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TOWARD A LIMITED- GOVERNMENT THEORY OF EXTRATERRITORIAL DETENTION

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INTRODUCTION

The United States military's detention of hundreds of men at the Naval Base at Guantánamo Bay since January 2002 has drawn intense international condemnation, focused mainly on the United States' refusal to afford the detainees minimal due process protections.¹ For years the Bush administration has maintained that the detainees possess no rights that can be vindicated in domestic U.S. courts, implicitly contending that, at least with respect to executive detentions, Guantánamo is a legal black hole.² The Supreme Court rejected this extreme position in June 2004 in *Rasul v. Bush*, ruling that the federal courts have jurisdiction to hear habeas petitions from the Guantánamo detainees and strongly implying that the detainees possess some constitutional rights.³ *Rasul*, however, did not

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1. See, e.g., Jamie Doward & Mark Townsend, *Attorney General Calls for Guantánamo to Close*, THE GUARDIAN (London), May 7, 2006, at 3 (discussing the statements of U.K. Attorney General Lord Goldsmith); Editorial, *Free U.S. Captives or Charge Them*, TORONTO STAR, Feb. 20, 2006, at A14; Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantánamo*, N.Y. TIMES, Feb. 17, 2006, at A6.

2. See, e.g., Response to Petitions for Writ of Habeas Corpus & Motion to Dismiss or for Judgment as a Matter of Law & Memorandum in Support at 2-3, *Abdah v. Bush*, No. 04-125 (D.D.C. Oct. 4, 2004) ("The notion that the U.S. Constitution affords due process and other rights to enemy aliens captured abroad and confined outside the sovereign territory of the United States is contrary to law and history. . . . Similarly, petitioners' other claims — whether under the Constitution, international treaties and conventions that are not self-executing, statutory provisions, or military regulations — have no merit."). The description of Guantánamo as a "legal black hole" was first offered by British Lord Steyn as a critique of the extrajudicial detentions at the prison camp. See Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, *Twenty-Seventh FA Mann Lecture at the British Institute of International and Comparative Law* (Nov. 25, 2003) in 53 INT'L & COMP. L.Q. 1 (2004), available at <http://www.nimj.com/documents/Guantanamo.pdf>.

3. *Rasul v. Bush*, 542 U.S. 466, 481, 484 (2004) (holding that federal courts have jurisdiction to consider habeas petitions by foreign nationals imprisoned at

address the question of *which* constitutional rights Guantánamo detainees possess and why.⁴

This issue was reached, however, at the district court level, resulting in two conflicting decisions.⁵ Senior Judge Joyce Hens Green, before whom most of the Guantánamo habeas petitions had been coordinated, reasoned that fundamental due process protections are available to the detainees because Guantánamo, which is under the complete jurisdiction and control of the United States, is not really “extraterritorial” in anything but a formal sense.⁶ Thus her opinion sidestepped the question of whether constitutional rights apply extraterritorially. Addressing the claims of seven petitioners whose cases were not consolidated before Judge Green, Judge Leon reached the opposite conclusion, holding that the detainee petitioners lacked any enforceable constitutional, statutory, or treaty rights, and that they could not otherwise assert a “viable legal theory” that would entitle them to challenge their detention.⁷

The conflicting opinions of Judge Green and Judge Leon were appealed to the D.C. Circuit soon after the decisions were issued in early 2005. The question of the extraterritorial application of the

Guantánamo Bay Naval Base in Cuba). *See also infra* notes 4 and 5, and accompanying text. In *Hamdan v. Rumsfeld*, the Court held that military commission procedures – specifically designed to try a small number of these detainees for war crimes – were not authorized by law. 126 S.Ct. 2749, 2754-55 (2006). In doing so, the Court concluded that Guantánamo detainees possessed certain rights under the Geneva Conventions, but it did not address the question of constitutional rights. *Id.* at 2755-56.

4. In a revealing footnote in *Rasul*, the Court intimated that the petitioners do possess constitutional rights:

Petitioners’ allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”

Rasul, 124 S. Ct. at 2698 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000) and citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)). The Court remanded to the district court, in which the Government would “make their response” to the petitions and the court would “consider in the first instance the merits of petitioners’ claims.” *Rasul*, 124 S. Ct. at 2698.

5. *In re Guantánamo Bay Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (rejecting the government’s contention that habeas petitions should be dismissed because foreign nationals detained in Guantánamo enjoy no substantive rights whatsoever).

6. *See In re Guantánamo Bay Detainee Cases*, 355 F. Supp. 2d at 454.

7. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

Constitution to non-citizens, at least in the Guantánamo context, thus looked ripe for resolution, first by the Court of Appeals and then, inevitably, by the Supreme Court. Foot-dragging by the D.C. Circuit and intervening legislation, however, delayed the day of reckoning. In December 2005, Congress passed the Detainee Treatment Act, which ostensibly removed jurisdiction from the federal courts to hear any action brought by a person being detained at Guantánamo.⁸ But in June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that Congress did *not* intend for the DTA to have retroactive effect.⁹ In October 2006, after the Court of Appeals had still not issued a ruling in the Guantánamo cases, Congress again stepped into the fray and passed the Military Commissions Act,¹⁰ which among other things includes stronger—though by no means definitive—language concerning the intended retroactive effect of the DTA procedures.

Finally, in February 2007, more than two years after Judges Green and Leon issued their decisions, the Court of Appeals held in *Boumediene v. Bush* that the Guantánamo detainee cases must be dismissed.¹¹ Over a dissent, the panel ruled that Congress intended the MCA to have retroactive effect and that the federal courts no longer had jurisdiction over the pending habeas cases.¹² In reaching this decision, the panel determined that Congress's stripping of habeas jurisdiction for the detainees was not an unconstitutional suspension of habeas corpus, because (1) "the Suspension Clause protects the writ 'as it existed in 1789'";¹³ (2) the privilege of the writ did not then extend to aliens outside the sovereign's terri-

8. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005 (2005) [hereinafter DTA]. Congress did provide for a form of anemic judicial review in the Court of Appeals of military determinations that a detainee is an "enemy combatant," as well as whether the use of standards and procedures devised by the military in reaching its internal determination that a detainee is an "enemy combatant" is "consistent with the Constitution and laws of the United States." *Id.* The same logic would appear to apply to petitions challenging their detention *qua* detention, but the Court refrained from ruling on that question, *see id.*, and the Government continues to argue that the DTA should have retroactive effect for detainees who are challenging their detention, *see id.*

9. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2815 (2006).

10. Military Commissions Act of 2006, S. 3930, 109th Cong. (2006) [hereinafter MCA].

11. No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007).

12. *Id.* at *10-16.

13. *Id.* at *17 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301(2001)). It is worth noting that the D.C. Circuit engages in some strangely selective quotation here. The Court in *St. Cyr* actually stated that, "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" 533 U.S. at 301 (emphasis added).

tory;¹⁴ and (3) even though the U.S. maintains complete dominion and control over Guantánamo, it is not U.S. territory for constitutional purposes.¹⁵

The issuance of the D.C. Circuit's *Boumediene* decision is a fascinating development for the authors of this article.¹⁶ As lawyers deeply involved in the representation of seventeen Yemeni detainees who have been held without charge or trial for five years in Guantánamo, practicalities had driven us to think creatively about the extraterritorial reach of the Constitution. We refused to accept without question the stale and typically overbroad Supreme Court pronouncements on the issue—which we review in detail below—and found the academic literature on the subject to be reflexively conservative in its approach. In other words, we turned to this issue with the intention of reopening heretofore closed debates about extraterritorial constitutionality because a new context, a new type of war, and a newly effectuated doctrine of executive overreach demanded it.

Before *Boumediene*, the question of the extraterritorial application of the Constitution to non-citizens in the Guantánamo context saw advocates on both sides of the debate staking out predictable positions. Human rights advocates and government lawyers properly saw the Guantánamo litigation as a first sparring ground for looming battles involving invocation of the Constitution's protections for detainees kept in U.S. detention centers in Afghanistan and Iraq, and even in the CIA "black sites" where high-value detainees have been kept *incommunicado* in undisclosed locations.¹⁷ But their legal arguments seemed, in a word, stale.

14. *Boumediene*, 2007 U.S. App. LEXIS 3682 at *17-25.

15. *Id.* at *29.

16. The Supreme Court denied the detainees' petition for a writ of certiorari in *Boumediene* shortly before this article went to print. 127 S. Ct. 1478 (2007).

17. See, e.g., Carlotta Gall, *Rights Group Reports Afghanistan Torture*, N.Y. TIMES, Dec. 19, 2005, at A14 ("Eight men at the American detention camp in Guantánamo Bay have separately given their lawyers 'consistent accounts' of being tortured at a secret prison in Afghanistan at various periods from 2002 to 2004 . . ."); Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32, 37 (describing the press' allegation of C.I.A. personnel mistreating prisoners in secret Afghani prison); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01; Brian Ross & Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC NEWS, Dec. 5, 2005, available at <http://abcnews.go.com/WNT/investigation/story?id=1375123>; Scott Shane & Margot Williams, *Yemenis Freed After Transfer From Secret Prisons, Report Says*, N.Y. TIMES, Apr. 5, 2006, at A10; HUMAN RIGHTS WATCH, THE UNITED STATES' "DISAPPEARED": THE CIA'S LONG-TERM

