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How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay

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NOTES

How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay: Examining Theories that Interpret the Constitution's Scope

ABSTRACT

In the aftermath of the September 11th attacks, the United States has held suspected terrorist detainees captured during the military campaign in Afghanistan indefinitely at the United States military facility at Guantanamo Bay, Cuba. Among those currently detained are members of the al-Qaeda terrorist group and the Taliban. Currently the detainees are in the peculiar situation of generally being outside the scope of protections offered by both the international humanitarian law and the Unites States criminal law regimes.

This Note examines the extraterritorial scope of the United States Constitution as it applies to the suspected terrorist detainees at Guantanamo Bay. It argues that the difficult questions concerning how to define the detainees' constitutional status cannot be answered by courts employing a formalistic analysis that characterizes the issue as one governed by the notion of sovereignty. Instead, a more substantive approach is warranted that examines theories used to interpret the Constitution's scope. After discussing these theories, this Note proposes that the textured membership theory provides a useful approach in determining the Constitution's extraterritorial scope as it pertains to the Guantanamo detainees.

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I. INTRODUCTION

On September 11, 2001, terrorists launched an attack on the United States that killed thousands of Americans.[1] Shortly following the attacks, the United States, acting with allied forces, launched air strikes against Afghanistan.[2] In the midst of the ground campaign

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1. Elisabeth Bumiller, *Vigilance and Memory*, N.Y. TIMES, Sept. 12, 2002, at B8.

2. Stephen Castle, *Air Strikes on Afghanistan: Coalition—Key Allies Rally to Support US-Led Military Response*, INDEP. (London), Oct. 8, 2001, at 5.

that followed the air campaign, allied forces captured a number of suspected terrorists.[3] Those captured included suspected members of the al-Qaeda terrorist group as well as members of Afghanistan's former Taliban leadership.[4] These individuals were eventually transferred to the United States military facility at Guantanamo Bay, Cuba, where they have received indefinite detention.

The United States has determined that although the Taliban detainees are entitled to receive the protections of the Third Geneva Convention, they are ineligible to receive prisoner-of-war status.[5] The United States has also maintained that the al-Qaeda detainees are not entitled to receive the protections of the Third Geneva Convention, and by implication, are not eligible to receive prisoner-of-war status.[6] Moreover, some federal courts in the United States have held that federal courts lack jurisdiction to determine the constitutionality of the detentions.[7] These decisions have left the detainees in the peculiar situation of generally being outside the scope of protections offered in the two legal regimes that would typically govern their status.

This Note examines the extraterritorial scope of the U.S. Constitution as it applies to the suspected terrorist detainees at Guantanamo Bay. Following the introduction, Section II provides a discussion detailing the U.S. response to the September 11 attacks. Section III addresses the two legal regimes available to the United States through which it can extend protections to the detainees. Specifically, this section will discuss the Third Geneva Conventions and its relevant provisions concerning prisoners of war. It will address how the United States has defined the status of the detainees and what that status means insofar as receiving protections from the Convention. Moreover, this section will focus on how federal courts have concluded that constitutional protections afforded to individuals in the criminal law context do not apply to the detainees currently located at Guantanamo Bay. Central to this discussion will be an examination of the notion of sovereignty and its ambiguous nature. Section IV contains a general discussion addressing theories that have attempted to interpret the scope of the Constitution and how the

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3. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 475 (2002) (providing background on the legal status of the Guantanamo detainees).

4. Castle, *supra* note 2, at 5.

5. White House Fact Sheet on Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Oct. 12, 2003) [hereinafter Fact Sheet].

6. *Id.*

7. *See generally* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub. nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-0334); Gherebi v. Bush, 262 F. Supp. 2d 1064 (C.D. Cal. 2003).

Supreme Court treated some of these theories in one of its decisions. Section V discusses an alternative conceptualization of one theory that is rooted in the notion of membership. This Note proposes that the approach offered by the textured membership theory serves as a useful guide in assessing the extraterritorial scope of the Constitution with respect to the Guantanamo detainees that avoids the flaws that are apparent in its more restrictive counterpart. Finally, Section VI offers a conclusion.

II. BACKGROUND

On September 11, 2001, terrorists hijacked four airplanes and executed the deadliest attacks against the United States since the Civil War.[8] Two of the planes crashed into the World Trade Center, another directly hit the Pentagon, and the final one crashed into a field in Pennsylvania.[9] Over three thousand people lost their lives as a result of the attacks.[10] Almost immediately afterwards, U.S. officials held Osama bin Laden and his al-Qaeda terrorist network responsible.[11] In the wake of the devastation, President Bush declared a national emergency.[12] He emphasized that the attacks were "not acts of terrorism but acts of war."[13] As a response to them, the United States, acting in conjunction with allied forces, launched air strikes against Afghanistan on October 7, 2001.[14]

During the ensuing military campaign, allied forces captured many suspected members of al-Qaeda and individuals associated with Afghanistan's former Taliban leadership.[15] President Bush's Military Order of November 13, 2001, provided that such individuals would be detained, and when tried, would face trial by military tribunals.[16]

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8. *The New Enemy*, THE ECONOMIST, Sept. 15, 2001, at 15, *available at* LEXIS, News and Business Library, The Economist File.

9. *Id.*

10. Michael Tackett, *With Grief and Resolve, U.S. Pauses to Remember*, CHI. TRIB., Sept. 12, 2002, at 1.

11. Richard Beeston, *Bin Laden Heads List of Suspects*, TIMES (London), Sept. 12, 2001, *available at* LEXIS, News and Business Library, Major World Publications File.

12. 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter *Military Order*].

13. *The New Enemy*, *supra* note 8, at 16.

14. Castle, *supra* note 2, at 5.

15. *See* Murphy, *supra* note 3, at 475.

16. Section 1(e) of the *Military Order* provides:

> (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

The Order specifically gave the Secretary of Defense authority to use all means necessary to ensure that persons subject to the order were detained and, if applicable, tried by a military commission.[17] The Order also provided a broad definition of persons subject to it: its provisions could potentially apply to any individual who lacked U.S. citizenship.[18] Under the Order, rules of evidence that normally applied in criminal trials were not to be used in trials by military commissions.[19]

At the beginning of January 2002, twenty captured individuals were transferred to the U.S. Naval Base at Guantanamo Bay, Cuba.[20] This number soon rose to 300 by the end of February.[21] By November 2002, there were approximately 625 detainees held at the naval base.[22] Soon after the first detainees arrived at Guantanamo, concerns were raised by foreign governments, human rights groups, and the U.N. High Commissioner for Human Rights as to whether the detainees were receiving adequate treatment under international law.[23] Reports received by Amnesty International indicated that the detainees were shackled, hooded, and sedated during transfer, had their beards forcibly shaved, and were housed in small cages not

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Military Order, *supra* note 12, § 1(e) at 57,834.

17. *Id.* §§ 2(a),(b) at 57, 834-35.

18. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263 (2002). Section 2(a) defines the persons subject to the Order and reads in pertinent part:

> (a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.

Military Order, *supra* note 12, § 2(a) at 57, 834.

19. *Military Order*, *supra* note 12, §1(f) at 57, 833.

20. Murphy, *supra* note 3, at 475.

21. *Id.*

22. Susan Schmidt & Bradley Graham, *Military Trial Plans Nearly Done*, WASH. POST, Nov. 18, 2002, at A10.

23. Murphy, *supra* note 3, at 475.

providing substantial protection from external conditions.[24] Detainees at Guantanamo continue to be held and interrogated without access to lawyers or members of their families.[25] The length of time the prisoners spend at Guantanamo is also in limbo, as the Administration has noted that the detainees may be held indefinitely without trial.[26] Moreover, the Administration has further added that even persons who are acquitted by military commissions will remain detained indefinitely if they are considered dangerous.[27]

In general, there are two legal regimes through which the United States can provide protections to the suspected terrorist detainees. The first is comprised of protections included in international humanitarian law and specifically embodied in the provisions of the Geneva Conventions. The Geneva Conventions contain provisions addressing the wounded and sick of the armed forces while on the field,[28] armed forces at sea,[29] prisoners of war,[30] and civilians during wartime.[31] U.S. criminal law also provides constitutional safeguards that the federal government must apply to those individuals who are suspected of committing crimes. These safeguards include the habeas clause[32] and the Fourth, Fifth, and Sixth Amendments[33] of the United States Constitution. In the context of the Guantanamo detainees, general concerns over their treatment prompted discussion regarding their specific legal status.[34] Questions have arisen as to whether the protections listed in Article 4 of the Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)[35]

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24. Amnesty International, *AI Calls on the USA to End Legal Limbo of Guantanamo Prisoners*, (Jan. 15, 2002), *available at* http://web.amnesty.org/web/content.nsf/pages/gbrsep11crisis (last visited Nov. 19, 2002).

25. Neely Tucker, *Detainees Seek Access to Courts*, WASH. POST, Dec. 3, 2002, at A22.

26. Amnesty International, *Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay*, (April 15, 2002), *available at* http://web.amnesty.org/web/content.nsf/pages/gbrsep11crisis (last visited Nov. 19, 2002).

