Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases

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Andrew Kent

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INTRODUCTION

In 2008, the Supreme Court embraced both global constitutionalism—the view that the Constitution provides judicially enforceable rights to noncitizens outside the sovereign territory of the United States—and what I call human-rights universalism—the view that the Constitution protects military enemies during armed conflict. *Boumediene v. Bush* found a constitutional right to habeas corpus for noncitizens detained as enemy combatants at the Guantanamo Bay naval base in Cuba,1 while *Munaf v. Geren*—decided the same day as *Boumediene* and involving U.S. citizens detained in Iraq during the war there—hinted that the Due Process Clause might be a limit on the U.S. military’s ability to cooperate in a foreign nation on security detention matters during an armed conflict.2 In both *Boumediene* and *Munaf*, the Court reached back for supportive precedents to an earlier era of U.S. empire: the period of territorial expansion and military interventions following the Spanish-American War of 1898. The Court then decided important cases about the legality of U.S. military and civil activities in the newly annexed islands of Puerto Rico, Hawaii, and the Philippines, and in Cuba, where the United States was conducting its first humanitarian intervention. A handful of the most famous decisions are known as the Insular Cases—“insular” because the cases concerned U.S. activities in these islands. In 2008, the Court relied substantially on a few Insular Cases to sketch a vision of a global Constitution protecting rights around the world, even for military enemies. But in so relying on the Insular Cases, the Court in 2008 erred. Little that it wrote about the Insular Cases was correct—as to law or fact. The Court in 2008 misunderstood that the Insular Cases were highly relevant to contemporary legal disputes precisely because they reject global constitutionalism and human-rights universalism. This occurred because the Court misread the few Insular Cases it discussed, failed to consider many more Insular Cases that were on point, and misconstrued key historical facts regarding the U.S. intervention in Cuba and acquisition of the Guantanamo Bay naval facility.

I. BACKGROUND AND OVERVIEW OF ARGUMENT

A. THE CONSTITUTION’S DISPUTED SCOPE: GLOBALISM AND HUMAN-RIGHTS UNIVERSALISM

*Boumediene v. Bush* and *Munaf v. Geren*, decided the same day in 2008, represent an enormously significant inflection point in U.S. constitutional law. In these decisions, the Supreme Court embraced two related theories of the scope of constitutional protections that represent profound departures

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from prior law. The Supreme Court had never previously accepted one of these theories and had only tentatively embraced the second, but in different and less far-reaching contexts than what the Court confronted in 2008. The first theory is one I have described in prior work as *globalism* or *global constitutionalism*, which is the view that the Constitution should be interpreted to protect the rights of noncitizens in areas beyond the sovereign territory of the United States. Since the Founding, the Supreme Court, Congress, and the Executive have accepted that the Constitution does not protect noncitizens outside U.S. sovereign territory. Nevertheless, in recent years, noncitizens have continued to file suits challenging this limitation, though generally without success.

The second theory is that military enemies can invoke the Constitution for protection in armed conflicts. I call this view of the Constitution’s scope *human-rights universalism* because it resembles a phenomenon in international law. “Classic international public law recognized the separation between the law of peace and the law of war.” But in the modern era, there has been a concerted effort to inject human-rights law—the law of peacetime—into the realm of war in order to impose limits on states’ warmaking powers, in addition to those found in the less restrictive laws of war. Similarly, for much of U.S. history, it was understood that “we have a constitution of government for war and a constitution of government for peace,” and that the international laws of war—and not the Constitution—

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5. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (rejecting a Mexican citizen’s Fourth Amendment challenge, brought while he was on trial in the United States, to the search of his house in Mexico by U.S. and Mexican law-enforcement officers); Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008) (affirming dismissal of Uzbeki’s suit alleging that the United States violated the Takings Clause of the Fifth Amendment by causing the destruction of her cafeteria in Tashkent); People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 22 (D.C. Cir. 1999) (rejecting two foreign organizations’ Due Process challenges to the U.S. Secretary of State’s designation of them as terrorist groups); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (affirming dismissal of a suit by Nicaraguan residents and others alleging that U.S. military support for the Contras violated their Fourth and Fifth Amendment rights). In each of these decisions, the Court held that the noncitizen’s lack of presence in the United States barred their assertion of constitutional rights.


protect military enemies in war. This rule was solidified in U.S. constitutional law during and after the Civil War, when the President, Congress, and Supreme Court united in holding that the residents of the Confederacy, though all were U.S. citizens, could be treated during the war as military enemies of the United States with no protection from the Constitution. During subsequent wars with foreign powers, fought on foreign soil, the rule that military enemies had no constitutional rights overlapped with the rule that noncitizens outside the United States had no constitutional rights. Thus, when the Court received a habeas corpus petition from German soldiers convicted by the United States of war crimes during World War II and imprisoned in Allied-controlled post-war Germany, it dismissed out of hand the claim that those men had a right to access U.S. courts and to invoke the protection of the Constitution. In recent years, courts have dismissed the cases brought by noncitizens outside the United States claiming a right to constitutional protection from being targeted by the U.S. military. But the Court has shown some receptivity to human-rights universalism when military enemies who have been present on U.S. soil have claimed constitutional protection.

B. THE 2008 DECISIONS

In 2008, in Boumediene, the Court embraced global constitutionalism for the first time and expanded its previously quite limited acceptance of human-rights universalism. As part of the post-9/11 war on terror, the Executive had chosen to detain noncitizens at Guantanamo because the naval base, leased by the United States from Cuba since 1903, is not

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12. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (upholding military detention in the United States of a U.S. citizen captured in Afghanistan fighting for the Taliban, but finding that the Due Process Clause required more procedural protections than the military had granted to date); In re Yamashita, 327 U.S. 1 (1946) (reviewing the conviction of a Japanese general in a U.S. military commission held in the Philippines—then a territory of the United States—for compliance with applicable statutes and international law); Ex parte Quirin, 317 U.S. 1 (1942) (rejecting the U.S. government’s contention that German soldiers had no right to access the civilian courts via habeas corpus during World War II, but also rejecting the soldiers’ Fifth and Sixth Amendment challenges to their military commission trial).
sovereign territory of the United States. The U.S. government argued that aliens could not assert constitutional rights because they were not present in territory under the de jure sovereignty of the United States and because they were enemy combatants in the custody of the U.S. military. Boumediene rejected this argument. The Court held five-to-four that the Guantanamo detainees had an indefeasible constitutional right—a right that Congress had unconstitutionally denied in a jurisdiction-stripping statute—to seek relief from U.S. federal courts using the writ of habeas corpus. The Court seemed to assume that at least minimum Due Process protections would protect the detainees in their subsequent habeas litigation. Thus, the Court in Boumediene held for the first time that noncitizens outside the sovereign territory of the United States could demand constitutional protections; this holding was especially novel and significant because the noncitizens were alleged military enemies detained during an armed conflict.

13. In a 1903 agreement to lease the area for a naval base, “the United States recognize[d] the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” while “the Republic of Cuba consent[ed] that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.” Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418. A 1934 treaty provided that the lease would run “[s]o long as the United States . . . shall not abandon the . . . naval station of Guantanamo,” unless the parties agree otherwise. Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1683.

Prior to 9/11, the Executive detained at Guantanamo some Haitians who were attempting to enter the United States and argued to the federal courts that, as noncitizens held outside U.S. sovereign territory, the Haitians lacked constitutional rights. See Brief for the Petitioners at 16 n.10, McNary v. Haitian Ctr. Council, Inc., 509 U.S. 155 (1993) (No. 92-344), 1992 WL 541276 (case later renamed Sale v. Haitian Ctr. Council, Inc.).


15. See Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (“No court, justice, or judge shall have jurisdiction to hear” a habeas petition seeking the release “of an alien detained by the United States who has been determined . . . to have been properly detained as an enemy combatant or is awaiting such determination.”).

16. Boumediene, 553 U.S. at 771, 792. The writ of habeas corpus requires the government to convince a judge of the legal and factual justification for an individual’s detention. Of ancient English common-law origins, the writ is protected by the Constitution. See U.S. Const. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).


18. See id. at 770 (“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution.”).

19. See David D. Cole, Rights over Borders: Transnational Constitutionalism and Guantanamo Bay, 2008 CATO SUP. CT. REV. 47, 48 (“[F]or the first time, the Court [in Boumediene] extended constitutional protections to noncitizens outside U.S. territory during wartime.”); Robert J. Pushaw, Jr., Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically
Two other recent Supreme Court decisions support my conclusion that Boumediene embraced both global constitutionalism and human-rights universalism. On the same day as Boumediene, the Court, in Munaf, decided that the United States' federal courts had statutory jurisdiction over the habeas petitions filed by U.S. citizens whom the U.S. military had detained in Iraq on behalf of the Iraqi justice system during an ongoing military conflict in that country. In addition to hinting that the Constitution required habeas access to federal courts for these petitioners because they were citizens, Munaf implied that the Due Process Clause might place some limits on the U.S. military's ability to cooperate with foreign states on security detention matters. A few months later, the Supreme Court vacated, in light of Boumediene, the D.C. Circuit's decision in Rasul v. Myers, another Guantanamo detainee case. The reversed circuit court opinion had dismissed tort claims against U.S officials based on alleged torture on the ground that, as "aliens without property or presence in the United States," the detainees could not assert claims under the Fifth Amendment (substantive due process) or Eighth Amendment.

The Court in 2008 claimed that it was not breaking new ground; instead, the Court in Boumediene asserted that its precedents stretching back over 100 years showed that the Executive was wrong to assert that a bright-line rule barred noncitizens outside U.S. sovereign territory from claiming constitutional protections. In fact, in both Boumediene and Munaf the Court reached back for supportive precedents to an earlier era of U.S. empire: cases arising from the Spanish-American War of 1898 and the concurrent territorial expansion of the United States.

C. THE INSULAR CASES

The United States annexed the Spanish colonies of the Philippines, Puerto Rico, and Guam as a result of its victory in that war. The U.S. military only temporarily occupied Cuba, another Spanish colony, while it conducted its first humanitarian intervention there. In 1898, the United States also annexed the independent nation of Hawaii, and in 1899, the United States took control of part of Samoa. In the next few years, the Supreme Court

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Pragmatist, 84 NOTRE DAME L. REV. 1975, 1976 (2009) ("[Boumediene] reached the unprecedented conclusion... that the Constitution's writ of habeas corpus may be invoked by noncitizen enemy combatants who have been apprehended and detained outside of the United States' sovereign territory.").
21. Id. at 688.
22. Id. at 702 (disclaiming any intent to rule out a potential Due Process Clause claim arising from "a more extreme case in which the [U.S.] Executive has determined that a detainee is likely to be tortured [if transferred from U.S. to foreign custody] but decides to transfer him anyway").
decided a number of important cases about the legality of U.S. military and
civil activities in Cuba, Puerto Rico, Hawaii, and the Philippines.\textsuperscript{25} A handful
of the most famous decisions are known as the Insular Cases—"insular"
because the cases concerned U.S. actions in the annexed islands.

The most well-known Insular Cases addressed not the wartime activities
of the U.S. government or the military occupation of Cuba but rather the
peacetime activities of civil governments in the newly annexed islands. These
Insular Cases asked whether constitutional and statutory provisions
concerning import and export tariffs and the use of juries in criminal cases
were applicable to the islands and their inhabitants.\textsuperscript{26} These somewhat
narrow legal issues were the occasion for the Supreme Court's involvement
in a "great national debate"\textsuperscript{27} around the turn of the twentieth century about
whether the Constitution allowed the United States to have an empire—that
is, whether the Constitution allowed the United States to annex
extracontinental territory unlikely ever to be admitted to statehood,
containing people considered to be unfit for self-government, and to govern
with fewer constitutional limitations than on the mainland. In the imprecise
but evocative phrasing of that era, the Court addressed in the Insular Cases
whether "the Constitution followed the flag" as it was planted in the newly
annexed islands.\textsuperscript{28}

By 1905, a previously splintered Supreme Court had agreed upon a
framework for deciding whether the Constitution followed the flag to the
newly annexed islands: the doctrine of \textit{territorial incorporation}.\textsuperscript{29} Under this
doctrine, some, but not all, individual constitutional rights followed the
flag—that is, inhabitants of these territories were protected from the time
the territory was annexed to the United States. Certain constitutional rights
and guarantees—specifically those requiring tariff uniformity and the use of
petit and grand juries—were held to be applicable only if the territory had
been further "incorporated" into the United States—that is, deemed an
integral and permanent part of the Union by Congress.\textsuperscript{30} Puerto Rico and
the Philippines were held to be "unincorporated" and, therefore, their

\textsuperscript{25}. For a timeline listing key historical events and decisions by the Court in important
Insular Cases, see the Appendix at the end of this Article.

\textsuperscript{26}. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138
(1904); Hawaii v. Mankichi, 190 U.S. 138 (1903); Fourteen Diamond Rings, 183 U.S. 176
(1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901);

\textsuperscript{27}. \textsc{Jose A. Cabranes}, \textsc{Citizenship and American Empire} 4 (1979).

\textsuperscript{28}. See, e.g., Owen M. Fiss, 8\textsc{ History of the Supreme Court of the United States:}
contemporaneous example of this trope, see \textit{Does the Constitution Follow the Flag?}, 8\textsc{ As.
Lawyer} 548 (Dec. 1900).

\textsuperscript{29}. See infra Part IV.

\textsuperscript{30}. See Christina Duffy Burnett, \textit{A Convenient Constitution? Extraterritoriality After
inhabitants were entitled to somewhat fewer constitutional rights than others living in the United States and its incorporated territories, such as Oklahoma, Hawaii, and Alaska.\footnote{As Christina Burnett has demonstrated, it is confusing and not fully accurate to describe the Insular Cases as holding that "the 'entire' Constitution applies 'with full force'" in incorporated territories while "only its fundamental provisions apply in the unincorporated territories." Christina Duffy Burnett, Untied States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 820 (2005). "Numerous constitutional provisions (notably those addressing representation in the federal government) never applied outside the states, before or after 1901 [when the first Insular Cases were decided], whether a territory was incorporated or not. Other parts (such as the Territory Clause itself) never applied in the states." Id. at 821 (footnote omitted).}

In 2008, the Supreme Court relied substantially on a few of the Insular Cases about "territorial incorporation" and the annexed islands to sketch a vision of a global and universal Constitution. Boumediene applied the "fundamental rights" doctrine of the Insular Cases to an entirely inapposite context: where noncitizens are detained outside the sovereign territory of the United States as military enemies during a congressionally authorized armed conflict. Boumediene read the Insular Cases about territorial incorporation and fundamental rights, as well as a few later Court precedents,\footnote{Reid v. Covert, 354 U.S. 1 (1957); Johnson v. Eisentrager, 339 U.S. 763 (1950). Boumediene construed these later cases in light of its (mis)understanding of the Insular Cases. See Boumediene v. Bush, 553 U.S. 723, 764 (2008) ("[I]f the Government's reading of Eisentrager were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later Reid's) functional approach to questions of extraterritoriality.").} to reject a bright-line "formalistic, sovereignty-based test" for the availability of constitutional rights.\footnote{Boumediene, 553 U.S. at 764.} Instead, Boumediene held that the Insular Cases and other precedents required "a functional approach to questions of [the] extraterritoriality" of the Constitution's protection of individual rights, under which constitutional protections for noncitizens could be available even outside sovereign U.S. territory.\footnote{Id. at 764.} Based on the Insular Cases and what the Court called its other "extraterritoriality opinions," Boumediene offered a six- or seven-factor, nonexclusive, unweighted, totality-of-the-circumstances test, which evaluated "practical" and "objective factors" and the "specific circumstances" of the United States' "control" over the territory, the "status" of the detainee, and similar generalities.\footnote{Id. at 766 ("[W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."). This lists many more than "three factors."} As a practical matter, the U.S. military was, the Court found in Boumediene and Munaf, very much in control of Guantanamo and Iraq, respectively, and so under what it understands to be the doctrine of the Insular Cases, the Constitution is in force in those places.
In Boumediene, the Insular Cases and their doctrine of territorial incorporation emerged as unlikely heroes—unlikely because today the Insular Cases are despised, dimly understood, or entirely unknown. Most who peruse Boumediene have likely never heard of the Insular Cases. For readers familiar with the Insular Cases, the cases’ deplorable discussions of the supposed racial and cultural inferiority of inhabitants of the newly annexed island territories—cited as a reason they were entitled to fewer constitutional rights—likely make the cases seem a strange basis for Boumediene’s ringing affirmation of human rights irrespective of citizenship or location. What many critics view as the Insular Cases’ overly deferential accommodation of the Constitution to the geostrategic preferences of Presidents McKinley and Roosevelt for empire makes them unlikely precedents for Boumediene’s judicial intervention into President Bush’s leading foreign affairs initiatives. Moreover, the critics of the Insular Cases, who (erroneously) believe that the decisions allowed the United States to govern the newly annexed island territories wholly free from any constitutional rights limitations, must find them odd precedents for Boumediene’s holding that the Constitution’s protection of habeas corpus in federal courts “has full effect at Guantanamo Bay.”

D. THE 2008 COURT MISCONSTRUES THE INSULAR CASES

The Court in 2008 erred in relying on the Insular Cases about territorial incorporation and fundamental rights to reject a bright-line sovereignty test for the availability of constitutional rights to noncitizens and to extend constitutional protections to alleged military enemies held abroad. Very little that the Court wrote about the Insular Cases was correct—as to

36. Cf. Sanford Levinson, Installing the Insular Cases into the Canon of Constitutional Law, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121, 122 (Christina Duffy Burnett & Burke Marshall eds., 2001) (hereinafter FOREIGN IN A DOMESTIC SENSE) (“At the present time, few cases can be said to be less . . . canonical than Downes (or any of the other Insular Cases).”).

37. Many authors have critiqued the racism found in the Insular Cases. See, e.g., T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 29, 94 (2002); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO 51, 59 (1985).

38. See Cole, supra note 19, at 51 (“[Boumediene] reflects new understandings . . . that pierce the veil of sovereignty, reject formalist fictions of territoriality where the state exercises authority beyond its borders, and insist on the need for judicial review to safeguard the human rights of citizens and noncitizens alike.”).


40. See, e.g., Saikrishna Prakash, Against Tribal Fungibility, 89 CORNELL L. REV. 1069, 1091 (2004) (stating that the Insular Cases hold that “the Constitution does not apply in so-called unincorporated territories”). See generally Burnett, supra note 31 (demonstrating the error of the conventional understanding that no constitutional rights were available in unincorporated territory).

In particular, the Court in 2008 did not understand that the
Insular Cases reject global constitutionalism and human-rights universalism.

The few Insular Cases the 2008 Court relied upon cannot provide a
theory about "the Constitution's extraterritorial application" because they
concerned lands annexed to the United States. As the justices who
developed the territorial-incorporation doctrine understood it, the doctrine
had a very limited domain: peacetime in a territory that had been formally
annexed to the United States and that had a civil government organized by
Congress. The great national debate had been primarily about that very
specific issue—whether the Constitution followed as the flag of U.S.
sovereignty was planted in the newly annexed territories. Contemporary
lawyers, commentators, and government officials understood the Court's
decisions in the most famous Insular Cases as addressing that issue. But
today the "flag" has not been placed in Afghanistan or Iraq; the United
States has not and almost certainly will not formally annex these or other
foreign nations where its military or other executive agents are currently
operating. The specific questions raised in Boumediene and Munaf—whether
there was a constitutional or statutory right to Article III judicial review, by
way habeas corpus, of wartime detentions in the nonsovereign territories of
Guantanamo or Iraq—simply has very little relation, as a matter of U.S
constitutional law and history, to questions about the status of peacetime
governments of civilian populations of island territories like Hawaii, Puerto
Rico, or the Philippines, after they were formally annexed by the United
States.

But yet the Court in Boumediene and Munaf was correct to rely upon
legal precedents from the fascinating period of war and territorial expansion
in 1898 and afterward. Of course, there are great differences between the
classic colonial empire the United States acquired in 1898 and today's more
notional or figurative empire. There are, however, instructive parallels
between these periods of U.S. history. As part of its large corpus of work
growing out of the war of 1898 and territorial expansion, the Court did
decide numerous cases of great contemporary relevance. This Article
exhumes these forgotten decisions and shows how they, rather than the few

42. One example for now: Boumediene's discussion of the relevance of a particular insular
case for the rights of noncitizens at Guantanamo Bay seems to have proceeded on the
erroneous assumption that, in 1922, Puerto Ricans were not U.S. citizens. See id. at 758 ("[A]s
early as Balzac [v. Porto Rico, 258 U.S. 298 (1922), a case concerning Puerto Rico] in 1922, the
Court took for granted that even in unincorporated Territories the Government of the United
States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental
personal rights declared in the Constitution.'" (quoting Balzac, 258 U.S. at 312)). But, the very
case discussed in Boumediene states—correctly—that Congress's Act of March 2, 1917, known as
the Jones Act, provided that all Puerto Ricans, with unimportant exceptions, "are hereby
declared, and shall be deemed and held to be, citizens of the United States." Balzac, 258 U.S. at
Insular Cases relied upon by *Boumediene*, are the relevant precedents for analyzing issues of extraterritorial constitutionalism.

It was not the few “insular” decisions discussed in *Boumediene* concerning the doctrine of territorial incorporation—precedents I call the canonical Insular Cases—which are the most important. The canonical Insular Cases about territorial incorporation represent only a tiny fraction of the Court’s output of decisions concerning the 1898 war and territorial expansion. One of the contributions of this Article is to interpret the canonical Insular Cases and the doctrine of territorial incorporation in light of the almost entirely overlooked noncanonical decisions. These cases are highly relevant to contemporary legal disputes, but the Court in 2008 did not rely upon them and may, in fact, have been unaware of their existence. These important, noncanonical Insular Cases concerned the legality of military operations against Spanish subjects during the War of 1898, the constitutional status of the temporary U.S. military government of Cuba, and the interim military governments of newly annexed Puerto Rico and the Philippines, and whether persons detained in accordance with military-court judgments have a right to Article III review.

