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Guantanamo and U.S. Law

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Abstract

This Article deals with the United States' presence at Guantanamo Bay, Cuba, the domestic and international law issues that have arisen, and the nature of the jurisdiction exercised there by the United States. It does not deal with the operation of the prison facility. Guantanamo Bay is near the eastern end of Cuba, 628 miles (1000 km) from the capital, Havana. It is a deep-water harbor, protected by hills from the extremes of Caribbean weather; but it has an unhealthy tropical climate. The forty-five square miles of the Guantanamo Naval Base have been occupied by the United States since the Spanish-American War in 1898. Originally a coaling station, it had been utilized for training, repairs, anti-submarine warfare, and humanitarian rescue before its present uses. Its continued presence is deeply resented in the island State of almost twelve million people, but the persistence of the communist dictatorship of Fidel Castro has strengthened U.S. determination to hold on, even though the base no longer serves a military purpose.

GUANTANAMO AND U.S. LAW

*Joseph C. Sweeney**

Hurrah for old GITMO on Cuba's fair shore
The home of the cockroach, the flea and the whore
We'll sing of her praises and pray for the day
We get the hell out of Guantanamo Bay!†

I. INTRODUCTION

This Article deals with the United States' presence at Guantanamo Bay, Cuba, the domestic and international law issues that have arisen, and the nature of the jurisdiction exercised there by the United States. It does not deal with the operation of the prison facility.

Guantanamo Bay is near the eastern end of Cuba, 628 miles (1000 km) from the capital, Havana. It is a deep-water harbor, protected by hills from the extremes of Caribbean weather; but it has an unhealthy tropical climate. The forty-five square miles of the Guantanamo Naval Base have been occupied by the United States since the Spanish-American War in 1898. Originally a coaling station, it had been utilized for training, repairs, anti-submarine warfare, and humanitarian rescue before its present uses. Its continued presence is deeply resented in the island State of almost twelve million people, but the persistence of the communist dictatorship of Fidel Castro has strengthened U.S. determination to hold on, even though the base no longer serves a military purpose.

II. BACKGROUND

A. *The Spanish Colony*

After Spain lost most of its empire in Latin America during

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† Old Navy song, recorded in 1968 by Oscar Brand. The Spanish language uses an accent mark over the second "a" in Guantanamo. Navy practice eliminates the accent in English, a practice followed herein.

the first quarter of the nineteenth century, Cuba became its most valuable colony, the source of wealth from sugar, tobacco, and minerals, produced largely by slaves.¹ In 1854, the United States had sought to annex Cuba by purchase or other means as a slaveholding outpost from which U.S. slaveholding could be protected, but Northern Abolitionists would never agree to such an expansion of slavery.² By that time, the Cuban economy,

1. Efforts by Spain to plant a settlement on Cuba after its discovery by Columbus in his first voyage (1492-93) did not begin until 1512 at Baracoa near the eastern tip of the island, and, were quickly followed by other settlements with headquarters at Santiago de Cuba, in 1515. From this outpost the conquistadors of Mexico under Cortes set out in 1519; at the same time as an outpost on the northeast shore, Havana (San Cristobal de Habana) was established. By 1533 native opposition to Spanish land seizures ended as their numbers decreased from war and disease and the importation of African slaves had begun. Sugar and tobacco plantations soon joined the mines as sources of wealth and Spanish entrepreneurs developed Cuba into Spain's richest colony. The bloody slave revolution in Haiti from 1791 to 1803 forced the French planters out and many of them made the short voyage to Cuba where they were permitted to reestablish their sugar and coffee plantations worked by slave labor. See RICHARD GOTT, *CUBA: A NEW HISTORY* 11-26 (2005); HUGH THOMAS, *RIVERS OF GOLD: THE RISE OF THE SPANISH EMPIRE, FROM COLUMBUS TO MAGELLAN* 312-22, 473-91 (2004) [hereinafter THOMAS, *RIVERS OF GOLD*]. The absence of Spanish language authorities is not meant to imply a lack thereof; there is a substantial literature by Cuban, Spanish and Latin American scholars in all aspects of Cuban history; for instance, see the bibliographies in GOTT, *supra*, HUGH THOMAS, *CUBA: THE PURSUIT OF FREEDOM* (1971) [hereinafter THOMAS, *CUBA*], and FRANK ARGOTE-FREYRE, *FULGENCIO BATISTA: FROM REVOLUTIONARY TO STRONGMAN* (2006).

2. The United States, then a country half-slave and half-free, entered Cuban history at the beginning of the nineteenth century as U.S. slave-owning interests sought to invest in or acquire the slave-dependent island. See THOMAS, *CUBA*, *supra* note 1, at 207-32. In fact, slavery was so important to the Spanish Colony of Cuba that it survived more than twenty years in Cuba after its abolition in the United States; slavery was abolished in 1886, the first year of the reign of Alfonso XIII under the regency of his mother, Queen Maria Cristina. See *id.* at 281-92.

Efforts to acquire Cuba by purchase were made informally after the United States purchased Florida in 1819 but were ignored. A formal effort in 1853 occurred in the wake of President Pierce's inaugural address in which he suggested further territorial purchases. Secretary of State William L. Marcy offered to purchase Cuba for US\$130,000,000. In October 1854, a meeting at Ostend in Belgium of the U.S. Ministers to Spain (Pierre Soulé), France (John Y. Mason) and Great Britain (James Buchanan, future president) composed a dispatch ("The Ostend Manifesto") suggesting future policy respecting Cuba, concluding that if Spain should refuse to sell, "then by law human and divine, we shall be justified in wresting it from Spain, if we possess the power." The Secretary of State rejected the suggestion and dismissed Minister Soulé. Nevertheless, the dispatch received wide publicity in Europe and the United States.

Spain's colonial policy has been described as both "incompetent and tyrannical," especially in the 1895-1897 uprising when General Valeriano Weyler (called "the Butcher" in the U.S. press) introduced concentration camps in which thousands of

based on sugar, was more closely connected to the United States than to Spain.³

Spain retained a tight control as an independence movement broke out in 1868. Interference by the United States in 1875 to assist the Cuban efforts was bitterly resented by Spain, which succeeded in crushing the ten-year struggle in 1878. When a new Cuban revolt occurred in 1895, Cuban revolutionaries, many of them exiled in Florida and New York, sought to involve the United States, which was again ready to assist in negotiating independence from Spain, but Spain refused to consider the offer and troops under General Valeriano Wyler brutally suppressed the rebellion, which ended in 1897. General Weyler resigned when the Liberal Spanish Prime Minister Praxedes Sagasta sought to bring peace to Cuba through negotiations and home rule, but it was too late for negotiations.⁴

B. *The Spanish-American War*

The next year, on February 15, 1898, the battleship *Maine* exploded and sank in Havana harbor,⁵ setting off a rancorous call to war with Spain by several powerful newspaper editors.

Cubans died of disease and starvation. See HUBERT HERRING, A HISTORY OF LATIN AMERICA 405-07 (2nd ed. 1961); THOMAS, CUBA, *supra* note 1, at 316-38.

After the end of U.S. slavery, Cuban revolutionaries from 1868 to 1898 operated out of the United States, usually from Miami and New York where Marti, Estrada Palma and Gomez planned the overthrow of Spanish colonialism. See THOMAS, CUBA, *supra* note 1, at 293-315. See generally 2 PHILIP S. FONER, HISTORY OF CUBA AND ITS RELATIONS WITH THE UNITED STATES 198-309 (1961); FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY 167-214 (1963).

3. See GOTT, *supra* note 1, at 67-70. United States predominance as Cuba's largest trading partner continued until the total embargo on Cuban imports and exports after the Castro revolution. See *infra* note 118.

4. See JOHN A. S. GRENVILLE & GEORGE B. YOUNG, POLITICS, STRATEGY AND AMERICAN DIPLOMACY: STUDIES IN FOREIGN POLICY 1873-1917, at 179-200, 239-66 (1965); WILLIAM L. LANGER, DIPLOMACY OF IMPERIALISM, 1890-1902, at 517-20 (1935).

5. Ostensibly on a courtesy call, the battleship *Maine* anchored in Havana harbor on February 15, 1898. She was in fact there to protect U.S. citizens and property. An explosion at 9:40pm destroyed the ship, which sank, killing 266 members of the crew. The U.S. Navy Court of Inquiry blamed an external source, such as a torpedo or mine. The official Spanish investigation attributed the explosion to an internal source, especially a powder magazine. The U.S. press, led by William Randolph Hearst and Joseph Pulitzer, blamed Spain and demanded war. Admiral Hyman Rickover, USN, agreed with the Spanish investigation in his 1976 study, *How the Battleship Maine was Destroyed*. See also PEGGY & HAROLD SAMUELS, REMEMBER THE MAINE 97-139 (1995). For the press, see JOSEPH E. WISAN, CUBAN CRISIS AS REFLECTED IN THE NEW YORK PRESS 384-447 (1934) and WILLIAM A. SWANBERG, CITIZEN HEARST 108-73 (1962).

President McKinley⁶ took action on April 11 by asking Congress for forcible intervention in Cuba,⁷ and Congress responded on April 20, 1898 with a Joint Resolution authorizing military force against Spain.⁸

The long history of U.S. interests in Cuba had created suspicions that the United States intended to acquire Cuba by any possible method, largely because of substantial U.S. investment and trade.⁹ To obviate the suspicions, Congress appended the Teller Amendment to the Joint Resolution, by which the United States denied any intention to assert "sovereignty or control" over Cuba, which would instead remain free to determine its own future government.¹⁰

The President approved the Joint Resolution on the same day and sent a simultaneous ultimatum demanding Spanish withdrawal from Cuba.¹¹ Two days later, the U.S. Atlantic Fleet began a blockade of Cuba, to which Spain responded with a Dec-

6. William McKinley (1843-1901), from Niles, Ohio. His college studies at Allegheny College were interrupted by the Civil War, in which he served at the battles of Antietam, Winchester, and Cedar Creek, discharged as a major in 1865 at age 22. He then attended Albany Law School and was admitted to the Ohio Bar in 1867. He practiced law in Canton, Ohio where he was elected county Prosecutor in 1869. In 1876 he was elected to Congress as a Republican, serving twelve years, after which he was elected governor of Ohio (1891) for two terms. As the protégé of the Ohio boss, Marcus Hanna, he secured the presidential nomination in 1896 and defeated William Jennings Bryan. He was reelected in 1900, again defeating Bryan; his first term vice president died in 1899) and the 1900 Republican Convention forced the reform Governor of New York, Theodore Roosevelt (elected as war hero in 1899) onto the ticket to get him out of New York. McKinley strongly endorsed high protective tariffs and the gold standard. His war message caused an unnecessary war as Spain had conceded earlier demands for a cease fire and an end to the suppression of rebels. During the war with Spain, Congress annexed Hawaii. McKinley said he acquired the Philippines in response to a Christian duty to civilize the islands. He was assassinated at the Pan-American Exposition in Buffalo by the anarchist, Leon Czolgosz on September 6, 1901. *See generally* MARGARET LEACH, *IN THE DAYS OF MCKINLEY* (1959).

The Congress that declared war was elected in 1896 and controlled by Republicans:

House: 209 Republicans; 124 Democrats; 22 Populists; 5 Independents.

Senate: 46 Republicans; 34 Democrats; 10 Independents.

7. *See* 31 CONG. REC. 3699-702 Apr. 20, 1898.

8. *See* J. Res. 24, 55th Cong., 30 Stat. 738 (1898).

9. *See* JULIUS W. PRATT, *EXPANSIONISTS OF 1898: ACQUISITION OF HAWAII AND THE SPANISH ISLANDS* 209-51, 275-78 (1936); *see also* THOMAS, *CUBA*, *supra* note 1, at 271-315.

10. The Teller Amendment was offered by Senator Henry M. Teller (1830-1914). He practiced law at Central City, Colorado. He served divided terms in the U.S. Senate (1876-1882 and 1885-1909), and was Secretary of the Interior (1882-1885). He was the voice of the Silver industry. *See* Pratt, *supra* note 9, at 230-48.

11. *See* An Act Declaring that War Exists Between the United States of America and

laration of War on the United States on April 24; the United States declared war on Spain on April 25, 1898,¹² retroactive to the beginning of the blockade. The U.S. naval blockading force was established off Havana and the south coast of Cuba.

In mid-May the Secretary of the Navy, John D. Long,¹³ ordered Commodore Winifred Schley¹⁴ of the blockading squadron to take possession of Guantanamo as a coaling station. Thus, on June 7, the cruiser USS *Marblehead* anchored in the outer harbor of Guantanamo, and on June 10 following a naval bombardment¹⁵ sixty Marines from the Navy ships landed as a covering force. A battalion of Marines—650 men—under Lieutenant Colonel Robert W. Huntington, USMC,¹⁶ landed on the same day on the eastern side of the bay from the troopship USS *Panther* and established a hillside camp. There was no Spanish

the Kingdom of Spain, 30 Stat. 364, ch. 189 (1898). President McKinley's War Message is in 10 MESSAGES AND PAPERS OF THE PRESIDENTS 153-55 (1999).

12. The Teller Amendment states,

The United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

J. Res. 24, 55th Cong., 30 Stat 738, 739 (1898).

13. John D. Long (1838-1915) served three terms as Governor of Massachusetts and three terms in Congress before appointment as Secretary of the Navy by McKinley in 1897 to 1902. Theodore Roosevelt was Assistant Secretary from 1897 to May 6, 1898, when he resigned to join the Rough Riders. (As president (1901-1909) Roosevelt made naval policy himself, the reason for the brief tenures of five Secretaries of the Navy.) Long advocated an advanced naval strategy with battleships in his book, *The New American Navy* (1903). See ROBERT G. ALBION, MAKERS OF NAVAL POLICY, 1798-1947, at 323-54 (1980).

14. Winifred Scott Schley (1839-1901), graduated from the U.S. Naval Academy in 1860, and commanded an Arctic Rescue Mission in 1884. In 1898 he was junior to Rear Admiral William T. Sampson, USN (1840-1902), but, in Sampson's absence at a conference with General Shafter, Schley led the attack on the Spanish squadron at Santiago. His retirement and early death ended a bitter controversy with Sampson over credit for the victory. See *generally* RICHARD CHALLENGER, ADMIRALS, GENERALS AND AMERICAN FOREIGN POLICY 1898-1914, at 81-88 (1976).

15. Col. R.D. Heinl, Jr. USMC, *How We Got Guantanamo*, 13 AM. HERITAGE 196 (1962). Stephen Crane served as a war correspondent and published his reports of the action as *Wounds in the Rain* (1900).

16. Colonel Robert W. Huntington, USMC (1840-1917), from West Hartford, Connecticut. He left Trinity College to join the Army in 1861 but was commissioned in the Marine Corps six weeks later. He served at the First Battle of Bull Run, then in the Blockading Squadron. He later served in Tokyo, Samoa and the Brooklyn Navy Yard, then was assigned to command the First Marine Battalion (Reinforced). He was promoted to full Colonel by Presidential order because of eminent and conspicuous conduct at Guantanamo. He retired in 1900.

resistance to the landing on that first day; however, Spanish forces attacked the next night—two marines and a naval surgeon were killed and three marines were wounded. Huntington then moved the camp to a less exposed position.

On June 14, the Marines and Cuban guerillas aided by naval gunfire attacked the Spanish position on Cuzco Hill. The Spanish force fled after 60 were killed and 150 wounded. The United States had captured Guantanamo Bay.

Spain's Atlantic Fleet had arrived from Spain and was stationed since May 28 at Santiago de Cuba, sixty miles west of Guantanamo. Santiago's large harbor was protected by fortresses manned by 24,000 troops. The U.S. Army Cuban Expeditionary Force of 17,000 troops¹⁷ landed on the coast at Daiquiri and Siboney near Santiago from June 20 to 26 and then began its march on the city. On July 1, Colonel Theodore Roosevelt led his Rough Riders in the successful battle of San Juan Hill¹⁸ and General Shafter's main force fought a battle at El Caney¹⁹ on the same day, thereby seizing heightened positions looking over Santiago from which the artillery could destroy the Spanish fleet in the harbor. Before that bombardment began, Spanish Admiral Pascual Cervera decided to escape from the blockaded harbor, but in a running battle on July 3, the U.S. Navy blockade Squadron (five battleships and two cruisers) destroyed four cruisers and three destroyers of the Spanish fleet with almost 500 casualties and 1750 prisoners.²⁰ Two weeks later, on July 17, the Spanish army in Santiago surrendered, ending hostilities;²¹ Spain sought to end the war on July 26—its Pacific Fleet having already been destroyed by the U.S. Asiatic Fleet under Admiral George Dewey, USN, at the Battle of Manila Bay on May 1, 1898.²²

Active warfare ceased on August 12, 1898; the war had

17. See FRANK FREIDEL, *THE SPLENDID LITTLE WAR* 56-57 (1958).

18. See THEODORE ROOSEVELT, *ROUGH RIDERS* 103-28 (1899); see also HERMANN HAGEDORN, *ROUGH RIDERS* (1927) (novel based on Roosevelt's account).

19. See FREIDEL, *supra* note 17, at 142-79.

20. *Id.* at 192-211. United States casualties were one dead and one wounded.

21. See GRENVILLE & YOUNG, *supra* note 4, at 256-96.

22. See KENNETH J. HAGAN, *THE PEOPLE'S NAVY: THE MAKING OF AMERICAN SEA POWER* 214-27 (1991); see also ALFRED T. MAHAN, *LESSONS OF THE WAR WITH SPAIN* (1899). The obsolete Spanish fleet lost seven warships with 400 casualties. Seven U.S. sailors were wounded. See WILLIAM R. BRAISTED, *THE UNITED STATES NAVY IN THE PACIFIC, 1897-1909* 21-32 (1958).

lasted only sixteen weeks.²³ Four months later, the Treaty of Paris of December 10, 1898 restored peace between the United States and Spain.²⁴ According to the terms of the Treaty, Spain abandoned its title and claims to Cuba, while assuming Cuban public debt. Spain ceded outright its colonies of Puerto Rico and Guam to the United States and agreed to the cession of its colony of the Philippine Islands to the United States in exchange for a cash payment of US\$20,000,000.²⁵ This did not end the violence and deaths to U.S. personnel. While only 385 were killed in the Cuban combat, tropical diseases killed more than 2500 soldiers. Three years of guerilla warfare in the Philippines tied down an army of 60,000 U.S. troops.²⁶

Although the victory over Spain was very popular, the instant creation of a U.S. colonial empire was not generally approved by the U.S. public.²⁷ A fierce newspaper battle began, and public meetings occurred in which "Anti-imperialists" confronted McKinley's "Imperialists" in a prelude to the 1900 presidential election.²⁸ The resulting Senate advice and consent to the Treaty with Spain on February 6, 1897 was very close, with a vote of fifty-seven in favor, twenty-seven against—only one vote more than the constitutional requirement of two thirds of the eighty-four senators voting (six did not vote).²⁹

Spain's abandonment of Cuba proceeded rapidly after December 10, 1898, even though tropical diseases had caused the withdrawal of most of the U.S. Expeditionary Force.³⁰ Post-war problems soon became apparent. Businesses had ceased to operate during the revolt and war; agriculture was largely in ruins. Cuban revolutionaries, operating from the United States for

23. See PRATT, *supra* note 9, at 328-45.

24. See Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

25. See *id.* arts. 2, 3, 30 Stat. at 1755-56.

26. See STUART C. MILLER, *BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES 1899-1903* (1982); see also STANLEY KARNOW, *IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 78-195* (1987).

27. See ROBERT L. BEISNER, *TWELVE AGAINST EMPIRE: ANTI-IMPERIALISTS 1898-1900* 151-59, 215-30 (1968); see also Christopher Lasch, *Anti-Imperialists, The Philippines and Inequality of Man*, 24 J. SO. HIST. 319 (1958).

28. *Id.* In fact, however, McKinley was reelected by an increased margin over Bryan.

29. S. Doc. No. 62, 55th Cong. (1899).

30. Many of the U.S. deaths occurred at Montauk, N.Y., where the troops were sent for demobilization. See FREIDEL, *supra* note 17, at 295-304.

more than thirty years, assumed that U.S. democratic ideals would immediately determine the relationship between an independent Cuba and the United States;³¹ they had not foreseen the challenges to Cuban independence in the world situation.

First, Spain had not encouraged Cubans to participate in the higher levels of administration. Thus, few Cubans had been trained to assume the responsibilities of governing Cuba and many Spanish administrators remained after the army left. Second, Cubans held strongly divergent views as to the way Cuban democracy should develop and were unable to compromise their political beliefs.³² Lastly, in the age of colonialism, the Spanish withdrawal from Cuba could provide an opportunity to Germany, France, or Great Britain for adventures on the island. Among the many problems facing the McKinley Administration and its Secretary of State, John Hay, was keeping Europe out of Cuba until a stable democracy could be established.³³

An experienced Army officer, Colonel John R. Brooke,³⁴ who had led the occupation force in Puerto Rico, was on the spot and was appointed Military Governor of Cuba in January 1899 with a force of 24,000 men, a new U.S. army with preference given to those accustomed to tropical climates—thus, an army with large numbers of southerners and black Americans. A small cadre of civilian employees also accompanied the military governor.

Eleven months later, Brooke was replaced by the United States' most talented colonial administrator, Colonel Leonard

31. See THOMAS, CUBA, *supra* note 1; see also GOTT, *supra* note 1, at 104-10.

32. See PRATT, *supra* note 9; see also DANA G. MUNRO, INTERVENTIONS, DOLLAR DIPLOMACY IN THE CARIBBEAN, 1900-1921, at 24-37 (1964).

33. John Hay (1838-1905), born in Indiana, A.B. Brown University 1858, then to Springfield, Illinois, admitted to Bar in 1861; served as a private secretary to President Lincoln. After Lincoln's death he served in diplomatic posts in Paris, Madrid, and Vienna (1865-70); journalist in New York 1870-75, served as Assistant Secretary of State 1879-81. Under McKinley, he was Ambassador to United Kingdom in 1897-1898 and Secretary of State from 1898 to 1905. Author of *Abraham Lincoln: A History*, written with John G. Nicolay in ten volumes (1890), novels and poetry. He announced the "Open Door Policy" respecting China to prevent further dismembering of China after the Boxer Rebellion (1901) and negotiated the construction of the Panama Canal. See THOMAS, CUBA, *supra* note 1, at 402-14.

34. John R. Brooke (1838-1926) from Pennsylvania, served in the Civil War battles of Antietam, Fredericksburg, Chancellorsville and Gettysburg; wounded at Cold Harbor; promoted Major General 1897, led invasion of Puerto Rico before assignment to Cuba.

Wood,³⁵ a medical doctor who had initially commanded the Rough Riders in battle. During Wood's twenty-nine-month administration, improved sanitation and standards of public health led to the conquest of yellow fever.³⁶ Furthermore, unemployed guerillas were disarmed and paid. Public schools were organized, a census was held and municipal elections were held to establish local governments. Elections for a Constitutional Convention were held early in Colonel Wood's tenure and assembled in Havana on November 5, 1900. In the Constitution of February 21, 1901, the delegates adopted a U.S.- type of government for their non-federal or unitary nation with a two-house Congress and a popularly elected president.

Before the Constitution became effective, the United States forced a virtual recognition of a U.S. protectorate over Cuba when Wood told the delegates that the U.S. army would remain until a permanent relation with the U.S. was fixed.³⁷ Senator Orville H. Platt (R. Conn.) had attached an amendment to the crucial appropriation for the U.S. Army in May 1901 with the following stipulations: (1) Cuba may not become party to a treaty impairing its sovereignty in favor of another State; (2) Cuba may not commit itself to an "excessive foreign debt" beyond its capacity to repay based on ordinary revenue receipts;

35. Leonard Wood (1860-1927) from Winchester, NH, M.D. Harvard 1884; joined U.S. Army Medical Corps in 1886. In 1897, in Washington, he became acquainted with Assistant Secretary of the Navy, Theodore Roosevelt. He organized and commanded the Rough Riders (1898), assisted by T.R. who became commander when Wood was given command of a cavalry brigade. Wood became military governor of Santiago before his appointment as military governor of Cuba from December 1899 to May 1902, having been promoted Brigadier General (1901) and Major General (1903). After Cuba he was sent to the Philippines as Governor of Mindanao, then given command of the U.S. Army in the Philippines (1906-1908). On return to Washington he was appointed Chief of Staff of the U.S. Army (1910-1914). He became a candidate for the Republican presidential nomination in 1916 and 1920, but lost out to Charles E. Hughes in 1916 and Warren G. Harding in 1920. Harding appointed him Governor General of the Philippines (1921-1927). *See* 1 HERMANN HAGEDORN, LEONARD WOOD 261-392 (1931); JACK MCCALLUM, LEONARD WOOD 147-96 (2005).

36. *See* MOLLY CALDWELL CROSBY, THE AMERICAN PLAGUE: THE UNTOLD STORY OF YELLOW FEVER, THE EPIDEMIC THAT SHAPED OUR HISTORY 31-33; 93-106; 122-49; 161-92, 203-07 (2006). A Cuban doctor, Carlos Finlay had identified the mosquito as the source in 1881, but he was ignored until the Sanitary Commission with Major Walter Reed (M.D. Virginia 1869) demonstrated mosquito transmission of the disease. Major William Gorgas supervised the elimination of the disease in Havana and later at the Panama Canal.

37. *See* 1 HAGEDORN, *supra* note 35, at 328-33; 338-65. Wood personally favored U.S. annexation of Cuba.

(3) the United States will maintain Cuban independence and may intervene at any time to preserve life and property, and (4) Cuba will sell or lease territories for coaling stations for the U.S. Navy.³⁸ Secretary of War, Elihu Root³⁹ was undoubtedly involved

38. See THOMAS, CUBA, *supra* note 1, at 448-52; see also GOTT, *supra* note 1, at 108-12; DAVID F. HEALY, THE UNITED STATES IN CUBA 1898-1902, at 116-78 (1963). Orville H. Platt (1827-1905) from Washington, Conn., lawyer, Senator 1879-1905, where he served as a Member of the Foreign Relations Committee. Senators were divided on the wisdom of the protectorate over Cuba but finally regarded it as inevitable.

The U.S. version of the Platt Amendment says:

The President of the United States is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

1. That the government of Cuba shall never enter into treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

(A) That said government shall not assume or contract any public debt, to pay the interest upon which, and to make any reasonable sinking fund provision for the ultimate discharge of which the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.

(B) That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed by the government of Cuba.

(C) That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

(D) That the government of Cuba will execute, and, as far as necessary, extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

(E) That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustments by treaty.

(F) That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its defense, the government of Cuba will sell or lease to the United States lands

in drafting Platt's Amendment, which was unopposed by the McKinley Administration.

The February Cuban Constitution was amended on June 12, 1901 to incorporate the Platt Amendment into the Constitution.⁴⁰ To guarantee the undisturbed future of the Platt Amendment, it was also incorporated into the Treaty of May 22, 1903 between the United States and Cuba.⁴¹ This treaty was negotiated and signed in the year when President Theodore Roosevelt would often boast, "I took the isthmus."⁴² The 1903 treaty with the newly independent Panama granted to the United States "full sovereignty" over a ten-mile-wide zone in the middle of Panama in which the new canal would be built.⁴³

To these treaties must be added the U.S. protectorate over the Dominican Republic, initially contained in the 1905 treaty

necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

An Act Making Appropriation for the Support of the Army for the Fiscal Year Ending June 13, 1902, ch. 803, pts. I-VII, 31 Stat. 895, 897-98 (1901).

39. Elihu Root (1845-1937) from Clinton, N.Y., A.B. Hamilton College (1864), LL.B. New York University (1867). After private practice in New York City he was appointed U.S. Attorney for the Southern District of New York (1883-1885). He served in the New York State Constitutional Convention (1894) and became an expert in efficient reorganization of government. He was appointed Secretary of War by President McKinley in 1899, after the inefficient administration of the dismissed Secretary Alger. He continued under President Roosevelt, who appointed him Secretary of State in 1905. He was elected Senator from New York in 1909 and served until 1915 when he returned to private practice. After the First World War, Root was a drafter of the Statute of the Permanent Court of International Justice and served as U.S. Representative to the Conference on Naval Armaments Limitation. He was awarded the Nobel Peace Prize in 1912. *See generally* PHILIP C. JESSUP, ELIHU ROOT (1938).

40. The Constituent Assembly approved the addition by a vote of fifteen to fourteen after considerable debate. The winning argument asserted that the change was necessary in order to make General Wood and the U.S. Army leave. *See* GOTT, *supra* note 1, at 110-12; THOMAS, CUBA, *supra* note 1, at 453-57.

The U.S. Navy initially sought to buy four port areas as coaling stations; two leases were agreed to, Guantanamo on the south shore and Bahia Honda on the north shore. By 1912, no further efforts were made to acquire Bahia Honda.

41. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418, 6 Bevans 113.

42. "I took the isthmus." Theodore Roosevelt, Speech at University of California, Berkeley, March 23, 1911; *see also* HENRY F. PRINGLE, THEODORE ROOSEVELT: A BIOGRAPHY (1931); EDMUND MORRIS, THEODORE REX (2001).

43. Convention between the United States and the Republic of Panama for the construction of a ship canal to connect the waters of the Atlantic and Pacific Oceans ("Hay-Bunau-Varilla Treaty"), U.S.-Pan., Nov. 18, 1903, 33 Stat. 2234; *see* DAVID MCCULLOUGH, THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL 1878-1914, at 353-94 (1979).

between the United States and the Dominican Republic that was rejected by the U.S. Senate but carried out by President Roosevelt as an executive agreement.⁴⁴ These situations, and the threats of Germany and Great Britain to blockade Venezuela because of failure to pay debts, produced the Roosevelt Corollary to the Monroe Doctrine, proclaimed in the President's message to Congress of December 6, 1904. Theodore Roosevelt stated that the United States would "reluctantly" intervene as an international police force in nations of the Western hemisphere where "[c]hronic wrong doing, or [a governmental] impotence [resulted] in a general loosening of the ties of civilized society."⁴⁵

The Platt Amendment authorizing such intervention remained at the heart of United States-Cuba relations for thirty-three years until the first administration of Franklin Delano Roosevelt when the Amendment was abrogated under the "good neighbor" policy by the new treaty of May 29, 1934,⁴⁶ which also contained a provision for the continuation of a lease by Cuba to the United States of the naval station at Guantanamo for a yearly rental, the lease to continue until both sides agree to its termination.⁴⁷ During the Platt Amendment the United States intervened militarily in Cuban affairs in 1906, 1912, 1917, and 1921, but the economic intervention was not sporadic but permanent.

The troubled sugar-based economy and the political chaos of the twenties did not stop U.S. investment in the island. The British historian, Richard Gott, has summarized this period:

Cuba had become a significant producer of immense wealth,

44. 4 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776-1976, at 19-22 (C. Wiktor ed., 1979).

45. President Theodore Roosevelt, Fourth Annual Message to Congress, Dec. 6, 1904, in 15 COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 6894, 6923; see DEXTER PERKINS, THE MONROE DOCTRINE, 1823-1826, at 322 (1927); DEXTER PERKINS, THE UNITED STATES AND THE CARIBBEAN 122-34 (1947).

46. Treaty of Relations, U.S.-Cuba, May 29, 1934, T.S. 866, 48 Stat. 1682; see THOMAS, CUBA, *supra* note 1, at 693-96; see also U.S. Dep't of State Website, Good Neighbor Policy, 1933, <http://www.state.gov/r/pa/ho/time/id/17341.htm> (last visited May 11, 2007). The negotiators were Secretary of State Cordell Hull and former Ambassador Sumner Welles for the United States and President Carlos Mendieta for Cuba.