We perceive that the most important flaw in present academic theories on extraterritorial constitutionality is a disregard for what should be a central inquiry in analyzing any exercise of government power over an individual: whether the government has exceeded its constitutional mandate, irrespective of the rights the Constitution may afford to that individual. We believe—and argue below—that a proper analysis of this issue should begin with whether the U.S. government, in detaining aliens outside its own territory indefinitely, has exceeded the powers granted to it by the Constitution. This determination should precede a focus on whether non-citizens abroad have rights, and if so, which ones they possess. The result is a two-step approach that first analyzes limits and then analyzes rights. We call our approach a limited-government theory.¹⁸ Although we recognize that a limited-government understanding of the extraterritorial reach of the Constitution has never gained much of a foothold among legal scholars, the present trend toward extraterritorial detention suggests it is time to reevaluate the usefulness of this approach. Indeed, we contend that a limited-government theory not only accords with our common-sense intuition about the proper functioning of our government abroad but also serves to reconcile seemingly inconsistent holdings from the Supreme Court with respect to the constitutional limits on extraterritorial exercises of U.S. government power.¹⁹

We were gratified, therefore, to find that Judge Judith W. Rogers, in her scholarly dissent in *Boumediene*, adopted a position very

“GHOST DETAINEES” (2004), available at <http://www.hrw.org/backgrounders/usa/us1004/us1004.pdf>.

The United States, in its prosecution of Zacarias Moussaoui, relied, in part, on a summary of a “statement” provided by prisoner Khalid Sheikh Mohammed from an undisclosed location. See Substitution for the Testimony of Khalid Sheikh Mohammed, *United States v. Moussaoui*, 365 F.3d 292, 334-25 (4th Cir. 2004) available at <http://img.slate.com/media/71/sheikmohammed.pdf>. Although the Government refused for years to acknowledge that it maintained “black sites,” it recently confirmed the existence (though not the location) of the sites, after moving fourteen “high value” detainees to Guantánamo in the fall of 2006. See Dan Eggen & Dafna Linzer, *Secret World of Detainees Grows More Public*, WASH. POST, Sept. 7, 2006, at A18.

18. We are not the first to use this term. See, e.g., Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2035 n.89 (2005).

19. Our approach is consistent with that proposed by the Restatement of Foreign Relations (Third), published in 1986—before the Supreme Court’s decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which stated that “at least some actions by the United States in respect of foreign nationals outside the country are also subject to constitutional limitations.”

much in tune with the non-rights based, limited-government theory that we have advocated in lectures and that is fleshed out in this article. As Judge Rogers saw it, the source of the *Boumediene* majority's error was in its failure to recognize that the Suspension Clause is a limitation on congressional power and not merely a source of individual rights.²⁰ "The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights," she explained.²¹ "It is a truism, of course, that individual rights like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature."²² In response, the majority questioned why Judge Rogers was "fixated on how to characterize the Suspension Clause," suggesting that, under her constitutional theory, "aliens outside the United States are entitled to the protection of the Separation of Powers *because* they have no individual rights under the Separation of Powers."²³ The majority mischaracterized Judge Rogers' limited-government approach to constitutional adjudication. This perhaps accounts for the majority's failure to address the method's relative virtues, instead simply throwing up its hands: "Where the dissent gets this strange idea is a mystery, as is the reasoning behind it."²⁴

This article will lift some of the mystery and uncover some of the reasoning that supports a limited-government approach like that espoused by Judge Rogers. We focus in this article on the plight of non-citizens detained extraterritorially without charge or trial because such persons are at the greatest risk of suffering from arbitrary detention and abuse by the U.S. government; of all the individuals who might theoretically be subject to exercises of power by the U.S. government, it is the discrete class of non-citizens who are arrested and detained abroad that is by far the most vulnerable. The U.S. government holds non-citizens in overseas prisons and in Guantánamo precisely because it believes that these are places in

20. *Boumediene*, 2007 U.S. App. LEXIS 3682 at *45 (Rogers, J., dissenting).

21. *Id.*

22. *Id.* (footnote omitted). Judge Rogers went on to explain that:

[t]hese two sets[*of rights*] cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, see U.S. CONST. art. I, § 8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, see U.S. CONST. art. I, § 7, cl. 1.

Id.

23. *Boumediene*, 2007 U.S. App. LEXIS 3682 at *35 (majority opinion) (emphasis added).

24. *Id.*

the world where the government is accountable at law to no person or judge. Moreover, and despite the fact that it has recently moved several high-value suspects from secret prisons to Guantánamo, the government has demonstrated its continued interest in exploiting these putative legal black holes for the benefit of military and intelligence personnel. We firmly believe that any functioning theory of extraterritoriality must be sufficiently robust to ensure that the U.S. government cannot reasonably contend that there is any place on earth entirely beyond the reach of law.²⁵