In these neglected Insular Cases, instead of twenty-first century globalism and human-rights universalism, the Court applied a traditional constitutional doctrine and theory that had been largely consistent since the Founding. According to these earlier understandings, 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 sovereign territory of the United States, and any who were military enemies, even if they were present in the United States. Generally speaking, the United States’ *de jure* sovereign authority over territory was the touchstone of constitutional rights. And even in newly annexed sovereign U.S. territory, the U.S. military could temporarily govern, free from constitutional

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43. I use the term canonical Insular Cases to distinguish them from the many other cases concerning the war of 1898 and territorial expansion that have received little attention and generally have not been deemed “Insular Cases.” For a partial list of canonical Insular Cases, see the cases decided between 1901 and 1922 and cited in *supra* note 26 and *infra* notes 260 & 272. On debates about which decisions should count as “Insular Cases,” see Christina Duffy Burnett, *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 36, at 389.

44. I refer to the decisions about the constitutional status of military operations and military government as noncanonical Insular Cases because for many decades they have not been grouped and discussed with the canonical Insular Cases as part of the era’s jurisprudence concerning war, sovereignty, territorial governance, and foreign relations.


limitations, until Congress established civil government. Thus the Constitution prevailed only when and where Congress governed and peace existed. War, foreign relations, and the governance of U.S. territory before Congress created civil government occurred under the legal regime of international law. Of particular relevance today, the constitutional law of the Insular Cases' era treated small, special-purpose Executive enclaves, such as military bases and naval stations, as foreign and hence not under control of the Constitution and municipal law, even if they were under the de jure or long-term de facto control of the United States.

By showing the very limited domain of the canonical Insular Cases about territorial incorporation—that they apply only during peacetime in a territory that had been formally annexed to the United States and had a civil government organized by Congress—and by showing that the overlooked noncanonical Insular Cases reject constitutional rights for military enemies and for noncitizen's outside sovereign U.S. territory, this Article demonstrates that Boumediene misread the Insular Cases. The Insular Cases, properly understood, mean literally the opposite of what Boumediene claimed: they reject global constitutionalism and human-rights universalism. Boumediene's claim that it rests on a solid foundation of Court precedent is demonstrably incorrect.

One might ask how the Court could have gone so wrong. There are probably several reasons. The 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. A second possible

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48. See infra Part V.C, discussing Boumediene's apparent misunderstanding of certain facts regarding the U.S. occupation of Cuba and acquisition of Guantanamo Bay. In Munaf, the Court also seemed to struggle with the historical facts about Cuba. The Court's opinion is written as if unaware that the U.S. military had occupied Cuba in 1898-1902—the relevant period for one of Munaf's key precedents. Munaf rejected the detainees' claim that the U.S. military would violate the Due Process Clause by transferring the detainees from U.S. military detention to Iraqi custody where there was a risk of torture. Munaf v. Geren, 553 U.S. 674, 692 (2008). The Court noted that it had twice previously applied "the principle that a nation state reigns sovereign within its own territory...to reject claims that the Constitution precludes the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial." Id. at 695 (emphasis added). One of the precedents was Neely v. Henkel, an insular case that held that the Bill of Rights did not bar the extradition of a U.S. citizen to be criminally prosecuted in Cuba for crimes he committed there. 180 U.S. 109 (1901). In discussing Neely, the Munaf Court repeatedly described Cuba, circa 1900-01, as a "foreign" and distinct "sovereign" in relation to the United States, Munaf, 553 U.S. at 696-97, and advised that Neely had demonstrated that "diplomacy," rather than judicial review, was the appropriate mechanism to address concerns about extraditions from the United States to "foreign" countries with allegedly unfair criminal justice systems, id. at 701. But at the time of Neely, a U.S. Army general, who reported directly to the Secretary of War in Washington and through him to
reason is that, by the second half of the twentieth-century, the Supreme Court had begun to misinterpret the Insular Cases by applying their rules for domestic governance of annexed, but unincorporated, U.S. territory to U.S. actions in wholly foreign territory, such as England in 1953 and Mexico in 1986. Taking their cues from the Supreme Court, lower courts, litigants, and globalist commentators have treated the territorial-incorporation doctrine of the canonical Insular Cases as a comprehensive legal framework for deciding whether individuals—specifically noncitizens—in foreign countries or other "extraterritorial" or nonsovereign places may invoke the Constitution to restrain U.S. government actions. Prior to Boumediene, scholars, detainees, and amici in war-on-terror cases had urged the Supreme Court to look to the Insular Cases about territorial incorporation to find that noncitizens outside the sovereign territory of the United States could invoke constitutional protections. Guantánamo was

the President of the United States, headed the government of Cuba. See infra Part V.B. How exactly did communications between the U.S. military in Cuba and its civilian superiors in Washington constitute international "diplomacy" with a "foreign" government?

49. See Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result) (relying upon canonical Insular Cases about the doctrine of territorial incorporation to help decide whether wives tried by courts-martial for killing their U.S. servicemember husbands on U.S. military bases in England and Japan had a constitutional right to a jury trial). Though the justices in Reid were apparently aware that the canonical Insular Cases concerned sovereign U.S. territory, see id. at 13, 14 (plurality opinion of Black, J.); id. at 50-54 (Frankfurter, J., concurring), both the plurality opinion and Justice Harlan’s concurrence used imprecise and potentially misleading words like "abroad" to refer to the territory where the canonical Insular Cases arose, id. at 9 & n.11 (plurality opinion of Black, J.) (citing a canonical Insular Case); id. at 12 & n.19 (citing canonical Insular Cases); id. at 74-75 (Harlan, J., concurring).

50. See United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (relying upon canonical Insular Cases about the doctrine of territorial incorporation to help decide whether a Mexican citizen tried in U.S. district court could invoke the Fourth Amendment to challenge the U.S. and Mexican law enforcement’s warrantless search of his residence in Mexico); id. at 277 (Kennedy, J., concurring) (same).


said to be similarly situated to Puerto Rico at the turn of the twentieth century, when the Supreme Court found that residents of the newly annexed island were entitled to fundamental constitutional protections. The briefs and scholarly works advocating the application of the "fundamental rights" doctrines of the canonical Insular Cases to the controversy at Guantanamo have often ignored crucial noncanonical Insular Cases and therefore fundamentally misunderstood the cases' doctrines and underlying legal assumptions.53

Another possible reason for the 2008 Court's misunderstanding of the Insular Cases is that the briefing the Court received in 2007 and 2008 and much of the scholarship about the Insular Cases is marked by a failure to look for legal precedents and interpretations outside the Supreme Court. There are rich veins of precedent—including ones bearing on the specific constitutional questions raised in Boumediene and Munaf—in the decisions of territorial or "legislative" courts in the islands, statutes of Congress and territorial legislative bodies, key congressional reports and debates, presidential orders, military orders, and opinions of the Attorney General, the Secretary of War, the Solicitor of the War Department and the Judge Advocate-Generals of the Army and Navy. These sources often provide crucially helpful context for understanding what was at issue in the Court's Insular Cases.

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After Boumediene, it is no longer necessary to demonstrate that the Insular Cases are important. In addition to continuing to restrict the constitutional rights of people living in the United States' various territories and dependencies,54 the Insular Cases are now a key part of the doctrinal support for the Court's decisions in Boumediene and Munaf, which will have deep and lasting effects in one of the most significant areas of foreign affairs and national security law in this country's history. In Boumediene, the Court disclaimed any intention to be extending constitutional protections to any nonsovereign locations other than Guantanamo Bay; but the broad sweep of

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53. See infra note 182 and accompanying text.
54. These include the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa. Although it is beyond the scope of this Article, it is worth noting that Boumediene has done a real disservice to the residents of U.S. territories and possessions—most of them U.S. citizens or U.S. nationals—by assimilating their rights in everyday affairs to the rights of noncitizen military prisoners held at a base outside U.S. sovereign territory as captives in a congressionally authorized armed conflict. Boumediene threatens to demean and diminish the already somewhat shaky constitutional basis of the rights of inhabitants of U.S. territories and possessions.
Boumediene's rhetoric and reasoning, the highly-malleable test, and the Court's implicit vision of the federal judiciary as the *primus inter pares* branch of government, charged with overseeing the extraterritorial national security policies of the President and Congress, suggest that the Court embraced global constitutionalism and human-rights universalism and might soon extend the Constitution to new places and persons. Post-Boumediene, the Insular Cases are being analyzed in litigation concerning whether military detainees in overseas locations other than Guantanamo have judicially-enforceable habeas corpus and other constitutional rights, and in non-habeas civil suits concerning the constitutional rights of war-on-terror detainees. In court filings in these and other cases, and in scholarship and commentary concerned with the future trajectory of the Supreme Court's judicial doctrine, the Insular Cases will of course be seen through the lens of Boumediene's interpretation. That is perfectly appropriate, but this Article has a different project. Here, Boumediene, Munaf, and their inaccurate understanding of the Insular Cases will not be treated as objective facts of the current doctrinal landscape. This Article rather reaches back to the past to supply an accurate account of the Insular Cases and their historical and legal contexts.

**E. OVERVIEW OF THE ARGUMENT**

The remainder of this Article is in six parts. The next part, Part II, provides a factual overview of the War of 1898 and the United States' concomitant territorial expansion. It also explores the constitutional significance of the treaty ending the war and ceding territory to the United States, the U.S military governments for captured Spanish islands, and later congressional statutes creating civil governments. This is part of the Article's attempts to give due weight to constitutional interpretation outside the courts. Part III then describes the great debate about the constitutionality of

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55. See supra note 35 and accompanying text.

56. See, e.g., Jules Lobel, *The Supreme Court and Enemy Combatants*, 54 Wayne L. Rev. 1131, 1141 (2008) ("The Court's rejection of a test that focuses exclusively on the formal legal status of a territory and its invocation of the concept of 'objective degree of control' that the United States exercises, suggests that Boumediene might not be cabined to the particular status of Guantanamo, and could possibly be a significant step in an expansion of habeas jurisdiction and other constitutional rights to aliens abroad.").

57. See, e.g., Al Maqaleh v. Gates, 605 F.3d 84, 93–94 (D.C. Cir. 2010) (considering the Insular Cases in deciding whether Boumediene extends protection to detainees held by the U.S. military in Afghanistan).


imperialism that occurred in the United States from 1898 to 1900. It shows that participants in the debate agreed that the Constitution only supplied rights in sovereign U.S. territory and that military enemies lacked rights. Part IV analyzes the legality of the U.S. military government of Puerto Rico, showing that the Supreme Court, Congress, and the Executive were united in the view that constitutional rights did not run against the U.S. military government of Puerto Rico (or the U.S. military government of any other island) during the period before April 1899 when Treaty of Paris became effective, formally ending the state of war and transferring Puerto Rico, the Philippines, and Guam to the United States, and ending Spanish rule of Cuba. In addition, Part IV shows that, even after April 1899 when Puerto Rico was indisputably under the de jure sovereignty of the United States, and when it was peacetime, the fact that Congress had not yet created a civil government for Puerto Rico meant that military government—unrestrained by constitutional rights—had to continue. These decisions of the Supreme Court show just how erroneous is Boumediene’s reading of the Insular Cases. Finally, Part IV shows that, in the insular era, the Supreme Court did not perceive any constitutional problem with the U.S. military detaining individuals under judgments of U.S. military courts in Puerto Rico, having no access to Article III courts via habeas corpus or otherwise.

Part V concerns Cuba, the site of the 1898 war’s most significant military operations against Spanish ground forces and the United States’ first self-described “humanitarian intervention.” Cases concerning U.S. military actions against Spanish subjects show that military enemies lacked constitutional protection during wartime. And an overlooked but crucially important 1901 Supreme Court decision concerning the United States’ temporary military government of Cuba—Neely v. Henkel—shows that individual constitutional rights were not enforceable there, despite de facto sovereignty and control by the United States. This is important evidence that Boumediene misunderstood the true constitutional doctrines of the Insular Cases. This Part also debunks the conspiracy theory Boumediene offered about the United States allegedly trying to “manipulate” away constitutional rights that otherwise would have existed at the Guantanamo Bay military facility.

Part VI shows the limited domain of the doctrine of territorial incorporation, as established by the very canonical Insular Cases relied upon by Boumediene. The doctrine applied only after annexation to the United States, during peacetime, and once Congress had created a civil government. Boumediene clearly erred by treating the doctrine as applicable to nonsovereign territory.

Finally, Part VII further confirms Boumediene’s misunderstanding of the Insular Cases’ jurisprudence by demonstrating the nearly universal

agreement that the United States could annex ports, harbors, or small islands for military purposes, and govern them as military enclaves, free from individual constitutional-rights restrictions. Guantanamo was, of course, leased for precisely these purposes in 1903. This Part shows that Guam and Samoa were governed for decades as naval outposts under military law—not the Constitution.

The Appendix at the end of this Article contains a timeline of key historical events and a chart categorizing the many canonical and noncanonical Insular Cases discussed in the Article.

II. THE WAR OF 1898 AND TERRITORIAL EXPANSION

The overseas territorial expansion during and after the War of 1898 was the United States' most consequential foreign-policy initiative between the Civil War and World War I. In the second half of the nineteenth century, European powers gobbled up millions of square miles of colonies around the world, while the United States watched from its "splendid isolation" across the oceans. It was the most economically powerful country in the world, but hardly a heavyweight in the arena of global politics. But then in 1898, the United States overpowered and humiliated Spain in a short and easy war and took the Spanish colonies of Cuba, Puerto Rico, Guam, and the Philippines. By the Treaty of Paris of December 1898, Spain ceded the latter three territories to the United States. But Cuba was a special case. In authorizing President McKinley to intervene in the rebellion against Spain, Congress had imposed a crucial condition in the so-called Teller Amendment: the Cuban people, declared Congress, "of right ought to be, free and independent," and "the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over [Cuba] except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." As a result of this policy, the Treaty of Paris provided that Spain would withdraw from Cuba and the United States would not

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63. The War of 1898 began over Cuba. Spain's uncertain grip on Cuba had long concerned American policymakers and enticed American expansionists. A bloody revolutionary struggle lasted from 1868–78 and restarted in 1895. See Lester D. Langley, The Cuban Policy of the United States 55–58, 80 (1968). Widespread American sympathy for the Cuban rebels and concerns about American trade and investment in Cuba gradually grew into conviction that the United States should intervene militarily to end the conflict.


annex, but instead merely temporarily occupy it on behalf of the Cuban people.\textsuperscript{66}

Although some expansionists still hoped that Cuba would become part of the United States, the island was generally considered to be on a fast track to independence, as stipulated by Congress. Puerto Rico, where the United States had been greeted warmly—or at least without much complaint—by a majority of the population, was treated as a permanent U.S. possession from the beginning.\textsuperscript{67} Guam was designated a U.S. naval station to be ruled by military law. None of this was controversial. Substantial segments of the American public, however, opposed annexation of the Philippines—an enormous archipelago of over 3,000 islands, located over 7,000 nautical miles from Washington, with a population of somewhere between seven and ten million people.\textsuperscript{68} Public and congressional resistance to acquiring the Philippines only increased when the Filipino insurgents, who had earlier fought Spain, attacked U.S. forces at Manila in February 1899, just as the U.S. Senate was set to vote on the Treaty of Paris.\textsuperscript{69}

Only after intense debates and by a slim margin, the Senate gave its advice and consent to ratification of the treaty on February 6, 1899.\textsuperscript{70} But the Senate also passed a resolution purporting to clarify the meaning of the treaty vote and to state future U.S. policy toward the Philippines: no “incorporation” of Filipinos into the American body politic and no “permanent annex[ation]” of the islands.\textsuperscript{71} Spain and the United States exchanged ratifications and the treaty entered into force on April 11, 1899.\textsuperscript{72} This day in April 1899, marking the formal end of the state of war and the United States’ formal annexation of Puerto Rico, the Philippines,
and Guam, would have great significance in later litigation about the islands.

Differences between how the treaty handled Cuba, on the one hand, and the Philippines, Guam, and Puerto Rico, on the other, show the United States' tacit assumption that international law would continue to govern the U.S. military's occupation of Cuba, a territory that would remain foreign to the United States, while U.S. domestic or "municipal" law would govern the United States' relations with the other islands once they had been formally annexed to the United States by the President's and Senate's acceptance of the treaty. With regard to Cuba, the treaty provided that:

Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Mere military conquest and "occupation" of a foreign country did not, under American public law previously expounded by the Supreme Court, constitute annexation by the United States, so it was clear from the treaty that the United States was not annexing Cuba.

By contrast to the provision regarding Cuba, the treaty stated that Puerto Rico, Guam, and the Philippine Islands were "ceded" to the United States and that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress"—not by public international law—the law that governed relations between different nations and peoples.

In July 1898, during, but unrelated to the war, the United States annexed the independent nation of Hawaii with the consent of its government. Just after the war with Spain ended, the United States claimed sovereignty over Wake and imposed a protectorate over Samoa, both island

73. Cf. MacLeod v. United States, 229 U.S. 416, 434 (1913) (stating that "the treaty became effective" on April 11, 1899); Dooley v. United States, 182 U.S. 222, 230 (1901) (stating that April 11, 1899 was "the date of the ratification of the treaty and the cession of the island [Puerto Rico] to the United States").
74. Treaty of Paris, supra note 64, art. I.
76. Treaty of Paris, supra note 64, art. IX.
77. See Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (2d Sess. 1898). A treaty had been signed but was not approved by the U.S. Senate. See Report from Secretary Sherman: Review of Conditions Leading Toward Annexation Accompanies President's Message, Chi. Daily Tribune, June 18, 1897, at 9 (reviewing the treaty and the President and Secretary of State's statements about it).
groups in the Pacific. In the latter part of 1898, President McKinley created military governments for the captured Spanish islands of Cuba, Puerto Rico, and the Philippines. The military order announced a key legal principle: "the absolute domain of military authority" over the conquered Spanish islands "is and must remain supreme in the ceded territory until the legislation of the United States shall otherwise provide." Both Congress and the federal courts later approved this legal proposition—though it is utterly inconsistent with Boumediene's understanding of the Insular Cases.

The U.S. military government of Cuba lasted until May 1902, when the United States turned over control to a newly created Cuban government. Congress and the Executive understood, and the Supreme Court confirmed that individual constitutional rights did not run against the U.S. military government because Cuba was foreign to the United States notwithstanding the United States' total control over the island.

In Puerto Rico, the U.S. military government lasted beyond the ratification of the treaty of peace and cession in April 1899 until Congress approved civil government for the islands in May 1900 in the Foraker Act, named after its sponsor, a Republican Senator from Ohio. In the Foraker Act, Congress chose not to make the residents U.S. citizens or to indicate that the Constitution applied in Puerto Rico. The Foraker Act also treated Puerto Rico as if it were not part of the United States for purposes of certain

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79. As the Spanish were ousted from the Philippines, Cuba and Puerto Rico, President McKinley issued instructions to the Army to govern the military occupation of the captured islands; the instructions were published to the Army by the Adjutant General's Office in Washington as General Orders No. 101 ("GO 101"). The version of GO 101 tailored to Cuba is most easily found in Ochoa v. Hernandez y Morales, 230 U.S. 139, 155 n.1 (1913), or in A Compilation of the Messages and Papers of the Presidents 214–16 (James D. Richardson ed., 1899) [hereinafter GO 101]. The War Department did not separately issue these orders to the Army in Puerto Rico, but it was understood to be binding there as well. See Ochoa, 230 U.S. at 254. In his first general order, directed to both the people of Puerto Rico and U.S. forces there, the U.S. military governor paraphrased much of the substance of GO 101. See General Orders No. 1, Department of Puerto Rico (Oct. 18, 1898), reprinted in Brig. Gen. George W. Davis, U.S.V., Civil Affairs in Puerto Rico, 1899, at 89–90 (1900) [hereinafter Davis 1899 Report]. Note that in the U.S congressional serial set, the Davis report is in volume 1, part 6, page 477 et seq. of the War Department reports for the fiscal year ending June 1899; the Davis report cited in the previous sentence is a stand-alone version issued by the Government Printing Office.

80. GO 101, supra note 79.

81. See infra Part V.C.

82. Foraker Act, ch. 191, §§ 7–8, 31 Stat. 77, 79 (1900). These were conscious legislative choices. See Senate Comm. on Pac. Islands & P.R., Temporary Civil Government for Porto Rico, S. Rep. No. 56-249 passim (1st Sess. 1900) (discussing these issues); House Comm. on Ways & Means, To Regulate the Trade of Puerto Rico, and for Other Purposes, H.R. Rep. No. 56-249 passim (1st Sess. 1900) (same).
tariff regulations. The Constitution limits Congress' Article I taxing power with the requirement that "all duties, imposts and excises shall be uniform throughout the United States." But Congress created a special, non-uniform tariff for Puerto Rico: merchandise entering the United States from Puerto Rico, or vice versa, would be taxed at the rate of fifteen percent of the tariff on goods from "foreign countries" entering the United States. The Executive branch enforced this special tariff at ports in Puerto Rico and the mainland United States. The Foraker Act's non-uniform duty gave rise to the litigation that ultimately resulted in the Supreme Court's 1901 decision in *Downes v. Bidwell*—the origin of the doctrine of territorial incorporation.

The conflict with the Filipino revolutionary army greatly complicated American government of the Philippines. Executive control of the archipelago was not transferred from the U.S. commanding general to a civilian administrator appointed by the President until mid-1901, more than two years after the Treaty of Paris was ratified. Congress had waited until spring 1901 to legislate about the government of the Philippines, and then it essentially rubber-stamped the Executive's military government. Although Congress had approved the Philippine government, it was not a civil government. The entire archipelago was still considered a military zone due to the insurrection. It would be another year until Congress, in July 1902, finally enacted a more detailed law regarding the government for the Philippines and the President proclaimed that the insurrection had been suppressed. Though the confluence of peace and civil government organized by Congress was generally thought to mark the beginning of individual constitutional rights for inhabitants of U.S. territories, in its 1902 Philippine Bill, Congress specified that the Constitution did not apply in the Philippines and so provided a statutory Bill of Rights instead.