47. See Lease to the United States of Certain Areas of Land in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 16-23, 1903, T.S. No. 418, 6 Bevans 1113 [hereinafter 1903 Lease Agreement]; see also Treaty Between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, May 29, 1934, T.S. No. 866 [hereinafter 1934 Lease Agreement].

in whose activities American companies and individuals were deeply involved. Bankers and traders, mill and plantation owners, railroad operators and simple investors, all looked to the United States to protect their interests. Cuba had become a colony in all but name.⁴⁸

In addition to business investment, the Cuban tourist industry took off during U.S. prohibition as thirsty Americans took advantage of luxurious cruise ships to travel to elegant hotels in Cuba where alcohol was abundant and the entertainment lavish.⁴⁹

C. *Failures of Democracy*

The next thirty-three years reveal a dismal story of the inability to create the trust and confidence necessary for the survival of popular government. Massive corruption, tolerated by U.S. business and government, undermined Cuban democracy from the beginning. The result was dictatorship. It is a powerful lesson of the United States' failure to export democracy.

The U.S. Army and General Leonard Wood sailed out of Havana on May 20, 1902, after Tomas Estrada Palma⁵⁰ was inaugurated as the first president of Cuba. The sixty-seven year old Estrada Palma was a hero of the first Cuban Revolution (1868-1878), in which he was appointed the provisional president of the Cuban Republic; but he was captured and jailed in 1877, expelled to Honduras in 1878, then to the United States. In the second Cuban Revolution (1895-1897), he served as Minister Plenipotentiary to the United States for the Provisional Republic of Cuba, inspired by the martyr, José Martí.⁵¹

48. See GOTT, *supra* note 1, at 129.

49. See THOMAS, CUBA, *supra* note 1, at 1062-64; ROSALIE SCHWARTZ, PLEASURE ISLAND: TOURISM AND TEMPTATION IN CUBA 30-73, 103-63 (1977).

50. Tomas Estrada Palma (1835-1908) successfully combated graft and inefficiency while greatly improving education but was unable to abolish the military and control its incompetence and corruption. Although accused of subservience to the United States, he obtained a very favorable tariff treaty with the U.S. and reduced U.S. demands for coaling stations to two. Electoral purity was not in his vision; 150,000 spurious voters were added to the voting lists by his cohorts. See Ana M. Otero, *Cluster VIII: Cluster and Postcolonial Critiques in Latcrit Theory: To the People Sitting in Darkness: A Resolve for Unity and Integration*, 54 RUTGERS L. REV. 1133, 1145-47 (2002); see also GOTT, *supra* note 1, at 113-14; THOMAS, CUBA, *supra* note 1, at 474.

51. José Martí (1853-1895) was jailed as a schoolboy for revolutionary writings; then he was deported to Spain where he graduated in law and philosophy. He returned to Cuba in 1877 but was deported again in 1879; he went to New York where he worked

Estrada Palma's election had not been seriously opposed in 1901, but his conservative policies following the lead of Leonard Wood, produced opposition and obstruction by the Liberals under Jose Miguel Gomez.⁵² In the election of 1906, Estrada Palma appeared to defeat Gomez, but the Liberals alleged fraud and attempted an unsuccessful revolt. The turmoil of this February upheaval led Estrada Palma to appeal to President Theodore Roosevelt to intervene and restore order.⁵³ Roosevelt sent his Secretary of War and problem-solver, William Howard Taft,⁵⁴ to Havana. Taft had already served as governor of the Philippines, but Taft's mediation did not succeed, and Estrada Palma was unable to govern with a hostile congress of his enemies, so he and his vice president resigned their offices on September 25, 1906.⁵⁵ Deadlock in Cuba's congress continued causing Taft, who was also Theodore Roosevelt's choice as his successor for the 1908 U.S. election, to establish a provisional government aided by a new 5,000 man army of occupation;⁵⁶ he returned to Washington, D.C. after fewer than four weeks.

as a journalist, translator and poet, then as consul for Argentina, Paraguay and Uruguay. He organized the Cuban Revolutionary Party in 1892; joined the revolution in Cuba on April 2, 1895, was killed in action May 19, 1895. See THOMAS, CUBA, *supra* note 1, at 295-316 (recounting Marti's life).

52. José Miguel Gomez (1858-1921) a veteran of the 1895 revolution, former civil governor of Santa Clara. He was a popular chief surrounded by thieves, who could not be controlled. Gomez's political party was called the Republicans, then the Liberals, a centrist group; while Estrada Palma's conservative party was called Moderates. See THOMAS, CUBA, *supra* note 1, at 473-75, 507-24.

53. THOMAS, CUBA, *supra* note 1, at 479; GOTT, *supra* note 1, at 115-18. A.R. MILLET, *THE POLITICS OF INTERVENTION IN CUBA: MILITARY OCCUPATION 1906-1909* 44-168 (1968).

54. William Howard Taft (1857-1930), born in Cincinnati, A.B.: Yale 1878, LL.B. Cincinnati 1880; Assistant County Prosecutor 1881; Judge of superior Court 1887; United States Solicitor General 1890-92; Judge, U.S. Court of Appeals for Sixth Circuit 1892-1900; Dean of the University of Cincinnati Law School 1892-1900; Philippine Commission 1900; Civil Governor of the Philippines 1901-03; Secretary of War 1904-08; President of the United States 1909-1913; Professor of Law, Yale 1913-1921 and Chief Justice of the United States 1921-30. See generally HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1939).

55. *Id.* at 305-10. Taft was accompanied by Acting Secretary of State Robert Bacon, arriving in Havana on Sept. 19, 1906. Taft's most recent experience as governor of the Philippines was no help in Cuba, as he was unable to obtain agreement of the contending parties. See also Ralph Eldin Minger, *William H. Taft and the United States Intervention in Cuba in 1906*, 41 *HISP. AMER. L. REV.* 75, 81-82 (1961).

56. Initially there were 5,000 U.S. Army in the interior. See THOMAS, CUBA, *supra* note 1, at 490.

Charles E. Magoon,⁵⁷ a lawyer from Nebraska, who had just served as governor of the Panama Canal Zone was appointed provisional governor of Cuba on October 13, 1906, serving until new elections under a reformed election law were held. The liberal candidate of 1906, José Miguel Gomez was elected president on November 18, 1908.⁵⁸ U.S. military forces and Governor Magoon left Havana on February 1, 1909. The Guantanamo coaling station expanded into a repair facility and naval base.

In 1912, marines from Guantanamo were used to keep order in Santiago during a strike by sugar plantation laborers, an initial effort of black Cubans to exert political power, but violently suppressed by the Cuban army.⁵⁹ After the unopposed election of Estrada Palma in 1901, there was never an election without some form of tampering by officials. It became a fatal disease, as unrepresentative governments regularly ignored the needs of the people. Gomez completed his term, but his Liberal party fractured and the Conservative candidate, Mario Garcia Menocal,⁶⁰ was elected president in 1912. In the disputed 1916 election, Menocal was reelected,⁶¹ but the Liberals, led by ex-president Gomez, again alleged fraud and attempted a revolt on February 10, 1917.⁶² The U.S. president, Woodrow Wilson,⁶³

57. Charles E. Magoon (1861-1920) was a wealthy lawyer. He worked in the Department of Justice in 1899 on legal issues of the new empire. Magoon's principal job was to reform the administration, eliminate corruption, reform the electoral system, and create a Cuban professional army. Governor Magoon was aided in the reorganization by Enoch Crowder, who returned as a virtual pro-consul in 1919. See DAVID A. LOCKMILLER, *MAGOON IN CUBA 1906-1907* 64-196 (1938).

58. THOMAS, *CUBA*, *supra* note 1, pp. 473-513.

59. GOTT, *supra* note 1, at 120-25.

60. Mario Garcia Menocal (1866-1941) trained as a civil engineer at Cornell University, and served in the revolution of 1895-1897. Advancing to General, he became Manager of the largest sugar producer. His two terms continued the notorious corruption of the Gomez days. On U.S. declaration of war in April 1917, Menocal caused the Cuban Congress to follow suit against Germany and Austria in order to confiscate their investments in Cuba. [The U.S. did the same.] He created the Central Bank of Cuba and stabilized the currency on a par with the U.S. dollar. See THOMAS, *CUBA*, *supra* note 1, at 467-68, 489, 525-43.

61. THOMAS, *CUBA*, *supra* note 1, at 526-27.

62. *Id.* at 528.

63. Woodrow Wilson (1856-1924) was born in Staunton, Virginia, son of a Presbyterian minister, A.B. Princeton 1879, LL.B. Univ. Of Virginia 1880, practiced law in Atlanta; Ph.D. 1885 John Hopkins Univ. Professor at Bryn Mawr, Wesleyan, and Princeton; President of Princeton 1902-1910, governor of New Jersey 1911-1912; chosen presidential candidate on the 46th ballot at the Democratic Convention, elected President of the United States in three-way race with W.H. Taft and T. Roosevelt in 1912;

threatened that the United States would never recognize a Cuban government established by military force, a type of threat he had carried out in 1913 after the murder of President Madero of Mexico, and U.S. marines from Guantanamo landed at Santiago as a deterrent.⁶⁴ Gomez and the liberal leaders were jailed, and Menocal took office for a second term on May 20, 1917,⁶⁵ thus ending the third U.S. interference.⁶⁶

Because of U.S. involvement in the First World War (April 1917—November 1918), the Cuban sugar industry prospered greatly.⁶⁷ The war also brought the prohibition of the sale and consumption of alcohol to the United States; accordingly, organized crime figures such as Al Capone, Meyer Lansky, Lucky Luciano, and Santo Trafficante arrived in Cuba and developed criminal activities there, beginning with the export of illegal liquor to the United States during prohibition and expanding into prostitution, gambling, and drugs. Legal investments continued to pour into Cuba from the United States, chiefly in infrastructure, (railroads, shipping, electric utilities), telephone and telegraph, mining, cattle, tobacco, and especially sugar, the major export.

Alfredo Zayas y Alfonso, vice-president under Gomez, assembled a coalition from both parties for the 1920 election, but José Gomez ran as candidate of the Liberal party. Zayas declared that he had been elected, but Gomez again claimed fraud and threatened another revolt (his third and last).⁶⁸ A fourth

reelected in 1916. He requested war on Germany and Austria; father of the League of Nations, he suffered a stroke on a speaking tour in favor of the League of Nations (September 25, 1919) and was incapacitated for the last eighteen months of his term. See ROBERT F. SMITH, *UNITED STATES AND CUBA: BUSINESS AND DIPLOMACY, 1917-1960* 18-41 (1960). See generally August Hecksher, Woodrow Wilson (1991).

64. THOMAS, *CUBA*, *supra* note 1, 528-34.

65. Under the war emergency, President Menocal governed by decree and exercised full powers over the nation without Congress. A general amnesty freed the liberal politicians in March 1918. *Id.* at 534.

66. *Id.* 529-35.

67. *Id.* 536-42.

68. Alfredo Zayas y Alfonso (1861-1934) lawyer and Liberal politician, he met with Gomez in the 1906 election and then served as vice-president. As president (1921-1925) he was under the tutelage of General Crowder, as Cuba suffered from a depression in its sugar industry. See, THOMAS, *CUBA*, *supra* note 2, at 473, 550-56.

General Gomez never hesitated to use force in the 1906, 1916, and 1920 elections. In 1917 he was imprisoned but amnestied in 1917. He died in New York in 1921 attempting to undo Zayas's presidency in an unsuccessful appeal to President Harding. See *id.* at 474, 527, 529-30, 547, 554.

U.S. intervention looked imminent, but General Enoch H. Crowder,⁶⁹ a Missouri lawyer who had graduated from West Point and served as Judge Advocate General of the Army after the First World War, was sent as pro-consul in 1921 to attempt a peaceful resolution without an army of occupation. General Crowder's "advice" was acceptable because of a simultaneous loan of US\$50 million from J.P. Morgan Co. Under General Crowder, a new presidential election was held on March 15, 1921, in which Zayas was again elected president.⁷⁰ General Crowder retired from the U.S. Army in 1923 and was immediately appointed U.S. Ambassador to Cuba, serving until 1927.⁷¹ The facade of Cuban independence remained, but the reality was economic and political dependence on the United States.

In the 1924 election the Conservative Mario Menocal sought reelection as president, opposed by the Liberal candidate, Gerardo Machado,⁷² a businessman. He was another veteran of the 1895 revolution. Machado was elected president, but the election of 1924 was the last attempt to govern Cuba by honest elections. After a constitutional convention, assembled in April, 1928, extended his term of office from May 20, 1929 until May 30, 1935, Machado assumed dictatorial powers.⁷³ Dictators and sham elections have followed in dismal succession until the present day, but no Cuban politician in the democratic era could disregard the commands of U.S. business or government.

69. Enoch H. Crowder (1859-1932) fought in the Indian Wars and had served under Governor Magoon to reform the judiciary (1906-1908). He also served in the Philippines. He was the principal drafter of the U.S. compulsory draft in the First World War, became Provost Marshall (1917) and Judge Advocate General of the U.S. Army (1919). See D. LOCKMILLER, ENOCH H. CROWDER 217-54 (1955).

70. Zayas's presidency occurred during a worldwide agricultural depression, beginning in 1921. See THOMAS, CUBA, *supra* note 1, at 544-55.

71. General Crowder, as adviser, lived on board a U.S. warship in Havana harbor (usually USS *Minnesota*). As ambassador, he operated out of the U.S. embassy with far less leverage than he had as adviser. See JORGE I. DOMINGUEZ, CUBA: ORDER AND REVOLUTION 18 (1978); see also THOMAS, CUBA, *supra* note 1, at 548-56.

72. Gerardo Machado (1871-1939) a young butcher's apprentice, became a protégé of Gomez, ran a sugar mill and then the Cuban Electric Co., electricity supplier to Havana, of which he became vice-president. The company helped him buy the Liberal nomination in 1924. His administration spent lavishly on roads and the new Capitol Building (1928). GOTT, *supra* note 1, at 129-35; see also THOMAS, CUBA, *supra* note 1, at 569-602.

73. See THOMAS, CUBA, *supra* note 1, at 587. John Huston made a film of the overthrow of Machado, "We Were Strangers" (1949) with John Garfield, Jennifer Jones, and Gilbert Roland.

D. Cuban Dictatorships

1. The Fascist Model: Machado and Batista

In the age of dictatorship,⁷⁴ the United States did not use military force in Cuba⁷⁵ until the Bay of Pigs in 1961. Despite considerable misgivings, dictatorship was tolerated so long as U.S. investments and lives were protected; however, when the dictator Batista fled, to be succeeded by Fidel Castro,⁷⁶ toleration turned to outright hostility and the termination of any formal relations between the United States and Cuba.

Dictatorship began with Gerardo Machado's "reelection" in 1929 and his use of the army to control opposition, but his incompetence could not improve Cuba's depression economy and merely ignited conspiracies, especially among university students. Machado's Cuba had become a victim of the worldwide depression after 1929 and could not emerge from the resulting poverty by its own efforts. The first revolt against Machado, led by former president Menocal, was unsuccessful in 1930, but a "*golpe de estado*" led by Army officers on August 12, 1933, assisted by U.S. Ambassador Sumner Welles, and business leaders forced Machado to flee to the Bahamas.⁷⁷ Manuel de Cespedes y Quesada,⁷⁸ grandson of a martyred revolutionary, became provisional president for about three weeks before a second *golpe en-*

74. Dictatorships in most parts of the world were the curse of the twentieth century. A partial list would include Mussolini, Stalin, Hitler, Pilsudski, Vargas, Franco, Salazar, Trujillo, Peron, Somoza, Stroessner, Duvalier, Pinochet, Marcos, Mobutu, Bokasso, Idi Amin, Hussein, and Mugabe.

75. Fulgencio Batista (1901-1973), born on a sugar cane plantation, cut sugar cane in the day and attended a Quaker School in the evening. He enlisted in the army at age twenty, served as a typist and stenographer, and made wide and deep contacts with other enlisted men. Batista promoted himself to Colonel and named himself Chief of Staff, from which position of strength he controlled Cuba for twenty-five years. Batista's ancestry was widely debated. No definitive information is available. However, given the region of his birth, he probably had Spanish, African, and Indian ancestors. See ARGOTE-FREYRE, *supra* note 1, at 9-10; GOTT, *supra* note 1, at 142; see also, THOMAS, CUBA, *supra* note 1, at 635-40, 646-47.

76. THOMAS, CUBA, *supra* note 1, at 590-91. ARGOTE-FREYRE, *supra* note 1, at 1-5 (2006). See also JULES R. BENJAMIN, *THE UNITED STATES AND CUBA: HEGEMONY AND INDEPENDENT DEVELOPMENT 1880-1934* 128-49 (1977); IRWIN F. GELLMAN, *ROOSEVELT AND BATISTA: GOOD NEIGHBOR DIPLOMACY IN CUBA 1933-1945* 8-33 (1973).

77. THOMAS, CUBA, *supra* note 1, 615-25.

78. Carlos Manuel de Cespedes y Quesada (1871-1939) grandson of Carlos Manuel de Cespedes (1819-1874), hero of the first Cuban revolution (1868-1878), first provisional president. Born and educated in the United States, was chosen provisional president because of his heritage. He restored the 1901 Constitution before he was deposed

gineered by the young enlisted man, Sergeant Fulgencio Batista. Batista was quickly designated Colonel⁷⁹ and became Commander of the Army. There was no doubt that Batista was in charge after September 4, but he did not assume the presidency for the first seven years of his power, always dependent on control of the Army.⁸⁰ The presidency itself became comical as ten men succeeded one another in the office from 1933 to 1940: Gerardo Machado, Carlos Manuel de Cespedes, Carlos Hevia, Manuel Marquez Sterling, Ramon Grau San Martin, Carlos Mendieta, Jose Barnet, Miguel Mariano Gomez, Federico Laredo Bru, and Fulgencio Batista.

For the first four months of Batista's power, the provisional presidency was held by Ramon Grau San Martin,⁸¹ a self-described radical, who would frequently appear on the political scene over the next twenty-five years, but his first "presidency" was cut short by the failure of President Franklin D. Roosevelt to recognize his radical government, on the urging of the new U.S. Ambassador, Sumner Welles,⁸² later famous for the Good Neighbor

and fled to the Brazilian Embassy and to Brazil. See THOMAS, CUBA, *supra* note 1, at 621-31.

79. Sergeant Batista's forces were able to lay siege to 250 of the most senior officers in the Hotel Nacional in Havana where they had assembled to bargain with the old politicians who had now been bypassed. THOMAS, CUBA, *supra* note 1, at 640-55.

80. *Id.* at 651-706.

81. Ramon Grau San Martin (1887-1969), a medical doctor, professor, and dean of medicine, was selected by students and intellectuals of ABC, but supported by Batista until Ambassador Welles reported U.S. disapproval, after which he fled to Mexico on January 14, 1934. He returned to the presidency in 1940, serving four years marked by graft and corruption. See THOMAS, CUBA, *supra* note 1, at 638, 642-74.

82. Sumner Welles (1892-1961) from New York City, A.B. Harvard (1914), served with the State Department in Tokyo, Buenos Aires, the Dominican Republic, and Honduras before his appointment as Ambassador to Cuba in 1933. Under Secretary of State under Cordell Hull, 1933-1943 and U.S. Delegate to many international conferences. He was forced to resign by Secretary Hull on September 23, 1943. See GELLMAN, *supra* note 76, at 12-13, 221; THOMAS, CUBA, *supra* note 1, at 549 n.29, 606-07; see also Arthur P. Whitaker, *Review: The Memoirs of Cordell Hull*, 29 *HISP. AMER. HIST. REV.* 81, 85 (1949).

The Good Neighbor Policy was introduced by President Franklin D. Roosevelt in his Inaugural Address and was implemented by Secretary of State Hull at the Montevideo Conference of the Pan American Union, December 26, 1933, by which the United States opposed armed intervention in the internal affairs of Latin American nations. See President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933); see also ARGOTE-FREYRE, *supra* note 1, at 45.

The Good Neighbor Policy did not seek to undo the historical past of Manifest Destiny, the Mexican War of 1846-1848 nor the filibusters in Central America when William Walker was President of Nicaragua (1856-1860) nor the excision of Panama from Columbia. The concerns of the Good Neighbor Policy were 20th Century: U.S.

bor policy.

Grau San Martín, installed September 10, 1933, was removed on January 15, 1934, and initially replaced by Carlos Hevia⁸³ for a mere seventy-two hours, then replaced by the more conservative Carlos Mendieta,⁸⁴ recalled from exile in the United States and quickly recognized as provisional president. During the two years in which Mendieta fronted for the Batista regime, the relationship between the United States and Cuba was renegotiated in a treaty signed on May 29, 1934.⁸⁵ The 1903 treaty, which included the Platt Amendment, was abrogated except for the lease terms to the Naval Base at Guantanamo Bay. In addition, a trade agreement that benefited Cuba's economy was signed on August 23, 1934.⁸⁶

Popular discontent with the apparent failure of Cuba's government to improve living conditions led to riots in Havana during which Mendieta resigned on December 10, 1935.⁸⁷ Batista's involvement in the disorder is uncertain. Batista replaced Mendieta with Jose A. Barnet⁸⁸ for a few months until a sham election could be put together.

military interventions in the Dominican Republic, 1905-1907 and 1916-1930; Nicaragua, 1912-1934; Mexico, 1914 and 1916; and Haiti, 1915-1934.

83. Carlos Hevia (1900-1964), served in the U.S. Navy and graduated from the U.S. Naval Academy. He was Secretary of Agriculture under Grau and provisional president Jan. 15-17, 1934. He was Foreign Minister (1948-1950) and a candidate for president in 1952, but forced into exile to the United States. See THOMAS, CUBA, *supra* note 1, at 669, 676; see also ARGOTE-FREYRE, *supra* note 1, at 130-35, 175, 317 n.132.

84. Carlos Mendieta (1873-1960), participant in the 1895-1897 revolution, opposed Menocal and Machado, went into exile in New York, 1931. He became provisional president on January 18, 1934 but was forced to resign in December 1935. As there was no vice-president, he was replaced by the Secretary of State, José A. Barnet. Mendieta had abolished guarantees of civil rights in February, 1934 and dissolved labor unions in March, 1935 after a general strike was suppressed by the army. See GOTT, *supra* note 1, at 140-42; see also SMITH, *supra* note 63, at 156-57; THOMAS, CUBA, *supra* note 1, at 676-78, 701,

85. The yearly rental is US\$4,085 (the 1934 value of the \$2000 in gold of the 1903 lease). See Lease Agreement, *supra* note 47, art. II. The Cuban government has not cashed the rental checks since 1959.

86. THOMAS, CUBA, *supra* note 1, at 694-95.

87. The dissolved unions did not disappear and violent strikes began in March 1935 in many industries until the strikes were crushed by Batista's army. THOMAS, CUBA, *supra* note 1, at 98-99.

88. José A. Barnet (1864-1945), Secretary of State under Mendieta, provisional president for four months until Mariano Gomez was elected and inaugurated. See GELLMAN, *supra* note 76 at 138; see also THOMAS, CUBA, *supra* note 1, at 701-02.

A new president, Miguel Mariano Gomez,⁸⁹ the son of the former Liberal president who had fomented several revolts against conservative presidents, was elected in January 1936. After Mariano vetoed school legislation desired by Batista, he lasted a little more than ten months before Batista became determined to replace him. This time, the appearance of legality was used in that Mariano Gomez was impeached, tried before the Senate, and removed.⁹⁰ Batista's next choice was Vice President Federico Laredo Bru,⁹¹ who served four years until Batista had rewritten the Constitution under the influence of European fascism, especially Mussolini's 1934 Corporative State plan.⁹² During this regime, Batista's exercise of power included the fascist-type repression of opposition. Prison and murder replaced exile for political opponents.

The Constitutional Convention of February 1940⁹³ approved a new document based on models that greatly increased State power concentrated in the presidency, while incorporating the social decrees of the brief Presidency of Ramon Grau San Martin. A referendum, without opposition, replaced the 1901 Constitution⁹⁴ and Fulgencio Batista became the President in

89. Miguel Mariano Gomez (1889-1950), son of General José Miguel Gomez, Mayor of Havana 1934. He was elected President January 10, 1936, but impeached and removed December 24, 1936. His downfall came from an attempt to reduce the size of the army and civil service and keep the army out of the rural education scheme. The tax on sugar to support rural education was vetoed on December 21, 1936; the House voted impeachment on December 22 and the trial in the Senate was December 23. *See* GELLMAN, *supra* note 76, 138-58; *see also* THOMAS, CUBA, *supra* note 1, at 678, 702-04.

90. The House of Representatives voted for an impeachment trial before the Senate. Gomez was convicted by twenty-seven votes in favor, 12 opposed, December 24, 1936. Vice-president Laredo Bru was inaugurated at noon on December 24, 1936.

91. Federico Laredo Bru (1875-1946): Vice-president under Mariano Gomez, served as president until Batista took office in 1940. Batista was elected in a reasonably honest (for Cuba) election in which his opponent's votes were actually counted and reported as 40 percent of the total (Candidacy of Dr. Ramon Grau San Martin).

92. The Corporative State Plan, begun in 1926, put all parts of the economy under state control, including education, labor organizations, business cartels and social welfare. Members of Parliament were selected through these organizations. *See* IVONE KIRKPATRICK, MUSSOLINI: A STUDY IN POWER 246-48 (1964); NATHANIEL & SYLVIA WEYL, THE RECONQUEST OF MEXICO: THE YEARS OF LAZARO CARDENAS 198-314 (1939).

93. The 1940 Constitutional Convention began on February 9, 1940, consulting as model the Constitution of the Spanish Republic of 1931, a social democrat document with enormous detail about unemployment, pensions, accidents, minimum wage, holidays, forty-hour work week and eight-hour day. In an emergency, all political rights could be suspended for forty-five days. State "intervention" [nationalization] of businesses was allowed. *See* THOMAS, CUBA, at 716-23.

94. The Referendum of October 10, 1940 approved the new constitution, which

his own name on October 10, 1940 as the United States prepared for an Atlantic war with Germany. Despite popular election, no one could question the authority of Batista and his continued control of the 30,000 man army.

In the near approach of world war, the Batista dictatorship could be tolerated by the United States and its wartime allies in order to incorporate Cuba, its harbors, and airfields into the war against the German submarine menace.⁹⁵ Mammoth and end-

lasted until 1976. The Castro Constitution of 1975 copies from the Soviet Constitution of 1936, describing Cuba as a "socialist state of workers and peasants and all other manual and intellectual workers."

95. After the Second World War began in Europe on Sept. 1, 1939, the United States assembled the Latin American nations to demand that the belligerent powers not carry out hostile action in the Western Hemisphere south of Canada, a belligerent. See Panama Declaration of October 3, 1939, *reprinted in* 34 AM. J. INT'L L. SUPP. 1 (1940). The next year at the Inter-American Conference of the Pan American Union in July 1940, the nations unanimously agreed to the Act of Havana of July 30, 1940 and announced a plan to take control of any European colony subject to being taken over by a belligerent power—essentially the French colonies of Martinique, Guadeloupe, Guiana, and St. Martin and the Dutch colonies of Aruba, Bonaire, Curaçao, St. Maarten, and Suriname.

After the fall of France in June 1940, as Hitler prepared to invade Britain, the United States, and Great Britain made an executive agreement for the transfer of fifty First World War destroyers in exchange for leases of military air and naval bases in the Western Hemisphere in Bermuda, the Bahamas, Jamaica, Trinidad, Antigua, St. Lucia, British Guiana, and Newfoundland. See Agreement of Sept. 2, 1940, U.S.-U.K., 203 L.N.T.S. 201, 54 Stat. 2405 (1940).

During 1941, prior to the Japanese Attack on Pearl Harbor on December 7, 1941, the neutral countries of the Americas became involved in the war. Under the 1939 "Cash and Carry" policy, Britain was able to buy war material in the United States to be carried across the Atlantic in convoys under British-Canadian control, an effort to counter German submarine warfare that was only partly successful.

U.S. involvement, despite neutrality, increased with the Declaration of April 11, 1941, establishing a maritime security zone in mid-Atlantic as the sea frontier that would be patrolled by the U.S. military. This followed the new policy of "Lend-Lease," whereby the financially strapped British were able to "purchase" war materials in the United States under a new federal exception to neutrality. See An Act Further to Promote the Defense of the United States, Pub. L. No. 11, 55 Stat. 31 (1941).

After U.S. entry into the Second World War, a Conference of Foreign Ministers of the Pan American Union met at Rio de Janeiro (Jan. 15-29, 1942), recommending that all Latin American republics, at a minimum, break diplomatic relations with the Axis powers. All republics except Argentina and Chile did so and declared war on the Axis powers. After signing the Declaration of United Nations on January 1, 1942, Cuba had declared war on Japan on December 9, 1941 and on Germany and Italy on December 11, 1941. Several additional U.S. naval and air bases were established for the war period in Cuba.

During the Second World War, United States naval and air installations in several other Cuban areas were part of the anti-submarine campaign. Dirigibles (blimps) and seaplanes operated out of Guantanamo and U.S. naval air units patrolled the Caribbean

less corruption continued to affect all aspects of business and trade, but U.S. business was eager to invest in sugar and other developing industries, without too many questions being asked. Repression of outspoken critics continued unabated, but the incompetence and inefficiency at most government levels meant that discrete and private opposition could continue in privileged circles. Unknowing foreigners concluded that graft was reduced, but it was merely systemized by Batista who accumulated a great fortune.

Batista held the presidency in his own name during the war emergency, 1940-1944,⁹⁶ but he allowed the old radical, Ramón Grau San Martín,⁹⁷ to hold the presidential office as Cuba became involved in international affairs in the work of the Pan American Union⁹⁸ and the United Nations.⁹⁹ When Batista retired to Florida, however, he retained control of everything important, including U.S. investments. In 1948, during a period of heavy U.S. investment, when the Cuban peso and the U.S. dollar were on par, Carlos Prío Socarras¹⁰⁰ held the presidency until

from the Bahamas, Jamaica, St. Lucia, Antigua, and Trinidad. Just before the end of the Second World War the Inter-American Conference on Problems of War and Peace met in Mexico City from February 21 to March 8, 1945. (Only Argentina did not attend). The result was the *Act of Chapultepec* of March 3, 1945, by which the nations agreed that aggression by one American state on another American state would be deemed an attack on all and could be prevented by armed force; a further regional security agreement would remain in force until the end of the Second World War. (Regional security for the hemisphere was negotiated at Bogota, Colombia, in the new Organization of American States ("OAS") on April 30, 1948. Cuba was expelled from OAS in 1962.)

96. See THOMAS, CUBA, *supra* note 1, at 718-36.

97. Ramón Grau San Martín was not supposed to win the 1944 election, intended for Batista's Prime Minister, Carlos Saladrigas, but Batista did not use the army to support his candidate. Although Grau became President, Batista controlled Congress and the army from his Miami residence.

98. The Pan American Union came out of an international conference of the nations of Latin America at Washington, D.C. Oct. 1889 to April 1890, on call of President Grover Cleveland but continued during the presidency of Benjamin Harrison and Secretary of State James G. Blaine. While the substantive achievements were slight, machinery for an international organization with a long series of conferences emerged. The name was changed to Organization of American States in 1948.

99. Cuba signed the Declaration of United Nations of January 1, 1942, 55 Stat. 1600 (1942), and declared war on Japan on December 9, 1941, and on Germany and Italy on December 11, 1941, leading to the internment of 5000 enemy aliens and confiscation of enemy property. Cuba was an original member of the United Nations.

100. Carlos Prío Socarras (1903-1977) was one of the student revolutionaries in the Machado era. Served as Senator, then Minister of Labor under Grau San Martín. Prío did not achieve a majority, but a plurality over four candidates. He established the

1952 when Batista again decided to be leader in fact and engineered a *golpe de estado* on March 10, 1952 through his leadership of the military.¹⁰¹

In the last six of the twenty-five years of the Batista dictatorship, U.S. control of the economy became absolute.¹⁰² Batista and his cronies profited excessively as U.S. organized crime increased its investments and joined the parade of wealthy investors in Cuba, as left-wing opposition to Batista expanded at universities in the Americas to include middle-class elements.

2. Fidel Castro and the Communist Model

Fidel Castro¹⁰³ was a young law graduate of the University of

Central Bank in 1950. Before the 1952 election, Batista engineered a *golpe* on March 10, 1952. Prio was forced into exile in Mexico. The United States recognized the new regime seventeen days later. U.S. organized crime figures were part of the Batista dictatorship until the end on January 1, 1959.

