec. 10, 1898, in 2 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, at 1690–95 (1910) [hereinafter Treaty of Paris 1898].

<sup>54</sup> Powers, *supra* note 48, at 161.

<sup>55</sup> Professor Kent suggests that the United States had fully withdrawn from Guantanamo Bay between the transfer of sovereignty to the Cuban government in May 1902 and the formal transfer of control over the base to the United States in December 1903. Kent, *supra* note 19, at 152–54. Kent relies on a government report suggesting that no steps had been taken towards constructing a naval coaling station on the island, a news article implying that there was no naval station in existence at Guantanamo, and the purported absence of congressional appropriations for building or maintaining facilities at Guantanamo Bay. *Id.* at 153 n.222. None of these sources provide direct evidence that all U.S. forces had left the existing facilities at Guantanamo, and there is reason to believe that the U.S. military retained some presence at Guantanamo Bay between May 1902 and December 1903. *See, e.g., The Naval Manoeuvres*, N.Y. TIMES, June 7, 1902 (summarizing Navy Department orders for gathering all available vessels for naval exercises about January 1, 1903 at Culebra, Puerto Rico, or Guantanamo, Cuba). Nevertheless, it is not clear that this fact has any bearing on the questions asked in *Boumediene v. Bush*.

<sup>56</sup> *See Cuban Reciprocity*, LEWISTON DAILY SUN (Western Maine), Oct. 29, 1902, at 7.

<sup>57</sup> *See id.*

Havana station out of “regard for Cuban sensibility.”<sup>58</sup> But U.S. authorities continued to seek naval stations on the island, and by February 1903 a compromise was reached for the lease of two stations on the island, including one at Guantanamo Bay.<sup>59</sup>

Balancing the sensibilities of the new Cuban government with the interests of the United States, the February agreement contained the following language on the issue of sovereignty:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . . .<sup>60</sup>

This provision recognized the “continuance” of the Republic of Cuba’s “ultimate sovereignty” over Guantanamo Bay, and has caused some to speculate that the treaty was intended as a temporary grant of sovereignty to the United States for the duration of the lease.<sup>61</sup> But other treaty provisions do not support this conclusion, including language granting U.S. authorities the power “to do any and all things necessary to fit the premises for use as coaling or naval stations *only*, and for no other purpose.”<sup>62</sup> Such limitations on use are generally inconsistent with formal notions of territorial sovereignty. Later treaties set out financial and practical arrangements for the leased

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<sup>58</sup> *Id.* Indeed, the very notion of a coaling station at Havana became the source of a very public spat between Cuban leaders and President Roosevelt. During treaty negotiations, Cuba’s Minister to the United States—Don Gonzalo de Quesada—emphasized to members of the U.S. press corps that he had previously secured from President McKinley “a solemn promise that while he was Chief Executive he would not give his consent to the establishment of a naval station at Havana.” *Scope of the Cuban Treaty*, N.Y. TIMES, Nov. 1, 1902. Much to the Minister’s dismay, McKinley was assassinated four days later, leaving the Minister insisting that Roosevelt knew about the promise and was obligated to honor it because Cuba’s new President “never would have gone to Havana” and agreed to serve as President “while a foreign flag was flying over the city.” *Id.*

<sup>59</sup> *Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, U.S.-Cuba, Feb. 23, 1903, in 1 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, at 358, 358–59 (1910) [hereinafter *Treaty of February 1903*].

<sup>60</sup> *Id.* at 359 (art. III).

<sup>61</sup> See, e.g., Joseph Lazar, Comment, “Cessation in Lease” of the Guantanamo Bay Naval Station and Cuba’s “Ultimate Sovereignty”, 63 AM. J. INT’L L. 116, 117–18 (1969) (arguing that the treaties intended to suspend Cuba’s sovereignty over the territory covered in the lease until the end of the U.S. occupation).

<sup>62</sup> *Treaty of February 1903*, *supra* note 59, at 359 (emphasis added) (art. II).

territory,<sup>63</sup> and confirmed the continuing vitality of the lease until such time as the base was abandoned or the terms of the lease were renegotiated by the consent of both parties.<sup>64</sup> Those treaties did nothing to clarify the basic ambiguity regarding the provisions on sovereignty.

In *Boumediene v. Bush*, the government relied on those provisions to suggest that the writ of habeas corpus did not run to Guantanamo Bay because the United States had “disclaimed sovereignty” over the territory.<sup>65</sup> Justice Kennedy rejected this interpretation,<sup>66</sup> largely because he eschewed *any* formal “sovereignty-based test” for the reach of the writ.<sup>67</sup> Kennedy, however, accepted the notion that the U.S. Naval Station at Guantanamo Bay had a “unique status” that could hinder the search for “close parallels to this one.”<sup>68</sup> But a closer examination of other territories acquired at the height of U.S. imperialism reveals that the ambiguous sovereignty provisions in the February 1903 agreement were more common than generally acknowledged; a particularly salient example can be found in the Panama Canal Zone.

### B. The Panama Canal Zone

For many reasons, the Panama Canal Zone (Canal Zone) may be the best historical parallel to the U.S. Naval Station at Guantanamo Bay. These similarities stem from the shared history of both possessions after the U.S. victory in the Spanish-American War. In addition to both liberating Cuba and paving the way for the establishment of a naval and coaling station at Guantanamo Bay, the war left the United States as a recognized world power with new island territories off both of its coasts.<sup>69</sup> These new territories reinvigorated a long-standing U.S. interest in building a canal that linked the Atlantic to the Pacific,<sup>70</sup> because U.S. policymakers suddenly faced

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<sup>63</sup> *Lease to the United States by Cuba of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda*, U.S.-Cuba, July 2, 1903, in 1 WILLIAM M MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, at 360–62 (1910) [hereinafter Treaty of July 1903].

<sup>64</sup> Treaty Abrogating the Treaty of Relations of 1903, Cuba-U.S., May 29, 1934, 28 AM. J. INT’L L. SUPP. 97 (1934).

<sup>65</sup> 553 U.S. 723, 765 (2008).

<sup>66</sup> *Id.* (“The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this.”).

<sup>67</sup> *See id.* at 764–66.

<sup>68</sup> *Id.* at 752.

<sup>69</sup> *See* WAYNE D. BRAY, THE COMMON LAW ZONE IN PANAMA 3 n.1 (1977).

<sup>70</sup> U.S. interests in establishing a canal in Central America date back to at least 1825, when the Central American and United States Atlantic and Pacific Canal Company was

higher stakes when it came to moving naval assets quickly between oceans to protect far-flung foreign possessions.<sup>71</sup>

U.S. diplomats soon found themselves negotiating an ill-fated treaty with Colombia to obtain control over a strip of land across the Isthmus of Panama (then a Colombian province) that would enable the U.S. government to complete a canal already started by French business interests.<sup>72</sup> When the Colombian Senate failed to ratify that treaty, the U.S. government officially took up the cause of revolutionaries in Panama who had long sought independence from Bogota,<sup>73</sup> just as the United States had intervened to secure Cuban independence from Madrid. The presence of U.S. forces made a decisive difference, and quickly established Panama's de facto independence.<sup>74</sup> Panama declared its independence on November 6, 1903, and signed a treaty twelve days later that granted the United States certain rights over the Canal Zone.<sup>75</sup>

This timeline is important, because all of these events occurred in 1903. By virtue of this timing, the final agreements that established U.S. control over both the U.S. Naval Station at Guantanamo Bay and the Canal Zone were negotiated by U.S. Secretary of State John Hay.<sup>76</sup> Unsurprisingly, both treaties featured similar provisions on jurisdiction and sovereignty.<sup>77</sup> These provisions, negotiated by the same diplomatic corps during an overlapping period of months in 1903, form a solid foundation for any comparison between the legal status applicable to the Canal Zone and the U.S. Naval Station at Guantanamo Bay. Indeed, the U.S. Supreme Court explicitly described these arrangements as "similar" in *Vermilya-Brown Co. v. Connell*.<sup>78</sup>

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organized by directors including De Witt Clinton, a driving force behind New York's Erie Canal. *See id.* at 20–21. Bray provides a fascinating history of some of these obscure and ill-fated American efforts. *Id.* at 20–29.

<sup>71</sup> *See id.* at 3 n.1 ("Though not a direct result, it was more than coincidental that the Canal Zone was acquired so soon after the sudden annexation of new territories, separated by a narrow land barrier, in the Caribbean and in the Pacific . . .").

<sup>72</sup> *See id.* at 25–29 (providing a history of French work on the canal).

<sup>73</sup> *See id.* at 34–35 (describing the U.S. government's support of the revolution in Panama).

<sup>74</sup> *Id.*

<sup>75</sup> Morey L. Sear, *Historical Review of Treaty Relationships in the Canal Zone as to the Maritime Legal and Court System*, 57 TUL. L. REV. 1368, 1368 (1983); *see also* Hay-Bunau-Varilla Treaty, U.S.-Pan., Nov. 18, 1903, 33 Stat. 2234 [hereinafter Hay-Bunau-Varilla Treaty].

<sup>76</sup> *See* BRAY, *supra* note 69, at 36–37 (describing Secretary Hay's role in negotiating the Hay-Bunau-Varilla Treaty); *Scope of the Cuban Treaty*, *supra* note 58 (noting the exchange of treaty drafts between Secretary Hay and the Cuban government).

<sup>77</sup> *See* Powers, *supra* note 48, at 161 ("Leased bases in the country of other sovereigns is a significant development of the 20th Century. . . . The bases at Guantanamo Bay in Cuba and the Canal Zone in Panama are unique in their grants of jurisdiction and their indefinite terms of occupancy.").

<sup>78</sup> 335 U.S. 377, 383–84 (1948) ("This country did have a lease from the Republic of Cuba of an area at Guantanamo Bay for a coaling or naval station 'for the time required for the purposes of coaling and naval stations.' . . . The time limits of the grant were redefined on June 9, 1934, as extending until agreement for abrogation or unilateral abandonment by

### 1. Specific Treaty Provisions

In relevant part, the treaty that conveyed control over the Canal Zone to the U.S. government provided that “[t]he Republic of Panama grants to the United States all the rights, power and authority within the [canal] zone . . . which the United States would possess and exercise *if it were sovereign of the territory* . . . .”<sup>79</sup> In this text, “if it were sovereign” implies that Panama’s grant of authority stopped short of full, formal sovereignty. The treaty also limited the activities for which the Canal Zone could be used,<sup>80</sup> provided the U.S. government with exclusive control and jurisdiction over the Canal Zone,<sup>81</sup> and neglected to set a fixed period after which the United States would presumably surrender control.<sup>82</sup> These aspects parallel the treaty framework established for the U.S. Naval Station at Guantanamo Bay.

While observers may note some differences in the way that the Canal Zone and the U.S. Naval Station at Guantanamo Bay were administered, these differences reflected their divergent uses and were not grounded in inherent characteristics of the territories or differing provisions regarding sovereignty and control.<sup>83</sup> Indeed, while the casual reader may think of today’s bustling Canal Zone as vastly different from the barren isolation of Guantanamo Bay, they were not always so different. Instead, when the Canal Zone was first acquired, it was an extremely inhospitable territory that only the government, railroad, and canal employees operating under official license inhabited.<sup>84</sup> Like Guantanamo Bay, the Canal Zone was also governed by

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the United States. A similar arrangement existed in regard to the Panama Canal Zone.” (footnote omitted)).

<sup>79</sup> Hay-Bunau-Varilla Treaty, *supra* note 75, at 2235 (emphasis added).

<sup>80</sup> *See id.* at 2234–35 (granting the territory “for the construction, maintenance, operation, sanitation and protection of” the canal).

<sup>81</sup> *Id.* at 2235.

<sup>82</sup> *Id.* at 2234–35 (granting the United States rights “in perpetuity”).

<sup>83</sup> *See Powers, supra* note 48, at 163 (“This difference in administration has resulted from the use of the leased territory, and not from the provisions of the treaties creating them.” (emphasis omitted)).

<sup>84</sup> *See Panama R.R. Co. v. Bosse*, 249 U.S. 41, 44 (1919) (“[T]he Canal Zone at the present time is peopled only by the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license.”). Guantanamo Bay was similarly only populated by authorized employees; the operating agreement signed with Cuba on July 2, 1903, specifically provided that native inhabitants would be removed from the territory and compensated. Treaty of July 1903, *supra* note 63, at 360 (specifying the process through which all private land would be bought by the Republic of Cuba and transferred to the United States, which “agrees that no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise within said areas.”). As construction wrapped up on the canal, serious consideration was given to depopulating the Canal Zone to reduce administrative costs, and the President was given the authority to do so by Congress. *See, e.g.,* GEORGE W. GOETHALS, GOVERNMENT OF THE CANAL ZONE 92 (1915) (noting that the Panama Canal Act expressly authorized the President to depopulate the Canal Zone).

officials appointed by the U.S. military throughout the entire period in which it was administered as a U.S. territory.<sup>85</sup>

Ultimately, a U.S. District Court for the Canal Zone was established within the Canal Zone and the Fifth Circuit Court of Appeals was authorized to hear appeals arising out of that court.<sup>86</sup> Some may argue that this renders the Canal Zone a poor parallel to Guantanamo Bay, but the Canal Zone treaty was deliberately silent about the establishment of courts,<sup>87</sup> and the later establishment of courts was not inherent to the Canal Zone's underlying status as a territory.

## 2. Judicial Interpretations: Disclaiming Sovereignty?

Despite the absence of formal sovereignty over the Canal Zone, the establishment of courts in the territory provides a long history of jurisprudence, which suggests that U.S. authorities did not view the ambiguous provisions on sovereignty as barring the full exercise of sovereign powers in the Canal Zone. As early as 1907, for example, the U.S. Supreme Court rejected arguments by petitioners that “the Canal Zone is no part of the territory of the United States.”<sup>88</sup> By 1919, the U.S. Supreme Court further suggested that there had been a “change in sovereignty” over the Canal Zone for the purposes of applying principles of the common law.<sup>89</sup>

The Supreme Court returned to the issue in 1930, led by President-cum-Chief Justice William Howard Taft.<sup>90</sup> Prior to his election as President, Taft served as Secretary of War from January 1904 to June 1908—the first years that U.S. military

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<sup>85</sup> While not often construed as a military installation, the Canal Zone was initially governed by the Isthmian Canal Commission (I.C.C.), which has been described as “the fount and embodiment of all authority in the Canal Zone, answerable only to the President through the Secretary of War.” BRAY, *supra* note 69, at 53. The first chair of the I.C.C. was Admiral John Grimes Walker and the first governor of the Canal Zone was Major-General George W. Davis. *Id.* at 53–54. As Professor Kent summarizes the situation, “The President governed the Canal Zone as a military reservation under the direction of the Secretary of War and, beneath him, the Isthmian Canal Commission.” Andrew Kent, *Habeas Corpus, Protection, and Extraterritorial Constitutional Rights: A Reply to Stephen Vladeck’s “Insular Thinking About Habeas”*, 97 IOWA L. REV. BULL. 34, 39 (2012).

<sup>86</sup> Panama Canal Act, Pub. L. No. 62–337, §§ 8–9, 37 Stat. 560, 565–66 (1912).

<sup>87</sup> BRAY, *supra* note 69, at 41. This absence is particularly notable given that provisions for the establishment of U.S. courts in the Canal Zone were included in the prior treaty that was rejected by the Colombian Senate. *Id.* at 30–31. Colombian lawyers had specifically objected to that treaty’s grant of perpetual control over the zone—which they saw as akin to alienation—and to the establishment of separate U.S. courts in the territory, construing both as infringements of Colombian sovereignty. *Id.* Given those reactions, it is not entirely surprising that the treaty with the newly independent Republic of Panama side-stepped the issue of courts altogether.

<sup>88</sup> *Wilson v. Shaw*, 204 U.S. 24, 32–33 (1907).

<sup>89</sup> *Panama R.R. Co.*, 249 U.S. at 44.

<sup>90</sup> *See Luckenbach S.S. Co. v. United States*, 280 U.S. 173, 177–78 (1930).

forces exercised control over the Canal Zone and the U.S. Naval Station at Guantanamo Bay under their respective leases. Taft was presumably privy to the highest level executive discussions of treaty and sovereignty issues at the time. More than two decades later, Taft emphasized that “[w]hether the grant in the treaty [for the Canal Zone] amounts to a complete cession of territory and dominion to the United States, or is so limited that it leaves at least titular sovereignty in the Republic of Panama, is a question which has been the subject of diverging opinions.”<sup>91</sup> Far from disclaiming sovereignty, Taft’s opinion suggests that the U.S. government interpreted the treaty for the Canal Zone as a full surrender of Panamanian sovereignty over the territory.<sup>92</sup> To the extent that the Supreme Court evaluates the effect of early twentieth century provisions on sovereignty, these original understandings of the text are incredibly important.

Moreover, regardless of whether the United States actually *held* sovereignty over the Canal Zone, the Supreme Court has since taken the position that “the United States *exercised* sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone” before the territory was returned to the Republic of Panama.<sup>93</sup> This was at least the conclusion reached by Justice Scalia on behalf of a unanimous Court in *O’Connor v. United States*, a tax dispute that turned on whether the 1977 treaty providing for the Canal Zone’s transfer back to Panama exempted employees of the Panama Canal Commission from U.S. taxes.<sup>94</sup>

A close reading of *O’Connor* raises good questions about whether Justice Scalia intended any distinction between *holding* and *exercising* sovereignty. After all, shortly after Justice Scalia described the United States as “exercising” sovereignty over the Canal Zone between 1904 and 1979, he suggested that the 1977 treaty “transferred to Panama sovereignty over the Canal and Zone.”<sup>95</sup> The reader might ask exactly who held sovereignty *before* that transfer (presumably the United States), or how the United States could transfer sovereignty that it did not previously hold.

Setting aside these ambiguities, Justice Scalia’s recognition that the United States *either* exercised or held sovereignty over the Canal Zone in *O’Connor* is surprising, since he concluded in *Boumediene v. Bush* that the U.S. government neither held nor exercised sovereignty over the U.S. Naval Station at Guantanamo Bay, a territory established with a nearly identical legal framework negotiated by the same diplomatic corps.<sup>96</sup> This discrepancy calls into question whether Justice Scalia’s bright-line rule

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<sup>91</sup> *Id.* at 177.

<sup>92</sup> Indeed, the article Taft cited to support his statement indicates that “the United States contends it acquired general and unrestricted sovereignty over the Canal Zone.” L. H. Woolsey, Editorial Comment, *The Sovereignty of the Panama Canal Zone*, 20 AM. J. INT’L L. 117, 118 (1926).

<sup>93</sup> *O’Connor v. United States*, 479 U.S. 27, 28 (1986) (emphasis added).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See generally* 553 U.S. 723, 826–50 (2008) (Scalia, J., dissenting).

regarding the effect of holding (or exercising) sovereignty is really a bright-line rule at all, or whether it is subjective and based on loose characterizations that vary depending on the issue raised and mask the complexity of sovereignty in practice.

*C. Other Territories Appertaining to the United States*

The Canal Zone presents the best parallel to Guantanamo Bay, but it is not alone. American Samoa, for example, remains under the complete control of the United States but outside of its formal sovereignty.<sup>97</sup> Like Guantanamo Bay, the United States first assumed full control of American Samoa at the turn of the twentieth century with the stated purpose of maintaining a U.S. naval and coaling station in the territory.<sup>98</sup> The United States has also similarly governed this territory for more than a century without establishing a federal district court or other clear rights of appeal to Article III courts for actions arising in the territory.<sup>99</sup>

Other historical examples are evident. Of note, the island of Cuba was governed by a U.S. military government between 1899 and 1902.<sup>100</sup> The United States formally took control of the island by treaty with Spain, but the treaty did not grant the United States sovereignty over the island; instead the treaty formally reserved sovereignty for the Cuban people.<sup>101</sup> Nevertheless, as with the Canal Zone,<sup>102</sup> the sovereignty of the United States over Cuba as a territory was a matter of debate at the time. As the United States argued in *Neely v. Henkel*,<sup>103</sup> the U.S. President held “‘all executive, legislative, and judicial power over the affairs of the island of Cuba . . . ,’ and is thus the sovereign power in Cuba.”<sup>104</sup> Arguing that “the extent of sovereignty is not coterminous with acknowledged territorial boundaries,”<sup>105</sup> the U.S. government

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<sup>97</sup> See Uilisona Falemanu Tua, *A Native’s Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL’Y J. 246, 261–63 (2009) (detailing the treaty arrangements through which the United States took on a “trust responsibility” over American Samoa).

<sup>98</sup> *Id.* at 270.

<sup>99</sup> Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL’Y. J. 325, 325 (2008).

<sup>100</sup> Kent, *supra* note 19, at 147–48.

<sup>101</sup> Article I of the Treaty of Paris notes only that “Spain relinquishes all claim of sovereignty over the title to Cuba,” before obligating the United States to protect life and property on the island “so long as [its] occupation shall last.” Treaty of Paris, U.S.-Spain, Dec. 10, 1898, in 1 OFFICE OF PUERTO RICO, DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 47, 47 (1948). Article II, by contrast, specifically *cedes* to the United States other territories, including Puerto Rico and Guam. *Id.*

<sup>102</sup> See *supra* Part II.B.

<sup>103</sup> 180 U.S. 109 (1901).

<sup>104</sup> Brief for the United States at 50, *Neely v. Henkel*, 180 U.S. 109 (1901) (Nos. 387 and 406).

<sup>105</sup> *Id.* at 74.

further asserted that the United States had “acquired sovereignty in Cuba by its military occupation.”<sup>106</sup>

As in Cuba after the Spanish-American War, the United States exercised full control over the Ryukyu Islands for more than a decade after a peace treaty was signed with Japan in 1945, despite recognition that Japan had “residual sovereignty” over the islands.<sup>107</sup> Similarly, U.S. military authorities technically had full control over the American zone in West Berlin for decades after World War II ended, even though the United States rarely exercised its powers.<sup>108</sup>

This Article focuses on the Canal Zone as a matter of convenience; however, it is important to remember that although territories under full U.S. control but not U.S. sovereignty may not be *common*, such territories are not necessarily *uncommon* either.

### III. HABEAS CORPUS IN TERRITORIES APPERTAINING TO THE UNITED STATES

Identifying territories that shared a similar legal status as Guantanamo Bay is particularly important to answering the historical questions posed by the Court in *Boumediene* because of Guantanamo Bay’s limited experience with foreign prisoners.<sup>109</sup> Unlike other territories, the U.S. naval station was specifically cleared of all non-military inhabitants early on,<sup>110</sup> which explains why courts were not established in the territory. Where the only inhabitants were U.S. military personnel, the military justice system had sufficient jurisdiction over the entire population.

Other unincorporated territories, however, were inhabited by non-citizens who regularly appeared before courts established by both the President of the United States and Congress. As described in Part II, the United States arguably did not hold formal sovereignty over some of those territories. Sovereignty over other territories had been formally ceded to the United States, whether or not the United States intended to formally incorporate those territories into the United States. The existence of these territories raises a significant question: after more than a century of imperial U.S. governance over unincorporated overseas territories, how is it possible

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<sup>106</sup> *Id.* at 80. The Government claimed that such territories, though not incorporated into the United States by treaty or legislation, should be considered “land ‘appertaining to the United States.’” *Id.* at 77–78 (quoting *Jones v. United States*, 137 U.S. 202 (1890)).