**III. The Great Debate About Imperialism**

Starting during the War of 1898, a "great national debate on imperialism" occurred in the United States. Because several opinions in *Downes v. Bidwell* and other important canonical Insular Cases responded

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84. Foraker Act § 3.
85. See Act of March 2, 1901 (Spooner Amendment), ch. 803, 31 Stat. 895, 910.
86. See Act of July 1, 1902 (Philippine Bill), ch. 1369, 32 Stat. 691.
87. See Philippine Bill § 1 ("The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands."); id. § 5 (statutory bill of rights); see also Provisions Common to all the Territories, tit. 13, ch. 1, § 1891, 1 Rev. Stat. 325, 333 (1878) ("The 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.").
88. CABRANES, supra note 27, at 4.
to themes and arguments of the great debate on imperialism, it is important to understand what was at issue in the country at large. Moreover, the extensive debate allows one to reconstruct the range of opinions about the constitutional questions of the day and identify areas of consensus and disagreement. Although a great variety of views about the Constitution were advanced during the great debate, Boumediene’s understanding of a global and universal Constitution was not among them.

A. THE CONSTITUTION DID NOT PROTECT MILITARY ENEMIES

The Civil War confirmed that under U.S. law the Constitution did not protect military enemies during war. During wartime, both civilian residents of the enemy nation and enemy combatants—wherever located—were barred from using U.S. courts to assert legal rights.90 And the Constitution provided them with no protections, even when suits were brought after the war, when courts had reopened to them.91 These understandings were black letter law for many decades after the Civil War, including during the insular era. For instance, Professor John Burgess of Columbia wrote that “the government is the creature of the constitution . . . [and] draws its life and legitimacy at every instant from the constitution,” but, he continued, “we have a constitution of government for war and a constitution of government for peace,”92 and this Constitution for war or “situations requiring the exercise of military power . . . places no limitations on the powers of the government.”93

B. THE CONSTITUTION DID NOT PROTECT NONCITIZENS’ RIGHTS OUTSIDE OF THE SOVEREIGN TERRITORY OF THE UNITED STATES

At the Founding, in the antebellum period, and through the Civil War and later nineteenth century, it was generally agreed that the Constitution did not protect noncitizens outside the United States.94 The lack of

90. See Kent, supra note 9, at 1857–58, 1905–07.
91. See id. at 1856–59, 1899–1902, 1913–17. For a succinct statement of this view during the Civil War, see Leonard Bacon, Reply to Professor Parker, 22 NEW ENGLANDER 191, 220 (1863) (“Enemies at war with the United States have no rights other than those which are theirs by the law of nations and the laws of war. The Constitution has no occasion to provide for enemies at war with the Union anything else than a speedy and effectual destruction. The idea that declared enemies, waging war upon the Union, have rights under the Constitution, is too preposterous to be entertained.”).
92. Burgess, Newly Acquired Territory, supra note 8, at 383–84. Burgess was an influential constitutional lawyer and political scientist at Columbia University.
94. See generally Kent, supra note 3 (Founding and early antebellum); Kent, supra note 9 (antebellum, Civil War, later nineteenth century).
constitutional protection for noncitizens outside the sovereign territory of the United States remained basic, black-letter law during the insular era.95 It is sometimes said that, until the mid-twentieth century, a dogma of "strict territoriality"—that is, the view that domestic law, including the Constitution, can have no force abroad—prevented American legal thought from conceiving that either citizens or noncitizens could possibly have extraterritorial constitutional rights.96 This is somewhat overstated. Territoriality undoubtedly did play a role in how extraterritorial constitutional protections were thought about. For instance, in a noncanonical Insular Case about the temporary U.S. military occupation of Cuba, the United States' brief to the Supreme Court stated that "the Constitution and laws of the United States . . . have no effect for a foreign

95. See, e.g., United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898) ("Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States."); Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) ("The term 'person,' used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."); Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893) ("Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility."); Carlisle v. United States, 85 U.S. (15 Wall.) 147, 154 (1872) ("All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection." (internal quotation mark omitted)). For later statements about the unavailability of individual constitutional protections for noncitizens outside the sovereign territory, see, for example, United States v. Belmont, 301 U.S. 324, 332 (1937) ("[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens."); and United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.").

96. See Gerald L. Neuman, Strangers to the Constitution 7 (1996) ("Under a strictly territorial model, the Constitution constrains the United States government only when it acts within the borders of the United States. Strict territoriality prevailed as dogma for most of American constitutional history, until the Supreme Court overturned it in 1957 in Reid v. Covert."); Neuman, supra note 4, at 45 (noting that "[p]re-modern case law assists little in deciding how the Bill of Rights should apply to aliens abroad" because it reflects "the rigidly territorial methodology of turn-of-the-century conflict of laws," which "assumed that constitutional rights were unavailable—to both citizens and aliens—outside the borders of the United States"); Kal Raustiala, The Evolution of Territoriality: International Relations and American Law, in Territoriality and Conflict in an Era of Globalization 219, 219 (Miles Kahler & Barbara F. Walter eds., 2006) ("In the nineteenth century the dominant rule of legal spatiality was strict territoriality: law and land were understood to be tightly and fundamentally linked.").
country." In another U.S. brief to the Court, the Solicitor General wrote that "[o]ur Constitution has no effect outside the United States, or of [sic] territory subject to its jurisdiction, and therefore can have no operation in China . . . [which] is an independent nation." Moreover, the practice of the U.S. political branches and decisions of the Supreme Court confirmed that, in certain circumstances, the government could exercise power extraterritorially without constitutional protections even for U.S. citizens. For example, the government could exercise power overseas in special-purpose enclaves like consular courts in foreign countries free from individual, constitutional-rights restrictions. But so-called "strict territoriality" was not a universally shared theory about the Constitution's scope. Another strand of thought viewed constitutional protections as potentially worldwide for U.S. citizens, but as strictly territorially limited—only available in sovereign U.S. territory—for noncitizens. The theory underlying this approach to the Constitution's scope was that allegiance to the United States and protection from its Constitution were correlative. For U.S. citizens, allegiance was owed no matter where on earth the person was located, and so the protections of the Constitution were similarly universal. By contrast, noncitizens only owed allegiance to the United States temporarily—only for so long as they were present within its borders—and so only had the protection of the Constitution within the United States.

No matter which constitutional-theoretical framework was deployed,

98. Brief Opposing the Petition for Certiorari at 11, Ah Sou v. United States, 200 U.S. 611 (1905) (No. 339) (citation omitted); see also Brief for the United States, Goetze v. United States, 182 U.S. 221 (1901) (No. 340) (noting the "maxim" that laws "have no extraterritorial effect or jurisdiction. So also of constitutional provisions"), reprinted in THE INSULAR CASES, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING THE APPENDICES THEREETO 137, 173 (Albert H. Howe ed., 1901) [hereinafter INSULAR CASES]; Richards on Expansion, N.Y. TIMES, June 27, 1900, at 6 (reporting that in a speech the Solicitor General "contended that the limitations of the Constitution apply only within the States united under it"); Constitution in Puerto Rico, N.Y. TIMES, Apr. 5, 1900, at 6 ("[O]n the question of whether the Constitution extends to the new possessions of the United States[,] t[he Department of Justice says it does not without act of Congress.").
99. Ross v. McIntyre, 140 U.S. 453, 464 (1891) ("By the constitution a government is ordained and established for the United States of America, and not for countries outside of their limits. The guaranties it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country." (citation omitted)).
100. See generally Philip Hamburger, Beyond Protection, 109 COLUM. L. REV. 1823 (2009) (analyzing the allegiance-protection framework during the colonial period in the United States and England and the American Founding era); Kent, supra note 9 (showing that this allegiance-protection framework persisted during the antebellum, Civil War and post-Civil War periods).
Americans during the insular era agreed that the Constitution did not protect noncitizens outside the sovereign territory of the United States.

Before the Insular Cases were decided, it was repeatedly expressed in political debates and internal government deliberations about imperial policies that noncitizens outside the United States lacked constitutional protections. Attorney General John Griggs issued an important legal opinion to that effect in 1898:

Puerto Rico, Cuba, and Manila have not, as yet, been formally ceded to the United States. So far as they are subject to the control and government of this country, they are ruled under the principle of belligerent right. They have not become entitled to the rights and privileges of citizens of the United States.101

During the debate about whether to ratify the Treaty of Paris and thereby to formally end the war with Spain and annex Puerto Rico, Guam, and the Philippines, Senator William Allen of Nebraska stated:

If we have acquired the archipelago [Philippines], if it is now a part and parcel of the territory of the United States, then the Constitution of the United States extends to every one of those islands and protects every one of the inhabitants. If we have not acquired that territory, if our possession is simply tentative as a possession of war . . . then the provisions of the Constitution do not apply to the territory and the inhabitants . . . .102

Administration lawyers, Congressmen, and others made these legal points many times. There are dozens of examples of express statements that individual constitutional rights were unavailable outside the sovereign territory of the United States.103

Even committed opponents of the imperialists' constitutional views believed that constitutional protections were unavailable in nonsovereign territory. One of the most prolific anti-imperialist authors, Carman Randolph, argued that the newly annexed insular possessions had come under the protections of the Constitution, but noted that constitutional protections did not apply outside the sovereign territory of the United

102. 32 CONG. REC. 573 (1899).
103. See, e.g., John T. Morgan, What Shall We Do with the Conquered Islands?, 166 N. AM. REV. 641, 645 (1898) (“The limitations on the powers of our departments of government are intended to protect our people and the States against domestic usurpation or wrong, rather than to limit the national government in its dealings with foreign states or countries.”); A Question of Constitutional Law, 88 Outlook 64, 65 (1908) (“The limitations on the power of the Federal Government are solely for the protection of the people of the United States. In dealing with those who are not citizens of the United States, its powers are not limited by the Constitution . . . People living in a territory which belongs to the United States, but is not a part of the United States, cannot claim the protection of the Constitution.”).
States. Edward Perkins, an attorney for importers in the first Insular Cases, argued to the Supreme Court that the Constitution protected "all people who might inhabit within the dominion of the Nation." William Jennings Bryan declared that the privileges and immunities found in the Constitution protect "all the people of the United States" in any "section subject to United States sovereignty."

There were two main tropes that organized the constitutional discourse during the great debate about imperialism. The first was the question whether "the Constitution followed the flag." The second was the question whether the Constitution extended "ex proprio vigore"—of its own force—over annexed territory by the act of annexation. Examining debates involving both tropes shows that there was deep agreement during the insular era that the Constitution was not the global and universal one envisaged by the Court in 2008.

1. Did the Constitution Follow the Flag?

To the question "does the Constitution follow the flag?" in annexed territories, expansionists or imperialists—often Republicans, members of President McKinley’s party—answered with a qualified "no," maintaining

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104. See CARMAN F. RANDOLPH, THE LAW AND POLICY OF ANNEXATION 74 (1901) ("The Bill of Rights is not an essay on liberty. It is a law forbidding acts which, for the most part, are political crimes, and the illegality of these acts does not depend on the place of their commission or the color of their victims, if they are committed within the territorial jurisdiction of Congress."); id. at 102 (stating that the Constitution "confers rights" "[i]n the Philippine Archipelago, as in all United States territory"); id. (suggesting that individual constitutional rights exist in "all land under the sovereignty of Congress"); id. at 106 ("The inclusion of the Philippines within the boundaries of the United States, and the aegis of the Constitution, are results of acquiring territorial sovereignty . . .").

105. Rights of Ceded Islands, N.Y. TIMES, Dec. 19, 1900, at 5; see also Fourteen Diamond Rings, 46 L. Ed. 138, 140 (1901) (argument of Charles H. Aldrich, for importer) ("The application of the Constitution in its operation is coextensive with our political jurisdiction."). Aldrich, then a prominent private lawyer in Chicago, had been Solicitor General of the United States from 1892-1893.

106. Mr. Bryan Discusses the Insular Cases, N.Y. TIMES, June 2, 1901, at 1.

107. Though there was a clear partisan divide on the issue, views about expansion did vary within political parties as well. This is illustrated by the views of leading Republican senators. For example, Senator Hanna of Ohio supported the peaceful annexation of Hawaii, was opposed to war for expansion or otherwise, and seems to have been little motivated by arguments based on the Constitution. See HORACE SAMUEL MERRILL & MARION GALBRAITH MERRILL, THE REPUBLICAN COMMAND 50 (1971); JULIUS W. PRATT, EXPANSIONISTS OF 1898, at 217, 233-34 (1936). Senator Hoar of Massachusetts was a long-time proponent of annexing Hawaii but one of the fiercest and most effective opponents—for reasons of constitutional principle—of acquiring Puerto Rico and the Philippines. See 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 315-318 (1903); PRATT, supra, at 324-25, 347-51, 357-58. Senator Spooner of Wisconsin opposed annexation of Hawaii and only reluctantly supported acquisition of Puerto Rico and the Philippines, though he thought annexation was constitutional and afterwards worked to secure American control over the colonies. See 32 CONG. REC. 1377-79 (1899) (remarks of Senator Spooner); MARGARET LEECH, IN THE DAYS OF
that the United States had authority to govern and hold the islands permanently as a property or possession, outside of the mainland constitutional community of citizenship, robust individual rights, tariff nondiscrimination, and future Statehood. Notably, many expansionists also maintained that, once the war ended, the islands were annexed, and Congress began to govern them, individual constitutional rights would protect the island populations. Others suggested that, though specific constitutional rights would not be applicable, other limits on U.S. action would protect the islanders, including morality, natural rights, the United States' duty to uplift and safeguard uncivilized peoples, or principles inherent in the U.S. system of government.

To the question "does the Constitution follow the flag?" in annexed territories, anti-expansionists or anti-imperialists—typically Democrats, members of smaller left-wing parties, or New Englanders with old-time Whigish or Mugwump sensibilities—answered a qualified "yes." They maintained that, except for these slight deviations that were justified by the fact that temporary territorial status would soon mature into full Statehood, the Constitution followed the flag *ex propiore vigore*—immediately and by its own force—as a result of annexation. As former president Benjamin Harrison put it in a widely covered speech, "the Constitution goes to annexed territory." For many anti-expansionists, it was unconstitutional for the republican government of the United States to act as an imperialist power governing subject peoples who would be denied full rights of citizenship. Though there are reasons to question the sincerity of the constitutional objections of some anti-expansionists, many others clearly did have principled objections to imperial rule over Puerto Rico and the Philippines.

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108. For instance, most anti-expansionists with constitutional objections to empire would not have questioned the use of non-Article III courts in U.S. territories, because the Constitution's life-tenure provision (tenure during "good behavior") was obviously ill-suited to a temporary territorial office soon to give way to State institutions.

109. See *Current Events*, 57 FRIENDS' INTELLIGENCER 935, 935 (1900) (quoting the speech); see also *A Conscience Republican*, 71 NATION 480, 480 (1900) ("[Harrison] holds that the Constitution follows the flag; that as Porto Rico and the Philippines are parts of the United States, the fundamental law of the republic applies to them as much as to any other parts of the United States.").

110. As noted above, many anti-expansionists objected to territorial expansion because of the race or alleged "barbarism" of the inhabitants of the Philippines. See supra note 68. They too made the constitutional argument that the Constitution followed the flag *ex propiore vigore*, but as part of a parade-of-horribles argument aimed at the many Americans who shared their view—also expressed in the Democratic Party platform of 1900—that "[t]he Filipinos cannot be citizens without endangering our civilization." THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789 TO 1900, at 333 (3d rev. ed. 1900).
The constitutional vision underlying the anti-expansionist arguments was not the flexible, global view of a Constitution available to noncitizens outside the United States, as presented in Boumediene. The constitutional vision underlying the anti-expansionist arguments was rather a view of a territorially based community of liberty and republican self-government, founded and governed by the Declaration of Independence and the Constitution. Imperialism was a dangerous innovation because it introduced into the U.S. system the possibility of government without popular participation or even consent, and undermined the equality of rights between members of the political community that was thought essential to republican government. As Charles Francis Adams said in an influential address to the Lexington Historical Society in December 1898, imperialism undermines “our fundamental principles of equality of human rights” that “the consent of the governed [is] the only just basis of all government” and “that representation is a necessary adjunct to taxation.” The Democratic Party platform in 1900 held that, because “all governments instituted among men derive their just powers from the consent of the governed [and] that any government not based upon the consent of the governed is a tyranny,” the Constitution must “follow[] the flag.” Rule over far-away subject peoples rent asunder the constitutional community. As the 1900 Democratic platform put it, “[t]he Filipinos . . . cannot be subjects without imperiling our form of government.”

111. This is how historians and other thoughtful commentators have understood the constitutional principles at issue in the great debate. See, e.g., THOMAS BENDER, A NATION AMONG NATIONS 222 (2006) (describing the “constitutional” objection to annexing the Philippines as concern that taking “a territory without the intention of eventually making it a state equal to existing states” would “compromise republican principles”); HAROLD U. FAULKNER, POLITICS, REFORM AND EXPANSION 1890–1900, at 255 (1959) (“The anti-imperialist argument was simply: for the United States to govern a people without their consent violated the cardinal principle of American democracy.”); FISS, supra note 28, at 41 (“Anti-imperialists objected that by creating a subject class, colonization of foreign lands violated the democratic principles of self-determination and consent of the governed that America embodied.”); LEECH, supra note 107, at 324–25 (relating that, according to anti-imperialists, “[t]he venerated concept of government by consent of the governed was violated by the seizure of distant colonies” and the “subjugation of alien peoples was odious to the ideals of the republic, subversive of the Constitution, degrading to the flag that was the symbol of freedom”); Josè A. Cabranes, Puerto Rico: Colonialism as Constitutional Doctrine, 100 HARV. L. REV. 450, 454 (1986) (reviewing JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985)) (“The issue was imperialism or, more precisely, colonialism—the holding of other peoples in a subordinate political position.”).

112. CHARLES FRANCIS ADAMS, “IMPERIALISM” AND “THE TRACKS OF OUR FOREFATHERS” 18–19 (1899). On the influence of this speech, see E. BERKELEY TOMPKINS, ANTI-IMPERIALISM IN THE UNITED STATES 181–82 (1970). Adams was great-grandson of the first President Adams and grandson of the second. He served with distinction in the Union Army during the Civil War, amassed a fortune as a railroad executive, and then retired to be a historian.

113. See THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789 TO 1900, supra note 110, at 333.

114. Id.
2. The *Ex Proprio Vigore* Doctrine of Anti-Expansionists Held That the First Moment at Which the Constitution Could Apply Was Annexation by the United States

Examination of the terms of the great debate about the constitutionality of imperialism reveals that even the most vigorous anti-imperialists did not assert doctrines like those that *Boumediene* wrongly attributed to the canonical Insular Cases. None of the leading anti-imperialists appear to have believed that the Constitution could extend outside formally annexed sovereign U.S. territory. Here is a typical expression of their doctrine that the Constitution was applicable *ex proprio vigore* to newly annexed territory:

The cession of the Philippines by Spain to the United States was accomplished by the execution, delivery and acceptance of an international deed of transfer known as a treaty. The transfer became complete upon the exchange of ratifications of the treaty. Thereupon, the territory transferred became an integral part of the United States. As such, it became subject to the Constitution, bound by its restrictions and entitled to its privileges.\(^\text{115}\)

Representative Francis Newlands, Democrat of Nevada, understood Supreme Court precedent to dictate that "when territory is ceded to the United States by treaty it then becomes domestic, not foreign" and "the Constitution of the United States applies to it."\(^\text{116}\) Countless other examples can be given of anti-expansionists stating or assuming that the first moment at which the Constitution could possibly protect individual rights of insular inhabitants was the formal transfer of sovereignty over the territory to the United States.\(^\text{117}\)

The lawyers challenging the U.S. government in the Supreme Court in the first set of Insular Cases had the same constitutional views as the anti-expansionist politicians and commentators. They agreed that the first moment at which individual constitutional rights could possibly be available against the U.S. government was the April 11, 1899 formalization of the peace and cession. Although many firms and individual lawyers were

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\(^{116}\) See *33* Cong. Rec. 1997 (1900); see also *id.* at 1998 (statement of Rep. Newlands) (agreeing with the holding of *Cross v. Harrison* "that immediately upon cession, and without the action of Congress at all, the Constitution and the laws applied to the ceded territory"). Newlands referred to himself as an "anti-imperialist," *id.* at 1996, but he did favor the annexation and incorporation into the Union of Hawaii and Puerto Rico, *see id.* at 1994; *32* Cong. Rec. 254 (1898).

\(^{117}\) See, e.g., *32* Cong. Rec. 434 (1899) (statement of Senator Caffery) (maintaining that "[p]eople inhabiting a territory ceded to us" become entitled to constitutional rights); *The Puerto Rico Question*, 61 Alb. L.J. 245, 247-49 (1900) (contending that the Constitution extended over Puerto Rico *ex proprio vigore* immediately upon the effectiveness of the cession to the United States).
involved in briefing and arguing the first round of insular tariff cases against the government, probably the most influential was Frederic Coudert, Jr., of the Coudert brothers' firm in New York.

At oral argument before the Supreme Court in January 1901, he had discussed the point at which "foreign" territory becomes "domestic" and "military control" must give way to "civil government" under the Constitution. According to the New York Times' account, "Mr. Coudert contended that in a case of acquisition the dividing line is passed when a treaty of acquisition is signed and ratified. When, he said, the United States sanctions acquisition by the ratification of a treaty, it thus signalizes control of and sovereignty over new territory."

Paul Fuller, Coudert's law partner, who also appeared in the Supreme Court dozens of times as counsel challenging the U.S. government in canonical and noncanonical Insular Cases, wrote in early 1901 that the Constitution came into force in the "newly acquired territory" when the treaty of peace and "the cession of sovereignty" became effective.

Other counsel opposing the government in the first set of Insular Cases reiterated the view that the Constitution began to protect individual rights in the new insular possessions only when the cession to the United States became complete on April 11, 1899. For instance, the brief of counsel challenging the government's tariff in Fourteen Diamond Rings stated that "our proposition is that from the date of the ratification of the Treaty of Paris this territory [the Philippines] became a part of the United States; Congress and the Executive in dealing therewith are subject to the provisions of the Constitution."

As a corollary, anti-imperialist legal


120. Id. Looking back in 1926 at the development of the doctrine of territorial incorporation, Coudert wrote that “[u]p to the ratification of the Treaty of Paris (April 11, 1899), the new territories had been governed as conquered territory over which military and executive fiat were law. After the treaty and with the cessation of military authority, the question of their status in American constitutional law became acute.” Frederic R. Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 COLUM. L. REV. 823, 823 (1926).