101. Batista allowed the 1952 election to be held in November 1953.

The flavor of the Batista regime (*Batistero*) is portrayed in English in Graham Greene's novel *Our Man in Havana* (1958), which was made into a motion picture in 1960 by Carol Reed; also in Ernest Hemingway's posthumous *Islands in the Stream* (1970), which was made into a motion picture in 1977.

102. See ROBERT F. SMITH, *THE UNITED STATES AND CUBA: BUSINESS AND DIPLOMACY, 1917-1960*, at 165-86 (1960); see also U.S. DEP'T OF COMM., *INVESTMENT IN CUBA* (Gov't Printing Off. 1956).

Despite the grinding poverty of the back country, Cuba was one of the wealthier nations in Latin America, with per capita income second only to Venezuela (oil exporter). In the pre-revolutionary years it was estimated that sixty-five percent of Cuba's exports and seventy-five percent of Cuba's imports involved the United States. See JAIME SUCHLICKI, *CUBA FROM COLUMBUS TO CASTRO AND BEYOND* 119 (5th ed. 2002).

103. Fidel Castro Ruz was born in 1926. His father, Angel, came from Luo in Galicia, Spain in 1898, acquired a farm and worked for the United Fruit Company (*El pulpo*—the octopus). The farm grew sugar cane on roughly 10,000 acres owned or leased, located near Birán and the Bay of Nipe in Oriente Province. Fidel was one of five children of Angel's second marriage.

Fidel Castro's education before university was in Catholic schools: first, in Colegio de la Salle, then to Colegio Dolores, both in Santiago and then to the Jesuit Preparatory School, Belén, in Havana. In 1945 he became a law student at the University of Havana, but he was soon immersed in the revolutionary politics of the post-war era, skipping classes, and cramming for exams. He married in 1948 and graduated from the University in law in 1950. He began the practice of law with a Havana firm, but the *golpe* by Batista in March 1952 pushed him into anti-Batista revolutionary activities, culminating in the attack of July 26, 1953 on the Moncada Barracks in Santiago, for which he was prosecuted, convicted, and imprisoned. See generally HERBERT L. MATTHEWS, *CASTRO* (1969) (Matthews, a *New York Times* reporter, interviewed Castro in the mountains); ROBERT E. QUIRK, *FIDEL CASTRO* (1993); RAMON E. RUIZ, *CUBA: THE MAKING OF A REVOLUTION* (1968); TAD SZULC, *FIDEL: A CRITICAL PORTRAIT* (1986); see also ANDRES OPPENHEIMER, *CASTRO'S FINAL HOUR* (1992) (presenting the negative side of the Castro Administration).

Havana when Fulgencio Batista seized the presidency in 1952. Batista introduced a tighter form of dictatorship that took rigorous action to suppress dissent, while simultaneously encouraging monopoly capitalism. As Havana and the cities became too dangerous for opposition groups, almost always infiltrated by the secret police, the dissidents had to move out of their civilized orbit to the wild, lightly inhabited mountains of Oriente province.¹⁰⁴ There, the Castro brothers assembled a band of adventurers that made their move against the dictatorship in an attack on the Moncada Army Barracks in Santiago on July 26, 1953.¹⁰⁵ Although repressed with great violence, this event achieved the public notice needed by revolutionaries to grow the movement. Captured, tried, and imprisoned on the Isle of Pines, the Castros were released on May 15, 1955, after nineteen months, in an amnesty of political prisoners.

On July 7, 1955, Fidel Castro, fearing for his safety in Cuba, left for Mexico where he lived in exile for the next seventeen months. The Castro group managed to escape assassination and returned to Cuba on December 2, 1956. Acquiring the aura of inevitability, these revolutionaries became popular heroes and the corrupt dictatorship lost any type of popular support among factory workers and agricultural laborers. Whether the Castro brothers were then communists is questionable,¹⁰⁶ but, in any event, the Soviet Union of Nikita Khrushchev was far away and unable to commit substantial resources to the mountain men. The idea of removing a corrupt dictatorship in Cuba proved attractive in university circles, labor groups, and the few democra-

104. Oriente, the most easterly province in Castro's Cuba, has now been subdivided into four provinces: Granma, Santiago, Guantanamo and Holguin. In 1976 the six former provinces were subdivided into fourteen districts.

105. Castro's attack on the Batista army occurred on a Sunday morning, July 26, 1953 when Castro and 105 men charged the gate successfully but an alarm was given, and the rebels had to retreat. Nineteen soldiers were killed in the attack, as were three rebels; sixty-eight captured rebels were later tortured and killed. Castro was captured last and put on trial two months later. A gifted orator, he defended himself, but was convicted and sentenced to fifteen years in prison. However, Batista signed an amnesty eighteen months later, and Fidel Castro fled to Mexico for the next seventeen months. See THOMAS, CUBA, *supra* note 1, at 836-39.

106. The Soviet Comintern Communist Party, legalized in 1940 by Batista, strongly opposed the Castro mountain men. In 1959 Castro frequently and publicly denied any "communist" ties, but on December 1, 1961, Castro announced that Cuba and its revolution were "Marxist-Leninist" instead of "socialist."

cies of the hemisphere.¹⁰⁷ In the United States, opinion about Batista was divided. Batista played the anti-communist card in the McCarthy era and was attractive to the military, the Federal Bureau of Investigation ("FBI"), the Central Intelligence Agency ("CIA"), big business, and organized crime, but many exiles from the dictatorship and their supporters loudly and persistently decried the crimes of Batista and his colleagues.¹⁰⁸

By late November 1958, the Batista regime was crumbling as support diminished in the army, the civil service, the unions, the bankers, the church, and, lastly, among the wealthy. Members of the Batista regime began to plan their places of refuge and exile, as Castro's mountain men moved relentlessly toward the capital. Finally, on New Year's Day, 1959, Batista fled into exile.¹⁰⁹

Fidel Castro did not immediately enter Havana to claim the prize of governing Cuba. His mountain men under Che Guevara preceded him and began to settle scores with the Batista people who had not yet fled. Looting and mob violence were followed by mass trials and mass executions in the Sports Stadium.¹¹⁰ In the absence of government, Fidel Castro was proclaimed provisional premier of Cuba on February 16, 1959.¹¹¹

107. Democratically elected governments in Latin America were few and weak in 1959. In *Brazil*, the Vargas dictatorship gave way to the elected presidents: Kubitschek (1956-1961) and Goulart (1961-1964), but the army returned in 1964. Chile's democratic tradition continued only until Pinochet in 1973. Mexico's P.R.I. Party permitted a limited democracy under Lopez Mateos. Panama had a form of democracy, until a new strongman, Omar Torrijos Herrera, seized power in 1968.

The remaining nations were ruled by dictators or military juntas: Argentina; Bolivia; Colombia, recovering from a vicious civil war; Dominican Republic's Trujillo; Ecuador; Guatemala—Jacob Arbenz was removed in *golpe*; Haiti—Duvalier; Paraguay—Stroessner; Peru—the army twice removed the elected Haya de la Torre; Uruguay—a junta; and Venezuela—a junta. See generally HERRING, *supra* note 2.

108. See generally EARL E. T. SMITH, *THE FOURTH FLOOR: AN ACCOUNT OF THE CASTRO COMMUNIST REVOLUTION* (1962). Smith was U.S. Ambassador to Cuba from June 1957 to January 1959.

109. Batista and his family and close aides flew out of Havana at 3:00am on January 1, 1959 to the Dominican Republic. Asylum in the United States was not permitted, thus he retired to Spain.

110. Approximately 200-700 people were briefly "tried" by a court presided over by Che Guevara and executed at the Sports Stadium or the fortress. The sources do not agree on the number of killings.

111. Initially Manuel Yrrutia Lleo was provisional president, but he was ousted by Castro and replaced by a figurehead, Oswaldo Dorticos Torrado in July 1959, who served until Castro assumed the Presidency on December 3, 1976. See Phillip W. Bonsal, *Cuba, Castro and the United States*, 45 FOREIGN AFF. 260 (1967). Bonsal was the last U.S. Ambassador to Cuba, from January 1959 to January 1961.

The prime targets of his reforms were: (1) the sugar industry, with vast plantations and sugar refineries owned by U.S. investors; (2) the cattle industry; and (3) the tobacco plantations that were the source of the international cigar industry. These vital industries were nationalized without “prompt, adequate and effective” compensation—the formula devised by Secretary of State Cordell Hull in 1938 to deal with Mexican nationalization of the oil industry.¹¹² The promise of land reform was peasant ownership of land, but this did not happen. Instead, the reality was the Soviet collective farm. An actual achievement was the expulsion of U.S. organized crime figures in June, 1959.

The U.S. owners of these confiscated lands and industries vowed to pursue the produce of their confiscated properties anywhere in the world, following the precedents of the nationalization of the Iranian oil industry under Mohammed Mossadegh in 1951.¹¹³ Before Mossadegh was removed in a coup in which the CIA and British Intelligence Service were involved, every Iranian

112. Cordell Hull (1871-1955), from Tennessee, received a law degree from Cumberland University (1891), and served in Cuba in the Spanish-American War. He was a judge in the Tennessee state courts in 1903, and served as a Member of Congress from 1907-21, and as Senator from Tennessee from 1931-33, specializing in federal income and inheritance taxes. He was Secretary of State from 1933-1944, was awarded the Nobel Peace Prize in 1945. He negotiated tariff reduction agreements under the 1934 Trade Expansion Act.

113. The ancient ruling house of Persia was deposed by the father of the last shah in 1923; his son, Mohammed Reza Pahlavi, succeeded in 1941. In 1951, the elected Prime Minister Mohammed Mossadegh nationalized the oil industry, including the British-owned Anglo-Iranian Oil Company, whose employees were expelled. The Shah fled to Italy in 1953, but Britain's MI-5 and the U.S. CIA had combined efforts to support a *coup* in favor of the shah on August 20, 1953, and Mossadegh was jailed.

The early effort to pursue the confiscated goods in world markets was initially rejected in the United States under the Act of State doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), but Congress rejected the court's decision in the “Sabbatino Amendment” or the “Second Hickenlooper Amendment.”

No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination of the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state . . . through a confiscation or other taking after January 1, 1959 by an act of that state in violation of the principles of international law including the principles of compensation

Foreign Assistance Act of 1965, Pub. L. No. 89-171, 79 Stat. 653; *see* Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1951 I.C.J. 437 (Dec. 20); *accord* Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., 22 I.L.R. 19 (Italy, Civ. Ct. Rome 1954); Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), 20 I.L.R. 316 (Aden Sup. Ct. 1953). *See generally* MICHAEL GORDON, THE CUBAN NATIONALIZATION: THE DEMISE OF FOREIGN PRIVATE PROPERTY 69-108 (1976).

oil cargo unloaded in a Western State was pursued as stolen property. In Cuba, U.S. banks soon became involved as loans and mortgages with the nationalized industries could not be repaid, causing loans to be called and collateral to be sold.¹¹⁴ Thus, Cuba's efforts to reform its domestic industries soon had international implications. Fidel Castro entered world politics in September, 1960 when he gave a four and one-half hours-long speech to the U.N. General Assembly. During that New York visit, Castro held meetings at the Hotel Theresa in Harlem with Nikita Khrushchev of the USSR, Gamal Abdel Nasser of Egypt, and Jawarhalal Nehru of India. President Eisenhower would not meet him anywhere—Castro had a two and one-half hour-long meeting with Vice President Nixon at the U.S. capitol on April 19, 1959.

Searching for leverage against Cuba's uncompensated takings, the Eisenhower Administration determined to alter the special provisions for importation of Cuban sugar under the quota system,¹¹⁵ the Cuban quota being eliminated in favor of increases in the sugar quotas for Trujillo's Dominican Republic and for the Philippines.¹¹⁶ The response of the Castro Government was further confiscations and the offer of compensation for nationalized properties by agricultural bonds, the repayment of which required increased sales of Cuban sugar in the United States.¹¹⁷

Because of the failure of economic retaliation, the outgoing Eisenhower Administration broke diplomatic relations with Cuba on January 3, 1961.¹¹⁸ The incoming Kennedy Administration was also presented with a covert CIA plan, approved by Eisenhower, to overthrow Castro through an invasion by Cuban refugees trained in Guatemala and Nicaragua.¹¹⁹ The presuppositions of the plan were: (1) air cover by the U.S. naval and air forces, and (2) the participation by malcontent Cubans who

114. See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

115. See *Agricultural Adjustment Act Amendments*, Pub. L. No. 213, 48 Stat. 670 (1934).

116. In June 1960, quotas for Cuban sugar were eliminated.

117. See THOMAS, *CUBA*, *supra* note 1, at 1215-33.

118. Diplomatic relations ended on January 3, 1961 by order of President Eisenhower. The embargo on trade with Cuba is in the Cuban Assets Control Regulations, 31 C.F.R. 515.204 *et seq.*

119. See HAYNES B. JOHNSON, *THE BAY OF PIGS: THE LEADERS' STORY OF BRIGADE 2506*, at 103-202 (1964); PETER WYDEN, *BAY OF PIGS: THE UNTOLD STORY* (1979).

were expected to join the invasion forces in the overthrowing of Castro: neither occurred. The new U.S. Administration did not cancel the plan, which was put into execution on April 17, 1961 at the Bay of Pigs.¹²⁰ The invasion failed and no uprising occurred.

The collapse of the invasion and the inability to disavow the CIA plan humiliated the new president and put U.S.-Cuban relations into the middle of the Cold War. Fidel Castro announced that he was now, and had been, a Marxist-Leninist, and this declaration was soon accompanied by military negotiations with the Soviet Union,¹²¹ while the U.S. military's plans for an invasion of Cuba moved ahead. Threats of war over Soviet efforts to expel the United States, Britain, and France from Berlin eventually led to the construction of the Berlin Wall in mid-August 1961 that would imprison East Germans for the next twenty-eight years. Undoubtedly frustrated by Western resistance, Nikita Khrushchev then took the greatest risk of the cold war years.

Soviet assistance became essential for Cuba as the consequence of the United States' embargo on all U.S. trade with Cuba. But Soviet assistance went far beyond petroleum, machinery, tourists, and advisers; it developed into the creation of a Soviet missile base with nuclear weapons fitted on Intermediate Range Ballistic Missiles (1,000 mile radius).¹²² U.S. overflights by U-2 aircraft, above the range of existing anti-aircraft, confirmed the installation of forty-two missile sites with twenty-four

120. Of the 1400 invaders, 211 were killed and about 1178 were taken prisoner. Private groups raised US\$62 million to ransom the prisoners. One hundred and sixty Cuban soldiers were killed. For conflicting numbers, see GOTT, *supra* note 1, at 194; THOMAS, CUBA, *supra* note 1, at 1370-71.

121. CIA efforts to kill Fidel Castro in "Operation Mongoose" are alleged in Philip Agee's *Inside the Company: CIA Diary* (1975), supposedly involving expenditures of US\$100 million in cooperation with foreign governments and U.S. organized crime. Practice landings on Caribbean islands were a feature of U.S. training exercises in 1961-62 preparatory to an invasion planned for October 1962.

122. See HENRY M. PACHTER, *COLLISION COURSE: CUBAN MISSILE CRISIS AND COEXISTENCE 20-61* (1967); see also ROBERT F. KENNEDY, *THIRTEEN DAYS: CUBAN MISSILE CRISIS* (1969); accord ELIE ABEL, *THE MISSILES OF OCTOBER: THE STORY OF THE CUBAN MISSILE CRISIS* (1967); MICHAEL BESCHLOSS, *THE CRISIS YEARS: KENNEDY AND KHRUSHCHEV 1960-1963*, at 431-548 (1991); ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 794-841* (1967); WILLIAM TAUBMAN, *KHRUSHCHEV: THE MAN AND HIS ERA 529-77* (2003).

For a review of the crisis by the remaining participants, see CUBA BETWEEN THE SUPERPOWERS (J. Blight et al. eds., 1992), and ANATOLY DOBRYNIN, *IN CONFIDENCE: MOSCOW'S AMBASSADOR TO AMERICA'S SIX COLD WAR PRESIDENTS 66-93* (1995).

nuclear missiles by October 14, 1962, despite Soviet prevarication.¹²³ On October 22, 1962, President Kennedy announced the presence of Soviet missiles in Cuba and his response was the Quarantine of Cuba—in truth a blockade—but without using that inflammatory term.¹²⁴ The Quarantine¹²⁵ was designed to prevent further installations of missiles and compel the removal of those already present.

The next week resounded with world crisis, terrifying people in the United States and Europe, but the Soviet people were not informed of the crisis. Harsh words on both sides brought the superpowers very close to a nuclear war.¹²⁶ Soviet vessels turned back before arriving at the Quarantine boundary, a 500-mile radius from Cuba, thereby ending the immediate crisis. The long-term resolution involved U.S. removal of intermediate range missile bases in Turkey and a declaration not to invade Cuba, while the Soviets removed the nuclear missiles from Cuba;¹²⁷ Castro was furious about the missile agreement about which he was not informed by the Soviets. Turkish missile removal, however, was not part of the announced agreement. Thirteen years later as the United States was withdrawing from Vietnam, after dealing with the Nixon presidential crisis, hearings into CIA operations of an illegal nature around the world revealed a clearer picture of U.S. efforts to eliminate Fidel Cas-

123. Missiles are Missiles. The Soviets alleged that the missiles were not offensive, but defensive. In a White House meeting on October 18, 1962, Andrei Gromyko, accompanied by Ambassador Dobrynin, denied the presence of offensive missiles in Cuba.

124. The threat of nuclear war appeared in the President's words:

It shall be the policy of this nation to regard any nuclear missile launched from Cuba as an attack by the Soviet Union on the United States requiring full retaliatory response on the Soviet Union.

President John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 485 PUB. PAPERS 806, 808 (OCT. 22, 1962),

125. In customary international law, absent the U.N. Charter, a blockade was an act of war. See LASSA OPPENHEIM, INTERNATIONAL LAW: THE LAW OF WAR 767-99 (7th ed. 1952); see also *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635 (1863); accord Symposium on the Quarantine/Blockade, 57 AM. J. INT'L L. 515-613 (1963).

126. Estimates at the time were that the Soviets' nuclear capability was limited to forty-four intercontinental missiles ("ICBMs") while the United States had 156 ICBMs and could deliver them from a large fleet of nuclear submarines and 1300 Strategic Air Command ("SAC") bombers.

127. Kennedy feared that an exact exchange of missile for missile would only encourage further blackmail. See SCHLESINGER, JR., *supra* note 122. The removal of Soviet missiles was confirmed by low level flights over Soviet merchant ships with on-deck missile cargoes.

tro and destabilize the Cuban government in the period between the Bay of Pigs and the 1962 Missile Crisis.¹²⁸

Thirty years later, after the collapse of the Soviet Union, an anniversary conference in Havana revealed that 40,000 Soviet troops had been in Cuba, accompanying the missiles and six tactical nuclear weapons. Soviet military men and some Politburo members had opposed Khrushchev's reckless gamble in installing the scarce missiles in a country likely to be invaded. The Soviet military and Communist party leaders regarded the removal of the missiles as a national humiliation, requiring Khrushchev's deposition, accomplished on October 16, 1964.

U.S.-Cuban relations in the Caribbean became less turbulent during the end of the U.S. Vietnam war, although the total embargo continued; but financial aid from the Soviets and their allies preserved the Cuban economy.¹²⁹

Cubans emigrating to the United States, especially to southeastern Florida, grew to about one million people, a formidable political bloc.¹³⁰ Cuba's participation in the Cold War on the Soviet side, however, increased tensions after 1975 when Cubans served as Soviet surrogates in Angola, Guinea, and Ethiopia in the 1975-1990 period, and in Nicaragua in the 1980s.¹³¹ But the end of Soviet financial support forced Cuba to end its export of revolution. A 1980 incident involving political prisoners, allegedly being released from Cuban prisons through the port of

128. See generally REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES (June 1975), available at <http://history-matters.com/archive/church/rockcomm/contents.htm>.

129. As a member of the Soviet trade bloc COMECON, Cuba bartered its sugar for oil and manufactured goods until the collapse of COMECON in 1992.

130. Without accounting for Batista's followers, the Cuban urban middle class professionals and the wealthy fled Cuba in a torrent—probably one-quarter million by 1963 to Florida, abandoning properties that were then seized by the State. By 2005, it was estimated that one million Cubans resided in the United States, a political powerhouse in Florida because of estimates that 500,000 have now become U.S. citizens and voters. An international incident occurred in the aftermath of the rescue of five-year old Elian Gonzales from the Atlantic Ocean in December 1999 when his mother and other refugees had drowned in the foundering of their small boat. Miami Cubans demanded that he remain with relatives there while his father (and Fidel Castro) demanded he be returned to his family in Cuba. The United States Immigration and Naturalization Service ("INS") seized the child from the Miami Cubans and gave custody to the father for a return to Cuba. See *Gonzales v. Reno*, 212 F.3d 1338 (11th Cir.), cert. denied 120 S. Ct. 2737 (2000). Anti-Castro propaganda has been broadcast continuously by radio and television in Spanish from Radio Marti in Florida since March 1990.

131. See GEORGE GALLOWAY, FIDEL CASTRO HANDBOOK 306-28 (2006).

Mariel, destroyed any trust on the part of the Carter Administration.¹³²

The end of the Cold War in the period 1989-1991 should have produced an improvement in U.S.-Cuba relations as the Soviet Union collapsed and Soviet presence in Cuba terminated. It did not, and Cuban Socialism was in desperate condition. The flow of petroleum and the import of manufactured goods and food from Soviet allies ceased. Castro, always wary of a U.S. invasion, decreed wartime austerities, along with mobilization measures in this "Special Period in Peacetime," while Cuba's economy spiraled downward, stopping just short of collapse. However, capitalism rescued the situation in part after 1994 as the tourist industry was revived and brought essential financial aid.

Western Europeans were no longer involved in a cold war, so they sought to invest in the developing tourist industry in Cuba, which had decided to risk its socialism to benefit from tourism in order to fill the void left by the Soviets.¹³³ U.S. investors whose property had been confiscated in the early 1960's had preserved their claims, with the aid of the U.S. Foreign Claims

132. Briefly altering his policy against exiles in 1980, Castro "accepted" President Jimmy Carter's offer to allow Cuban political prisoners into the United States, departing Cuba by ship from the small port of Mariel, west of Havana. More than 120,000 Cubans left Cuba, but in fact there were few political prisoners. Instead, Castro emptied the jails of petty offenders and many of the criminally insane were released from mental institutions, plus many Havana homosexual men, deemed "anti-social elements." Cf. STRAWBERRY AND CHOCOLATE (Mirimax Films 1995).

On arrival, the *Marielitos* were reviewed by INS: Class I convicted criminals were detained for deportation, while Class II were released on parole pending asylum determinations. But then the new Reagan Administration changed the Carter policy and all the *Marielitos* were detained in federal prisons awaiting disposition by INS. The change of U.S. policy was upheld by the courts on the principle that "executive policy" can alter customary international law. See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986).

By statute, INS can deport people from the United States to nations that accept them; Cuba, however, refused to accept the return of *Marielitos*, thus they remained in detention. The Mariels allegedly cost the U.S. government \$530 million.

Finally, in 1987, Cuba accepted the return of 2500 Cuban convicted criminals or insane and 4000 convicted of crime after entry into the United States. Those remaining in custody are entitled to habeas corpus. See *Clark v. Martinez*, 543 U.S. 371 (2005).

133. Raul Castro (born 1931), brother of Fidel was given charge of an economic policy and program to encourage foreign investment in areas of the economy released from socialist controls, especially the tourist industry. This change followed devastating famines, shortages of all goods, and economic slowdown resulting from the end of COMECON trade. See generally Berta Esperanza Hernandez Trujol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15 (1994).

Settlement Commission¹³⁴ and the possibility that former U.S. properties would pass to European and Canadian investors led to a tightening of the U.S. trade restrictions of the embargo in 1992.¹³⁵

Political dissent and popular demonstrations in the summer of 1994 in Cuba brought about further repression and the Castro regime's decision to expel dissident elements. Courageous but foolhardy Cubans attempted to cross the ninety miles of ocean to the United States in small, unseaworthy boats and rafts resulting in great loss of life.¹³⁶ Miami Cubans of Brothers to the Rescue (*Hermanos al Rescate*) occasionally flew patrols over the ocean area to alert the U.S. Coast Guard to the presence of Cuban boat people in peril in international waters.¹³⁷

On February 24, 1996 the Cuban Air Force jets shot down two unarmed, propeller planes of Brothers to the Rescue. At this point, factual agreement ceases: the Cubans claim that the aircraft had invaded Cuban airspace to drop anti-Castro leaflets on Havana,¹³⁸ the Miami Brothers claim the attack took place over international waters.¹³⁹ Litigation followed in the United States against the Cuban government,¹⁴⁰ but in 1996 Congress used the occasion to enact a series of further restrictions on do-

134. The Foreign Claims Settlement Commission established under 22 U.S.C. § 1622 *et seq.*

135. The Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992).

136. Cuban boat people (*los balseros*) crowded the Straits of Florida in Fall 1994 as 75,000 Cubans had to be rescued at sea. See James M. Cooper, *Creative Problem Solving and the Castro Conundrum*, 28 CAL. W. INT'L L.J. 391, 399-400 (1998); Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crisis Revisited*, 9 GEO. IMMIGR. L.J. 479, 492-93 (1995); see also *infra* notes 191-192.

137. But these risky attempts to cross the Straits on rafts or flimsy boats had greatly diminished by the date of the fatal flights. See Cooper, *supra* note 136, at 399-400.

138. No provision of the 1944 Chicago Convention on Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295, 61 Stat. 1180, authorizes the use of deadly force to destroy a private, civil aircraft trespassing into national air space; such aircraft may be required to land. *Id.* arts. 9, 10.

139. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). A report by the International Civil Aviation Organization supported the international waters situs. The action was commenced under the "terrorist nation" 1996 amendment to the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1605(a)(7). Punitive damages are authorized against agents or instrumentalities of foreign sovereigns.

140. Recovery of damages by execution on Cuban State Telecommunications debts was disallowed in *Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.2d 1277 (11th Cir. 1999). Payment of US\$96,700,000 was made out of frozen Cuban assets in 2001.

ing business in or with Cuba.¹⁴¹ Opposition by U.S. allies to the legislation, resulted, but the restrictive laws were not repealed.¹⁴²

Several prominent people have spoken out against the embargo. In 1998, during an unprecedented papal visit to Cuba, Pope John Paul II indirectly denounced the U.S. embargo as “unjust and ethically unacceptable;”¹⁴³ four years later, former U.S. President Jimmy Carter during his visit to Cuba urged the lifting of the ban. The embargo is still in force.

Nonetheless, Fidel Castro and his Revolution have managed to survive, astonishing millions around the world, including probably the Cuban leader himself, who is well aware that many groups, known and unknown, have targeted him for assassination.¹⁴⁴ Last summer, on August 13, 2006, Castro celebrated his eightieth birthday, and four months later, on December 2, Cubans marked the fiftieth anniversary of the landing—or rather running aground in a mangrove swamp—of the *Granma*, an unseaworthy, overloaded vessel that had taken Fidel, his younger brother, Raúl, and Che Guevara and seventy-nine other guerrilla fighters on a 1,200-mile perilous voyage from Mexico to the southwest shore of Oriente province.¹⁴⁵ In just a little more than two years, the small band that had survived the landing, with the help of revolutionaries throughout Cuba, installed a government in Havana.¹⁴⁶

On August 1, 2006, Fidel Castro delegated his duties to his brother, Raúl. Seriously ill with diverticulitis, Castro underwent several surgeries that caused a number of complications,¹⁴⁷ including peritonitis. As a result, his health has been severely compromised, leading to speculation about how long he will survive, how the world will view his legacy, and what will happen in Cuba after his death.

The first issue is left to the medical professionals who know

141. Cuban Liberty and Democratic Solidarity (“LIBERTAD”) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, 22 U.S.C. §§ 6021-6091 (1996).

142. See W. Fletcher Fairy, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U.L. REV. 1289 (1996-1997); see also Andreas F. Lowenfeld, *Congress and Cuba; The Helms-Burton Act*, 90 AM. J. INT’L LAW 419 (1996).

143. GOTT, *supra* note 1, at 309.

144. See GALLOWAY, *supra* note 131, at 240-41.

145. See GOTT, *supra* note 1, at 154-56.

146. See THOMAS, CUBA, *supra* note 1, at 1030-34.

147. See Marc Lacey, *Castro “Serious;” Report Details Many Surgeries*, N.Y. TIMES, Jan. 16, 2007, at A4.

the facts of his case. With regard to Castro's legacy, his achievements are not inconsiderable and, in many ways, reflect the views of his hero, José Martí, about literacy, racism, Cuba's independence, as well as the country's relationship to the United States.

From the first days of his regime, Fidel Castro placed great emphasis on the literacy of the entire Cuban population. In 1960, forty percent of the population could not read or write; today almost all Cubans are literate.¹⁴⁸ They also have access to good health care, whether they live in urban or rural areas.

Castro, like Martí, abhorred racism and its resultant inequities and set out to eradicate it; racism in Cuba, while still problematic, has been greatly mitigated.¹⁴⁹ Fidel Castro was not only concerned with racial inequality at home, but also in other parts of the world. When Nelson Mandela visited Cuba in July, 1991, he credited Castro with advancing the cause of non-white South Africans in their struggle against apartheid, citing the symbolic importance of the 1988 victory against the South African Army by Cuban forces at Cuito Cuanavale in Angola.¹⁵⁰

Martí always visualized an independent Cuba, stating:

The hands of every nation must remain free for the untrammelled development of the country in accordance with its distinctive nature and with its individual elements.¹⁵¹

Castro has certainly achieved and maintained Cuba's political independence. Whether it will continue in the twenty-first century remains to be seen. Unfortunately, Castro also shares Martí's animosity toward the United States, which Martí articulated in his last letter, written to a friend:

It is my duty . . . to prevent, through the independence of Cuba, the U.S.A. from spreading over the West Indies and falling with added weight upon other lands of Our America. All I have done up to now and shall do hereafter is to that

148. See GOTT, *supra* note 1, at 188-89.

149. See JAIME SUCHLICKI, CUBA FROM COLUMBUS TO CASTRO AND BEYOND 224 (5th ed. 2002).

150. See GOTT, *supra* note 1, at 276-79. Fifty thousand Cuban troops were sent to Angola, where some of them fought against guerrillas and the South African Army at Cuito Cuanavale in the south. The victory led to the retreat of the South Africans from Angola and their subsequent withdrawal from Namibia. Chester Crocker, the United States Secretary of State for African affairs, led negotiations that resulted in Namibian independence and the departure of Cuban troops from Angola.

151. See THOMAS, CUBA, *supra* note 1, at 301.

end . . . I know the Monster¹⁵²

Fidel Castro, obsessed by the United States and always fearful of an invasion or annexation or U.S. expansion into Latin America, has echoed Martí's anti-American theme in his many speeches over the years. In May of 2001, in addressing students at the University of Tehran, he voiced his hostility to the United States once again, by telling them that "the imperialist King will fall."¹⁵³ The Ayatollah Ali Khamenei, Iran's principal religious leader, stated that their two countries could "overcome the United States."¹⁵⁴

No matter what the positive accomplishments of dictators have been, there is always a dark side to their legacies; Castro's legacy will be no exception. Almost immediately after he took power, human rights violations started with the execution of several hundred of the soldiers, policemen, and officials of the Batista government;¹⁵⁵ the violations have continued with the ongoing repression, imprisonment and sometimes elimination of political adversaries. Thousands of Cubans have fled, principally to the United States.¹⁵⁶ Those who remained have suffered great privations, particularly after the withdrawal of subsidies by the Soviet Union in the early 1990s.¹⁵⁷

One wonders what will occur after the passing of Fidel Castro. Will there be a period of chaos? A successor administration made up of a cadre of university graduates is already in place.¹⁵⁸ Raúl Castro is in charge of the military, so the transition may be a tranquil one. Of course, there are relatively new players on the scene in Cuba. President Hugo Chávez of Venezuela has an arrangement to supply much needed oil in exchange for Cuban assistance in the fields of education and medicine.¹⁵⁹ China has also made sizable investments in the Cuban economy,¹⁶⁰ and there is always the possibility of a Cuban-Iranian alliance. It is difficult to assess what the ramifications of these relationships

152. *Id.* at 310.