<sup>107</sup> Myron L. Birnbaum & Charles W. Fowler, O’Callahan v. Parker: *The Relford Decision and Further Developments in Military Justice*, 39 *FORDHAM L. REV.* 729, 734 n.33 (1971); B. J. George, Jr., *The United States in the Ryukyus: The Insular Cases Revived*, 39 *N.Y.U. L. REV.* 785, 795 (1964).

<sup>108</sup> See *United States v. Tiede*, 86 F.R.D. 227, 235–38 (1979) (explaining how the American Sector Commandant was authorized to withdraw jurisdiction from German courts on a case-by-case basis).

<sup>109</sup> The first foreign detainees held at Guantanamo Bay arrived in the 1990s as refugees fleeing Haiti, and litigation related to migrants held at the base since then has been limited. *But see Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1049 (E.D.N.Y. 1993).

<sup>110</sup> Treaty of July 1903, *supra* note 63, at 360.

that there is no case law regarding the reach of the writ of habeas to noncitizens held in unincorporated U.S. territories overseas?

This absence is particularly stunning when considering a vast array of evidence that indicates that the writ of habeas corpus was made available in most, if not all, overseas territories governed by the United States, even in territories like Cuba that were not expected to remain indefinitely under full U.S. control. That hidden history is described below.

#### *A. Habeas Corpus in the Canal Zone*

The authority of territorial courts in the Canal Zone to issue writs of habeas corpus was first recognized on August 16, 1904, through Isthmian Canal Commission (I.C.C.) Act No. 1, which set forward the initial structure for the new territory's courts.<sup>111</sup> Section 9 of that Act granted the Supreme Court of the Canal Zone "original jurisdiction to issue writs of Mandamus, Certiorari, Prohibition, Habeas Corpus, Quo Warranto, in cases warranted by the principles and usages of law."<sup>112</sup> Section 24 also granted circuit courts the "power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto, and habeas corpus in their respective circuits and districts in the manner provided by law."<sup>113</sup> Scholars can debate whether these provisions amounted to a statutory *extension* of these writs to the Canal Zone or merely a recognition that the common law writs already ran to the territory by virtue of its administration by U.S. government officials.<sup>114</sup>

Notably, however, the Act did not on its face purport to extend the scope of any of the writs. Instead, the Act merely authorized the Supreme Court of the Canal Zone to issue the writs as "warranted by the principles and usages of law," a phrase that—at least in England—would have been construed as adopting the common law as a whole.<sup>115</sup> Less than a month later, on September 4, 1904, the President enacted I.C.C. Act No. 15, "An Act to establish a Code of Criminal Procedure for the Canal Zone,

<sup>111</sup> BRAY, *supra* note 69, at 76.

<sup>112</sup> ISTHMIAN CANAL COMM'N, LAWS OF THE CANAL ZONE, ISTHMUS OF PANAMA 4 (1906).

<sup>113</sup> *Id.* at 8.

<sup>114</sup> The same question can be raised regarding the legal significance of Section 14 of the Judiciary Act of 1789, which authorized federal courts to issue writs of habeas corpus following the ratification of the U.S. Constitution. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), for example, Justice Marshall relied solely on Section 14 of the Judiciary Act of 1789 to support the Court's ability to issue the writ, but this argument "did not suggest that the writ was *only* conferred by statute." Halliday & White, *supra* note 43, at 696–97 (emphasis added). In other words, the existence of a statutory basis for the writ does not on its own exclude the possibility of a separate common law basis for the writ.

<sup>115</sup> In 1684, for example, the Privy Council rejected the Charter of Liberties of New York, which stated merely "[t]hat the Inhabitants of New York shall be governed by and according to the Laws of England," precisely because "[t]his Privilege is not granted . . . where the Act of habeas corpus and all such other Bills do not take Place." A. H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 21 (1902); see also WILLIAM S. CHURCH, *A TREATISE ON THE WRIT OF HABEAS CORPUS* 33–40 (1893).

Isthmus of Panama,” which contained a lengthy Title XII that listed the specific habeas protections available to “[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever.”<sup>116</sup>

### 1. The Writ as Issued to Noncitizens in the Canal Zone

The first petitions for habeas corpus in the Canal Zone soon followed. On October 14, 1904, less than a year after U.S. authorities first took possession of the Canal Zone and just months after habeas was recognized by I.C.C. Act No. 1, a Chinese national named Oli Nifou was arrested for selling lottery tickets in violation of an executive order entered by the President.<sup>117</sup> Mr. Nifou’s attorney promptly filed what may have been the territory’s first petition for a writ of habeas corpus. Three days later the Circuit Court of the Third Judicial Circuit of the Canal Zone—opened less than a month earlier—heard the petition, but denied the relief requested.<sup>118</sup> In other early cases, habeas petitioners obtained the relief they sought.<sup>119</sup>

Most of those cases involved relatively straightforward criminal detentions. Some like Mr. Nifou were aliens, and their ability to obtain habeas review is accordingly relevant when considering the historical question posed in *Boumediene* by Justice Scalia. After all, if writs of habeas corpus were granted, and detentions were evaluated by judges under similar procedures to those available within the United States, one would expect few (if any cases) to arise in those territories about the complete denial of the writ. But because the petitioners were not “enemy combatants,” their access to the writ is less relevant to the historical question posed by Justice Kennedy. A better parallel to answer Justice Kennedy’s inquiry subsequently arose with the rendition and detention of a Nicaraguan rebel commander in the Canal Zone.

### 2. The Case of “Enemy Combatant” General Luis Mena

The best parallel with the current military detentions at Guantanamo Bay may have begun with the U.S. intervention in Nicaragua in 1909 to end a purported “Reign of Terror” by Nicaragua’s long-time President Santo Zelaya.<sup>120</sup> The United

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<sup>116</sup> ISTHMIAN CANAL COMM’N, *supra* note 112, at 217–22.

<sup>117</sup> BRAY, *supra* note 69, at 81.

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g.*, Canal Zone v. Murray, 2 Canal Zone Rep. 161 (1911) (granting the writ to a defendant fined by a district court judge for contempt of court and subsequently imprisoned for failure to pay the fine); *In re Walsh*, 2 Canal Zone Rep. 325 (1910) (summarizing circumstances surrounding the release of habeas petitioners after oral arguments in the absence of a filed opinion); *In re Huey*, 1 Canal Zone Rep. 137, 137–44 (1908) (releasing habeas petitioner detained by Canal Zone authorities at the request of the government of Ecuador where the government of Ecuador had not taken preliminary steps to prepare a complaint justifying the prisoner’s continued detention).

<sup>120</sup> Charles C. Conant, *Nicaragua’s Revolution a Matter of Politics*, N.Y. TIMES, Aug. 25, 1912, at SM7. The U.S. government officially intervened in Nicaragua’s civil war following

States ostensibly landed forces in the country to protect foreign persons and property; those troops conveniently shielded rebel forces and gave them an upper hand.<sup>121</sup> By August 1910, a government led by the rebels formally took control over Nicaragua,<sup>122</sup> but political stability remained elusive.

Within two years, there were signs that the political situation had deteriorated to the point of open revolution.<sup>123</sup> The Taft administration reacted to the news by demanding that the Nicaraguan president act to ensure the safety of American lives and property, but Nicaragua's president replied that he could not make such a guarantee given the disproportionate condition of his army as compared with the rebel forces led by General Luis Mena.<sup>124</sup> President Diaz instead asked the United States to send forces to guarantee the security of U.S. civilians, American property, and "all the inhabitants" of his country.<sup>125</sup> President Taft lost no time honoring this request, dispatching more than 2,000 U.S. Marines to Nicaragua.<sup>126</sup>

The arrival of U.S. forces in Nicaragua did not stop Mena's forces from approaching the capital of Managua by mid-August 1912 and threatening to bombard the city.<sup>127</sup> Informed of these threats, American Minister George T. Weitzel protested the rebels' planned bombardment of the city, which contained "many non-combatants and women and children."<sup>128</sup> Weitzel notified Mena that "he and his Generals would be held personally responsible for injury to Americans or their property" in an effort to "compel the combatants to do their fighting outside a neutral zone."<sup>129</sup> But newspapers

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the executions of two U.S. citizens by the Zelaya government, an act seen by U.S. observers as a "distinct violation of the laws of Nicaragua, which forbade the penalty of death except in the case of treason in the face of the enemy on the battlefield." *Id.* But see Dana G. Munro, *Dollar Diplomacy in Nicaragua, 1909–1913*, 38 HISP. AM. HIST. REV. 209, 209–14 (1958) (providing some of the economic and political reasons leading the United States to side with the revolutionists prior to the actual intervention by U.S. forces).

<sup>121</sup> Munro, *supra* note 120, at 215–18.

<sup>122</sup> Frank C. Pandolfe, *The Role of the United States in Nicaragua from 1912–1933*, 9 FLETCHER F. 401, 404 (1985).

<sup>123</sup> See, e.g., *Trouble in Nicaragua? President Diaz Said to be About to Claim Our Protection and Aid*, N.Y. TIMES, July 20, 1912, at 1.

<sup>124</sup> Pandolfe, *supra* note 122, at 406.

<sup>125</sup> Munro, *supra* note 120, at 227.

<sup>126</sup> Pandolfe, *supra* note 122, at 406–07. President Taft subsequently issued an order transferring the U.S. Army's Tenth Infantry to Nicaragua, before rescinding the order several hours later. See *President Recalls Move on Nicaragua*, N.Y. TIMES, Aug. 29, 1912, at 1. Some in the press apparently believed the decision to send only marines was more politically palatable. See, e.g., *The Nicaragua Incident*, N.Y. TIMES, Aug. 30, 1912, at 8 ("If the troops of the regular army had gone there it might have seemed more like 'intervention.'"); see also *College Girls in Serious Peril in Town of Granada*, THE EVENING NEWS, Sept. 21, 1912, at 1 ("The Washington government in sending relief to the beleaguered city Granada, populated by many foreigners, had hoped to avert any pretext for landing European military or naval forces on Central American soil.").

<sup>127</sup> N.Y. TIMES, Aug. 13, 1912, Front Page.

<sup>128</sup> *Id.* The formal title of the ambassador to Nicaragua was "American Minister" at the time.

<sup>129</sup> *Id.*

carried reports of Weitzel's protest the same day as they brought word that "[s]everal women and children were wounded" during the rebel shelling and advance into the city.<sup>130</sup> For more than two weeks, the hostilities continued, with reports flowing back to Washington about on-going atrocities beyond the shelling of Managua.<sup>131</sup>

Mena's actual role directing these atrocities is unclear. The General fell ill during the course of the revolution, and Mena and his son ultimately surrendered to the U.S. Navy weeks before rebel forces were fully defeated.<sup>132</sup> Nonetheless, Mena was the leader of rebel forces that had committed atrocities against women and children depicted as outside the "pale of civilization."<sup>133</sup> As such, the Taft administration began searching for ways to ensure that Mena could not return to cause trouble in Nicaragua,<sup>134</sup> eventually transporting Mena and his son to an army hospital in the Canal Zone.<sup>135</sup> Reports vary on whether Mena officially asked to be taken to the Canal Zone for his own protection or whether Mena was transported to the Canal Zone against his will. Regardless, once brought to the Canal Zone, the record is clear that Mena was placed under surveillance and held against his will.<sup>136</sup>

With General Mena and his son under armed guard in Panama, public attention turned to how the U.S. government could prevent him from further destabilizing Nicaragua in the future.<sup>137</sup> Two U.S. interventions in as many years had impressed on the American public the severe fragility of the situation in Nicaragua. But the U.S. government was divided on how to contain the threat. Ambassador Weitzel, having previously given an ultimatum regarding the shelling of innocent civilians, advocated treating the leaders of the revolution as war criminals, complete with trials and public executions.<sup>138</sup>

But no charges were forthcoming against General Mena—leading two American attorneys to file applications for writs of habeas corpus with the Supreme Court of

<sup>130</sup> *Rebels Shell Managua: Bombarded Nicaraguan Capital All Sunday—Women Wounded*, N.Y. TIMES, Aug. 13, 1912, at 1.

<sup>131</sup> See, e.g., *President Recalls Move on Nicaragua*, *supra* note 126 ("The people of Nicaragua, the President has been informed, are suffering untold horrors, and Americans are suffering in many instances with them.").

<sup>132</sup> See *The Panama Canal: Hearings Concerning Estimates for Construction of and Fortification of Before the H. Comm. on Appropriations*, 62d Cong. 141–42 (1913) (containing testimony by Governor Goethals from November 18, 1912 regarding the circumstances of Mena's capture and detention) [hereinafter *Congressional Hearings on Panama Canal: 1913*].

<sup>133</sup> *Nicaraguan Chief Surrenders to U.S. With 700 Soldiers*, TRENTON TRUE AMERICAN, Sept. 27, 1912, at 10.

<sup>134</sup> *Id.*

<sup>135</sup> *Congressional Hearings on Panama Canal: 1913*, *supra* note 132, at 141.

<sup>136</sup> *Id.* at 141–42.

<sup>137</sup> See, e.g., *Mena's Surrender*, N.Y. TIMES, Sept. 27, 1912, at 12 (suggesting that Mena "will be the head centre of a [new] junta within a few months" if settled in New Orleans or Galveston and that the U.S. government "can prevent this in Mena's case and all similar cases").

<sup>138</sup> Pandolfe, *supra* note 122, at 407.

the Canal Zone in early November 1912 alleging that Mena and his son were being “unlawfully held by the United States as political prisoners on the order of [President] Taft.”<sup>139</sup> In response, the United States Secretary of War maintained that the United States was only holding Mena “for observation.”<sup>140</sup> Press reports speculated that the United States Government was considering charging Mena for the murder of U.S. Marines, but that the case looked shaky because “Mena was out of the country when the killing occurred.”<sup>141</sup> With the U.S. government unable to produce charges against Mena and his son,<sup>142</sup> “writs of habeas corpus were granted by the Chief Justice [of the Supreme Court of the Canal Zone] and made returnable before th[e] court.”<sup>143</sup>

When he appeared before the Supreme Court of the Canal Zone, the government’s attorney did *not* argue that the privilege of habeas corpus was unavailable to a noncitizen combatant held in an unincorporated (or non-sovereign) territory. Instead, he argued that Mena’s detention should “be taken as a suspension of the right of habeas corpus.”<sup>144</sup> The Supreme Court of the Canal Zone rejected this argument.<sup>145</sup> Nonetheless, having considered the return of the government and concluded that “the allegations of fact are based upon the official records of the Department of State and that they are the conclusions upon which the Executive acted with reference to the applicants,” the Supreme Court of the Canal Zone, taking judicial notice of the events in Nicaragua and Mena’s role directing those events, found that the President’s detention of Mena and his son were justified and within the scope of the President’s authority as Commander-in-Chief.<sup>146</sup> In other words, the court reviewed the evidence related to General Mena’s individual detention *on its merits*, and it determined that the Government had adequate evidence to believe he was properly detained as a prisoner of war and to continue holding him.<sup>147</sup>

### *B. Habeas Corpus in Other Territories Appertaining to the United States*

At various times, an active habeas practice has also lurked below the Article III radar in other territories falling under the complete control of (but outside of formal incorporation into) the United States. In October 1900, for example, an order was issued by the military government of Cuba providing for the availability of the writ

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<sup>139</sup> *Want Us to Free Mena: Lawyers Get Writs from Zone Court—Say We Illegally Hold Nicaragua*, N.Y. TIMES, Nov. 3, 1912, at C3.

<sup>140</sup> *Id.* (quoting American Secretary of War Henry Stimson).

<sup>141</sup> *Id.*

<sup>142</sup> *We Still Hold Mena: Not Under Taft’s Orders—Zone Court Defers Deciding on Release*, N.Y. TIMES, Nov. 7, 1912, at 8.

<sup>143</sup> *Canal Zone v. Mena*, 2 Canal Zone Rep. 170, 171 (1912).

<sup>144</sup> *Id.* at 172.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 175.

<sup>147</sup> *See id.*

of habeas corpus, beginning in December 1900.<sup>148</sup> Within the first month that the order was in effect, territorial courts in Cuba considered their first habeas case, brought by “an American of the name of Thompson, from Detroit.”<sup>149</sup> While the Great Writ was brought to Cuba by military authorities, Cuba’s new constitution of 1901—through which it eventually gained independence—expressly provided that acts performed by the United States in Cuba during its military occupation would be ratified as valid and that all lawful rights acquired under those acts would be kept protected.<sup>150</sup> Looking back at these constitutional developments, Leonard Wood, the territory’s former military governor, later boasted that, in Cuba, “[t]he writ of habeas corpus has been made a feature of the law.”<sup>151</sup>

The writ of habeas corpus was also made available in the Philippine Islands, where specific habeas provisions were even enacted to protect enemy combatants “who surrender and who are subject to arrest on charge[s] of crimes committed while in the insurrection service believed to be contrary to the rules of civilized warfare.”<sup>152</sup> The habeas provisions were necessary, according to then-Governor Taft, because “[s]uch charges against these men were common and often they were unfounded.”<sup>153</sup> Within several years of establishing control over the Philippine Islands, the Honorable Henry Clay Ide, a member of the Philippine Commission, described the “establishment of a complete justice system” as the Commission’s greatest achievement, including having “released on habeas corpus numbers of prisoners who had been incarcerated for years without even knowing with what offences they were charged.”<sup>154</sup>

Provisions have been similarly made for other territorial courts to provide for the writ of habeas corpus in other jurisdictions prior to formal incorporation, including

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<sup>148</sup> *Habeas Corpus for Cuba: New Act to Go into Force Dec. 1 by Order of Gen. Wood*, N.Y. TIMES, Oct. 16, 1900, at 6 [hereinafter *Habeas Corpus for Cuba*]. The *New York Times* also explained to its readers that the act “is based upon the English common law,” and that the delay before it took effect was designed to allow Cubans “to become familiar with a principle and a procedure entirely new to them.” *Id.*

<sup>149</sup> *Cuba’s First Habeas Corpus Case*, N.Y. TIMES, Dec. 20, 1900, at 3. Other cases followed. See, e.g., *Bail for Rathbone: The Audiencia Court Accepts \$100,000 Bond, but Habeas Corpus Proceedings Will Continue*, N.Y. TIMES, Apr. 19, 1902, at 3.

<sup>150</sup> CUBAN CONST. OF 1901, app., art. IV.

<sup>151</sup> Leonard Wood, *The Military Government of Cuba*, 21 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 180 (1903); see also Gordon Ireland, *Observations upon the Status of Corporations in Cuba Since 1898*, 76 U. PA. L. REV. 43, 46–47 (1928) (noting “the gradual assimilation of procedure in the engrafted alien fields of unconstitutionality, habeas corpus, workmen’s compensation and one or two other common law juridical notions” in Cuba).

<sup>152</sup> *The Clash of Authorities*, BOS. EVENING TRANSCRIPT, Feb. 5, 1902, at 1; see also *Relations are Harmonious: Governor Taft on Civil and Military Authority in Philippines*, SPOKANE DAILY CHRON., Feb. 5, 1902 [hereinafter *Relations are Harmonious*].

<sup>153</sup> *Relations are Harmonious*, *supra* note 152.

<sup>154</sup> Francis E. Leupp, *Today in The Philippines: An Interview with Hon. Henry Clay Ide, Member of the Commission*, BOS. EVENING TRANSCRIPT, May 13, 1903, at 18.

Puerto Rico, American Samoa, the Ryukyu Islands, and even occupied Berlin.<sup>155</sup> These developments are almost entirely absent from Article III reporters—for reasons explained below.

#### IV. THE “UNAPPEALING” NATURE OF TERRITORIAL JUSTICE

A fair reading of the habeas practice highlighted in the preceding Part demonstrates that the writ of habeas corpus was often granted by territorial courts, which demanded returns and reviewed habeas claims in the first instance. The reader may ask, therefore, why this active practice is entirely absent from Article III reporters. Indeed, as described below, the U.S. Supreme Court denied petitions for the writ of habeas corpus on numerous occasions from prisoners detained within unincorporated territories under U.S. control.

The reader *might* conclude from that pattern of denials that territorial courts were granted free reign by Article III courts, such that the territorial courts effectively fell beyond the reach of the U.S. Constitution. But that would be an incredibly broad reading of the U.S. Supreme Court’s refusal to issue the writ. After all, it is almost unheard of for petitioners held *in fully incorporated states* to get habeas review in the first instance from the Supreme Court.<sup>156</sup> Even *appeals* of habeas proceedings conducted by lower courts are regularly denied certiorari.<sup>157</sup> Few legal scholars would divine broad rules of jurisprudence from these refusals to grant writs of habeas corpus or certiorari, and for good reason.

Nevertheless, Justice Scalia’s dissent in *Boumediene* suggests that “a case denying such a writ *for lack of jurisdiction*,” if found, could definitively answer underlying substantive questions about the reach of habeas to overseas territories.<sup>158</sup> Professor Kent has taken the argument further, inferring from the Supreme Court’s refusal to hear habeas petitions from prisoners at the Canal Zone that the historical record conclusively demonstrates that the Great Writ was not available to similar prisoners held in non-sovereign territories.<sup>159</sup> Having already established that the writ *was* regularly granted by territorial courts, this Part accordingly addresses why

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<sup>155</sup> See McCauliff, *supra* note 47, at 682–90, 700–05.

<sup>156</sup> See, e.g., Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 153–54 (1962) (noting in 1962 that the last successful habeas petition granted by the U.S. Supreme Court occurred in 1925).

<sup>157</sup> See, e.g., Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293, 301–02 (1951) (noting an instance in which the Supreme Court ignored a clear circuit split about habeas procedure, explaining that “the Supreme Court apparently decided to leave the issue in its present confused state”). When it comes to the denial of certiorari, Harper and Rosenthal warned, “To look for a reason is futile.” *Id.* at 302.

<sup>158</sup> *Boumediene v. Bush*, 553 U.S. 723, 847–48 (2008) (Scalia, J., dissenting) (emphasis added).

<sup>159</sup> See, e.g., Kent, *supra* note 85, at 40 (citing *In re Coulson*, 212 U.S. 553 (1908) (mem.)).

those denials of the writ on jurisdictional grounds for appeals from those courts are *not* dispositive of the questions asked in *Boumediene*. Section A briefly addresses the distinction between appellate jurisdiction and substantive law, noting the inherent problems with drawing broad conclusions of substantive law from Supreme Court appeals refused (without explanation) on purely jurisdictional grounds. Section B then explores why the U.S. Supreme Court did not feel obliged to review every appeal from the territories *de novo*, despite the fact that territorial courts fell outside the gambit of Article III of the Constitution. Section C next demonstrates how even disputes *not* decided by the U.S. Supreme Court drove the development of law throughout the Insular possessions. Finally, Section D places this history into context, offering a theory of how the specter of review itself spurred the political branches to create a system that increasingly protected rights in overseas territories to steer the nation away from the precipice of repeated constitutional crises.

#### *A. Appellate Jurisdiction Versus Substantive Law*

In the United States, it is a truism that federal courts are courts of limited jurisdiction, and that petitioners must accordingly pass a number of jurisdictional thresholds before federal courts will address substantive arguments on the merits. In some instances arguments on jurisdiction and the substantive merits may be interwoven, but those arguments should not be conflated or confused. If a petitioner cannot establish jurisdiction, federal courts must not move on to consider the merits of a case. As a result, a good rule of thumb is that lawyers should be wary of drawing broad conclusions about *substantive law* from rulings decided solely on *jurisdictional* grounds—particularly when the basis for rejecting jurisdiction is not explained.