27. Katherine Q. Seelye, *Pentagon Says Acquittals May Not Free Detainees*, N.Y. TIMES, Mar. 21, 2002, at A1.

28. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

29. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

30. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

31. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

32. U.S. CONST. art. I, § 9, cl.2

33. U.S. CONST. amends. IV, V, VI.

34. Murphy, *supra* note 3, at 476.

35. Third Geneva Convention, *supra* note 30.

were applicable to the detainees.[36] Lawsuits have also been brought in the federal courts to determine whether the detainees could secure specific protections enumerated in the U.S. Constitution.[37]

III. TWO LEGAL REGIMES GOVERNING THE STATUS OF THE SUSPECTED TERRORIST DETAINEES AT GUANTANAMO BAY

A. *Applicability of the Third Geneva Convention to the Detainees*

1. Provisions of the Third Geneva Convention

The four Geneva Conventions were created in 1949 as a reaction to the events following World War II.[38] The Conventions reflected an attempt by the international community to create universal rules to protect victims of war.[39] The four conventions were signed by 188 nations and are accepted by almost the entire international community.[40] The Convention Relative to the Treatment of Prisoners of War was one of these four conventions.[41] It defines what persons are prisoners of war and lists a number of protections that are to be provided to such persons.[42] The provisions of the Convention apply in all instances of war or armed conflict between two states that are parties to the agreement.[43] It also applies in situations where there is partial or total occupation of a member state irrespective of whether the specific occupation meets any armed resistance.[44] All member states are bound by the provisions of the Convention regardless of whether other states in a conflict are parties that abide by the Convention.[45]

Provisions detailing what persons constitute prisoners of war are found in Article 4 of the Third Convention. There are a number of categories that confer prisoner-of-war status to those persons in

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36. Murphy, *supra* note 3, at 476.

37. *See generally* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub. nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-0334); Gherebi v. Bush, 262 F. Supp. 2d 1064 (C.D. Cal. 2003).

38. Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19, 30 (2002).

39. *Id.*

40. Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participating in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 640 (1997).

41. MacDonnell, *supra* note 38, at 30.

42. Third Geneva Convention, *supra* note 30, art. 2, 6 U.S.T. at 3517, 75 U.N.T.S. at 136.

43. *Id.*

44. *Id.*

45. *Id.*

enemy custody.[46] Members of the armed forces of a party to the conflict and members of militias or volunteer corps that form part of the armed forces are given prisoner-of-war status under the Convention.[47] Prisoner-of-war status is also conferred to members of other militias as well as members of other volunteer corps, including organized resistance movements that belong to a party to the conflict and that are commanded by an individual responsible for his subordinates; have a fixed distinctive sign that can be recognized at a distance; openly carry arms; and conduct their operations in accordance with the laws and customs of war.[48] Article 4 protections also extend to members of the regular armed forces maintaining allegiance to a government or authority not recognized by a "detaining power," civilians who are authorized to accompany the armed forces, members of crews who are not benefited by more favorable treatment under any other provision of international law, and inhabitants of a non-occupied territory who spontaneously take arms in resistance of invading forces.[49]

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46. Article 4(A) of the Third Geneva Convention provides in pertinent part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power . . . .

Third Geneva Convention, *supra* note 30, art. 4, 6 U.S.T. at 3517-19, 75 U.N.T.S. at 138-40.

47. *Id.*

48. *Id.*

49. *Id.*

Article 5 states that the provisions in the Convention will apply to all prisoners of war from the time they are taken into the power of the enemy until they receive their final release and repatriation.[50] Additionally, Article 5 contains mechanisms to address ambiguities over whether a person falls under any of the Article 4 categories.[51] In the case of any such ambiguity, Article 5 provides that persons will continue to receive the protections listed in the Convention until a competent tribunal determines their status.[52]

2. The U.S. Administration's Treatment of the Third Geneva Convention

Following the transfer of suspected al-Qaeda and Taliban members to Guantanamo Bay, the U.S. Administration proceeded in determining what legal status these individuals possessed. Initially, the Administration classified both groups of detainees as "unlawful combatants" who were not entitled to the protections listed in the Third Geneva Convention, yet were still afforded humane treatment.[53] With respect to the Taliban, some members in the U.S. government argued that Afghanistan ceased to be a party to the Third Geneva Convention since it was not a functioning state during the allied campaign and since the Taliban was not recognized as the legitimate government of the country.[54] Therefore, by implication, the provisions of the Third Geneva Convention could not apply to the Taliban members captured and transferred to Guantanamo Bay. Some officials in the government also argued that the members of al-Qaeda were similarly not to receive any protections under the Third Geneva Convention.[55] Their rationale was that the organization did not constitute a state, the campaign in Afghanistan was not an internal conflict and therefore Article 3 could not afford them any protections, and the members of the organization failed to meet the

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50. Article 5 provides that:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Third Geneva Convention, *supra* note 30, art. 5, 6 U.S.T. at 3519-21, 75 U.N.T.S. at 140-42.

51. *Id.*

52. *Id.*

53. Murphy, *supra* note 3, at 476-77.

54. *Id.* at 477.

55. *Id.*

requirements under Article 4(a)(2) of the Convention.[56] This formulation therefore denied the detainees prisoner-of-war status under Article 4 of the Third Convention.[57]

Responding to criticism from European allies and recommendations from some members within the government, the United States later modified its position with respect to the Taliban detainees and stated that captured members of the Taliban would receive protections contained in the Third Geneva Convention.[58] Secretary of State Colin Powell asked President Bush to reconsider his position and noted that the United Nations recognized Afghanistan as a state during the allied campaign and that the Third Geneva Convention prisoner-of-war protections applied to the Taliban forces since they constituted regular armed forces whose allegiance was with a government not recognized by the United States.[59] Secretary Powell also argued that a "competent tribunal" should determine the status of each detainee under Article 5 of the Convention.[60] Officials in the military supported Secretary Powell's views and were concerned that by denying the protections of the Convention to the detainees, the government would be creating a precedent that may adversely affect U.S. soldiers captured in war.[61] Specifically, these concerns were centered on the prospect of foreign governments not affording a certain level of protections to such soldiers.[62] Therefore, on February 7, 2002, President Bush announced that captured members of the Taliban were entitled to the protections of the Third Geneva Convention because the nation of Afghanistan was still a party to the Convention.[63]

President Bush, however, also determined that he would not extend prisoner-of-war status to the Taliban detainees.[64] This official announcement lacked the specific reasons why the Taliban detainees were not entitled to prisoner-of-war status.[65] Other members in the Administration did, however, provide some of the rationale underlying the decision.[66] For instance, Secretary of Defense, Donald Rumsfeld, noted that the Taliban did not meet the requirements of

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id*
61. Katherine Q. Seelye & David E. Sanger, *Bush Reconsiders Stand on Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A1.
62. *Id.*
63. Fact Sheet, *supra* note 5.
64. *Id.*
65. Murphy, *supra* note 3, at 479.
66. *Id.*

Article 4(a)(2) and were closely coordinated with al-Qaeda.[67] Additionally, U.S. Ambassador at Large for War Crimes Issues Pierre-Richard Prosper further elaborated on the reasons for the U.S. position:

> [W]e have concluded that the Geneva Conventions do apply, however, to the Taliban leaders who sponsored terrorism. But, a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.[68]

Despite the change of policy with respect to the status of the Taliban detainees, the Administration maintained that it would not extend the protections of the Third Geneva Conventions to the al-Qaeda detainees.[69] By implication, the al-Qaeda detainees were also ineligible to receive prisoner-of-war status under the Convention. In announcing the Administration's position, Ari Fleischer, the White House Spokesman at the time, stated that al-Qaeda was an international terrorist group and was not a party to the treaty.[70] Fleischer also noted that the nature of global security threats had vastly changed since the inception of the Convention, saying that "the war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949."[71] Ambassador Prosper, in explaining the Administration's position, further added:

> These aggressors initiated a war that under international law they have no legal right to wage. The right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization or the ability and willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. The members of al Qaida fail to meet the criteria to be lawful combatants under the law of war. In choosing to violate these laws and customs of war and engage in

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67. U.S. Dep't of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray (Jan. 27, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html (last visited Oct. 10, 2003).

68. Pierre-Richard Prosper, Ambassador at Large for War Crimes Issues, Status and Treatment of Taliban and al-Qaida Detainees, Remarks at Chatham House, London, United Kingdom (Feb. 20, 2002) *available at* http://www.state.gov/s/wci/rm/2002/8491.htm (last visited Oct. 10, 2003).

69. Fact Sheet, *supra* note 5.

70. Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1.

71. *Id.*

> hostilities, they become unlawful combatants. And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes. As we have repeatedly stated, these were not ordinary domestic crimes, and the perpetrators cannot and should not be deemed to be ordinary "common criminals."[72]

The United States has maintained that all of the detainees at Guantanamo are receiving and will continue to receive humane treatment "to the extent appropriate and consistent with military necessity, [and] in a manner consistent with the principles of the Third Geneva Convention."[73] Although neither the Taliban nor the al-Qaeda detainees were entitled P.O.W. privileges, the Administration stated that as a matter of policy they would be provided with many of those privileges.[74] For instance, all of the detainees would receive a diet that complied with Muslim dietary law, medical care, clothing, shelter, sanitary facilities, an opportunity to worship, the ability to send mail, and the ability to receive packages subject to a security screening.[75] Detainees will also not be subjected to abuse or cruel treatment.[76] The P.O.W. privileges the detainees would not receive included access to a canteen to buy food, soap, and tobacco, a monthly pay advance, an opportunity to have and consult financial accountants, and the ability to receive scientific equipment, musical instruments, or sports outfits.[77] The Administration justified this policy noting that the detainees at Guantanamo Bay constituted a security risk to not only those individuals who guarded them, but also to each other.[78]

B. *Withholding Constitutional Protections from the Detainees and Issues of Sovereignty*

1. Federal Courts' Decisions to Withhold Constitutional Protections from the Detainees

Three recent cases have involved efforts to secure certain constitutional protections for the detainees located at Guantanamo Bay.[79] *Coalition of Clergy v. Bush* involved a group of individuals

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72. Prosper, *supra* note 68.
73. Fact Sheet, *supra*, note 5.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* ("Some of these individuals demonstrated how dangerous they are in uprisings in Mazar-e-Sharif and in Pakistan. The United States must take into account the need for security in establishing the conditions for detention at Guantanamo.").
79. *See generally* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub. nom.* Al Odah v.