153. *See* GOTT, *supra* note 1, at 318.

154. *Id.*

155. *Id.* at 168; *see also supra* note 110.

156. *See* GOTT, *supra* note 1, at 298-300; *see also supra* note 130.

157. *See* GOTT, *supra* note 1, at 286-88.

158. *Id.* at 318.

159. *See* GALLOWAY, *supra* note 131, at 401.

160. *See* GOTT, *supra* note 1, at 297.

will be. But, Cubans have always aspired to freedom and democracy, an aspiration that should not be underestimated.

III. *THE U.S. NAVAL BASE AT GUANTANAMO*

On December 10, 1903, the Cuban government presented the forty-five square miles of the Naval Base to the United States under the terms of the lease in a ceremony onboard the U.S.S. *Kearsarge*, anchored in Guantanamo Bay.¹⁶¹ While the Base is on both sides of the entry to the Bay, Cuban vessels and those vessels trading with Cuba have a right to pass freely to the upper bay and the Cuban ports of Boqueron and Caimanera. To Fidel Castro, however, the Base is “a dagger plunged in the heart of Cuban soil.” Guantanamo thus resembles Gibraltar in Spain, East Timor in Indonesia, or Nagorno Karabakh in the Caucasus Mountains in being an unwelcome outpost.

Guantanamo started as a coaling station for U.S. Navy operations in the Caribbean; the first U.S. military installation *outside* the continental United States. In that era, navies depended on coal to fire the burners to produce the steam to propel their steel warships. Coal ships (colliers) did not accompany the fleets since they were regarded as dangerous and impractical; instead, land-based coaling stations around the world were considered essential, preferably controlled by the colonial power whose fleet would be serviced. After navies switched to petroleum for propulsion during the First World War, oil tankers (fleet oilers) accompanied the operating fleets, thereby rendering coaling stations obsolete;¹⁶² however, two new uses for Guantanamo had already been found.

The U.S. Atlantic Fleet operated out of naval bases at Portsmouth, Boston, New London, New York, Philadelphia, and Norfolk. All were affected by winter weather to the point where training of the peacetime Navy was often disrupted; thus, an all-weather instruction center for refresher training of vessel crews and “shakedown” cruises of new vessels was set up at the Guantanamo Base. The Fleet Maintenance Center (a repair facility) was

161. The metes and bounds were fixed from May 27 to July 8, 1903 by a Joint Commission at 11,661,983 hectares or 28,812,360 acres. The grant also includes adjacent waters. See 1 RADM. M.E. MURPHY, USN, *THE HISTORY OF GUANTANAMO BAY*, 1494-1952 ch. 3 (1953).

162. The last vessel coaled at Guantanamo was serviced in 1937. See Heinl, *supra* note 15.

established in 1903, and the Fleet Training Center was established in 1943. Added over the years were the following: one of the largest post exchanges in the navy system, two airfields, a naval hospital, a Communications Center, a Meteorological and Oceanographical Center, a Schools Command, library, chapel, cemetery, four cinemas, five swimming pools, a golf course, 400 miles of highways, a race track, English language radio and TV stations, and a major Fleet Industrial Supply Center. The lease excludes the possibility of private enterprise on the Base. All of this activity required civilian help, and the U.S. Base became the major employer in the region with 2,000 to 3,000 Cuban workers.¹⁶³ The Cuban cities of Guantanamo and Caimanera provided fleet entertainment not available on the Base.

A second reason for retaining the Base at Guantanamo was the protection of the Panama Canal. The Panamanian Revolution of November 1903 separated the independent republic of Panama from Colombia, and the Hay-Bunau-Varilla Treaty of November 18, 1903 granted to the United States the right to build the 50.7 miles long canal across the Isthmus of Panama connecting the Atlantic and Pacific Oceans. Congress finally authorized construction on June 25, 1906, after the conquest of yellow fever and the decision to build the canal with locks.¹⁶⁴ The canal was built by the Army Corps of Engineers, led by Colonel George W. Goethals, U.S.A.,¹⁶⁵ and was opened on August 15, 1914 to world traffic. The opening date, however, occurred just as the European nations began the First World War.¹⁶⁶ Pres-

163. *See id.* The permanent shore station personnel included only 300 officers and men until the Second World War. Occasionally Marines would be brought in to await transfer to Haiti or the Dominican Republic. Congress appropriated \$100,000 to build a naval station in 1903. A further US\$385,000 was appropriated in 1906 for the ship repair facility and drydock. *See* Gerald Neuman, *Anomalous Zones*, 48 *STAN. L. REV.* 1197, 1128-29 (1996).

164. *See* DAVID McCULLOUGH, *THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL, 1870-1914*, at 438-58, 481-89 (1977).

165. George W. Goethals (1858-1928) from Brooklyn, NY, graduated from West Point in 1880. He was appointed Chief Engineer to construct the Canal in 1907 and completed the job in 1914. Promoted to Major General USA in 1915. (He was appointed the Governor General of the Canal Zone in 1914 and Quartermaster General in the First World War. He retired in 1923.). *See, e.g.*, Panama Canal Authority, George Washington Goethals, <http://www.pancanal.com/eng/history/biographies/goethals.html> (last visited May 14, 2007).

166. The war in Europe began in earnest on August 1, 1914 after the assassination of the Austrian heir to the throne (June 28, 1914) and the mobilizations of armies and the demands on allies during July.

ident Wilson's Neutrality Policy,¹⁶⁷ proclaimed the same day as the canal opened, continued until the declaration of war against Germany on April 6, 1917.¹⁶⁸ Conscious of the danger of German occupation of Denmark and its West Indies colony, the United States purchased the Virgin Islands from Denmark for \$25 million by the Treaty of August 4, 1916.¹⁶⁹ Accordingly, when the United States became a participant in the First World War in April 1917, it had complete control of access from the Atlantic to the canal, extending from Guantanamo through Hispaniola (where U.S. Marines had occupied Haiti since July 1915, and the U.S. Army had occupied the Dominican Republic since November 1916);¹⁷⁰ Puerto Rico and the Virgin Islands were U.S. fortified possessions.

During the Second World War, the Base was expanded for anti-submarine activities and a further US\$34 million was spent by the United States on Guantanamo.¹⁷¹ U.S. supervision of the Caribbean because of the canal continued throughout the entire period when the United States was in control of the Panama Canal. Gradual Panamanian operation and control of the canal began with the Treaty of 1977,¹⁷² the United States ceding complete control to Panama on December 31, 1999.

A third rationale for Guantanamo surfaced, and that was the protection of American interests in Cuba, because of the instability and unpredictability of the Batista dictatorship (1933-1959), although the Platt Amendment no longer governed, there was always the possibility of chaos and bloodshed in a land where many Americans worked and traveled.

167. See generally EARNEST MAY, *WORLD WAR AND AMERICAN ISOLATION, 1914-1917* (1959).

168. Declaration of War between Germany and the United States, Apr. 6, 1917, 40 Stat. 1 (1917).

169. Convention for the Cessation of the Danish West Indies, Aug. 4, 1916, U.S. Den., 39 Stat. 1706. See generally CHARLES TANSILL, *THE PURCHASE OF THE DANISH WEST INDIES* (1932).

170. For information on the U.S. occupations of Haiti and the Dominican Republic, LUDWELL LEE MONTAGUE, *HAITI AND THE UNITED STATES, 1714-1938* (1940) and MELVIN KNIGHT, *AMERICANS IN SANTO DOMINGO* (1928).

171. See sources collected *supra* note 170. Coastal artillery, anti-aircraft, and anti-submarine protection was added during the Second World War. See MURPHY, *supra* note 161. The book has been updated to 1997 by Capt. John Pomfret, USMC.

172. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal ("Panama Treaty"), U.S.-Pan., Sept. 7, 1977, T.I.A.S. No. 10,029, 1161 U.N.T.S. 177 (signed 1977, ratified 1978).

The Castro uprising in Oriente province, 1956 to 1958, brought civil strife near the Base, as foreigners were frequently kidnapped. On June 27, 1958 Raul Castro's band took 29 US sailors and marines captive and held them as hostages for three weeks.¹⁷³ With the fall of Batista, and his flight into exile on January 1, 1959, the Base Commander restricted U.S. civilian and military personnel to the Base, and some Cuban workers brought their families inside the Base.¹⁷⁴ Evacuation of non-military U.S. personnel occurred during the Cuban Missile Crisis from October to December 1962.¹⁷⁵ Another result of the missile crisis was that both Cuba and the United States laid down minefields on both sides of the fence. The U.S. minefield was disarmed and dug up in 1999; the Cuban mines remain. During the existence of the U.S. minefield, 15 military personnel and five Cubans were killed by the mines. Cuba has also built military and naval installations near the Base. Unable to find new jobs for the Cuban workers at the Base, Castro ordered that no new Cuban workers could be employed, but those Cubans already employed were allowed to remain.

The Cold War at the Guantanamo Naval Base continued even though tensions between the U.S. and the Soviets had eased after the Cuban Missile crisis, with the "Hot-Line" of June 20, 1963¹⁷⁶ and the Nuclear Test Ban Treaty of August 5, 1963.¹⁷⁷ The assassination of President Kennedy on November 22, 1963 and the Politburo coup against Khrushchev in 1964 changed two of the principal actors in the superpower struggle, but Castro remained, and in 1964 it was Castro who made his move against the Base.

Guantanamo Naval Base is in an arid region and fresh water was a problem until 1939 when Cuba provided water from the Yateras River. In February 1964 Castro cut the water supply but

173. See generally U.S. Naval Station Guantanamo Website, History <http://www.nsgtomo.navy.mil> (last visited May 14, 2007).

174. *Id.*

175. *Id.*

176. Memorandum of Understanding between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link, U.S.-U.S.S.R., June 20, 1963, 14 U.S.T. 825, T.I.A.S. No. 5362, 472 U.N.T.S. 163.

177. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water ("Limited Test Ban Treaty"), Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

this proved to be an easy challenge for the Base to meet as a new desalination plant, capable of producing three million gallons of fresh water from sea water daily and new electric generators made the Base entirely self-sufficient.¹⁷⁸ During the seven months required to build the US\$10 million plant, water was brought by barge from Jamaica. Except for the Cuban families that moved onto the Base, Cuban employees were replaced by U.S. and Jamaican workers.¹⁷⁹

Strategic concepts of the U.S. military changed with the end of the Cold War in 1989-90, and the importance of Guantanamo readily declined until a new mission developed with the plight of thousands of refugee "boat people." This new mission was not executed in an appropriate manner because U.S. government officials abused the extraterritorial location to violate their own rules concerning refugees and asylum seekers that would have been applied in the continental United States.

The expression "boat people" entered the popular vocabulary after April 1975, the fall of Saigon, as thousands of South Vietnamese citizens who had worked for the United States or had some connection with the former government, fled the oppression and hardships introduced by the Communists. Because their departures were forbidden, they risked great perils from hostile seas and blood-thirsty pirates as they fled in their small and overcrowded boats. Over time the quality of the vessels and the nautical skills of their crews declined precipitously; unseaworthy sailing boats and even rafts were used to attempt to

178. See ALBINO KO ET AL., 40 YEARS OF SEAWATER DESALINATION AT GUANTANAMO BAY, CUBA 1 (2006), available at <http://www.energy-recovery.com/news/documents/40YearsofSWDesalatGuantanamoBay.pdf>. Provocative confrontations were the principal feature of the Guantanamo Naval Base during the time Capt. John D. Bulkeley, USN (1911-1996) (later Vice Admiral) was in command from November 1963 to July 1966. See Rachel L. Swarns, *Obituary, Vice Adm. John D. Bulkeley, 84, Hero of D-Day and Philippines*, N.Y. TIMES, Apr. 8, 1996. With 5,000 military and 10,000 civilians (military dependents and employees) the water supply was crucial. See KO, *supra*, at 103. In response to the arrest of Cuban fisherman off the Florida Keys, Castro closed off the source of the fresh water (the Yateras River), but fresh water was brought in by barge until the completion of a US\$10-million desalination plant for fresh water. The Johnson Administration responded by calling for the discharge of all Cuban employees who would not agree to live and spend all their income on the base. See Quirk, *supra* note 103, at 490-93.

179. Alan Sorkin developed an interesting play of military life at the Base from a 1986 incident in *A FEW GOOD MEN* (Castle Rock Entertainment 1990), which was made into a motion picture in 1992 starring Jack Nicholson, Tom Cruise, Demi Moore, Cuba Gooding, Jr., Kevin Bacon, and Kiefer Sutherland, and directed by Rob Reiner.

reach Thailand, Malaysia and the Philippines, where they were unwelcome, and, where they were unwilling to settle. Because of their political connection to the U.S. presence in Vietnam, the U.S. Government considered that there was an obligation to assist in the resettlement of Vietnamese boat people in the United States.

That exodus from Vietnam coincided with a humanitarian crisis in Cambodia where the Khmer Rouge regime of Pol Pot took power in April 1975, eventually killing 1,700,000 of their own people in the "Killing Fields." Many Cambodians fled into Thailand, Malaysia and Hong Kong seeking asylum. (The Khmer Rouge control of Cambodia ended in January 1979.) The United Nations High Commissioner for Refugees organized the emergency efforts to control the worst effects of famine and disease. In these two circumstances two U.S. programs, "Humanitarian Operation" and the "Orderly Departure Program" resulted in the resettlement of about 825,000 of these refugees in the United States from 1979 to 1994.¹⁸⁰ (France, Australia, Canada, Germany and the United Kingdom also accepted the "boat people" of Indochina.)

Half-a-world away in impoverished Haiti and Cuba, knowledge about asylum in the United States for the Vietnamese boat people created the impression that "economic refugees" fleeing poverty would be welcome, if they could only find a way to cross the seas to America. In Cuba the end of Soviet economic assistance had made civilized life very difficult for ordinary non-political Cubans who sought to escape Cuba's new poverty.

The problem for the effective administration of immigration policy was the presence of economic refugees among political refugees with a "well-founded fear of persecution." Congress revised these laws in 1980 to tighten the asylum provisions in the Refugee Act.¹⁸¹ The greatest number of cases concerned Haitians in the nine months from November 1991 to July 1992. That time period began after the Haitian military coup d'état against the elected president, Jean Bertrand Aristide, when armed thugs of the former Duvalier dictatorship terrorized the

180. Humanitarian Operation Program ("HO") 1989-1994 and Orderly Departure Program ("ODP") resulted from the Agreement on the Special Release Reeducation Center Detainee Resettlement Program, Aug. 28, 1989 U.S.-Viet., 29 I.L.M. 215 (1990).

181. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified 8 U.S.C. § 1151 (2006)).

population by looting and random killings. A great number of small, unseaworthy boats and rafts, all overloaded with people and baggage, began the almost 800-mile voyage to Florida. Very soon most of these vessels were in peril of foundering, and U.S. Navy and Coast Guard vessels responded to their cries for help; however, President Reagan had ordered that the interdicted boat people *not* go to Florida but to the Guantanamo Base for immediate assistance.¹⁸² On May 24, 1992 President George H.W. Bush issued an Executive Order effective beyond the territorial waters of the United States that the interdicted Haitians were to be returned directly to Haiti, without any U.S. Immigration and Naturalization Service (“INS”) refugee screening.¹⁸³ (This procedure was challenged, unsuccessfully, in the Supreme Court).¹⁸⁴

The 36,000 Haitians were divided into two main groups: those “screened out” for immediate return to Haiti (approximately 25,000) and those “screened in” for resettlement outside Haiti because they met the standard of a “credible fear of return” (approximately 10,500).¹⁸⁵ It was the second group that created the problem as the INS took no action to move the

182. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

183. Exec. Order No. 12,807, 57 Fed. Reg. 23133 (May 24, 1992). *See generally* Capt. Gary W. Palmer, USCG, *Guarding The Coast: Alien Migrant Interdiction Operations at Sea*, 29 CONN. L. REV. 1565 (1997).

184. *See generally* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993). The issue before the Supreme Court was the decision to return the boat people to Haiti from ship or from Guantanamo without providing an opportunity to seek asylum in the United States. In the view of the Haitian supporters, the boat people were refugees covered by the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, which imposes the duty of *non-refoulement* on signatories—i.e.: that no Party State shall return a refugee . . . to a State where his life or freedom would be threatened, *see id.* art. 33, a treaty obligation to which a U.S. statute conforms. *See* 8 U.S.C. § 1252-53. The eight to one decision written by Justice Stevens interprets the convention’s plain language to forbid the return of the refugee *from* the territory of the contracting state and states that the treaty is silent concerning the application of the duty *outside* its borders; there is an exception to the obligation for people who are dangers to the security “of the country *in which he is*.” Thus, the boat people have no rights under the treaty because they were never *in* U.S. territory. Justice Blackman’s dissent implied a more general humanitarian obligation never to return refugees to their persecutors, because the treaty does not define the geographical area from which the return is made, but it does clearly specify the place *to* which the refugee may not be sent.

185. *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1040-41 (E.D.N.Y. 1993). The decision was vacated on February 22, 1994 after approval of the class action settlement agreement.

“screened in” Haitians but detained them in Camp Bulkeley at Guantanamo, while seeking to resettle some of them in other Caribbean locations. The responses of the governments of Belize and Honduras were positive for persons free of the HIV virus.¹⁸⁶ (Alien persons with certain communicable diseases are excludable from admission to the United States). Accordingly, all the “screened in” people were subject to testing for the HIV virus, a predictor of the incurable and deadly AIDS.

Those testing positive for HIV were segregated and confined in a special camp. The immediate result was the indefinite incarceration of 267 people who had tested positive for HIV. While this action created a political storm in the United States, the continued detention of more than 8,000 people in tents and decrepit buildings at Guantanamo produced riots and a hunger strike. The hunger strike was taken up on college campuses in the United States. It was in this context that the status of the Haitian detainees at Guantanamo was reviewed by Judge Sterling Johnson of the United States Court for the Eastern District of New York.¹⁸⁷

Judge Johnson first allowed class action for “all Haitian citizens who have been or will be . . . ‘screened in’ . . . who are now, will be or have been detained on Guantanamo Bay Naval Base. . . .”¹⁸⁸ The “well-founded fear of persecution” hearings without lawyers for the detainees violated existing statutes and were permanently enjoined.¹⁸⁹ Furthermore, the Court found that the conditions in the camps for indefinite and arbitrary detention, inadequate medical care and disciplinary punishments violated the Due Process of Law requirement of the Constitution, thus, “screened-in” plaintiffs must be immediately released (to anywhere but Haiti).¹⁹⁰ The U.S. Government did not appeal this decision.

Judge Johnson had no difficulty with his court’s jurisdiction in consequence of the position of Guantanamo in American law, noting the First Amendment says that: “Congress shall make no

186. *Id.* at 1035.

187. See BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* 136-40 (2005); see also Harold Hongju Koh, *America’s Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 141-64 (1994).

188. *Haitian Ctrs. Council*, 823 F. Supp. at 1049.

189. *Id.* at 1050.

190. *Id.*

law. . . abridging the freedom of speech” U.S. Const. Amend. 1 applies on Guantanamo Bay Naval Base which is under the complete control and jurisdiction of the United States government, and where the government exercises complete control over all means of communication.”

After the decision not to appeal, the “screened-in” refugees were admitted into the United States, and the HIV detention center was closed.

Further turmoil in Haiti and Cuba in the 1994-1995 period brought at least 45,000 Cuban refugees to Guantanamo and more Haitian refugees. This time the Haitians were returned directly to Haiti, but the provisions for automatic asylum for Cubans in the United States had been replaced by an agreed quota system.¹⁹¹ The drama of boat people ended after a small number of illegal Chinese were sheltered at Guantanamo in 1997.

The large military commands began to abandon Guantanamo in 1995 as the southern states of the United States demanded the transfer of naval activities there. The Fleet Training Center relocated to Florida, and the Maintenance Facility was disestablished,¹⁹² but Guantanamo would not be allowed to fade away. After the attacks on New York and Washington on September 11, 2001, the United States’ war on terrorism produced new uses for the Base. The Southern Command Joint Task Force was established for anti-terrorism activities and when the United Nations’ war on the Afghan Taliban began to produce captives, the Base was designated as a detention center beginning in January 2002.¹⁹³ In 2006 Al-Qaeda captives were trans-

191. Cuban immigration was governed by the 1966 Cuban Adjustment Act for Cubans Seeking Asylum in the United States. There is now an annual quota of 20,000. See Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the U.S. Policy of Temporary Protection in Off-Shore Safe Havens*, 15 GEO. IMMIGR. L.J. 319, 327 (2001).

192. See U.S. Naval Station Guantanamo Website, *supra* note 173.

193. Guantanamo’s uses as a detention center or prison, designed to produce intelligence for the war on terror rather than to serve punitive or correctional purposes, began in January 2002 when a temporary external stockade, Camp X-Ray, was hastily thrown together to receive prisoners from the Afghanistan War. A more elaborate facility, Camp Delta, was quickly constructed for interrogation as the number of prisoners multiplied; another facility, Camp Echo, would be constructed for client interviews after they were authorized. Prison construction has continued with Camp Five, a super-maximum security prison for the most incorrigible and uncooperative and Camp Six, a barracks with communal conditions for minimal risk prisoners. A temporary facility for juveniles was also provided. See John C. K. Daly & Martin Sieff, *UPI Intelligence Watch*,

ferred to an enlarged facility. “Detention center” does not accurately describe its function after 2002 as a permanent warehouse for men expected to be sources of intelligence over an indefinite period. Determination of the status of these prisoners will be discussed in Sections V and VI.

IV. *THE GUANTANAMO LEASE IN INTERNATIONAL LAW*

Treaty law is one of the areas of customary international law codified under the International Law Commission¹⁹⁴ and put in treaty form at a Diplomatic Conference at Vienna in 1968-69.¹⁹⁵

UNITED PRESS INT’L, Jan. 11, 2005, *available at* http://www.upi.com/Security_Terrorism/Analysis/2006/01/11/upi_intelligence_watch/9786/.

194. The International Law Commission (“ILC”) was established by the General Assembly in 1947, initially only fifteen members, they were to be experts, not representatives of governments, to fulfill the mandate of Article 13 of the Charter to “encourag[ing] the progressive development of international law and its codification.” The vast number of projects of codification and development arising from the work of the Specialized Agencies of the United Nations rapidly outstripped the ability of the Commission to develop priorities in its work, which now deals exclusively with public international law issues. *See* G.A. Res. 174(11), U.N. Doc. A/Res/174(11) (Nov. 21, 1947).

The subject of treaty law occupied the Commission—then twenty-five members, now thirty-four—for fifteen years during which a series of eminent British scholars served the Commission as special rapporteurs: Prof. James Brierly of Oxford, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock also of Oxford. During those years, however, the number and character of the member nations of the U.N. changed as former colonies gained independence from colonial masters and the very expertise of the British components in the commission’s product was regarded with suspicion and even hostility by developing countries.

The ILC was not the first effort at codifying treaty law. The League of Nations looked at the subject in 1927 in a study by a Group of Experts and Prof. Manley O. Hudson of the Harvard Law School and his group of experts prepared a Draft Convention on the Law of Treaties. *See* Laurence Preuss, Note, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, 43 AM. J. INT’L L. 829, 829-30 (1949).

The classic treatise on the customary law of treaties is by Lord McNair, entitled *The Laws of Treaties* (1961).

The work of the Commission on the subject is reported annually in the ILC year-books. The Commission’s Report of a seventy-five article draft treaty, U.N.G.A. 21st Session, Official Records, Supp. 9, U.N. Doc. A/6309/Rev.1 (1966), is conveniently printed in 61 AM. J. INT’L L. 263-285 (1967).

195. The General Assembly authorized the Diplomatic Conference after a review of the ILC Draft in the Sixth (Legal) Committee. *See* G.A. Res. 2287 (XXII), U.N. Doc. A/Res/2167(XXII) (Dec. 6, 1967); G.A. Res. 2166(XXI), U.N. Doc. A/Res/2166(XXI) (Dec. 8, 1966). The Diplomatic Conference met at the Hofburg Palace in Vienna in two sessions in Spring 1968 and Spring 1969, attended by 110 nations. Because of a large number of new nations with small delegations, the work of the Conference was done in the Committee of the Whole rather than subdivided on topical lines. Although

The Vienna Convention on the Law of Treaties ("Vienna Convention") entered into force in 1980;¹⁹⁶ however, it has not yet been ratified by the United States, even though it was presented to the Senate for advice and consent by President Nixon in 1971.¹⁹⁷

The diplomatic conference at Vienna was not without controversy. Forty-one of the 110 states that participated had achieved independence after 1945. Debates at the conference often appeared to be the struggles of these developing, newly independent nations to emerge from a colonialism seemingly being re-imposed by developed nations claiming to be preserving the stability of treaties.

Although the treaty has languished in the Senate, lacking an advocate to shepherd it through to ratification, the U.S. Department of State considers the Vienna Convention on The Law of Treaties to be the authoritative guide to current treaty law, in effect a restatement of customary international law.¹⁹⁸ Accordingly, the Guantanamo treaty-based lease will be examined under the provisions of the Vienna Convention on the Law of Treaties, although the convention is not retroactive¹⁹⁹ and would only be analogous in a United States-Cuba dispute.

Just as modern contract law seeks to preserve the contractual relationship rather than terminate it,²⁰⁰ so the Vienna Con-

decisions by consensus rather than by vote had emerged in the General Assembly, voting was used to determine many controversial issues.

196. Vienna Convention on the Law of Treaties ("Vienna Convention"), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, *reprinted in* 63 AM. J. INT'L L. 875 (1969). There are 108 ratifications as of Jan. 1, 2007. It entered into force on Jan. 27, 1980.

197. President Richard Nixon, Message to the Senate Transmitting the Vienna Convention on the Law of Treaties (Nov. 22, 1971); *see* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 295-96 (1988).

198. S. Exec. Doc L, 92nd Cong. (1971); *see* Herbert W. Briggs, *United States Ratification of the Vienna Convention*, 73 AM. J. INT'L L. 470, 471 (1979).

199. Article 28 on non-retroactivity is an essential part of the Convention in view of the developments in a number of areas, especially the invalidity articles. During the ILC and the Diplomatic Conference, a number of participant States were engaged in boundary disputes that might have been affected by the Treaty provisions unless the Convention were prospective only. *See* *Mavrommatis Palestine Concession (Greece v. U.K.)*, 1924 P.C.I.J. (Ser. A) No. 2, at 35 (Aug. 30).

200. *See* 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.22 (Joseph M. Perillo ed., 1998). The ILC said, "[a]s a safeguard for the stability of treaties . . . the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles."

vention has the same goal, clearly expressed in Article 26,

Pacta Sunt Servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Thus, the Vienna Convention does not make it easy to avoid or escape treaty obligations, listing about a dozen narrow exceptions to the continued viability of treaties.²⁰¹

1. The Passage of Time: Articles 45 and 56

Despite efforts to eliminate all treaties imposed by colonial powers prior to the U.N. Charter,²⁰² the Vienna Convention provides that international agreements without express provisions for termination or denunciation are intended to be perpetual and must be observed.²⁰³ Article 56 clearly states such treaties are “not subject to denunciation or withdrawal.” Without specific termination language or the characteristics of necessarily ephemeral alliances, there is in effect a presumption of perpetuity unless future treaty drafters intend the opposite result.²⁰⁴ Termination of the Guantanamo lease is by mutual

ILC, Draft Articles on the Law of Treaties and Commentaries, *reprinted in* 61 AM. J. INT'L L. 285, 387 (1967).

201. See Vienna Convention, *supra* note 196, arts. 46, 48-49, 50-53, 56-62.

202. Especially in the discussion of the use of *travaux préparatoires* in the interpretation of treaties, *id.* art. 32, treaty invalidity due to error, fraud, corruption, coercion of representatives, and States, *id.* arts. 46-53, acquiescence of States, *id.* art. 45, and the definition of peremptory norms—*ius cogens*, *id.* arts. 53, 64, implied conditions—*rebus sic stantibus*, *id.* art. 62, and dispute settlement, *id.* Art. 66. See Richard Kearney & Robert Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 519-21, 525-28, 528-34, 535-38, 542-45, 548-52 (1970). Ambassador Kearney was the United States Member of the International Law Commission and Representative at the Diplomatic Conference; Mr. Dalton is Head of the Treaty Section in the Office of the Legal Adviser to the Department of State.

203. See Vienna Convention, *supra* note 196, art. 56. Article 56 provides:

Art. 56. Denunciation of or Withdrawal from a Treaty Containing No Provision Regarding Termination, Denunciation or Withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (A) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (B) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

204. The 1958 Geneva Conventions on the Law of the Sea, the Convention on the

agreement or abandonment by the United States.

The presumption of perpetuity is strengthened by the Command of Article 26 (*Pacta sunt servanda*) and the presumption of acquiescence of Article 45 (Loss of a Right to invoke a Ground for Invalidating, Terminating, Withdrawing from or suspending the Operation of a Treaty).²⁰⁵ Analogous decisions make it plain that the passage of more than thirty years without objection results in acquiescence.²⁰⁶

These provisions invalidate the legendary view of General de Gaulle concerning inconvenient treaties:

Le traité, c'est comme une rose ou comme une jeune fille;
quand elles sont passées, elles sont passées.²⁰⁷

Age alone does not invalidate treaties, otherwise the organizations that have been built out of treaties, such as the United Nations (Treaty of 1945)²⁰⁸ or the European Union (Treaty of 1957)²⁰⁹ become evanescent.

2. *Rebus Sic Stantibus* (All Things Must Stay the Same): Article 62

The cynical view that all treaties are never more than temporary or conditional was the hidden danger in the *rebus sic stantibus* doctrine as ILC and the Diplomatic Conference considered it.²¹⁰ This customary doctrine ought not to be part of the same

Territorial Sea, and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205, the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, and the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311, had no provisions for termination, but they are being replaced by the 1982 Convention on the Law of the Sea which also has no provisions for termination. See U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

205. See *Arbitral Award Made by the King of Spain (Hond. v. Nicar.)*, 1960 I.C.J. 192, 213 (Nov. 18); see also *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6, 23 (Nov. 18)

206. See *Temple of Preah Vihear*, 1962 I.C.J. at 23. In the Honduras-Nicaragua case, the period of alleged acquiescence was sixty-one years; in the Cambodia-Thailand case, the period was fifty years. Efforts to impose a statute of limitations on claims of invalidity were defeated at the Conference. See Kearney & Dalton, *supra* note 202, at 526-27.

207. "Treaties are like roses or young ladies, when they've gone by, they've gone by." De Gaulle, a press conference remark.

208. See generally U.N. CHARTER.

209. See generally Treaty Establishing the European Economic Community, 298 U.N.T.S. 11 (Mar. 25, 1957).

210. Report of the ILC on the Work of Its Eighteenth Session, May 4 to July 19, 1966, Official Records of the General Assembly, Twenty-First Session, Supplement No. 9, A/6309/Rev.1 [hereinafter I.L.C. Report]; see Oliver Lissitzyn, *Treaties and Changed*

treaty with *pacta sunt servanda*, but its long tradition was recognized by most scholars, thus the Vienna Convention preserved but narrowed the formulation and reframed it in Article 62.²¹¹

The circumstances being changed must have been an essential basis of the consents, and the changed circumstances must radically transform the extent of obligations remaining.

It could be argued that the change of Guantanamo from a coaling station, as expressed in the 1903 lease²¹² to a multi-purpose naval base violated this doctrine. However, the lease says "coaling and naval stations" and the transformation of vessel propulsion systems from coal to oil was surely not an essential basis of the agreement. More importantly, the lease was rewritten in 1934.²¹³ Further, Cuba's obligation to provide the land and

Circumstances (Rebus Sic Stantibus), 61 AM. J. INT'L L. 895 (1967); Kearney & Dalton, *supra* note 202, at 542-44; *see also* Load Line Convention Termination, 40 Op. Atty. Gen. 119 (1941).