121. From 1905 to 1915, Fuller served as the first dean of Fordham Law School.

122. Paul Fuller, Some Constitutional Questions Suggested by Recent Acquisitions, 1 COLUM. L. REV. 108, 108, 110 (1901); id. at 111 (identifying "the absolute cession of territory" to be the moment when the Constitution began to apply).

123. Brief of Claimant and Plaintiff in Error Emil J. Pepke, Fourteen Diamond Rings, 183 U.S. 176 (1901) (No. 153), reprinted in INSULAR CASES, supra note 98, at 393. At oral argument, counsel for another importer in the Armstrong case contended that the Constitution of the United States extends over every portion of the National domain, whether State, Territory, or District, and that as Porto Rico was ceded to the United States by the Paris treaty, there was an absolute change of sovereignty and of title.... He held that since the ratification of the peace treaty the title to Porto Rico is as complete as the title to Ohio or New York.
thinkers agreed that U.S. military governments of occupied Spanish territory were not subject to constitutional limitations. 124

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In the great debate about the constitutionality of imperialism, the most rights-protecting position staked out—the legal position of the anti-imperialists who stood on constitutional principle—was that the first moment the Constitution could possibly provide protections was when the war was over and territory had come under the de jure sovereignty of the United States. The least rights-protecting view, dominant in Congress and the Executive branch was that, even after peace and formal annexation of the United States, the Constitution did not fully protect civilian residents of the new U.S. territories. These were the poles of the debate. Boumediene’s flexible, global view of the scope of the Constitution was not heard.

IV. PUERTO RICO UNDER U.S. MILITARY GOVERNMENT

Supreme Court decisions, legal opinions of Executive officers, and the arguments of lawyers and commentators concerning the constitutional status of the U.S. military occupation of Puerto Rico all show that Boumediene fundamentally misunderstood the legal doctrines of the insular era. These sources unanimously confirmed that, during the U.S. military occupation prior to cession of the territory from Spain, the Constitution did not protect inhabitants of Puerto Rico because it was foreign to the United States—not under its de jure sovereignty. This is despite the fact that, as at Guantanamo in the twenty-first century, the United States had complete de facto control and its military jurisdiction was supreme and unchallenged. Even after the United States had formally annexed Puerto Rico, the temporary U.S. military government there was not bound by constitutional-rights

Arguments Continued in Porto Rican Cases, supra note 119, at 5; see also Rights of Ceded Islands, supra note 105, at 5 (quoting Lawrence Harmon, counsel for an importer opposing the government in the initial Insular Cases, arguing to the Supreme Court that “immediately upon the exchange of ratifications of the treaty of peace with Spain the Philippine Islands became a part of the United States, and became instantly bound and privileged by the Constitution.” (internal quotation marks and citation omitted)).

124. See, e.g., Simeon E. Baldwin, The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory, 12 Harv. L. Rev. 393, 411 (1898) (“There is no constitutional objection to the acquisition of any or all of our new possessions, or to subjecting them to a temporary government of military or colonial form.”); Carman F. Randolph, Some Observations on the Status of Cuba, 9 Yale L.J. 353, 353 (1900) (“[Cuba was] occupied, although not annexed, by the United States. In these circumstances Cuba remains as foreign to our domestic system as it was when under the dominion of Spain. It is not within the purview of the Constitution nor any law of the United States.”); L.S. Rowe, The Political and Legal Aspects of Change of Sovereignty, 50 Am. L. Rev. 466, 467 (1902) (“The overthrow of the Spanish government by the invading army of the United States, placed the island in possession of the military authorities. In the exercise of the right accorded by international law to every belligerent, a provisional government was established .... In administering civil affairs, as an obligation incident to belligerent occupation, the power of the military commanders is free from constitutional limitations on executive, legislative and judicial power.”).
restrictions, according to the U.S. Executive branch and later the Supreme Court—it was only when Congress created a civil government for Puerto Rico that the Constitution enveloped the island in its protections. Boumediene cannot explain this.

Unlike the Cubans and Filipinos, Puerto Ricans had not revolted against Spain and the United States' pre-war planning did not contemplate an invasion of their small island. But to achieve total victory over Spain and secure a Caribbean naval base, McKinley decided to send the Army to take Puerto Rico, which it did in late July and early August 1898, with few casualties and minimal fuss. Spanish troops completed their withdrawal from Puerto Rico in October 1898, and a U.S. general became military governor. Two months earlier, the armistice and peace protocol had already announced the United States' intention to annex Puerto Rico. So from the outset the U.S. military knew its government there would be a temporary stop on the road to a new civilian government of the island under de jure U.S. sovereignty. Because of this, and because of Puerto Ricans' general receptivity to U.S. annexation, the initial U.S. military occupation orders called for local administrative and judicial functions to continue largely as before, once current or newly appointed officials swore loyalty to the United States.

The U.S. military government controlled Puerto Rico from August 1898, when Spain surrendered, until May 1, 1900, when Congress's Foraker Act created a civilian government to take control from the military. In between these events, the treaty formalizing the peace and ceding Puerto Rico to the United States was signed, approved by the U.S. Senate, and then

\[125. \text{See Arturo Morales Carrión, Puerto Rico: A Political and Cultural History 133-35 (1983) (discussing U.S. war planning and motives for deciding to seize Puerto Rico).}
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\[126. \text{See Davis 1899 Report, supra note 79, at 12; Edward J. Berbusse, The United States in Puerto Rico, 1898-1900, at 78 (1966).}
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\[127. \text{Cf. Berbusse, supra note 126, at 65-67 (discussing the range of sentiments that American occupation provoked among Puerto Ricans).}
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\[128. \text{General Orders No. 1 (Oct. 18, 1898), reprinted in Davis 1899 Report, supra note 79, at 89-90; see also Guillermo A. Baralt, History of the Federal Court in Puerto Rico: 1899-1999, at 83-84 (Janis Palma trans., 2004).}
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\[129. \text{See Letter from J.C. Gilmore, Brig.-Gen., U.S. Army, to Russell A. Alger, Sec'y of War (July 29, 1898), in Russell A. Alger, Report of the Secretary of War (1898), in 1 Annual Reports of the War Department for the Fiscal Year Ended June 30, 1898, at 1, 41-42 (1898); General Orders No. 27 (Dec. 8, 1899), reprinted in Davis 1899 Report, supra note 79, at 93. On the lawlessness in certain parts of Puerto Rico, leading to the appointment of U.S. military commissions, see Baralt, supra note 128, at 84-87.}
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entered into force on April 11, 1899.\textsuperscript{130} Several Supreme Court decisions hold that, during both of these time periods—the eight months from surrender to the effective date of the treaty of peace and cession, and the one year from the effective date of the treaty until Congress civilian government assumed control—Puerto Rican inhabitants could not assert individual constitutional rights against the U.S. military government. These decisions are wholly inconsistent with Boumediene's reading of the Insular Cases.


The legal views of the Executive and Congress provide helpful context for understanding the Court's later decisions about the legal status of the United States' presence in Puerto Rico. The Attorney General and Army took the position that, prior to the effective date of the treaty of peace and cession, Puerto Rico and the other occupied islands were foreign, enemy territory and therefore constitutional rights did not limit the U.S. military government.\textsuperscript{131} This was clearly correct—it had been firmly established in multiple Supreme Court cases arising from the Mexican and Civil Wars involving, respectively, U.S. occupation of Mexican territory before formal annexation by the United States and Confederate territory that was treated as foreign pending the surrender of the rebels.\textsuperscript{132} Even the importers challenging government policies in the early Insular Cases accepted that no constitutional rights ran against the U.S. military government prior to the treaty coming into effect. According to the Supreme Court arguments of one importer, the U.S. government only became "subject to the constitutional requirements," when the treaty of peace and cession is ratified and the territory "hence com[es] under the sovereign jurisdiction of the United States."\textsuperscript{133} Anti-expansionist commentators likewise conceded the

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\textsuperscript{130.} See supra notes 72–73 and accompanying text.

\textsuperscript{131.} See supra note 101 and accompanying text.

\textsuperscript{132.} See, e.g., Kent, supra note 9, at 1925–27.

\textsuperscript{133.} Brief for Plaintiffs in Error, De Lima v. Bidwell, 182 U.S. 1 (1901) (No. 966), reprinted in INSULAR CASES, supra note 98, at 522–23; see also id. (conceding that the power of the President as commander-in-chief to govern hostile occupied territory is free from all legal restraints, including individual constitutional rights, and limited only by an implied duty to "wage only civilized warfare," and then stating that "the freedom from limitation does not arise from the inapplicability of the restraints of the Constitution; on the contrary, it is a freedom granted by the Constitution, which gives [the President], in case of war, the usual powers of military commanders recognized by international law"); \textit{Supreme Court Hears the Porto Rico Case}, N.Y. TIMES, Dec. 18, 1900, at 5 (quoting counsel for the importer in the \textit{Goetze} case "conced[ing] that the Constitution allowed the United States "to govern [Puerto Rico] and its inhabitants while it remains foreign territory, subject only to the rules and usages of civilized warfare under international laws").
\end{flushleft}
legality of the U.S. military government, which was restricted only by the customary laws of war and not individual constitutional rights.\footnote{134} 

In \textit{Ex parte Ortiz}, a federal circuit court upheld the constitutionality of trying a Puerto Rican in a U.S. military commission in March 1899—before the treaty established peace and annexed Puerto Rico to the United States—for the murder of an American soldier.\footnote{135} At trial, Ortiz had asserted that, because he was a civilian and that no war was then occurring, a trial before a military commission infringed his Fifth and Sixth Amendment rights to a grand and petit jury.\footnote{136} The circuit court held that only “upon the cession by Spain to the United States of the Island of Porto Rico,” marked by the entry into force of the treaty on April 11, 1899, would “that island bec[o]me a part of the dominion of the United States . . . and that the constitution of the United States, ex proprio vigore, at once extend[] over that island.”\footnote{137} Ortiz’s military trial occurred too early for him to claim constitutional rights; he was tried while “the military forces of the United States held and occupied the Island of Porto Rico by force of arms, as conquered territory, forming a military department, governed by military law, administered through military tribunals, according to the usages of war and the orders in force.”\footnote{138} 

Though not in a habeas corpus case involving personal liberty, the Supreme Court in an early Insular Case held that the laws of war—instead of constitutional rights—limited the U.S. military government in Puerto Rico before annexation to the United States became effective. In \textit{Dooley v. United States},\footnote{139} the Court described in detail the legal regime that existed in Puerto Rico under U.S. occupation after hostilities ended, but prior to the entry into force of the Treaty of Paris:

\textit{We . . . do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war . . . . There is no limit}

\footnote{134}{\textit{See supra} note 124.}
\footnote{135}{\textit{See Ex parte Ortiz}, 100 F. 955 (C.C.D. Minn. 1900). After the military commission convicted Ortiz and sentenced him to death, President McKinley commuted the sentence to life in prison and Ortiz was sent to a penitentiary in Minnesota, from which he filed his habeas petition. \textit{See id.} at 955. Thus the Ortiz case raised no questions about the availability of habeas to prisoners detained outside the United States.}
\footnote{136}{\textit{See id.} at 955.}
\footnote{137}{\textit{Id.} at 962.}
\footnote{138}{\textit{Id.}}
\footnote{139}{\textit{Dooley v. United States}, 182 U.S. 222 (1901).}
to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.\textsuperscript{140}

Note that before the effective date of the treaty of peace and cession, the Court considered Puerto Rico to be “foreign” territory—and “the territory of the enemy”—even though the United States had agreed to annex it, it had been under undisputed control for months and there was no ongoing combat operations of any kind.\textsuperscript{141} This legal analysis in \textit{Dooley} shows the implicit legal understanding that individual constitutional rights did not protect foreigners in foreign countries from the U.S. government. The dissenting justices in \textit{Dooley} agreed with the majority about the unavailability of individual constitutional rights during a wartime military occupation.\textsuperscript{142}

Likewise in \textit{De Lima v. Bidwell}, another one of the early, canonical Insular Cases about tariffs, the majority and dissenting justices agreed that the laws of war governed the U.S. military occupation of foreign and hostile territory—here, Puerto Rico—during wartime.\textsuperscript{143} Finally, in \textit{Ochoa v. Hernandez y Morales}, the Court described Puerto Rico during this period—"before the exchange of ratifications," that is, before the annexation was formally complete on April 11, 1899—as “foreign territory” for constitutional purposes, governed solely under military authority.\textsuperscript{144}

\textbf{B. PEACETIME U.S. MILITARY GOVERNMENT IN PUERTO RICO: AFTER THE TREATY OF PEACE AND CESSION WENT INTO EFFECT BUT BEFORE CONGRESS CREATED A CIVIL GOVERNMENT}

After peace and annexation to the United States were formalized in April 1899, the U.S. military continued to govern Puerto Rico because Congress waited a year before creating a civil government. According to \textit{Boumediene}, during this time the Constitution should have protected individual rights in Puerto Rico because the territory was under the \textit{de jure} sovereignty of the United States, as well as its total \textit{de facto} control. But, as it happened, during the insular era the Supreme Court and the Executive agreed that, until a congressional government replaced the military government, the President, as Commander in Chief, governed Puerto Rico

\textsuperscript{140} \textit{Id.} at 230–31 (emphases added) (internal quotations omitted).
\textsuperscript{141} \textit{Id.} at 230. The Court later stated plainly that "[t]he United States and Porto Rico were still foreign countries with respect to each other." \textit{Id.} at 233.
\textsuperscript{142} \textit{Id.} at 237 (White, J., dissenting).
\textsuperscript{143} \textit{See} \textit{De Lima v. Bidwell}, 182 U.S. 1, 186 (1901) (suggesting that prior to formal cession to the United States, the military may govern conquered territory "under the war power"); \textit{id.} at 208 (McKenna, J., dissenting) (same, "as a belligerent right"). A later, noncanonical Insular Case arising in the Philippines cited approvingly a host of precedents from the Mexican War and Civil War in which the Court had indicated that military governments of occupied foreign territory are not subject to constitutional-rights limitations. \textit{See} \textit{MacLeod v. United States}, 229 U.S. 416, 425 (1913) (citations omitted).
under the international law of belligerent occupation, executive orders, and applicable statutes and provisions of the Treaty of Paris. Any rights possessed by the inhabitants of the islands derived from these sources—not the U.S. Constitution. The military governor of Puerto Rico explained this to the inhabitants in an August 1899 circular:

While an arbitrary government over any territory included within the United States is not contemplated by the American Constitution and laws, under those laws it is impossible to supply any other form of governmental control than the military over territory conquered by the arms of the Union until Congress shall, by suitable enactment, determine and fix a form of civil government for such conquered territory.145

This is merely a gentler way of stating what the President had communicated in General Orders 101, issued in mid-1898 to establish the legal frameworks for governing Puerto Rico, Cuba, and the Philippines: "the absolute domain of military authority" over the conquered Spanish islands "is and must remain supreme in the ceded territory until the legislation of the United States shall otherwise provide."146

The theoretical reason why military government—limited by the laws of war but not constitutional rights—was understood to continue might sound odd to modern ears. Until Congress acted to create a government, the President had to continue to legislate and govern Puerto Rico lest there be anarchy. The only constitutional power he could invoke to govern an area for which Congress had not created civil government was his war power as Commander in Chief, a power which was not subject to constitutional limitations. When acting as peacetime chief executive subject to ordinary constitutional limitations, the President could not make law and create institutions—that was Congress's sphere. As a result of this understanding, constitutional limitations on the Executive could only apply in places where Congress created a civil government.147

A legal opinion of the Judge-Advocate General of the Army, approved by President McKinley, held that use of military commissions could continue in Puerto Rico, even after peace and cession to the United States, until

145. Circular of General Davis (Aug. 15, 1899), reprinted in BRIG. GEN. GEORGE W. DAVIS, U.S.V., REPORT OF THE MILITARY GOVERNOR OF PORTO RICO ON CIVIL AFFAIRS FOR THE FISCAL YEAR ENDED JUNE 30, 1900, at 27, 28 (1902) [hereinafter DAVIS 1900 REPORT]; see also id. ("As Congress has as yet taken no measures or action respecting Porto Rico, the supreme government is, under the Constitution, vested in the President of the United States, as Commander in Chief of the Army and Navy. He has designated a general officer to represent him and to perform the functions of civil governor.").

146. GO 101, supra note 79.

147. For an explication of this view, see Alexander Porter Morse, The Civil and Political Status of Inhabitants of Ceded Territories, 14 HARV. L. REV. 262, 264 (1900), or Santiago v. Nogueras, 214 U.S. 260, 265 (1909) (quoted infra text accompanying note 156).
Congress created a civil government, but cautioned that military commissions should only be used if "absolutely necessary." Otherwise, it was "much more desirable to resort to some other measures, such as the provisional courts which were instituted during and immediately after the rebellion [the U.S. Civil War]." The Judge-Advocate's view was consistent with Supreme Court precedent from the Civil War. In cases concerning the occupation of seceded states by Union armies, the Supreme Court held that the war powers of the President authorized him to create military courts even after the close of hostilities—his authority lasted until Congress could by law make "proper provision for the business before it [the continuing wartime court], as well as that which had been disposed of." The Supreme Court would soon confirm the Judge-Advocate's view about the legality of continuing military government in peacetime in cases arising out of a new military court the U.S. military governor of Puerto Rico created in 1899, after the treaty had been ratified. Denominated the "United States Provisional Court for the Department of Porto Rico," the military governor gave it jurisdiction to try serious crimes and hear a variety of civil suits. Despite its different name, this court was essentially a "military tribunal or commission."

1. U.S. Provisional Court for the Department of Porto Rico

The Supreme Court sustained the constitutionality of the Provisional Court in Santiago v. Nogueras. The Provisional Court's validity was collaterally attacked by a party to a civil suit in the later-created District Court for the District of Puerto Rico, a court instituted by the Foraker Act,

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148. Davis 1900 Report, supra note 145, at 75. Initially, the U.S. military governor of Puerto Rico and some Army lawyers did not fully accept that the laws of war, and not the Constitution, continued to provide applicable limitations after peace and cession to the United States had been completed. They believed that the United States could no longer invoke the full legal rights of a belligerent now that it was dealing with a civilian population in U.S. territory during peacetime. See Davis 1899 Report, supra note 79, at 28. These views were overruled by the Judge Advocate General of the Army and the President.

149. Davis 1900 Report, supra note 145, at 75 (quoting a draft "order for the institution of a United States provisional court") (internal quotations omitted).


151. Davis 1899 Report, supra note 79, at 28–29. On the creation, composition, and jurisdiction of the court, see Baralt, supra note 128, at 90–95. The primary model for this court was the United States Provisional Court for Louisiana, located in occupied New Orleans, created by President Lincoln in late 1862 to hear civil and criminal cases arising under federal and state law in the rebel State held under Union military government. See id. at 74. The Supreme Court repeatedly upheld the constitutionality of the Louisiana court. See Kent, supra note 9, at 1926 n.348.

152. Brief for the United States at 3, Ex parte Baez, 177 U.S. 378 (1900) (No. --). The Provisional Court was "composed of a law judge, an American lawyer, and two associate judges, officers of the Fifth Cavalry, with an officer as clerk and a trooper as marshal." Id.

Congress’s April 1900 organic act for the island. In Santiago, the Supreme Court cited precedent upholding the constitutionality of the military governments of New Mexico and California, which had continued after the treaty of peace between the United States and Mexico and formal annexation by the United States, because Congress had not yet created civil governmental institutions. On the basis of this precedent, the Supreme Court unanimously upheld the Provisional Court:

By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the Crown of Spain, and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander in Chief.

In 1900, the Supreme Court decided two personal-liberty cases concerning the legality of the Provisional Court during the post-annexation, pre-Foraker Act military government of Puerto Rico. In neither case did the Court hear the merits. The two cases involved the Supreme Court denying original petitions for writs of certiorari and habeas corpus. Especially with

156. Santiago, 214 U.S. at 265.
157. In Ex parte Baez, 177 U.S. 378 (1900), the Court denied an application for leave to file a habeas corpus petition and for a writ of certiorari to bring up the record of Ramon Baez’s conviction in the Provisional Court of Puerto Rico. Baez was arrested in November 1899 and charged with illegally voting in a municipal election held under the auspices of the U.S. military government. See General Orders No. 145 (Sept. 21, 1899), reprinted in Davis 1899 Report, supra note 79 at 150–52; General Orders No. 160 (Oct. 12, 1899), as reprinted in Davis 1900 Report, supra note 145, at 110–12. Baez alleged in his filing with the Supreme Court that he had requested a grand jury indictment and petit jury trial, but both had been refused by the Provisional Court. Baez, 177 U.S. at 385. This refusal and his subsequent conviction were unconstitutional, he maintained, because there had been no state of war in Puerto Rico since April 11, 1899, and because the civilian courts had been open and functioning there since the U.S. military occupation began in October 1898. Id. at 381, 385–86. The Solicitor General’s
brief maintained that the Supreme Court lacked appellate jurisdiction to review the military actions of military commissions because they are "mere agencies of the military power" and as such "are subject to review and correction by military authority alone." Brief for the United States, supra note 152, at 5. Moreover, the brief continued, Congress had made "[n]o provision whatever . . . for extending the judicial power of the United States over Puerto Rico," and so people and institutions in Puerto Rico were outside the courts were not "within the territorial jurisdiction" of the Supreme Court. Id. at 4. Faced with these novel and difficult issues, the Supreme Court punted and denied leave to file on technical grounds. See Puerto Rico Case Decided, N.Y. TIMES, Apr. 13, 1900, at 2 ("The Court [in Baez] did not . . . decide any of the more important points raised by the petitions."). In its April 12, 1900 decision, the Court chided Baez for waiting until March 26 to file. Baez, 177 U.S. at 387-88. After all, the Court noted, it had been scheduled to recess for the term on April 9 and Baez's imprisonment would end on April 15. Id. Since, by statute, the custodian is given twenty days after the filing of a habeas petition to make a return, this case, involving "grave questions of public and constitutional law," would be moot by the time it was ready for decision. Id. at 388-90.