entitled the "Coalition of Clergy, Lawyers, and Professors" who filed a petition to secure a writ of habeas corpus on behalf of the detainees located at Guantanamo Bay in the U.S. District Court for the Central District of California.[80] The group alleged that the detainees were deprived of their liberty without due process, were not informed of the nature and cause of the accusations made against them, and were not given legal counsel.[81] On February 21, 2002, the district court held that it did not have the jurisdiction to hear the claims forwarded by the Coalition.[82] On appeal, the Ninth Circuit vacated that conclusion and noted that since the Coalition lacked the necessary standing to bring a habeas petition, it was not necessary for the district court to entertain questions regarding whether it could assert jurisdiction over the Coalition's claims.[83]

In *Rasul v. Bush*, a group of aliens detained at Guantanamo Bay filed an action claiming that their detention was unconstitutional.[84] The petitioners included an Australian citizen allegedly living in Afghanistan when captured, two citizens of the United Kingdom who traveled to Pakistan and were later transferred to U.S. control, and the families of twelve Kuwaiti nationals who were allegedly in Afghanistan and Pakistan performing humanitarian work.[85] The primary issue in *Rasul* was whether individual aliens located outside the sovereign territory of the United States could use U.S. courts to assert claims under the Constitution.[86] The U.S. District Court for the District of Columbia held that because Guantanamo Bay was located outside the sovereign territory of the United States, it could not assert jurisdiction to hear the petitioners' claims.[87] In reaching this conclusion, the court noted that the Supreme Court's decision in *Johnson v. Eisentrager*[88] was controlling on the issue.[89]

In *Eisentrager*, twenty-one German nationals sought a petition for a writ of habeas corpus from the District Court for the District of Columbia.[90] These individuals alleged that they belonged to the German armed forces in China.[91] They were convicted of violating the laws of war by engaging in continued military activity against the

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United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-0334); Gherebi v. Bush, 262 F. Supp. 2d 1064 (C.D. Cal. 2003).

80. Murphy, *supra* note 3, at 481.
81. *Coalition of Clergy*, 189 F. Supp. 2d at 1038.
82. *Id.* at 1044.
83. Coalition of Clergy v. Bush, 310 F.3d 1153, 1164 (9th Cir 2002).
84. *Rasul*, 215 F.Supp. 2d at 57.
85. *Id.* at 57-61.
86. *Id.* at 56.
87. *Id.* at 72-73.
88. Johnson v. Eisentrager, 339 U.S. 763 (1950).
89. *Rasul*, 215 F. Supp. 2d at 65.
90. *Eisentrager*, 339 U.S. at 765.
91. *Id.*

United States following Germany's surrender, but before the surrender of Japan in World War II.[92] A U.S. military commission in China sitting with the consent of the Chinese Government convicted the twenty-one prisoners.[93] The prisoners were then repatriated to Germany where they served their sentences at the Landsberg Prison.[94] Their custodian was an officer of the U.S. Army under the Commanding General, Third United States Army and the Commanding General, European Command.[95] The petition filed alleged that the individuals were denied rights under Articles I and III of the Constitution, their Fifth Amendment right to due process, other rights under the Constitution and U.S. law, and the protections provided under the Third Geneva Convention.[96]

Justice Jackson, in writing the opinion for the Court, began by discussing the distinctions between both citizens and aliens and friendly and enemy aliens.[97] Citizenship, Justice Jackson noted, provides a person the opportunity to present claims to the government for protection.[98] With respect to aliens, Justice Jackson noted that "the alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."[99] This scale begins with certain rights provided through an alien's lawful presence in the country that expand and are more secure when an alien intends to become a citizen and further expand to include all the rights consistent with citizenship upon an alien's naturalization.[100] The justification for extending constitutional protections beyond the citizenry was rooted in the alien's presence within the territorial jurisdiction of the Supreme Court, giving the Court the power to act.[101] The Court therefore noted that "a lawful residence in the country implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity."[102] Justice Jackson clearly noted that a nonresident enemy alien does not have qualified access to U.S. courts,

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92. *Id.* at 766.
93. *Id.*
94. *Id.*
95. *Eisentrager*, 339 U.S. at 766.
96. *Id.* at 767.
97. *Id.* at 769.
98. *See id.* ("Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection."); *see also Rasul*, 215 F. Supp. 2d at 65-66 (discussing Jackson's opinion in *Eisentrager*).
99. *Id.* at 770.
100. *Eisentrager*, 339 U.S. at 770-71.
101. *Id.*
102. *Id.* at 776 (quoting *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813)).

"for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[103]

Applying these considerations to the twenty-one German prisoners, Justice Jackson first made the observation that there were no cases where a court in the United States or in any other country recognizing the notion of the writ issued a writ on behalf of an alien enemy who had at no time been within the court's territorial jurisdiction.[104] Moreover, Justice Jackson stated that there was no support in the text of the Constitution or in any statutes that supported issuing a writ under the above circumstances.[105] With respect to the twenty-one prisoners, Justice Jackson noted that:

> [w]e are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against the laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.[106]

The issue of sovereignty played a central role in Jackson's discussion. On this issue, Jackson specifically noted:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the circumstances of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.[107]

Therefore, Justice Jackson concluded that the German nationals could not invoke the power of the federal district court to issue the writ.[108]

The petitioners in the *Rasul* case attempted to distinguish their situation from those of the prisoners in *Eisentrager*, arguing that the German nationals' status as enemy aliens was determined by a military commission, whereas the petitioners had yet to receive such a determination.[109] The district court, however, noted that the critical issue in *Eisentrager* was not a determination of status as an enemy

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103. *Id.*
104. *Id.* at 768.
105. *Eisentrager*, 339 U.S. at 768.
106. *Id.* at 777.
107. *Id.* at 777-78.
108. *Id.* at 781.
109. *Rasul*, 215 F. Supp. 2d at 66.

alien, but rather whether the situs from which the alien was imprisoned was within the sovereignty of the United States.[110] Moreover, the district court also cited later Supreme Court decisions reinforcing that position.[111]

Applying the *Eisentrager* considerations to the Guantanamo detainees, the district court first noted that all of the parties in the lawsuit conceded that Guantanamo Bay was not included within the sovereign territory of the United States.[112] This conclusion was based on a lease agreement entered into between the United States and Cuba in 1903.[113] The lease specifically provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.[114]

In a footnote, the court stated the above language clearly showed that the United States does not maintain sovereignty over the base at Guantanamo Bay.[115] The court then had to decide whether the existence of this fact alone barred it from issuing the writ of habeas corpus, or whether the detainees on Guantanamo are nonetheless within the territorial jurisdiction of the U.S. under the theory of de facto sovereignty.[116] The petitioners argued that under a theory of de facto sovereignty, even though the United States did not maintain de jure sovereignty over the base at Guantanamo, it could still assert sovereignty because of the unique nature of the control and jurisdiction that the United States maintained over the base.[117] Therefore, according to the petitioners, the decision in *Eisentrager* was irrelevant, and the district court could assert jurisdiction over their claims.[118]

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110. *Id.* at 67.

111. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (stating that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders")); United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990).

112. *Rasul*, 215 F. Supp. 2d at 69.

113. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.- Cuba, art. III, T.S. 418.

114. *Id.*

115. *Rasul*, 215 F. Supp. 2d at 69 n.14.

116. *Id.* at 69.

117. *Id.*

118. *Id.*

The petitioners relied on the D.C. District Court case of *Ralpho v. Bell*[119] to support their theory of de facto sovereignty.[120] In *Ralpho*, a claim was made under the Micronesian Claims Act of 1971, which was a statute that established a fund compensating Micronesians for losses sustained during World War II.[121] The plaintiff in *Ralpho* argued that a claims commission created under the Act to adjudicate settlement claims violated his due process rights because it used secret evidence when resolving his claim.[122] Although the United States did not maintain sovereignty over Micronesia, the court concluded that the plaintiff should receive the protections of the due process clause.[123] The petitioners in *Rasul* relied on *Ralpho* for the argument that since constitutional protections extended to the plaintiff in a location where the United States was not sovereign, those same protections should be extended to aliens who are in places where the United States exercises de facto sovereignty.[124]

The district court pointed out that the petitioners' reliance on *Ralpho* was misplaced, since that case only held that aliens who resided in the sovereign territories of the United States were entitled to certain constitutional protections.[125] In reaching this conclusion, it noted that the court in *Ralpho* quoted a statement made by the U.S. Representative to the United Nations at a Security Council meeting to determine whether the United States would have a trusteeship over Micronesia.[126] The statement said, "My government feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign territory."[127] The district court also noted that when the United States was given a trusteeship over Micronesia, no other country maintained sovereignty over the territory, and the United States had "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of [the trust] agreement."[128] The court interpreted *Ralpho* as equating Micronesia with a U.S. territory, such as Puerto Rico or Guam, and extended constitutional protections to the plaintiff on that basis.[129]

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119. Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977).
120. *Rasul*, 215 F. Supp. 2d at 69.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 69-70.
125. *Rasul*, 215 F. Supp. 2d at 70.
126. *Id.*
127. *Id.*
128. *Id.* (quoting Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty Fourth Meeting of the Security Council, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, art. 3).
129. *Rasul*, 215 F. Supp. 2d at 70.