The distinction between these concepts is illustrated nicely in the habeas context by the U.S. Supreme Court's 2007 decision in *Bowles v. Russell*.<sup>160</sup> At issue in *Bowles* was whether Mr. Bowles, convicted of murder in Ohio state court and sentenced to life imprisonment, had timely filed his appeal of a district court ruling denying his federal habeas corpus application.<sup>161</sup> Bowles did not file his notice of appeal within the thirty days required by federal rules, but he subsequently moved to reopen the filing period by fourteen days as provided by statute.<sup>162</sup> On February 10, 2004, the district court granted Bowles's motion, but "inexplicably gave Bowles's seventeen days—until February 27, 2004—to file his notice of appeal."<sup>163</sup> Bowles filed sixteen days later, within the period specified by the district court but outside of the period allowed by statute.<sup>164</sup> On that basis, the court of appeals ruled that it

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<sup>160</sup> 551 U.S. 205 (2007).

<sup>161</sup> *Id.* at 207.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

lacked jurisdiction to hear Bowles's appeal,<sup>165</sup> and the Supreme Court affirmed that ruling.<sup>166</sup> Nobody would argue that the Supreme Court in *Bowles*, by rejecting Mr. Bowles's appeal, was expressing its doubts about the availability of habeas in the state of Ohio. Instead, the Court was merely recognizing the (at times frustrating) limits placed on its grant of appellate jurisdiction.

Under the Constitution, the Supreme Court only has original jurisdiction over a very limited set of cases: those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."<sup>167</sup> For all other cases, the Supreme Court only has appellate jurisdiction, subject to exceptions and regulations passed by Congress.<sup>168</sup> Lower federal courts, in turn, depend entirely on statutes passed by Congress to define their status and jurisdiction.<sup>169</sup> These constitutional limitations set the outer perimeters of federal jurisdiction, and allow for cases like Mr. Bowles's to be decided entirely on jurisdictional grounds.

Indeed, since the early days of the American Republic, it has generally been acknowledged (though not without criticism) that Congress has the power to limit the jurisdiction of the federal courts, including the appellate jurisdiction of the Supreme Court.<sup>170</sup> Based on this principle, for example, "a unanimous Supreme Court recognized the power of Congress to frustrate a determination of the constitutionality of the post-Civil War reconstruction legislation by withdrawing, during the very pendency of an appeal, its jurisdiction to review decisions of the federal circuit courts in habeas corpus."<sup>171</sup>

While legal scholars in the twenty-first century continue to debate the extent to which Congress has the power to limit the appellate jurisdiction of the federal courts (and the U.S. Supreme Court in particular),<sup>172</sup> there can be no doubt that the Supreme Court at a minimum countenanced the view that Congress had broad authority to limit the appellate jurisdiction of federal courts in the years leading up to the Insular Cases.<sup>173</sup>

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 213.

<sup>167</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>168</sup> *Id.*

<sup>169</sup> U.S. CONST. art. III, § 1.

<sup>170</sup> See generally Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

<sup>171</sup> *Id.* at 1362–63 (citing *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

<sup>172</sup> See Steven G. Calabresi & Gary Lawson, Essay, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1003 (2007) ("While the Constitution leaves Congress with the option of creating or not creating lower federal courts, it does not give Congress the option of creating or designing lower federal courts over which the Supreme Court does not, at the end of the day, have the last word.").

<sup>173</sup> See, e.g., *The Francis Wright*, 105 U.S. 381, 385–86 (1881) (explaining "the rule . . . that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such

Jurists and scholars may be tempted to fuse the constitutional questions underlying appellate jurisdiction with the underlying merits of constitutional challenges, but the Supreme Court has previously cautioned against construing a decision on a “constitutional issue [that] affects only the mechanics of administering justice in our federation” as “an extension or a denial of any fundamental right or immunity which goes to make up our freedoms.”<sup>174</sup> This distinction is critical when assessing Justice Scalia’s contention that “a case denying such a writ *for lack of jurisdiction*” could answer questions about the effect of the Suspension Clause in overseas territories,<sup>175</sup> and Professor Kent’s related conclusion that the Supreme Court’s refusal to accept cases from the Canal Zone on the writ of habeas corpus amounted to an acknowledgement that Congress was not required to “extend” the writ of habeas corpus to territories like Guantanamo Bay.<sup>176</sup> Both Scalia and Kent err by placing the cart before the horse.

The Canal Zone cases are particularly instructive. There is plenty of evidence that aliens (and even enemy combatants) were not denied access to the writ of habeas corpus by the Canal Zone courts.<sup>177</sup> The record is equally clear that the courts created by the President in the Canal Zone “had [the] authority to issue extraordinary writs.”<sup>178</sup> As a result, while the Supreme Court did refuse to accept two habeas petitions from prisoners in the Canal Zone in the years following the U.S. assumption of control over the territory,<sup>179</sup> neither of those petitions involved a denial of the writ by territorial courts.

Directly to the contrary, Oli Nifou, the first petitioner denied review by the U.S. Supreme Court, had already received habeas review from a judge sitting on the Circuit Court of the Third Judicial Circuit of the Canal Zone.<sup>180</sup> Mr. Nifou’s attorney then filed a notice of appeal to the Supreme Court of the Canal Zone, before filing a Petition to Reconsider in the U.S. Supreme Court seeking appellate review on the basis that “there was no Supreme Court of the Canal Zone and that the decision of the Circuit Court was a final order from the highest court of record.”<sup>181</sup> The Petition to Reconsider raised alleged violations of constitutional rights, as well as “basic questions of authority and legitimacy” related to the governance of the Canal Zone.<sup>182</sup> In

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limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control.”)

<sup>174</sup> Nat’l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 585 (1949).

<sup>175</sup> Boumediene v. Bush, 553 U.S. 723, 847–48 (2008) (Scalia, J., dissenting) (emphasis added).

<sup>176</sup> See Kent, *supra* note 85, at 40 (citing *In re Coulson*, 212 U.S. 553 (1908) (mem.)).

<sup>177</sup> See *supra* Part III.A.

<sup>178</sup> See Wm. K. Jackson, *The Administration of Justice in the Canal Zone*, 4 VA. L. REV. 1, 5 (1916).

<sup>179</sup> See *In re Coulson*, 212 U.S. 553, 553 (1908) (mem.); *In re Nifou*, 198 U.S. 581, 581 (1904).

<sup>180</sup> BRAY, *supra* note 69, at 81.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 82.

response, U.S. Solicitor General Henry M. Hoyt simply argued “that the case should first be tried on the merits, that [the] petitioner could well wait for the constitution of the Supreme Court of the Canal Zone if he wanted to appeal, and that no appeal from the latter court was provided by law.”<sup>183</sup> Presumably on those grounds, the U.S. Supreme Court ultimately refused to grant a writ of certiorari or habeas corpus allowing for Nifou’s appeal.<sup>184</sup>

The *Coulson* matter followed a similar trajectory. That case arose when Adolphus Coulson—a native of Barbados—was accused of murdering his wife in January 1907 and was subsequently convicted of murder by a panel of three Canal Zone judges a month later.<sup>185</sup> Coulson appealed that decision before the Supreme Court of the Canal Zone on the grounds that he had been denied the right to trial by jury in violation of the Fifth and Sixth Amendments to the U.S. Constitution.<sup>186</sup> After the (now-constituted) Supreme Court of the Canal Zone affirmed the lower court decision, Coulson’s attorneys filed a writ of error before the U.S. Supreme Court.<sup>187</sup> Solicitor General Hoyt’s central jurisdictional argument in response to Coulson’s petition for a writ of error was that no appeal of decisions from the Supreme Court of the Canal Zone was provided by law,<sup>188</sup>—the last of the three arguments that Hoyt previously had made before the U.S. Supreme Court in the *Nifou* matter.<sup>189</sup> Unlike Oli Nifou, Coulson had already had his case tried on the merits and reviewed by the Supreme Court of the Canal Zone, which only left the Government with the last of its earlier arguments from the *Nifou* case—that no appeal to the U.S. Supreme Court was provided by law.<sup>190</sup> Notably, the Government did not argue that habeas corpus simply was unavailable in the Canal Zone.<sup>191</sup>

Instead, the Government’s argument in *Coulson* relied solely on the fact that “Congress had not seen fit to vest in any of the courts of the United States, district, circuit, circuit court of appeals or Supreme Court, any jurisdiction over cases arising in the Canal Zone.”<sup>192</sup> Of course, Congress had not legislated at all for a civil government

<sup>183</sup> *Id.* at 81.

<sup>184</sup> *See Nifou*, 198 U.S. at 581 (“Motion for leave to file petition for writs of *habeas corpus* and certiorari denied.”).

<sup>185</sup> BRAY, *supra* note 69, at 87.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 87–88.

<sup>188</sup> *See* Motions to Dismiss or Affirm, and Brief in Support Thereof at 6, *Coulson v. Canal Zone*, 212 U.S. 553 (1908) (No. 187) (“It is plain that under the laws of Congress and of the Isthmian Canal Commission, the case at bar is made final in the Supreme Court of the Canal Zone, and that this court is without jurisdiction to review it on writ of error.”) [hereinafter *Coulson Brief I*].

<sup>189</sup> BRAY, *supra* note 69, at 81.

<sup>190</sup> *Id.* at 88.

<sup>191</sup> *See generally* *Coulson Brief I*, *supra* note 188.

<sup>192</sup> Jackson, *supra* note 178, at 5; *see also Investigation of Panama Canal Matters: Hearing Before the S. Comm. on Interoceanic Canals of the United States*, 59th Cong. 2734 (1906) (statement of William H. Taft, Secretary of War) (agreeing with the suggestion that

of the Canal Zone, so Congress had not divested the federal courts of jurisdiction either. But because the Constitution grants Congress the exclusive power to confer appellate jurisdiction,<sup>193</sup> the Government took the position that “[t]he President of the United States could not by executive order confer upon any of the courts of the United States any jurisdiction, original or appellate, in Canal Zone matters, even though he could create courts in the Canal Zone and define their jurisdiction.”<sup>194</sup> Months later, in response to the Government’s arguments that appeal through a writ of error was not available without a statutory basis, Coulson’s attorneys also sought leave to file for a writ of habeas corpus and certiorari before the U.S. Supreme Court, belatedly articulating a theory that “habeas corpus is a constitutionally required backstop when no other form of statutory review is available.”<sup>195</sup>

These facts make clear that *Coulson* primarily turned on constitutional questions about appellate jurisdiction under Article III, rather than questions about the reach of the writ of habeas corpus under the Suspension Clause. Tellingly, the issue of habeas corpus was not even mentioned in Secretary Hoyt’s original brief, since Coulson initially petitioned for appeal through a writ of error.<sup>196</sup> Coulson only filed for writs of habeas corpus and certiorari as an afterthought, a fact emphasized in Hoyt’s opposition.<sup>197</sup> The record accordingly makes clear that the petitioner’s filing for three separate writs in *Coulson*—including a Hail Mary pass for a writ of habeas corpus—was a product of the uncertainty about how to get *any* Article III review of Coulson’s conviction,<sup>198</sup> which had already been reviewed by the Supreme Court of the Canal Zone.

These cases from the Canal Zone reveal that, while the legal debate in the Insular Cases is often characterized as a fight over whether the “Constitution follows the flag,” subsumed in that debate was the preliminary constitutional question of whether Article III jurisdiction *also* follows the flag.<sup>199</sup> A year before *Coulson* was

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the President “can not [sic] create the right of appeal or appellate jurisdiction in the Supreme Court”) [hereinafter *Investigation of Panama Canal Matters*].

<sup>193</sup> U.S. CONST. art. III, § 1.

<sup>194</sup> Jackson, *supra* note 178, at 5.

<sup>195</sup> Kent, *supra* note 85, at 40.

<sup>196</sup> See generally Coulson Brief I, *supra* note 188.

<sup>197</sup> See Brief in Opposition, Filed by Leave of Court at 1, *In re Coulson*, 212 U.S. 553 (1908) (“Mr. Storey says that the proceedings . . . were begun in great haste, which ought not to prejudice the plaintiff in error if he has mistaken his remedy. But that case has been pending in this court since October 4, 1907. It is now in reality sought to substitute the writs of habeas corpus and certiorari for a writ of error which the law does not grant.”).

<sup>198</sup> See *id.*

<sup>199</sup> See generally Lebbeus R. Wilfley, *The Legal Status of the Philippines—As Fixed by the Recent Decision of the Supreme Court in the Jury Trial Cases*, 14 YALE L.J. 266 (1904). Far from intentionally setting up the judicial system to avoid all Article III review of constitutional questions, the executive branch actively sought a right of “appeal in a limited class of cases from the Supreme Court of the [Canal] Zone to the Supreme Court of the United States” as one of “two provisions which Congress only can supply.” *Investigation of Panama*

decided, for example, the late Professor Bordwell observed that the decisions in the Insular Cases appeared to turn on *the power of the judiciary to enforce* fundamental constitutional principles rather than the actual *applicability* of those principles in the newly acquired territories.<sup>200</sup> These questions about appellate jurisdiction provide reason to question whether any summary denial for want of jurisdiction could, as Justice Scalia suggests, answer questions about the reach of the writ of habeas corpus protected by the Suspension Clause.<sup>201</sup> Of course, this distinction between appellate jurisdiction under Article III and substantive constitutional law may seem trivial if no other court or tribunal is authorized to issue the writ of habeas corpus or consider other constitutional challenges in place of courts organized under Article III.<sup>202</sup> The political branches, however, quickly empowered separate territorial courts to review constitutional claims. The legitimacy of constitutional review by those courts is discussed below.

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*Canal Matters*, *supra* note 192, at 2522. Despite these efforts, Solicitor General Hoyt made good use of Congress's failure to pass such legislation to avoid Article III review of the specific disputes that did arise in the territory in practice.

<sup>200</sup> See Percy Bordwell, *The Function of the Judiciary II*, 7 COLUM. L. REV. 520, 521 (1907) ("It seems to the writer that it was on the question as to whether one of these fundamental principles of our own American life *should be enforced by the judiciary or not*, that the decision in the Insular Cases turned." (emphasis added)). It is worth recalling here that almost everyone (including expansionist Republicans) agreed at the time of the Insular Cases that the Constitution required Congress to protect certain "fundamental principles of free government" when legislating for the newly acquired possessions. See generally Wilfley, *supra* note 199, at 268. In 1904, for instance, Lebbeus R. Wilfley (then Attorney General of the Philippine Islands) summarized the debate in the Insular Cases as one between: (1) those who believed that Congress was "bound by all the limitations and prohibitions contained in the Constitution" when legislating for the territories; and (2) those, including "friends of the administration and others," who believed that "Congress was always restrained by certain fundamental principles upon which free government is founded, yet there were certain other rules of government, not fundamental in their nature, which Congress might extend to or withhold from the territories as it sees proper." *Id.* Because all parties agreed there were some fundamental principles that could not be abridged by Congress, Wilfley explained elsewhere: "the only practical question left for determination in cases coming from our insular possessions involving constitutional questions is, What are natural or fundamental rights, and what are artificial or remedial rights?" Lebbeus R. Wilfley, *Trial by Jury and "Double Jeopardy" in the Philippines*, 13 YALE L.J. 421, 422 (1904). Wilfley was by no means a neutral observer; he was named as representing the United States in the Philippine Insular Cases along with Solicitor General Hoyt. See *Kepner v. United States*, 195 U.S. 100, 105 (1904); *Dorr v. United States*, 195 U.S. 138, 139 (1904). His writings should be sufficient evidence to disprove any notion that the political branches believed that they could operate without *any* constitutional restraints in unincorporated overseas territories.

<sup>201</sup> See generally *Boumediene v. Bush*, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting).

<sup>202</sup> The reader may recall the familiar thought experiment: "If a tree falls in a forest and no one is around to hear it, does it make a sound?" So too, if the political branches are bound by constitutional limitations, but no court is empowered to adjudicate allegations of constitutional violations, are there really any limitations at all?

*B. The Separation of Powers as a Separation of Functions*

The notion that constitutional questions could be considered and decided by courts established outside the scope of Article III of the Constitution is not without controversy. But the practice of establishing courts or tribunals separate from Article III courts and empowering them to answer constitutional questions has been sanctioned by the Supreme Court in contexts beyond territorial governance.<sup>203</sup> This same practice applied to territorial governance, where constitutional arguments were first (and at times only) heard by territorial courts whose judges lacked Article III protections.<sup>204</sup> These territorial courts undoubtedly provided some leeway to the U.S. Supreme Court; because the political branches created territorial courts with the power to review constitutional questions and issue the extraordinary writs within their jurisdiction, the U.S. Supreme Court was never forced to consider whether Congress could by indirection (for example, failing to provide Article III jurisdiction) accomplish what Congress was prohibited from doing directly (for example, suspending habeas corpus). Moreover, in federal territorial jurisdictions, Congress provided for Article III review of decisions.

The reader may ask how this separate review, by less than independent courts, accords with the doctrine of the separation of powers. As legal scholars might note, however, the separation of powers as applied in the United States is more of a maxim than a precise doctrine, and the concept as named is “not really accurate as a description” of how the federal government actually works—considering many powers are actually shared between branches.<sup>205</sup>

Instead, one compelling rationale underlying the separation of powers is the rule of law notion that “no man can be a judge in his own cause,” an approach that focuses

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<sup>203</sup> See Hart, *supra* note 170, at 1380–82 (discussing *Yakus v. United States*, 321 U.S. 414 (1944)). *Yakus* involved a statute that provided penal penalties for violating World War II-era price controls, which required that any constitutional challenges be filed in an independent administrative proceeding rather than as a defense at trial in an Article III court. 321 U.S. at 418. In upholding this separate review structure, the Court explained that “[t]here is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here.” *Id.* at 444; see also Steven I. Vladeck, *Boumediene’s Quiet Theory: Access to the Courts and Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2113 (2009) (“[T]he limited jurisprudence with respect to Congress’ power to preclude judicial review reflects a similar understanding—i.e., that a ‘serious constitutional question’ would arise *only* ‘if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.’” (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). *But see* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646–55 (2004) (summarizing criticism of this approach).

<sup>204</sup> See Pfander, *supra* note 203, at 646.

<sup>205</sup> Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 301 (1989).

on the “prevention of conflicts of interest” as a motivating principle.<sup>206</sup> As Professor Verkuil describes,

Conflicts occur at three levels: those between the branches; those within a particular branch; and those involving an individual’s personal stake in the outcome of a proceeding. In each situation the presence of a conflict of interest argues in favor of branch separation *or*, at the individual public official level, *of separation of functions within the particular branch*.<sup>207</sup>

This latter notion—that conflicts of interest can be limited by the separation of functions within particular branches—is an underlying, if not oft-spoken, basis for a variety of courts established outside of the purview of Article III to adjudicate constitutional questions.<sup>208</sup> The separation of functions is a particularly salient notion when it came to the governance of overseas possessions at the time of the Insular Cases, and nowhere was it more salient than in the Canal Zone. For the first years of its existence, the President’s sole source of congressional authority to govern the territory came in the form of the Spooner Act, which granted the President and his appointees “all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone.”<sup>209</sup> It was an exceptionally broad mandate, and contemporary writings indicate that there was considerable doubt—even in the executive branch—about whether Congress could grant the President the power to directly enact legislation for a territory.<sup>210</sup> Regardless, the President continued to effectively govern the Canal Zone by executive order for nearly a decade,<sup>211</sup> a practice that drew frequent criticism.<sup>212</sup>

Despite that criticism, when granted a free hand to act by Congress in the Canal Zone, the President did not assert the power to reject constitutional protections.<sup>213</sup>

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<sup>206</sup> *Id.* at 305–06.

<sup>207</sup> *Id.* at 307 (emphasis added).

<sup>208</sup> *See, e.g.*, Pfander, *supra* note 203, at 697–715 (detailing the history of Article I tribunals).

<sup>209</sup> BRAY, *supra* note 69, at 55 (quoting 33 Stat. 429 (Apr. 28, 1904) (further specifying the Spooner Act)).

<sup>210</sup> *See id.* at 82 n.42 (quoting a memorandum written by the head of the Department of Civil Administration that “[t]here has been, and still is, grave doubt in the minds of many well-informed men as to the authority of Congress to delegate to the President or anyone else, power given it to enact laws.”). These doubts were amplified by the fact that the Spooner Act only granted authority to the President until the end of the Fifty-eighth Congress, a period that was briefly extended to the start of the Fifty-ninth Congress in early 1905, but not renewed thereafter. *Id.* at 55.

<sup>211</sup> GOETHALS, *supra* note 84, at 41–42; *see also* BRAY, *supra* note 69, at 55.

<sup>212</sup> *See* GOETHALS, *supra* note 84, at 42 (“While he was criticized for this procedure, there was no other course open if the work was to be continued.”).

<sup>213</sup> *Id.* at 13–15.

To the contrary, Roosevelt embraced those protections.<sup>214</sup> His first Governor of the Canal Zone, George W. Davis, arrived on May 17, 1904, and within two days announced that “the laws of the land would be continued in force *except where they were found to be in conflict with certain fundamental principles of government that are embodied in the Constitution of the United States whereby specified individual rights are guaranteed.*”<sup>215</sup> Three months after that proclamation, the I.C.C. passed its first act, establishing Canal Zone courts and recognizing their power to issue the prerogative writs.<sup>216</sup> In part because the Canal Zone was granted these overt protections paralleling those in the U.S. Constitution, some contemporaries began to refer to the Canal Zone’s form of government as “benevolent despotism.”<sup>217</sup>

It is within this context that General Mena’s case arose in the Canal Zone.<sup>218</sup> There is plenty of evidence that the Canal Zone courts were less independent than might have been desired, stemming from the short terms of judicial appointments and other judicial politics that plagued Canal Zone courts in their early years.<sup>219</sup> Despite this reduced independence, the courts established by the President did serve as a basic check on some conflicts of interest. In the *Mena* case, for example, counsel for the United States sought to avoid habeas review by claiming that the President, as the sole holder of “all the powers of government upon the Canal Zone including legislative and administrative functions,” had the authority to implicitly suspend “the right of habeas corpus” through his order of detention.<sup>220</sup> The Supreme Court of the Canal Zone thoroughly repudiated this argument, concluding that the President could not indirectly suspend protections already recognized in the territory by his own orders.<sup>221</sup> This process—by which judges with limited executive branch appointments forced executive branch officers to defend their actions under laws promulgated through executive order—matches the separation of functions approach in both form and substance.

Moreover, even where there was no explicit statutory basis for review of territorial court decisions by the U.S. Supreme Court, evidence suggests that territorial officials understood that their actions could eventually be subject to review by Article III courts (and the U.S. Supreme Court in particular).<sup>222</sup> As discussed in the

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 19 (emphasis added).

<sup>216</sup> ISTHMIAN CANAL COMM’N, *supra* note 112, at 3–4.

<sup>217</sup> *See e.g.*, GOETHALS, *supra* note 84, at 50; Jackson, *supra* note 178, at 9.

<sup>218</sup> *Canal Zone v. Mena*, 2 Canal Zone Rep. 170, 172 (1902).

<sup>219</sup> *See* BRAY, *supra* note 69, at 83–86 (profiling and detailing the appointments and departures of the Justices of the Supreme Court of the Canal Zone during its short existence).

<sup>220</sup> *Mena*, 2 Canal Zone Rep. at 172.

<sup>221</sup> *See id.* (“The court therefore can not hold that the Chief Executive of the United States will or does or can revoke or suspend by indirection any law or order he has expressly enacted.”).

<sup>222</sup> *See* BRAY, *supra* note 69, at 56 (quoting Senate testimony by Canal Zone Governor Charles Edward Magoon that “the time shall come when we will have the action of our courts, for instance, reviewed by the Supreme Court of the United States”).

next Section, this understanding that Supreme Court review (and repudiation) was possible was a powerful motivator for the President and Congress as they considered what protections should be “voluntarily” extended to new overseas possessions.