The second 1900 case concerning the Provisional Court was In re Vidal, 179 U.S. 126 (1900). Like Baez, it concerned fraud in the fall 1899 municipal elections held under U.S. military auspices. See generally BARALT, supra note 128, at 98-102 (discussing the prosecutions for election-related fraud in the Provisional Court). Petitioner Juan José Vidal and several others were ousted from fraudulently obtained municipal offices in the Town of Guayama, Puerto Rico, by a suit "in the nature of a quo warranto" filed in December 1899 in the Provisional Court on behalf of the people of "the Department of Porto Rico"—essentially the U.S. military government with newly adopted civilian stylings assumed once the treaty of peace and cession had been ratified. Vidal, 179 U.S. at 126. The Petitioners sought reinstatement in office. Thirty-three other individuals—who filed papers in the Supreme Court under the caption Ex parte Vasquez which were consolidated with Vidal's filing—had, like Baez, been convicted of the crime of election fraud in the Provisional Court. See Suggestion by the United States at 5, In re Vidal, 179 U.S. 126 (No. -). They argued that their convictions were illegal. Although most of the petitioners consolidated in Vidal had been sentenced on criminal charges, their counsel did not seek a writ of habeas corpus; only a writ of certiorari was requested to allow the Supreme Court to review the civil and criminal decisions. The Supreme Court denied the petition. Vidal, 176 U.S. at 127. Vidal's motion argued, like Baez's, that the lack of a jury trial in the Provisional Court violated the Constitution and that a military court could not lawfully sit in Puerto Rico because there had been no state of war since at least April 1899, when the treaty became effective, if not from the August 1898 agreement to cease hostilities. See Motion for Leave to File Petition for Writ of Certiorari at 6, In re Vidal, 179 U.S. 126 (No. -); Brief for Petitioners at 2, 4-5, 8, 12, In re Vidal, 179 U.S. 126 (No. -). The Executive's brief to the Court made essentially the same arguments as the Baez filing. See Brief for the United States at 6-7, 8-10, 15-16, In re Vidal, 179 U.S. 126 (No. -). In a terse, unanimous opinion, the Court denied the petition because by statute: "This court is not . . . empowered to review the proceedings of military tribunals by certiorari. Nor are such tribunals courts with jurisdiction in law or equity, within the meaning of those terms as used in the 3d article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect of them." Vidal, 179 U.S. at 127. There was no mention of any constitutional problems under the Suspension Clause or other provisions. Federal district and circuit courts also lacked statutory jurisdiction over Puerto Rico; in other words, it was clear that Vidal had no access to an Article III court to review his conviction and detention by the military court. This unconcern is inexplicable if Boumediene is correct that the Constitution positively requires habeas corpus to be available in Article III courts for noncitizens under the total de facto jurisdiction and control of the United States—given that at the time Puerto Rico was de jure U.S. territory governed by a peacetime U.S. military government.

denials of certiorari, in the ordinary course these actions by the Court do
not have any precedential effect. But these resolutions are nonetheless noteworthy because the Court gave no hint that the petitioners’ lack of access to an Article III court to challenge a military detention in peacetime in U.S. territory could itself be a violation of the Constitution—the Suspension Clause or any other provision. Instead, military detention with no access to Article III courts was viewed with equanimity.\textsuperscript{158}

2. Tariff Cases

In three 1901 tariff cases, including \textit{Dooley} and \textit{De Lima}, discussed above in reference to Puerto Rico’s status prior to the effective date of the treaty of peace and cession, the Supreme Court upheld the constitutionality of the Executive military government of Puerto Rico that continued after the arrival of peace and formal cession of territory in April 1899. In \textit{De Lima}, an importer of Puerto Rican sugar challenged taxes levied in New York in autumn 1899 under Congress’s generally applicable levy of duties “upon all articles imported from foreign countries.”\textsuperscript{159} \textit{Goetze v. United States} challenged taxation under the Dingley tariff of Puerto Rican tobacco imported into the United States in June 1899, during the period after the effectiveness of the treaty, but before the Foraker Act.\textsuperscript{160} And the trading firm in \textit{Dooley} challenged an Executive tariff imposed in Puerto Rico on merchandise from New York during this period. In these three cases, the importers argued that, at least since the effective date of the treaty of peace and cession, Puerto Rico had become U.S. territory and (1) could no longer be considered a “foreign countr[y]” under the Dingley tariff statute, even if Congress had not yet created a civil government in Puerto Rico, and (2) could not have its taxes and tariffs of imports into Puerto Rico set by Executive fiat instead of congressional legislation.

In \textit{Dooley}, \textit{De Lima}, and \textit{Goetze}, the Court rejected the Executive’s tariffs during the period after ratification of the treaty and before congressional government of Puerto Rico under the Foraker Act.\textsuperscript{161} By that time, the Court said, Puerto Rico had become “a country which had been ceded to us, the cession accepted, possession delivered and the island occupied and administered without interference by Spain or any other power.”\textsuperscript{162} It was no longer foreign territory. But the Court held in \textit{De Lima} that, even after the effectiveness of the treaty of peace and cession, the President could continue

\textsuperscript{158} For a discussion of the Court’s two cases, see \textit{supra} note 157. In a later case, the Supreme Court referred in dicta to the Provisional Court as “legally constituted.” \textit{Basso v. United States}, 239 U.S. 602, 607 (1916).

\textsuperscript{159} \textit{De Lima v. Bidwell}, 182 U.S. 1, 180 (1901); see also \textit{Dingley Act}, ch. 11, 30 Stat. 151 (1897).

\textsuperscript{160} \textit{Goetze v. United States}, 103 F. 72 (C.C.S.D.N.Y. 1900), rev’d, 182 U.S. 221 (1901).

\textsuperscript{161} \textit{Dooley v. United States}, 182 U.S. 222, 234-35 (1901); \textit{De Lima}, 182 U.S. at 194. \textit{Goetze} was decided in a summary opinion citing only \textit{De Lima}. \textit{Goetze}, 182 U.S. at 222.

\textsuperscript{162} \textit{De Lima}, 182 U.S. at 180-81.
to govern “under the war power . . . from the necessities of the case, until Congress provide[s] a territorial government.”\textsuperscript{165} The entire Court was unanimous on this point.\textsuperscript{164} Similarly, in \textit{Dooley} the Court stated that “[w]e have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress.”\textsuperscript{166} According to \textit{Dooley}, the U.S. military continued to have “despotic” and “absolute” “power to administer” the government of Puerto Rico until Congress created a new government.\textsuperscript{166} The Court cited the same controlling precedents from the Mexican War that \textit{Santiago} relied upon.\textsuperscript{167} But the majority and dissenting justices in \textit{Dooley} differed about the military’s power to “legislate,” specifically whether a generally applicable congressional statute—here, the Dingley tariff statute—bound the military government of Puerto Rico “after the ratification of the treaty and the cession of the island to the United States.”\textsuperscript{168} Explaining why it considered the military bound by Congress’ statute, the majority noted that “Porto Rico then ceased to be a foreign country,” and “where the rights of the citizen are concerned,” and when operating in “his own country,” a military commander’s power to legislate does “not extend beyond the necessities of the case.”\textsuperscript{169} There was no need, in the Court’s view, for the Executive to administer a tariff different from Congress’ once Puerto Rico became part of the United States and Congress therefore assumed primacy as the domestic lawmaker.

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Between 1900 and 1913 the Supreme Court repeatedly affirmed the legality of the U.S. military government of Puerto Rico and the lack of constitutional-rights limitations on that government.\textsuperscript{170} Prior to the effective date of the treaty of peace and cession, the Court treated it as obvious that

\footnotesize

\textsuperscript{163} Id. at 186.  
\textsuperscript{164} Id. at 208–09, 212–14 (McKenna, J., dissenting).  
\textsuperscript{165} \textit{Dooley}, 182 U.S. at 234.  
\textsuperscript{166} \textit{Id.}  
\textsuperscript{167} See supra note 155 and accompanying text.  
\textsuperscript{168} \textit{Dooley}, 182 U.S. at 236 (White, J., dissenting). The majority held that general statutes applying to the entire United States bound the military government after ratification of the Treaty of Paris. \textit{Id.} at 235–36 (majority opinion). For the dissenting justices, it did not make sense to think that Congress would intend that its general revenue laws, enacted well before anyone dreamed of annexing Puerto Rico, should apply immediately to Puerto Rico; Congress, these justices believed, would prefer to be able to study the situation and legislate specifically for new territory. \textit{Id.} at 239–43 (White, J., dissenting).  
\textsuperscript{169} Id. at 234–35 (majority opinion); see also \textit{Santiago} v. \textit{Nogueras}, 214 U.S. 260, 266 (1909) (citing \textit{Dooley} and stating that “[t]he authority of a military government during the period between the cession and the action of Congress . . . is of large, though it may not be of unlimited, extent”).  
\textsuperscript{170} In 1913, the Court made clear it still approved of \textit{Santiago} and \textit{De Lima’s} holdings about the U.S. military government. See \textit{Ochoa} v. \textit{Hernandez y Morales}, 230 U.S. 139, 159–60 (1913).
constitutional rights did not limit a U.S. military government in foreign territory; in other words, the Court applied the bright-line rule that the Constitution only applied in sovereign U.S. territory. This, we recall, was the rule that *Boumediene* erroneously said the Insular Cases had rejected. Even after the treaty of peace and cession had gone into effect, the Court approved the continuation of military jurisdiction over civilians in sovereign U.S. territory, free from constitutional restraints. The Court refused to intervene when noncitizens tried in military courts appealed for its assistance; statutory limitations on its jurisdiction apparently did not pose constitutional problems. These decisions utterly discredit *Boumediene*’s reading of the Insular Cases.

V. THE U.S. MILITARY IN AND AROUND CUBA, 1898–1902

None of the canonical Insular Cases addressed by *Boumediene* arose from the military occupation of Cuba. *Munaf* discussed a Cuba case but, as noted above, appeared to be unaware that the U.S. military governed Cuba from 1898–1902, when a key precedent arose.171 Cases arising from Cuba are critical to understanding the Court’s legal doctrines about war, territory, and individual rights because, unlike Puerto Rico and the Philippines, but like Guantanamo Bay today, Cuba was never formally annexed by the United States. Like all other Insular Cases, the Cuba cases show that *Boumediene* wholly misunderstood the legal framework and rules applied by the Court and other legal actors during the insular era.

A. CASES INVOLVING SPANISH-AMERICAN WAR MILITARY OPERATIONS

Noncanonical Insular Cases, not mentioned in *Boumediene*, applied the war-powers law enunciated in Civil War era decisions to hold that the United States could use military measures against enemies without regard to individual-rights protections of the Constitution.

1. Naval Seizure of Enemy Vessels as Prizes of War

The U.S. Navy’s first hostile shot of the War of 1898 was in aid of the seizure, as prize of war, of a Spanish merchant vessel in the waters between Cuba and Florida.172 Within four years of the war’s end, the Supreme Court would issue at least sixteen decisions involving vessels captured by the U.S. Navy as prizes of war.173 Not one decision considered whether individual

171. See supra note 48.


173. See, e.g., The Carlos F. Roses, 177 U.S. 655 (1900); The Benito Estenger, 176 U.S. 568 (1900); The Panama, 176 U.S. 535 (1900); The Adula, 176 U.S. 561 (1900); The Paquete Habana, 175 U.S. 677 (1900); The Steamship Buena Ventura v. United States, 175 U.S. 384 (1899); The Pedro, 175 U.S. 354 (1899); The Olinde Rodrigues, 174 U.S. 510 (1899).
rights under the U.S. Constitution might protect either Spanish subjects or the subjects of neutral nations who, through their conduct—such as running a blockade—made their vessels and cargo liable to seizure. Such an idea would have been quickly dismissed, since the *Prize Cases* of 1863 and many other prior and subsequent decisions of the Court had firmly established the contrary rule.\(^{174}\)

2. Other Military Measures Against Enemy Civilians

Additional cases arising from military operations in and around Cuba show that *Boumediene* misconstrued the prevailing constitutional doctrines of the insular era. In July 1898, the general commanding the U.S. Army in Cuba ordered the destruction, for military purposes, of buildings owned by a Pennsylvania corporation.\(^{175}\) The company sued the United States in the Court of Claims, alleging that this was a taking without compensation in violation of the Fifth Amendment. The Supreme Court held unanimously that domicile during the war in Spanish territory made the company an “alien enemy,” and therefore it “could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances.”\(^{176}\) As the War Department’s chief counsel for insular affairs put it: “During the time and in the locality of military operations of actual war the laws of peace are suspended and the most cherished rights of individuals and communities may be ignored or obliterated should the

\(^{174}\) See Kent, supra note 9, at 1893–1905.

\(^{175}\) See Juragua Iron Co. v. United States, 212 U.S. 297, 301–02 (1909).

\(^{176}\) Id. at 308. The Court decided a similar case arising in July 1898, but from Puerto Rico. Ribas y Hijo v. United States, 194 U.S. 315 (1904). During the war, the U.S. Army seized a Spanish-owned and Spanish-flagged vessel and used it for one year. See id. at 316. The Spanish owner filed a claim in the nature of quantum meruit in the U.S. District Court for Puerto Rico—a court created by the Foraker Act—and argued that the Constitution implied a contract to make compensation. Id. at 319, 323. Judge William H. Holt denied the claim, holding that “use of an enemy’s property by the war power for war purposes” need not be compensated and “[t]here is no constitutional limitation of the war power.” Transcript of Record at 6–7, Ribas y Hijo, 194 U.S. 315 (No. 151). The Supreme Court affirmed unanimously, rejecting the contention that the Constitution created a right to compensation because “[t]he seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations,” and “[a]ccording to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies [and t]he vessel . . . therefore . . . enemy’s property.” Ribas y Hijo, 194 U.S. at 323.
exigencies of the military situation actually or apparently require it.”¹⁷⁷ Two unanimous decisions later reaffirmed these rules.¹⁷⁸

B. THE NEGLECTED CASE OF NEELY V. HENKEL (1901)

Neely v. Henkel, concerning extradition from the United States to U.S. military-governed Cuba, is tremendously interesting as it was the first U.S. Supreme Court case to discuss the legality of humanitarian intervention in a foreign country;¹⁷⁹ unfortunately, though, today it is often misconstrued as a simple extradition dispute between independent nations.¹⁸⁰ Although a few astute historians of the Court appropriately discuss Neely as an insular case,¹⁸¹ Neely is generally ignored in discussions about the Insular Cases’ holdings regarding individual constitutional rights.¹⁸² That is a mistake. As discussed


¹⁷⁸. Diaz v. United States, 222 U.S. 574 (1912); Herrera v. United States, 222 U.S. 558 (1912). Herrera made clear that the denouement of active military operations in one theater does not terminate the United States’ belligerent rights under the law of war; so long as “war was flagrant elsewhere,” the military commander in a subdued district “had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or the effect of congressional action”—that is, without limitation by the rights-granting provisions of the Constitution. Herrera, 222 U.S. at 572-73 (internal quotation omitted).

This holding is important because critics of the United States’ conduct of the conflict against al Qaeda and the Taliban have often contended that, even granting arguendo that the United States may employ military force and the laws of war on an active battlefield in, say, Afghanistan, the mild sway of the Constitution and the U.S. criminal justice system must govern areas distant from the battle—for instance, Guantanamo Bay. The Supreme Court agreed with this in Boumediene, the majority found “few practical barriers to the running of the writ” to Guantanamo in part because it is not located “in an active theater of war.” Boumediene v. Bush, 553 U.S. 723, 770 (2008); see also id. at 769 (“The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”).


¹⁸². See, e.g., Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners at 16-22, Boumediene, 553 U.S. 723 (Nos. 06-1195, 06-1196), 2007 WL 2441580 (discussing the Insular Cases at length without mentioning Neely); Azmy, supra note 51, at 407-13 (same); Neuman, supra note 4, at 6-14, 26-31 (same). But see
below, the “territorial incorporation” Insular Cases concerned peacetime
civilian governments of populous lands—Puerto Rico, the Philippines, and
Hawaii—that had been formally annexed to the United States by treaty and
given civil governments. Not surprisingly, in that situation the civilian
populations of the islands were found to be protected by at least the
“fundamental” constitutional rights during peacetime. Neely is an entirely
different case because Cuba’s situation was different.\textsuperscript{186} From the outset of
the war, U.S. policy set by Congress disclaimed any intention to annex
Cuba.\textsuperscript{184} In the Treaty of Peace, the two nations agreed that Spain would
relinquish sovereignty over Cuba, but the United States intentionally
deprecated to take it up; the United States’ role would be as a temporary
trustee or custodian for the Cuban people until order could be restored and
a Cuban government created.\textsuperscript{186} Congress never legislated a government for
Cuba. For the nearly four years of its existence, the U.S. government of Cuba
was military, administered through the President’s authority as Commander
in Chief, who invoked the international laws of war for its powers and limits.
Neely is important because it unanimously held that Cuba never became part
of the United States for constitutional purposes, and that individual
constitutional rights could not be asserted against the U.S. occupation
government—notwithstanding the United States’ total and exclusive control
over Cuba for several years. Neely is arguably the insular case most on point
to the situation at Guantanamo Bay, but the Court in 2008 and many
globalist commentators have not given it sufficient weight. Boumediene, for
example, cites Neely only for a factual point about the U.S. occupation of
Cuba\textsuperscript{186} but its legal significance is not discussed.

Neely arose from patronage appointments in the Havana post office
made at the instigation of powerful Ohio Senator Marcus Hanna and a
senior U.S. postal official in Washington, D.C.\textsuperscript{187} Charles Neely and Estes
Rathbone, recipients of the patronage appointments, were U.S. citizens
holding supervisory positions in the Havana post office when they
embezzled tens of thousands of dollars in 1899 and early 1900, and then

\textsuperscript{186} Neuman, supra note 96, at 88 (discussing other opinions in Downes then stating: “Harlan
[dissenting in Downes] distinguished vehemently, if not wholly convincingly, his prior decision
in Neely v. Henkel (1901), which arose out of the American occupation of Cuba in the wake
of the Spanish-American War. ‘Temporary’ military occupation of foreign territory, without
the intention of acquiring sovereignty, did not bring it under the Constitution.” (footnote
omitted)).

\textsuperscript{187} See Sarah H. Cleveland, Embedded International Law and the Constitution Abroad, 110
COLUM. L. REV. 225, 239 (2010) (contrasting the canonical Insular Cases, concerning
“territories over which the United States claimed full sovereignty,” with “Neely, which addressed
the temporary occupation of Cuba”).

\textsuperscript{188} See supra note 65 and accompanying text.

\textsuperscript{189} See supra note 66 and accompanying text.

\textsuperscript{186} Boumediene, 553 U.S. at 764–65.

escaped to the United States. The U.S. Postmaster General in Washington oversaw the Cuban postal service, while the rest of the Cuban government was under the control of the War Department, which reported to the President as Commander in Chief and exercised authority locally in Cuba through the Governor General, a U.S. Army general.  

Secretary of War Elihu Root and General Leonard Wood, the Governor General of Cuba, ignored political pressure from Hanna and other Republicans who did not want a major scandal to mar an election year, and made sure that Neely and his confederates were criminally charged in Cuba. The U.S. government then sought and received a warrant for Neely's arrest in New York and brought him to federal court there for extradition to Cuba pursuant to a hastily enacted U.S. statute allowing extradition to a "foreign country or territory . . . occupied by or under the control of the United States." Neely's constitutional and statutory objections to extradition and trial in U.S. governed Cuba were brought to the U.S. Supreme Court. The Supreme Court unanimously ruled against Neely in early 1901, just as the Court was putting the finishing touches on its decisions in the pending cases of Downes, De Lima, and Dooley. Neely then submitted another habeas petition with additional facts and briefing, and the Court again unanimously denied it. Despite the United States' complete de facto and de jure possession and control of Cuba at the relevant time, the Court in Neely applied a categorical rule under which no individual constitutional rights could be asserted against the U.S. Government when operating in foreign territory through the military. This holding is, of course, wholly inconsistent with Boumediene's claims about the legal rules applied in the Insular Cases.

During the period 1898–1902, the U.S. Army was the government of Cuba. The United States' brief to the Court in Neely announced that "[t]he United States is at the present time, under the law of belligerent occupation, the de facto and de jure sovereign in the island of Cuba, and as such is possessed of all essential attributes of sovereignty." Official legal opinions
of the U.S. Attorney General described the United States' "occupation" of and "dominion" over Cuba, as well as its exercise of "all the powers of municipal government" in Cuba through the U.S. military.\textsuperscript{194} Boumediene's stated reasons why the Guantanamo facility should be considered effectively U.S. territory today apply equally to all of Cuba circa 1898–1902—"complete jurisdiction and control," "answerable to no other sovereign for its acts" there, etc.\textsuperscript{195} In Boumediene, these considerations about Guantanamo Bay led the Court to find that the Constitution's protection of habeas corpus rights "has full effect" there and to claim—incorrectly—that the Insular Cases support this view.\textsuperscript{196} But in Neely, the Court held that Cuba "cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States" and that individual constitutional rights did not bind the U.S. military government.\textsuperscript{197}

Mr. Neely made two principal arguments, both of which the Court rejected. First, the Court rejected Neely's argument that Cuba could not be considered a "foreign country" under the U.S. extradition statute because it was occupied and governed by the United States. The Court looked to the nature and purposes of the United States' actions in Cuba, as determined by relevant statutes, the Treaty of Paris, and presidential proclamations. It held that, even under U.S. military government, Cuba was nevertheless a foreign country because "the avowed objects intended to be accomplished" by the war and military occupation were "a temporary occupancy and control of Cuba" for the purpose of holding the island "in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be

\textsuperscript{194} See Copyrights—Cuba, Puerto Rico, the Philippine Islands, 22 Op. Att'y Gen. 268, 269 (1898) ("Cuba...[has] not, as yet, been formally ceded to the United States. So far as [it is] subject to the control and government of this country, [it is] ruled under the principle of belligerent right. [Cubans] have not become entitled to the rights and privileges of citizens of the United States"); Cuba—Insurgents, 22 Op. Att'y Gen. 301, 302 (1899) ("Although the treaty of Paris is not yet ratified, Spain has surrendered to the United States the possession and control of Cuba, and the government of the island is now being administered under the law of belligerent right by the military authorities of the United States, under the direction of the President as Commander in Chief."); Cuba—Municipal Regulations—Public Works, 22 Op. Att'y Gen. 526, 528 (1899) ("Cuba...is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government.")