In Section I, we describe our limited-government theory in more detail. In Section II, we discuss the development of the doctrine regarding the extraterritorial application of the Constitution and explain why the limited-government approach best explains this doctrine. In Section III, we describe the major theories utilized in precedent and advocated by scholars and explain why these theories fail to adequately to explain the doctrine or would not afford protections to certain non-citizen detainees. In Section IV, we explain why the limited-government approach is a better solution to the “legal black holes” problem than rights-based theories. Finally, in Section V, we discuss the major objections to the limited-government approach and avenues for further research. As the title of this article suggests, what we offer here is not a comprehensive explication or defense of the limited-government approach, but only a beginning.²⁶

One last preliminary note: The Guantánamo litigation has raised many important legal questions which profoundly affect aliens held abroad but which are beyond the scope of this article. For instance, we do not examine the extent to which international

25. Scholars have proposed other approaches to the issue of the extraterritorial application of constitutional protections, but we do not discuss them here because they have not played a role in the development of the doctrine and are therefore unlikely to win the support of the Court anytime soon. See, e.g., Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 299-300 (2004) (arguing that U.S. courts should apply international law to determine the applicability and content of constitutional rights outside U.S. borders); Roosevelt, *supra* note 18 (arguing for an approach, based on conflicts of law principles, that would examine the constitutional right at issue, and whether its application in a foreign context will promote its domestic purpose).

26. For example, we do not explore or discuss the extent to which a limited-government approach to this particular question was contemplated by the founding generation. See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) (arguing from history and the text and structure of the Constitution that non-citizens abroad lack constitutional rights). One of the authors of this article is currently working on a project exploring this question.

laws and treaties afford protections to detainees. Nor do we discuss whether Congress may limit through legislation the executive's authority to detain "enemy combatants" abroad. While we believe that statutes, treaties, and international law speak clearly to these questions and establish that aliens held outside of the sovereign territory of the United States possess a variety of rights, we address in the instant article only the degree to which the Constitution itself protects persons in their situation.

I.

A LIMITED-GOVERNMENT APPROACH

The concept of limited government may seem counter-intuitive because we are accustomed to thinking of all limitations on power as rights.²⁷ But the concept is in fact deeply rooted in our American legal tradition.²⁸ Limited government follows directly from the common, federalist understanding that the Constitution establishes a national government with enumerated rather than plenary powers. As Sanford Levinson observed, "the central mantra of the founding generation was that the national government established by the 1787 Constitution was a 'limited government of assigned powers,' and that mantra retains its own power even in 2006."²⁹ Although the Founders may have disagreed among themselves about the scope of particular powers granted to the federal government, the debates about the meaning of the Necessary and Proper Clause demonstrate that the Constitution was not intended to create any general, "freestanding" governmental powers.³⁰ In

27. See Roosevelt, *supra* note 18, at 2054 ("[M]odern due process jurisprudence is typically concerned with what rights are contained in the Due Process Clause, rather than the limits of governmental power.").

28. One of the most famous early Supreme Court cases, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is in one sense a limited-government decision. Besides establishing that the role of the judicial branch is to decide the constitutionality of legislation, *Marbury* reinforced the limited-government principle simply by declaring that there are limits to Congress's power. *Id.* at 176 ("The powers of the legislature are defined, and limited.").

29. Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 708 (2006). See also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435-41 (1987) (discussing the transition during the founding generation from parliamentary supremacy under the British government to a new concept of limited government, in which ultimate sovereignty resided in the People); see also *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers." (citing THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961))).

30. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 173-90 (2003). James Madison cautioned that the Necessary and

Federalist No. 84, Alexander Hamilton argued that a Bill of Rights was unnecessary—and that adding one to the Constitution would in fact be dangerous—because its addition would suggest that the government’s powers were broader than their enumerations in the text would indicate.³¹

Although we now think of the national government as having very broad powers, the limited-government principle persists and has been given new vitality in recent federalism decisions. In *United States v. Lopez* and *United States v. Morrison*, for example, the Court struck down federal statutes on the ground that Congress had exceeded its power to regulate under the Commerce Clause.³² These decisions recognized the importance of states as regulatory laboratories and separate “regulatory spheres” for the state and federal governments; they also characterized the statutes in question as straying from Congress’s textually-mandated authority to regulate commercial and economic activity.³³

Proper Clause should not be interpreted “to give an unlimited discretion to Congress.” 2 ANNALS OF CONG. 1798. Madison later expressed this general principle during debates about the constitutionality of the proposed Bank of the United States: “All power . . . had its limits; those of the general government were ceded from the mass of general power inherent in the people, and were consequently confined within the bound fixed by their act of cession.” *Documentary History of the First Federal Congress, in DEBATES IN THE HOUSE OF REPRESENTATIVES, THIRD SESSION: DECEMBER 1790-MARCH 1791, BIOGRAPHIES OF MEMBERS*, 379 (William Charles diGiacomantonio ed., 1995). For discussion of this debate, see BARNETT, *supra* at 158-84.