According to the district court, the U.S. military installation at Guantanamo Bay "was nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants."[130] Instead, it simply constitutes a portion of land the United States leases in order to operate a naval base.[131] The district court then pointed to other cases that it believed rejected the idea of applying a de facto sovereignty test to examine claims arising out of the military base at Guantanamo Bay.[132]

On appeal, the Court of Appeals for the D.C. Circuit affirmed the decision of the district court, holding that *Eisentrager* precluded the detainees from seeking a writ of habeas corpus in U.S. courts.[133] The court, in *Al Odah v. United States*, noted that like the German prisoners in *Eisentrager*, "[the Guantanamo detainees] are aliens, they . . . were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States."[134] It interpreted *Eisentrager* to mean that certain constitutional protections do not extend to aliens located outside sovereign U.S. territory, irrespective of whether they are enemy aliens.[135] As did the district court, it stated that later decisions of the Supreme Court reaffirmed this interpretation of *Eisentrager*.[136]

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130. *Id.* at 71.

131. *Id.*

132. *See id.* (citing *Bird v. United States*, 923 F. Supp. 338 (D. Conn. 1996); and *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), *cert denied*, 515 U.S. 1142 (1995)).

133. Al Odah v. United States, 321 F.3d 1134, 1140 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-0334). In addition to affirming the decision of the district court in *Rasul*, the court of appeals also dismissed the petition brought by the wife of an Australian citizen who was detained at Guantanamo Bay. *Id.* at 1137.

134. *Id.* at 1140.

135. Specifically, the court of appeals based this interpretation on the following passage from *Eisentrager*:

> If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American judiciary to assure them freedoms of speech, press, and assembly as in our First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments."

Id. at 1140 (quoting *Eisentrager*, 339 U.S. at 784).

136. *Id.* at 1141. The court of appeals, as did the district court, noted that the Supreme Court interpreted *Eisentrager* as rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990) (holding that Fourth Amendment protections did not extend to nonresident aliens where searches or seizures are performed outside sovereign U.S. territory)). Moreover, as did the district

According to the court, "*Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions . . . ."[137]

Turning its attention to the status of Guantanamo Bay, the court of appeals relied on the text of the aforementioned Lease agreement between the United States and Cuba in holding that the naval base is not within the sovereign territory of the United States.[138] The court also rejected the argument that U.S. military control over the base was equivalent to the United States exercising de facto sovereignty over Guantanamo Bay.[139] Finally, it concluded that the detainees' causes of action under the Alien Tort Act were also barred under the holding of *Eisentrager*.[140]

Following the *Al Odah* decision, the issue of whether the Guantanamo detainees could seek a writ of habeas corpus in a U.S. federal court was again considered by the U.S. District Court for the Central District of California in *Gherebi v. Bush*.[141] In this case, the brother of a detainee at Guantanamo Bay brought a petition for a writ of habeas corpus to the district court.[142] Again relying on the Court's decision in *Eisentrager* and subsequent interpretations of the

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court, the court of appeals discussed how the Supreme Court cited *Eisentrager* for the proposition that it was "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* (quoting *Zadvydas*, 533 U.S. at 678). Finally, the court of appeals stated that it followed the language about the Fifth Amendment in *Verdugo-Urquidez*, although it was dictum. *Id.* (discussing *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) *rev'd on other grounds sub nom*); Christopher v. Harbury, 536 U.S. 403 (2002); Pauling v. McElroy, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960); People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)).

137. *Id.* at 1141.

138. *Id.* at 1142-43. In reaching this conclusion, the court of appeals distinguished criminal cases involving activities by both aliens and U.S. citizens at Guantanamo Bay and noted that those cases "arose under the special maritime and territorial jurisdiction" under 18 U.S.C. § 7. *Id.* (discussing *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (per curiam)).

139. *Id.* at 1143. (discussing *Christopher*, 443 F.3d at 1425 (rejecting notion that "'control and jurisdiction' is equivalent to sovereignty"); Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (holding that U.S. controlled naval base in Cuba pursuant to lease agreement with Great Britain was not under U.S. sovereignty)).

The court of appeals also rejected the detainees' argument that *Eisentrager* used the terms "territorial jurisdiction" and "sovereignty" interchangeably in a manner that did not attach significance to either term. *Id.* at 1143-44. Specifically, it stated that when the Court in *Eisentrager* discussed "'territorial jurisdiction', it meant the territorial jurisdiction of the United States courts." *Id.* at 1143. Sovereignty, however, referred to "supreme dominion exercised by a nation." *Id.* at 1143. The court of appeals therefore concluded: "The United States has sovereignty over the geographic area of the States and, as the *Eisentrager* Court recognized, over insular possessions, . . . Guantanamo Bay fits within neither category." *Id.* at 1143-1144.

140. *Id.* at 1144.

141. Gherebi v. Bush, 262 F. Supp. 2d 1064, 1064 (C.D. Cal. 2003).

142. *Id.* at 1065.

decision, the district court concluded that the detainees could not seek a writ of habeas corpus in a U.S. federal court.[143]

Interestingly, the district court stated that it "reache[d] this conclusion reluctantly . . . because the prospect of the Guantanamo captives' being detained indefinitely without access to counsel, without formal notice of charges, and without trial is deeply troubling."[144] Statements in other portions of the district court's opinion could also be interpreted to show the court's reluctance in reaching the above conclusion. For instance, in its discussion of whether Guantanamo Bay was within the sovereign territory of the United States, the district court admitted that the "dispositive distinction between "sovereign territory" and "complete jurisdiction and control" may appear technical (or at least elusive), but Petitioner's arguments provide no principled basis for this Court to disregard *Johnson* [*v. Eisentrager*]."[145] Moreover, after commenting on how reports in the press indicating that some of the detainees are juveniles "led some to resort to extreme hyperbole in calling for immediate remedies," the district court ended its opinion with the following statement: "Unfortunately, unless *Johnson [v. Eisentrager]* and the other authorities cited above are either disregarded or rejected, this Court lacks the power and the right to provide such a remedy. Perhaps, a higher court will find a principled way to do so."[146]

2. The Courts' Mistaken Reliance on Sovereignty

The courts' reliance on the notion of sovereignty in the above cases provides a unique example of how a strict reliance on using specific legal characterizations can often be difficult to defend as an analytical matter. The courts' decision to characterize whether specific constitutional protections applied to the Guantanamo

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143. *Id.* at 1065-72. The district court specifically noted that under *Eisentrager*, the detainees could invoke the jurisdiction of any district court only if the United States maintained sovereignty over the base. *Id.* at 1067. The district court then relied on the 1903 lease agreement between the U.S. and Cuba to conclude that Cuba maintained sovereignty over the base. *Id.* at 1069-70. In reaching this conclusion, the district court rejected the argument that U.S. control over the base established sovereignty. *Id.* The district court also noted that *Eisentrager's* holding was not limited to only those captured during a formally declared war. *Id* at 1070. Such a limitation would ignore the *Eisentrager* court's concern that providing access to the courts would "divert [the] efforts and attention [of field commanders] from the military offensive abroad to the legal defensive at home." *Id.* (quoting *Eisentrager*, 339 U.S. at 779). Moreover, the district court stated that under *Eisentrager*, it did not matter whether the detainee was charged or brought before a military commission. *Id.* at 1071-72.

144. *Id.* at 1066.

145. *Id.* at 1065-70.

146. *Gherebi*, 262 F. Supp. 2d at 1073.

detainees as an issue of sovereignty provided an easy solution to a seemingly complicated issue. The reliance on sovereignty, however, is problematic because the concept of sovereignty is ambiguous in and of itself. The courts' reliance on the issue of sovereignty also overlooked the realities of the U.S. relationship to Guantanamo Bay.

Characterizations play an important role in our legal system.[147] Specifically, characterizations help judges divide the world into distinct categories through which substantive rules attach.[148] The majority of characterizations are successful in capturing relevant phenomena.[149] In rare cases, however, there are certain phenomena involving difficult issues that are not amenable to a simple characterization.[150] In such instances, courts often struggle in confronting these issues and oftentimes resort to attaching preexisting characterizations to such phenomena instead of undertaking a more thorough analysis.[151] The courts' use of sovereignty provides an example of the difficulties associated with applying such characterizations to certain phenomena.

In traditional legal theory, attributes of sovereignty included the power to maintain exclusive jurisdiction over citizens residing in the state, equality with other states, and the ability to create policies limited only to the extent that those policies impacted other states or agreements with other states.[152] Louis Henkin, however, argues that sovereignty is a confusing term that has a variety of uses.[153] Specifically, Henkin notes:

> States are commonly described as "sovereign," and "sovereignty" is commonly noted as an implicit, axiomatic characteristic of statehood. The pervasiveness of that term is unfortunate, rooted in mistake, unfortunate mistake. Sovereignty is a bad word, not only because it has served terrible national mythologies; in international relations, and even in international law, it is often a catchword, a substitute for thinking and precision. It means many things, some essential, some insignificant; some agreed, some controversial; some that are not warranted and should not be accepted.[154]

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147. *See generally* Thomas R. McCoy, *Logic vs. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277 (1970) (discussing the role categorizations play in grouping phenomena that exist in reality and the difficulties associated with applying such categorizations to certain phenomena).

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 752 (1997).

153. Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Etcetera*, 68 FORDHAM L. REV. 1, 1 (1999) (discussing the confusing nature of the term sovereignty).

154. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8 (1995).