### C. *The Role of Constitutional Avoidance in Territorial Governance*

Despite constitutional questions about the availability of appellate review in Article III courts (highlighted in Section A) and the availability of separate territorial courts empowered to hear constitutional challenges (discussed in Section B), numerous disputes raising constitutional questions related to overseas territories were eventually heard by the U.S. Supreme Court.<sup>223</sup> While constitutional questions were often *raised*, a close reading of the Insular Cases demonstrates that the Court often avoided these constitutional questions or, at the very least, deliberately framed its holdings as narrowly as possible so as to avoid any bright-line rules related to the application of the Constitution in the territories.<sup>224</sup>

Of course, the political branches had no way of knowing how the Court would rule in each case, but there is considerable (albeit circumstantial) evidence that the political branches were concerned that the Court *might* more actively intervene.<sup>225</sup> Indeed, the Court’s refusal to proclaim any bright-line rules related to the application of the Constitution in the territories continuously left open the possibility that future challenges could invite a judicial rebuke. As a result, the Government often sought to change the facts on the ground during the pendency of appeals to minimize or even moot the alleged constitutional conflict, presumably with the intent of influencing the Court’s opinion.<sup>226</sup> This Section addresses several examples of this activity.

#### 1. Judicial Avoidance (and Non-Avoidance) Related to Puerto Rico

One of the U.S. Supreme Court’s first opportunities to consider the constitutionality of executive actions in the territories acquired from Spain in 1899 came in the form of a habeas petition raised against the actions of U.S. military authorities on the island territory of “Puerto Rico”<sup>227</sup> in *Ex parte Baez*.<sup>228</sup> Depicted in the contemporary press as a test case for constitutional questions in the newly acquired territory, *Ex parte Baez* arose out of the conviction of Ramon Baez, a local resident, by a provisional military court for a voting illegality related to city elections.<sup>229</sup> Baez’s

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<sup>223</sup> See, e.g., *Ex parte Baez*, 177 U.S. 378 (1900).

<sup>224</sup> See, e.g., *id.* at 389 (rejecting the case based on timing, instead of answering the constitutional question).

<sup>225</sup> See *infra* Part IV.C.1.

<sup>226</sup> *Id.*

<sup>227</sup> Though the territory was called “Porto Rico” at the time of the Insular Cases, this Article primarily uses the current name of the territory, “Puerto Rico,” to avoid confusion.

<sup>228</sup> 177 U.S. 378 (1900).

<sup>229</sup> *A Test Case in Porto Rico*, BOS. EVENING TRANSCRIPT, Mar. 27, 1900.

attorneys filed a petition for habeas corpus and certiorari with the U.S. Supreme Court on the grounds that the provisional military court's ruling was unconstitutional, alleging that the civil courts in "Puerto Rico" were open and should have handled the case.<sup>230</sup> Counsel for Baez alleged that the decision to try Baez by a military court deprived him of due process in contravention of the Constitution of the United States.<sup>231</sup>

The Supreme Court rejected Baez's petition, but largely on grounds related to timing.<sup>232</sup> First, the Court criticized Baez for squandering the period between December 11, 1899 and March 15, 1900 in which the military court had stayed execution of his sentence to allow for an appeal to the U.S. Supreme Court.<sup>233</sup> Baez failed to file an application with the Court during that period, and only did so on March 24, 1900—at least a week after his incarceration had begun.<sup>234</sup>

This timing was significant because Baez was scheduled to be released from prison on April 15, 1900.<sup>235</sup> This time frame was too short, the Court explained, to allow for a return to be made to a writ of habeas by the military authorities in "Puerto Rico" under the federal habeas statute.<sup>236</sup> The Court summarized its dilemma and decision as follows:

The grave questions of public and constitutional law sought to be brought into judgment by this application would have become merely moot questions so far as the decision thereof could affect any right or interest of the petitioner. And this would be so even if we issued the writ and attempted to deal with the prisoner by a preliminary order. Before he could be communicated with and brought before us he would be freed from restraint. . . . It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition.<sup>237</sup>

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<sup>230</sup> *Id.* (“[T]his [is] not . . . a case arising in the land or naval forces or in the militia in actual service either in time of war or public danger. The ordinary civil courts were open, and therein he should have been tried, if at all.”).

<sup>231</sup> *Id.*

<sup>232</sup> *Ex parte Baez*, 177 U.S. at 387–89.

<sup>233</sup> *Id.* at 388.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 388–89 (“[B]efore the case could be heard upon the writ and return the prisoner would no longer be in custody.”).

<sup>237</sup> *Id.* at 389–90.

This doctrine might well be called “anticipatory mootness.” The dispute was not *quite* moot, but it was sufficiently close to mootness to allow the Court to avoid deciding the “grave questions of public and constitutional law” raised by the petitioner.<sup>238</sup> The Court made a point to emphasize, however, that “[i]n arriving at this conclusion [the Court was] not to be understood as intimating in any degree an opinion on the question of jurisdiction or other questions pressed on [its] attention.”<sup>239</sup>

The reader should not necessarily be surprised that the Court declined Baez’s petition. As with the Canal Zone cases,<sup>240</sup> the Solicitor General argued to the Court that Puerto Rico “was not within the statutory jurisdiction of the Supreme Court because Congress had not so provided.”<sup>241</sup> As it did with the early Canal Zone cases, the Court could have easily accepted that argument and declined the case for “want of jurisdiction” without an elaborate opinion summarizing its reasons for declining review.<sup>242</sup> But that is not what happened.

Instead, far from showing “no concern about the lack of access to Article III review” (as suggested by Professor Kent),<sup>243</sup> the *Ex parte Baez* Court intimated that it *might* have accepted jurisdiction if it thought that its ultimate ruling on the “grave questions of public and constitutional law” raised by the petitioner could have been made in time to have an effect in the petitioner’s case.<sup>244</sup> Indeed, the Court’s detailed calculations regarding the time that habeas proceedings would take under the federal habeas statute suggest that the Court actually considered taking the case.<sup>245</sup> Akin to a naval warning shot across the bow of a rival vessel, that may have been precisely the message that the unusual explanation of the Court’s denial of review was intended to convey to military authorities.

When considering *Ex parte Baez* (and any of the Insular Cases), one should focus closely on dates. Baez’s petition was submitted on March 26, 1900, and decided on April 12, 1900.<sup>246</sup> The Supreme Court’s opinion curiously made a point of explaining its delay in deciding to deny the petition, noting that the Court had already announced that it was about to take a well-publicized recess until April 9 before Baez’s petition was filed and that “the situation was the same on April 9” as April 12 for the purposes of its ruling.<sup>247</sup>

While it is true that the situation on April 9 was the same as the situation on April 12 for Mr. Baez, the same was not true for other prisoners on the island of Puerto Rico. Instead, April 12 was also the day that Congress decided to enact, and

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<sup>238</sup> *Id.* at 389.

<sup>239</sup> *Id.* at 390.

<sup>240</sup> *See supra* Part IV.A.

<sup>241</sup> Kent, *supra* note 85, at 38.

<sup>242</sup> *See supra* Part IV.A.

<sup>243</sup> Kent, *supra* note 85, at 38.

<sup>244</sup> *See Ex parte Baez*, 177 U.S. at 389–90.

<sup>245</sup> *Id.* at 388–89.

<sup>246</sup> *Id.* at 378.

<sup>247</sup> *Id.* at 387, 390.

the President signed, the Foraker Act providing for a civil government in Puerto Rico.<sup>248</sup> In particular, that Act established a “district court of the United States for Porto Rico” as “the successor to the United States provisional court” established by the military, and provided that “writs of error and appeals from the final decisions of the supreme court of Puerto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States.”<sup>249</sup> The Act also required that all officials authorized under its provisions “take an oath to support the Constitution of the United States” before “entering upon the duties of their respective offices.”<sup>250</sup>

It would be a remarkable coincidence if the Court’s decision in *Ex parte Baez* was not related to the passage of the Foraker Act (and vice versa). *Ex parte Baez* was a direct challenge to the authority and procedures of the provisional military courts of “Puerto Rico.”<sup>251</sup> By replacing those provisional courts with district courts modeled on Article III courts (and by providing a statutory grounds for appeal from those territorial courts to Article III courts), Congress and the President reasonably assured the Court that future prisoners would not have similar due process claims to those presented by Baez. These changes may have made the Chief Justice more comfortable avoiding the soon-to-be-moot issues raised by Baez. Indeed, the political branches may have hoped that the Foraker Act would have precisely that effect.

Despite the passage of the Foraker Act, prisoners convicted by provisional military courts before the act’s passage continued to challenge their sentences on constitutional grounds. For example, within a month of the Court’s decision in *Ex parte Baez*, another federal judge—Judge Lochren of the U.S. District Court for the District of Minnesota (of all courts)—heard a habeas petition filed by Raphael Ortiz, another prisoner tried by a military court in Puerto Rico and convicted for the murder of a U.S. soldier.<sup>252</sup> In his ruling, Judge Lochren rejected arguments that the Constitution did not apply to “Puerto Rico,” finding instead that the protections of the Constitution applied to “Puerto Rico” immediately upon Spain’s cession of the island.<sup>253</sup> Lochren ultimately refused to order Ortiz’s release, but only because Ortiz was sentenced by a “war court” sitting in a “theatre of war” before Spain formally ceded the territory.<sup>254</sup>

Of course, Lochren’s findings on the reach of the Constitution to Puerto Rico could be dismissed as dicta—they were not essential to his final ruling, and observers at the time generally acknowledged that “his remarks thereon probably have no

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<sup>248</sup> Foraker Act, ch. 191, 31 Stat. 77 (1900).

<sup>249</sup> *Id.* §§ 34–35, 31 Stat. at 84–85.

<sup>250</sup> *Id.* § 16, 31 Stat. at 81.

<sup>251</sup> *See Ex parte Baez*, 177 U.S. at 386.

<sup>252</sup> *See Lochren Logic*, PITTSBURGH COM. GAZETTE, May 8, 1900, at 1.

<sup>253</sup> *See id.* (quoting substantial portions of text from Judge Lochren’s “exhaustive opinion thereon”).

<sup>254</sup> *See Porto Rico a Territory*, BOS. EVENING TRANSCRIPT, May 4, 1900.

weight other than as a personal opinion.”<sup>255</sup> The fact that Lochren’s ruling came from a district court, rather than a higher tribunal, also dampened its perceived importance.<sup>256</sup> But Lochren’s ruling, like the opinion of the Supreme Court in *Ex parte Baez*, strongly suggested that Article III courts *might* grant habeas relief to foreign prisoners on the island under other circumstances.<sup>257</sup>

## 2. Executive and Judicial Avoidance Related to the Military Government of Cuba

Just as the Supreme Court avoided deciding the “grave” constitutional questions related to the military government of Puerto Rico in *Ex parte Baez*, the Supreme Court similarly avoided constitutional questions related to the military government of Cuba a year later in *Neely v. Henkel*.<sup>258</sup> *Neely* arose when Charles F. W. Neely, a U.S. citizen appointed as a public employee for the Department of Posts in Cuba, was accused of violating Cuban laws related to embezzlement and fled to the United States.<sup>259</sup> Neely was subsequently apprehended by U.S. authorities at the request of Cuba’s military government, which issued charges related to his crimes and sought his extradition.<sup>260</sup> Significantly, at the time his appeal was heard, Neely had not yet been extradited and was under detention in New York—not Cuba.<sup>261</sup> Moreover, a federal judge, clothed with full authority under Article III, had already considered his habeas petition, reviewed the evidence, and found probable cause to support the allegations.<sup>262</sup> At that point, Neely could not claim to have had any rights denied by Cuba’s military government.

### a. *The Case of Neely v. Henkel*

To avoid extradition to Cuba, Neely filed a constitutional challenge against amendments made by Congress to the general federal statute governing extraditions.<sup>263</sup> Beyond extraditions to foreign governments, the amendments allowed for extraditions to a foreign country or foreign territory “occupied by or under the control

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<sup>255</sup> *Judge Lochren’s Decision*, TOLEDO BLADE, May 10, 1900.

<sup>256</sup> *See A United States Court Judge on Porto Rico*, BOS. EVENING TRANSCRIPT, May 4, 1900 (noting that Judge Lochren’s ruling “would be more important if it came from a higher tribunal, but nevertheless is still of great importance as it is” and that “[a] district judge’s opinion, or decision, is always entitled to respect, but it is not, in a grave constitutional case, of itself final”).

<sup>257</sup> *See Judge Lochren’s Decision*, *supra* note 255.

<sup>258</sup> 180 U.S. 109 (1901).

<sup>259</sup> *Id.* at 112–14.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 113–14; *see also* Brief for the United States at 1, *Neely v. Henkel*, 180 U.S. 109 (1901) (Nos. 387 and 406) (“The appellant, Charles F. W. Neely, is admittedly in the custody of the United States marshal for the southern district of New York.”).

<sup>262</sup> *See Neely*, 180 U.S. at 113–14.

<sup>263</sup> *Id.* at 111–14.

of the United States,”<sup>264</sup> reportedly the first time that Congress had exercised the power to provide for extradition “independent of treaty.”<sup>265</sup> Neely alleged the statute was unconstitutional, in particular, because it did not guarantee that prisoners extradited would receive the same protections in foreign jurisdictions (presumably including Cuba) as available in U.S. courts under the U.S. Constitution.<sup>266</sup> To dispose of Neely’s challenge, the Supreme Court pursued three separate lines of inquiry.

First, the Court asked whether Cuba was “foreign territory” within the meaning of the extradition statute, eventually holding that the island must be considered “foreign territory, within the meaning of the act of Congress,” in light of numerous Congressional resolutions disclaiming sovereignty over Cuba, various Presidential proclamations to the same effect, and even the specific obligations accepted in the Treaty of Paris.<sup>267</sup> This was a threshold inquiry that may not have been necessary had the plain text of the statute indicated that it applied to Cuba. But the amendment was silent on exactly which territories were covered, so the Court was required to make a determination on whether the statute applied to Cuba *before* addressing the petitioner’s broader substantive challenge to the constitutionality of the statute.<sup>268</sup> In short, the Court’s first inquiry involved a question of congressional *intent*, rather than a question of congressional *authority*.

Second, the Court entertained the petitioner’s argument that the extradition statute was unconstitutional *as a whole* because the statute did not ensure that prisoners extradited to foreign jurisdictions would receive the same constitutional protections abroad as they would in the United States.<sup>269</sup> This challenge was exceptionally broad in two respects. First, rather than take issue with any specific rights that would be denied to the petitioner in Cuba, mere “[a]llusion [was] here made to the provisions of the Federal Constitution relating to the writ of *habeas corpus* bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument.”<sup>270</sup> Second, and perhaps more important, the petitioner’s challenge was not limited to the constitutionality of the statute with regards to extraditions to the military government of Cuba. Instead, as Assistant Attorney-General James M. Beck emphasized

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<sup>264</sup> *Id.* at 123 (internal citation marks omitted).

<sup>265</sup> *See* *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936). *But cf.* Brief for the United States, *supra* note 261 (citing Supreme Court opinions supporting the power of extradition in prior cases independent of a treaty).

<sup>266</sup> *See Neely*, 180 U.S. at 122.

<sup>267</sup> *Id.* at 115–20.

<sup>268</sup> *See id.* at 115 (“[T]he applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.”).

<sup>269</sup> *See id.* at 122.

<sup>270</sup> *Id.*; *see also* Brief for the United States, *supra* note 261, at 21 (“There is no testimony before this court which would justify it in assuming that if Neely be extradited he will not secure a fair trial in Cuba. The suggestion that he will not is wholly an assumption by appellant’s counsel . . .”).

in the Government's brief, "[I]t should be observed that the plaintiff in error does not question the applicability of the act of June 6, 1900, to the present case, but broadly denies the power of Congress to pass such a law."<sup>271</sup> In other words, the petitioner's argument, if accepted, would have effectively rendered extradition to *any* foreign jurisdiction unconstitutional, since few (if any) countries would agree to try extradited suspects under the provisions of the U.S. Constitution rather than their own laws.<sup>272</sup> Aware of these broad implications, the Court dispensed of "this suggestion" with the simple "answer" that the referenced constitutional "provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."<sup>273</sup> Unlike the Court's answers to the first inquiry, the Court's brief discussion of this constitutional question—contained in just two paragraphs—avoided any mention of the specific situation in Cuba, grounding itself instead in general extradition principles applicable to any "foreign country."<sup>274</sup>

Third, the Court considered the petitioner's final argument that Congress had already recognized the existence of an independent Republic of Cuba in its joint resolution of April 20, 1898, such that the subsequent "occupancy and control of th[e] island [of Cuba], under the military authority of the United States is without warrant in the Constitution and an unauthorized interference with the internal affairs of a friendly power."<sup>275</sup> This challenge was rooted in basic questions of authority and legitimacy similar to those later posed against the government of the Canal Zone in the matter of *Oli Nifou*.<sup>276</sup> In rejecting the petitioner's suggestion, the Court found that the judiciary was not competent to decide how long Cuba may be "rightfully occupied and controlled by the United States," but that, because "both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba," the military occupation and pacification of the island was not unconstitutional.<sup>277</sup>

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<sup>271</sup> Brief for the United States, *supra* note 261, at 12.

<sup>272</sup> *See id.* at 44 (calling it the "Chief Fallacy of Appellant's Argument" that "an extradition statute is an attempt to legislate for a foreign country" and noting that, based on this argument, "all extradition statutes would of necessity be unconstitutional").

<sup>273</sup> *Neely*, 180 U.S. at 122.

<sup>274</sup> *Id.* at 122–23. Later, in *Downes v. Bidwell*, 182 U.S. 244 (1901), Justice Harlan suggested that the *Neely* Court held Cuba was a "foreign country" within the meaning of the extradition act, adding that:

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations.

*Downes*, 182 U.S. at 387–88 (Harlan, J., dissenting).

<sup>275</sup> *Neely*, 180 U.S. at 123.

<sup>276</sup> *See supra* Part III.A.

<sup>277</sup> *Neely*, 180 U.S. at 124–25.

Together, a careful reading of *Neely* reveals a delicate balance struck by the Court to avoid commenting on the legality of the judicial system established by the U.S. military government in Cuba. For example, while the Court was forced in its first inquiry to decide whether Cuba was “foreign territory, within the meaning of the act of Congress,”<sup>278</sup> the Court conspicuously limited its second inquiry to whether it was unconstitutional for Congress to pass an act allowing prisoners to be renditioned to “a foreign country” without guaranteeing those accused would receive the same rights provided by the U.S. Constitution.<sup>279</sup>

The distinction between “foreign territory” and “a foreign country” may seem trivial or overly semantic, but other Insular Cases turned on similar distinctions.<sup>280</sup> More to the point, the brief filed by the United States reveals that the Government proposed alternative justifications for the Government’s conduct depending on whether Cuba is “a foreign country” or “a territory which is subject to our jurisdiction, and over which we are for the time being exercising full sovereignty.”<sup>281</sup> To support the latter theory, the Government noted that:

Cuba is not a foreign *state*—for there is no such state recognized by our or any other Government—yet it is “foreign” to us to the extent and in the sense that the island has not been incorporated either by the Treaty of Paris or by the legislation of Congress into the Union, either as a State or Territory. But it by no means follows that because it is foreign it is not “land appertaining to the United States” by reason of conquest and treaty stipulation, and subject to our jurisdiction and dominion *pro tempore*.<sup>282</sup>

Indeed, the Government even suggested that Neely’s removal to Cuba would not offend justice because “it is within the power of the United States to annul any decision of the local courts which shall do Neely an injustice.”<sup>283</sup>

By accepting the argument that Cuba was a foreign territory appertaining to the United States, and not directly commenting on whether Cuba was “a foreign country,” the Court appears to have avoided the question of whether the U.S. military government in Cuba was bound by the U.S. Constitution. To answer the underlying constitutional challenge to the extradition act, the Court simply found it unnecessary to decide the more controversial question about the reach of constitutional provisions to Cuba. Indeed, the Court’s opinion was particularly careful to cast no judgment on

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<sup>278</sup> *Id.* at 120 (emphasis added).

<sup>279</sup> *Id.* at 122 (emphasis added).

<sup>280</sup> *See, e.g.,* *DeLima v. Bidwell*, 182 U.S. 1, 198 (1901) (acknowledging that a country, such as Puerto Rico “may be domestic for one purpose and foreign for another”).

<sup>281</sup> Brief for the United States, *supra* note 261, at 13.

<sup>282</sup> *Id.* at 15.

<sup>283</sup> *Neely*, 180 U.S. at 122.

the constitutional status of the U.S. military government, except so far as to later indicate that control over the island by the U.S. military was not unconstitutional.<sup>284</sup>

*b. Alternative Readings of Neely*

Casting aside this delicate balance, Professor Kent has argued that *Neely* stands for the propositions that “the U.S. military government of Cuba was a ‘foreign’ government for constitutional purposes” and that “the Constitution of course does not apply to the actions of foreign governments.”<sup>285</sup> But Kent errs in fusing issues of statutory interpretation that the Court intentionally kept separate from issues of constitutional law, which then leads him to the equally flawed conclusion that Cuba was a territory in which “individual constitutional rights did not bind the U.S. military government.”<sup>286</sup> The *Neely* opinion did not take such sweeping steps.

Aside from the plain text of *Neely*, the best evidence that Professor Kent has read too far into the unanimous opinion penned by Justice Harlan in *Neely* can be found in the text of Harlan’s subsequent dissent in *Downes v. Bidwell*, in which he declared:

*The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States. . . . In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the People of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the*

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<sup>284</sup> See *id.* at 124.

<sup>285</sup> Kent, *supra* note 19, at 149 (emphasis added).

<sup>286</sup> *Id.* at 148.

*people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.*<sup>287</sup>

Justice Harlan’s dissent in *Downes* (uncoupled from the restraints inherent in cobbling together a unanimous opinion) provides a passionate case that the Constitution reaches *every* territory under the authority of the U.S. government and its officers.

Ironically, Professor Kent relies on Justice Harlan’s dissent in *Downes* to support the principle that “constitutional rights could only attach in Puerto Rico at the moment of formal cession to the United States, when full political jurisdiction and the right to legislate were acquired.”<sup>288</sup> Admittedly, Justice Harlan’s dissent does state that “[w]hen the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any Department of the Government to make ‘concessions’ that are inconsistent with its provisions.”<sup>289</sup> But Justice Harlan did not state the opposite conclusion that Professor Kent infers from those words: that the *absence* of formal cession allows for military governance *without* constitutional limitations. Instead, the unambiguous language of his dissent (quoted in length above) indicates that Justice Harlan believed that the Constitution limited the power that the U.S. government, “or any branch or officer of it, may exert at any time or at any place.”<sup>290</sup>

At the same time, Justice Harlan’s dissent in *Downes* does raise questions about the narrower textual interpretation of *Neely v. Henkel* offered in this Article above. As previously mentioned, the Court’s discussion of the constitutional question in *Neely* avoided any mention of the situation in Cuba, relying instead on extradition principles applicable to any “foreign country.”<sup>291</sup> In his *Downes* dissent, however, Justice Harlan went further, suggesting that *Neely* had held that Cuba was *both* “a foreign country” and “foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President.”<sup>292</sup> In his *Downes* dissent, Harlan also specifically addressed the argument that “under the modes of trial there adopted, *Neely*, if taken to Cuba, would be denied the rights, privileges and immunities accorded by our Constitution to persons charged with crime

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<sup>287</sup> *Downes v. Bidwell*, 182 U.S. 244, 378–80 (1901) (Harlan, J., dissenting) (emphasis added). This view—that the Constitution applies wherever our government, or “any branch or officer of it,” may exert power—accords well with the conclusions of Professors Halliday and White on the historic reach of the writ of habeas corpus. See Halliday & White, *supra* note 43, 586–87 (“So long as officials of the king, or his equivalent, were exercising custody over the bodies of prisoners in a territory, the basis of that custody could be challenged by prisoners through habeas writs.”).