211. *See* Vienna Convention, *supra* note 196, art. 62. Article 62 states:

Art. 62. *Fundamental Change of Circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- (a) if the treaty establishes a boundary; or
- (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

See Gabcikovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7, 60-65.

212. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. I, Feb. 16-23, 1903, T.S. No. 418 ("The Republic of Cuba hereby leases to the United States, for the time required for the purposes of coaling and naval stations, the following described area of land and water situated in the island of Cuba.").

213. Treaty on Relations with Cuba, U.S.-Cuba, May 29, 1934, 48 Stat. 1682. Article III of the treaty provides:

Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of

water areas, and the United States obligation to pay rent are not impeded by the change of fuel—both are pollutants.

The next question concerns the use of Guantanamo as a prison or detention center. It is loosely referred to as a prison, but in fact none of the detainees have been tried, convicted and sentenced. Arguably, a military prison is not a necessary function of a naval station, but a naval brig for short-term punishments is included on all naval stations. However, the Al-Qaeda and Taliban prisoners are being *detained* rather than imprisoned at hard labor. Their detention, although more severe as to physical restraints on the person, resembles the *detention* of the Cuban and Haitian boat people prior to their return to their homelands, a detention to which Cuba made no objection.

3. Coercion of the State: Article 52

This highly controversial article making void a treaty procured by threat or use of force made a fundamental change from customary international law,²¹⁴ as it would have invalidated hundreds of peace treaties imposed by the victor on the vanquished.²¹⁵ Undoubtedly the new law was mandated by the provision of Article 2(4) of the UN Charter, that no state shall use force in international relations, and the individual criminal responsibility of the Nuremberg and Tokyo War Crimes Trials. The inability of the developing nations to add “economic pres-

the United States of America on the 23rd day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantanamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the said naval station at Guantanamo. So long as the United States of America shall not abandon the naval station of Guantanamo or the two governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.

Id. at 1683.

214. Customary international law did not prohibit resort to force: war, reprisal or retaliation. Treaties of 1899 and 1907 at the Hague imposed certain limitations on the use of force on land and sea and an obligation to make a declaration of war prior to the commencement of hostilities. The Kellogg-Briand Pact of 1928 renounced war as an instrument of national policy.

215. For example, the Treaty of Peace between the United States and the United Kingdom of 1783 after the surrender of British forces under General Charles Cornwallis at Yorktown on October 19, 1781. See generally STUART S. MALAWER, *IMPOSED TREATIES AND INTERNATIONAL LAW* (1977).

sure” to the threat or use of force also caused an inability to agree on explanation of the uses of force that had paralyzed the General Assembly’s efforts to define the nature of the prohibited force.²¹⁶

Obviously, the treaty written after the surrender of armies because of defeat in battle will make the peace treaty void, but the use of hostages held under threats of death as in the hijacking of aircraft²¹⁷ or vessels²¹⁸ or the invasion of an embassy²¹⁹ or the threat of chemical, biological or nuclear damage²²⁰ as the motivating force behind an agreement is the more likely modern possibility that suggests the applicability of Article 52.

Certainly the 1898 Treaty of Paris between Spain and the United States was coerced because of the surrender of Spain’s

216. In the debates, the withdrawal of promised economic aid was given as an example of prohibited use of force. See Kearney & Dalton, *supra* note 202, at 534-35.

The potential victory of the advocates of the “economic pressure” amendment would have been hollow, as developed nations would not ratify the resulting convention, accordingly the amendment was withdrawn and a declaration against the threat or use of pressure in any form was added outside the treaty in the Final Act of the Conference. *Id.*

The U.N. General Assembly eventually dealt with the use of force issue in two resolutions: Resolution 2625 on Friendly Relations Between Nations, G.A. Res. 2625(XXV), U.N. Doc. A/Res/2625(XXV) (Oct. 24, 1970); and Resolution 3314 on the Definition of Aggression, G.A. Res. 3314(XXIX), U.N. Doc. A/Res/3314(XXIX) (Dec. 14, 1974).

217. The Black September Hijackings of September 1970 when five 747 aircraft were hijacked over Western Europe and flown to the Desert of Jordan. See Alona E. Evans, *Aircraft Hijacking: What Is Being Done*, 67 AM. J. INT’L L. 641, 644-48 (1973).

218. The Cruise ship *Achille Lauro* was hijacked in the Mediterranean Sea on October 7, 1985 and the passengers were held hostage for two days and an U.S. citizen, Leon Klinghoffer, was killed. The hijackers left the ship in Egypt, but their flight out of Egypt was intercepted by U.S. warplanes and forced to land in Italy where they were prosecuted. See Thomas Friedman, *Hijackers in Custody: A Special Satisfaction for Israel and U.S.*, N.Y. TIMES, Oct. 12, 1985, at A10. As a result, a new treaty emerged. See Antonio Casese, *The International Community’s “Legal” Responses to Terrorism*, 38 INT’L & COMP. L.Q. 589, 592 (1989).

219. The United States Embassy at Tehran, Iran was seized by militant “students” on November 4, 1979. Members of the embassy staff were held hostage until January 20, 1981 when they were released pursuant to the Algiers Accord, negotiated on the last day of the Carter Administration. The incoming Reagan Administration was urged to repudiate the financial aspects after the hostages were freed, but eventually decided to carry out the agreement. The Algiers Accord survived constitutional attack in *Dames & Moore v. Regan*, 453 U.S. 654, 683-89 (1981).

220. See William J. Broad, *Experts Call For Better Assessment of Threats*, N.Y. TIMES, Oct. 2, 2001, at F1. The Tokyo subway attack by sarin gas of 1995 and the fear of anthrax poisoning in the U.S. in October 2001 are prominent examples. See Kieth Johnson et al., *British Police Fear More Attacks by Terrorists*, WALL. ST. J., July 12, 2005, at A2. Traditional explosives were used in the Madrid and London subway bombings.

armies and the destruction of the Spanish Atlantic and Pacific fleets.²²¹ There is little doubt that the incorporation of the Platt Amendment into the Cuban Constitution in 1903 was coerced,²²² but the leases of 1903 and 1934 were made, arguably, by a Cuban government in full control of its land and people and not subject to occupation by a hostile army.²²³

4. *Ius Cogens* (Impermissible Subject Matter): Articles 53, 64 and 71

While it is difficult to imagine any human activity that could not be made the subject of a treaty, nevertheless the Vienna Convention drafters had the experience of recent history near at hand to give rise to the new concept of the *ius cogens* peremptory norm²²⁴ (or the norm *erga omnes*).²²⁵ Violation of *ius cogens* norm cannot be the subject of international agreement. The treaty language is devoid of exemplars because of the inability of the delegates to agree.²²⁶

Obviously peremptory norms, such as the prohibition of the use of force by individual nations,²²⁷ use of force to compel the

221. See FREIDEL, *supra* note 17, at 295-302.

222. See BENJAMIN, *supra* note 76, at 12.

223. The U.S. governor and the U.S. army left Cuba on May 20, 1902 after the inauguration of President Estrada Palma. See *supra* note 50 and accompanying text. The lease agreement was negotiated on July 2, 1903 and the ratifications were exchanged on October 6, 1903. See Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 734-38 (1968).

224. *Ius Cogens*—A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another. BLACK'S LAW DICTIONARY 1295 (7th ed. 1999). See generally Egon Schwelb, *Some Aspects of International Ius Cogens As Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967). The Restatement describes them as "basic standards of international conduct." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 116 (1965).

225. *Erga Omnes*. Rights belong to the peoples of all nations and cannot be contravened by agreements or votes or decisions. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, ¶ 4 (July 11).

226. See Kearney & Dalton, *supra* note 202, at 535-38. While noting the recent and rapid development of the concept, the ILC determined that, "the full content of this rule [is] to be worked out in State practice and in the jurisprudence of international tribunals." ILC Report, *supra* note 210, at 81. Some limit on the concept was the addition to Article 53 of the description that the norm was, "accepted and recognized by the international community of States as a whole." *Id.* at 90.

227. See U.N. CHARTER art. 2(4).

payment of debts,²²⁸ the prohibition on piracy,²²⁹ slavery,²³⁰ slave trade,²³¹ drug trafficking,²³² and genocide of racial groups²³³ existed when the Vienna Convention was drafted, but the list is capable of growth and there are no necessary limitations on that possibility. Thus, an agreement to breach an existing treaty,²³⁴ to pollute the oceans²³⁵ or the atmosphere,²³⁶ to hijack aircraft,²³⁷ or vessels,²³⁸ to torture individuals or take hostages²³⁹ or to terrorize²⁴⁰ populations are within the meaning of *ius cogens*. These *ius cogens* analogies are based on international treaties, the modern form of legislation. The next question is whether General Assembly Resolutions are (or should be) enti-

228. See Convention Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

229. See, e.g., *In re Piracy Jure Gentium*, [1934] A.C. 586 (PC).

230. Twentieth century prohibition on slavery began with the Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253, 46 Stat. 2183.

231. Nineteenth century prohibitions on the slave trade, initially bilateral, became multilateral in the General Act of Berlin Conference art. IX, Feb. 26, 1885, 165 Consol. T.S. 485, and the General Act for the Repression of the African Slave Trade, July 2, 1890, T.S. No. 383, 1 Bevans 134, 27 Stat. 886.

232. Drug Conventions: International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 187; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 493.

233. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045.

234. Vienna Convention on the Law of Treaties art. 26, Jan. 27, 1980, 1155 U.N.T.S. 331.

235. International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978 relating Thereto (Marpol 73/78), Feb. 17, 1978, 17 I.L.M. 546; United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF 62/121, 21 I.L.M. 1261.

236. Air Pollution: Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293, 26 I.L.M. 1529; United Nations Conference on the Human Environment, Declaration of Principles, June 16, 1972, U.N. Doc. A/CONF. 48/14, 11 I.L.M. 1416 (1972).

237. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

238. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668.

239. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), June 26, 1987, 1465 U.N.T.S. 85, 112 Stat. 2681; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 203.

240. Inability to agree on the definition of terrorist and terrorism has stymied efforts to prepare a general convention; this despite the General Assembly's December 9, 1985 resolution denouncing terrorism. See G.A. Res. 40/61, U.N. GAOR, 40th Sess., Agenda Item 129, at 3, U.N. Doc. A/RES/40.61.

tled to *ius cogens* treatment.²⁴¹ Undoubtedly, the Charter never intended to create a legislative body in the General Assembly.²⁴² Even so, however, the use of General Assembly Resolutions as evidence of customary international law²⁴³ has been recognized and does create the possibility of arguing *Ius Cogens* status, but the problem for Cuba is the absence of sufficiently analogous language in the General Assembly's series of resolutions on Permanent Sovereignty over Natural Resources²⁴⁴ or the 1974 Charter of Economic Rights and Duties of States.²⁴⁵

The 1934 lease of Guantanamo provides for termination of the lease by mutual agreement or abandonment by the United States.²⁴⁶ The latter now seems to be the more likely prospect. Even President Bush has expressed a desire to close the Base,

241. At the time when General Assembly resolutions resulted from voting, it was argued that resolutions approved nearly unanimously with strong support from all geographic, economic and political viewpoints, could be used as evidence of customary international law. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 85-92 (1991); see also OBED ASAMOAH, *THE LEGAL SIGNIFICANCE OF DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966). Many important treaties emerged after a positive General Assembly Resolution. See, e.g., Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; CAT, *supra* note 239.

Since 1965, consensus has replaced voting and such resolutions often have internal contradictions necessary to obtain a wide range of sponsors, thus the future use of Resolutions as evidence of customary law is questionable.

242. U.N. CHARTER arts. 10-12. The Charter uses "may" to describe General Assembly operations as opposed to the imperative "shall" used in the Security Council articles.

243. The United Nations Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810, enacted on December 10, 1948 at the beginning of the Cold War, in accordance with UN Charter Articles 1 and 55 is often described as the evidence of customary international law, although at the time of preparation it was regarded as inspirational rather than legislative. Its provisions were put into treaty form in two covenants in 1966: The International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 172, and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), Dec. 16, 1966, 993 U.N.T.S. 4. See generally Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995); Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 1988-1989 AUSTRALIAN Y.B. INT'L L. 82.

244. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (1962); accord G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973).

245. See Charter of Economic Rights and Duties of States ("CERDS"), G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974).

246. See 1934 Lease Agreement, *supra* note 47, art. III.

and the Base Realignment and Closure Commission may very well make such a recommendation.

V. LAWS APPLICABLE IN GUANTANAMO

A. Overview

Guantanamo is not a legal vacuum. A number of laws of the United States are applicable, but Cuban law does not apply. The lease agreement provides that the United States has complete jurisdiction and control of the area;²⁴⁷ there is a reciprocal obligation assumed by both Cuba and the United States to return fugitives from justice.²⁴⁸

United States military personnel are subject to the Uniform Code of Military Justice ("UCMJ") of the United States.²⁴⁹ The United States may also administer certain customary laws: the Law of War,²⁵⁰ Martial Law²⁵¹ or Military Government,²⁵² in cir-

247. The 1903 Lease Agreement states:

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.

See 1903 Lease Agreement, *supra* note 47, art. III. A second lease agreement, signed on July 2, 1903, provides that:

Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities. On the other hand the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory shall on demand, be delivered up to duly authorized United States authorities.

See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations art. IV, U.S.-Cuba, Feb. 23, 1903, T.S. No. 426.

248. A mutual extradition treaty was signed April 6, 1904. See Treaty Providing for the Mutual Extradition of Fugitives from Justice, U.S.-Cuba, Apr. 6, 1904, T.S. No. 440, 33 Stat. 2265, 6 Bevans 1128.

249. See Uniform Code of Military Justice ("UCMJ"), *codified at* 10 USC §§ 801-946 (2002).

250. Textual treatment of the law of war may be found in LASSA OPPENHEIM, *INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY* 201-533 (7th ed., Hersch Lauterpacht ed., 1952). A number of provisions of the law of war have been codified in the UCMJ: Article 99 (misbehavior before the enemy in war); Article 100 (subordinate compels surrenders); Article 101 (countersign offenses); Article 102 (forcing a safeguard); Article 103 (offenses involving enemy property); Article 104 (aiding the enemy); and Article 105 (misconduct as prisoner of war; Art. 106 espionage).

251. Martial Law implies temporary control of a civilian population by military au-

cumstances authorized by international law; however martial law and military government are not part of this discussion. In addition, a United States statute, the Special Maritime and Territorial Jurisdiction,²⁵³ and a number of federal criminal laws are

thorities during a period when the normal civil officers are not in effective control—during wartime or in a weather emergency. See Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 83-87 (2005).

252. Military Government implies temporary performance of normal governmental functions by specially assigned military officers because of a breakdown in such performance as the result of wartime operations. See Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT'L L. 645, 748-53 (2006).

253. 18 U.S.C. § 7 (2001).

7. Special maritime and territorial jurisdiction of the United States defined the term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

applicable to the Naval Base.²⁵⁴

In circumstances different from the present hostile confrontation between Cuba and the United States, there would be reciprocal provisions for jurisdiction concerning the presence of non-U.S. military personnel in the series of Executive Agreements called Status of Forces Agreements.²⁵⁵

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act

(A) The premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

254. *See* *United States v. Rogers*, 388 F. Supp. 298, 302 (E.D. Va. 1975). Federal criminal prosecutions must be based on legislated crimes, since the Supreme Court has held that there are no federal common law crimes. *See* *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

The U.S. Code currently lists and defines seventy-two federal offenses from arson, 18 U.S.C. § 81 (2001), to release of state motor vehicle records, 18 U.S.C. § 2721 (2000).

255. In the nineteenth century, powerful colonial nations forced weaker non-European nations to concede jurisdiction over their non-diplomatic citizens, such as businessmen, tourists or retirees—to special courts of the colonial power established in the territory of the weaker nation. These were called Capitulation Courts that thereby freed Europeans from Islamic law in the Turkish Empire and Africa and from Imperial laws in China and from tribal laws in Africa. The Capitulation Courts ended by the middle of the twentieth century. An example of Capitulation courts was the Court in Egypt established for Europeans. *See* JASPER Y. BRINTON, *THE MIXED COURTS OF EGYPT* (1968).

The North Atlantic Treaty Organization ("NATO"), in response to the beginning of the Cold War after the Communist *coup d'état* in Czechoslovakia in February 1948 and the Berlin Blockade (June 23, 1948 to Sept. 30, 1949), was agreed by the United States, Canada, and ten Western European nations. *See* North Atlantic Treaty, Apr. 4, 1949, 34 U.N.T.S. 243, T.I.A.S. 1964, 63 Stat. 2244. *See generally* Jane E. Stromseth, Symposium, *The North Atlantic Treaty and European Security After the Cold War*, 24 *CORNELL INT'L L.J.* 479 (1991). Subsequent to the alliance the NATO nations agreed on prototype Status of Forces Agreement regulating the jurisdiction of host nations and guest military forces, of June 19, 1951 (in force, Aug. 29, 1953); (T.I.A.S. 2846, 199 U.N.T.S.

While Cuban law was not applied on the Base after the effective dates of the leases of 1903 and 1934, there were informal arrangements for the transfer of Cuban nationals accused of criminal acts on the Base to Cuban jurisdiction; these arrangements ended in 1961.

B. *United States Military Personnel*

One result of the experience of more than 16 million U.S. residents with military life in the Second World War was a demand for change in the systems of military justice that had been used during the conflict.²⁵⁶ Consequently, Congress enacted the *Uniform Code of Military Justice* in 1950, before the beginning of the Korean War, but to be effective May 31, 1951 in the middle of a new conflict, part of the forty-four-year Cold War.²⁵⁷

67, 14 U.S.T. 1792). Executive Agreements were negotiated between the United States and individual nations. In fifty-eight years, NATO has expanded to thirty-six nations, including Eastern Europe in the Partnership for Peace of June 19, 1995. See North Atlantic Treaty and Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June, 19, 1995, T.I.A.S. No. 12,666; see also Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

256. See Delmar Karlen, *The Personal Factor in Military Justice*, 1946, WISC. L. REV. 394; Delmar Karlen, *Lawyers and Courts-Martial*, 1946 WISC. L. REV. 240; see also ROBERT SHERILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 74-93 (1969) (Vietnam-era book concerned with the Military Draft but referring to World War II criticisms). For judicial criticism, see *Hicks v. Hiatt*, 141 F.2d 664, 665-66 (3rd Cir. 1944).

257. See Uniform Code of Military Justice ("UCMJ"), codified at 10 USC §§ 801-946 (2002). The UCMJ was enacted and approved May 5, 1950. The Korean War began with the invasion of South Korea on June 25, 1950. The UCMJ became effective May 31, 1951. See generally Howard S. Levie, *How It All Started—And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205 (2005).

American military law originated before the Constitution; in 1775 the Continental Congress enacted (1) the *Articles of War* for the continental army then assembled outside Boston—it was an adaptation of the British Articles of War and was enacted as a statute in 1790, revised in 1806, 1916 and 1920, and (2) *Rules for the Regulation of the Navy of the United Colonies*, adapted by John Adams—unusual for its time in that it limited floggings ordered by the Captain to twelve lashes. See Lieutenant Keith J. Allred, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court Martial Size and Voting Requirements*, 35 NAVAL L. REV. 153, 154-58 (1986); Richard Hartzman, *Congressional Control of the military in a Multinational Context: A Constitutional Analysis of Congressional Power to Restrict the President's Authority to Place United States Armed Forces under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 86-87 (1999). When Congress created a new navy for the undeclared war with France, Congress enacted the 1798 *Articles for the Government of the U.S. Navy* revised by Congress in 1800, 1862 and 1874, known familiarly as "Rocks and Shoals." Flogging was forbidden in the Navy in 1862, but not until 1874 in the Army where branding and flogging had been

The purpose of Congress was to consolidate, unify and codify the military laws applicable to all of the armed forces of the United States: Army, Navy, Marines, Air Force, and Coast Guard. Furthermore, Congress clearly intended to increase the rights of accused service men and women by mandating the rule of law through the use of trained lawyers.²⁵⁸ Congress thereby

common. See Dwight A. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 9-14 (1998)

The idea of a uniform military law for all branches of the military service had been raised after the First World War by Professor Edmund M. Morgan of Harvard Law School, an expert in the law of evidence, in testimony before a Senate Committee in 1919. See Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17 (1965); see also F. Bernays Wiener, *The Seamy Side of the World War I Court Martial Controversy*, 123 MIL. L. REV. 109 (1989). Nothing was done until the end of the Second World War when dissatisfaction with wartime military justice—especially because of the large number of naval personnel in pre-trial confinement—was loud and clear from the public and from members of Congress who had been in military service. The time was ripe because of the creation of a new military branch, the U.S. Air Force, out of the old U.S. Army Air Corps in 1947. Most important was the unification of all branches of the military under the Department of Defense, created on July 26, 1947. See ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 9 (1956).

The first Secretary of Defense, James Forrestal (1892-1949), formerly Secretary of the Navy, appointed a Committee to prepare a Uniform Code of Military Justice in July, 1948. Professor Morgan was the Chair of the four-member committee. See Felix E. Larkin, *Prof. Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7 (1965). The Secretary's directive called for a statute, "that would provide full protection of the rights of persons subject to the Code without undue interference with appropriate military discipline and the exercise of appropriate military functions." Morgan, *supra*, at 22.

The Morgan Committee prepared a Draft Statute, introduced simultaneously in Senate and House on February 8, 1949. Lengthy hearings featured many witnesses over the next three months and amendments were made, the principal documents being: Uniform Code of Military Justice, Hearings, H.R. Rep. No. 81-491 (1949), and Uniform Code of Military Justice, Hearings, S. Rep. No. 81-486 (1949). The legislation passed both houses and slight differences were reconciled in the Conference Committee, and debate in both houses before Pub. L. No. 81-506 was enacted on May 5, 1950 and approved by President Truman on the same day. There are two helpful treatises: *Military Justice in the Armed Forces of the United States*, written by future judge of the Court of Military Appeals Robinson Everett (1956), and *Justice Under Fire*, by Joseph W. Bishop, Jr. (1974).

258. The 1968 Amendment created the powerful office of the Military Judge. Previously, the General Court Martial had a Law Officer to rule on motions with a minimum panel of five officer members for verdict and sentence, but Trial Counsel (prosecutor) and Defense Counsel were law-trained specialists certified by the Judge Advocate General of the relevant service. The Special Court Martial, with very limited punishment power, had no law officer, but if trial counsel were a lawyer, defense counsel would also have to be a lawyer. Review of courts martial began with the staff judge advocate of the convening authority. Appeal was before the service Board of Review on facts and law (now renamed Courts of Military Review). Questions of law could be

acted under Article I, Section 8 of the Constitution.²⁵⁹ The Constitution specifically exempts the “land and naval forces” from the provisions of the Fifth Amendment on Grand Jury indictment for a “capital or otherwise infamous crime.”²⁶⁰ No provision of Article III extends the judicial power of the United States to courts martial nor does the Article exempt courts martial from the judicial power. In 1950 Congress had resolved that silence by eliminating direct review of military trials by appeals,²⁶¹ nevertheless, the Supreme Court assumed the right to provide extraordinary relief indirectly or collaterally by habeas corpus.²⁶² In 1983 Congress amended the Certiorari provisions to allow appellate review of the decisions of the Court of Appeals for the Armed Forces in the Supreme Court.²⁶³

Plenary jurisdiction over members of the U.S. armed forces applies to: members of regular components of the armed forces from the time of enlistment or commission until delivery of a discharge;²⁶⁴ (but discharged ex-servicemen cannot be arrested and tried by court martial);²⁶⁵ members of reserve components while on active duty under orders voluntarily accepted;²⁶⁶ retired regular component persons entitled to pay;²⁶⁷ retired reserve persons hospitalized in a military hospital;²⁶⁸ certain employees of the federal government in departments such as the National Oceanic and Atmospheric Administration or Public Health Service, assigned to and serving with the armed forces;²⁶⁹ and ser-

appealed to the Court of Military Appeals (since 1994 the Court of Appeals for the Armed Forces). See generally Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968). The finality of the direct review within the military was upheld in *Burns v. Wilson*, 346 U.S. 137, 154 (1953).

259. U.S. CONST. art. I, § 8 (“Congress shall have power . . . to make rules for the Government and Regulation of the land and naval forces.”).

260. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces”).

261. UCMJ, arts. 66, 67(a), .

262. See *Toth v. Quarles*, 350 U.S. 11 (1955); see also *Reid v. Covert*, 354 U.S. 1 (1957).

263. Military Justice Act of 1983, Pub. L. No. 98-209, § 1259, 97 Stat. 1393 (1983).

264. See UCMJ, art. 2(a)(1).

265. See *Quarles*, 350 U.S. at 13-15.

266. UCMJ, art. 2(4).

267. *Id.* art. 2(a)(4).

268. *Id.* art. 2(a)(5).

269. *Id.* art. 2(a)(8).

vice academy cadets and fleet reservists.²⁷⁰

Congress initially attempted to extend court martial jurisdiction over civilians, "serving with, employed by, or accompanying the armed forces" outside the United States but authorized under a Status of Forces Agreement with the foreign nation.²⁷¹ This statutory provision has been held to be unconstitutional by the Supreme Court, despite the usual aversion of the Court to interference in the military; in *Reid v. Covert*, the dependent wives of servicemen were charged with murder on U.S. military bases, resulting in trial by court martial and sentences to military prison in the United States.²⁷²

There are similar provisions for military jurisdiction in time of war over persons serving with or accompanying the armed forces, "in the field;" the Supreme Court has not considered the situation, although military cases appear to limit even this jurisdiction.²⁷³

270. *Id.* art 2(a)(2) (cadets), 2(a)(6) (fleet reserve). The statute also applies to persons serving with, employed by, or accompanying the armed forces and "[a]ll persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States." UCMJ, art. 2(a)(12). Both sections are subject to Status of Forces Agreements ("SOFAs"), which are agreements between a host country and a foreign nation stationing military forces in the host country, generally regulating the host country's jurisdiction over the troops stationed therein. *See generally* Jennifer Gannon, *Renegotiation of the Status of Forces Agreement Between the United States and the Republic of Korea*, 12 *COLO. J. INT'L ENV'T'L L. & POL'Y* 263, 264 (2000 Y.B.).

271. *Reid v. Covert*, 354 U.S. 1, 4, 15 (1957). The court heard cases from the United Kingdom and Japan in which military dependent wives killed their service member husbands on the U.S. military bases subject to SOFA. The host country refused to seek jurisdiction. The dependents were tried by Court martial and sentenced to prison. After transfer from overseas, the women were imprisoned in the United States where the writ of habeas corpus was sought on grounds of denial of Constitutional rights under the Fifth and Sixth Amendments.

Congress considered three solutions to the "accompanying persons" problem: trial of foreign offenses in the United States; trial in a U.S. court in the foreign country, and surrender to foreign jurisdiction in all cases. All three were rejected. These cases usually involve intense diplomatic negotiations. *See Wilson v. Girard*, 354 U.S. 524, 548(1957) (surrender of U.S. military member to Japan for trial and imprisonment). *Reid v. Covert* was applied in *Kinsella v. Singleton*, 361 U.S. 234 (1960) (dependent wife tried for manslaughter on a non-capital charge), *Grisham v. Hagan*, 361 U.S. 278 (1960) (civilian employee on a capital charge of murder), and *McElroy v. Giragiaro*, 361 U.S. 281 (1960) (civilian employees on non-capital charges of larceny and sodomy).

272. *See Reid*, 354 U.S. at 1, 3, 5, 40-41; *cf.* *United States v. Averette*, 19 U.S.C.M.A. 363 365(1970). The *Reid* wives' petitions for habeas corpus were granted after the Supreme Court decision.

273. Congress has provided new legislation applicable to the non-military member. 18 U.S.C. §§ 3261-3267; *see* UCMJ, art. 2(10)- (11); *see also* Mark Yost & Douglas S.

Nevertheless, one provision is crystal clear, the UCMJ extends to "Prisoners of War in custody of the armed forces."²⁷⁴

Another provision applicable to bases like Guantanamo, or those in Japanese or Korean territory is, "[areas] leased by or otherwise reserved or acquired for the use of the United States" and "outside the United States. . . ."²⁷⁵ Bases under NATO Status of Forces Agreements may remain the territory of the host country but jointly shared with the United States.²⁷⁶

The UCMJ governs those subject to its jurisdiction *everywhere*, or in the language of the statute, "in all places." But, interpreting Article I, Section 8, the Supreme Court interfered with Congress and the military in the Vietnam War era by drawing non-statutory limits around military offenses, requiring a *military nexus*.²⁷⁷ A post-Vietnam court overruled *O'Callahan v. Parker* downgrading "nexus" and emphasizing "status."²⁷⁸

C. Customary International Law

Under customary international law, military jurisdiction was

Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT'L L. 446 (2001).

274. UCMJ, art. 2(9). The expression "Prisoner of War" is found in treaty law, especially the Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 47 Stat. § 202.

The law of war contrasts the provisions governing prisoners of war with the status of "unlawful combatant" to which no P.O.W. rights are guaranteed. In *Ex Parte Quirin*, Chief Justice Stone wrote:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

317 U.S. 1, 31 (1942).

275. The Guantanamo Naval Base continues under a 1934 lease. See 1934 Lease Agreement, *supra* note 47. During the pre-war period, the United States leased bases from Great Britain in its Atlantic colonies from Newfoundland to Trinidad.

276. Examples are La Sigonella in Sicily and Rota in Spain.

277. See *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969) (five to three majority). The defendant, an off-duty member of the military, in civilian clothes, in a hotel room in Honolulu, Hawaii, in peacetime was charged with attempted rape, assault with intent to rape and house-breaking. The decision warned Congress and the Executive that exercises of power not subject to the Constitution are limited to the least possible power. Trial by court martial for an offense without a military connection was held to be unconstitutional.

278. See *Solorio v. United States*, 483 U.S. 435, 450-51 (1987) (five to three majority). An active duty Coast Guard seaman stationed in Juneau, Alaska was charged with sexual abuses of two daughters of a fellow Coast Guardsman. *O'Callahan* was specifically overruled.

exercised by a belligerent power that has occupied enemy territory in wartime under the name *Military Government*.²⁷⁹ In time of war or peace where public safety is imperiled by the absence of local police power, the military may exercise *Martial Law*,²⁸⁰ but the Supreme Court limited its exercise during the American Civil War where the courts remained open and its processes were unobstructed.²⁸¹

While the law of war (*Ius in bello*) has existed for years, defined by Church Councils²⁸² and treatise writers,²⁸³ there was no international enforcement against national executives until the London Agreement of August 8, 1945.²⁸⁴ The law of war has developed since that time through resolutions of the U.N. Security Council under chapter VII of the U.N. Charter²⁸⁵ and the

279. Military government. This branch of law owes much to the work of Professor Francis Lieber (1800-1872) of Columbia Law School. Born in Berlin and imprisoned as a young radical in Prussia in 1819; on release he fled to England, then to the United States (1827). He became Professor of History at South Carolina College (1835-1856), then to Columbia University in New York (1857-1865). He joined the Columbia Law School Faculty from 1857 until his death. He wrote many texts, including *The Code for Government of the Armed Forces* (1863), source for Army General Order 100, *Instructions for the Government of Armies in the Field*. See COLUMBIA ENCYCLOPEDIA (6th ed. 2005); Charles Fairman, *Some Observations on Military Occupation*, 32 MINN. L. REV. 319 (1948); see also DORIS A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION, 1863-1914: A HISTORICAL SURVEY* (1949). German actions in Belgium 1914-1918 began a new species of barbarous treatment of civilian populations.

280. Martial Law. Actual presence and control of a military force authorizes the enforcement of obedience on all persons therein temporarily. The 1907 Hague Convention (No. V) put limits on the actions of an occupying power. See generally WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT & MARTIAL LAW* (3d ed. 1914).