Henkin believes that the confusing nature of sovereignty stems from its origins.[155] Specifically, sovereignty arose out of an international system where nations and "princedoms" were the primary actors instead of "states".[156] This law of relations between princes was later assimilated into modern international law.[157] Henkin notes that the functions attributed to the prince through relations with other princes and through early international norms "were later attributed to 'the state.'"[158] As the prince was sovereign at home and carried that sovereignty into relations with other sovereign princes, the state also became sovereign at home and likewise carried its sovereignty into relations with other states.[159] Moreover, the sovereignty of the prince became confused with other aspects of the prince's authority and these were also carried over to the state.[160]

According to Henkin, sovereignty was initially confined as a domestic term describing domestic relationships.[161] It addressed relations between the ruler (the sovereign) and the ruled (the "subjects").[162] Henkin believes that sovereignty should be strictly defined as "the locus of legitimate authority in a political society, once the prince or "the Crown," later parliament or the people."[163] Henkin argues against the notion of sovereignty playing a role in influencing the external relations between states because it was a concept originating from the relationship between the prince and the prince's subjects.[164] Therefore, in the realm of international relations, Henkin argues that sovereignty is an essentially unnecessary concept that should be avoided.[165]

The courts' decision to deny constitutional protections to the detainees on the grounds that Cuba maintained de jure sovereignty over Guantanamo Bay does not withstand scrutiny. As discussed above, sovereignty is a nebulous concept that is susceptible to a number of meanings. It is therefore problematic to deny constitutional protections on an adherence to such an ambiguous notion. The reliance on de jure sovereignty can be best seen as an escape device by the courts to avoid answering the difficult question as to whether nonresident aliens detained on a military installation

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155. *See id.* at 9 (providing a historical discussion on the notion of sovereignty).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. Henkin, *supra* note 153, at 2.
162. *Id.*
163. HENKIN, *supra* note 154, at 9.
164. *Id.* at 9-10.
165. *Id.* at 10.

over which the United States effectively maintains complete jurisdiction and control are entitled to constitutional protections.

The courts' insistence on the notion of sovereignty also avoids the realities of the United States' relationship with the military base at Guantanamo Bay. The United States maintains complete control over the base and acts on the territory without the permission of Cuba.[166] Cuba maintains no control over activities that transpire on Guantanamo and has no method to maintain such control if it so desired.[167] One commentator has further elaborated that the United States does "not need Fidel Castro's permission to do anything there."[168] Moreover, although the U.S. government successfully argued that the Constitution does not extend to Guantanamo, it is highly unlikely that the government would be receptive to a Cuban assertion of jurisdiction over the detainees and a subsequent application of its laws affecting their current treatment.[169]

Therefore, under the status quo, the Administration has determined that the suspected terrorist detainees do not qualify as prisoners of war under the provisions of the Third Geneva Convention. The detainees also are not entitled to protections under the U.S. Constitution because Guantanamo Bay is not within the sovereign territory of the United States. With respect to this issue, the courts' formalistic methodology heavily relying on notions of sovereignty, avoided the practical realities of the United States' relationship with Guantanamo Bay. A more detailed examination of the Constitution's scope may provide more meaningful insights with respect to the issue of extending constitutional protections to the detainees. The next section addresses this issue and describes specific theories interpreting the scope of constitutional protections.

IV. THEORIES DESCRIBING THE SCOPE OF THE CONSTITUTION

A more detailed examination of the applicability of extending U.S. constitutional protections to the Guantanamo detainees requires an analysis of the Constitution's scope. The Constitution does not

166. *See* Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1230 (1996) (noting that Guantanamo Bay constitutes an anomalous zone where governments often suspend fundamental liberties in response to certain necessities).

167. Anupam Chander, *Guantanamo and the Rule of Law: Why We Should Not Use Guantanamo Bay to Avoid the Constitution*, (Mar. 7, 2002), *available at* http://writ.corporate.findlaw.com/commentary/20020307_chander.html#bio (last visited Oct. 10, 2003).

168. *See* Henry Weinstein, *Prisoners May Face 'Legal Black Hole'*, L.A. TIMES, Dec. 1, 2002, at A37 (quoting Gerald Neuman, who discusses in the article how attempts to characterize the issue facing the detainees as one involving sovereignty are misguided).

169. Chander, *supra* note 167.

specify its geographic or personal scope.[170] The proper scope of the U.S. Constitution has been a subject of debate throughout U.S. history. The text of the Constitution has yielded varied readings regarding its scope.[171] A number of conceptualizations seeking to resolve this issue emerged out of U.S. constitutional history.[172] Gerald Neuman has noted that these approaches include universalism, balancing approaches, and social contract based approaches.[173]

A. *Universalism*

Under a universalist approach, constitutional protections that are not expressly limited to persons or places should be interpreted to extend to all of those persons and places.[174] Universalism, however, does not require identical results irrespective of citizenship or location.[175] In this regard, the text of the specific constitutional provisions, especially those providing protections subject to balancing tests, can vary depending on the location.[176] The argument advocating a universal interpretation of specific constitutional provisions may rely on natural rights influences in U.S. constitutional history that may find support in current human rights norms.[177] Alternatively, universalism could be based on a plain textual reading of the U.S. constitutional provisions where some provisions are expressly limited to some persons and places whereas others operate to everybody everywhere.[178]

This specific approach to the Constitution would compel the government to follow the rules of a global regime rooted in universal

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170. Eric Bentley Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329, 335 (1994).

171. GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 5 (1996).

172. *See id.* (discussing four specific approaches emerging from U.S. constitutional history that addressed the scope of the constitution: universalism, membership models, mutuality of legal obligation, and global due process).

173. *See id.* at 5-8 (discussing the scope of the Constitution, breaking down social contract theories to include membership models and mutuality approaches).

174. *Id.* at 5.

175. Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1574 (1997) (providing a review of Gerald Neuman's work in *Strangers to the Constitution*).

176. NEUMAN, *supra* note 171, at 5 ("The precise commands of the provisions, especially of those creating rights subject to balancing tests, may vary from place to place, but one can never simply dismiss the provisions as inapplicable.").

177. *See id.* at 5-6 (discussing arguments that could support a universalism based approach to interpreting the scope of the Constitution).

178. *Id.*

norms.[179] Universalism, however, does not comport with the text and history of the Constitution.[180] The Constitution's text and history shows that it does not serve as a source for universal norms owed to everyone, but rather that it maintains a more limited role, outlining specific protections against government actions.[181] Generally, universalism had virtually no influence on the development of U.S. constitutional doctrine.[182]

B. *Balancing Approaches (Global Due Process)*

The balancing approach, otherwise referred to as Global Due Process, represents another model whereby the application of constitutional protections extraterritorially is subject to a test where a court weighs competing interests.[183] Specifically, under Global Due Process, constitutional protections may have worldwide applicability so long as articulated government interests do not outweigh those protections.[184] This approach was employed by Chief Justice Edward Douglass White during the *Insular Cases* and later by Justices Felix Frankfurter and the second Justice Harlan.[185] More recently, the Global Due Process approach was articulated in Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*.[186] Justice Kennedy's opinion in *Verdugo-Urquidez* relied to a large extent on Justice Harlan's concurrence in *Reid v. Covert*,[187] where he stated that "[t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."[188] Harlan noted that the central line of inquiry when determining which constitutional protections are to be applied in specific situations should focus on "what process is 'due' a defendant in the particular circumstances of a particular case."[189]

The Global Due Process approach, however, also presents certain flaws. For instance, Global Due Process provides unlimited flexibility

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179. *See id.* at 110 (stating that a universalist approach would "bind the government to the rules of a just world order").

180. Motomura, *supra* note 175, at 1578.

181. *See* NEUMAN, *supra* note 171, at 110 (explaining that universalism as a method to interpret the Constitution should be rejected because the moral rights it seeks to apply to everybody everywhere are not stated as moral duties in the constitution having universal applicability).

182. *Id.* at 6.

183. *Id.* at 8.

184. *Id.*

185. *Id.*

186. *See id.* at 107-08 (discussing Kennedy's concurrence in *Verdugo-Urquidez*).

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

188. *Id.* at 74 (Harlan, J., concurring).

189. Reid, 354 U.S. at 75 (Harlan, J., concurring)

and is not rooted in the text of the Constitution.[190] It has also been criticized as an approach that "presents more a political compromise than an elaboration of principle or an act of constitutional interpretation."[191]

C. *Social Contract Based Approaches*

Social contract theory represents another approach and has played an important role in U.S. constitutional history.[192] Under social contract theory, the government derives its legitimacy through either an actual or hypothetical agreement that represents the consent of those individuals who create the state and give it the authority to govern.[193] The social contract was primarily focused on the issue of government legitimacy.[194] The notion of government legitimacy involved two questions.[195] The first question addressed the manner in which the citizens' duty to obey government laws could arise.[196] The second question focused on the point at which government transgressions could relinquish the citizens from maintaining obedience to the laws.[197] One medieval form of the theory envisioned a contract of government between the monarch and the people to be governed that was communicated in an oath or charter.[198] Central to this theory, however, was the assumption that individuals could coalesce and create an agreement that was binding on each of them.[199]

Under social contract theory, the obligation for an individual to obey laws had to be rooted in that individual's actual or implied consent.[200] Absent the existence of some form of a collective association, social contract theory presumed that individuals lived in a "state of nature" without numerous protections that could improve their security and material well-being.[201] Due to numerous dangers existing in the "state of nature", individuals coalesced and agreed to create a governing institution.[202] This collective agreement

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190. Motomura, *supra* note 175, at 1578.
191. NEUMAN, *supra* note 171, at 116.
192. *Id.* at 6.
193. *Id.*
194. *Id.* at 9.
195. *See id.* (discussing the background of the social contract).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *See id.* (discussing the background of the social contract).
202. *See id.* (noting that some of these concerns included obtaining greater security and material improvement). Moreover, Neuman notes that individuals may

represented the social contract proper and differed from the contract between the government and the governed.[203]

Social contract theory left unresolved questions regarding its personal and geographic scope. These ambiguities provided an opportunity for alternative explanations to surface addressing the Constitution's scope.[204] Two alternative explanations attempting to describe the scope of the Constitution arose under the rubric of social contract theory. These include the membership and mutuality approaches.[205]

1. Membership

The membership approach is a restrictive articulation of social contract theory that narrows the class of beneficiaries under the contract to specific individuals (members).[206] Members share specific rights provided for in the contract, while non-members receive whatever rights they possessed independent of the contract.[207] Moreover, only members could seek redress against the government for any transgressions.[208] Non-members, on the other hand, were potentially subject to the unconstrained authority of the government.[209] One ambiguity in the membership approach related to the question of who is considered a member.[210] Those who advocated a restrictive interpretation of membership argued for varying characterizations of who or what constitutes a member.[211]

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have collectively agreed to form a governing association "out of an inherent sociability." *Id.*

203. *Id.* According to Neuman, different authors had varying conceptions regarding the number and content of the agreements embodying the social contract. *Id.* Hobbes, for instance, removed the contract of government. *Id.* Other writers wanted to reinstate limits on sovereign power. *Id.* at 10.