31. See THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”). Others, including James Wilson of Pennsylvania and Charles Pinckney of South Carolina, similarly warned that enumerating particular rights in the Constitution would imply that the new government had been granted the power to take away unenumerated rights. See BARNETT, *supra* note 30, at 56-57.

32. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (holding that Congress exceeded its powers to legislate under the Commerce Clause by creating federal civil penalties for intrastate acts of violence motivated by gender); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress exceeded its powers to legislate under the Commerce Clause by enacting a statute that made it a federal crime to possess a firearm in a school zone). *Lawrence v. Texas*, in which Justice Kennedy wrote the decision striking down a Texas statute prohibiting same-sex sodomy, also arguably takes a limited-government, rather than rights-based, approach, concluding that the statute “further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” 539 U.S. 558, 578 (2003). See also Roosevelt, *supra* note 18, at 2053 n.176 (noting the limited-government approach in *Lawrence*).

33. Some proponents of the new federalism regard *Gonzales v. Raich*, 545 U.S. 1 (2005), as a setback. But *Raich* does maintain the limits of *Lopez* and *Morrison* by

The limited-government approach we propose would similarly examine the scope of the national government's enumerated powers with respect to non-citizens outside its borders. The foreign relations powers of the national government are, like the power to regulate commerce, subject to limits.³⁴ When examining any exercise of a foreign relations power, the first step must be to determine whether particular exercises of government power are appropriate by looking not to whether individuals possess rights (although they do), but instead by asking whether the Constitution has granted the government the particular power that it seeks to deploy.

This approach makes intuitive sense once we recognize that the Constitution does not merely *create* rights; it also sets forth the conditions under which the government may and may not *regulate* pre-existing liberties.³⁵ Stated another way, the Constitution establishes a framework under which certain "natural rights" or inherent liberty interests (such as acquiring property or protecting oneself from harm) are fully or partially surrendered in exchange for the

requiring that an "economic/commercial line" be satisfied for federal legislation to be valid; the government does not have the "carte blanche" that arguably existed before these decisions. See George D. Brown, *Counterrevolution? – National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 989-90 (2005). Brown observes that the majority opinion in *Raich* recognized an "economic/commercial line for evaluating the validity of federal legislation" under the Commerce Clause and "emphasized the non-economic nature of the statutes at issue in *Lopez* and *Morrison* as both the reason for their invalidity and the central distinction from the statute in *Raich*." *Id.* at 981.

34. The most well-known example of the Court recognizing constitutional limits on foreign relations powers of the national government is the "Steel Seizure Case," in which the Court declared unconstitutional a presidential order authorizing seizure of the steel industry despite claims by the President that the seizure was necessary for national defense. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 589 (1952). In *Home Bldg. & Loan Ass'n v. Blaisdell*, the Court upheld a Depression-era moratorium on mortgage foreclosures against a Contracts Clause challenge, concluding that the economic emergency created by the Depression made the statute necessary. 290 U.S. 398, 415-16, 444-45, 448 (1934). In doing so, the Court took pains to observe that the limited-government principle was still vital and that "even the war power does not remove constitutional limitations safeguarding essential liberties." *Id.* at 426; see Levinson, *supra* note 29, at 728-29 (discussing *Blaisdell*).

35. As Randy Barnett has observed, the founding generation universally believed that people possessed "inherent" or "natural" liberty interests (or rights) independent of those granted by the government and "by which the justice or propriety of governmental commands are to be judged." BARNETT, *supra* note 30, at 54. The concept that inherent or natural rights exist prior to, and despite, the establishment of the government by the Constitution is one that has retained its power over the years: the framers of the Reconstruction Amendments believed in such inherent rights, as do most Americans today. See *id.* at 60-79.

creation of alternate civil or positive rights.³⁶ The purpose of this bargain is to leverage the power of the state to maximize the exercise of the citizenry's full panoply of natural rights or liberties.³⁷

With respect to the domestic context, to state this proposition is to echo the words of the Declaration of Independence and the Ninth Amendment.³⁸ The ramifications of our theory for non-citizens located abroad are different, however. While it is true that non-citizens located abroad are not parties to the Constitution and may arguably be deemed to fall outside the sphere of civil or positive rights "created" by the Constitution, such outsiders likewise have never *surrendered* any of their natural rights in exchange for the civil or positive rights enjoyed by those participating in the national community. It therefore follows that the U.S. government may not abridge a non-citizen's natural rights (such as the right to be free from arbitrary, extrajudicial detention) absent an express provision of such power *legitimately* and *lawfully* granted by the people.³⁹ The question is not, "What rights does the non-citizen have

36. *See id.* at 68-72.

37. Among the pre-existing liberty interests that are given up when one enters society is the right to enforce one's own rights, or the "executive power," which in a Lockean state of nature would remain with the individual. *See id.* at 69-71 (discussing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 370 (Peter Laslett ed., Cambridge University Press 1963 (1690))).