\textsuperscript{196} Id. at 771.

\textsuperscript{197} Neely, 180 U.S. at 119.
surrendered when a stable government shall have been established by their voluntary action." In other words, the United States had not and did not intend to annex Cuba.

Neely's second futile argument was that it was unconstitutional for the United States to extradite him to a place under U.S. military control for the purpose of a criminal trial which would lack the full procedural safeguards of the U.S. Constitution. The Court held that the constitutional provisions referenced simply "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." In effect, Neely held that the U.S. military government of Cuba was a "foreign" government for constitutional purposes. And the Constitution of course does not apply to the actions of foreign governments.

C. BOUMEDIENE'S CONSPIRACY THEORY ABOUT THE ACQUISITION AND LEGAL STATUS OF THE GUANTANAMO BASE

Boumediene sketched an elaborate theory about the United States' acquisition of Guantanamo Bay in 1903 to support a separation-of-powers argument that a judicially enforced constitutional right to habeas must protect Guantanamo detainees because otherwise Congress and the President would be usurping the Judiciary's constitutional prerogative of saying "what the law is." But the Court seems to have been mistaken about some key facts and legal issues.

198. Id. at 115, 120–21.
199. Id. at 122.
200. Neely's statements that Cuba "cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States," and that "Cuba is none the less foreign territory, within the meaning of [the extradition statute], because it is under a Military Governor appointed by and representing the President," was quoted with approval in Pearcy v. Stranahan. 205 U.S. 257, 264–65 (1907). See also Galban & Co. v. United States, 207 U.S. 579 (1907) (summarily affirming the power of the U.S. military government of Cuba to levy tariffs by citing Neely and Pearcy).
201. Because Neely's co-defendant Rathbone was a protégé of Senator Hanna, the legality of their convictions was reargued in Senate hearings instigated by Hanna in 1903 and 1904 aimed at discrediting General Leonard Wood, the former U.S. military governor of Cuba. At the hearings, Wood testified that the courts in Cuba in which Neely and Rathbone were tried under his watch "were part of the [U.S.] military government" and "the [U.S.] military governor had full authority to appoint and remove members of the judiciary at will." The Nomination of Brig. Gen. Leonard Wood to be a Major-General, United States Army: Hearings Before the S. Comm. on Military Affairs, 58th Cong. 343 (1904) (reply of Gen. Wood to the statement of E.G. Rathbone). Notwithstanding the U.S. government's total de facto and de jure control in Cuba, General Wood replied in response to Rathbone's charge that the prosecution had violated his Sixth Amendment rights that "[I]n reference to the Constitution of the United States, Mr. Rathbone is perfectly aware that Cuba is a foreign country and, as such, the Constitution "did not apply in Cuba." Id. at 343, 357.
The Court in *Boumediene* seemed convinced that the Guantanamo facility was at one time located in "unincorporated" territory of the United States. Unincorporated territory is a term of art originating in the canonical Insular Cases. It refers to (1) lands formally annexed to the United States (2) but not yet "incorporated"—made an integral part of the Union—by Congress, (3) in which the inhabitants nevertheless possess certain fundamental constitutional rights. None of these things were ever true about Cuba. The *Boumediene* Court seemed to believe that the United States possessed "formal sovereignty over an[] unincorporated territory," namely Cuba, when the lease for Guantanamo Bay was signed in 1903. More specifically, the *Boumediene* Court apparently believed that the United States' lease and occupation of Guantanamo went into effect while the U.S. military still governed Cuba. Based on this faulty factual assumption, the Court reasoned that fundamental constitutional rights had, when the lease was signed, been available to inhabitants of Cuba against the U.S. government. Because of this, *Boumediene* viewed the 1903 lease transaction—which gave the United States "complete jurisdiction and control" but stipulated that "ultimate sovereignty" remained with Cuba—as a sinister move by the U.S. government to take away Guantanamo's then-existing status as territory in which fundamental constitutional rights protected individuals, and thereby to undermine the ability of the judiciary to enforce such rights. It will perhaps help to quote directly the Court's assertions:

> The Government's formal sovereignty-based test [for availability of constitutional rights for noncitizens] raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach... At the close of the Spanish-American War, Spain ceded control over the entire island

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203. See id. at 757–59, 765.
204. See Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976) ("In a series of decisions that have come to be known as the [Insular Cases], the Court created the doctrine of incorporated and unincorporated Territories. The former category encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force. The latter category included those Territories not possessing that anticipation of statehood. As to them, only 'fundamental' constitutional rights were guaranteed to the inhabitants." (citations omitted)); see also Burnett, *supra* note 31, at 800 (explaining unincorporated territory was a type of "domestic territory—that is, territory within the internationally recognized boundaries of the United States and subject to its sovereignty").
206. See id. at 753–54.
207. See id. at 765 (suggesting that the Constitution was "on" when the United States occupied Cuba and that the Executive had improperly tried to turn the Constitution "off" at Guantanamo by "disclaim[ing] sovereignty in the formal sense of the term" over Guantanamo and then leasing the territory back from the Cuban government).
208. See *supra* note 13.
of Cuba to the United States. . . . From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory 'in trust' for the benefit of the Cuban people. And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. 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. . . . To hold the political branches have the power to switch the Constitution on or off at will. . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). The test for determining the scope of [the Constitution's Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.209

To summarize, using the Court's own terms, the Boumediene Court seems to have assumed (1) that the Constitution was "on" over the whole of Cuba when the United States occupied it; (2) that the Constitution continued to be "on" at the time the 1903 lease was signed—apparently on the mistaken belief that, notwithstanding the withdrawal of U.S. forces and the independence of Cuba in May 1902, the United States in 1903 "continued to maintain the same plenary control it had enjoyed since 1898[;]"210 and (3) that the Executive had improperly tried to turn the Constitution "off" at Guantanamo by "disclaim[ing] sovereignty" over Guantanamo in the 1903 lease agreement through a kind of sale-leaseback transaction with the new Cuban government.211 None of this is correct.

Here is what actually happened. During and immediately after the war with Spain, the United States established a coaling station, supply depot, and

210. Id. at 765. Others had made the same error. See Amy Kaplan, Where is Guantánamo?, 57 Am. Q. 831, 836 (2005) (describing the U.S.-Cuba lease for Guantanamo as "Cuba agree[ing] to cede sovereignty over part of the territory it never controlled").
211. Boumediene, 553 U.S. at 765.
post for soldiers on the islands and shores of Guantanamo Bay, Cuba.212 The post was maintained until April 1902, when it was abandoned in anticipation of the end of the U.S. military regime.213 In May 1902, the United States formally ended its military occupation of Cuba and withdrew from the island, turning governing responsibilities over to a new Cuban government.214 All U.S. forces left Cuba in 1902 except for a small group of officers deployed at three coastal defense batteries,215 who remained to instruct and command Cuban Army soldiers.216

As noted, Boumediene was incorrect that Cuba under U.S. military occupation constituted “unincorporated” territory of the United States in which fundamental constitutional rights were available. Congress must first annex the territory to the United States by treaty or statute before it can be further classified as incorporated or unincorporated. But even if Boumediene was correct that U.S.-occupied Cuba was sufficiently under U.S. sovereignty that it could constitute unincorporated territory in which fundamental constitutional rights were available, that “unincorporated” status nevertheless must have ended with U.S. withdrawal in May 1902. The United States did not have any sovereignty or control over Cuba after May 1902—Cuba was thereafter governed by the Government of the Republic of Cuba, and was a sovereign nation.217 It is decidedly odd, then, that just after acknowledging that “the Cuban Republic was established on May 20, 1902,” Boumediene asserts that, in 1903 when the lease for Guantanamo was signed, “the United States continued to maintain the same plenary control it had enjoyed since 1898.”218 The Court in Boumediene got the facts wrong.

In fact, when the U.S. military occupation gave way to the new Cuban government in May 1902, private parties owned the land around

216. Cf. Langley, supra note 69, at 122 (noting that before the U.S. Military Government withdrew in 1902, the U.S. Army had trained “[f]or coastal defense” several companies of Cuban soldiers to man the armaments”).
Guantanamo Bay,\textsuperscript{219} which was under the jurisdiction of the sovereign government of Cuba—it is simply not true that the American occupation “continued” in the “same” fashion as before May 1902. An agreement for the United States to lease an area at Guantanamo Bay for a naval base and coaling station was not signed until February 1903,\textsuperscript{220} well after transfer of sovereignty and control to the new Cuban government.\textsuperscript{221} At the time of this February 1903 agreement, it seems that there were no employable naval facilities on the land around Guantanamo Bay.\textsuperscript{222} After the lease was signed, United States and Cuban officials surveyed the area and signed a supplemental lease for the future U.S. outpost.\textsuperscript{223} In March 1903, Congress, for the first time, appropriated money for “public works” and occupation

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\item[219.] See McCoy, supra note 212, at 47.
\item[220.] See VARNER & KOZE, supra note 212, at 6.
\item[221.] The Cuban government did sign the 1903 agreement under some duress, but this does not change the constitutional analysis. Duress is a pervasive feature of international relations. During the second half of the U.S. occupation, the U.S. Congress and Executive implemented a policy to fix in advance of the U.S. departure the future relations with an independent Cuba. In March 1901, Congress, through the Platt Amendment to an army appropriations bill, outlined the undertakings that would have to be made in any new Cuban constitution before the United States would leave the island. See Act of March 2, 1901, ch. 803, 31 Stat. 895, 897; see also HITCHMAN, supra note 214, at 109–10, 113–18 (describing the origins of the Platt Amendment). One required undertaking was “to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations.” See 31 Stat. at 898. With the approval and organizational assistance of the U.S. military government, a Cuban constitutional convention had been meeting in Havana at the same time as the U.S. executive officials and Congress were finalizing what became the Platt Amendment. See HITCHMAN, supra note 214, at 94–109; JULIUS W. PRATT, AMERICA’S COLONIAL EXPERIMENT 120 (1950). Certain provisions of the Platt Amendment, including the requirement to provide the United States land for naval bases, were distasteful to many Cubans, and the constitutional convention did not vote to include it in the new Cuban constitution until June 1901. See HEALY, supra note 190, at 170, 177–78; HITCHMAN, supra note 214, at 115, 125–27, 136–38, 140–48, 150–55, 160–83; PRATT, supra, at 120, 122. It seems clear that the threat that the United States would continue to occupy Cuba until the Platt Amendment was embodied into the new Cuban constitution was what caused many reluctant members of the constitutional convention to agree to do so. See HEALY, supra note 190, at 178.
\item[222.] See REPORT OF THE CHIEF OF THE BUREAU OF EQUIPMENT (1903), in ANNUAL REPORTS OF THE NAVY DEP’T FOR THE YEAR 1903: REPORT OF THE SECRETARY OF THE NAVY, MISCELLANEOUS REPORTS, H.R. DOC. NO. 58-3, at 295, 358 (2d Sess. 1903) [hereinafter NAVY 1903 REPORT] (stating in regard to “Guantanamo, Cuba” that “[a] naval coal depot is projected at this port, but no steps have yet been taken toward its construction”); Naval Station in Cuba, N.Y. TIMES, Mar. 25, 1903, at 8 (implying that there was no naval station in existence at Guantanamo). For several years before the February 1903 lease agreement, Congress had been appropriating money for naval projects and marine garrisons at currently existing naval stations in the new insular possessions, namely at Cavite, Philippines; San Juan, Puerto Rico; Pearl Harbor, Hawaii; and Tutuila, Samoa. There were no appropriations for building or maintaining any facilities at Guantanamo. See, e.g., Act of July 1, 1902, ch. 1968, 32 Stat. 662, 669, 671, 675–76, 679, 681–83, 688.
\item[223.] McCoy, supra note 212, at 49–50.
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and use of Guantanamo as a naval station.224 Cuba and the United States ratified the agreement and exchanged ratifications in October 1903.225 Cuba began to acquire the land pledged to the United States from private owners.226 The U.S. Secretary of the Navy reported in November 1903 that “[p]ossession of the waters, islands, and such portion of the mainland as may have been acquired by Cuba will soon be taken” by the United States.227 In other words, the United States was yet not in possession of the Guantanamo Bay territory.228 Only in December 1903—one and one-half years after the United States ceased to occupy and govern Cuba—did the Cuban government officially transfer control over the leased area to the United States.229

To sum up, during the U.S. military occupation, individual constitutional rights did not protect people in Cuba because Cuba was foreign territory, notwithstanding the United States’ total de facto control of Cuba from 1898 to 1902. The Supreme Court so held in Neely in 1901—a decision entirely consistent with voluminous Supreme Court precedent. The U.S. occupation ended in May 1902 and Cuba became an independent nation. Any U.S. military or naval facilities at Guantanamo were abandoned. Since the U.S. government’s control of Cuba from 1898 to 1902 did not suffice to make individual constitutional rights available there, the United States’ departure and the advent of an independent Cuban government could not somehow bring the Constitution into force in Cuba. Even under Boumediene’s mistaken legal theory that Cuba was “unincorporated territory” of the United States during the 1898–1902 military occupation, and therefore that the Constitution protected individual rights in Cuba during


225. NAVY 1903 REPORT, supra note 222, at 14.

226. Id. at 15.

227. Id.; see also Theodore Roosevelt, President of the U.S., Special Session Message (Nov. 10, 1903), reprinted in 14 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (NEW SERIES) 6741, 6742 (James D. Richardson ed., 1909) (reporting to Congress that “[t]he negotiations as to the details of these naval stations [in Cuba] are on the eve of completion”).

228. See Cuba Offers Naval Station, N.Y. TIMES, Nov. 8, 1903, at 4 (“The Cuban Government to-day handed to United States Minister Squiers a proposition which, if accepted by the United States, will result in the immediate turning over of the Guantanamo Naval Station to the United States.”).

229. REPORT OF THE CHIEF OF THE BUREAU OF NAVIGATION (1904), in ANNUAL REPORTS OF THE NAVY DEPT FOR THE YEAR 1904: REPORT OF THE SECRETARY OF THE NAVY, MISCELLANEOUS REPORTS, H.R. Doc. No. 58-3, at 467, 526 (3rd Sess. 1904) (“On the 10th of December [1903] at noon formal possession was taken of the concession granted for the Guantanamo naval station.”); accord VARNER & KOZE, supra note 212, at 9; McCoy, supra note 212, at 53. It was reported in the press that the actual transfer of physical control had been “effected in a quiet manner” sometime in November 1903. See Transfer of Guantanamo, N.Y. TIMES, Nov. 12, 1903, at 1.
that time, the reign of the Constitution must have ended when the United States left Cuba in May 1902. So when the United States transacted in February 1903 with the Republic of Cuba to lease territory at Guantanamo Bay, it was Cuban territory that was leased. That territory had no U.S. constitutional status of any kind. Boumediene's conspiracy theory—that the 1903 lease's provision giving total control of the leased land to the United States but stating that Cuba possessed "ultimate sovereignty" was an attempt to "manipulat[e]" away the constitutional protections available to people at Guantanamo—has no basis in fact or law.

VI. THE LIMITED DOMAIN OF THE DOCTRINE OF TERRITORIAL INCORPORATION

The canonical Insular Cases that Boumediene relied upon do not support the Court's 2008 holding that noncitizen military detainees held in territory outside the de jure sovereign territory of the United States have enforceable individual rights under the Constitution. The reason for this is simple. The territorial incorporation doctrine developed by the canonical Insular Cases, and relied upon by Boumediene, concerned populous territories after the United States formally and fully annexed them by the treaty of peace and cession on April 11, 1899. The constitutional issues raised in these cases were fairly ordinary questions about civilian life in U.S. territory during peacetime. The canonical Insular Cases relied upon by Boumediene did not raise or decide questions about constitutional rights outside the sovereign territory of the United States, or questions about the availability of constitutional rights to alleged enemies during wartime. No relevant actor at the time—not the Executive, Congress, the Court, or the private litigants—understood these canonical Insular Cases the way the Boumediene Court did: as establishing that constitutional rights could be available extraterritorially, and for alleged military enemies at that. In fact, the Court itself made clear in the very same canonical Insular Cases relied upon by Boumediene that the earliest moment at which individual constitutional rights could possibly become available was the formalization of the annexation of territory to the United States. Formal annexation was a sine qua non requirement for individual constitutional rights.

A. DOWNES V. BIDWELL (1901)

As discussed above, Congress's Foraker Act for Puerto Rico imposed a duty on goods shipped between the mainland United States and Puerto Rico.\textsuperscript{230} There was no tax or duty on goods shipped between or among U.S. states and continental territories.\textsuperscript{231} The Foraker Act duty was set at a rate

\textsuperscript{230} See supra notes 82–84 and accompanying text.

\textsuperscript{231} See U.S. CONST. art. I, § 9, cls. 5–6 ("No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . .").
different from and lower than the duty on goods imported into the United States from foreign countries.\textsuperscript{232} In Downes v. Bidwell, the most important of the canonical Insular Cases, a fruit importer challenged the constitutionality of $659.35 paid under this unique Foraker Act duty, which had been exacted on oranges imported into New York from Puerto Rico in November 1900.\textsuperscript{233} The importer argued that Puerto Rico had become part of the United States at the time of the ratification of the Treaty of Paris and that therefore the Foraker Act violated the Constitution's Uniformity Clause—"all Duties, Imposts and Excises shall be uniform throughout the United States"\textsuperscript{234}—because oranges imported from other parts of the United States besides Puerto Rico were not subject to the same statutory duty.\textsuperscript{235}

Every justice in Downes agreed that the earliest point at which the Constitution could possibly have applied in Puerto Rico was when the exchange of ratifications of the Treaty of Peace ended the war with Spain and accomplished the cession of Puerto Rico to the United States—that is, April 11, 1899.\textsuperscript{236} Recall that the war began in April 1898, and by late July, all fighting had ended. The U.S. military government of Puerto Rico was up and running by late summer 1898. The Treaty of Paris was signed in December 1898. The United States was at that time at peace and exercised full, complete, and undisputed sovereignty over Puerto Rico. But none of these events, singly or in combination, was sufficient to trigger application of the Constitution to Puerto Rico—according to every justice of the Court.

Justice Brown, who wrote an "opinion of the court" in Downes joined by no other justice, noted that "the Constitution does not apply to foreign countries,"\textsuperscript{237} and held that even a formal "act of cession" of territory to the United States by treaty does not "extend" the Constitution to that new U.S. territory automatically.\textsuperscript{238} Rather, in line with "the practical interpretation

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\item \textsuperscript{232} See Foraker Act, ch. 191, § 3, 31 Stat. 77, 77 (1900).
\item \textsuperscript{233} Downes v. Bidwell, 182 U.S. 244, 247 (1901).
\item \textsuperscript{234} U.S. CONST. art. I, § 8, cl. 1.
\item \textsuperscript{235} See Downes, 182 U.S. at 247-48.
\item \textsuperscript{236} See id. at 256; id. at 337 (White, J., concurring) (joined by Justices Shiras and McKenna); id. at 345-46 (Gray, J., concurring); id. at 348 (Fuller, C.J., dissenting) (joined by Justices Harlan, Brewer, and Peckham).
\item \textsuperscript{237} Id. at 270 (majority opinion); see id. at 269 (stating that, in Ross v. McIntyre, the Court held "that the Constitution had no application, since it was ordained and established 'for the United States of America,' and not for countries outside of their limits" (quoting Ross v. McIntyre, 140 U.S. 453, 464 (1891))).
\item \textsuperscript{238} Id. at 264 ("[T]he government and laws of the United States do not extend to such territory ['territories previously subject to the acknowledged jurisdiction of another sovereign'] by the mere act of cession."); see also id. at 286 ("The executive and legislative departments of the government have for more than a century interpreted this silence [in the Constitution about whether it applies to U.S. territories] as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial
\end{itemize}
put by Congress" and the Executive upon the Constitution for over a century, Justice Brown held that "the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct." However, after the United States' formal acquisition of territory, constitutional "principles" or "principles of natural justice inherent in the Anglo-Saxon character" protect inhabitants from abuses such as deprivation of life, liberty, or property without due process of law.

The other eight justices rejected Brown's radical view—that the Constitution did not protect the individual rights of inhabitants in U.S. territory with a congressional government and in peacetime, unless and until Congress had acted to "extend" the Constitution. For these eight justices, the completion of the formal annexation on April 11, 1899, had constitutional significance even if Congress did not, by statute, expressly provide that the Constitution was applicable.

Justice White's lengthy, dense concurring opinion in Downes, joined by Justices Shiras and McKenna, was the origin of the doctrine of territorial incorporation relied upon by Boumediene. White reaffirmed his agreement with the Court's recent unanimous decision in Neely v. Henkel, which found that Cuba, though occupied and controlled by the U.S. military, had not been annexed by the United States and was still therefore "foreign" for constitutional purposes. This meant that the customary international laws...
of war, and any applicable statutes and treaties, but not individual constitutional rights, limited the U.S. military occupation government. It is therefore clear that White and the justices joining him in *Downes* viewed *de jure* sovereignty as a necessary prerequisite for invocation of constitutional rights.244

As to the facts of *Downes*, White framed the question as whether "Congress in governing the territories is subject to the Constitution" and found that Congress was bound by certain fundamental limitations at the moment the annexation to the United States became effective by the exchange of ratifications.245

Justice Gray concurred in *Downes*, staking out a pragmatic position about the instantiation of constitutional government in Puerto Rico. For Gray, "civil government," that is, government created by Congress for peacetime, was a necessary precondition for the availability of individual constitutional rights.246 Until Congress legislated, the Executive branch necessarily had to continue to govern using its military powers, even after the effective date of the treaty of peace and cession.247 And even after Congress, in peacetime, creates a civil government, Gray held that "[i]f Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution. Such was the effect of the [Foraker Act]."248

Both Chief Justice Fuller's dissent, joined by Harlan, Peckham, and Brewer, and Justice Harlan's separate dissent make clear that they believed 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.249 Because he had written the unanimous

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244. *Downes*, 182 U.S at 288–89 (White, J., concurring).
245. Id. at 291 (emphasis added).
246. Id. at 345–46 (Gray, J., concurring).
247. Id.
248. Id. at 346–47 (emphasis added).
249. See id. at 360 (Fuller, C.J., dissenting) (stressing the holding of *Cross v. Harrison* that "by the ratification of the treaty with Mexico 'California became a part of the United States'" and thus came under the Constitution (quoting *Cross v. Harrison*, 57 U.S. (16 How.) 164, 197 (1853))); id. at 367 (stressing the importance of the moment of the "cession of territory" (quoting *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833))); id. (stressing the moment when the "nation acquire[es] territory, by treaty or otherwise" (quoting *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 225 (1845))); id. at 368 (stressing the moment when "political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another" (quoting *Chi., Rock Island & Pac. Ry. v. McGlinn*, 114 U.S. 542 (1885))); id. (stressing the moment "[w]hen a cession of territory to the United States is completed by the ratification of a treaty"). In this context, one can understand what specifically Fuller meant by his looser language. E.g., id. at 361 (suggesting that the Constitution operates "everywhere within the dominion of the United States" (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1856))).
opinion in *Neely*, Harlan in *Downes* felt obliged to respond to White’s use of *Neely* to establish the nonapplicability of the Constitution over Puerto Rico after the effective date of the treaty of peace and cession. Harlan distinguished *Neely* as irrelevant because while Cuba remained a “foreign” country notwithstanding the U.S. military occupation, and therefore the Constitution did not provide individuals with rights against the government of Cuba, *Downes* involved “a territory of the United States acquired by treaty.” Harlan was very clear about the moment when constitutional rights became available in Puerto Rico:

> When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory.... The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States....