281. See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 141-42 (1866).

282. The Second Lateran Council (1139 A.D.) forbade Christians to use the crossbow as a weapon. The Third Lateran Council (1179 A.D.) prohibited selling Christians into slavery and authorized the Truce of God—cessation of hostilities of all types weekly from Wednesday evening to Monday morning.

283. See treatises *De Re Militari et Bello Tractatus* (1563), by Pierino Belli (1502-1575); *De Jure Naturae et Gentium* (1672), by Samuel von Pufendorf (1632-1684); and *De Jure Belli ac Pacis* (1625), by Hugo Grotius (1583-1645).

284. See International Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 280. The United States, United Kingdom, Union of Soviet Socialist Republics and France agreed on a four-power court to try major war criminals. See generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

285. See International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994); International Criminal Tribunal for Yugoslavia, S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993).

Treaty for the International Criminal Court.²⁸⁶

Several parts of the most important substantive law of war were codified by Congress in the UCMJ: Art. 99 Misbehavior before the Enemy;²⁸⁷ Article 104, Aiding the Enemy in War-time;²⁸⁸ Article 105, Misconduct as prisoner of war;²⁸⁹ and Article 106, Espionage in Wartime;²⁹⁰ triable by court martial or military commission. This codification resulted from uncertainty about the law applicable to the enemy saboteurs tried by military commission during the Second World War in *Ex Parte Quirin*.²⁹¹

286. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF 183/9 (1998). The treaty was adopted by vote of 120 to 7 at Rome on July 17, 1998. The United States voted no. It entered into force on July 1, 2002.

287. Misbehavior before the enemy in wartime includes any person who:

(1) runs away; (2) shamefully abandons, surrenders or delivers up any command . . . which it is his duty to defend; (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command . . . ; (4) casts away his arms or ammunition; (5) is guilty of cowardly conduct; (6) quits his place of duty to plunder or pillage; (7) causes false alarms . . . ; (8) willfully fails to do his utmost to encounter, engage, capture or destroy any enemy troops . . . ; (9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces [of] . . . the United States or their allies when engaged in battle.

UCMJ art. 99.

288. UCMJ art. 104:

Any person who — (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

289. UCMJ art. 105:

Any person subject to [the UCMJ] who, while in the hands of the enemy in time of war — (1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or (2) while in a position of authority over such persons maltreats them without justifiable cause; shall be punished by death or such other punishment as a court-martial may direct.

See Howard S. Levie, *Prisoners of War in International Armed Conflict* (Naval War College Int'l. L. Studies, No. 59, 1978).

290. UCMJ art. 106:

Spies. Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel or aircraft within the control or the jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

291. See *Ex Parte Quirin*, 317 U.S. 1 (1942); see also *supra* note 274.

D. *U.S. Federal Law*

1. The Special Maritime and Territorial Jurisdiction of the United States

The first Congress dealt with murders outside state jurisdiction, applicable on the “high seas, or in any river, haven, basin or bay out of the jurisdiction of any. . . state.”²⁹² Gradually Congress added other felonies: piracy, mutiny, robbery, burglary and rape.²⁹³ In 1909 Congress reorganized these provisions as the Special Maritime Jurisdiction. Further revisions applied these laws to aircraft and land areas beyond the jurisdiction of any state.²⁹⁴

A 1966 incident demonstrated the usefulness of the procedure. A Cuban national, living and working on the Base, killed a Jamaican who also lived and worked on the Base. In the absence of diplomatic relations, no transfer of the prisoner to Cuba was possible and no United States Court existed on the Base, but under the special Maritime and Territorial Jurisdiction Act, the federal court to which an accused is first brought has jurisdiction over the accused. The accused Cuban was flown to Miami where he was indicted for the crime, but a determination of mental incompetence to stand trial, as part of an insanity defense, rendered a trial impossible.

Violations of the law of war are to be tried by courts martial

292. See Act of April 30, 1790, § 8, 1 Stat. 112 (1790). Congress has provided as follows:

Art. 36: (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

The Manual for Courts-Martial provides as follows:

[M]ilitary commissions . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.

MCM pmbl. (2)(b)(2). Neither of these provisions has been repealed or rescinded by subsequent legislation.

293. Act of April 30, 1791, ch. 9, § 8, 1 Stat. 112 (currently 18 USC §§ 1651-1690, 2111-19, 2031-2032 (repealed)).

294. Congress has regularly added offenses to Section 18 of U.S. Code. See generally Christopher C. Burris, *Time for Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts-Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 FED. CTS. L. REV. 4.

of members of the U.S. military or by military commission for all others, but the procedures and evidentiary rules are to be those of the UCMJ.²⁹⁵

It is apparent that although U.S. law could be clearer, it is adequate to deal with criminal offenses by U.S. citizens or non-U.S. personnel before an authorized court on the U.S. Naval Base at Guantanamo, Cuba.

* * * *

Having analyzed the law applicable in Guantanamo, the obvious question is: “Why would the United States build a new U.S. prison at an obsolete naval base in a foreign country?” The answer may have been a legal miscalculation caused by the conflicting answers given by the Supreme Court to the question whether the Constitution follows the flag.

This issue does not seem to have been raised before the United States acquired an overseas empire in 1898.²⁹⁶ As previously noted, the acquisitions were very controversial²⁹⁷ and that controversy was reflected in the Supreme Court’s review of a series of problems in the *Insular Cases*²⁹⁸ concerned with trade policy on which the justices divided five to four in voluminous opinions. In *DeLima v. Bidwell*,²⁹⁹ the court held that the United States tariff on imports from Puerto Rico could no longer be

295. Before the Second World War, many federal installations, such as forts and naval bases were built in federal enclaves—like the District of Columbia—where the state had ceded its jurisdiction as well as title to the land; however, in the rapid build-up of military installations before and during the Second World War, the federal government merely bought the land, to which state law continued to be applied through the Federal Assimilative Crimes Act, 18 U.S.C. § 13(a). The predicate is the commission of an act, “punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District” but which has not been made punishable by Act of Congress. *Id.*

296. *In re Ross*, 140 U.S. 453, 464-65 (1891), involved a trial before the court of the U.S. consul at Yokohama, Japan where a British subject seaman had killed a ship’s officer of the U.S. ship on which both were serving while the ship was in Yokohama in Japanese territorial waters. The seaman was arrested, tried and convicted of murder by the U.S. consul in his court, as authorized by statute applicable “in non-Christian countries.” *Id.* at 465. The conviction was upheld by the Supreme Court on the basis of long-standing custom and history, because, “. . . the Constitution can have no operation in another country.” *Id.*

297. See Ramos, *infra* note 379, at 226.

298. 182 U.S. 1, 180-81, 200 (1901). See generally Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STANFORD L. REV. 587 (1949); Gerald Neuman, *Closing the Guantanamo Loophole*, 50 LOYOLA L. REV. 1 (2004).

299. 182 U.S. 1 (1901).

collected since Puerto Rico had ceased to be a foreign country at the treaty of peace in the war with Spain. In *Dookey v. United States*,³⁰⁰ there could not be a tariff in Puerto Rico on exports from the United States for the same reason. In *Downes v. Bidwell*,³⁰¹ Justice Brown explained that it was for Congress alone to decide what provisions of the Constitution and laws of the United States to apply to the newly acquired territories, because the Constitution did not apply immediately to the benefit of these *existing* populations. (Unlike the nineteenth century settling of the West where immigrants and territorial governments arrived in gradual succession.) Thus, the Constitution did not follow the flag. Justice Fuller's dissent reached the opposite conclusion; the intermediate position was that of Justice White concurring in the result.

The Supreme Court confronted issues of criminal law two years later³⁰² and the result was similar to the *Insular Cases*. The Republic of Hawaii had been annexed to the United States in 1898 during the Spanish American War. After the annexation but before Congress authorized the territorial government, Osaki Mankichi, a Japanese subject, was tried and convicted of the crime of manslaughter in a Hawaiian court without indictment by Grand Jury and a unanimous jury verdict, procedures authorized in the previous Kingdom of Hawaii.³⁰³ Petitioner Mankichi sought habeas corpus on the ground that his conviction violated the Fifth and Sixth Amendments to the U.S. Constitution. In a five to four decision, Justice Henry Brown, author of the *Insular Cases*, rejected habeas corpus and held that these provisions were not fundamental and had long been accepted as suitable for Hawaii.³⁰⁴ In view of the acquisition of Hawaii by voluntary annexation rather than conquest and treaty, the

300. 182 U.S. 222, 235-36 (1901) (citing *DeLima* and holding similarly).

301. 182 U.S. 244, 289-90 (1901). Justice Fuller, in dissent, denounced unrestricted power in distant provinces. *Id.* at 372-73. Justice White, later Chief Justice from 1910 to 1921, believed that the Constitution and laws followed the flag into "incorporated" territories, but as to "unincorporated" territories, Congress can decide on those provisions (other than fundamentals) to be applied. *Id.* at 288-94. There is, however, some embarrassing racist prejudice in his exclusion of uncivilized races unfit to receive the benefits of U.S. citizenship. *Id.* at 306.

302. See *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

303. *Id.* at 234 (Harlan, J., dissenting).

304. *Id.* at 218. A similar result concerning jury trial in the Philippines was reached in *Dorr v. United States*, 195 U.S. 138 (1904).

Brown opinion did not rely on the *Insular Cases*, but Justice White's concurrence was based on the *Insular Cases*.³⁰⁵ The dissenters considered that all the Constitutional provisions applied from the moment of annexation, citing *Ex Parte Milligan* and distinguishing the *Insular Cases*.³⁰⁶

The right to jury trial was again considered twenty years later as it applied to Puerto Rico. In *Balzac v. The People of Porto Rico (sic)*,³⁰⁷ the defendant was accused of the misdemeanor of criminal libel in the newspaper of which he was editor. He demanded a jury trial but it was denied and he was tried and convicted by the court without a jury.³⁰⁸ Referring to the *Insular Cases*, Chief Justice Taft held that the right to jury trial did not apply.³⁰⁹ (He also found that the First Amendment did not protect this "excessive and outrageous" speech, thus Justice Holmes merely concurred in the result.)³¹⁰

Government attorneys then applied the rule of the *Insular Cases* in combination with the canon of construction against the extraterritorial application of statutes³¹¹ to a wide range of issues dealing with U.S. government conduct beyond the international boundaries of the United States.

That permissive attitude was certainly questioned if not put to rest in *Reid v. Covert*.³¹² Justice Black's opinion is a landmark for the supremacy of the Constitution:

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 of Rights and other parts of the Constitution provide to protect his life

305. *Id.* at 219.

306. *Id.* at 245, 237. Justice Harlan's dissent stresses the conditional approval of the 1787 Constitution by important states until the promise of a Bill of Rights was made, as evidencing the fundamental nature of the grand jury and unanimous jury. *Id.* at 244-45.

307. 258 U.S. 298 (1922).

308. *Id.* at 300.

309. *Id.* at 305, 309.

310. *Id.* at 314.

311. See generally *Equal Employment Opp'y Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

312. 354 U.S. 1 (1957).

and liberty should not be stripped away just because he happens to be in another land³¹³

Then Justice Black becomes prophetic.

The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.³¹⁴

But how to deal with the *Insular Cases*? Justice Black dismissed them.

The “Insular Cases,” which arose at the turn of the century, involved territories which had only recently been conquered or acquired by the United States. These territories, governed and regulated by Congress under Article IV, § 3, had entirely different cultures and customs from those of this country Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion.³¹⁵

Of the eight participating justices, Black’s opinion spoke for Chief Justice Warren and Justices Brennan and Douglas only. Justices Clark and Burton dissented;³¹⁶ and Justices Harlan and Frankfurter concurred in the result because it was a capital case, but were unable to sweep away the wise and necessary gloss of the *Insular Cases*.³¹⁷

The *Insular Cases* still haunt the jurisprudence of the Supreme Court, as seen in the amazing opinion of Chief Justice Rehnquist in *United States v. Verdugo-Urquidez*³¹⁸ where a Mexican citizen drug dealer, wanted by the United States Drug Enforcement Agency [DEA], had been kicked out of Mexico (literally) into the hands of the waiting D.E.A. at the border for prosecution in the U.S. on charges of drug smuggling.³¹⁹ The real evidence in the case, however, was the product of a subsequent search of the accused’s apartment in Mexicali, Mexico by D.E.A. agents with the approval of the Mexican police. The accused’s

313. *Id.* at 5-6.

314. *Id.* at 14.

315. *Id.* at 13-14.

316. *Id.* at 78-90.

317. *Id.* at 49 (Frankfurter, J., concurring); *id.* at 65 (Harlan, J., concurring).

318. 494 U.S. 259 (1990).

319. *Id.* at 262-63.

effort to exclude the documentary evidence from the search was based on the Fourth Amendment's requirement of "Warrant(s) . . . upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched . . ." ³²⁰

The Chief Justice, however, was concerned with the opening words of the Amendment and not the prohibited conduct, as he finds the words, "The right of the people" to be more significant than the introductory words of the Fifth Amendment ("No person shall be held . . .") ³²¹ and Sixth Amendment ("In all criminal prosecutions, the accused . . ."). ³²² The Chief Justice's reasoning was that the Fourth Amendment was, "to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory." ³²³ Accordingly, when violations of Fifth and Sixth Amendment rights are tolerated outside the United States, ³²⁴ *a fortiori*, "[i]f such is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies only to 'the people.'" ³²⁵

320. U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

321. U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

322. U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

323. *Verdugo-Urquidez*, 494 U.S. at 206.

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

325. *Verdugo-Urquidez*, 494 U.S. at 269.

The *Insular Cases* then receive a resurrection: “certainly, 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.”³²⁶

The Chief Justice’s opinion for three colleagues also enjoyed concurrences by Kennedy³²⁷ and Stevens³²⁸ but produced expectable dissents by Brennan,³²⁹ Marshall, and Blackmun.³³⁰ Accordingly, the *Insular Cases*, like the common law writs, may have been buried by Justice Black, but, they “rule us from their graves.”³³¹

Non-U.S. personnel, potential defendants before U.S. Military Commissions at Guantanamo have been before the Supreme Court in two cases: *Rasul v. Bush*,³³² and *Hamdan v. Rumsfeld*.³³³ The latter case is more closely concerned with military commissions and will be discussed *infra*, but *Rasul v. Bush* more directly deals with the applicability of the Constitution and laws to Guantanamo. Both majority opinions are by Justice Stevens.³³⁴

326. *Id.* at 268-69.

327. *Id.* at 275, 278 (search not a violation of “due” process, because impracticable in foreign countries where privacy may have a different meaning than in the United States).

328. *Id.* at 279 (search not unreasonable).

329. *Id.* at 279-97. The fact of criminal prosecution in the United States is the sufficient nexus of the accused to the U.S. Constitution.

330. *Id.* at 297 (no testing of probable cause to determine reasonableness of search).

331. “The forms of action we have buried, but they still rule us from their graves.” FREDERICK WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 1* (A. H. Chaytor & W. J. Whittaker eds., 1936).

332. 542 U.S. 466 (2004).

333. 126 S. Ct. 2749 (2006).

334. John Paul Stevens, born in Chicago in 1920, attended the University of Chicago where he was Phi Beta Kappa and earned the A.B. in 1941. He then served on active duty as a naval officer in the Second World War from 1942 to 1945. After release from the Navy, he attended Northwestern University Law School where he was editor-in-chief of the law review. He achieved the highest grades in the school, and received the J.D. in 1947. He then served as law clerk in 1947-1948 to Supreme Court Justice Wiley B. Rutledge (1894-1949), a passionate New Deal supporter who had been a law professor (Colorado) and law school dean (Washington University of St. Louis and Iowa), before appointment to the Court of Appeals for the D.C. Circuit (1939-1943). After his clerkship, Stevens returned to Chicago to practice law, specializing in antitrust law from 1948 to 1970, during which time he taught briefly at the University of Chicago Law School and Northwestern University Law School. In 1970 he was appointed to the Seventh Circuit Court of Appeals by President Nixon. He was elevated to the Supreme Court by President Ford, replacing Justice William O. Douglas. Initially, he was often

In *Rasul*, the question is: Do the courts of the United States lack jurisdiction to review the legality of indefinite detention of foreigners by the United States military outside the United States? The answer of the majority is negative, because these foreigners have the “privilege of litigation” in U.S. courts, unaffected by their status as prisoners or detainees.³³⁵

The court’s answer is theoretical only, the merits of the petition are not addressed. The precedential problem was the 1950 decision of *Johnson v. Eisentrager*,³³⁶ which Justice Stevens first dis-

the bridge between the last of the old “liberal” court (Justices Brennan, Marshall, and Blackmun) and the new Burger-Rehnquist Court. He wrote the majority opinion reviewing the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment in the privilege to travel for welfare recipients in *Saenz v. Doe*, 520 U.S. 489 (1999). It is not unfair to say that Justice Stevens has not become more liberal, rather, the Court has become more conservative, thus he has become the Great Dissenter. Some of his dissents are not only notable but noble, others are quite blunt and confrontational. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Bush v. Gore*, 531 U.S. 98 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Printz v. United States*, 521 U.S. 878 (1997); *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976). His maritime law dissents have also been remarkable. See *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743 (2002); *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Carnival Cruise Lines v. Shute*, 499 U.S. 603 (1991). Now, as senior associate justice he assigns the writing of opinions in which the Chief Justice is in the minority. See Symposium: The Jurisprudence of Justice Stevens, 74 *FORD. L. REV.* 1557-2369 (2006).

335. *Rasul*, 542 U.S. at 485. Shafiq Rasul, a British subject, was arrested by an Afghan warlord and handed over to U.S. forces and transported to Guantanamo in January 2002.

336. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), twenty-one Germans (possibly civilians) were sent to assist their Japanese ally with intelligence work in the war in China. They continued that cooperation after the surrender of Germany (May 8, 1945). At the end of the Pacific war in August 1945, they were captured by the Chinese Army of Chiang Kai-shek and turned over to the U.S. Army unit operating in China. A U.S. military commission was convened at Shanghai, wherein the Germans were put on trial for violation of the laws of war, convicted, and sentenced to prison. The U.S. Army then transported the Germans to the Landsberg Prison, Bavaria, in the American Zone of Occupation of Germany to serve their sentences with other Nazi war criminals. Counsel for these German prisoners sought habeas corpus from the United States District Court for Washington, D.C.; the District Court denied the writ, but the Court of Appeals reversed. Defendant was the Secretary of Defense as the legal custodian. The opinion was by Justice Jackson, U.S. chief prosecutor at the Nuremberg War Crimes Trial in 1945-1946. The Supreme Court’s holding was:

We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.

339 U.S. at 785.

Justice Black’s dissent was concurred in by Justices Douglas and Burton. Justice Black took the high ground of Constitutional supremacy:

tinguished on the facts and then extinguished on the law.

The *Rasul* petitioners were nationals of nations friendly to the United States (Australia, Great Britain and Kuwait), whereas the *Eisenstrager* petitioners were from a nation at war with the United States (Germany); the petitioners deny having committed any offenses against the United States, whereas the *Eisenstrager* petitioners were convicted of war crimes;—the petitioners had not been charged with any offenses in two years of detention, whereas the *Eisenstrager* petitioners had been tried and convicted; and the petitioners are imprisoned in a base over which the United States exercises exclusive jurisdiction and control, whereas the *Eisenstrager* petitioners were imprisoned in an enemy nation under military occupation.³³⁷ The opinion distinguished the basis of *Eisenstrager* as the constitutional right to habeas corpus, whereas in *Rasul* the Court dealt with the habeas corpus statute³³⁸ and its previous interpretation in *Ahrens v. Clark*,³³⁹

Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. For our people “choose to maintain their greatness by justice rather than violence.” [citing the Roman historian Tacitus]. Our Constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. *Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress.

339 U.S. at 798.

337. *Rasul*, 542 U.S. at 476.

338. 28 U.S.C. § 2241-2255 (Supp. 2005) (formerly 28 U.S.C. 452 *et seq.*).

339. 335 U.S. 188 (1948). The petitioners were 120 German nationals, living in the United States at the outbreak of the War with Germany (December 11, 1941) and accordingly, enemy aliens. They were being held at Ellis Island in New York Harbor awaiting deportation to Germany. Pursuant to the Alien Enemy Act of 1798, 50 U.S.C. § 21, the President issued a removal order (Proclamation No. 2655 of July 14, 1945, 10 Fed. Reg. 8947). Petitioners hope to avoid return to occupied and devastated Germany by release from Ellis Island under habeas corpus, filed in the U.S. District Court for the District of Columbia against the Attorney General. The District Court dismissed, and the Court of Appeals affirmed.

Justice Douglas narrowed the issue to the jurisdiction of a United States court to consider a writ for habeas corpus from petitioners *outside* the district. Reviewing the history of the 1867 statute that added the words, “within their respective jurisdictions” to the earlier statutory provisions, thus the Ellis Island petitioners could not seek the writ in the District of Columbia.

Justice Rutledge, for whom John Paul Stevens served as a law clerk, wrote a dissent to which Justices Black and Murphy joined. The dissent says that the majority “cuts much more sweepingly at the roots of individual freedom by its decision upon the jurisdictional issue than could any disposition of those issues. The decision attenuates the

which was the governing precedent at the time of *Eisenstrager*. *Ahrens* held that the habeas corpus statute required that the petition must be filed in the district court where the petitioners are confined. Twenty-five years later, the Court overruled *Ahrens* in *Braden v. 30th Judicial Circuit Court of Kentucky*,³⁴⁰ reinterpreting the habeas corpus statute to require that the court issuing the writ of habeas corpus must have jurisdiction over the *custodian* of the petitioner. Thus, *Eisenstrager* has lost most of its force.

Having determined the court's statutory jurisdiction, Justice Stevens then considered the "longstanding" presumption against the extraterritorial reach of a statute. He found that the presumption was inapplicable because this was *not* an extraterritorial application of a statute since the Guantanamo lease agreement conferred, "complete jurisdiction and control" over the Naval Base to the United States. Cuba's ultimate sovereignty became irrelevant.

Further, Justice Stevens held that the jurisdiction over alien detentions is also correct because aliens have had the privilege of litigation in our courts since the Alien Tort Claims Act of 1789.³⁴¹

Justice Stevens' opinion sufficed for Justices Breyer, Souter, O'Connor and Ginsburg, but Justice Kennedy could not accept the reasoning based on *Braden* that opened the federal courts to all types of persons located outside the United States, thus his concurrence is narrowed to indefinite pre-trial detention at Guantanamo,³⁴² a weaker case of military necessity because of the distance from hostilities and the absence of proceedings.³⁴³

Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Thomas, fears that the floodgates have been opened by the carefree majority who have sprung a trap on the warrior government so that Guantanamo becomes a foolish place to

personal security of every citizen . . . [by] a narrow and rigid territorial limitation upon issuance of the writ." 335 U.S. at 194.

For the connection between Justice Stevens's *Rasul* opinion and Justice Rutledge's *Ahrens* dissent, see Joseph Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence From World War II To the War on Terror*, 92 VA. L. REV. 501 (2006).

340. 410 U.S. 484 (1973). There are no international aspects to this case. The Court revised the statutory language in a case where a prisoner in Alabama sought habeas corpus in Kentucky.

341. *Rasul*, 542 U.S. at 480-85.

342. *Id.* at 485-86.

343. *Id.* at 487.

have housed alien wartime detainees.³⁴⁴ He further questions the reliance on U.S. jurisdiction at Guantanamo, since it is not the “sovereign territory” of the United States.³⁴⁵ He puzzled at the wrenching departure from the *Eisenstrager* precedent and concluded that the majority has produced a potentially harmful effect upon the nation’s conduct of a war.³⁴⁶

There may have been a practical effect of *Rasul* as the Department of Defense established the *Combatant Status Review Tribunal*³⁴⁷ to advise commanders on continued detention of Guantanamo prisoners. Furthermore, procedures to establish military commissions to determine criminal charges against detainees were begun, leading to the 2006 decision in *Hamdan*.³⁴⁸ Shafiq Rasul was released for return to the United Kingdom in March 2004 before the oral argument.

Decided on the same day with *Rasul* were two other “enemy combatant” cases: *Hamdi v. Rumsfeld*³⁴⁹ and *Rumsfeld v. Padilla*.³⁵⁰ Neither case dealt with a Guantanamo detainee and both petitioners were U.S. citizens rather than aliens. Nevertheless, *Hamdi* has a due process issue that also affects proceedings at Guantanamo whether in the CSRT or the military commission—the neutral decision maker.³⁵¹

344. *Id.* at 488.

345. *Id.* at 497-98.

346. *Id.* at 498-501.

347. *See infra* note 405.

348. *See infra* note 398.

349. 542 U.S. 507 (2004).

350. 542 U.S. 426 (2004).

351. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the defendant, Yaser Esam Hamdi, a U.S. citizen born in Louisiana in 1980, moved with his family to Saudi Arabia as a child. By 2001, he was living in Afghanistan. At some point in that year, following the attacks on September 11, 2001 he was seized by members of the Northern Alliance and was eventually turned over to the U.S. military. He was initially detained and interrogated at Guantanamo Bay. Upon learning that he was an U.S. citizen, he was transferred to a naval brig in Norfolk, Virginia and then to a brig in Charleston, South Carolina. *Id.* at 510. The Government contended that Hamdi was an “enemy combatant,” and that his status as such “justifie[d] holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process [was] warranted.” *Id.*

Justice O’Connor wrote for the majority (Chief Justice Rehnquist and Justices Kennedy and Breyer—with concurrences in the judgment by Justices Souter and Ginsburg).

The majority opinion did not decide whether the Executive has plenary authority to detain pursuant to Article II, Executive Power, because it agreed with the Government’s alternative position that Congress had in fact authorized Hamdi’s detention through the Authorization for the Use of Military Force (“AUMF”). Citing *Ex parte*

Quirin, the Court stated that “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” *Id.* at 518. In addition, the Court stated that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant,” as stated in *Ex parte Quirin. Id.* at 519.

However, Justice O’Connor recognized that “[e]ven in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.” The Court noted that all parties to the suit agree that “absent suspension, the writ of habeas corpus remains available to every individual detained within the United States” and that suspension of the writ had not occurred. *Id.* at 525. Here, the “facts” pertaining to Hamdi’s detention are far from “undisputed,” as the Government asserted. The Government’s assertion that Hamdi resided in Afghanistan at the time of his seizure is insufficient by itself to justify his characterization as an enemy combatant.

The Court next uses the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test to discuss the Government’s interest versus “the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law.” The Court holds that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi*, 542 U.S. at 529-31. The Court next proposes a “burden-shifting scheme” in which “once the Government puts forth credible evidence that the habeas petition meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.” The Court believes that this system would protect both a defendant’s liberty interest and the Government’s wartime functions. The Court stated that this process does not apply to initial battlefield captures but rather is due only when “the determination is made to *continue* to hold those who have been seized.” *Id.* at 532-34.

The Court’s holding necessarily rejects “the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.” Furthermore, “unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check in the Executive’s discretion in the realm of detentions.” *Id.* at 535-36.

While Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a United States citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

Justice Souter, concurring in part, dissenting in part, and concurring in the judgment, agreed with the plurality’s rejection of a limit on the exercise of habeas jurisdiction in this case. However, he goes further to say that “[t]he Government has failed to demonstrate that the [AUMF] authorizes the detention complained of here.” In fact, Souter believes that “[i]f the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.” The Non-Detention Act, 18 USC § 4001 (a), “bars imprisonment or detention of a citizen ‘except pursuant to an Act of Congress.’” In Souter’s view, “it suffices that the Government has failed to justify holding [Hamdi] in the absence of a further act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001 (a) is unconstitutional.” *Hamdi*, 542 U.S. at 539-54.

Justice Ginsburg joined in Justice Souter’s opinion. *Id.* at 539. Justice Scalia’s dissent was joined by Justice Stevens, *id.* at 554-78, while Justice Thomas also filed a dissent. *Id.* at 578-99.

VI. THE USE OF MILITARY COMMISSIONS AT GUANTANAMO

Military Commissions to fix responsibility for criminal offenses and assess penalties are an essential part of combat operations conducted in populated areas being occupied by military forces. The reason for such commissions is military necessity.³⁵² They originated at a time when customary international law allowed the use of military force in declared wars. Now, Article 2(4) of the U.N. Charter prohibits nations from using force in international relations and Article 42 vests in the Security Council the authority to “take such action . . . as may be necessary to maintain or restore international peace and security”

Cases involving genocide, war crimes and crimes against humanity are referred to the International Criminal Court (“ICC”) at The Hague.³⁵³ In the future, however, when the Security Council authorizes enforcement of its decisions under Article 42 of the Charter,³⁵⁴ or when some other form of peacekeeping or peacemaking involving military force has been sanctioned by the

Yaser Hamdi was released for return to Saudi Arabia in October 2004. See *Stripped of US Nationality, Yasser Hamdi is Home*, ARAB NEWS, Oct. 12, 2004.

352. Military necessity is an inexact description of the professional skills needed to analyze an enemy's strengths and abilities in order to overcome them and compel surrender; the wisdom to distinguish military from non-military targets and to decide that a situation requires a military commission are among the skills.

353. The International Criminal Court became a reality on July 1, 2002, when the treaty creating it entered into force. The post-Second World War Trials at Nuremberg and Tokyo of the major war criminals for international crimes (planning or waging an aggressive war, traditional war crimes, and crimes against humanity) were reviewed in U.N. debates in the 1990s as the news media reported daily on human rights outrages and war crimes of exceptional and fiendish brutality in Bosnia and Kosovo. Eventually, the General Assembly called for a diplomatic conference to create the International Criminal Court and define the substantive law of the court. At the Rome Conference in 1998, the United States insisted on recorded votes instead of consensus; the treaty was approved by a vote of 120 yes and 7 no (United States, China, Israel, Iraq, Libya, Qatar, and Germany). Despite his negative vote in 1998, President Clinton ordered the treaty to be signed, subject to ratification, on December 31, 2000. The new Bush Administration reversed this policy and “unsigned” the treaty while pursuing bilateral agreements to immunize U.S. military members from being subject to the new court. One hundred and four nations are full members of the court, which will hear its first case later this year.

354. U.N. Charter art. 42.

Should the Security Council consider that measures provided for in Article 41 [economic sanctions] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

General Assembly or the Security Council,³⁵⁵ and crisis situations develop in which large numbers of people have to be tried expeditiously for crimes that they have committed, it is conceivable that the United Nations might convene military commissions for these trials, as an alternative to the ICC.

Absent from this discussion are the International Military Tribunals convened by the victorious allies at Nuremberg³⁵⁶ and at Tokyo³⁵⁷ in 1945 to deal with the major war criminals of the Second World War. Those unique proceedings were created by the agreement of the victorious allied powers and were outside the reach of U.S. laws.³⁵⁸

The court-martial³⁵⁹ has usually been understood to involve accused members of the convening authority's Armed Forces,

355. Uses of military force, less than enforcement under Chapter VII of the Charter, are undertaken pursuant to an unofficial amendment often described as "Chapter VI^{1/2}," beginning with truce supervision in Israel and Kashmir in 1948 and 1949, then, because of the stalemate of the Cold War Security Council, moving to the General Assembly under the "Uniting for Peace" Resolution, G.A. Res. 337A (Nov. 3, 1950), for the Suez Crisis, continuing through a series of thirty-eight peacekeeping operations during the Cold War and after in places such as the Congo, Cyprus, Lebanon, Bosnia, Kosovo, Sierra Leone, Cambodia, and Western Sahara. Since the end of the Cold War, peacemaking under Chapter VII has been authorized by the Security Council in Iraq, Somalia, Rwanda, Haiti, East Timor, Bosnia, and Kosovo.

356. Nuremberg Trials of the Major War Criminals were authorized by the decision of the four victorious allies in the London Agreement of August 8, 1945. The results were reviewable only by the Four-power Allied Control Council. Nineteen criminals were convicted and twelve were hanged. See TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS* 587-99 (1990).