38. *Compare* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .), with U.S. CONST. amend. IX. ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

39. Many scholars of foreign affairs have argued that the Constitution should be interpreted as extending the same rights (possibly in some diluted form) to non-citizens abroad as it does to U.S. citizens. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 305-07 (2d ed. 1996); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370-73 (2003); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871, 875-76 (1989); *cf.*, Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1350 (2004) (stating that "no human being is without protection under international law and the types of protection are many"). This "universalist" approach is sometimes justified on the ground that the Framers believed in natural rights and that they created a government of limited powers. *See, e.g.*, HENKIN, *supra*, at 306; Lobel, *supra*, at 875-76; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 5-6 (describing this approach as "universalist"). However, it is important to distinguish the universalist approach of these scholars

under the U.S. Constitution?” but rather, “What legitimate powers over non-citizens has the U.S. government been granted under the U.S. Constitution?” Certainly this latter question may be a vexing one to answer, requiring recourse to international law and historical practice. What is clear to us, however, is that to answer it one must look to the constitutional powers of the government and not to the constitutional rights of the non-citizen.

The limited-government approach, as opposed to purely rights-based approaches, recognizes that the initial burden must rest on the government to justify its exercises of power—not on the individual to assert a right against the exercise of this power.⁴⁰ Placing this burden on the government enhances accountability for government action and increases the likelihood that policies affecting liberty will be carefully developed and grounded in legal principles. The limited-government approach removes the possibility that the government may establish micro-tyrannies in legal black holes around the world.

II. THE EXTRATERRITORIALITY DOCTRINE AND LIMITED GOVERNMENT

Case law regarding the extraterritorial application of the Constitution has developed in an erratic and incoherent fashion.⁴¹

from our limited-government theory. Although both can be grounded in original intent and the nature of the government created by the Constitution, it is possible to reach radically different results in applying them. Making the claim that the government’s powers are limited is not the same thing as making the claim that non-citizens abroad possess constitutional rights. Although we are not prepared to dismiss universalism out of hand, its principal flaw is that it is not supported by the case law. See Part II *infra*.

40. Randy Barnett has argued for an interpretation of the Ninth Amendment that would “place the burden on the government to show why its interference with liberty is both necessary and proper rather than . . . imposing a burden on the citizen to show why the exercise of a particular liberty is a ‘fundamental right.’” BARNETT, *supra* note 30, at 260.

41. Scholars have noted that the doctrine allows for odd results. See Kal Raustalia, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2524-25 (2005) (“Yet while *Verdugo* may well stand for the proposition that spatial location remains essential to the rights of aliens against the U.S. government, that decision offered no coherent theory for why this was true – when territoriality so demonstrably no longer applied to citizens – nor what might explain the various anomalies in the case law.”); NEUMAN, *supra* note 39, at 101 (“It is hard to see the coherence of an approach that leads to the conclusion that American citizens cannot be tried by the federal government for capital offenses without jury trial in Japan but can be so tried in Puerto Rico.”).

These inconsistencies can be resolved, however, by viewing the cases through a limited-government rather than a rights-based lens.

Analysis of whether non-citizen detainees held by the U.S. abroad are protected in some manner by the Constitution must begin with the *Insular Cases*, a series of decisions reached in the early twentieth century in the imperial aftermath of the Spanish-American War. The *Insular Cases* addressed the application of particular constitutional provisions to litigants who were located in newly acquired U.S. territories, including Puerto Rico, the Philippines, and Hawaii.⁴² Although they did not directly address questions regarding extraterritorial application of the Constitution, the *Insular Cases* remain an important source for the Supreme Court's modern understanding of the reach of the Constitution and the limits of federal power outside of the U.S.

In *Downes v. Bidwell*, the central and most famous of the *Insular Cases*, the Court held that Congress could tax imports from Puerto Rico despite the uniform taxation requirements in Article I and despite the Court's earlier holding that Puerto Rico was part of the U.S.⁴³ Justice Brown announced the Court's judgment, concluding that the Constitution applied in acquired territories only at the discretion of Congress.⁴⁴ But it was Justice White's approach, expressed in his concurring opinion, which prevailed in subsequent cases.⁴⁵ Justice White believed that the Constitution applies every-

42. See *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197, 211, 217 (1903); *DeLima v. Bidwell*, 182 U.S. 1, 1-2, 200 (1901); *Goetze v. United States*, 182 U.S. 221, 221-22 (1901); *Dooley v. United States (Dooley I)*, 182 U.S. 222, 235-36 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Downes v. Bidwell*, 182 U.S. 244, 246-48 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States (Dooley II)*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). For a detailed discussion of these cases, potential sources for the various approaches adopted by the Justices, and the background of the litigation, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of the Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 3 (2002).

43. See *Downes* 182 U.S. at 251. The Court had concluded that Puerto Rico was part of the United States in *Dooley I*, 182 U.S. at 235.