**B. De Lima v. Bidwell (1901) and Other Early Insular Cases**

As discussed above, all the justices in *De Lima*, *Dooley* and other decisions agreed that the U.S. military lawfully governed Puerto Rico under the laws of war prior to the effectiveness of peace and annexation and, even after the island became sovereign U.S. territory, until Congress created a civil government. These decisions are thus wholly at odds with Boumediene’s interpretation of the canonical Insular Cases. Decided in December 1901, the *Fourteen Diamond Rings* case raised the same question with regard to the Philippines as *De Lima* had regarding Puerto Rico—whether after the ratification of the treaty of peace and cession a U.S. tariff collector in the continental United States could continue to consider the Philippines one of the “foreign countries” under the congressional tariff and therefore exact duties on goods coming from the Philippines. The Court held that the Philippines cannot “be distinguished” from Puerto Rico in regard to the “foreign country” provision of the tariff statute, and so the *De Lima* “decision is controlling.” According to the Court,

> The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity.... The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

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250. *Id.* at 388 (Harlan, J., dissenting).
251. *Id.* at 384–85.
254. *Id.* at 178.
More specifically, the Court stated:

The Philippines thereby ceased, in the language of the treaty, "to be Spanish." Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established.  

_Dorr v. United States_ addressed whether certain individual constitutional rights applied in Filipino territorial courts created by Congress under an organic act of 1902, enacted after the war for Filipino independence had been put down. The bigger question raised in _Dorr_ was the nature and scope of any constitutional limitations on Congress's power to "to govern... ceded territory not made a part of the United States by Congressional action," but annexed to the United States by the treaty of peace and cession. In _Dorr_, concerning the post-annexation Philippines, just as in _Downes_, concerning post-annexation Puerto Rico, the crucial constitutional moment was congressional acceptance of the cession of territory in the treaty.  

C. RASMUSSEN MAKES "INCORPORATION" THE LAW OF THE LAND  

The 1905 case _Rasmussen v. United States_ settled Justice White's incorporation doctrine from _Downes_ as the rule of Court. The Court's discussion in _Rasmussen_, especially Justice Harlan's concurrence, shows very clearly that the issue in the case concerned Congress governing people in a territory ceded to the United States, and viewed acquisition of sovereignty through cession as the trigger for application of the U.S. Constitution.  

_Rasmussen_ arose in Alaska, which had been ceded by Russia to the United States in 1867, but in 1905 was still five decades away from Statehood. The defendant was convicted at trial by a jury of six—as was required by the congressionally enacted Alaska Code—of the misdemeanor of "keeping of a disreputable house." He claimed that the six-member jury violated the Sixth Amendment right to a full common-law

255.  _Id._ at 179.  
257.  _Act of July 1, 1902 (Philippine Bill), ch. 1369, 32 Stat. 691._  
258.  _Dorr_, 195 U.S. at 149.  
259.  _Id._  
261.  According to Supreme Court Reporter Charles Henry Butler, after Justice White orally delivered the Court's opinion in _Rasmussen_ he said to Butler, "now _Downes v. Bidwell_ is the opinion of the Court and I want you to make it so appear in your report of this case." _CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES_ 94 (1942).  
263.  _Rasmussen_, 197 U.S. at 518.
According to the Supreme Court, the U.S. government in defending the conviction "did not dispute the obvious and fundamental truth that the Constitution of the United States is dominant where applicable;" but the United States asserted that the Sixth Amendment "did not apply to Congress in legislating for Alaska." The issue turned, said the Court, on whether Alaska had been incorporated into the Union. If not, the Court concluded:

[T]he Constitution... [did] not require [Congress] to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Note that the Court was considering only "ceded" territory when it discussed the application of the Constitution. Examining congressional enactments relating to Alaska, the Court held that after cession to the United States in 1867, Congress "incorporated [Alaska] into the United States as a part thereof," and therefore the Sixth Amendment had become applicable.

Justice Harlan, the Court's most vigorous opponent of any constitutional theory which limited the application of the Constitution on American soil, made clear in his concurrence that he viewed the reign of individual constitutional rights as coextensive only with "territory after it has come under the sovereign authority of the United States," when the people of the territory are therefore "subject to the full authority of the United States for purposes of government." Harlan also was quite clear about how and when the application of the Constitution was triggered:

Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that territory, as I think, came under the complete, sovereign jurisdiction and authority of the United States, and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such a result or not, the inhabitants of that Territory became at once entitled to the benefit of all the guarantees found in the Constitution of the United States for the protection of life, liberty, and property.
After such ratification no person charged with the commission of a crime against the United States in that Territory could be legally tried therefor otherwise than by what this court has adjudged to be the jury of the Constitution.  

Similarly, Justice Brown in his concurrence in *Rasmussen* viewed Russia's cession and the United States' acquisition of full sovereignty as marking the moment at which the Constitution could begin to apply.

After *Rasmussen*, Justice Harlan's concurring and dissenting opinions continued to be an easy way to see that all justices on the Court agreed that the Constitution did not bind the United States in foreign lands until they had been formally annexed to the United States and sovereignty extended over them. *Trono v. United States,* for example, was one of the many cases the Supreme Court decided concerning the application of the Bill of Rights in the territorial court system created in the Philippines by Congress's organic act of 1902. Mr. Trono had been tried by information before a single judge and acquitted of capital murder but convicted of assault. On appeal, the Philippine Supreme Court exercised its power, which it had held during Spanish rule as well, to overturn an acquittal and enter a judgment of conviction. The U.S. Supreme Court split over whether the Double Jeopardy Clause of the Fifth Amendment prohibited this. More interesting for present purposes is Justice Harlan's dissent:

> [F]rom the moment of the complete acquisition of the Philippine Islands by the United States, and without any act of Congress, or a proclamation of the President upon the subject, the people of those islands became entitled, of right, to the benefit of all the fundamental guaranties of life, liberty, and property to be found in [the Constitution]. . . . [N]o person within the territory and subject to the sovereign jurisdiction of the United States can be legally deprived of his life or liberty for crime committed by him against the United States, except in the mode prescribed by the Constitution of the United States.

Thus, starting with *Neely* and continuing through *Downes, De Lima, Dooley, Rasmussen,* and other precedents, the full Court was in agreement

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270. *Id.* at 529.

271. *Id.* at 531 (Brown, J., concurring) (stating that the constitutional right to a common-law jury trial was made applicable in Alaska “by the treaty of cession with Russia [which] provided that ‘the inhabitants of the ceded territory. . . . shall be admitted to the enjoyment all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property, and religion’” (alteration in original)).


273. *Id.* at 522.

274. *Id.* at 536 (Harlan, J., dissenting).
that de jure U.S. ownership and sovereignty over a territory was a necessary
precondition to the availability of individual constitutional rights. Boumediene's "functional approach to questions of [the Constitution's]
'extraterritoriality'"\textsuperscript{275} has no basis in the Insular Cases.

D. BOUMEDIENE'S MISREADING OF BALZAC V. PORTO RICO

Boumediene misread Balzac v. Porto Rico,\textsuperscript{276} finding in it support for the
notion that fundamental constitutional rights of individuals bind the U.S.
government wherever the government exercises significant control as a
practical matter.\textsuperscript{277} Balzac described "fundamental" constitutional rights
being available to residents in "territory belonging to the United States
which has not been incorporated into the Union,"\textsuperscript{278} otherwise known as
"unincorporated territory." As discussed above, the Boumediene Court may
have misunderstood "unincorporated territory" to be territory under the
control but not formal sovereignty of the United States, like Guantanamo
Bay.\textsuperscript{279} If so, that is an error. "Unincorporated" (or "not incorporated")
territory, a term of art originating in the canonical Insular Cases, refers to
(1) lands formally annexed to the United States (2) but not yet
"incorporated"—made an integral part of the Union—by Congress, (3) in
which the inhabitants nevertheless possess certain fundamental
constitutional rights.\textsuperscript{280} Puerto Rico was—and still is—unincorporated
territory, but Guantanamo Bay is not.

Boumediene's misreading of Balzac—erroneously finding in Balzac
support for a "flexible" rule under which the Constitution provides rights to
military enemies outside sovereign U.S. territory—might also stem from
Balzac's potentially ambiguous statement that "[t]he Constitution of the
United States is in force in Porto Rico, as it is wherever and whenever the
sovereign power of that government is exerted."\textsuperscript{281} The Boumediene Court
may have believed that "sovereign power" referred to de facto U.S. control of
a piece of land. That is also a mistake. As the preceding sections
demonstrated, the Court's territorial incorporation case law shows that all
justices agreed that the earliest moment at which the Constitution came into
effect was upon the formal annexation to the United States and creation of

\textsuperscript{276}. Balzac v. Puerto Rico, 258 U.S. 298 (1922).
\textsuperscript{277}. Boumediene, 553 U.S. at 758. Boumediene also mistated a key fact underlying the Balzac
case. See supra note 42.
\textsuperscript{278}. Balzac, 258 U.S. at 305, 309.
\textsuperscript{279}. See supra Subpart V.C.
\textsuperscript{280}. See supra note 204 and accompanying text.
\textsuperscript{281}. Balzac, 258 U.S. at 312.
civil government by Congress. This is what “sovereign power” must refer to.**

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Thus, when properly understood, even the canonical Insular Cases evaluated by the Boumediene Court establish that presence in de jure sovereign territory is a necessary precondition for the existence of individual constitutional rights. It is not even necessary to read the more obscure, noncanonical Insular Cases to see just how incorrect Boumediene was.

VII. NAVAL STATIONS, COALING STATIONS, AND OTHER MILITARY OUTPOSTS

During the great debate about the Constitution and imperialism during the 1898–1900 period, even anti-imperialists with strong constitutional objections to annexing Puerto Rico and the Philippines and treating the inhabitants as less than full American citizens were perfectly at ease with another form of territorial acquisition and autocratic government: the purchase or lease of small tracts of land for military purposes, such as coaling or naval stations, which were to be governed by the military without any constitutional rights for the inhabitants. This was not merely a theoretical question. The United States annexed Guam in 1898, took control of Samoa in 1899, leased from Panama a strip of land for the interoceanic canal in 1903, and leased land at Guantanamo Bay, Cuba for a naval station in 1903. Under Boumediene’s theory of the Constitution’s domain, individual constitutional rights should have protected people at each of these locations because the United States had, at a minimum, complete de facto control, if not also de jure sovereignty. But the opposite was true during the insular era—no individual constitutional rights were available at these locations—because of the categorical rule that constitutional rights existed in sovereign U.S. territory under congressional civil government, not in U.S. occupied foreign lands and not even in sovereign U.S territory when it was governed by the U.S. military. There are no Supreme Court decisions in the insular era concerning the constitutional status of Guam, Samoa, Guantanamo, or the Panama Canal Zone. But there is much to learn from the opinions of executive branch actors like the Attorney General and military officials, actions of Congress, and commentary by informed observers.

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282. See, e.g., De La Rama v. De La Rama, 201 U.S. 303, 308 (1906) (“Congress, having entire dominion and sovereignty over territories, has full legislative power over all subjects upon which the legislature of a state might legislate within the state.” (citation omitted)); Rasmussen v. United States, 197 U.S. 516, 520 (1905) (discussing rules derived from Downes v. Bidwell concerning “Congress, in legislating” for the Philippines, after “by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession”).
A. **Most Anti-Expansionists Did Not Think It Unconstitutional To Institute Permanent Military Government over Naval Outposts and Coaling Stations**

Anti-expansionists with principled constitutional objections to annexation of the Philippines and Puerto Rico as "second-class" territories did not generally oppose—or have any constitutional scruples about—acquiring ports, harbors, or other small pieces of territory for use as U.S. naval outposts or refueling stations for the Navy and U.S. merchant vessels. An excellent example of this is the so-called Vest Resolution. Because debates about treaties occurred in secret executive sessions, anti-expansionist U.S. Senators desiring to rouse public opinion against ratification of the Treaty of Paris in late 1898 and early 1899 skirted this rule by introducing resolutions as vehicles for public debate about questions they wanted to raise about the treaty. The most important of these resolutions, named for its sponsor Senator George Vest, resolved that:

> Under the Constitution... no power is given to the Federal Government to acquire territory to be held and governed permanently as colonies.

> ... All territory acquired by the Government, except such small amount as may be necessary for coaling stations, correction of boundaries, and similar governmental purposes, must be acquired and governed with the purpose of ultimately organizing such territory into States suitable for admission into the Union.\(^\text{283}\)

Under *Boumediene*’s understanding of the scope of constitutional rights, the distinction Vest offers makes no sense. Yet Vest’s view was mainstream, stated by numerous legal and political figures, while the *Boumediene* understanding of constitutional doctrine was never seen during the insular era.\(^\text{284}\)

For example, in a December 1898 interview, William Jennings Bryan—the most important Democratic politician in the country at the time—maintained, on the one hand, that “[o]ur form of government [and] our traditions... all forbid our entering upon a career of conquest.”\(^\text{285}\) But, on the other hand, he recommended that the United States "reserve a harbor and coaling station in Porto Rico and the Philippines in return for services rendered and I think we would be justified in asking the same concession from Cuba."\(^\text{286}\) Senator George Perkins, a Republican from California, opposed annexing the Philippines: “it seems to him that to acquire territory

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\(^{283}\). 32 CONG. REC. 20 (1898) (emphasis added).

\(^{284}\). To be clear, Congress never adopted the Vest Resolution; it is cited because its contents reveal common understandings about constitutional law, not because it is itself enacted law.


\(^{286}\). *Id.* at 15.
in the [Philippines] islands or on the Asiatic coast is contrary to the spirit of the Constitution." 287 But nevertheless, Perkins was "of the opinion that the United States" should maintain "a military, naval, and coaling station in the islands."288 The influential Senator John T. Morgan, Democrat of Alabama, believed that colonialism was, in his words, "repugnant to the principles of our national Constitution."289 He introduced legislation to provide republican governments for Puerto Rico, the Philippines, and Hawaii. But he also repeatedly argued that the United States could acquire land for naval outposts, coaling stations, or an isthmian canal and impose military government, without any individual constitutional rights protections.290 Many other prominent anti-expansionists held similar views: a colonial government over subject peoples would be unconstitutional, but seizing a few harbors here and there and governing them militarily, as naval bases or coaling stations, posed no legal dilemmas.291 In 1903, Guantanamo Bay was leased by the United States from Cuba for just these purposes and governed on the basis of these understandings.

Expansionists recognized the importance of their opponents' view that the Constitution did not stand in the way of the acquisition and military rule over small pieces of territory. The McKinley administration pressed this point to the Supreme Court during oral argument on the first set of Insular Cases, trying to move the justices from general agreement that the Constitution did not prohibit arbitrary rule of small military reservations to the larger point that the United States could annex territory yet still deny

288. Id.
289. Morgan, supra note 103, at 643–44.
290. See, e.g., id. (arguing that the United States must obtain “naval reservations” in the Philippines, “a naval station in Pango-Pango Bay, Samoa” and other overseas “military outposts”); Investigation of Panama Canal Matters: Hearing Before the S. Comm. on Interoceanic Canals, 59th Cong. 2263 (1907) (statement of Senator Morgan) (1907) (stating that the U.S. military government in the Panama Canal Zone was “perfectly constitutional . . . and legitimate, and is according to the settled and uniform practice of the Government of the United States” when exercised by the Executive in “any reservation set apart for military purposes, [even though] the country may be in a state of peace”).
291. See, e.g., Carl Schurz, American Imperialism, reprinted in REPUBLIC OR EMPIRE, supra note 285, at 329, 337–38, 355 (contending that annexation of the Philippines and Puerto Rico, and governing them as subject colonies, would violate the first principles of American government, but then asking rhetorically “can we not get as many coaling stations as we need without owning populous countries behind them that would entangle us in dangerous political responsibilities and complications?”); Philippine Race Problem, N.Y. TIMES, Jan. 14, 1899, at 4 (reporting a speech of Senator McLaurin opposing the Treaty of Paris and annexation of the Philippines, during which he denied the constitutionality of acquiring territory to hold as a permanent colony but stated: “of course subject to the exception of small tracts acquired for specific Governmental purposes, like coaling stations and guano islands under the act of 1856”).
some or all constitutional rights to the inhabitants. Justice White's seminal opinion in Downes picked up on this move.

B. A CASE STUDY ON GUAM AND SAMOA: FORGOTTEN ISLANDS OF THE UNITED STATES, GOVERNED BY MILITARY POWER FOR DECADES

In 1898 and 1899, the United States acquired Guam and Samoa, respectively, both populated, overseas territories where it established naval bases and put the populations under military rule. For decades afterwards, the President governed under his war power and the U.S. military, civilian executive branch, Congress, and other observers assumed that the individual-rights provisions of the Constitution did not protect the Guamanians and Samoans—precisely because the small islands were military outposts and Congress had not put them under a civil government. The theory of temporary military rule of U.S territory pending the institution of congressional government, approved in numerous Supreme Court decisions such as Dooley, Santiago, and Cross v. Harrison, was extended for several decades in Guam and Samoa. In the case of Samoa, there was the additional factor that for decades after U.S. control began, no treaty or act of Congress recognized or accepted the cession of the islands by Samoan leaders to the United States. Samoa could therefore be analogized to Cuba, foreign territory under temporary military occupation where, under Neely v. Henkel, constitutional rights could not be asserted as limits on the U.S. military government.

Guam, a volcanic island in the remote western Pacific, was ceded to the United States by Spain in the Treaty of Paris. In December 1898, even before the treaty came into effect, President McKinley put Guam and its

292. See INSULAR CASES, supra note 98, at 308 (reporting oral argument of Attorney General Griggs: "Suppose a cession of a small island with a half a dozen inhabitants is desired as a fort, or a military reservation, or a coaling station, or a place to land a cable, must the United States agree to permit those inhabitants to remain and accept them as citizens? Why should this Government be considered to have less power in this respect than other nations? What clause of the Constitution so compels?").

293. See Downes v. Bidwell, 182 U.S. 244, 211 (1901) (White, J., concurring) ("Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island, under the rule which is now insisted upon, be taken? Suppose, again, the acquisition of territory for an inter-oceanic canal where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result?").

294. See supra Subpart V.B.

295. Treaty of Paris, supra note 64, art. II, at 1755. The McKinley Administration wanted Guam as a naval base because of its strategic-geographic importance in light of the United States' expansion into the Pacific (Hawaii and the Philippines). See CAMPBELL, supra note 78, at 303; LEECH, supra note 107, at 212.
approximately ten thousand people under the administration of the Navy. The President and Secretary of Navy's instructions to the naval governor of Guam provided that "the absolute domain of naval authority . . . necessarily is and must remain supreme in the ceded territory until the legislation of the United States shall otherwise provide." Thereafter the whole of Guam was considered simply a United States "naval station," "under the absolute control and sole jurisdiction of the Navy Department." As the President's order implied, the absence of a congressional civil government required that a military government exist instead. Congress agreed with this legal analysis—by failing to give the island an organic act for civil government, Congress suggested, by operation of section 1891, Revised Statutes, that the Constitution did not have "the same force and effect" in Guam as it did in "organized" territories of the United States.

Unlike Guam, Samoa was not a conquest of war and was not formally annexed to the United States during the insular era. Decades before 1898, the Samoan Islands attracted the United States' interest because their location in the Pacific made them an ideal place for vessels heading to China or Japan from San Francisco, Hawaii, or other points east to stop for rest, provisions, or fuel. In a bilateral treaty signed in 1878, the United States obtained the right to use the harbor of Pago Pago and to establish


297. Beers, supra note 296, at 18. The Navy was directed to "take such steps as may be necessary to establish the authority of the United States and to give [Guam] the necessary protection and government." Doris Coulter Cogan, We Fought the Navy and Won: Guam's Quest for Democracy 16 (2008) (citing Exec. Order 108-A (Dec. 23, 1898)).

298. See William F. Willoughby, Territories and Dependencies of the United States 295 (1905) (describing how the President provided a government for Samoa by designating it as a "naval station" and "direct[ing] the secretary of the navy to take the necessary action for the establishment and maintenance there of the authority of the United States"); id. at 302 ("The legal situation of [Guam] is precisely that of Samoa. All government powers are vested in the hands of the naval officer in command of the naval station."); E.J. Born, Our Administration in Guam, 71 Independent 696, 697 (1911) (describing how Guam had "been maintained as a naval station ever since" the executive order of December 23, 1898, ruled by a "naval officer as Commandant of the Naval Station and Governor of Guam").


300. Cf. Woog v. United States, 48 Ct. Cl. 80, 1912 WL 1172, at *8 (Ct. Cl. 1913) (stating that Guam from the moment of cession "was necessarily governed by the military power of this country, because the island has never been organized as a Territory").