204. *Id.*

205. *Id.* at 5. Neuman notes that included in the mutuality approach is the notion of strict territoriality. Under strict territoriality, constitutional limitations only attach to acts of the U.S. government within its borders. *Id.* at 7. Neuman argues, however, that strict territoriality represents "a special case of a more general approach that focuses on a sphere in which American municipal law operates." *Id.* This sphere is not limited to a geographic definition and can be defined in a number of ways. *Id.* at 7-8.

206. *Id.* at 6.

207. *Id.*

208. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 20 (2002).

209. *Id.*

210. *Id.* at 21.

211. NEUMAN, *supra* note 171, at 6-7. Neuman notes that such characterizations "may include all the citizens of the nation 'the United States,' the subset consisting of those who are citizens of the various states, or some intermediate group including citizens of some, but not all, of the territories." *Id.* at 7.

The membership theory has historically played a prominent role in defining the scope of constitution protections. During the debates surrounding the Alien and Sedition Acts of 1798, Federalists argued that constitutional protections extended only to citizens, who represented the original parties to the social contract.[212] Aliens were not parties to the contract and therefore had to look to other sources for specific protections.[213] Membership theories also played a significant role in Justice Taney's decision in the *Dred Scott* case, where he concluded that blacks were never a part of "the people" that were afforded constitutional protections.[214]

Additionally, during the second half of the nineteenth century, state legislatures used membership theories to create schemes that restricted protections available to aliens that were enjoyed by citizens.[215] Membership theories also helped the Supreme Court constrain the geographic scope of the Constitution.[216] For instance, during the Insular Cases,[217] the Court applied the membership approach in the "incorporated territories" doctrine.[218] This doctrine was articulated in *Downes v. Bidwell*[219] through an opinion written by Justice Edward Douglass White.[220] Justice White noted that the Constitution provided full protection to individuals living in territories that were incorporated into the United States, whereas those living in territories that were only acquired by the United States were entitled to specific, fundamental constitutional protections.[221]

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212. *Id.* at 54-57.

213. *See id.* at 54 (explaining, for instance, that the law of nations may have been one such source, although under the law of nations a country could expel aliens at will).

214. Bentley, *supra* note 170, at 349 (discussing the extraterritorial application of the Fourth Amendment).

215. *See id.* at 349-50 (noting how the California legislature passed measures that conferred second-class status on Chinese immigrants and how these measures were later struck down by the Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Wong Wing v. United States*, 163 U.S. 228 (1896)).

216. *Id.* at 350.

217. Neuman points out that "This imprecise term refers to both the nine cases relating to the constitutional and legal status of Puerto Rico and the Philippines argued in 1901, and to the entire series of cases from *DeLima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Puerto Rico*, 258 U.S. 298 (1922), that established the framework of second-class status for overseas territories." NEUMAN, *supra* note 171, at 83.

218. *See id.* at 83 (discussing the *Insular Cases*).

219. Downes v. Bidwell, 182 U.S. 244 (1901).

220. NEUMAN, *supra* note 171, at 86.

221. *Downes*, 182 U.S. at 299 (White, J., joined by Shiras and McKenna, JJ., concurring); NEUMAN, *supra* note 171, at 86-87.

2. Mutuality

The mutuality approach ties the scope of constitutional protections to the imposition of government obligations on individuals. Mutuality serves as an alternative articulation of the strict territorial model of the U.S. Constitution.[222] Under the strict territorial model, the U.S. government is constrained by the Constitution only when it acts inside its borders.[223] This theory originated from the notion of the territorial integrity of sovereign states.[224] Therefore, strict territoriality held that law had binding effect only within the state that created it.[225]

Strict territoriality can be viewed "as a special case of a more general approach that focuses on a sphere in which American municipal law operates."[226] Instead of defining this sphere in geographic terms, it is possible to define the sphere by using a wider range of factors.[227] Serving as fundamental municipal law, the Constitution can also exist within that sphere and provide constraints on government action.[228] Under this approach, government actions outside the domain of municipal law are not binding upon individuals and are not subject to the Constitution's constraints on government.[229] The mutuality approach differs from membership approaches on the issue of how an individual becomes entitled to the benefits of the social contract.[230] Under the mutuality approach, full constitutional protections extend whenever the U.S. government places legal obligations on an individual requiring his or her obedience.[231]

The theories embodied in the mutuality approach also influenced the interpretation of the Constitution's personal scope. During the debate over the Alien and Sedition Acts of 1798, Jeffersonian Republicans used mutuality theories to argue against a membership

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222. *See* NEUMAN, *supra* note 171, at 7 (discussing how the strictly territorial approach constitutes a specific instance of a more general model that focuses on spheres through which U.S. domestic law operates).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* Neuman notes that municipal law is another word for a nation-state's domestic law. Specifically, he states "the term municipal law is used here in accordance with its use by writers on international law to designate the law of a given nation-state, in opposition to international or natural law."

227. *Id.* at 8.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 99-100. Neuman points out, however, that under the mutuality approach, certain provisions of the Constitution may apply more narrowly in light of textual or structural arguments.

view of the Constitution.[232] The Jeffersonian Republicans argued that aliens submitted themselves to the legal authority of the government when they entered the country and therefore constitutional protections should extend to these individuals.[233] Mutuality played a significant role in *Yick Wo v. Hopkins*,[234] where the Supreme Court clearly stated that aliens possessed rights inside the territory of the United States.[235]

Initially, more restrictive aspects of mutuality, represented in the notion of strict territoriality, governed the Court's interpretation of the Constitution's geographic scope.[236] The strict territoriality version of the mutuality approach was at the center of the Court's decision in In re *Ross*,[237] where a U.S. seaman tried by a U.S. consul in Japan argued that he was denied specific constitutional protections, such as the right to an indictment by a grand jury and jury trial.[238] The Court rejected those claims and noted that the Constitution only operates within the United States and is without effect in foreign countries.[239] However, the strict territoriality approach was later repudiated in *Reid v. Covert*,[240] a case where the wives of two servicemen were charged with murdering their husbands on U.S. military installations in England and Japan.[241] Justice Black, writing for the plurality of four, concluded that the protections of the Constitution extend to U.S. citizens abroad and noted:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill

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232. *See id.* at 57-60 (discussing the Jeffersonian Republicans' mutuality based arguments with respect to the interpretation of the Constitution's scope).

233. *Id.* at 60.

234. Yick Wo v. Hopkins, 118 U.S. 356, 356 (1886).

235. *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 16 (1985) (noting that the *Yick Wo* decision "confirmed that the Constitution, including the equal protection clause, protects aliens"). Henkin also adds that the case "assured the constitutional rights of resident aliens in the United States against the states, and against the United States." *Id.* at 18. In *Yick Wo*, the Supreme Court specifically concluded that the protections of the Fourteenth Amendment are not solely limited to citizens, but that they are rather universal protections applicable to any person living inside the territory of the United States. *Yick Wo*, 118 U.S. at 369.

236. *See* NEUMAN, *supra* note 171, at 73.

237. In re *Ross*, 140 U.S. 453 (1891).

238. *Id.* at 454-58; NEUMAN, *supra* note 171, at 82.

239. In re *Ross*, 140 U.S. at 464; NEUMAN, *supra* note 171, at 82.

240. Reid v. Covert, 354 U.S. 1, 1-2 (1957).

241. *Id.* at 3-4; NEUMAN, *supra* note 171, at 89.

> of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[242]

It is important to note that the Court in *Reid* was silent on the issue of whether the Constitution operated extraterritorially to aliens.

Generally, U.S. constitutional history has yielded four distinct theories attempting to interpret the scope of the protections listed in the Constitution. Approaches rooted in universalism view the Constitution as a source that embodies a set of global norms applicable to all persons everywhere. Balancing approaches such as Global Due Process apply a balancing test that weighs the necessity of providing constitutional protections against articulated government interests. Both of these approaches, however, have not played a significant role in the debate over the appropriate scope of the Constitution. The debate over the Constitution's scope has primarily occurred between advocates of the membership and mutuality approaches. This debate continues today and is highlighted in the Supreme Court's decision in the case of *United States v. Verdugo-Urquidez*.[243]

D. United States v. Verdugo-Urquidez: *The Court Draws the Battle Lines Over the Extraterritorial Scope of the Constitution*

The Supreme Court case of *United States v. Verdugo-Urquidez*[244] represents an instance where members of the Court took contrasting positions over whether a membership theory or a mutuality based approach should be employed when determining the proper scope of the Constitution.[245] The membership theory guided Chief Justice William Rehnquist's opinion for the Court, whereas the mutuality approach influenced Justices Brennan's dissent.[246]

Verdugo-Urquidez was a Mexican citizen who was thought to be the leader of a Mexican organization that smuggled narcotics into the

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242. *Reid*, 354 U.S. at 5-6.

243. *Verdugo-Urquidez*, 494 U.S. at 259.

244. *Id.*

245. Justice Kennedy's concurring opinion also employed the Global Due Process approach. The following discussion will focus on the membership and mutuality approaches. For further discussion of the Global Due Process approach, see supra Section B.