44. *Downes*, 182 U.S. at 278-79 (opinion of Brown, J.) ("[T]he Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct."). However, Justice Brown simultaneously observed that the Constitution contained certain "prohibitions [that] go to the very root of the power of Congress to act at all, irrespective of time or place." *Id.* at 277.

45. See *id.* at 288-89 (White, J., joined by Shiras & McKenna, J.J., concurring). Justice Gray declared that he agreed "in substance" with Justice White, but emphasized the fact that the case involved a temporary government. *Id.* at 345-46 (Gray, J., concurring). White's approach was explicitly adopted by the majority of the court in *Dorr*, 198 U.S. at 13.

where the U.S. government chooses to exercise power, because our government is one of limited powers. “The government of the United States,” he explained “was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument.”⁴⁶

Justice White noted that particular limitations on government power do not always apply in the same way in every place.⁴⁷ Articulating what has become known as the “doctrine of territorial incorporation,”⁴⁸ he held that in incorporated territories—essentially, those destined for statehood—all constitutional provisions and constitutional rights apply. In unincorporated territories, by contrast, congressional power is limited in a different manner, by “inherent, although unexpressed, principles which are the basis of all free government.”⁴⁹ As he explained, there may be “restrictions of so fundamental a nature that they cannot be transgressed,” even though they are not expressed in so many words in the Constitution.⁵⁰ Thus, although Justice White’s opinion has often been characterized as establishing that fundamental “rights” are available in unincorporated territories,⁵¹ such a description is misleading, since in the context of unincorporated territories he was consistently speaking in terms of limits on government power rather than in terms of rights.⁵²

The *Insular Cases* and the incorporation doctrine they spawned have justly been criticized for what Gerald Neuman calls their “frank racism” and “enthusiastic colonialism.”⁵³ In practice, the doctrine proved a useful tool for withholding certain rights—such as the Sixth Amendment rights to grand jury indictment and jury trial—in territories already heavily populated by non-caucasian people, while extending those rights in Alaska, which alone among the new territories was deemed “incorporated” because of its low native

46. *Downes*, 182 U.S. at 288 (White, J., concurring).

47. *Id.* at 278-83.

48. See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 195-96 (2004) (describing the doctrine as “murky”).

49. *Downes*, 182 U.S. at 290-291 (White, J., concurring).

50. *Id.*

51. See, e.g., NEUMAN, *supra* note 39, at 87.

52. See Roosevelt, *supra* note 18, at 2034-35 n.89.

53. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 *LOY. L. REV.* 1, 11 [hereinafter Neuman, *Guantanamo*]. See, e.g., *Downes*, 182 U.S. at 306 (White, J., concurring) (concluding that the U.S. had a right, as a sovereign nation on par with the European powers, to “protect the birthright of its own citizens” by withholding citizenship from people in the acquired territories that belonged to “an uncivilized race” and could be “absolutely unfit to receive it”).

population and suitability for settlement by white Americans.⁵⁴ Nonetheless, the underlying limited-government rationale of the cases is sound, and they have been relied on by the Court as a primary source for its analysis of the extraterritorial application of the Constitution.

The Court next grappled with the extraterritorial reach of the Constitution in the context of World War II, in *Johnson v. Eisentrager*.⁵⁵ The petitioners in *Eisentrager* were German nationals who, after the cessation of hostilities, had been captured by U.S. forces in China and accused of aiding the Japanese military in violation of Germany's surrender terms. With the permission of the Chinese government, the Germans were tried, convicted, and sentenced by a congressionally-authorized military commission.⁵⁶ The convicted prisoners, who were transferred to a U.S. military base in occupied Germany to serve out their sentences, filed habeas petitions challenging their detention on a variety of constitutional, statutory, and treaty-based grounds. Relying mainly on the German convicts' status as enemy aliens being detained abroad, Justice Jackson for a majority of the Court held that the protections of the Great Writ were not available to these petitioners. Adopting a half-articulated territoriality approach to the questions confronting the Court, he described the various legal disabilities that had traditionally limited court access to enemy aliens and the disadvantages of affording habeas to enemy nationals captured, tried, and imprisoned abroad, noting that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."⁵⁷ Though Justice Jackson in fact considered the substance of the Germans' claims, he rejected their contention that the Fifth Amendment "conferred 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."⁵⁸

54. Compare *Rasmussen v. United States*, 197 U.S. 516 (1905) (holding that the Sixth Amendment applied to Alaska, which had been incorporated into the United States), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 92 n.29 (1970), with *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that Fifth and Sixth Amendment grand and petit jury protections did not apply to Hawaii).

55. 339 U.S. 763 (1950).

56. See *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) ("Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.").

57. *Eisentrager*, 339 U.S. at 771.

58. *Id.* at 785.