<sup>288</sup> Kent, *supra* note 19, at 158.

<sup>289</sup> *Downes*, 182 U.S. at 384 (Harlan, J., dissenting).

<sup>290</sup> See *id.* at 378–80.

<sup>291</sup> See *Neely v. Henkel*, 180 U.S. 109, 122–23 (1901).

<sup>292</sup> *Downes*, 182 U.S. at 387–88 (Harlan, J., dissenting).

against the United States,” suggesting that the *Neely* Court had said in response to this specific argument “that the constitutional provisions referred to ‘have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.’”<sup>293</sup> Harlan’s *Downes* dissent accordingly “clarifies” that *Neely* stands for the proposition that the Constitution’s provisions related to rights, privileges and immunities accorded by the U.S. Constitution did not apply to prisoners charged with crimes against the U.S. military government of Cuba.

While Justice Harlan’s dissent in *Downes* suggests that it is simply restating the *Neely* holding, a close analysis of the text of both opinions provides reason to conclude that Harlan was actually expanding on the rationale underlying that opinion. Given the limited discussion of the constitutional question in *Neely*, it is worth considering the new rationale offered by Harlan in *Downes* as to why Cuba was a “foreign country” beyond the reach of the rights, privileges and immunities accorded by our Constitution. In particular, Harlan notes that Cuba was a foreign country because:

[t]he legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba “except for the pacification thereof,” and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view . . . .<sup>294</sup>

To summarize, Harlan believed that Cuba was a “foreign country” not covered by the Constitution because the Government did not intend to *indefinitely* “exercise” any of three levels of authority over the island: sovereignty, jurisdiction, or control. The reader can accordingly infer from his dissent that the purposeful “exercise” of sovereignty, jurisdiction, “or” control over a territory for an indefinite period *would* make the Constitution apply in full to that territory. Applying this rule, those constitutional provisions would presumably apply at Guantanamo Bay, because the U.S. government at a bare minimum has indicated its intent to exercise indefinite jurisdiction and control over the territory.

Of course, it is not clear that the rest of the *Neely* Court shared Justice Harlan’s convictions regarding the reach of the Constitution, particularly as those convictions were clarified in his *Downes* dissent (which was not joined by any other justices on the Court). But Harlan’s impassioned defense of the Constitution’s wide reach should call into question broad readings of his opinions as limiting the reach of the Constitution in overseas territories, particularly since Harlan continued to espouse the same views about the wide reach of the Constitution to overseas territories in subsequent

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<sup>293</sup> *Id.* at 388.

<sup>294</sup> *Id.* at 387–88.

opinions.<sup>295</sup> Moreover, without any actual denial of constitutional rights by the U.S. military government of Cuba, questions can be raised about whether a challenge to the protections afforded under the U.S. military government in Cuba was ripe for adjudication at the time of *Neely* and *Downes*.

*c. Executive Actions Spurred by Neely*

Despite the failure of Neely's constitutional challenge, the Court's mere acceptance of Neely's appeal may have spurred the military government of Cuba into action. The reader should note that it was in October 1900, the same month as the start of the Term in which the Supreme Court decided to hear arguments in *Neely v. Henkel*,<sup>296</sup> that the military government issued its first order providing for habeas in Cuba.<sup>297</sup> This timing is particularly interesting, considering it was nearly two years after Spain had formally relinquished sovereignty over the island,<sup>298</sup> leaving the Government plenty of time to act *before* Neely's appeal.

While Neely could not have objected to a denial of habeas by Cuban authorities before he arrived in Cuba, the reader will recall that Neely's challenge specifically alluded to the writ of habeas corpus as a constitutional provision not guaranteed to the accused under the federal extradition statute.<sup>299</sup> By establishing the writ of habeas corpus in Cuba during the pendency of Neely's appeal, and by making habeas available beginning December 1900 (just days before oral arguments in *Neely*),<sup>300</sup> it appears that the executive branch was trying to insulate the military government of Cuba from a broad constitutional rebuke. The Government's brief does not go into these details, but it does criticize appellant's counsel for making arguments based on "what *was* rather than what *is*."<sup>301</sup> By adopting the writ of habeas corpus (along with other constitutional and common law principles) before the Court heard oral arguments, the military government may have effectively rendered most of Neely's questions about the theoretical reach of these principles to the territory moot—and intentionally so.

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<sup>295</sup> See, e.g., *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting) ("In my opinion, guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may *exercise* the powers conferred upon it by the Constitution." (emphasis added)).

<sup>296</sup> Brief for the United States, *supra* note 261.

<sup>297</sup> See *Habeas Corpus for Cuba*, *supra* note 148.

<sup>298</sup> See *Neely v. Henkel*, 180 U.S. 109, 117 (1901) (noting that Spain relinquished sovereignty over Cuba on January 1, 1899).

<sup>299</sup> See *id.* at 122.

<sup>300</sup> See *Habeas Corpus for Cuba*, *supra* note 148.

<sup>301</sup> Brief for the United States, *supra* note 261, at 121.

### 3. Confrontation and Avoidance in the Philippine Islands

As the cases related to Puerto Rico and Cuba demonstrate, early constitutional challenges to the judicial systems of the territories relinquished by Spain after the Spanish-American War were instrumental in pushing the development of governments in those territories with judicial protections modeled on those in the U.S. Constitution. Notably, these challenges forced questions on the courts not previously raised both because of the manner that the territories were acquired *and* because of the way that constitutional rights were recognized in those territories.

#### *a. Most Rights Were Recognized by Statute in the Philippine Islands*

As the *Boumediene* majority noted, for example, it was only after the Spanish-American War that “Congress chose to discontinue its previous practice of extending constitutional rights to the Territories by statute.”<sup>302</sup> Before the Insular Cases, Justice Kennedy suggests, “there was no need to test the limits of the Suspension Clause because, as early as 1789, Congress [had automatically] extended the writ to the Territories.”<sup>303</sup> Though technically accurate, this description exaggerates this notion to the point of deception. Indeed, Justice Kennedy’s sole citation for the proposition that Congress voluntarily provided constitutional protections to new territories until the Spanish-American War is a temporary act passed by Congress providing that Rev. Stat. § 1891 did not apply to the Philippine Islands.<sup>304</sup>

This is relevant because Rev. Stat. § 1891 previously provided that “[t]he Constitution and all laws of the United States *which are not locally inapplicable* shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.”<sup>305</sup> Yet what Kennedy missed (or simply omitted) was the fact that, even after Congress acted to prevent the application of Rev. Stat. § 1891 in the Philippine Islands, the U.S. government still did “extend” *most* constitutional rights to the territories ceded from Spain (including the Philippine Islands). As a result, the challenges that arose over rights denied in those territories inevitably focused on the few constitutional protections that the Government argued were locally inapplicable (or impossible to implement) in the newly acquired territories—behavior which accords with the text of Rev. Stat. § 1891.<sup>306</sup>

Indeed, if it were really the case that Congress had “discontinue[d] its previous practice of extending constitutional rights to the territories by statute,”<sup>307</sup> the reader might expect a whole slew of challenges over the reach of the vast panoply of

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<sup>302</sup> *Boumediene v. Bush*, 553 U.S. 723, 756 (2008).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* (citing an Act Temporarily to Provide for the Administration of the Affairs of the Civil Government in the Philippine Islands, and for Other Purposes, ch. 1369, 32 Stat. 691 (1902)).

<sup>305</sup> See Rev. Stat. § 1891 (emphasis added).

<sup>306</sup> *Id.*

<sup>307</sup> *Boumediene*, 553 U.S. at 756.

constitutional rights to the territories. But cases over the reach of most constitutional rights to the territories did not materialize. An explanation of why can be found in the Supreme Court's opinion in *Kepner v. United States*.<sup>308</sup>

*Kepner* arose after a lawyer who was charged with the embezzlement of client funds was acquitted at trial.<sup>309</sup> Faced with this result, the prosecution appealed and obtained a conviction from the Supreme Court of the Philippine Islands.<sup>310</sup> *Kepner* appealed this verdict on the grounds that it was "in violation of the law against putting a person twice in jeopardy for the same offense, and contrary to the Constitution of the United States."<sup>311</sup>

The U.S. Supreme Court agreed, but it was not forced to rule on constitutional grounds. Instead, the Court found support for a prohibition on double jeopardy in a statute granting the inhabitants of the Philippine Islands *nearly all* of the protections of the Bill of Rights:

When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?<sup>312</sup>

This description of congressional and presidential actions in the Philippine Islands belies the *Boumediene* majority's suggestion that Congress had, at least in the

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<sup>308</sup> 195 U.S. 100 (1904). *Kepner* was one of the cases defended by Philippine Attorney General Lebbeus Wilfley. *See id.* at 105.

<sup>309</sup> *Id.* at 110.

<sup>310</sup> *Id.* at 110–11.

<sup>311</sup> *Id.* at 111.

<sup>312</sup> *Id.* at 124.

Philippines, departed en masse from its historical practice of extending constitutional rights to the territories by statute.

Perhaps because of these *statutory* enactments protecting constitutional rights, most of the Insular Cases focus on constitutional revenue questions,<sup>313</sup> whereas remarkably few focus on individual constitutional rights—and most of those cases about constitutional rights relate specifically to the availability of trial by jury.<sup>314</sup> Moreover, the U.S. government had particularly good grounds in some cases for arguing that trial by jury should be locally inapplicable in the territories—at least in the early years of territorial governance.<sup>315</sup>

It is true, of course, that Congress did not extend *all* constitutional rights to newly acquired territories. In Puerto Rico, for example, Congress eventually enacted a statutory “‘Bill of Rights’” for the territory that included “‘substantially every one of the guaranties of the Federal Constitution, except those relating to indictment by a grand jury in the case of infamous crimes and the right of trial by jury in civil and criminal cases.’”<sup>316</sup> Similarly, in the Philippine Islands, the Philippine Government Act “‘extended to the islands all the guaranties contained in the Bill of Rights *except the right of trial by jury and the right to bear arms.*’”<sup>317</sup> Because of these enactments, the U.S. Supreme Court was able to rely on the statutory grounds provided in the Philippine Government Act when considering most questions that might otherwise raise constitutional questions, allowing the Supreme Court to entirely side-step the broader question of whether those protections were available in the territories by the Constitution *of its own force*.<sup>318</sup>

Furthermore, where there were exceptions to rights extended in the territories, the U.S. Supreme Court did not always shy away from reviewing those questions. When Congress failed to extend trial by jury to the Philippine Islands by statute, for example, the Supreme Court eventually considered “‘whether, in the absence of a

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<sup>313</sup> See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 249 (1901) (evaluating “‘whether the *revenue clauses* of the Constitution extend of their own force to our newly acquired territories” (emphasis added)).

<sup>314</sup> See, e.g., Wilfley, *supra* note 199, at 270 (“It will be observed that there was but a single constitutional point determined by the court in these cases, viz., the question of the right of trial by jury.”).

<sup>315</sup> See, e.g., GOETHALS, *supra* note 84, at 72–73 (“In a community like that on the Isthmus the difficulty was to secure an impartial jury, and the result was that even in flagrant cases it was not possible to convict an American. . . . Experience had shown that Americans were loath to convict a fellow-citizen upon the testimony of non-Americans . . . . The jury system is applicable to a settled, established community but not to a locality where the population is constantly shifting as was the case during the construction period and would be the case, though perhaps to a less extent, during the operating period.”).

<sup>316</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

<sup>317</sup> Wilfley, *supra* note 199, at 269.

<sup>318</sup> *Kepner v. United States*, 195 U.S. 100, 124 (1904) (“It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without Congressional legislation.”).

statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands.”<sup>319</sup> Rather than proclaim a bright-line rule that the Constitution did not extend to the territories in that case, the Supreme Court proceeded to give serious consideration to the issue before holding *only* that the right to trial by jury did not extend on its own force to the territory.<sup>320</sup> The Court was careful not to reach beyond that narrow holding to a broader holding that *no* constitutional rights extended to the territory by the Constitution’s own force.<sup>321</sup>

*b. Habeas in Particular Was Recognized—With Exceptions*

Unlike the right to a trial by jury, Congress passed a statute in 1902 acknowledging the reach of the writ of habeas corpus to the Philippine Islands, which read:

[T]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion, *insurrection*, or invasion the public safety may require it; *in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.*<sup>322</sup>

The reader will notice that the beginning of this statutory text closely tracks the language of the Suspension Clause in the U.S. Constitution,<sup>323</sup> but that Congress added the emphasized language in an apparent attempt to lower the bar for the suspension of the privilege of the writ. The addition of the phrase “insurrection,” for example, suggests that Congress sought to allow for suspension for revolutionary movements smaller than a full-blown rebellion. Similarly, judgment as to when these thresholds were met was left to the President or the Governor, with the approval of

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<sup>319</sup> *Dorr v. United States*, 195 U.S. 138, 139 (1904).

<sup>320</sup> *Id.* at 149.

<sup>321</sup> Perhaps more importantly, the Court did *not* defer the question of whether the right to trial by jury was a “fundamental right,” suggesting that the Court viewed the ultimate determination of which rights *are* fundamental to be a justiciable question. *See id.* at 148 (framing the question as “[i]f the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends”). Just as significant, the Court’s determination that the right to a jury trial was not fundamental relied on a broader consideration of the rights made available in the territory. Indeed, the Court in *Dorr* specifically referenced *Kepler*’s recognition of the broad scope of rights made available in the Philippines before concluding that “[i]t cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings.” *Id.* at 145–46.

<sup>322</sup> Act of July 1, 1902, ch. 1369, Pub. L. No. 57-235, § 5, ¶ 7, 32 Stat. 691, 692 (emphasis added).

<sup>323</sup> U.S. CONST. art. I, § 9, cl. 2.

the Philippine Commission—a body that was also appointed by the President.<sup>324</sup> In this manner, Congress was delegating the authority to suspend the writ entirely to the executive branch, despite case law and scholarly opinions suggesting that, at least in the continental United States, it is questionable that the President has the authority to suspend the privilege of habeas corpus without congressional approval.<sup>325</sup>

These changes to the text of the Suspension Clause when adapted as a habeas statute for the Philippine Islands were the distinct product of the practical difficulties in governing a territory whose occupants were not particularly welcoming of U.S. authority. Insurrections in the Philippine Islands were not merely a theoretical possibility. Instead, fighting broke out between American forces and Filipino nationalists on February 4, 1899, two days *before* the U.S. Senate ratified the Treaty of Paris.<sup>326</sup> By the time President Roosevelt declared the conflict over on July 4, 1902, more than 4,200 American and 20,000 Filipino combatants had died.<sup>327</sup> As an active war zone, an observer might have expected a dramatic departure from the historic practice of providing access to the writ in new territories—at least until the cessation of hostilities.

To the contrary, officials authorized by the President quickly recognized the availability of the Great Writ in advance of any Congressional action. On April 23, 1900, the Office of the U.S. Military Governor on the Philippine Islands issued General Order No. 58, which provided that “[e]very person unlawfully imprisoned or restrained of his liberty under any pretence whatever may prosecute a writ of habeas corpus, in order to inquire into the cause of such imprisonment or restraint.”<sup>328</sup> On June 11, 1901, the Philippine Commission reaffirmed the availability of the writ when it passed an act organizing courts for the Philippine Islands.<sup>329</sup>

Underlying these broad protections, however, were substantial exceptions and loopholes. Nearly a month after General Order No. 58 was issued, for example, Major-General Arthur MacArthur passed an order clarifying General Order No. 58 that specified that the writ of habeas corpus would not “permit the civil courts to release persons confined under military orders.”<sup>330</sup> Based on that order, the Supreme Court of the Philippine Islands denied a writ of habeas corpus to an American prisoner

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<sup>324</sup> See § 5, ¶ 7, 32 Stat. at 692.

<sup>325</sup> See, e.g., Eli Palomares, Note, *Illegal Confinement: Presidential Authority to Suspend the Privilege of the Writ of Habeas Corpus During Times of Emergency*, 12 S. CAL. INTERDISC. L. J. 101, 114–17 (2002) (summarizing the contemporary debate regarding President Lincoln’s suspension of the writ during the Civil War and Justice Taney’s decision in *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861)).

<sup>326</sup> *The Philippine American War, 1899–1902*, DEP’T OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1899-1913/war> (last visited May 1, 2015).

<sup>327</sup> *Id.*

<sup>328</sup> OFFICE OF THE U.S. MILITARY GOVERNOR IN THE PHIL. ISLANDS, GEN. ORDER NO. 58, § 77 (1900); see also *id.* at §§ 78–94 (further elaborating on the availability of habeas corpus).

<sup>329</sup> U.S. PHIL. COMM’N, ACT NO. 136 (1901).

<sup>330</sup> OFFICE OF THE U.S. MILITARY GOVERNOR IN THE PHIL. ISLANDS, GEN. ORDER NO. 70, § III (1900).

of U.S. military authorities in the city of Manila on August 29, 1901 because “[n]o judge of this Archipelago has at present jurisdiction to issue the writ of habeas corpus unless such jurisdiction has been conferred upon him by some legislative act.”<sup>331</sup> Of course, Philippine Commission Act No. 136 (enacted in July 1901) had explicitly granted the court original jurisdiction to issue the writ,<sup>332</sup> but the court in *Calloway* noted that Act No. 136 only authorized the use of the writ “in the manner prescribed in the Code of Civil Procedure.”<sup>333</sup> Noting that “[t]he Code referred to in this article is not as yet in force,” the Supreme Court of the Philippine Islands held that the writ could not be applied in the *Calloway* case.<sup>334</sup>

What makes the *Calloway* opinion particularly remarkable is the fact that the Philippine Commission had already enacted the Code of Civil Procedure on August 7, 1901,<sup>335</sup> and the Code was set to take effect a week after the court ruled in *Calloway*.<sup>336</sup> The court could not have been ignorant of those developments, but it nonetheless chose to deny the writ shortly before the Code took effect rather than to assert an underlying common law basis for the writ or even to wait a mere four days until it had clear authority for the writ to be issued.<sup>337</sup>

The problem may have been, however, that the authority granted by the Code of Civil Procedure was ambiguous over certain military prisoners. In particular, the Act as originally enacted denied the courts any authority to issue the writ to discharge certain categories of prisoners held by military authorities in three specified provinces for “violation of the laws of war or for a military offense.”<sup>338</sup> Notably, this was referred to by the Philippine Commission as a *suspension* of the writ of habeas corpus, rather than as a mere refusal to extend the writ.<sup>339</sup> And the suspension of

<sup>331</sup> *In re Calloway*, 456 O.G. 11 (1901).

<sup>332</sup> U.S. PHIL. COMM’N, ACT NO. 136, § 17.

<sup>333</sup> *In re Calloway*, 456 O.G. at 12 (quoting U.S. PHIL. COMM’N, ACT NO. 136, § 17).

<sup>334</sup> *Id.*

<sup>335</sup> George R. Harvey, *The Administration of Justice in the Philippine Islands*, 9 ILL. L. REV. 73, 81 (1914).

<sup>336</sup> See U.S. PHIL. COMM’N, ACT NO. 190, §§ 525–50 (1901) (providing for the application of the writ of habeas corpus); *id.* § 796 (“This act shall take effect on the first day of September 1901”).

<sup>337</sup> The *Calloway* opinion is also remarkable because General MacArthur’s bitter clashes with the civilian-led U.S. Philippine Commission had already led to his removal by the War Department in July 1901. Laura A. Belmonte, *No Substitute for Virility: Douglas MacArthur, Gender, and the Culture of Militarism*, in *MACARTHUR AND THE AMERICAN CENTURY* 436, 439 (William M. Leary ed., 2001). But the Supreme Court of the Philippine Islands chose to ground its decision in his order denying the court’s jurisdiction to issue the writ to military prisoners instead of acts of the Philippine Commission that evinced a clear intent to provide the court with broad jurisdiction to issue the writ. See generally *In re Calloway*, G.R. No. 456.

<sup>338</sup> U.S. PHIL. COMM’N, ACT NO. 190, § 529. The act specifically limited the authority of courts to issue the writ to discharge prisoners held in the provinces of Batangas, Cebu, Bohol, and “in provinces wherein a provincial government has not yet been organized.” *Id.*

<sup>339</sup> See U.S. PHIL. COMM’N, REPORT OF THE UNITED STATES PHILIPPINE COMMISSION TO THE SECRETARY OF WAR 14 (1901) [hereinafter U.S. PHIL. COMM’N REPORT] (“The writ of

habeas corpus in those provinces was not actually introduced by the Code of Civil Procedure. Instead, three weeks before the Code was passed—on July 17, 1901—the Philippine Commission had separately suspended the writ of habeas corpus for military prisoners in those provinces after citing ongoing insurrection activities in the area.<sup>340</sup> The reader can accordingly deduce that the statutory exception to the availability of habeas in those three provinces, as codified in the Code of Civil Procedure, was intended to prevent the Act from effectively repealing the *prior* suspension of the writ in those limited areas.

Indeed, rather than serving as an initial suspension of the writ, the Code of Civil Procedure may have *narrowed* the suspension by requiring that the military detainee be held for “violation[s] of the law of war or for a military offense.”<sup>341</sup> Read closely, the original act of suspension did not allow the courts to *issue* the writ to any military prisoners in those provinces, whereas the Code of Civil Procedure provided only that the court could not *discharge* military prisoners held for certain offenses.<sup>342</sup> The revised text accordingly suggested that the writ could issue under the Code, and that the military would need to respond to clarify a basis of detention.

By issuing its opinion in *Calloway* before the Code of Civil Procedure took effect, the Supreme Court of the Philippine Islands may have sought to avoid any conflict of authority between military and civil authorities over the reach of the writ. But that result did not sit well with the Philippine Commission. Having already enacted a *suspension* of the writ in three provinces in July 1901,<sup>343</sup> the Philippine Commission was apparently of the opinion that the Philippine courts already had the authority to issue the writ at that time. Obviously, the Supreme Court of the Philippine Islands disagreed, and the “conflict of jurisdiction between the military and civil authorities” in *Calloway* ultimately led the Philippine Commission to revise the Code of Civil Procedure to clarify further the limited categories of military prisoners detained in a limited number of provinces who could not be discharged by a writ of habeas corpus and the procedure through which the military would reply to petitions from those prisoners.<sup>344</sup> Moreover, that limited suspension for a limited category of

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habeas corpus having been suspended by an act of the Philippine Commission within the provinces [of Batangas, Cebu, and Bohol], prisoners in custody by military authorities are lawfully detained and the reasons therefor may not be demanded by any civil judge.”)

<sup>340</sup> See U.S. PHIL. COMM’N, ACT NO. 173, § 3 (1901) (“The writ of *habeas corpus* in the civil courts of the three provinces named shall not issue therefrom for the release of prisoners detained by order of the Military Governor or his duly authorized military subordinates.”).

<sup>341</sup> Compare U.S. PHIL. COMM’N, ACT NO. 173, § 3 (denying the civil courts the ability to *issue* the writ for the release of any prisoners “detained by order of the Military Governor or his duly authorized military subordinates”), with U.S. PHIL. COMM’N ACT NO. 190, § 529 (denying the civil courts the ability to *discharge* prisoners held for violations of the laws of war or military offenses).