357. Tokyo War Crimes Trials were authorized by the Supreme Commander for Allied Powers in the Pacific (General Douglas A. MacArthur U.S.A.) in accordance with the Potsdam Agreement of the Allied Powers of July 26, 1945. Twenty-five were convicted and ten were hanged. See generally PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951* (1979); SONIA M. ZAIDE ET AL., *THE TOKYO WAR CRIMES TRIALS: INDEX AND GUIDE* (1981).

358. In *Hirota v. MacArthur*, 335 U.S. 876 (1948), an accused of the Tokyo major war crimes trial sought review of the proceedings by petition for habeas corpus. Four justices refused to hear the case (Chief Justice Vinson and Justices Burton, Frankfurter, and Reed). Four justices (Black, Douglas, Murphy, and Rutledge) would hear the case. Justice Jackson, Chief U.S. Prosecutor at the Nuremberg major war crimes trial, normally recused himself from war crimes issues, but to break the tie voted to hear the petition, which was denied.

359. Superior commanders in the field or at military bases are granted the right to convene courts-martial to dispose of charges of crime against members of the military subject to the orders of the convening authority. The only law to be applied is the *Uniform Code of Military Justice*. An investigative body to determine facts and make recommendations is a *Court of Inquiry*; where prosecution of military personnel is likely, provisions of UCMJ will apply. As compared to boards of investigation, the Court of Inquiry usually has subpoena power like courts-martial. See generally Richard V. Meyer,

whether voluntary or involuntary inductees, whereas the military commission³⁶⁰ is more indefinite—proceedings somehow connected with military operations and with wartime crimes committed by accused persons, who are not members of the military organization holding the trial. It is not unfair to observe that in military proceedings, the goals are speed and efficiency. While the civilian legal system subscribes to these objectives, meeting the requirements of truth and justice, often a time-consuming task, takes precedence.

The issue has been and still is whether trials by United States military commissions³⁶¹ are exempt from the rules and procedures that Americans identify with a fair trial. While this section does not argue for the abolition of military commissions, it does contend that any military commission of the United States is governed by the Uniform Code of Military Justice, the Constitution of the United States, and the Geneva Conventions of 1949 to which the United States is a ratifying party.

There has usually been a foreign element in the use of military commissions. In the 1846-1848 Mexican War, thousands of members of the United States Army and Navy were present in Mexico for twenty-seven months.³⁶² The military commission

When A Rose Is Not A Rose: Military Commissions v. Courts Martial, 5 J. INT'L CRIM. JUST. 48 (2007).

360. A Military Commission is a body whose procedures and rules of evidence are modeled on the law applicable to courts-martial, but not limited to the UCMJ; it may include the law of war and martial law. The commission usually consists of military officers appointed by the convening authority. See Robinson O. Everett & Scott L. Siliman, *Forums For Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994); see also LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (2005).

361. It is likely that General Winfield Scott (1786-1866), in command of the invasion force that captured Mexico City in the US-Mexican War, was the first to use the expression "military commission" in his General Orders No. 20 and 287 of 1847. See David Glazier, *Kangaroo Courts or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2028 (2003); see also JOHN S.D. EISENHOWER, *SO FAR FROM GOD: THE U.S. WAR WITH MEXICO, 1846-1848*, at 266, 303-07 (1989). Scott was trained in law at William and Mary College and as an apprentice in Virginia before joining the Army during the War of 1812. See JOHN S.D. EISENHOWER, *AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT* 2-19 (1997).

362. The Mexican War, in the U.S. view, began with an attack by the Mexican army on U.S. forces south of the Nueces River, Texas, on April 25, 1846. The Republic of Texas became independent of Mexico in the war of independence (Feb-Oct. 1836); nine years later the Republic was annexed to the United States by Joint Resolution of Congress; a treaty would not have achieved the required two-thirds approval. See EISENHOWER, *SO FAR FROM GOD*, *supra* note 361, at 13-14, 17-26. No treaty between Mexico

convened there dealt with crimes that occurred during the lengthy interaction between the American military and the Mexican people deep inside of Mexico.³⁶³ The only previous foreign experiences of the U.S. military were much briefer: the disastrous and unsuccessful invasion of Canada from July 12 to No-

and Texas or the United States had fixed the boundary. Texas claimed the Rio Grande as the southern border; Mexico claimed the more northerly Nueces River. See Ronald C. Lee, Jr., *Justifying Empire: Pericles, Polk, and a Dilemma of Democratic Leadership*, 34 *POLITY* 503 (2002). President Polk asked Congress to declare war, but the Congressional Action declared that war already existed by action of Mexico (House: 174 yes, 14 no on May 11, Senate: 40 yes, 2 no, 3 abstain on May 13). See Act of May 13, 1846, ch. 16, 29th Cong., 9 Stat. 9 (1846); see also EISENHOWER, *supra* note 361, at 65-68. The war ended with the peace treaty of Guadalupe-Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Bevans 791, the treaty having been compelled by the fact that the U.S. Army had occupied the capital, Mexico City, on Sept. 14, 1847, and the principal port, Vera Cruz, on March 27, 1847. See EISENHOWER, *supra* note 361, at 345-58. During an earlier armistice (Aug. 24-Sept. 6, 1847), a peace treaty had been negotiated, but was rejected by the Mexican Congress and the war was resumed with the U.S. assault on Mexico City. See EISENHOWER, *supra* note 361, at 328-34; see also BERNARD DeVOTO, *THE YEAR OF DECISION, 1846*, at 131-91 (1950).

363. The expeditionary force under General Winfield Scott had invaded a country where different languages and customs could create unexpected problems with the civilian population. Thus, Scott's General Order No. 20 dealt with offenses by the U.S. military against Mexicans—especially rape, assault, murder, robbery, and larceny—until Congress could legislate specifically on the subject. Nevertheless, the procedural provisions of the U.S. Articles of War governed. See Glazier, *supra* note 361, at 2027-34. During the existence of the war, the Military Commission was also used against Mexican nationals accused of crimes against American military personnel. *Id.*

An unusual situation involved a unit of the Mexican army, The San Patricios, originally recruited from Irish immigrants living in Texas and northern Mexico, to protect the Roman Catholic faith of most Mexicans from the aggressive Protestant proselytization of southern U.S. residents who were moving into the Republic of Texas with their slaves. See Richard C. Jones, *Cultural Diversity in a "Bicultural" City: Factors in the Location of Ancestry Groups in San Antonio*, 23 *J. CULT. GEO.* 33, 37 (2006).

After the war began, the U.S. Army and state militias heavily recruited recent Irish immigrants who had fled the deadly privation and disease of the Potato Famine (1845-1850) in Ireland. Fierce punishments for excessive drinking, or discourteous language to superiors and discriminatory treatment of their Catholic faith disillusioned many of those Irish troops, who deserted their units in Mexico and went over to the Mexican army unit commanded by John Riley, the San Patricios, which fought in the Mexican defeats at Monterey, Cerro Gordo, and Churubusco. See Rosemary King, *Border Crossings in the Mexican War*, 25 *BILINGUAL REV.* 63, 107 (2000). Captured San Patricios were severely treated by the U.S. Military Tribunals: those who deserted *before* the war began were branded on the face with the letter "D" and imprisoned at hard labor; those who deserted *after* the war began were condemned to death as traitors; thirty were hanged at the same moment in front of the U.S. Army at Mexico City on September 12, 1847. Mexico rewarded those who survived with land grants. See PETER F. STEVENS, *THE ROGUES' MARCH: JOHN RILEY AND THE ST. PATRICK'S BATTALION* (2005). Novelistic treatment of their story is found in the film *The San Patricios* (San Patricio Productions 1996).

vember 23, 1812³⁶⁴ and Andrew Jackson's invasion of Spanish Florida in April and May 1818 during the Seminole War.³⁶⁵ In Jackson's case, he found two British traders, Alexander Arbuthnot and Robert Armbrister, among his Indian enemies. Jackson held a trial of the two British subjects in Spanish Florida in a court or "military commission" under the law of war. Found guilty, Arbuthnot was hanged and Armbrister was shot. Despite fierce criticism of him by members of Congress and the Administration, Jackson was never punished for his actions.

Military commissions were used inside the United States during the Civil War³⁶⁶ when eleven states formed a foreign nation, the Confederate States of America, which was never recog-

364. The invasion of Canada on three fronts was a total disaster: the western army surrendered without a fight; the Niagara-front's three incursions ended with the Battle of Lundy's Lane and ignominious retreat; and the attack on Montreal never materialized when the N.Y. militia refused to cross the Canadian border. Later, the British burned Washington, but that army was defeated by Andrew Jackson at New Orleans. See WALTER BORNEMAN, 1812: THE WAR THAT FORGED A NATION (2004). *But see* FRANCIS BEIRNE, THE WAR OF 1812 (1949) (concluding that War of 1812 was an absurd and insignificant war).

365. Congress had frequently authorized the use of military force against native tribes inside and outside the borders of the United States. See Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 110 HARV. L. REV. 2047, 2073-74 (2005). The Seminole War was authorized by Act of March 3, 1819, ch. 93, 15th Cong., 3 Stat. 523 (1819). See Bradley & Goldsmith, *supra*, at 2074. The same Congress authorized force against slave traders and pirates. See An Act in Addition to the Acts Prohibiting the Slave Trade, ch. 101, 15th Cong., 3 Stat. 532 (1819); An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, 15th Cong., 3 Stat. 510 (1819); see also ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE 1767-1821, at 347-98 (1977).

366. See *Ex Parte Quirin*, 317 U.S. 1, 25-27 (1942). Authorization for military commission trials came indirectly through the 1862 statute dealing with the suspension of habeas corpus and which also created the Office of Judge Advocate General of the Army, to review, "the records and proceedings of all courts martial and military commissions . . ." Act of July 17, 1862, ch. 201, 37th Cong., 12 Stat. 597 (1862). The "border" states where slavery existed along with competing slave holders and abolitionists became a critical area where Lincoln and the military sought to prevent secession by martial law, military action and suspension of habeas corpus. The situation varied in the states of Delaware, Maryland, Kentucky, the portion of Virginia which would separate in 1863 from the seceded state and become West Virginia, Missouri and in the southern portions of the Ohio River states—Ohio, Indiana, and Illinois. See generally Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353 (1993).

During the early years of the war, until the Union victory at Gettysburg on July 4, 1863, and the almost simultaneous victory at Vicksburg on July 4, 1863, martial law and military commissions flourished, leading to the Supreme Court cases of *Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863), and *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See *infra* notes 371-76.

nized by the international community.³⁶⁷

The reputation of military commissions was permanently stained in the trial by military commission of the conspirators in the assassination of President Lincoln after the end of the Civil War.³⁶⁸ The abusive treatment, farcical procedures, and the

367. See generally Charles M. Hubbard, *James Mason, the "Confederate Lobby" and the Blockade Debate of March 1862*, 45 CIVIL WAR HIST. 223 (1999). In the seceded states, the Union army occupied Western Tennessee in early 1862 and the Navy took New Orleans in April 1862, but the first Union effort to take Richmond, Virginia, the Confederate capital, known as the Peninsular Campaign, failed after five months in 1862; it resumed under Grant in 1864.

The full scale Union invasion of the South came from Eastern Tennessee into Georgia at Atlanta, from May 1864, crossing the state in the march to the sea of General Sherman and moving north to Charleston. Martial law accompanied these actions.

Opposition to the military draft leading to the Draft Riots of July 13-16, 1863 in New York City, should have involved a Presidential Military Commission to be applied to, ". . . all rebels and insurgents, their aiders and abettors within the United States and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels. . ." Presidential Proclamation of Sept. 24, 1862. No such trials were held and Congress disapproved the provision. State criminal law trials disposed of the New York City incendiaries' cases. See generally JAMES MCCAGUE, *SECOND REBELLION: NEW YORK CITY DRAFT RIOTS OF 1863* (1968); BARNET SCHECTER, *THE DEVIL'S OWN WORK, THE CIVIL WAR DRAFT RIOTS AND THE FIGHT TO RECONSTRUCT AMERICA* (2005). Many novels have used the draft riots: *Bread and Circus* (1987), by Morris Renek, and *Paradise Alley* (2002), by Kevin Baker are good examples. The riots also figure in the 2004 film *Gangs of New York*.

368. Confederate General Robert E. Lee surrendered his army to Union General Ulysses S. Grant on April 9, 1865. President Lincoln was shot at Ford's Theater in Washington on April 14 at about 10:15 p.m.; he died April 15 at 7:22 a.m. The accused murderer, John Wilkes Booth, died outside Bowling Green, Virginia on April 26. Eight persons, alleged conspirators, were arrested by the military around Washington. President Johnson appointed the Military Commission on May 1, 1865 after receiving the written opinion of Attorney General Speed, 11 Op. Atty. Gen. 297 (1868). The arraignment took place on May 10, in the Old Penitentiary building (the building no longer exists; the site is within the National War College) where the public trial was held during the next seven weeks. See generally EDWARD STEERS, JR., *THE TRIAL: THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS* (2003).

The prosecution theory was a massive Confederate conspiracy for which manufactured evidence and evidence under torture were used to involve Jefferson Davis and other Confederate leaders in a scheme to produce chaos in the Union by eliminating the federal leadership. There were clearly two conspiracies involving John Wilkes Booth: to kidnap Lincoln in March 1865 and to murder Lincoln in April 1865. Of the eight defendants at the trial, three were obviously guilty: Lewis Powell (alias Payne) who attempted to kill Secretary of State Seward; George Atzerodt, assigned to kill Vice President Johnson but unable find him and David Herold, who assisted Booth's escape and was apprehended with him. Three were undoubtedly innocent of the murder conspiracy: Edward Spangler, stagehand at Ford's Theater; Dr. Samuel Mudd, who set Booth's broken leg; and Mary Surratt, who kept the boarding house where Booth met his fellow assassins including her son John Suratt, who escaped. Two childhood friends

rush to execute the innocent with the guilty exacted vengeance but not justice.

Residents of the former Confederacy were also subjected to trials by military commission during the military occupation of the South in the Reconstruction Period (1865-1877).³⁶⁹

of Booth were Confederate army deserters and involved in the kidnap conspiracy: Samuel Arnold and Michael O'Loughlin. See STEERS, *supra*, xix, xxix-xxxvi.

The verdict was announced on June 30, 1865, and the four defendants sentenced to death (Powell, Herold, Atzerodt and Mrs. Surratt) were hanged on July 7, 1865; the four defendants sentenced to imprisonment were sent to the Dry Tortugas Prison in Florida. The Military Commission of nine officers had three major-generals, four brigadier generals, and two colonels. Judge Advocate General of the Army, Joseph Holt, prosecuted. The defense involved five attorneys and Senator Reverdy Johnson, a former Attorney General, who defended President Johnson in the impeachment trial three years later. The three survivors of the Dry Tortugas Prison (Spangler, Mudd, and Arnold) were pardoned by President Johnson in February 1869. See STEERS, *supra*, xvii, xlv. Hostile criticism of the Assassination Commission is found in: F. BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940); Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50 FED. LAW 24 (2003); Michal Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W.L. REV. 43 (2002); see also WILLIAM HANCHETT, THE LINCOLN MURDER CONSPIRACIES (1983); GUY W. MOORE, THE CASE OF MRS. SURRETT (1954); cf. WILLIAM H. REHNQUIST, ALL THE LIBERTIES BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); EDWARD STEERS, JR., BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN (2001); John Cuiran, *Lincoln Conspiracy Trial and Military Jurisdiction Over Civilians*, 9 NOTRE DAME L. REV. 26 (1933).

A similar travesty of a mock trial occurred on November 10, 1865 in the military commission that hanged Captain Henry Wirz, C.S.A., commandant of the notorious Confederate Prisoner of War Camp at Andersonville, Georgia where 13,000 Union soldiers of 45,000 prisoners had died as the result of starvation, disease, exposure, and savage brutality. See Michelle Garcia, *Prison Atrocities Close to Home, Far From This Century*, WASH. POST, Oct. 13, 2006, at A2. The commission president was Major General Lew Wallace, USA, (1827-1905), a member of the military commission that tried the Lincoln assassination conspirators (and author of the novel *Ben Hur*). Command responsibility for the savage brutality of the guards clearly rested on Wirz's shoulders, but he was also convicted of thirteen specific murders for which there was no credible evidence. See Lewis Laska & James Smith, *Hell and the Devil: Andersonville and the Trial of Captain Henry Wirz, CSA 1865*, 68 MIL. L. REV. 79 (1975); see also OVID FUTCH, HISTORY OF ANDERSONVILLE PRISON (1968). The Andersonville trial has been dramatized by Sol Levitt in *The Andersonville Trial* (1959); its 1970 television production won an Emmy Award.

369. Lincoln's Presidential Reconstruction Plan of amnesty and quick reunion of the seceded states was being carried out by President Johnson before the Congress (elected in 1864) assembled in December, 1865. Congress, however, rejected the Lincoln plan and substituted the Radical plan to treat the seceded states as "Conquered Provinces," occupied and governed by the U.S. Army and not ready for readmission to the Union. The Radical Plan was passed over the veto of President Johnson. Acts of 1867, ch. 153, § 3, 14 Stat. 428. Instead of ten states, the South became five military districts under martial law administered by military commissions. An even more radical Congress was elected in 1866, which overrode vetoes and attempted to remove the President by an impeachment that failed by one vote in the Senate. The U.S. Army was not removed from occupation duties until after the disputed election of 1876, when Presi-

The Supreme Court steered clear of the emergency measures abrogating civil liberties during the Civil War and during the period that followed the Lincoln assassination,³⁷⁰ but the Supreme Court took vigorous action after the war when a military commission at Indianapolis, four hundred miles from the nearest war zone, ordered the death by hanging of a well-known Democratic politician, Lambdin P. Milligan, one of the leaders of the anti-war Democrats labeled "copperheads."³⁷¹ The Democratic Party had fractured in the 1860 presidential election, when the northern Democrats nominated Senator Stephen A. Douglas of Illinois and the southern Democrats nominated John A. Breckinridge of Kentucky, ensuring Lincoln's election. By 1864, without the slaveholding Confederates, the Democratic party reemerged behind General George McClellan at its Chicago Convention on August 29, 1864, with an anti-war platform demanding immediate cease-fire and restoration of the union. Milligan was clearly opposed to President Lincoln. He was accused of joining a secret society, The Order of American Knights, and conspiring with its members to overthrow the gov-

dent Hayes, selected by the Electoral Commission, withdrew the Army in April 1877 as part of the deal that made him president. Participation of five justices in the Electoral Commission may have made the Court wary of cases arising under the military occupation.

Military commission trials were first used during the War, essentially in war zones or areas likely to become war zones (slave states not seceded, non-slave-holding border states and occupied seceded states). The accused were usually transient residents of slave states, Confederate sympathizers, anti-war Democrats, draft resisters, and actual spies and traitors. The actual number is unclear, but there were several thousands.

370. The Supreme Court was suspected of treason during most of the war because of its 1857 *Dred Scott* Decision and the political sympathies of its members: Chief Justice Taney of Maryland, a Jackson Democrat; Justice Campbell of Alabama, who resigned his seat to become Secretary of War in the Confederate States Cabinet; John Catron of Tennessee, Benjamin Curtis of Massachusetts, and Nathan Clifford of Maine were Democrats, appointed by Democratic Presidents. See A. Leon Higginbotham Jr., *Bondage, Freedom, and the Constitution: The New Slavery Scholarship*, 17 *CARDOZO L. REV.* 1695 (1996). President Lincoln did not achieve a reliable Supreme Court until Congress created a tenth justice in 1863 and the death of Chief Justice Taney in October 1864. See DAVID MAYER SILVER, *LINCOLN'S SUPREME COURT* 185 (1998). The different political backgrounds were reflected in *Ex Parte Vallandigham*. See 68 U.S. (1 Wall) 243 (1864) (denying Supreme Court jurisdiction). Clement L. Vallandigham, an Ohio Democratic Congressman, was a candidate for Governor in 1863; his anti-war speeches and pro-Southern sympathies led to his trial and conviction by military commission. See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 162-74 (1991).

371. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Lambdin P. Milligan (1812-1899) was a lawyer and politician from Huntington, Indiana. He was an outspoken opponent of the war and a Southern sympathizer. *Id.*

ernment of the United States. The offenses were alleged to have been committed between October 1863 and August 1864. He was convicted by the military commission that had been convened on October 21, 1864 and given a death sentence — forwarded to President Johnson for confirmation, at which time Milligan sought habeas corpus from the Indiana federal circuit court, whose two judges divided on the issue that was then brought to the U.S. Supreme Court.³⁷²

The writ of habeas corpus was granted April 10, 1866, although the written opinion supporting the writ did not follow until eight months later. Presumably *Vallandigham* was overruled. Justice Davis's language is absolutely clear: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."³⁷³

Justice Davis, a Lincoln appointee, had been Lincoln's campaign manager in 1860. The Court was unanimous concerning the grant of the writ in the case of this military commission.³⁷⁴ The five-justice majority also held that neither the President nor Congress could authorize such a military commission.³⁷⁵ The four-justice minority opinion by Chief Justice Salmon P. Chase believed Congress could authorize such a commission.³⁷⁶ This case was the one whose precedential value had to be distinguished or ignored seventy-five years later in *Ex Parte Quirin*.³⁷⁷

Military Commissions were also used during the Indian Wars,³⁷⁸ during foreign expeditions in the Spanish-American

372. 71 U.S. at 114; see also A. NEVINS, 2 *THE WAR FOR THE UNION: THE ORGANIZED WAR TO VICTORY 1864-1865* 131-35 (1971).

373. 71 U.S. at 127.

374. *Id.* at 132.

375. *Id.* at 121-22. The majority was composed of Justices Clifford, Davis, Field, Grier, and Nelson.

376. *Id.* at 137. Chief Justice Chase, and Justices Miller, Swayne, and Wayne made up the minority.

377. 317 U.S. 1 (1942).

378. One Indian War Commission provided the spectacle of the simultaneous hanging of 38 Dakota Indians at Mankato, Minnesota on December 26, 1862 after the military trial that condemned 303 to death, the classic example of white man's injustice that eventually led to the Battle of Wounded Knee, December 29, 1890, where the U.S. Army massacred the Sioux Ghost Dancers. See Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Justice*, 43 *STAN. L. REV.* 13, 13 (1990); see also John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 *Mont. L. Rev.* 31, 31-33 (1991). See generally *Montoya v. United States*, 180 U.S. 261 (1901).

War,³⁷⁹ and during the First World War.³⁸⁰

The most widespread use of military commissions occurred during the Second World War, especially in Hawaii³⁸¹ (not yet a state) and in areas outside the United States.³⁸²

The use of the military commission in the United States in

379. In the Philippines, Spanish authority ended in early 1899, as in Cuba, and the U.S. military governor used military commissions to deal with criminal offenses by and to citizens of the Philippines. See Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW. 41, 45 (2002); see also Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 226 (1996) (describing the Treaty of Paris and the end of Spanish rule in the Philippines).

380. In the First World War, lasting only 19 months for the U.S., where U.S. military forces were engaged in battle on the territory of our ally France, the military commission was not used until after the end of the war in the occupation of the Rhineland. There was no division of Germany into occupation zones as occurred after the Second World War. Allied threats to try the Kaiser and German officers for war crimes were never realized. The Kaiser remained in exile in neutral Holland until his death in 1941. The German Supreme Court conducted war crimes trials under German law at Leipzig with unsatisfactory results, in allied eyes, because of the defense of superior orders. No senior commanders were prosecuted. See Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 249, 251-52 (2002); see also Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Policy, and International Law*, 29 VAND. J. OF TRANS'L L. 119, 132-40 (1995) (describing Kaiser Wilhelm II's exile in The Netherlands and war tribunals in Leipzig).

381. After the Japanese aerial attack of December 7, 1941 on Pearl Harbor, the Army imposed martial law, approved by the Governor and President Roosevelt. Trials by military commission for violations of law and military orders by civilians were authorized by General Order No. 4 of December 9, 1941. Martial law and military government continued until October, 1944. See Jason Collins Weida, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397, 1417-20 (2004); see also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (condemning convictions by military commission). The Court declined to review Executive Order 9060 of Feb. 19, 1942 ordering the relocation of Japanese-American citizens and aliens. See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (convictions vacated, 828 F.2d 591 (9th Cir. 1987)). Congress established a Commission in 1980 on Wartime Relocation and Internment of Civilians and in 1988 approved the Civil Liberties Act authorizing payment of \$20,000 for each surviving detainee as a redress of grievances. See Michael A. Newton, *Harmony or Hegemony? The American military Role in the Pursuit of Justice*, 19 CONN. J. INT'L L. 231, n.68 (2004).

382. After the Second World War, military commissions accompanied the army in enemy countries: Germany, Italy, Austria, and Japan and in enemy-occupied countries: France, Korea, and the Philippines. See *In re Yamashita*, 327 U.S. 1 (1946); *Homma v. Peterson*, 327 U.S. 759 (1946).

At the conclusion of the International Military Tribunal at Nuremberg for major war criminals whose crimes were not confined to a single location, each of the occupying powers created a tribunal for the trial of war crimes by enemy military found in their zones. Trial and conviction of a U.S. dependent wife for the murder of her military husband before the U.S. Military Commission was upheld by the Supreme Court in *Madsen v. Kinsella*, 343 U.S. 341 (1952); see also *Everett v. Truman*, 334 U.S. 824 (1978) (denying motion for leave to file a petition for writ of habeas corpus). Worldwide, the

1942 for the trial of Nazi saboteurs is the authority offered in 2002 and later by the Bush administration for dealing with unlawful enemy combatants.³⁸³

Nevertheless, the precedential status of *Ex Parte Quirin*,³⁸⁴ remains questionable if applied to a situation other than that of the total war of 1941-1945.

President Roosevelt had consulted with Attorney General Francis Biddle about the Nazi saboteurs in the week before the issuance of Presidential Proclamation 2561.³⁸⁵ The military commission began its work on July 8 and continued to hear evidence

number of executions of the defeated axis is uncertain. In the American Zone of Germany, 1,814 war criminals were convicted and 450 were hanged.

383. See *Ex Parte Quirin*, 317 U.S. 1, (1942) (denying habeas corpus to petitioners held in custody for trial before a military tribunal). See generally J. Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345 (2002); J. Forrester and K. Barry, *Military Commissions: Meeting American Standards of Justice*, 49 FED. LAW 28 (2002); R.O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, 48 FED. LAW 20 (2001).

384. 317 U.S. at 1. Germany declared war on the United States on December 11, 1941, and the United States declared war on Germany on the same day. See Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 998 (2004).

On June 13, 1942 four German military men in civilian clothes, disembarked from an enemy submarine at Amagansett on Long Island, New York: Ernest Burger, George Dasch, Heinrich Heinck, and Richard Quirin all were English speakers who had lived in the United States. On June 17, 1942, four more German military men in civilian clothes landed from another submarine at Ponte Vedra Beach near Jacksonville, Florida: Herbert Haupt, Edward Kerling, Hermann Neubauer, and Werner Thiel, (Their official status in the German military was unclear.) They were also English speakers who had lived in the United States. All were trained in the use of explosives to disrupt shipyards, factories and military depots. Pursuant to a presidential order, and on the advice of the Attorney General, a military commission was to be convened for trial of the eight Germans under the law of war. See Proclamation No. 2561, July 2, 1942, 7 Fed. Reg. 5101, see also Joseph Thysell Jr., *Ex Parte Quirin: The Case for Military Commissions*, 31 S.U. L. REV. 129, 131-143 (2004) (describing the facts that lead to *Ex Parte Quirin*).

385. Denying Certain Enemies Access to the Courts of the United States, Proclamation 2561, 7 Fed. Reg. 5101 (July 7, 1942).

DENYING CERTAIN ENEMIES ACCESS TO THE
COURTS OF THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA

A PROCLAMATION

WHEREAS the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espio-

nage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 2d day of July, in the year of our Lord nineteen hundred and forty-two, [SEAL] and of the Independence of the United States of America the one hundred and sixty-sixth.

Franklin D. Roosevelt

By the President:

Cordell Hull,
Secretary of State;

see also 7 Fed. Reg. 5103 (July 7, 1942).

Commander in Chief of the Army and Navy

APPOINTMENT OF A MILITARY COMMISSION

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, and more particularly the Thirty-Eighth Article of War (U.S.C., title 10, sec. 1509), I, Franklin Delano Roosevelt, do hereby appoint as a Military Commission the following persons:

Major General Frank R. McCoy, President

Major General Walter S. Grant

Major General Blanton Winship

Major General Lorenzo D. Gasser

Brigadier General Guy V. Henry

Brigadier General John T. Lewis

Brigadier General John T. Kennedy

The prosecution shall be conducted by the Attorney General and the Judge Advocate General. The defense counsel shall be Colonel Cassius M. Dowell and Colonel Kenneth Royall.

The Military Commission shall meet in Washington, D.C. on July 8, 1942 or as soon thereafter as practicable, to try for offenses against the law of war and the Articles of War, the following persons:

and argument for the next three weeks.³⁸⁶

Ernest Peter Burger
George John Dasch
Herbert Hans Haupt
Henry Harm Heinck
Edward John Kerling
Hermann Otto Neubauer
Richard Quirin
Werner Thiel

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

Franklin D. Roosevelt
THE WHITE HOUSE
July 2, 1942

From June 17 to June 25, Winston Churchill visited President Roosevelt at Hyde Park and in the White House to resolve Stalin's demand for an invasion of France in Fall 1942, an impossibility in view of the planned invasion of North Africa in Operation Torch set for November. They also discussed the atomic weapons that the United States was developing in the Manhattan Project. Churchill learned of the disaster to British forces at Tobruk in Libya, and the United States rushed a flight of heavy bombers, destined for the Pacific to Cairo to rescue the British situation. After Churchill left, the President stayed for the first time at Camp David (then called Shangri-la) in the mountains of Maryland. *See* MARTIN GILBERT, *CHURCHILL AND AMERICA* 258-61 (2005); JON MEACHAM, *FRANKLIN AND WINSTON* 181-95 (2003); DORIS KEARNS GOODWIN, *NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II* 345-49 (1995).

386. The Commission met in secrecy at the Department of Justice in Washington on July 8, 1942 and thereafter until August 1. Despite a proper defense on legal grounds by an experienced trial lawyer, Kenneth Royall, the inevitable outcome was about to be reached when seven of the eight, excluding Dasch, petitioned the U.S. District Court for a writ of habeas corpus and claiming that military commissions lack jurisdiction over civilians while the courts are open and functioning. The writ was denied, and an immediate appeal to the U.S. Supreme Court, then on summer recess, was allowed. The Court, except for Justice Murphy, who was on military duty, assembled for two days of public argument, then rendered its decision orally the next day, affirming the rejection of the petition.

The Commission convicted all eight, on August 3, and sentenced all eight to death. Dasch and Burger, who assisted the prosecution, were spared by the President, who commuted the sentence of Burger to life imprisonment and 30 years imprisonment for Dasch. The President confirmed the sentences, except as commuted, on August 5, 1942, and the executions, by electrocution, were carried out at the District of Columbia Jail on August 8, 1942. With the saboteurs dead, the U.S. Supreme Court had time to prepare the written opinion, published on October 29, 1942.

The unique review of a *habeas corpus* petition by the Supreme Court in the middle of the challenged trial did produce an immediate decision denying the petition, but the written opinion did not appear until three months later.³⁸⁷

The October opinion evidences some anguish on the part of Chief Justice Stone³⁸⁸ and has some internal contradictions³⁸⁹

The vigorous defense of the saboteurs by Colonel Kenneth Royall did not impair his career. He was born in North Carolina and graduated from the University of North Carolina in 1914. He then attended Harvard Law School. He served in the Field Artillery in France as a lieutenant (1917-19) and then returned to North Carolina where he practiced law in Goldsboro and Raleigh. He then entered politics. In the Second World War, he became an Army colonel and was promoted to Brigadier General after the saboteur trial. He served as Special Assistant to Secretary of War Stimson in 1944. President Truman appointed him Secretary of War in 1947. At the creation of the Department of Defense, he was appointed Secretary of the Army, serving two years before he returned to the practice of law in Washington, D.C. and New York.