301. See Provisions Common to all the Territories, tit. 19, ch. 1, § 1891, 1 Rev. Stat. 325, 353 (1878) ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all organized Territories, and in every Territory hereafter organized as elsewhere in the United States.").

there a coaling or naval station.\textsuperscript{303} After England and Germany obtained similar privileges, the 1880s saw increasing tension and jockeying for control by the three foreign powers.\textsuperscript{304} In 1889, the three powers concluded an agreement—without Samoan consent—guaranteeing the “independence of the Samoan Government,” and the islands’ status as “neutral territory,” and devising a system of local government of commercial affairs to be jointly administered by U.S., German, and British representatives.\textsuperscript{305} Then in 1899, the United Kingdom allowed the other two powers to split Samoa between them.\textsuperscript{306} The resulting trilateral treaty did not purport to vest sovereignty in the United States.\textsuperscript{307} After the U.S. Senate approved the treaty, President McKinley declared that the islands of Samoa, home to approximately 5000 native people,\textsuperscript{308} were “placed under the control of the Department of the Navy, for a naval station,” and directed a naval officer to act as “governor.”\textsuperscript{309} Like Guam, Samoa was now under a military government.\textsuperscript{310} In 1900, the chiefs of the most important eastern island, Tutuila, executed an instrument purporting to unilaterally “cede and transfer” it to the United States.\textsuperscript{311} Though neither Congress nor the President formally responded, in 1902


\textsuperscript{304} See Campbell, supra note 78, at 76-83; Dobson, supra note 302, at 42-44; Walter LaFeber, The New Empire 35-36, 55-56 (1963).


\textsuperscript{306} A treaty, again excluding Samoa as a party, provided that the United Kingdom and Germany renounced in favor of the United States all their rights and claims over the eastern islands of Samoa, and the United Kingdom and United States renounced rights and claims over western islands in favor of Germany. See Treaty of Berlin of 1899, U.S.-Ger.-U.K, Dec. 2, 1899, 31 Stat. 1878; see also Campbell, supra note 78, at 312-13 (describing the events).

\textsuperscript{307} See W.M. Crose, American Samoa: A General Report by the Governor 9-10 (1913).

\textsuperscript{308} In 1900, the naval governor of Samoa estimated that Tutuila, the largest and most populous island of the American portion, had 4000 to 5000 inhabitants. Benjamin F. Tilley, The United States in Samoa, 52 Independent 1888, 1846 (1900).

\textsuperscript{309} General Orders No. 540 (1900), reprinted in Alexander Stronach, Codification of the Regulations and Orders for the Government of American Samoa by Order of the Governor 73, app. 1 (1917) (issued by Secretary John D. Long to transmit the instructions of President McKinley).

\textsuperscript{310} See Gray, supra note 303, at 125 (stating that President McKinley placed Samoa under “military jurisdiction”).

\textsuperscript{311} The entire document is reproduced in Gray, supra note 303, at 112-17. It stated that the undersigned Samoan chiefs “cede and transfer to the Government of the United States the Island of Tutuila and all things there to rule and to protect it.” Id. at 114.
President Roosevelt did send a “thank you” note and some gifts.312 Congress waited until 1925 to expressly note that the United States had “sovereignty... over American Samoa”313 and did not accept the chiefs’ deeds of cession until 1929.314 At that time, Congress belatedly delegated to the President and his appointees—or rather, made express its earlier silent delegation by acquiescence—“all civil, judicial, and military powers” in Samoa,315 putting Samoan government on a congressional basis for the first time.

During the decades of naval government, and “[i]n the absence of congressional legislation, authority of the naval governor of Guam” and Samoa was considered “supreme.”316 It was agreed that individual rights provisions of the Constitution did not restrict the naval governments’ activities. In a 1903 legal opinion, the Attorney General of the United States noted “the absence of the Constitution” because “[t]he Constitution of the United States had not been extended to Guam.”317 According to the Attorney General, the naval governor’s power “as a military governor was intended to be plenary. He had authority to do what the exigencies of military government required, and held the supreme legislative, executive, and judicial authority of the island.”318 The next year, another Attorney General opinion declared that the “political status” of Guam and Samoa “is anomalous. Neither the Constitution nor the laws of the United States have been extended to them, and the only administrative authority existing in them is that derived mediately or immediately from the President as


313. Act of Mar. 4, 1925, ch. 563, 43 Stat. 1357, 1357 (providing “[t]hat the sovereignty of the United States over American Samoa is hereby extended over Swains Island”).


315. Id.

316. S. Doc. No. 67-238, at 111 (1922) (citing Judge Advocate General of the Navy, Legal Op. 9351-1436:4 (1915)) (regarding Guam). The same legal analysis would apply a fortiori to Samoa because it was constitutionally “foreign” to the United States in a way that annexed Guam was not.

317. Guam—Spanish Law—Condemnation of Property, 25 Op. Att’y Gen. 59, 61 (1905). This opinion might seem—in retrospect—to be erroneous because it adopted the language of Justice Brown’s opinion in Downes, which never commanded majority support on the Court and was soon supplanted by the doctrine of territorial incorporation. But the language does accurately convey the widely accepted legal proposition that constitutional rights did not run against a caretaker U.S. military government over U.S. territory that would eventually be supplanted by a congressionally approved civil government.

318. Id. In 1899, a U.S. Navy Lieutenant described the naval governor’s power in Guam as “unlimited.” Louis M. Nulton, The Expedition to the Island of Guam, 51 INDEPENDENT 1357, 1357 (1899); see also KEESING, supra note 312, at 132 (stating that the naval governor of Samoa had “absolute power”).
Commander in Chief of the Army and Navy of the United States." A 1906 opinion of the Solicitor General of the United States, approved by the Attorney General, cited Dooley and held that the "military government" of Guam was authorized by the President's "war power... with the silent acquiescence of Congress, in accordance with the doctrine that a temporary and provisional government of this nature continues ex necessitate rei until further action by Congress." This legal analysis applies equally to the naval government of Samoa. In 1911, the High Court of American Samoa, headed by the naval governor, rejected claims that the Fifth and Sixth Amendments applied as limits on the military courts in Samoa. Congress's knowledge and acquiescence in the Executive's interpretation of the Constitution cannot be doubted. The Navy Department and governors of Guam and Samoa maintained for decades afterward that the

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321. Cf. Island of Tutuila—Status—Customs Duties, 25 Op. Att'y Gen. 629, 629-30 (1902) (stating that Samoa "has no government but that of a naval officer appointed by United States authority, except local town governments"). Samoa was also arguably "foreign" under Nedy until Congress accepted the cession in 1929. If that was the case, the Constitution would not have supplied the inhabitants with enforceable individual rights.
322. American Samoa v. Willis, 1 Am. Samoa 635, 646 (1911). In addition to emphasizing that Congress has not accepted the cession of Samoa to the United States (by implication, Samoa was still foreign), and that Samoa was governed as a naval station under the military powers of the President—factors which we have seen mean that the Constitution was inapplicable—the court also noted that it would be impractical to use juries and grand juries because "[t]here are very few who could be called upon for jury duty, among the whites, as the majority of them are not Citizens of the United States or of Tutuila. The natives are uncivilized and are incapable of self-government." Id.
323. Congress appropriated and legislated for Guam and Samoa. See, e.g., Act of March 3, 1901, ch. 852, 31 Stat. 1107, 1108; ANNUAL REPORTS OF THE NAVY DEPARTMENT FOR THE YEAR 1900, H.R. DOC. NO. 56-3, at 68 (2d Sess.1900) [hereinafter NAVY'S 1900 REPORT]. Congress also received the legal opinions of the Attorney General and other executive branch reports about the military governments. See, e.g., NAVY'S 1900 REPORT (reporting to Congress about the naval governments of Guam and Samoa).
324. See ANNUAL REPORT OF THE NAVY DEPARTMENT FOR THE FISCAL YEAR 1907, H.R. DOC. NO. 60-3, at 25 (1908) ("The island of Tutuila, Samoa, and the island of Guam stand in a peculiar position with respect to the administration of their affairs. These islands have never been organized as territories by any act of Congress or otherwise. Their political status is anomalous. Neither the Constitution nor the laws of the United States have been extended to them."); see also S. DOC. NO. 67-3, at 109 (1922) (same).
325. See, e.g., CROSE, supra note 307, at 11 ("Neither the Constitution nor the laws of the United States have been extended to Samoa and Guam." (quoting 25 Op. Att'y Gen. 91, 97-98 (1904))).

Naval governors occasionally invoked the U.S. Constitution when they banned objectionable native practices. See, e.g., Richard P. Leary, U.S.N. Gov. of Guam, Proclamation (Jan. 1, 1899) (banning slavery and peonage in Guam because they are "subversive of good government, ... an obstacle to progressive civilization, a menace to popular liberty, and a
Constitution did not limit the governments of the islands. Military and civilian commentators agreed. As late as 1946, the Navy reported to the United Nations that "the Constitution of the United States does not extend to American Samoa." In 1949, a congressional committee on Guam reported that "[t]he Constitution of the United States does not apply to Guam."

Scholars whose work likely influenced Boumediene's reading of the Insular Cases have bolstered arguments in favor of individual constitutional rights for Guantanamo detainees by citing cases finding rights available for inhabitants of Guam and Samoa. But the cited cases, decided after fifty
years of military rule in Guam and Samoa, had been replaced by civilian oversight by the Department of the Interior, and after Congress and the Executive branch had taken several significant actions to make the islands "domestic" for constitutional purposes and to indicate an intent to protect the rights of the inhabitants of Guam\textsuperscript{330} and Samoa.\textsuperscript{331} It is hardly surprising that, after all of these developments, lower federal courts would determine that Guam and Samoa had become so substantially similar to Puerto Rico, for example, that the doctrines of territorial incorporation and fundamental rights were applicable. Congress and the Executive have taken the opposite view of Guantanamo Bay.\textsuperscript{332}

\textsuperscript{330} In 1930, the naval governor of Guam promulgated a bill of rights. See SEC'Y OF THE NAVY JAMES FORESTAL'S SPECIAL CIVILIAN COMM., COMM. TO STUDY THE NAVAL ADMIN. OF GUAM AND AM. SAM., REPORT ON THE CIVIL GOVERNMENTS OF GUAM AND AMERICAN SAMOA, Discussion and Explanation, at 8 (1947). Congress's 1950 Organic Act of Guam created a three-branch form of local government; granted U.S. citizenship to Guamanians; created a federal district court; and promulgated a Bill of Rights very similar to what the U.S. Constitution protects. See Organic Act of Guam, ch. 512, §§ 3-5, 21, 64 Stat. 384 (1950) (current version at 48 U.S.C. § 1421a (2006)). The following year, Guam was included within the jurisdiction of the Ninth Circuit Court of Appeals. See Act of Oct. 31, 1951, Pub. L. No. 248, sec. 34, 65 Stat. 710, 723 (1951) (codified at 48 U.S.C. § 1424 (2006)). The Organic Act of Guam also declared that "Guam is ... an unincorporated territory of the United States," id. sec. 3, thereby expressly invoking the Downes v. Bidwell line of cases and their holding about the availability of fundamental constitutional rights in populated territories governed under the authority of Congress—as Guam would now be. See generally Pugh v. United States, 212 F.2d 761, 762-63 (9th Cir. 1954) (noting section 9's reference to the Insular Cases). Two years after the Organic Act, the Immigration and Nationality Act of 1952 reconfirmed U.S. citizenship for Guamanians and defined "[t]he term 'United States', except as otherwise specifically herein provided, when used in a geographical sense" to mean "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 101(a) (38), 66 Stat. 163, 171 (1952) (codified at 8 U.S.C. § 1101(38) (2006)).

\textsuperscript{331} In 1929, Congress formally accepted, ratified, and confirmed the cessions of territory offered in 1900 and 1904 by Samoa leaders and gave formal legislative approval to the existing naval government. S. J. Res. 110, 70th Cong., 45 Stat. 1255 (1929). In 1931, the American naval governor promulgated a bill of rights. See ASSISTANT CHIEF OF NAVAL OPERATIONS, supra note 327, at 30 ("While the Constitution of the United States does not extend to American Samoa, Section 105 of the Codification of the Regulations and Orders for the Government of American Samoa contains most of the guarantees included in the first ten amendments of the United States Constitution known as the Bill of Rights."). In 1951, the President confirmed the transfer of administration of Samoa from the Navy to the Department of the Interior, further signifying Samoa's "domestic" status. See Exec. Order No. 10264, 16 Fed. Reg. 6417 (July 3, 1951). The INA classified Samoa as an "outlying possession[] of the United States," § 101(a)(29), and granted U.S. citizenship to Samoans, § 301(a)(5). In 1960, the Secretary of the Interior, acting with congressional authorization pursuant to the 1929 joint resolution, approved a constitution for Samoa, which organized a government and provided a Bill of Rights. See 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, 347 (2008).

\textsuperscript{332} For instance, the Executive branch has repeatedly stated that Guantanamo Bay is outside the United States and, as a result, noncitizens there have no constitutional rights to
CONCLUSION

*Boumediene* is one of the most celebrated Supreme Court decisions in recent history. But in terms of the application of standard judicial methods, it is also one of the most clearly wrongly decided. To answer a difficult and important constitutional question of the type presented in *Boumediene*, one would be well advised to consult a range of sources of constitutional meaning, among them certainly the text, the original understanding of the Founding generation, the practices of the U.S. government over history, judicial doctrine, and general constitutional principles. The *Boumediene* Court did not closely analyze the text of the Constitution, but should have.333 The original meaning of the Constitution should have cut against the detainees, because *Boumediene* concluded that both English and American Founding era history—thought to be incorporated by reference in the Habeas Suspension Clause of the Constitution—were inconclusive as to the existence of the claimed right.334 As to historical practices of the U.S. government since the Founding, *Boumediene* itself admitted that it was an unprecedented decision.335 The actual practice of the Executive branch and Congress had, since the Founding, been to regard noncitizens outside the United States, and military enemies no matter where located, as lacking constitutional protection.336 Regarding the factual, historical questions about the origins and nature of the U.S. government’s control over Guantanamo in 1903, the *Boumediene* Court advanced a novel theory about U.S. government “manipulation” that is at odds with the facts.337 *Boumediene* found highly relevant the general constitutional principle of separation of powers.338 But its application of that principle was troubling. For one thing, near-absolute congressional control over federal court jurisdiction has been

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333. The most plausible textual analysis of the relevant constitutional provisions is that noncitizens outside the United States are not protected by the Suspension Clause. *See* Kent, supra note 3, at 521-23.

334. *See Boumediene v. Bush*, 553 U.S. 723, 752 (2008). *See generally* Pushaw, supra note 19, at 2025 (noting Justice Scalia’s argument in dissent that if the Constitution’s original meaning was truly inconclusive, *Boumediene* “had no basis to strike down the interpretation of [the Suspension] Clause by Congress and the President as not covering foreign enemy combatants in Guantanamo. The Court avoided its duty to defer to the political branches’ reasonable constitutional judgments about military affairs.”).

335. *See Boumediene*, 553 U.S. at 770 (“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.”); *see also* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950) (“We are cited no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an enemy alien who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.”).

336. *See generally* Kent, supra note 9; Kent, supra note 3.

337. *See supra* Part V.C.

a key factor making judicial review work in our system of separated powers, but Boumediene seemed uninterested in discussing that. Moreover, Boumediene suggested that if the Court could not deploy the Constitution to conduct judicial review this would be tantamount to allowing "the political branches to govern without legal constraint." This is a strikingly aggressive claim of judicial supremacy, giving essentially no consideration to the Executive and Congress's independent duties to uphold the Constitution and laws of the United States. It also slights the important historical role that international law has played as the primary limit on the United States' extraterritorial and wartime activities.

Text, original meaning, the historical practices of the U.S. government, and general constitutional principles provide little support for the result in Boumediene, which leaves judicial doctrine to bear the load. Boumediene implied that a key Civil War precedent supported its approach, but that is not correct. Even supporters of the Boumediene decision do not defend the Court's blatant misconstruction of the most relevant modern precedent, Johnson v. Eisentrager. And then we come to Boumediene's reading of the Insular Cases. Boumediene relied substantially on the Insular Cases to reject a "formalistic, sovereignty-based test" for the availability of constitutional rights and employ "a functional approach to questions of [the] extraterritoriality" of the Constitution's protection of individual rights,

339. Cf. Peter J. Smith, Textualism and Jurisdiction, 108 COLUM. L. REV. 1883, 1892 (2008) (describing the "traditional view" that Congress has plenary control over how much of Article III jurisdiction to allow courts to exercise); Martin H. Redish, Text, Structure, and Common Sense in the Interpretation of Article III, 138 U. PA. L. REV. 1633, 1637 (1990) ("The inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court."). But see, e.g., Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 271-72 (1985) (arguing that Congress may not strip away both Supreme Court and lower federal jurisdiction over certain categories of cases, including those arising under the Constitution).


341. See generally Kent, supra note 9; Kent, supra note 3.

342. See Boumediene, 553 U.S. at 759, 794 (relying on Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)).

343. See generally Kent, supra note 9, at 1845-47 (demonstrating that during the Civil War era, noncitizens located outside the United States, and declared to be military enemies by Congress, were understood to lack any protection from the U.S. Constitution).

344. See, e.g., Cole, supra note 19, at 49 ("The result in Boumediene was also surprising because the government had precedent on its side. In 1950, the Supreme Court had expressly ruled that the writ of habeas corpus was unavailable to enemy fighters captured and detained abroad during wartime. Both the district court and the court of appeals had found that decision, Johnson v. Eisentrager, to be controlling, and no subsequent case law had directly undermined its reasoning."); Richard A. Epstein, How To Complicate Habeas Corpus, N.Y. TIMES, June 21, 2008, http://www.nytimes.com/2008/06/21/opinion/21epstein.html (stating that the Boumediene decision was "correct" and that he had joined an amicus brief urging the result the Court reached, but criticizing Boumediene's treatment of Eisentrager as "sleight of hand").
under which constitutional protections for noncitizens could be available even outside sovereign U.S. territory. Yet this Article has demonstrated that the Insular Cases say precisely the opposite of what Boumediene claims they do about the scope of constitutional rights.

345. Boumediene, 553 U.S. at 762, 764. Boumediene even justified its misreading of Eisentrager on the ground that, "if the Government's reading of Eisentrager were correct"—that constitutional rights are unavailable to noncitizens who are outside the sovereign territory of the United States—"the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' . . . functional approach to questions of extraterritoriality." Id. at 764.
1895: Cuban revolution against Spanish rule begins
1896–1897: Filipino revolution against Spanish rule
Apr. 1898: Spanish–American War begins. Congress authorizes use of force to free Cuba from Spanish rule. The United States proceeds to attack Spanish forces in Cuba, Puerto Rico, Guam, and the Philippines
July 1898: U.S. Congress votes to annex Hawaii
Aug. 1898: United States–Spain armistice, leaving the United States in control of Cuba, Puerto Rico, Guam, and Manila and environs (the rest of the Philippines is in control of indigenous rebel forces or ungoverned). U.S. military governments are instituted in Cuba, Puerto Rico, Guam, and at Manila
Dec. 1898: Treaty of Paris signed. Spain agrees to cede Puerto Rico, Guam, and the entire Philippines to the United States; Spain agrees to withdraw from Cuba, leaving the United States as caretaker. President McKinley institutes military government in Guam
Feb. 6, 1899: U.S. Senate gives its advice and consent to ratification of the Treaty of Paris; Filipino insurrection against U.S. rule began two days earlier
Apr. 11, 1899: Treaty ratifications exchanged; treaty enters into force, including its provisions ceding Puerto Rico, Guam and the Philippines to the United States. U.S. military governments continue as before in Puerto Rico, Guam, the Philippines, and Cuba
Aug. 1899: The United States, United Kingdom, and Germany agree that the United States and Germany will split up Samoa between them
June 1899: U.S. Provisional Court for Puerto Rico created by military governor’s order
Feb. 1900: President McKinley institutes military government for Samoa
Apr. 1900: Ex parte Baez decided
May 1900: Congress’s Foraker Act, creating civilian government for Puerto Rico and imposing tariff between Puerto Rico and
the mainland, goes into effect; U.S. military government of Puerto Rico ends

Nov. 1900: William McKinley defeats William Jennings Bryan, winning second term. Bryan had declared imperial rule over colonies like the Philippines to be unconstitutional; *In re Vidal* decided

Dec. 1900–
Jan. 1901: Original Insular Cases argued before U.S. Supreme Court

Jan. 1901: *Neely v. Henkel* decided

Mar. 1901: U.S. Congress enacts the Platt Amendment, defining future U.S.–Cuba relations, including the requirement that Cuba allow the United States to have a naval base there


Sept. 1901: Pres. McKinley dies from assassin’s bullets; Theodore Roosevelt sworn in

Dec. 1901: *Fourteen Diamond Rings* and second *Dooley* case decided

Apr. 1902: The United States abandons its coaling station, supply depot, and post for soldiers at Guantanamo Bay, Cuba, in anticipation of the end of U.S. military occupation of Cuba

May 1902: End of U.S. occupation of Cuba; new Cuban government assumes sovereignty

July 1902: U.S. Congress passes Organic Act creating civil government for the Philippines. Governor Taft declares insurrection against U.S. rule in the Philippines to be at an end

Feb. 1903: The United States and Cuba sign an agreement for the United States to lease an area at Guantanamo Bay for a naval base and coaling station

Oct. 1903: After the United States and Cuba separately ratify their agreement to lease land at Guantanamo Bay for a naval station, ratifications are formally exchanged

Dec. 1903: Cuba formally transfers land at Guantanamo Bay to the United States for purposes of building a naval station

1904: *Dorr v. United States* and *J. Ribas y Hijo v. United States* decided

1905: *Rasmussen v. United States* decided
1909: *Juragua Iron Co. v. United States* and *Santiago v. Nogueras* decided

1913: *Ochoa v. Hernandez y Morales* and *MacLeod v. United States* decided

1922: *Balzac v. Porto Rico* decided
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n/a means that the category is not applicable. An empty box indicates that the category is applicable but there are no relevant Supreme Court decisions. Supreme Court cases are listed if they contain a holding or dicta about the constitutional status of governmental action. Note that where cases are listed in a given category, the list is not necessarily exhaustive.

i. Discussed supra Part V.A–B.
ii. Discussed supra Part V.A.
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x. Discussed supra Part VI.C.