246. *See* NEUMAN, *supra* note 171, at 104-08 (discussing the Justices' opinions in *Verdugo-Urquidez*). Neuman also states that Justice Blackmun's dissent "aligned itself with Brennan's mutuality of obligation argument," although it differed with respect to the scope of mutuality in certain situations. *Id.* at 108. Specifically, Justice Blackmun stated that he did not agree "that the Fourth Amendment governs every action by an American official that can be characterized as a search or seizure. American agents acting abroad generally do not purport to exercise *sovereign* authority over the foreign nationals with whom they come in contact." *Verdugo-Urquidez*, 494 U.S. at 297 (Blackmun, J., dissenting).

United States.[247] In 1986, he was apprehended by Mexican police officers and transported to a U.S. Border Patrol station in California where he was then arrested.[248] While he was incarcerated in the United States, the U.S. Drug Enforcement Agency acting with the cooperation of Mexican authorities searched Verdugo-Urquidez's Mexican properties in Mexicali and San Felipe, where they found documents detailing his drug smuggling activities.[249] The district court suppressed the evidence, concluding that the searches violated the Fourth Amendment.[250] A divided panel of the Ninth Circuit Court of Appeals affirmed.[251] In a six-to-three decision, the Supreme Court reversed, holding that the Fourth Amendment does not apply to searches of a nonresident alien's property in another country.[252]

The Chief Justice's analysis began with a textual argument focused on the phrase "the people."[253] He noted that the phrase "the people" is "a term of art" used in specific sections of the Constitution and "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[254] Verdugo-Urquidez, Rehnquist stated, was not entitled to Fourth Amendment protections because "he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico."[255] After concluding that the history surrounding the drafting of the Fourth Amendment suggested that its protections were only to operate within the United States, Rehnquist noted that the Fourth Amendment did not constrain U.S. seizures of French ships during an "undeclared war" with France in the late eighteenth century.[256] Rehnquist next discussed the Court's precedent and argued that the Court has never held that aliens were provided with constitutional protections against U.S. actions overseas.[257] He further noted that the reliance Verdugo-Urquidez

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247. *Verdugo-Urquidez*, 494 U.S. at 262.
248. *Id.*
249. *Id.* at 262-63.
250. *Id.*
251. *Id.*
252. *Id.* at 261; NEUMAN, *supra* note 171, at 105.
253. *Verdugo-Urquidez*, 494 U.S. at 265.
254. *Id.* at 265.
255. *Id.* at 274-75.
256. *Id.* at 266-68.
257. *See* NEUMAN, *supra* note 171, at 105-06 (providing a summary of Chief Justice Rehnquist's opinion in Verdugo-Urquidez). In his *Verdugo-Urquidez* opinion, the Chief Justice stated that the *Insular Cases* "held that not every constitutional provision applies to government activity even where the United States has sovereign power." *Verdugo-Urquidez*, 494 U.S. at 268. Central to this conclusion was the doctrine of "incorporated" territories where in territories that are only acquired by the United States, the full protections of the Constitution do not have to necessarily apply to

placed on *Reid* to support the notion that the Fourth Amendment applied to the government's actions in this case was misplaced, because *Reid* only stood for the proposition that U.S. citizens abroad could assert the protections contained in the Fifth and Sixth Amendments.[258] Because Verdugo-Urquidez was not a citizen, Rehnquist concluded that *Reid* was inapposite.[259]

Finally, Rehnquist concluded his opinion by stating that a decision to extend Fourth Amendment protections to aliens such as Verdugo-Urquidez would have "significant and deleterious consequences" for the U.S. with respect to its acts overseas.[260] Specifically, the Fourth Amendment would not only apply to extraterritorial law enforcement operations, but also to other military operations and could subsequently undermine the capacity of the political branches to address foreign policy issues that affect the national interest.[261] Moreover, Rehnquist argued that the extraterritorial application of the Fourth Amendment would force the political branches "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad."[262]

Justice Brennan's dissent emphasized an alternative view of the Constitution and advocated the mutuality approach.[263] Justice Brennan criticized the majority's conclusion that Verdugo-Urquidez was not of "the people" that receive Fourth Amendment protections because it "disregarded basic notions of mutuality."[264] Brennan stated that the mutuality approach mandated that whenever the government placed legal obligations on aliens abroad, it had to correspondingly act on such aliens within the constraints of the Constitution.[265] He further elaborated that under notions of mutuality, "[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate,

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government action. *Id.* Drawing from this discussion, Chief Justice Rehnquist concluded that if the full level of constitutional protections are not necessarily applicable in territories governed by the United States, then the argument that those same protections should extend to aliens abroad is on even weaker ground. *Id.* Rehnquist then went on to state that "it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power." *Id.* at 268-69. He pointed out that under *Eisentrager*, for instance, aliens are not entitled to the protections of the Fifth Amendment when they are located outside U.S. sovereign territory. *Id.* at 269.

258. *Verdugo-Urquidez*, 494 U.S. at 269-70.

259. *Id.* at 270.

260. *Id.* at 273.

261. *Id.* at 273-74.

262. *Id.* at 274.

263. *See Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting) (outlining the requirements of the mutuality approach); NEUMAN, *supra* note 171, at 107 (discussing Brennan's opinion in *Verdugo-Urquidez*).

264. *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

265. *Id.*

prosecute, and punish them."[266] Therefore, Brennan concluded that Verdugo-Urquidez was entitled to Fourth Amendment protections because the U.S. government imposed obligations on him under domestic criminal law.[267]

E. *Criticisms of the Membership and Mutuality Approaches*

Criticisms leveled against the membership approach focus on its restrictive nature. Chief Justice Rehnquist's formulation of the membership approach is embodied in his "substantial connection" test in *Verdugo-Urquidez*, where the members included under the Constitution are essentially limited to citizens and aliens who have become part of the national community.[268] One problem with this formulation is that it ignores certain historical developments. For instance, foreign aliens were given an opportunity to collect debts in U.S. courts through foreign diversity jurisdiction outlined in Article III of the Constitution.[269] Additionally, one commentator noted that as a historical matter, U.S. courts have not considered foreign defendants who are involuntarily brought into the country as enemies who can be dealt with without constitutional constraint.[270] Another more fundamental problem with the restrictive formulation of the membership approach is that it simply leaves non-members who are subject to U.S. government actions without any constitutional protection.[271]

The mutuality approach, on the other hand, has received criticism for its relative ambiguity and also for its broad applicability. Under the mutuality approach, all constitutional protections should apply whenever the government imposes legal obligations upon an

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266. *Id.*

267. *See Verdugo-Urquidez*, 494 U.S. at 284 ("[Verdugo-Urquidez] is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.").

268. *Id.* at 265.

269. Bentley, *supra* note 170, at 347.

270. *See* NEUMAN, *supra* note 171, at 113 (stating that U.S courts have "generally assumed that their authority over such defendants must be exercised within the bounds of constitutional constraint, including the constitutional rights that govern trial procedure, and that the substance of the criminal statutes said to have been violated abroad is subject to judicial review").

271. *See id.* at 112 (arguing that if restrictive membership claims asserting that aliens lack constitutional protections overseas are taken at face value, "then it would seem to follow that there are no constitutional limits on the content of the laws to which they may be subjected, at least so long as the imposition of sanctions does not take place within the United States").

alien.[272] One specific criticism of this approach has focused on the difficulty in determining what constitutes legal obligations imposed by the government and if such obligations are imposed on aliens, to what degree can aliens assert constitutional protections.[273] This line of criticism generally concludes that there is little difference between the mutuality approach and the global due process and universalism theories.[274] Another criticism raises the potential problem associated with the mutuality approach's tendency to attach all constitutional protections to government-imposed obligations on individuals.[275] The criticism is specifically directed at the fact that such broad based extension of constitutional protections may undermine national security concerns and the ability of the political branches to effectively carry out their delegated powers.[276]

V. APPLYING A REVITALIZED MEMBERSHIP APPROACH TO THE DETAINEES

Under restrictive conceptions of the membership approach embodied in Chief Justice Rehnquist's opinion in *Verdugo-Urquidez*, it is almost certain that the al-Qaeda and Taliban detainees at Guantanamo Bay would not receive constitutional protections. The Guantanamo detainees are not U.S. citizens.[277] Most of the detainees were captured during the military campaign in Afghanistan. Applying these circumstances to Rehnquist's "substantial connection" test, it is unlikely that the Guantanamo detainees are part of the national community or had substantial voluntary connections to the United States. Moreover, as Rehnquist noted in his *Verdugo-Urquidez* opinion, considerations with respect to the detainees implicating the national interest and national security may support judicial deference to the institutional expertise of the political branches.[278] Therefore, for advocates of the restrictive formulation of

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272. *Id.* at 99.

273. *See* Motomura, *supra* note 175, at 1578-81 (outlining flaws in the mutuality of obligation theory).

274. *Id.*

275. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 273-75 (1990) (noting the consequences of extending all of the protections listed in the Fourth Amendment abroad); Bentley, *supra* note 170, at 358-59 (noting Chief Justice Rehnquist's trouble with the impact Justice Brennan's mutuality approach in *Verdugo-Urquidez* would have on U.S. sovereignty abroad).

276. Bentley, *supra* note 170, at 358-59.

277. Jess Bravin, *Hearing on 'American Taliban' Is Scheduled to Begin Today*, WALL ST. J, July 15, 2002, at B8.

278. *See Verdugo-Urquidez*, 494 U.S. at 273-75 (explaining that extending the entire scope of Fourth Amendment protections abroad would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries").

the membership theory, it would be difficult to justify extending membership to this specific group of aliens.