387. The decision may be seen after the passage of 65 years as the Total War exception to the *Milligan* decision; however, it is significant to note that the Supreme Court heard the habeas corpus petitions even though the only review of the record of trial was to be by the President alone, and the President had specifically excluded the civilian courts. The Court was not concerned with the facts or the procedures of the commission, but only the lawful exercise of presidential power in a threat of foreign sabotage in wartime. The actual guilt of the eight men was noted in a brief sentence, "it is the absence of uniform that renders the offender liable to trial for violation of the laws of war." 317 U.S. at 28. Having previously noted the British 1929 Manual of Military Law, listing war crimes and concluding, "all war crimes are "punishable by death." 317 U.S. at 27. The literature on this case continues to be substantial. See H.H. Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); G.E. White, *Felix Frankfurter's Soliloquy in Ex Parte Quirin*, 5 GREEN BAG 2d, 423 (2002); M. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 GEO. WASH. L. REV. 131; (1943); F. Granville Munson, *The Arguments in the Saboteur Trial*, 91 UNIV. PA. L. REV. 239 (1942).

388. Harlan Fiske Stone (1872-1946), born in Chesterfield, New Hampshire, entered Massachusetts Agricultural College where there was compulsory military training, but from which he was expelled for disciplinary violations; then he attended Amherst College, B.S. 1894, teaching high school for a year before making enough money to start law school at Columbia University (LL.B. 1898) at which point Columbia hired him to teach Bailments and Insurance part-time while he began the practice of law with the firm of Sullivan & Cromwell in New York City. In 1902, he briefly joined the Columbia Law Faculty, but resumed law practice in 1905. In 1910, he returned to Columbia as Dean and Professor of Law, teaching Trusts, Wills, Criminal Law and Equity, his specialty, continuing to teach there until 1923. During the First World War's compulsory draft, he was a member of a Board that dealt with the conscientious objector exception to the draft. After the armistice, he joined the protests of the Red Scare raids and prosecutions led by Attorney General A. Mitchell Palmer and Francis Gavan, Dean of Fordham Law School. In a conflict over teaching methodology with University President Butler, Stone resigned in 1923 to return to practice. The scandals of the Harding administration, especially involving Attorney General Daugherty, persuaded the new president, Calvin Coolidge, to appoint Stone to the position of Attorney General in

but is justified as an exception to the *Milligan* case by the total war with fascism. Its precedential effect is also lessened by the history of the President's order creating the 1942 Military Commission, because that order was changed and was not used in the second instance of Nazi saboteurs landed later in the war by submarine on our shores.³⁹⁰ In fact, the changes in the Presidential order of January 16, 1945 require a comparison of the back-

April 1924. Stone served only nine months before accepting the President's appointment as Associate Justice of the Supreme Court. He served during the legal battles of the New Deal, usually differing with his colleagues, the Four Horsemen, (Butler, McReynolds, Sutherland and Vandevanter), in support of legislative solutions to the Depression. Although Stone was a lifelong Republican, President Roosevelt appointed Stone Chief Justice in 1941. He suffered a stroke while presiding over the Court on April 22, 1946 and died after only four and a half years as Chief Justice. It should be noted that the Chief Justice's son, Major Lauson Stone, U.S.A., a JAG officer, was detailed to assist Colonel Royall in the defense of the saboteurs at the Commission; he did not participate in the proceedings before the Supreme Court and Chief Justice Stone did not recuse himself with the agreement of his colleagues. See generally ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956) (describing the life and career of Harlan Fiske Stone).

389. *Ex Parte Quirin* holds that: "Constitutional safeguards for the protection of all who are charged with offense are not to be disregarded." 317 U.S. at 25.

390. The Military Order provided as follows:

MILITARY ORDER

GOVERNING THE ESTABLISHMENT OF MILITARY COMMISSIONS FOR THE TRIAL OF CERTAIN OFFENDERS AGAINST THE LAW OF WAR AND GOVERNING THE PROCEDURE FOR SUCH COMMISSIONS

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, and more particularly the Thirty-Eighth Article of War (10 U.S.C. 1509), it is ordered as follows:

1. All persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals. The commanding generals of the several service and defense commands in the continental United States and Alaska, under the supervision of the Secretary of War, are hereby empowered to appoint military commissions for the trial of such persons.

2. Each military commission so established for the trial of such persons shall have power to make and shall make as occasion requires, such rules for the conduct of its proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it: *Provided*, that:

Such evidence shall be admitted as would in the opinion of the president of the commission, have probative value to a reasonable man;

The concurrence of at least two-thirds of the members of the commission

grounds of the orders of July 1942 and January 1945 as to court-martial proceedings and post-trial review. Habeas corpus review of a prison sentence was belatedly sought from a 1945 military commission in *Colepaugh v. United States*,³⁹¹ but the result was the same as in *Ex Parte Quirin*.

The first six months of the Second World War were the darkest hours of persistent defeats,³⁹² public fears³⁹³ and dangers

present at the time the vote is taken shall be necessary for a conviction or sentence;

The provisions of Article 70 of the Articles of War, relating to investigation and preliminary hearings, shall not be deemed to apply to the proceedings;

The record of the trial, including any judgment or sentence, shall be promptly reviewed under the procedures established in Article 50 1/2 of the Articles of War.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE

January 11, 1945.

391. 235 F.2d 429 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

In November 1944, William C. Colepaugh, a U.S. citizen who had been trained as a saboteur in Nazi Germany, landed on the coast of Maine from a German submarine with an associate; both were in civilian clothes but armed and possessed false identification. Colepaugh was apprehended and charged with violation of the law of war on January 11, 1945 for trial before a military commission. He was convicted and sentenced to prison. Eleven years later he sought habeas corpus to challenge his conviction and imprisonment alleging that he should have been tried by jury for treason in a civil court. *Id.*

The denial of habeas corpus by the District Court was affirmed because the offense of unlawful belligerency under the law of war had been clearly stated and referred to a military commission, thus the Fifth and Sixth Amendments are inapplicable under *Ex Parte Quirin*. *Id.*

392. Fears of air raids, actual Nazi submarine devastation of Atlantic shipping, and an actual attack on the California coast by a Japanese submarine on February 23, 1942 created newspaper hysteria. Apprehension of food shortages, leading to rationing; price and rent controls; rationing of gasoline and rubber put the nation into a war mode that lasted until VE Day (May 8, 1945) and VJ Day (August 15, 1945). See generally RICHARD LINGEMAN, DON'T YOU KNOW THERE'S A WAR ON?: THE AMERICAN HOME FRONT 1941-1945 (1970) (commenting on U.S. social conditions during World War II).

393. The nation was at war with Germany, Italy and Japan, but the loyalty of the millions of U.S. citizens with German and Italian ancestry was not seriously questioned while anti-Japanese racism on the West Coast led to the exclusion of U.S. citizens of Japanese ancestry from coastal areas of California, Oregon, and Washington, resulting in the internment of about 110,000 Japanese-Americans of which 70,000 were U.S. citizens in "relocation" or concentration camps. All enemy aliens were supposedly rounded up or accounted for, but this applied only to Japanese and some German residents. The Japanese internment program was approved by the Supreme Court. See generally *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* contained fierce dissents by Justices Jackson, Murphy, and Roberts. *Id.* The conviction has since been vacated. See generally *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984) (outlining the recent history of the *Korematsu* decision).

of invasion.³⁹⁴ The entire American nation knew of the war and suffered its deprivations. By 1945, the end of the war was in sight, and a review of the facts and laws of military commissions became a necessity, along with the requirement that the Articles of War (predecessor of the Uniform Code of Military Justice) procedures be followed.

Comparing the total war exception of *Ex Parte Quirin*³⁹⁵ to the November 16, 2001 Presidential Order for Military Commission trials³⁹⁶ is futile. Both had resulted indirectly from vicious and deadly surprise attacks, but the resemblance ceases there. Disruption of the civilian community has been minimal. Control of industry for war-related production is non-existent. Wages and prices are not controlled. Taxes have not increased but have decreased. Shortages and rationing are non-existent, and most important there is no military draft. Unhappily, mistrust of government³⁹⁷ cannot be discounted as we consider the Supreme Court's 2006 review of proposed military commissions.

Hamdan v. Rumsfeld,³⁹⁸ is the leading case at the present time on proposed military commissions at Guantanamo. The holding in the majority opinion by Justice Stevens, speaking for four other justices, (Kennedy, Souter, Ginsburg and Breyer) is clear: ". . . we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and

394. The surprise attack of December 7, 1941 on Pearl Harbor, without a declaration of war, caused the destruction of 21 Navy ships, including 8 battleships, loss of 188 planes, the deaths of 2,335 military and 68 civilians. See GORDON W. PRANGE, *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* 512-27, 539-40, 573-81 (1982). Japanese forces simultaneously attacked U.S. forces in the Philippines, Guam, and Wake Island, and on British forces in Malaya and Hong Kong. By the beginning of 1942 Guam and Wake were lost and the Japanese invasion of the Philippines had encircled U.S. forces on the Bataan peninsula, where they surrendered on May 6. British Singapore surrendered on February 15 and the Dutch Army surrendered Java on March 9. See Eric C. Miller, *12/7 & 9/11: War, Liberties, and the Lessons of History*, 104 E. VA. L. REV. 571, 578 (2002).

In Europe, Britain was reeling under Nazi air attacks, France, Belgium, Netherlands, Norway, and Denmark had surrendered and the German army was victorious in Egypt and the Germans had advanced deep into Russia where the Soviet government had abandoned Moscow and Leningrad was encircled.

395. 317 U.S. 1 (1942).

396. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

397. Government dissimulation or "spin" has been a feature of political life at least since the Second World War, resulting in the widespread belief that governments are systematically unable to tell the truth.

398. 126 S. Ct. 2749 (2006).

procedures violate both the UCMJ and the Geneva Conventions.” Dissents were written by three justices (Scalia, Thomas and Alito);³⁹⁹ and Chief Justice Roberts did not participate. There is also a plurality opinion (Souter, Ginsburg, Breyer and Stevens) dismissing the charges of conspiracy.⁴⁰⁰

Because the first prong of the majority opinion is the absence of presidential power to override existing statutory provisions of the UCMJ, the question for the future is whether Congress has provided an acceptable new form of military commission in the Military Commissions Act of 2006⁴⁰¹ that will withstand constitutional scrutiny of its continued departures from the existing UCMJ as an expression of due process. The second prong of the majority opinion is the deviation from the treaty-based standards for military trials of combatants; the question for the future is whether the President or Congress violated international law and whether they intended to do so.⁴⁰²

The facts of the case are assumed: Salim Ahmed Hamdan, of uncertain age, from Yemen, apparently worked as a driver and bodyguard for Osama Bin Laden, leader of the Al-Qaeda terrorist organization, in Afghanistan. He may have performed other tasks assisting Bin Laden. Hamdan was captured by the Northern Alliance militia, opponents of the Taliban and their Al-Qaeda allies, in November 2001 in the early stages of the United Nations Afghan War⁴⁰³ in which United States forces had been

399. *Id.* at 2810-55.

400. *Id.* at 2775.

401. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

402. *See generally* Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

403. Following Soviet withdrawal from Afghanistan (February 1989) an intense civil war raged until one of the most radical of Islamic factions, the Taliban, captured Kabul in 1996; their control lasted until November 2001. *See* Symposium, Women & War: A Critical Discourse, 20 BERKELEY J. OF GENDER L. & JUST. 352, 366 (describing the phases of war in Afghanistan).

After the September 11, 2001 attacks on New York and Washington, the U.N. Security Council condemned the attacks as a threat to international peace and security and “called on” all States to “suppress terrorist acts” and recognized self-defensive action. *See* S.C. Res 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

On the refusal of the Taliban to shut down Al-Qaeda facilities and hand over Osama Bin Laden, the U.N. Security Council called upon all States to prevent and suppress terrorist attacks. *See* S.C. Res 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Air attacks by U.S. and U.K. forces began October 7, 2001 as self-defensive uses of force.

engaged for several weeks. Within a few months Hamdan was “sold” by his captors to the United States as an Al-Qaeda terrorist. In June 2002 Hamdan was transported to Guantanamo for detention awaiting some disposition, unknown to him. Two years after his Guantanamo detention began, criminal charges were filed against him.⁴⁰⁴

At this point it is necessary to review the procedures at Guantanamo: the first is the Combatant Status Review Tribunal,⁴⁰⁵ an administrative procedure to determine the continuation of detention; the second is the Military Commission, a quasi-judicial determination of criminal charges and assessment of penalties therefor.⁴⁰⁶

While there are substantial questions concerning the conduct and review of the Combatant Status Review Tribunal (hereafter C.S.R.T.), the focus of this case is disposition of the criminal charges by military commission.

After the first year of detention, Hamdan was declared to be “triable” by military commission for crimes not specified⁴⁰⁷ and military defense counsel was provided who demanded a speedy

U.S. and British ground forces followed, assisting the Northern Alliance, enemies of Taliban, by the end of October 2001 (when the accused Hamdan was captured). The Taliban fled Kabul on November 13, 2001. See BRUCE R. PIRNIE, RAND CORP., *BEYOND CLOSE AIR SUPPORT: FORGING A NEW AIR-GROUND PARTNERSHIP* 48-49 (2005). President George W. Bush declared an end to the hostilities in Iraq and Afghanistan on May 1, 2003. See Tom Shales, *Aboard the Lincoln: A White House Spectacular*, WASH. POST, May 2, 2003, at C1.

404. 126 S. Ct. at 2759.

405. The Combatant Status Review Tribunal (“CSRT”) was established on July 7, 2004 by order of the Secretary of Defense, an administrative body to determine the continued detention of Taliban captives as unlawful combatants in an environment free of law and lawyers. The tribunal of military officers operated at Guantanamo to consider whether the detainee, assisted by a representative (not a lawyer), can overcome the official determination of combatant status. It is a mockery of the battlefield screening of P.O.W.’s from civilians under the Geneva Convention. Validity of CSRT actions is conferred on the Court of Appeals for the District of Columbia. The CSRT was created in response to *Rasul v. Bush*. See 542 U.S. 466 (2004). See *supra* notes 337-346.

406. Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). The order reads, in part:

Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

407. See 126 S. Ct. at 2759.

trial under the UCMJ.⁴⁰⁸ One year later charges were proffered, alleging Hamdan's conspiracy with Al Qaeda to attack and murder civilians.⁴⁰⁹ Defense counsel sought habeas corpus,⁴¹⁰ granted by the District Court,⁴¹¹ but reversed by the Court of Appeals⁴¹² in an opinion by Judge Randolph. Judge John Roberts, about to become Chief Justice of the United States, was a member of the panel.

The first problem was whether Congress had foreclosed consideration of this habeas corpus appeal by the 2005 Detainee Treatment Act that deprived the courts of jurisdiction,⁴¹³ but the court found the statute to be, in effect, prospective so that habeas corpus issues already in the courts were not affected.⁴¹⁴ Justice Scalia, however, found that jurisdiction to hear the case was lacking.⁴¹⁵

At the outset the Supreme Court did not confront the question whether the President alone may convene military commissions without congressional approval on the grounds of controlling military necessity.⁴¹⁶ But that question did not have to be reached because Congress had consistently legislated on the subject of military commissions, citing *Ex Parte Quirin's* 1942 reliance on Article of War 15 and the provisions of the 1950

408. *Id.* at 2760.

409. *See id.* at 2761.

410. *Id.*

411. *Hamdan v. Rumsfeld*, 344 F.Supp 2d. 152 (D.D.C. 2004)

412. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

413. The Detainee Treatment Act of 2005 is contained within the National Defense Authorization Act for Fiscal Year 2006. *See* Pub. L. No. 109-163, §§ 1401-1406, 119 Stat. 3136, 3444-80 (2006). The Act specifies, in part:

Except as provided in § 1405 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider:

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2003 to have been properly detained as an enemy combatant.

414. *See* 126 S. Ct. at 2762-69.

415. *See id.* at 2810-23.

416. *See id.* at 2774.

UCMJ.⁴¹⁷

In a crucial footnote, Justice Stevens says, “whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. . . .”⁴¹⁸

Turning to the fatal defects of the presidential military commission, the Court based the invalidity on the UCMJ:

The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable and with the rules and precepts of the law of nations. . . . The procedures that the Government has decreed will govern Hamdan’s trial by commission violate these laws.⁴¹⁹

The fatal defect is the admission of prosecution evidence in the hearing without the knowledge or presence of the accused and his counsel.⁴²⁰ Evidentiary defect is the admission into evidence of coerced evidence, hearsay, and unsworn oral or written testimony.⁴²¹

Two provisions of the UCMJ were crucial in Justice Stevens’ opinion: Articles 21 and 36. Both are used to strike at the idea that there was something about the actions of Congress in the

417. *See id.* at 2774-75.

418. *See* 126 S. Ct. at 2774, n.23. Justice Stevens cites *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which held that President Truman’s seizure of the steel industry during the Korean War was unconstitutional. *See id.* at 587. The nine justices produced seven opinions. Justice Black’s majority opinion rejected the arguments based on the president’s powers as commander in chief, his foreign relations powers, the pastoral power to execute the laws faithfully and the NATO Treaty obligation. *See id.* at 586-87. The Court was perhaps unduly impressed by Congress’s failure to include such power in the Taft-Hartley Act, vetoed by Truman who refused to apply the 80 days Cooling-off Injunction. The dissent by Chief Justice Vinson and two justices (Read and Minton) argued the wartime seizures of railroads and other industries in the First and Second World Wars, to no avail. *See id.* at 693-99 (Vinson, C.J., dissenting). The present difficulty with the case as precedent is the acceptance of a difference between foreign and domestic uses of presidential power—the assumption that the steel strike was purely domestic seemed obvious then; today a globalized world finds that distinction more difficult to justify. *Cf.* *Curtiss-Wright Export Co. v. United States*, 299 U.S. 304 (1936) (upholding congressional delegation to the President in the area of foreign relations).

419. 126 S. Ct. at 2786.

420. *See id.*

421. *See id.* at 2786-87.

Authorization for Use of Military force (“AUMF”)⁴²² and the President’s Military Order of November 13, 2001⁴²³ that raise them above all contrary provisions of the Constitution, statutes - specifically the UCMJ and precedents created in the Civil War and the Second World War.⁴²⁴ UCMJ Article 21 provides,

The provisions of this chapter conferring jurisdiction upon courts - martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Justice Stevens notes that this provision is the same as Article of War 15, reviewed in *Ex Parte Quirin*, noting:

[T]he *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had . . . to convene military commissions - with the express condition that the President and those under his command comply with the law of war. [T]here is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.⁴²⁵

At issue with respect to military commissions compliance with the UCMJ, is UCMJ Article 36, at the head of the Trial Procedures sub-chapter indicating the President’s authority to prescribe rules—essentially the authority behind the Executive order for the “Manual for Courts Martial.” This statute uses the word “practicable” in each of its sections. An obvious question is whether it means the same thing in each provision.

Article 36(a) provides that substantive and evidentiary rules of United States district courts should be applied in military commissions, which are not contrary to or inconsistent with the UCMJ, such rules being prescribed by the President “so far as he

422. Pub. L. No. 107-40, 115 Stat. 224 (2001).

423. 66 Fed. Reg. 57833, Nov. 13, 2001.

424. See *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

The broadest reach of the president’s wartime commander-in-chief powers may be reviewed in JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2007). Professor Yoo was Deputy Assistant Attorney General in the Department of Justice, Office of Legal Counsel, 2001-2003.

425. See 126 S. Ct. at 2774-75.

considers practicable."⁴²⁶

Art. 36(b) provides that all such rules shall be uniform "*insofar as practicable*" and reported to Congress.⁴²⁷ It is uncertain whether the result intended was the same as with changes to the Federal Rules of Civil Procedure, which are laid before Congress for 90 days before becoming effective.

While the textual contexts are different: 36(a) rule preparation; and 36(b) rule enactment, a systematic theory of interpretation would accord the same meaning to both uses of "practicable," but in Justice Stevens's analysis, 36 (b) is a limitation on 36 (a) so that different meanings apply. .

Justice Stevens assumes that the President had determined the impracticability of district court rules to which complete deference is owed, but there was no determination that it is impracticable to apply the rules for courts-martial.

Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for Courts-martial, provost courts, and military commissions alike conform to those that govern procedures in Article III courts, "so far as he considers practicable". . . Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts and military commissions . . . be "uniform insofar as practicable."⁴²⁸

* * * *

There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.⁴²⁹

426. UCMJ Art. 36(a). Article 36 provides:

Pretrial, trial, and post-trial procedures, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions and other military tribunals may be prescribed by the President by regulations which shall so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

427. UCMJ art. 36 (b) ("All rules and regulations made under this article shall be uniform insofar as practicable.").

428. 126 S. Ct. at 2791.

429. *Id.* at 2792.

* * * *

Assuming *arguendo* that the reasons articulated in the President's Article 36 (a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require. . . any variance from the rules that govern courts-martial.⁴³⁰

Because the President's rules omit the fundamental right of the accused to be present at his trial, "the jettisoning of so basic a right cannot lightly be excused as practicable."⁴³¹ Accordingly, the UCMJ must govern, and the Hamdan commission rules are illegal.⁴³²

This fundamentalist reasoning must surely affect any future trial to be held under the Military Commissions Act of 2006, which deprives an accused of the right to be present by way of a purported amendment to UCMJ.

Judge Randolph's Court of Appeals decision had refused to consider international law issues, especially those arising under the 1929 and 1949 Geneva Conventions, because the alleged procedural rights are not judicially enforceable; even if enforceable, this petitioner is not entitled to them; and courts should abstain from such questions.⁴³³

The Supreme Court, however, bypassed the government's argument based on the difference between the Taliban, as a High Contracting Party, and Al-Qaeda (not a High Contracting Party) in Article 2 whose language is common to the four conventions that make up the 1929 and 1949 international commitments.⁴³⁴ But common Article 3 is not so narrowly confined to war between signatory states, but rather applies in the territory of a High Contracting Party in which a conflict not of international character is occurring.⁴³⁵ Common Article 3 mandates that sentences and executions result from "judgment pro-

430. *Id.*

431. *Id.*

432. *See id.* at 2793.

433. 415 F.3d at 40-41.

434. *See* 126 S. Ct. at 2794-95.

435. *See id.* at 2776.

nounced by a regularly constituted court.”⁴³⁶ The Court views Common Article 3 as a form of protection for “individuals associated with neither a signatory nor even a non-signatory “Powers who are involved in a conflict ‘in the territory of’ a signatory.”⁴³⁷

The regularly constituted court must, “. . . [afford] all the judicial guarantees which are recognized as indispensable” by civilized peoples.⁴³⁸ In a systematic interpretation⁴³⁹ of Common Article 3, the Supreme Court reached into the Fourth Geneva Convention for language interpreting “regularly constituted court” to mean ordinary military courts and not special tribunals.⁴⁴⁰ Thus, the UCMJ, with the right of the accused to be present, emerges as a prerequisite of international law by way of common Article 3.⁴⁴¹

The Dissenters found authority for the President’s military commissions in the immediate response of Congress to the Al-Qaeda attacks of September 11, 2001 in the statute described as Authority to Use Military Force (“AUMF”)⁴⁴², already recognized as authoritative in *Hamdi v. Rumsfeld* in 2004, and castigates the court’s “audacity” in failing to abstain from a review of the president’s decision-making.⁴⁴³

The plurality opinion concluded that the conspiracy charge against Hamdan and any alleged overt acts do not state a viola-

436. Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, art. 3, ¶ 1(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“The following acts are and shall remain prohibited at any time and in any place whatsoever . . . (d) the passing of sentences and the carrying out of executions without judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

437. 126 S. Ct. at 2796.

438. *Id.*

439. Four schools of treaty interpretation can be found within The Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, *supra* note 196, art. 31. Article 31 states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

The systematic interpretation goes beyond the exact textual ambiguity to seek out the meaning within the “four corners of the instrument.

440. 126 S. Ct. at 2796-97.

441. See *id.*; see also Theodor Meron, *Geneva Conventions as Customary International Law*, 81 AM. J. INT’L. L. 348 (1987) (discussing obligations under the Geneva Conventions).

442. See 126 S. Ct. at 2820-22.

443. *Id.* at 2821; see *supra* note 351 and accompanying text.

tion of the law of war, and accordingly, cannot be referred to trial by military commission.⁴⁴⁴

Winthrop's treatise on military law analyzed historical military commissions to conclude that the offense must have been committed in a theatre of war and during the conflict.⁴⁴⁵ This conclusion is incorporated into the common law of war that Congress has committed to military commissions in the UCMJ⁴⁴⁶ The conspiracy charge here was not preferred by a commander on the battlefield, but by an official far removed from any hostilities, and that alleged an illegal agreement of 1996 long before the September 11, 2001 attacks and the AUMF statute, accordingly the military necessity for trial by military commission is entirely absent.⁴⁴⁷

Descending from the heights of abstraction, we come to the remand to the D.C. Circuit that will mean many more years of pre-trial detention for Hamdan in the American "Bleak House" at Guantanamo.

In another Cuban, non-Guantanamo, context, the Supreme Court has interpreted the provisions of the Immigration statute to deny the government's request for indefinite detention of inadmissible aliens for reasons of national security.⁴⁴⁸ Although it concerns a complex problem in statutory construction, there is an underlying rejection of indefinite detention even for career-criminal aliens. The occasions for the decision was a circuit split: the writ of *habeas corpus* having been granted in the Ninth Circuit⁴⁴⁹ and denied in the Eleventh⁴⁵⁰ to Cubans eligible for deportation but refused entry into Cuba.

Both detainees, Martinez (9th Cir.) and Benitez (11th Cir.) arrived in the United States as part of the Mariel boat lift in June 1980.⁴⁵¹ As they were not then convicted criminals or certified lunatics they were admitted on parole, awaiting INS asylum de-

444. *See id.* at 2776.

445. *See* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836-37 (2d ed. 1920).

446. *See* 126 S. Ct. at 2778-81.

447. *See id.* at 2785-86.

448. *Clark v. Martinez*, 543 U.S. 371, 386-87 (2005); *cf.* *Hamdi v. Rumsfeld*, 542 U.S. at 507, 554-79 (Scalia, J., dissenting) (disapproving of indefinite detentions).

449. *Suarez-Martinez v. Ashcroft*, No. 03-35053, 2003 WL 23892563, at *1 (9th Cir. Aug. 18, 2003).

450. *See Martinez*, 543 U.S. at 376-77 (2005); *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003).

451. *See* 543 U.S. at 371, 374.

termination. Both soon had criminal convictions in the United States: Martinez convicted of assault in Rhode Island and burglary in California; Benitez convicted of grand theft in Florida. Both served prison sentences in United States state prisons and upon completion of sentences, their INS parole status was revoked and they were detained and ordered to be deported.⁴⁵² The Cuban government refused to permit their return to Cuba, and refused even to negotiate their return. The Immigration Statute authorized detention during a 90 day period to affect removal from the United States.⁴⁵³ Interpreting that statute the Supreme Court authorized further detention,⁴⁵⁴ “. . . only for so long as was reasonably necessary to secure. . . removal,” presumably six months.⁴⁵⁵

Years beyond the six month detention period the detainees petitioned for *habeas corpus* under the federal statute⁴⁵⁶ and the Supreme Court has now held that it must be granted, although their parole into American society can be monitored.

Justice Scalia concluded:

The government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it. But for this court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.⁴⁵⁷

Because of *Hamdan's* reliance, in part, on the Geneva Conventions for the unconstitutionality of the proposed military commission it is appropriate to consider the anti-foreign and anti-treaty provisions of the 2006 Military Commissions Act.⁴⁵⁸ First, *detainees* are forbidden to invoke the Geneva convention as a source of rights before the commission or in *habeas corpus* proceedings.⁴⁵⁹ This prohibition is directed only to the detainee

452. *See id.* at 374-75.

453. 8 U.S.C. § 1231(a)(1) (2006).

454. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

455. *Id.* at 689-99.

456. 28 U.S.C. § 2241 (2006).

457. 543 U.S. at 386.

458. Pub. L. No. 109-366, 120 Stat. 2600 (2005).

459. *Id.*; 120 Stat. 2631.

and not to the courts' sua sponte review of precedents involving the Geneva Convention. Second, no international or foreign law is to be used in the interpretation of the War Crimes Act.⁴⁶⁰

Constitutional case law makes it clear that Congress can by statute change the domestic effect of treaties or customary international law when it clearly intends to do so.⁴⁶¹ This is so despite the hortatory language of *The Paquete Habana*:⁴⁶² "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."⁴⁶³

Nevertheless, the Act's interpretation of the substantive law to be applied in United States courts cannot simultaneously affect the methods by which courts perform their judicial functions in light of the specific constitutional language separating the legislative and judicial powers:

Article III(2)

The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made or which shall be made, under their authority

The concept that Congress or the President can tell the courts how to do their job challenges the principle of separation of powers inherent in the scheme of constitutional government. The anti-foreign and anti-international provisions of the 2006 Military Commission Act destroy the concepts of ordered liberty upon which the United States was built.

460. This provision of the Military Commission Act amends the War Crimes Act. See 18 U.S.C. § 2441 (2006).

No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section.

This echoes a 2003 House bill that reflected the current thinking of Justice Scalia. The bill requires that "the Supreme Court should base its decision on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law." See H.R. 446, 108th Cong. (2003); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 308 (1998); see also, *A Conversation Between U.S. Supreme Court Justices, The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST., L. 519 (2005); Richard S. Markovits, *Learning From the Foreigners: A Response to Justice Scalia's and Professor Levinson's Moral Parochialism*, 39 TEX. INT'L L.J. 367 (2004).

461. See *Breard v. Greene*, 523 U.S. 371, 376 (1998); see also *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988); *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972).

462. 175 U.S. 677 (1900).

463. *Id.* at 700.

In Hamdan's future is a hearing before a flawed military commission without the presumption of innocence, without knowledge of the evidence used against him and without the ability to combat coerced and hearsay evidence. Without doubts about the outcome of such a hearing, appeal lies to the convening authority and the review board. The vagaries of that process cannot be predicted, but, despite the efforts of government, it is not impossible that the Supreme Court will again have to confront the fate of Salim Ahmed Hamdan. To prevent that possibility, Hamdan and the other candidates for military commission treatment should be sent from Guantanamo to Washington for a military commission hearing under UCMJ standards to determine his participation, if any, in Al-Qaeda operations, based on an open record of trial. At this remove from the facts of 2001, it is hardly possible that there could be anything to damage the United States government in such a proceeding.

Conclusion

Guantanamo Bay was acquired by the United States as an imperial outpost in a time of great empires. It is a colonial remnant of a policy abandoned seventy-five years ago when the United States became the Good Neighbor. Nevertheless, American complicity in the failure of Cuban democracy and the grinding poverty of the people is part of the historical record. Furthermore, toleration of two Cuban dictators (Machado and Batista) demonstrated American blindness to the problems of a close neighbor. The United States did not create the Castro dictatorship but American trade and immigration policies have unconsciously perpetuated his rule.

Guantanamo no longer represents a single American virtue; there is nothing about its existence as a prison about which an American can be proud. The only thing Guantanamo now represents is a perverse effort to hide government actions from the searchlights of the Constitution and laws. Blame for these secretive policies can be shared on a bi-partisan basis: the Democratic administration for the callous treatment of Haitian and Cuban boat people and the Republican administration for the lawless treatment of prisoners of war from Afghanistan. There is no reason to perpetuate these mistakes.

Closing the Guantanamo prison would not be a victory for

Fidel Castro, but for the United States Constitution. American withdrawal from the Naval Base itself is more complicated. Cuba must not be allowed to replace an American military base with those of China, Iran or Venezuela. The security of the hemisphere is at stake, thus, American departure must be carefully negotiated with Cuba, something envisioned in the lease itself.

Fidel Castro has proposed that the abandoned naval base could become a medical treatment center for the Caribbean; a good idea, but the aging facility no longer provides the latest techniques in tropical medicine and disease control. Instead, the existing structures might furnish the beginnings of a new United Nations University for research and teaching, devoted to the peoples of the Caribbean and Gulf of Mexico, bringing together the virtues and talents of Cuba, the United States and the hemisphere.