<sup>342</sup> See *supra* note 341.

<sup>343</sup> See U.S. PHIL. COMM’N REPORT, *supra* note 339, at 14.

<sup>344</sup> OFFICIAL OPINIONS OF THE ATTORNEY-GENERAL OF THE PHILIPPINE ISLANDS ADVISING THE CIVIL GOVERNOR, THE HEADS OF DEPARTMENTS, AND OTHER PUBLIC OFFICIALS IN

prisoners in a limited number of provinces also had a limited duration. Months later, after declaring that “armed insurrection no longer exists in the Province of Batangas,” the Philippine Commission expressly repealed those exceptions on June 23, 1902.<sup>345</sup> This coincided with President Roosevelt’s declaration of an end to military conflict in the territory on July 4, 1902.<sup>346</sup> Since these exceptions to the availability of habeas lasted for less than a year, the reader should not be surprised that cases about that suspension of the writ never made their way to the U.S. Supreme Court. The process for appeals to the U.S. Supreme Court can often take years, not months.

*c. The Executive Branch Avoided Adjudication of Those Exceptions*

While the early statutory exceptions to the availability of habeas in the Philippine Islands catalogued above were repealed by July 1902,<sup>347</sup> the reader should recall that Congress subsequently passed an act allowing the President to *continue* suspending the privilege of the writ of habeas corpus in the case of insurrection. The President did not shy away from exercising that authority, and this situation ultimately led to a constitutional challenge that made its way to the nation’s highest court brought on behalf of a prisoner named Felix Barcelon.<sup>348</sup>

Barcelon was originally detained by the territorial government on April 19, 1905, after being called to testify as a witness in separate court proceedings. When he was released from the witness stand, he was detained by Colonel David J. Baker, Jr. of the Philippines Constabulary.<sup>349</sup> Then, on August 2, 1905 (more than three months later), attorneys Fred C. Fisher and Charles C. Cohn appealed to the Supreme Court of the Philippine Islands for the writ of habeas corpus.<sup>350</sup> The very next day the Supreme Court of the Philippine Islands ordered that the officers detaining Barcelon show cause as to why the writ of habeas corpus should not be granted, and the Attorney General of the Philippines responded on August 4, 1905.<sup>351</sup>

In substance, the Attorney General of the Philippines responded that the writ should not issue for three reasons: (1) the writ of habeas corpus had been suspended

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RELATION TO THEIR OFFICIAL DUTIES 89–90 (1903); *see also* U.S. PHIL. COMM’N, ACT NO. 272 (1901) (amending Section 529 of the United States Philippine Commission Act No. 190 to provide that “[i]t shall be a conclusive answer to a writ of habeas corpus against a military officer or soldier, and a sufficient excuse for not producing the prisoner in all other organized provinces to those herein named, if the Commanding General or any general officer in command of the department or district shall certify that the prisoner is held by him” as one of five categories of prisoners subject to military jurisdiction).

<sup>345</sup> U.S. PHIL. COMM’N, ACT NO. 421, § 4 (1902).

<sup>346</sup> *The Philippine American War, 1899–1902*, *supra* note 326.

<sup>347</sup> *See* U.S. PHIL. COMM’N, ACT NO. 421, § 4.

<sup>348</sup> Fisher *ex rel.* Barcelon v. Baker, 203 U.S. 174, 178 (1906).

<sup>349</sup> Transcript of Record at 1, Fisher *ex rel.* Barcelon v. Baker, 203 U.S. 174 (1906) (No. 214).

<sup>350</sup> *Id.* at 2.

<sup>351</sup> *Id.* at 8.

by the Governor General in the Province of Batangas, depriving the court of jurisdiction to hear an application for habeas corpus; (2) Barcelon allegedly consented to his own detention (and had not consented to representation by Fisher and Cohn); and (3) Barcelon was being held under surveillance because he was “a witness for the prosecution in the case of the United States against Pedro A. Roxas, pending in the Court of First Instance of Batangas Province, in which cause the applicants Fred C. Fisher and Charles C. Cohn are attorneys for the defense.”<sup>352</sup> The Philippine Government further explained that the detention was necessary “because of intimidations and threats to kill the said Barcelon if he did not deny his declarations made to the authorities at Nasugbu and testify before the Court that he had been maltreated and compelled to make such declarations.”<sup>353</sup> The Supreme Court of the Philippine Islands granted judgment in favor of the government solely on the “jurisdictional grounds” that the political branches had legitimately suspended the writ of habeas corpus, ignoring the government’s further arguments on the merits of his detention.<sup>354</sup>

Fisher and Cohn then filed a petition with the U.S. Supreme Court for a writ of error, setting the stage for a constitutional challenge over the legitimacy of the resolution that had suspended habeas corpus in the provinces of Cavite and Batangas.<sup>355</sup> Precise dates matter here. On the same day that their petition was filed—October 19, 1905—the Civil Governor of the Philippine Islands issued a proclamation revoking the Philippine Commission’s prior suspension of habeas corpus.<sup>356</sup> It would seem a remarkable coincidence if these two events were not related.<sup>357</sup> Indeed, the Civil Governor’s action allowed Solicitor General Hoyt to make the following argument after longer (and less convincing) arguments about the authority of the political branches to suspend the Great Writ in the Philippines:

If the application herein had been renewed after October 19, 1905,  
and denied, or if the writ had been granted and then dismissed,

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<sup>352</sup> *Id.* at 9–10.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 23–42.

<sup>355</sup> Fisher *ex rel.* Barcelon v. Baker, 203 U.S. 174, 179 (1906).

<sup>356</sup> *Id.* at 179–80.

<sup>357</sup> For his part, Solicitor General Hoyt represented on behalf of the United States that the January 31, 1905 proclamation suspending habeas corpus “was revoked as soon as that step could safely be taken.” Brief for the United States at 47, Fisher *ex rel.* Barcelon v. Baker, 203 U.S. 174 (1906) (No. 214). This language is remarkably similar to the answer provided when General Mena was later released from detention in the Canal Zone. *See infra* Part IV.C.4. There is ample reason to question this assessment that the suspension in the province of Cavite was revoked as soon as safely possible. *See, e.g.*, U.S. PHIL. COMM’N, SIXTH ANNUAL REPORT OF THE PHIL. COMM’N 1905 (pt. 1) 213 (1906) (providing a report from August 15, 1905 from the Office of the Governor of the Province of Cavite discussing the suspension of habeas corpus in the province which states that “[t]he writ still remains suspended, but for some time past no arrests have been made except such as could be immediately acted upon in a court of law.”).

that determination would necessarily have proceeded on other grounds than the suspension of the writ, and the present case would have died from inanition.

Is there not, then, a mere moot question here, which the court will decline to consider under well-settled precedents?<sup>358</sup>

Solicitor General Hoyt also asked the Court to “notice of its own motion a defect of jurisdiction patent on the record,” stating that the petitioners “have come up on writ of error and should have come by appeal.”<sup>359</sup> This latter argument was reminiscent of the jurisdictional argument that Hoyt had successfully put forward in the *Nifou* matter in the Canal Zone in 1904, and the jurisdictional argument that Hoyt later would make again in *Coulson*.<sup>360</sup>

The U.S. Supreme Court accepted both propositions offered by Hoyt, finding the dispute in *Fisher* to be moot in light of the changed circumstances,<sup>361</sup> but ultimately disposing of the case by accepting the principle that a proceeding for habeas corpus is a civil proceeding and should have been brought by the petitioners though a writ of appeal rather than a writ of error.<sup>362</sup> That decision allowed the Court to entirely bypass the “[v]ery grave constitutional questions” raised in the pleadings, a fact not lost on contemporary observers.<sup>363</sup>

#### 4. Executive Constitutional Avoidance in the Canal Zone

Just as in the Philippine Islands, habeas was voluntarily extended to the Canal Zone shortly after the U.S. government took control over the territory.<sup>364</sup> These developments effectively rendered unnecessary (and theoretical) most constitutional questions related to whether the Great Writ would have been available to prisoners (alien or otherwise) on the island short of statutory enactment. But other constitutional concerns abounded, resulting in legal challenges.

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<sup>358</sup> Brief for the United States, *supra* note 357, at 48.

<sup>359</sup> *Id.* at 9.

<sup>360</sup> *See supra* Part IV.A.

<sup>361</sup> *See Fisher*, 203 U.S. at 181 (“The question ruled by the court below and solely argued before us became in effect a moot question, not calling for determination here.”).

<sup>362</sup> *Id.*

<sup>363</sup> *See* Howard Thayer Kingsbury, *Writs of Error and Appeals from the New Territorial Courts*, 16 *YALE L.J.* 417, 419 (1907).

<sup>364</sup> *See supra* Part III. As in the Philippine Islands, most other constitutional rights were also recognized in the Canal Zone by legislative enactments. *See* ROBERT W. AGUIRRE, *THE PANAMA CANAL* 194 (2010) (comparing the protections offered by the Canal Zone “bill of rights” with the U.S. Bill of Rights, noting that “[t]he pattern in discrepancies and omissions seems to be that individual civil rights were not guaranteed if they posed a risk to public health or public safety,” and providing examples like the absence of a right to bear arms).

Just as with the Philippine Islands, for example, there were serious constitutional questions about the extent to which Congress had impermissibly delegated its legislative powers to the President in the Canal Zone. At least in the Philippine Islands, most legislative powers were exercised by Congress in setting up a civil government by 1902, and the legislative power ceded to executive branch officials was relatively narrow (e.g., the power to suspend the writ of habeas corpus).<sup>365</sup> By contrast, the powers ceded by Congress over the Canal Zone were extensive; the Spooner Act (the sole act passed by Congress related to the Canal Zone for nearly a decade) almost entirely delegated the task of forming the Canal Zone government to the President.<sup>366</sup> Moreover, the Spooner Act only authorized presidential action within a narrow period of time, and the Canal Zone government continued well after this limited congressional authorization (despite failed attempts to have the Spooner Act extended).<sup>367</sup>

Petitioners were quick to seize upon these questionable bases of presidential authority to challenge the legitimacy of the initial Canal Zone courts (before the eventual authorization by Congress of a U.S. District Court for the Canal Zone years later). In pursuing an appeal to the U.S. Supreme Court in the *In re Nifou* matter, for instance, the petitioner raised “basic questions of authority and legitimacy” related to the governance of the Canal Zone that reached far beyond the substantive merits of the circuit court’s denial of the relief requested in Nifou’s original habeas petition.<sup>368</sup> Indeed, Nifou’s appeal was not just about the questionable basis of presidential actions in light of congressional inaction; it also raised questions that stemmed from presidential (rather than congressional) inaction and failure to govern. Most notably, the petitioner argued that appeal to the U.S. Supreme Court was necessary because the President had failed to establish a Supreme Court of the Canal Zone called for by the I.C.C. Acts establishing the Canal Zone government.<sup>369</sup> As a result of this failure to act, the petitioner argued that, “there was no Supreme Court of the Canal Zone and that the decision of the Circuit Court was a final order from the highest court of record.”<sup>370</sup> In other words, the petitioner asserted that appeal to the U.S. Supreme Court was simply his only option for appellate review.<sup>371</sup> Solicitor General Hoyt responded by arguing that the petitioner could wait for the Supreme Court of the Canal Zone to be organized if he wanted to appeal the circuit court’s habeas ruling.<sup>372</sup>

Though the Canal Zone’s military governor reportedly reacted with “uncomprehending irritation” when asked about Nifou’s appeal while testifying before Congress,<sup>373</sup> the military government of the Canal Zone was well aware that the *Nifou*

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<sup>365</sup> See *supra* Part IV.C.3.

<sup>366</sup> Jackson, *supra* note 178, at 7.

<sup>367</sup> BRAY, *supra* note 69, at 55.

<sup>368</sup> *Id.* at 82.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 81.

<sup>371</sup> *Cf. id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 81 n.40.

case raised difficult legal issues before the petitioners filed their briefs with the Supreme Court. Indeed, in anticipation of the challenge, the Government took action to change the facts on the ground. Within several months of the denial of Nifou's original habeas petition by the district court—and before the Supreme Court was presented with or ruled on Nifou's petition—the first meeting of the Supreme Court of the Canal Zone was convened, an act seen as forced on Secretary Taft by the *Nifou* case.<sup>374</sup> The meeting was very short; according to the official minutes, only one justice was in attendance and, “[t]here being no other justice, the Court was adjourned until the further order of the Chief Justice, or until the second Monday in July, 1905.”<sup>375</sup> Later, on February 24, 1905, the President appointed a second justice for the nascent territorial supreme court.<sup>376</sup> Based on these developments, the record was clear that the Supreme Court of the Canal Zone would soon be sitting and available to accept appeals. Perhaps we should not be surprised then that the U.S. Supreme Court summarily denied Nifou's motion for leave to file for writs of habeas corpus and certiorari on May 1, 1905.<sup>377</sup> The Court did not explain its reasons for denying leave, but legal scholars may surmise that the steps taken by the administrators of the Canal Zone were aimed at reassuring the Court that an alternative route of appellate review was being made available that would render Nifou's arguments about the availability of any appellate review moot. Those steps may have succeeded.<sup>378</sup>

*Coulson v. Canal Zone* followed a similar trajectory. The case of Adolphus Coulson, the reader may recall, involved the question of whether a defendant accused of murder in the Canal Zone had the constitutional right to trial by jury.<sup>379</sup> As we already know, the Supreme Court did not consider that constitutional question, having denied Coulson's appeal through three separate writs on jurisdictional grounds.<sup>380</sup> But events that occurred *before* the Court's ruling reveal some concern in the executive branch about how the Court *might* rule.

Here, as elsewhere, the timeline is important. Coulson was convicted in February 1907, and the U.S. Supreme Court rejected his request for a writ of error in November 1908.<sup>381</sup> In between those dates—on February 6, 1908—the President issued an

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<sup>374</sup> *Id.* at 82.

<sup>375</sup> *Id.* (quoting the Supreme Court of the Canal Zone meeting minutes and referring to the meeting as “little more than a gesture but an acknowledgment of intent”).

<sup>376</sup> *Id.* at 84. The President accepted the resignation of the first justice on March 23, 1905, but the executive branch did have three sitting justices by the time the court's expected second meeting in July 1905. *Id.* at 84–85.

<sup>377</sup> *Id.* at 81.

<sup>378</sup> In one of its first actions, the Supreme Court of the Canal Zone then dismissed Nifou's appeal “without consideration” on July 10, 1905. *Canal Zone v. Nifou*, 1 Canal Zone Rep. 135 (1905).

<sup>379</sup> BRAY, *supra* note 69, at 87–88; *see also supra* Part IV.A.

<sup>380</sup> *See supra* Part IV.A.

<sup>381</sup> *Id.*

executive order extending the right of trial by jury in capital cases in the Canal Zone.<sup>382</sup> It was hardly a coincidence. As Canal Zone Governor George Washington Goethals later recalled about *Coulson*,

As might have been expected, the case brought on considerable discussion concerning conditions on the Isthmus, and the President, by executive order, directed that in all criminal prosecutions in the Canal Zone where the penalty of death or imprisonment for life might be inflicted the accused should enjoy the right of trial by an impartial jury . . . .<sup>383</sup>

This change by executive order may have offered little comfort to Adolphus Coulson (who already had been sentenced to death without a jury trial), but it appears to have been aimed at minimizing the consequences of Coulson's pending petition. It may also have been aimed at influencing the Supreme Court—which had not decided yet whether to accept the case.

The President's decision to *voluntarily* extend the right to trial by jury to the Canal Zone in capital cases may seem surprising in light of the fact that the U.S. Supreme Court had already found that the right to trial by jury did not apply through the Constitution on its own force in other territories in *Dorr v. United States*.<sup>384</sup> Then again, *Dorr* was decided by a deeply divided Supreme Court,<sup>385</sup> and the President may have justifiably feared reversal of that precedent. Indeed, the President's preemptive changes to address the precise legal challenges raised in the *Nifou* and *Coulson* matters suggest that, with the Canal Zone (as with Puerto Rico, Cuba, and the Philippine Islands), there was some worry that the petitioners' challenges in the Canal Zone could succeed. Despite Solicitor General Hoyt's success in getting the Supreme Court to punt on those early Canal Zone cases on jurisdictional grounds, the executive branch was acutely aware that the actions of Canal Zone courts would one day, as recognized by Governor Magoon in 1906, be "reviewed by the Supreme Court of the United States."<sup>386</sup>

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<sup>382</sup> *Id.*

<sup>383</sup> See GOETHALS, *supra* note 84, at 72.

<sup>384</sup> 195 U.S. 138, 149 (1904).

<sup>385</sup> While only Justice Harlan dissented from the Court's opinion, see *id.* at 154–58 (Harlan, J., dissenting), three other Justices joined in a concurring opinion that effectively attributed their decision on *stare decisis* rather than agreement on the merits. See *id.* at 153–54 (Peckham, J., concurring) (referencing *Hawaii v. Mankichi*, 190 U.S. 197 (1903) and noting "[t]hat case was decided by the concurring views of a majority of this court, and although I did not and do not concur in those views, yet the case in my opinion is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands." (emphasis added)).

<sup>386</sup> BRAY, *supra* note 69, at 56 (quoting S. DOC. No. 59-401, at 910 (1906)).

Governor Magoon's prediction was ultimately validated when Congress passed the Panama Canal Act in 1912,<sup>387</sup> which set forth the terms upon which the President was authorized—upon the completion of the canal—to “discontinue the Isthmian Canal Commission” that governed the Canal Zone during the period of construction and to establish in its place authorities “to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone.”<sup>388</sup> While the Panama Canal Act (like the Spooner Act before it) left the President with considerable discretion in crafting the new Canal Zone government, Congress gave the President less leeway in establishing the new Canal Zone courts.<sup>389</sup> Instead, the Act prescribed the specific structure of the courts within the Canal Zone and allowed for appellate review of decisions from those courts by the Fifth Circuit Court of Appeals and, ultimately, the U.S. Supreme Court.<sup>390</sup>

Despite this congressional directive, the situation with regards to appellate review of Canal Zone decisions in Article III courts remained murky for some time after the passage of the Panama Canal Act. It is worth noting, for example, that the Panama Canal Act was passed by Congress *before* the Supreme Court of the Canal Zone issued its opinion in *Canal Zone v. Mena*.<sup>391</sup> But whether the Act (and its jurisdictional grant to Article III courts) applied to the Canal Zone at the time of the *Mena* case is less certain. Instead, the Act specified that “[t]he existing courts established in the Canal Zone by executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established.”<sup>392</sup> The Supreme Court of the Canal Zone was obviously still functioning at the time that it heard *Mena*'s petition, which suggests that the President had not yet established the courts called for by the Act. In a potential loophole of epic proportions, this presidential inaction arguably delayed the congressional grant of appellate jurisdiction to Article III courts, because the Act specified that it was the opinions of the new courts—and not the opinions of their predecessors—that could be appealed to the Fifth Circuit Court of Appeals and the U.S. Supreme Court. The President did not act to create the new Canal Zone courts until March 12, 1914.<sup>393</sup>

These facts may explain what happened in the Canal Zone following the Supreme Court of the Canal Zone's decision to issue the writ of habeas corpus for General Mena and then deny the relief requested on the merits. As Canal Zone Governor Goethals later testified, the favorable decision in the *Mena* case was a surprise to the

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<sup>387</sup> Pub. L. No. 62-337, 37 Stat. 560 (1912).

<sup>388</sup> *Id.* at § 4, 37 Stat. at 561.

<sup>389</sup> *See, e.g., id.* at § 8, 37 Stat. at 565 (detailing the structure of the new court system that would replace the courts initially set up by the President once construction of the canal was complete).

<sup>390</sup> *Id.* at § 9, 37 Stat. at 566.

<sup>391</sup> *Canal Zone v. Mena*, 2 Canal Zone Rep. 170 (1912).

<sup>392</sup> 37 Stat. at 561.

<sup>393</sup> BRAY, *supra* note 69, at 90 (citing Exec. Order No. 1897).

Government's counsel, who had privately informed Goethals that "he was of the opinion that the writ would issue and that I would have to comply with it."<sup>394</sup> As a result, Goethals notified the War Department that "if the writ [was] issued [he] would comply," and the War Department responded with instructions directing that "[s]hould the court order release you will give the order its proper effect."<sup>395</sup> Robert Shaw Oliver, Acting Secretary of War, relayed the same opinion to the Secretary of State as follows: "Counsel for Commission advises that [the] court will probably grant the writ, and that, unless instructed to contrary, I will have to comply with the order of the court."<sup>396</sup>

These officials must have been surprised when the Supreme Court of the Canal Zone did not order Mena's release. But that was not the end of the story. Instead, less than a month after the court issued its opinion in *Mena*, reports surfaced that the U.S. government would release General Mena in light of improving circumstances in Nicaragua.<sup>397</sup> Whatever relief the headline may have generated for General Mena, it appears to have been premature, since Mena remained under surveillance in the Canal Zone for more than three months after the announcement that his release was imminent.<sup>398</sup> On March 11, 1913, Mena's attorneys reacted to this unexplained delay by sending President Wilson—who had by then succeeded Taft—a "petition for his release, asserting that he had had no trial and that there was no reason for his being held a prisoner for six months at Ancon."<sup>399</sup> A month later, President Wilson apparently granted the petition, formally releasing Mena from custody.<sup>400</sup>

General Mena was held in U.S. custody in the Canal Zone for roughly seven months, a far cry away from the decade of detention that prisoners have now faced at Guantanamo Bay.<sup>401</sup> But the precise reasons for President Wilson's decision to release General Mena remain a mystery. It is possible that Wilson genuinely believed that the detention had outlived its usefulness, and that the passage of seven months

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<sup>394</sup> *Congressional Hearing on Panama Canal: 1913*, *supra* note 132, at 142.

<sup>395</sup> *Id.*

<sup>396</sup> Letter from Acting Secretary of War Robert Shaw Oliver to the Secretary of State, Nov. 4, 1912, in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1065* (1919).

<sup>397</sup> *See Gen. Mena to be Freed*, N.Y. TIMES, Dec. 6, 1912 (noting Mena would be freed even though "the courts have sustained the right of the United States Government to keep him in custody").

<sup>398</sup> *See Gen. Mena Seeks Release: Nicaraguan Revolutionist Sends a Petition to President Wilson*, N.Y. TIMES, Mar. 12, 1913.

<sup>399</sup> *Id.*

<sup>400</sup> *See Wilson Releases Gen. Mena*, N.Y. TIMES, Apr. 20, 1913.