Although Rehnquist's application of the "substantial connection" test and reliance on the judgment of the political branches represents a restrictive interpretation of the membership theory, it is not necessary for membership to be so narrowly limited.[279] One commentator has noted that a restrictive interpretation of the membership approach stems from constitutional interpretation that focuses on the rights of aliens.[280] A restrictive membership model that focuses on aliens' rights, however, easily allows the characterization of aliens not residing in the United States as non-members.[281] Therefore, a broader conceptualization of the membership approach may be more helpful in assessing how to interpret the Constitution's scope.[282]

One theory that broadens traditional notions of membership shifts the emphasis to the position of members in the constitutional structure.[283] This theory, otherwise known as the textured membership theory,[284] focuses on how government actions against nonmembers affect those individuals that already maintain a place in the constitutional scheme.[285] This broader conceptualization of membership asserts that members are not only interested in their own constitutional protections, but are often interested in providing constitutional protections to certain nonmembers.[286] Nonmembers are therefore entitled to constitutional protections to the extent necessary for members to attain their own objectives within the constitutional structure.[287] Fundamentally, the textured membership

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279. Here I rely on the work of Hiroshi Motomura who argues for a broader conception of the membership theory that can be embodied in a textured membership model in the field of immigration law. *See generally* Motomura, *supra* note 175. Although, Motomura's analysis is confined to the realm of immigration law, I argue that this method of constitutional interpretation can serve as a useful guide in approaching general questions that address the scope of the Constitution. *See id.* at 1571.

280. *Id.* at 1582.

281. *See id.* ("[A] restrictive version of the membership model is a consequence of a perspective on constitutional immigration law that focuses primarily on aliens' rights. From that perspective, a model that instead first asks "who is a member?" is easily interpreted as a model that completely excludes nonmembers, or aliens.").

282. *Id.*

283. *See id.* at 1582-87 (stating that under a "textured membership model" the primary concern is placed on the position of the members).

284. *Id.* at 1582.

285. *Id.* In a footnote, Motomura leaves open the possibility that members can be defined more broadly to include not only citizens, but also permanent residents. *Id.* at 1582 n.37.

286. *Id.*

287. *Id.* Motomura further elaborates on this point and also offers an example: "A textured membership model expresses the idea that we should define a

model is concerned with the notion of national self-definition, or in other words, the process through which Americans shape their future as a nation.[288]

The textured membership approach avoids the fundamental difficulty associated with the restrictive membership model. It would not completely exclude constitutional protections from the detainees simply on the basis that they are non-members. Rather, the textured membership approach compels a more substantive inquiry into how government actions leveled against the detainees affect the degree to which members receive constitutional protections. If such actions against non-members were likely to risk further transgressions of the constitutional protections afforded to members, then those actions would warrant judicial review.[289]

In making a determination to subject government actions against non-members to judicial review, consideration must be given to the potential that unconstrained U.S. government action against the detainees at Guantanamo Bay will create a precedent allowing the government to undermine the protections enjoyed by members residing within the United States.[290] Indeed, events from our nation's history have shown that withholding constitutional protections to aliens served as a stepping stone for government transgressions of citizens' liberties.[291] The internment of people of Japanese descent during World War II, for instance, was predicated on the theory that individuals maintaining ties to a country that the United States was fighting should be detained, because those aliens are generally disloyal to the country and constitute enemies to the United States.[292] This theory, however, also served as the basis during the war to extend internment to those Japanese who had U.S. citizenship.[293] Similarly, government transgressions aimed at aliens

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constitutional place for aliens – often quite generously – by applying principles for the benefit of citizens. Thus, because we do not wish to endorse racial discrimination, we do not practice it in immigration law and policy." *Id.* at 1582-83.

288. *Id.* It is important to note that Motomura discusses immigration decisions involving the selection of "whom to admit and expel" and questions involving an alien's "transition from outsider to citizen" as choices that affect Americans' national future. *Id.* at 1582. Similarly, it could be argued that decisions involving the scope of constitutional protections in other contexts also affect our national future. For further discussion outlining a model of national self-definition, see generally Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 (1996).

289. Motomura, *supra* note 288, at 1945.

290. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (suggesting that constitutional protections withheld from aliens may create a precedent to undermine similar protections enjoyed by citizens).

291. *See id.* at 989 (explaining how measures restricting the individual liberties of immigrants, often provided a basis to institute deprivations of citizen liberties).

292. *Id.* at 990.

293. *See id.* at 990-91 (pointing out that the U.S. Army defended internment of Japanese-Americans on the theory that although persons of Japanese descent were

accused of associating with disfavored political groups deemed to pose a threat to national security were later extended to citizens.[294] These historical examples underline the tendency of the government to move from a system where guilt is based on criminal conduct to a regime where guilt is determined by association.[295] This transition is easily facilitated when the government's action is directed against a particular minority, because people in the majority generally know that they will not find themselves in the minority group.[296]

Past history may already have begun to repeat itself in the post September 11 environment, as a number of individuals within the United States, many of whom constitute members, have experienced an infringement of their constitutional liberties. Even before the United States began transporting detainees to Guantanamo Bay, aliens inside the country lost certain constitutional protections following the passage of the USA PATRIOT Act.[297] Additionally, a large number of aliens have been subject to secret preventative detention at the hands of the government.[298] For instance, in the months following the attacks of September 11, twelve thousand immigrants, who were mostly Muslims, were detained.[299] Moreover, public attitudes about the use of ethnic profiling as a method to capture suspected terrorists has become more favorable following the attacks of September 11.[300] A draft bill, referred to as "Patriot Act II" contemplates extending the denial of certain constitutional protections to specific citizens.[301] One provision, for instance,

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technically U.S. citizens, they still constituted "enemy aliens" who were most likely loyal to Japan). Cole also notes that Lt. John L. DeWitt, who was influential in issuing the internment orders, suggested that internment of Japanese-Americans was justified on the basis of their race writing that "[t]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." *Id.* at 990.

294. *See id.* at 994-97 (showing how government activities aimed at undermining the liberties of aliens associated with Communists later broadened to include U.S. citizens during the McCarthy era).

295. *Id.* at 997.

296. *See id.* at 992 (noting how this transition was easily made with respect to government action against Japanese-Americans).

297. *See id.* at 966 (discussing how the USA PATRIOT Act "makes noncitizens deportable for wholly innocent associational activity, excludable for pure speech, and detainable on the Attorney General's say-so, without a hearing and without a finding that they pose a danger or a flight risk"). Cole also states that the Act allows the government to avoid normal Fourth Amendment requirements with respect to searches and wiretaps. *Id.* at 972-74.

298. *Id.* at 960.

299. *A Question of Freedom*, THE ECONOMIST, Mar. 8, 2003, at 30.

300. Cole, *supra* note 290, at 974.

301. *See A Question of Freedom, supra* note 299, at 29-31 (discussing how recent actions by the Bush Administration have undermined certain civil liberties).

provides the government the power to remove citizenship from any American suspected of providing "material support" to an organization that is designated as being terrorist and to subsequently detain or deport that person without trial.[302]

Consideration, however, must also be given to the importance of maintaining security when determining whether the judiciary should oversee the legality of government actions. Certainly terrorism represents a unique threat that this country has not had much experience addressing and therefore there may be compelling reasons to withhold some or even all constitutional safeguards from the Guantanamo detainees. During times of great anxiety, the balance between liberty and security has often been struck in favor of promoting the latter. When the government acts unconstrained by the Constitution against individuals such as the Guantanamo detainees, it is dangerous to just presume that the security interests of the nation outweigh countervailing interests shared by members in maintaining the protections provided for under the Constitution. Because such actions against non-members pose a substantial risk to the interests members possess in maintaining their constitutional protections, the judiciary should at least entertain claims to observe the legality of the government's action.

The results derived from an inquiry guided by the textured membership theory do not necessarily have to lead to the wholesale application or denial of constitutional protections with respect to the suspected terrorists at Guantanamo Bay. It may be the case that only a certain level of constitutional protection should be afforded to such individuals. There may even be compelling reasons to deny constitutional protections to terrorist suspects. Nevertheless, because unconstrained government actions against non-members may pose a significant risk to the constitutional protections enjoyed by members, it is necessary that the judiciary step in and evaluate the legality of those actions.

VI. CONCLUSION

The suspected terrorist detainees at Guantanamo Bay are caught in a unique situation where they generally fail to receive the protections provided by the two primary legal regimes governing their status. Although the United States has extended the protections embodied in the Third Geneva Convention to the Taliban detainees held at Guantanamo Bay, Taliban detainees are not entitled to prisoner-of-war status. The United States has maintained that the al-Qaeda detainees will not receive the protections of the Third Geneva

302. *Id.* at 31.

Convention and are therefore ineligible to receive prisoner-of-war status. Moreover, some federal courts have ruled that the suspected terrorist detainees cannot challenge their detentions under the Constitution because Guantanamo Bay is not within the sovereign territory of the United States.

The situation of the detainees presents difficult questions about how to define their constitutional status. Such questions, however, cannot be adequately answered by employing formalistic analysis that characterizes the issue as one governed by the notion of sovereignty. Rather, a more thorough approach is warranted that examines the various theories attempting to interpret the nature of the Constitution's scope. The textured membership theory represents a unique approach that breaks away from the restrictive aspects of its more traditional counterpart. This theory examines the scope of constitutional protections through a focus on the member, instead of the alien. Considerations addressing both the members' interest in maintaining their constitutional protections and the government's interest in improving security must be evaluated when determining whether government action against nonmembers warrants judicial scrutiny. Interpreting the scope of constitutional protections through the textured membership theory also helps us as Americans focus on our national self-definition. This notion of self-definition is an important tool that allows our country to send a powerful message to the world about how we, as Americans, live in a country governed by the rule of law embodied in the provisions of our Constitution.

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