<sup>401</sup> Duration was so central to the petitioners' cases in *Boumediene* that Seth P. Waxman began oral arguments by citing the fact that all of the petitioners "have been confined at Guantanamo for almost six years, yet not one has ever had meaningful notice of the factual grounds of detention or a fair opportunity to dispute those grounds before a neutral decision-maker." Transcript of Oral Argument, *supra* note 31, at 4.

had rendered Mena less of a threat to peace and order in Nicaragua.<sup>402</sup> But given that another revolution broke out in Nicaragua less than a month before Mena sent his petition, stability in Nicaragua seems an unlikely explanation.<sup>403</sup>

A more likely explanation is rooted in the particular circumstances created by the passage of the Panama Canal Act. By the time of General Mena's detention, the Solicitor General would find it more difficult to credibly argue that Congress had not provided Article III courts with appellate jurisdiction over the Canal Zone courts, as Solicitor General Hoyt had for the *Nifou* and *Coulson* matters. Instead, Congress had finally legislated for the Canal Zone and that legislation provided that the Fifth Circuit and the U.S. Supreme Court would have appellate jurisdiction over cases arising in the territory. The Solicitor General may have been able to argue that Congress did not intend for Article III courts to review opinions until the new judicial system was in place, but that seems like a far weaker argument than carried the day in *Nifou* and *Coulson*—and it would have highlighted the prolonged delay setting up the courts prescribed by Congress. This context may help to explain why President Wilson, having received General Mena's petition for release in March 1913,<sup>404</sup> quickly granted the relief sought.<sup>405</sup>

Whatever reason prevailed, General Mena's release ended a case that may have presented the closest parallels to the situation at Guantanamo Bay: an enemy combatant was brought to a territory in which the U.S. government had complete control but lacked formal sovereignty, and the President claimed the right to indefinitely detain him as a threat without formal charges. But one fact ruins the comparison: unlike detainees at Guantanamo Bay, General Mena (like noncitizen Oli Nifou before him) promptly received a habeas hearing before a judge to confirm the legitimacy of his detention.<sup>406</sup> Moreover, as communications within the War Department demonstrate, it was *not* understood that the writ was simply unavailable to an alien enemy combatant like General Mena in a territory outside of the formal sovereignty of the United States. To the contrary, the assumption was that the writ would be granted.

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<sup>402</sup> There is some evidence that the U.S. Department of State had become of the opinion that Mena's departure from the Canal Zone "would no longer constitute a serious menace to the people of Nicaragua" as early as November 8, 1912. Letter from Acting Secretary of State Huntington Wilson to the Secretary of War, Nov. 8, 1912, in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES* 1065–66 (1919). But the War Department continued to hold Mena for months following that determination, raising questions about the grounds for his prolonged detention.

<sup>403</sup> See *New Nicaraguan Revolt*, N.Y. TIMES, Feb. 25, 1913 (reporting on a revolt led by Francisco Vaca in Chichigalpa, Nicaragua). Indeed, General Mena eventually led another revolt in Nicaragua in 1926, before his assassination two years later. *Mena Victim of Assassin's Gun*, PRESCOTT EVENING COURIER, May 22, 1928, at 1.

<sup>404</sup> *Gen. Mena Seeks Release*, *supra* note 398.

<sup>405</sup> *Wilson Releases Gen. Mena*, *supra* note 400.

<sup>406</sup> *We Still Hold Mena: Not Under Taft's Orders—Zone Court Defers Deciding on Release*, N.Y. TIMES, Nov. 7, 1912, at 8.

*D. Constitutional Questions and the Specter of Article III Review*

As the cases discussed above reveal, the Supreme Court's persistent avoidance of constitutional questions at the time of the Insular Cases was far from a passive endeavor. It would have been far easier for the Court to establish a bright-line rule on the extent to which the Constitution applied to overseas possessions. Instead, the Court continued to decide dozens of Insular Cases on a case-by-case basis, refraining from any bright-line rule on the broader constitutional question. Petitions continued to be filed precisely because the Supreme Court continued, on occasion, to entertain them.

On some level, the Court's reluctance to adopt a bright-line rule may have been the result of the judicial politics underlying a deeply divided Court. But the Court may have also been making a deliberate decision to pursue a form of strategic ambiguity on these complex constitutional questions. While granting a fair amount of leeway to the political branches in practice, the Court continued to leave the door open to constitutional challenges—and, in doing so, the Court's "active avoidance" forced the political branches to actively consider how the Court *might* eventually rule, if pushed. Through that process, individual high-profile challenges often gave rise to broad protections modeled on constitutional provisions. Those rights were often implemented in advance of Court rulings and without the heavy hand of the Court. Out of judicial uncertainty a pseudo-constitutional order was formed.

But, for the most part, it was only a pseudo-constitutional order. The Executive and Legislative Branches, fearing adverse precedent, were quick to recognize *most* rights in newly acquired territories and to act to render moot individual cases that called attention to the few exceptions. Similarly, the courts resisted broad declarations, limiting themselves to the narrow facts of appeals brought and often readily accepting jurisdictional grounds to punt appeals. Because the political branches and the courts understood that legal brinkmanship could precipitate a constitutional crisis, uncertainties about the extent to which certain rights extend to such territories under the Constitution persist to this day.

V. THE COMMON LAW ROOTS OF CONSTITUTIONAL UNCERTAINTY

Much of the discussion above has rested on the intricacies of U.S. constitutional law and principles of appellate jurisdiction and practice in U.S. courts. As a result, it is worth considering whether our uncertainty about the reach of the writ of habeas corpus (and other protections under the U.S. Constitution) is an anomaly of the American legal system or whether it is a common ailment that reaches other common law jurisdictions far beyond U.S. control. The fact that we must ask that question after more than a century of direct British rule suggests the answer that this uncertainty is rooted in common law practices stretching well beyond our constitutional processes, and the examples provided below confirm that conclusion.

Indeed, for centuries preceding the birth of the American Republic, legal scholars had attempted to catalog the nature and reach of the original writs under the English

common law. Beginning in 1531, this evolving register of writs occupied the time and efforts of some of the finest legal minds across the British Empire. Professor Frederic William Maitland described the result of these Herculean efforts as follows: “It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book.”<sup>407</sup> It is worth recalling that Jamestown—England’s first permanent settlement in the Americas—was founded in 1607,<sup>408</sup> a mere seventy years after English jurists first embarked upon this project.

The Framers of the U.S. Constitution were certainly aware of these difficulties tracing precedent, particularly when it came to the application of the Great Writ. Historians have noted, for example, that there was substantial disagreement between the colonists and jurists in England on the manner and extent to which the writ of habeas corpus first arrived in the American colonies prior to independence.<sup>409</sup> Understanding how the colonists navigated (and at times circumvented) these issues is critical to understanding what the Framers understood was the reach of the Great Writ at the time of independence.

On that score, the evidence indicates that, despite persistent obstacles in England, the colonists believed they were entitled to the writ, and the writ was regularly applied by colonial courts even in the absence of specific statutes passed by Parliament or colonial legislatures.<sup>410</sup> These cases were often disposed of with sparse documentation,<sup>411</sup> which may be a function of how courts historically focused on common law habeas as an extraordinary remedy in practice, focusing on “pragmatic resolutions” and a “disinclination to pronounce broad rules of law.”<sup>412</sup> This is all to say that the colonists, in construing their right to the writ of habeas corpus, never looked merely to the opinions or rulings of jurists in England, which (based on the Canadian experience) could have been a long wait.<sup>413</sup>

This was all known by the Supreme Court at the time of the Insular Cases. Indeed, just as detentions at Guantanamo Bay have spurred a cottage industry focused on investigating the territorial reach of the Great Writ,<sup>414</sup> the earlier acquisition of

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<sup>407</sup> F.W. Maitland, *The History of the Register of Original Writs*, 3 HARV. L. REV. 97, 97 (1889).

<sup>408</sup> William F. Swindler, *Common Law at Jamestown Celebration*, 3 AM. J. LEGAL HIST. 282, 282 (1959).

<sup>409</sup> See generally Carpenter, *supra* note 115.

<sup>410</sup> See *id.* at 22–23.

<sup>411</sup> See generally Halliday & White, *supra* note 43.

<sup>412</sup> Eric M. Freedman, *Habeas Corpus in Three Dimensions—Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 595 (2011).

<sup>413</sup> As the majority noted in *Boumediene*, it was not until the middle of the nineteenth century that English courts “could issue the writ to Canada, notwithstanding the fact that Canadian courts also had the power to do so.” *Boumediene v. Bush*, 553 U.S. 723, 750 (2008).

<sup>414</sup> See, e.g., Sarah H. Ludington, *The Dogs that Did Not Bark: The Silence of the Legal Academy During World War II*, 60 J. LEGAL EDUC. 397, 399 (2011) (referencing the hundreds of law review articles relating to detentions in the War on Terror and contrasting that

overseas possessions sparked a body of (largely originalist) literature related to the Founders' understandings regarding the scope of the Great Writ and other constitutional protections.<sup>415</sup>

Contemporary articles also explored the manner in which Great Britain governed her territories, with an eye towards setting up similar systems of governance in America's new overseas colonies. Before his stint as Philippine Attorney General, for example, Lebbeus R. Wilfley published an article elaborating on, among other things, the lesson learned by the British from the American Revolution: to "rule with a loose rein that they may rule at all."<sup>416</sup> Wilfley's article describes a process through which all authority in England's overseas territories was devolved to territorial institutions reporting to the Home Government through a territorial governor.<sup>417</sup> Wilfley's description is particularly prescient given the nearly identical form of civil governments established in the U.S. Insular Possessions by the President and Congress shortly after his article was published.

The bedrock understandings underlying these developments paradoxically led the U.S. government to establish "benevolent" territorial governments acknowledging the reach of the vast majority of constitutional rights to inhabitants of the Insular Possessions, but often with attenuated means of appeal to the "home government" for rights denied. Given the interwoven development of these governance mechanisms for United States and British territorial possessions, it should not be that surprising that questions about appellate jurisdiction undermined legal certainty about habeas corpus in British territories just as similar questions about appellate jurisdiction left uncertainty about the reach of constitutional rights to U.S. territories. Moreover, for many of the reasons Wilfley describes, political authorities in England actively sought to avoid constitutional crises related to their overseas territories,<sup>418</sup> just like political authorities did in the United States. Courts in England even used forms of constitutional avoidance similar to those employed by Article III courts. All of these discoveries suggest that the problems affecting the clarity of habeas jurisprudence and case law in the United States are very much common law problems rather than just problems of American constitutional design.

The next Sections explore these issues by focusing on three separate examples. Sections A and B look at how the British government, just like the U.S. government, took steps to "voluntarily" expand protections in a manner that left most constitutional

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literature with the absence of similar academic writings related to the detention of Japanese Americans in World War II).

<sup>415</sup> It was not a coincidence, for example, that the late Professor A. H. Carpenter published an extensive article on the original roots of habeas corpus in the American colonies in 1902, just three years after the acquisition of most of the Insular possessions after the Spanish-American War. *See generally* Carpenter, *supra* note 115.

<sup>416</sup> Lebbeus R. Wilfley, *How Great Britain Governs Her Colonies*, 9 YALE L.J. 207, 209 (1900).

<sup>417</sup> *See id.* at 211–12.

<sup>418</sup> *Id.* at 210.

questions more theoretical than identifiable in practice. Section A begins with a quick look at the actions of the political branches in England's American colonies and Section B follows up with a look at similar events that unfolded on the island of Cyprus shortly after England assumed control (but not sovereignty) over the island in the late nineteenth century. Finally, Section C examines a case that arose in the British Mandate of Palestine as an example of the willingness of British courts to identify, but then avoid deciding on jurisdictional grounds, constitutional questions that could have otherwise resulted in a broader constitutional crisis.

*A. Conflicting Bases of the Privilege in the American Colonies*

In *Boumediene*, Justice Scalia makes much of the fact that the Great Writ was not extended to non-sovereign possessions through Parliament's passage of the Habeas Corpus Act of 1679.<sup>419</sup> Scalia neglects to mention, of course, that the writ *also* did not arrive in England's American colonies pursuant to that act—or through the generosity of British jurists and commenters.<sup>420</sup> Quite to the contrary, the Privy Council actively tried to prevent the spread of protections under the Habeas Corpus Act of 1679 to the American colonies by rejecting enactments by colonial legislatures that embraced the Act's provisions. In 1692, for example, the Privy Council rejected a Massachusetts statute that “was practically a copy of the English act.”<sup>421</sup> Pennsylvania also repeatedly enacted similar provisions for issuing writs of habeas corpus in its court laws, and, in an eighteenth century version of Whac-a-Mole, English authorities “frequently” repealed those provisions.<sup>422</sup> Along the same lines, the Privy Council on March 3, 1684 rejected the Charter of Liberties of New York, which contained a provision “[t]hat the Inhabitants of New York shall be governed by and according to the Laws of England,” on the specific basis that the privilege of habeas corpus did not extend to territories where the Act of Habeas Corpus of 1679 did not apply.<sup>423</sup> The Great Writ was apparently considered so essential to the Laws of England that the Privy Council was concerned that even general adoption of the “Laws of England” would irreversibly transplant the writ to New York.<sup>424</sup>

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<sup>419</sup> *Boumediene v. Bush*, 553 U.S. 723, 845–46 (Scalia, J., dissenting).

<sup>420</sup> Prior to the Habeas Corpus Act of 1679, case law in England had established “that the common law of England becomes *ipso facto* the common law of the colonies,” but that “[n]o statute laws made since the settlement would extend to the [colonies] unless they were specially mentioned, or unless they had been adopted by special legislation of the colonies, whose freedom in this respect was limited by the fact that most of their laws required the approval of England.” Carpenter, *supra* note 115, at 19–20. The Habeas Corpus Act of 1679 was silent regarding England's American colonies, and as a result it was not construed as applicable to those territories. *Id.* at 21.

<sup>421</sup> *Id.* at 21.

<sup>422</sup> *Id.* at 23.

<sup>423</sup> *Id.* at 21.

<sup>424</sup> *Id.*

Eventually, aware of the Privy Council's position, colonial legislatures stopped trying to enact habeas statutes. In South Carolina, for example, the proprietors of the colony disallowed (on the grounds that it was "unnecessary") a bill from the colonial council authorizing courts to adopt the Habeas Corpus Act of 1679.<sup>425</sup> This decision by the proprietors has been described as "a double evasion that clearly was designed to avoid any ground that could give rise to an appeal to the Privy Council, and the explicit royal disallowance that would have followed."<sup>426</sup>

The colonists were not the only parties who attempted a "double evasion" when it came to the reach of the Great Writ in the American colonies. Instead, faced with increasing evidence of colonial insubordination regarding the Great Writ, Queen Anne purportedly decided to formally extend the Habeas Corpus Act of 1679 to Virginia during her reign.<sup>427</sup> While Chalmers provides a heroic account of this benevolence, scholars have noted that "[i]t is doubtful if this so-called extension of the writ of habeas corpus really gave the Virginians much more than they already possessed."<sup>428</sup> Moreover, it is even doubtful whether "the Crown in 1710 possessed any power of this kind" to extend an act of Parliament to the colonies.<sup>429</sup> After nearly three decades trying (and failing) to prevent the application of the Great Writ in its American colonies, the Crown eliminated the appearance of insubordination by placing its own stamp on the practice. "If you can't beat them, join them."

By embracing habeas in the colonies, Queen Anne may have been trying to stem the tide of these developments. Indeed, while the Queen claimed to be extending the provisions of the Habeas Corpus Act of 1679 to Virginia, a close analysis of the proclamation delivering the Queen's grant reveals that the penalties for failing to comply with the act were feeble compared to the penalties in England and left almost entirely to the discretion of judges.<sup>430</sup> A judge could be removed by the governor for the failure to follow the act, but even that offered "no special protection against an arbitrary governor."<sup>431</sup> In this manner, Queen Anne's purported extension of the Great Writ to Virginia is remarkably similar to Congress's later Act extending the writ to the Philippine Islands: in both cases, political authorities extended something less than the "full" writ of habeas corpus to an overseas territory, and the political authorities questionably left most authority to implement those protections to the will of the territorial governor. But in both cases, these purported extensions of the writ may have cooled political pressures and minimized the potential for more serious controversies in the territories related to a complete denial of the writ.

Even with royal acknowledgment of the Great Writ in Virginia, courts *located in England* did not suddenly become a hot-bed of habeas activity related to the

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<sup>425</sup> ROBERT SEARLES WALKER, HABEAS CORPUS WRIT OF LIBERTY 101 (rev. ed. 2006).

<sup>426</sup> *Id.*

<sup>427</sup> Carpenter, *supra* note 115, at 18.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 26.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

American colonies. One could draw an inference from the absence of these cases that the common law writ was simply unavailable before 1776 in the American colonies; but the Framers of our Constitution clearly understood that the privilege of habeas corpus extended to their shores, and they enshrined that understanding in the Suspension Clause of the U.S. Constitution.<sup>432</sup> Because this understanding cannot be found in precedential case law from English courts, this gap again demonstrates the problems with drawing conclusions from the absence of reported precedent.

Similar problems would arise as England continued to expand its empire in the nineteenth century. The next Section considers one such example related to the British acquisition of the Mediterranean island of Cyprus, which, initially occupied as a non-sovereign possession and base of military activities, is a particularly good parallel for the U.S. Naval Station at Guantanamo Bay.

### *B. Political Avoidance of Constitutional Questions in Pre-Annexation Cyprus*

The British presence on the island of Cyprus and the U.S. presence at Guantanamo Bay have much in common. Both were initially administered as temporary occupations of areas that were perceived to have strategic importance. Both were intended to assure the independence of a weak regional ally. And both remained long after the party ceding control—but not sovereignty—over each territory came to regret that decision.

#### 1. The Legal Status of the British Occupation

The British occupation of Cyprus in 1878 began in the wake of war between the Russian and Ottoman Empires over the control of territories in Europe and the Caucasus.<sup>433</sup> Militarily, the Russian Empire was the distinct victor in the conflict, its march to Constantinople only restrained by a British threat of war should Russian troops enter the city. The conflict was initially settled by the Treaty of San Stefano, which was a relatively unmitigated victory through which Russia obtained substantial territorial and political concessions from the Ottoman Sultan.<sup>434</sup> This result did not sit well with the British Foreign Secretary, Lord Salisbury, who objected to the treaty on the basis that its “combined effect . . . is to depress almost to the point of entire subjection the political independence of the Government of Constantinople.”<sup>435</sup>

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<sup>432</sup> Had the Framers limited their understanding of the American privilege of habeas corpus to published opinions of courts in England, the Suspension Clause would have been the effective equivalent of the appendix in the body of the Constitution; it would seemingly have no real function, but offer some vague insight into forms of constitutional life from which our own form of government evolved.

<sup>433</sup> *Timeline: Cyprus—A Chronology of Key Events*, BBC.COM (Dec. 13, 2011, 10:05 AM), [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/1021835.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/1021835.stm).

<sup>434</sup> *Treaty of San Stefano*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/world/treaty-san-stefano/p23591> (last visited May 1, 2015).

<sup>435</sup> *English and Austrian Objections: The Whole Treaty Irreconcilable With the Interests*

A Congress of European powers soon convened to address these concerns, resulting in the Treaty of Berlin several months later—which restored some territory to the Ottomans, gave Austria more influence in the Balkans, and essentially left Britain responsible as both a policeman monitoring Ottoman actions and the protector of Ottoman independence.<sup>436</sup> Formally, the treaty allowed Great Britain to occupy Cyprus for these purposes. But the island had already been occupied by Great Britain,<sup>437</sup> pursuant to a conditional convention reached between the British and the Ottoman government just days before negotiations started in Berlin.<sup>438</sup> That temporary convention was soon followed by a defensive treaty, signed before the conclusion of the Congress of Berlin, under which “England occupie[d] Cyprus immediately, and guarantee[d] the integrity of Asiatic Turkey.”<sup>439</sup> Despite total English control over the territory during the occupation, the Ottoman Sultan technically retained formal sovereignty over the island.<sup>440</sup> As such, with British troops already on the ground in Cyprus, the Treaty of Berlin—finalized less than a week later—merely recognized and further legitimized their presence.

## 2. The Curious Case of Major di Cesnola in Cyprus

As British authorities first secured control of Cyprus in 1878, Major Luigi Palma di Cesnola—a naturalized U.S. citizen, a war hero awarded the Congressional Medal of Honor, and a U.S. diplomat—found himself in a difficult situation in the new British territory. For more than a decade, ever since his appointment by President Lincoln as U.S. Consul to Cyprus, di Cesnola had been conducting private archeological explorations on the Mediterranean island.<sup>441</sup> The Cypriot artifacts he collected and shipped west drew significant attention from Western museums and governments.<sup>442</sup>

Di Cesnola’s pursuits, though lauded at home, allegedly violated Turkish laws prohibiting excavations on the island.<sup>443</sup> Tolerated at first, these activities caught the attention of the British military shortly after it took over the administration of Cyprus—a

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*of Europe—Turkey Reduced to a State of Dependence on Russia—The Highways to the East Thus Placed in a Position to be Menaced by Russia*, N.Y. TIMES, Apr. 3, 1878, at 1.

<sup>436</sup> *The European Settlement*, LEWISTON SATURDAY EVENING J. (Western Maine), July 13, 1878, available at <http://news.google.com/newspapers?id=VmUgAAAIBAJ&sjid=a2YFAAAAIBAJ&dq=british%20protect%20ottoman&pg=4536%2C2898188>.

<sup>437</sup> See *Anglo-Turkish Alliance: Immediate Occupation of Cyprus by England*, N.Y. TIMES, July 9, 1878, at 1 [hereinafter *Anglo-Turkish Alliance*].

<sup>438</sup> See *id.*

<sup>439</sup> *Id.*

<sup>440</sup> *The Unsettled Eastern Problem: British Jurisdiction in Cyprus—Hostile Attitude of the Servians and Montenegrins*, N.Y. TIMES, Dec. 18, 1878, at 1 [hereinafter *The Unsettled Eastern Problem*].

<sup>441</sup> See, e.g., *The Cesnola Collection at the Metropolitan Museum of Art*, METRO. MUSEUM OF ART, [http://www.metmuseum.org/toah/hd/cesn/hd\\_cesn.htm](http://www.metmuseum.org/toah/hd/cesn/hd_cesn.htm) (last visited May 1, 2015).

<sup>442</sup> See *id.*

<sup>443</sup> See *Maj. di Cesnola’s Wrong: Insolent Treatment of an American in Cyprus*, N.Y. TIMES, Nov. 28, 1878, at 3 [hereinafter *Maj. di Cesnola’s Wrongs*].

territory over which the Ottoman Sultan retained formal sovereignty.<sup>444</sup> Without a warrant, British officers arrested di Cesnola and delivered him to a traditional Cypriot prison.<sup>445</sup> He was held without bail and all visitors, including his legal adviser, were initially turned away.<sup>446</sup> Di Cesnola was eventually tried and convicted for his violations of Turkish law and ordered to pay a fine. The trial was administered by a local judge—with British supervision.<sup>447</sup>

It may not have been the first example of a foreigner imprisoned and tried under the British administration of Cyprus, but di Cesnola's plight, and its accompanying protest from the U.S. government, drew significant attention to a legal black hole for foreigners in Cyprus, who were suddenly subject to arbitrary arrest by British officials and trial by a local judge with no clear right to habeas and no appeal to higher Turkish or British courts. Outrage over the events quickly made its way to London, where Under Secretary of State for Foreign Affairs Robert Bourke did his best to assure the British Parliament that arrangements were being made to ensure that, on British-controlled Cyprus, "[e]very precaution was taken to secure a fair trial to any foreigner who might be charged with an offence."<sup>448</sup>

Two weeks later, after negotiations between the British government and the Ottoman Sultan over the rights of foreigners detained in Cyprus,<sup>449</sup> an acceptable solution was found. As William Burge's *Colonial Laws and Courts* later summarized the situation, "[t]he law in force in Cyprus is . . . in foreign actions, or in the prosecution of persons not Ottoman subjects, English law in force on December 21st, 1878, as altered and modified from time to time by Cyprus statute law . . ."<sup>450</sup> A similar blanket adoption of English Law, the reader will recall, was contained in the New York Charter of Liberties that the Privy Council rejected in 1684 on the basis that it was understood to incorporate the privilege of habeas corpus as understood in the Magna Charta and the Habeas Corpus Act.<sup>451</sup> But curiously, these developments made English law applicable to all foreigners on Cyprus approximately six

<sup>444</sup> See *Anglo-Turkish Alliance*, *supra* note 437 (providing a brief history of the situation that led up to the British occupation of Cyprus).

<sup>445</sup> *Maj. di Cesnola's Wrongs*, *supra* note 443, at 3.

<sup>446</sup> *Id.*

<sup>447</sup> *Cyprus and the Capitulations*, 4 L. MAG. & REV. 129, 130 (1879).

<sup>448</sup> *Id.* at 131. These actions were reportedly spurred by an inquiry by the United States into "the judicial arrangements in Cyprus . . . growing out of the arrest of Major Di Cesnola for making excavations in [sic] the Island of Cyprus." *England's Foreign Relations: Pretext for a Debate on the Turkish Question—The Result of the Action on the Vote of Censure*, N.Y. TIMES, Dec. 15, 1878, at 1.

<sup>449</sup> See *The Unsettled Eastern Problem*, *supra* note 440 ("The Porte and Great Britain are negotiating concerning British jurisdiction over foreigners in Cyprus. Great Britain recognizes the Sultan's sovereignty over the island, but denies that the capitulation concerning consular jurisdiction is still applicable there.").

<sup>450</sup> WILLIAM BURGE, *COLONIAL LAWS AND COURTS* 149 (Alexander Wood Renton & George Grenville Phillimore eds., 1907).

<sup>451</sup> See Carpenter, *supra* note 115, at 18–29.

months after the British Empire took over the administration of the island rather than at the start of the British administration.<sup>452</sup> Di Cesnola may not have been the first foreigner denied English common law rights on the British-administered island of Cyprus, but, thanks to this change in law after his trial, he may have been the last. Notably, this change occurred *before* the Crown formally annexed the island in 1914, after the Ottoman government declared war on England.<sup>453</sup>

### 3. Lessons from the di Cesnola Affair

Di Cesnola's case, of course, was not explicitly about the writ of habeas corpus. Di Cesnola does not appear to have formally sought the writ, nor was it denied by a court. But the visceral reaction to even his short detention—as expressed by the U.S. government and in the British Parliament—is noteworthy. In England, the political pressure caused by a single high-profile detention led to a quick recognition of nearly all common law rights (and writs) on the island, particularly for foreigners. This easily compares with the actions of the President and Congress recognizing nearly all constitutional rights in the Insular Possessions following individual challenges in each territory. Simply put, the political authorities in both nations saw no need to provoke unnecessary constitutional crises.

#### *C. Habeas Review and Constitutional Avoidance in the Mandate of Palestine*

The developments in Cyprus were, of course, almost entirely political, and, as such, were not recorded in judicial reporters. The colorful Major di Cesnola was not a serious threat to the British Empire, and his detention was so short-lived as to make a meaningful appeal unlikely. But several decades later new detentions presented more serious constitutional questions for the British legal system in the nearby Mandate of Palestine.

### 1. The Legal Status of the British Mandate of Palestine

The British first occupied Palestine in 1917, and its control over the territory was formally recognized when the League of Nations granted it a “mandate” in 1922.<sup>454</sup> Through the mandate system, the Turkish Empire had been divested of sovereignty over Palestine, but sovereignty was not transferred to the United Kingdom.<sup>455</sup> Instead, outright colonial annexation was cast aside for a “conception of international

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<sup>452</sup> BURGE, *supra* note 450, at 149 (“The administration of the island was taken over by England under the Treaty of June 4th, 1878.”).

<sup>453</sup> Marios L. Evriadiades, *The Legal Dimension of the Cyprus Conflict*, 10 TEX. INT’L L.J. 227, 229 (1975).

<sup>454</sup> Assaf Likhovskiy, *In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine*, 29 ISR. L. REV. 291, 311 (1995).

<sup>455</sup> Charles Henry Alexander, *Israel in Fieri*, 4 INT’L L.Q. 423, 424–25 (1951).

guardianship” in which the mandatory Powers were entrusted with the administration of territorial mandates.<sup>456</sup> The United Kingdom did not accept all restrictions on its exercise of sovereign power in Palestine; despite provisions prohibiting mandatory Powers from establishing military fortifications, for example, the United Kingdom made “notorious use of Haifa as [a] British naval base.”<sup>457</sup> But the United Kingdom also did not formally assert its sovereignty over the territory. These comparisons make the situation quite analogous to the legal status of the U.S. Naval Station at Guantanamo Bay.

When the British administration took over government functions in the Mandate of Palestine, it initially “maintained in force the law and, in its main lines, the judicial system which it found there.”<sup>458</sup> But as in Cyprus, the British faced the difficulties inherent in balancing the Ottoman law that had been in force with the procedural safeguards expected under English law.<sup>459</sup> In 1920, two years *before* the British were formally granted the Mandate, an Order in Council, considered “the Magna Charta” of Palestine,<sup>460</sup> officially recognized this balance between Ottoman and English law:

“The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order or may hereafter be applied or enacted. . . . Subject thereto, and so far as the same shall not extend or apply, *the jurisdiction shall be exercised in conformity with the substance of the Common Law* and the doctrines of equity *in force in England*, so far as the circumstances of Palestine and its inhabitants and the limits of His Majesty’s jurisdiction permit, and subject to such qualification as local circumstances render necessary.”<sup>461</sup>

The British also considered broader substantive revisions to the Ottoman penal law to bring it into line with elements of modern criminal law, but those proposed revisions

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<sup>456</sup> Benjamin Akzin, *The Palestine Mandate in Practice*, 25 IOWA L. REV. 32, 33 (1939).

<sup>457</sup> *Id.* at 34.

<sup>458</sup> Norman Bentwich, *The Law and the Courts of Palestine*, 2 CAMBRIDGE L.J. 37, 38 (1924).

<sup>459</sup> Bentwich explicitly compared the British Mandate of Palestine to Cyprus because of this similar mix of law, before suggesting that the lessons learned from Cyprus were minimal because “the circumstances of that secluded island” were not conducive “to any striking legal evolution.” *Id.* at 39.

<sup>460</sup> *Id.* at 38.

<sup>461</sup> *Id.* at 38–39 (emphasis added) (quoting the Order in Council). A Palestine Order in Council dated August 10, 1922 contains similar, but not identical, language. *See Zabrovsky v. Gen. Officer Commanding Palestine*, [1947] A.C. 246 (P.C.) (appeal taken from Palestine).

aroused strong opposition as “an unlawful interference . . . by a temporary ruler who had not obtained definite sovereignty.”<sup>462</sup> The British nevertheless pushed forward with a simplified criminal procedure that “embodie[d] the main principles of English law,” and created a Supreme Court that would “administer those remedies dear to the English system, *habeas corpus* and *mandamus* and the like, which in the Turkish regime were matters of administrative action, but, under our rule of law, are to be granted judicially.”<sup>463</sup>

In practice, it was difficult to understand exactly what the law was in the British Mandate of Palestine. As described in one history:

The system was a mishmash of Turkish, French, Moslem, Jewish, English (common law and equity) and colonial law. The administration of justice was characterized by deprivation. There were no libraries where copies of statutes could be found; *stare decisis* was followed, but court opinions were not published; whoever was quick enough to lay hands on the most recent holding won the case. . . .<sup>464</sup>

These circumstances—particularly the absence of published early opinions—make it difficult for current scholars to trace early habeas cases from the British Mandate of Palestine. But there is considerable evidence that the writ of habeas corpus, as understood under the common law of England, was available in the territory, as evinced by the Privy Council’s 1946 opinion in *Zabrovsky v. General Officer Commanding Palestine*.<sup>465</sup>

## 2. A Test of Habeas Corpus in the Holy Land

The *Zabrovsky* case arose out of a petition for habeas corpus filed in the Supreme Court of Palestine for the release of Arie Ben Eliezer, a “Palestinian citizen” who “had arrived in Palestine at some date before April 17, 1944, from the United States of America.”<sup>466</sup> Mr. Eliezer was arrested by British authorities upon his arrival, detained until October 19, 1944, and then deported to Eritrea, where he was held by British authorities in a detention camp at the time his habeas appeal was

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<sup>462</sup> Bentwich, *supra* note 458, at 42.

<sup>463</sup> *Id.* at 43–45. The author notes in passing that this difference between the administrative actions of the Ottomans and the judicially granted actions of the English is a good example in practice of what legal luminary A. V. Dicey felt was unique about British justice—a deference to ordinary judges and the judiciary. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 334–38 (3d ed. 1889).

<sup>464</sup> Pnina Lahav, *Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat’s Legacy*, 24 ISR. L. REV. 211, 214 (1990).

<sup>465</sup> *Zabrovsky*, [1947] A.C. at 249.

<sup>466</sup> *Id.* at 247.

considered.<sup>467</sup> Though not mentioned in the Privy Council’s opinion, Mr. Eliezer was no ordinary civilian, and his trip was not without consequence to the British government. Instead, Arie Ben Eliezer was a representative of the Hebrew Committee for National Liberation, which had grown out of the delegation of the Irgun National Military Organization to the United States—a paramilitary group that considered itself actively at war with Great Britain at the time he was detained.<sup>468</sup> Moreover, Arie Ben Eliezer was not the only Irgun prisoner in captivity; instead, his attorneys hoped that their appeal to the Privy Council “would result in opening the prison doors to 300 Jews confined in British Eritrea without charge or trial on suspicion of terrorist activities.”<sup>469</sup>

Founded in 1937, the Irgun and a splinter group called the “Stern Gang” engaged in “a decisive underground campaign of assassinations, bombings, hostage-taking, and massacres” directed at British and Arab targets in pursuit of a Jewish national homeland within the Mandate of Palestine.<sup>470</sup> The Irgun could reasonably be considered “terrorists,” and its members were labeled as such by the British and other nationalist Jewish groups in Palestine.<sup>471</sup> The Irgun’s “most sensational” attack came in June 1946 with the bombing of Jerusalem’s King David Hotel, which was aimed at the offices of the civil administration of the British Mandate that occupied the top floors of the hotel, but the Irgun also engaged in repeated attacks against British military and civilian interests in Palestine and abroad, including an attempted assassination in Cairo and letter bombings directed by members in Europe.<sup>472</sup> The Irgun had temporarily called off its military struggle against the British at the start of World War II, but by 1944—with “the destruction of the Jews of Europe and Britain’s persistent refusal to admit Jewish refugees into Palestine”—the Irgun once again declared “a war against the British Government . . . as part of the political struggle for the rescue of the Jews of Europe.”<sup>473</sup> As part of that war on the British Government, the Hebrew Committee for National Liberation sent Arie Ben Eliezer from the United States to Palestine, where he was detained by British authorities.<sup>474</sup>

When faced with a habeas petition filed by Arie Ben Eliezer’s father, the Supreme Court of Palestine refused to order Arie Ben Eliezer’s release from detention, and the Privy Council affirmed that decision—but not because the writ did not run to the non-sovereign territory. To the contrary, the Privy Council directly confirmed

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<sup>467</sup> *Id.* at 247–48. Mr. Eliezer was moved from Eritrea to a separate detention camp in Sudan for a period, but he was eventually returned to Eritrea. *Id.* at 248.

<sup>468</sup> JOSEPH AGASSI, *LIBERAL NATIONALISM FOR ISRAEL 192–93* (1999).

<sup>469</sup> Gwen Morgan, *Begin Test Case To Free 300 Jews Held in Eritrea: Deported by Palestine Without Trial*, CHI. TRIBUNE, Dec. 4, 1946, at 30.

<sup>470</sup> KAMEEL B. NASR, *ARAB AND ISRAELI TERRORISM* 18 (1997).

<sup>471</sup> See, e.g., *Palestine Terror is Laid to Misrule: Dr. Heller, United Appeal Head, Puts Responsibility, ‘to Some Extent’ on the British*, N.Y. TIMES, Nov. 19, 1944, at 18.

<sup>472</sup> See NASR, *supra* note 470 (chronicling these events).

<sup>473</sup> AGASSI, *supra* note 468, at 192–93.

<sup>474</sup> *Id.* at 193.

the availability of habeas in the territory as a common law right.<sup>475</sup> But having recognized the availability of habeas in Palestine, the Privy Council next considered the emergency orders under which Mr. Eliezer was arrested and the specific order that was issued for his arrest and deportation.<sup>476</sup> After considering the evidence, the Privy Council concluded that the deportation order was validly issued, and that “no court in Palestine ha[d] authority to require his production in that country in defiance of an order lawfully made by its responsible government.”<sup>477</sup>

Of course, the issue of Arie Ben Eliezer’s deportation was different than the issue of his continuing detention in Eritrea, and the Privy Council also addressed that issue. The Privy Council pointed out, for example, that Eritrea—though occupied by the British—had a military government distinct from the British administered government of Palestine:

Though the exact organization adopted for governing Eritrea at the material date has not been shown into evidence, it is sufficiently clear that it is territory captured from the Italians during the war, and was at all material times held by the British under military government. It was and is in no way subordinate to the Palestine Government but is under the control of a Chief Administrator, who is head of the Military Government. It is not suggested that any court in Palestine had authority to issue the writ or ensure its execution in Eritrea, and it does not seem to be disputed that Eliezer came under the control of the military authorities there.<sup>478</sup>

The Privy Council accordingly concluded that “the Palestine Court has no jurisdiction to inquire into the legality of an order made by the responsible governing authority in Eritrea, under which Eliezer [was] detained in that country, and in any case has no ground for questioning that order.”<sup>479</sup>

While upholding the Palestinian court’s decision based on its asserted lack of jurisdiction to issue the Great Writ to Eritrea, however, the Privy Council specifically took care to “offer no opinion as to the further suggestion of that court” that the prisoner’s detention in Eritrea was valid, offering only the opinion that, “if the petitioner wishes to question the validity of the order made in Eritrea, he must do

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<sup>475</sup> *Zabrovsky v. Gen. Officer Commanding Palestine*, [1947] A.C. 246 (P.C.) 255 (appeal taken from Palestine) (“Habeas corpus is perhaps the most characteristic writ known to the English Common Law. . . . It is accordingly clear that the common law rules which have been evolved on this topic by the English Courts will be applicable in the court in Palestine, and that these rules will govern the decision.”).

<sup>476</sup> *Id.* at 256–57.

<sup>477</sup> *Id.* at 262.

<sup>478</sup> *Id.* at 257.

<sup>479</sup> *Id.* at 262.

so in the courts of Eritrea.”<sup>480</sup> Indeed, recognizing that the “validity and effect of the Eritrean law and order may raise many difficult questions of *constitutional* or other law,”<sup>481</sup> the Privy Council concluded its opinion by reiterating,

Their Lordships have abstained from expressing any opinion about what was done in Eritrea or in the Sudan. These matters are outside the competence of the Palestinian court and therefore of this Board, which is only a Court of Appeal to determine whether the respondents or either of them have acted contrary to Palestinian law.<sup>482</sup>

In one masterfully-crafted opinion, the Privy Council managed both to acknowledge the reach of the common law writ to Palestine and to recognize—but avoid deciding on narrow jurisdictional grounds—the important legal issues presented by Mr. Eliezer’s continued detention in the similarly non-sovereign territories of Eritrea and Sudan, leaving those complex constitutional questions hanging for future determination. Israel’s subsequent independence, and the associated release of the Irgun prisoners, rendered those questions moot before they could be raised again.

#### CONCLUSION

For more than a decade, legal scholars have referred to the U.S. Naval Station at Guantanamo Bay as a “legal black hole.”<sup>483</sup> The expression is intended to convey the idea that Guantanamo is an isolated anomaly beyond the reach of any established judicial system,<sup>484</sup> and it harkens back to a time when actual black holes were just considered “a mathematical curiosity . . . tolerated by the established scientific community of the early twentieth century.”<sup>485</sup> But science now views black holes as “indispensable forces of creation and the sculptors of mighty galaxies.”<sup>486</sup> Actual

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<sup>480</sup> *Id.* at 264.

<sup>481</sup> *Id.* (emphasis added).

<sup>482</sup> *Id.* at 264–65.

<sup>483</sup> See, e.g., Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 3 (2004); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004).

<sup>484</sup> See, e.g., Ernesto Hernández-López, *Guántanamo as a “Legal Black Hole”: A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 143 (2010) (characterizing the base “as a jurisdictional island in a sea of legal anomaly”).

<sup>485</sup> R. Jay GaBany, *A Singular Place: Once Considered a Mathematical Curiosity, Black Holes Have Taken Center Stage in Cosmology*, COSMOTOGRAPHY, [http://www.cosmotography.com/images/supermassive\\_blackholes\\_drive\\_galaxy\\_evolution.html](http://www.cosmotography.com/images/supermassive_blackholes_drive_galaxy_evolution.html) (last visited May 1, 2015).

<sup>486</sup> *Id.*

black holes are also much more common than previously theorized, and they are vastly larger.<sup>487</sup> Perhaps it is also time for legal scholars to rethink our conceptions when it comes to legal black holes like Guantanamo Bay.

In *Boumediene v. Bush*, Justice Scalia asked whether there was a single case in the history of the United States (or the five centuries of the English Empire) in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England.<sup>488</sup> If Scalia was asking for a case in which the writ was issued and the government was forced to justify its detention, the answer is a qualified “yes.” The *Mena* case is a clear example within a non-sovereign U.S. territory, and the *Zabrovsky* case was heard in the Mandate of Palestine and even heard on appeal before the Privy Council in England. Of course, if the inquiry aims for a case in which the writ was granted *in the first instance* by a court located “within” the “sovereign control” of the United States, the answer *might* be no—but the answer really begs the question. Everything depends on the definition of what is “within” a nation’s “sovereign control,” and therefore the answer received will depend on the definition chosen.

The research presented in this Article suggests that the legal status of Guantanamo Bay is less unique than often depicted. The Canal Zone in particular is a close cousin, and others, including the American Samoa, the Philippine Islands, Puerto Rico, pre-independence Cuba, pre-annexation Cyprus, and the British Mandate of Palestine, are certainly notable. Despite these similarities, most habeas issues related to these territories managed to successfully avoid appellate adjudication by U.S. and British courts for decades before *Boumediene v. Bush*. Just like Sir Arthur Conan Doyle’s famous dog that did not bark,<sup>489</sup> this absence should not be ignored. Instead, this gap in precedent raises questions about whether the purported legal black hole that existed before *Boumediene* was limited to Guantanamo Bay—or whether the forces driving this uncertainty, like black holes in space, are more common and vastly larger than previously understood.

The notion that judicial avoidance mechanisms cloud our understanding of the rule of law is nothing new. But the notion that political branches similarly practice constitutional avoidance is less explored territory—even if those maneuvers are often staring us straight in the face.<sup>490</sup>

The recent history of detentions at Guantanamo Bay illustrates how this mutual aversion to constitutional brinkmanship remains deeply embedded in our legal system and political institutions. In the early 1990s, when Haitian immigrants detained at the naval station won an initial habeas victory in the Eastern District of New

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<sup>487</sup> *Id.*

<sup>488</sup> Transcript of Oral Argument, *supra* note 31, at 10.

<sup>489</sup> ARTHUR CONAN DOYLE, *SILVER BLAZE* 11 (1892).

<sup>490</sup> *But see generally* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (discussing the executive branch’s reliance on constitutional avoidance doctrines as part of its legal analysis related to the war on terror).

York,<sup>491</sup> the Clinton Administration acted quickly to settle with the petitioners and have the opinion vacated rather than appeal to have the ruling overturned. Similarly, a year before the Supreme Court heard *Boumediene v. Bush*, the Supreme Court denied certiorari on the same appeal, with Justices Kennedy and Stevens expressing the view that “traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction” justified denying the petitions.<sup>492</sup> If the Court’s subsequent holding that common law habeas extends to Guantanamo Bay was a surprise at all, the surprise should have been the Court’s willingness to hear the appeal and not necessarily the Court’s ultimate conclusion.

Moreover, by endorsing a test for the application of the Suspension Clause to territories like Guantanamo Bay that requires weighing “at least” three factors,<sup>493</sup> the Court’s majority continued the established pattern in the Insular Cases; where it chose to intervene, it did so by focusing narrowly on the circumstances of the case and refusing to adopt any bright-line rule for the reach of the Suspension Clause (or other constitutional provisions). As a result, future courts will have similar difficulties finding dispositive precedent for disputes beyond the narrow confines of the Court’s holding, whether those disputes involve prisoners held in other territories or even different prisoners held under different circumstances at Guantanamo Bay.<sup>494</sup> After more than a century governing overseas territories, Americans still do not have clear answers to the most basic questions about the reach of constitutional protections to those possessions.

Historically, when it came to the reach of the U.S. Constitution to the Insular Possessions, the evidence is clear that certain justices on the U.S. Supreme Court (particularly Justice Harlan) believed that certain fundamental principles of our constitutional government could not be violated by the political branches. The scope of those fundamental rights (and the Court’s powers to enforce those rights) was unclear, but there was the very real possibility that a denial of those fundamental rights could precipitate a constitutional crisis.

Because the judicial and political branches actively worked to avoid constitutional crises as the United States took on its own empire, the system that those

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<sup>491</sup> *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1049 (E.D.N.Y. 1993).

<sup>492</sup> *Boumediene v. Bush*, 549 U.S. 1328 (2007).

<sup>493</sup> *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

<sup>494</sup> *See, e.g.*, Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982 (2009) (acknowledging voluminous commentary that “the case leaves unanswered a wide range of questions concerning the constitutional rights of foreign detainees abroad”); Stephen I. Vladeck, Response, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78, 80 (2012) (“Quite pointedly, the *Boumediene* majority did not go on to hold that noncitizens detained at Guantanamo actually *have* any constitutional rights that might bear on the merits of their habeas petitions[.]”). *But cf.* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 538 (2010) (heralding the “precedential significance” of the Court’s opinion in *Boumediene*).

branches created had far more order than often recognized. Constitutional and common law principles spread quickly by relative agreement, hastened by the prospect that disputes with relatively small stakes in any territory could result in constitutional blowback affecting all other territories—or even the powers of the political branches at home. Neither judicial nor political branches had much interest in constitutional brinkmanship, so none actively pursued it. Avoidance mechanisms were used by both sets of authorities, with a great deal of “success.”

A main problem with this balance is that it has been largely forgotten, the result of a common law approach that relies almost entirely on reported precedent that masks the significance of disputes that were averted. The purported absence of a single case about prolonged detentions of non-citizens without habeas protection in our Insular Possessions or other territories convinced Justice Scalia that the constitutional privilege of habeas corpus must not have existed in those areas. Blinded by the limits of reported precedent, Scalia never stopped to consider that the issue may never have arisen because it was simply obvious to previous generations of Americans (and Englishmen) that the prolonged denial of the writ to prisoners in obscure territories was not worth a constitutional fight. The potential gains were too low, and the potential stakes—both legal and political—too high. It was only by forgetting this delicate balance that the political branches brought themselves to the precipice of the very type of constitutional crisis that prior generations worked so diligently to avoid.

This narrative presents another important lesson for both political leaders and jurists: constitutional avoidance has costs, both to present litigants and future generations looking to derive legal conclusions from the disputes of the past. Though common law jurists may narrowly author opinions to avoid unnecessary questions, future generations have a tendency to draw broad conclusions from even narrow holdings. As evinced by Justice Scalia’s dissent in *Boumediene*, future generations may even draw broad conclusions from a court’s mere refusal to entertain a legal question on (unspecified) jurisdictional grounds. Historical analysis can help jurists avoid drawing such inaccurate or incomplete conclusions by filling in the contextual gaps, but such analysis is only likely to be helpful where courts first understand the significant failings of reported precedent as a historical guide.