The territoriality approach underlying portions of *Eisentrager* was seriously undermined by *Reid v. Covert*, a 1956 decision involving servicemen's civilian widows who had been accused of capital crimes.⁵⁹ The *Reid* Court held that the widows, who were U.S. citizens, could not be tried by court martial for capital crimes while overseas.⁶⁰ Justice Black's watershed plurality opinion, adopting a mode of analysis that would become the majority approach in later cases,⁶¹ established that American citizen civilians may invoke full constitutional rights against the government anywhere in the world. Justice Black's opinion diverged from the *Insular Cases*' doctrine as far as American citizens were concerned,⁶² but in many respects reinforced the limited-government theme of *Downes*.⁶³ *Reid* "rejected the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."⁶⁴ Moreover, Justice Black reasoned, since the "United States is entirely a creature of the Constitution," its "power and authority have no other source" and it "can only act in accordance with all the limitations imposed by the Constitution."⁶⁵

Justices Harlan and Frankfurter concurred in the result and wrote separate opinions. Unlike Justice Black, Justices Harlan and Frankfurter reasoned from the *Insular Cases*, treating them as the foundation of doctrine, rather than as precedent to be distinguished.⁶⁶ Justice Harlan articulated a two-step analysis. First, he addressed the threshold question of whether the government

59. *Reid v. Covert*, 354 U.S. 1 (1956).

60. *Id.* at 32-33, 40-41.

61. The *Reid* holding was extended by a series of opinions. See, e.g., *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246-48 (1960) (extending *Reid* to dependents of service personnel accused of non-capital crimes); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (extending *Reid* from dependents of service personnel to civilian employees of the armed forces accused of capital crimes); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (extending *Reid* to civilian employees of the armed forces accused of non-capital crimes).

62. Justice Black concluded that the *Insular Cases* were distinguishable because "they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship." *Reid*, 354 U.S. at 14.

63. See *id.* at 8-9 & n.10. Justice Black, who believed in the wholesale incorporation of the Bill of Rights into the Fourteenth Amendment, clearly disliked the territorial incorporation doctrine. See NEUMAN, *supra* note 39, at 91.

64. *Reid*, 354 U.S. at 5.

65. *Id.* at 5-6. In this respect, Justice Black's opinion was strikingly similar to that of the D.C. Court of Appeals opinion that was eventually overruled in the *Eisentrager* case. See *Eisentrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949).

66. See NEUMAN, *supra* note 39, at 92-93.

power being invoked—in this case, Congress’s Article I power to regulate the armed forces—existed at all.⁶⁷ As Justice Harlan reasoned, only if there were a rational connection between a grant of power and the exercise of the power in the particular case should the Court ask whether it was appropriate to recognize the constitutional rights at issue. This second inquiry, he wrote, “can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”⁶⁸ Justice Frankfurter’s opinion adopted a similar approach, concluding that courts must weigh the congressional power at issue against “the safeguards of Article III and the Fifth and Sixth Amendments.”⁶⁹

The *Insular Cases*, *Eisentrager*, and *Reid* all played a role when the Court next considered whether constitutional protections extended to non-citizens outside of U.S. territory. In 1990, the Court decided *United States v. Verdugo-Urquidez*, holding that the Fourth Amendment does not apply to searches by U.S. agents of property that is owned by nonresident aliens and that is located in a foreign country.⁷⁰ The defendant in *Verdugo-Urquidez* was detained in a San Diego prison while Drug Enforcement Agency agents searched his home in Mexico, where they obtained evidence that they then sought to use against the defendant in his trial in the U.S. In his opinion for the Court, Chief Justice Rehnquist rebuked Verdugo-Urquidez’s Fourth Amendment challenge to the admission of the drug evidence, reasoning that the reference to “the People” in the Amendment limits its application to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁷¹

Because *Verdugo-Urquidez* is the most recent Supreme Court pronouncement on the extraterritorial reach of the Constitution, it is worth discussing. Two aspects of the Chief Justice’s opinion present potential problems for a limited-government approach in the

67. *Reid*, 354 U.S. at 70 (Harlan, J., concurring).

68. *Id.* at 75. Justice Kennedy quoted this language in his *United States v. Verdugo-Urquidez* concurrence. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

69. *Reid*, 354 U.S. at 53 (Frankfurter, J., concurring).

70. *Verdugo-Urquidez*, 494 U.S. at 259, 274-75; see 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.”).

71. *Verdugo-Urquidez*, 494 U.S. at 265.

context of the extraterritorial reach of the Constitution. First, Chief Justice Rehnquist provides a very broad reading of the *Eisen-trager* case, characterizing it as standing for the proposition that aliens held “outside the sovereign territory of the United States” lack any Fifth Amendment rights.⁷² In light of the Chief Justice’s strong reading of *Eisen-trager*, a number of courts subsequently read *Verdugo-Urquidez* to be an acknowledgment that aliens detained extraterritorially by the U.S. have no constitutional protections whatsoever.⁷³ Such a conclusion is unwarranted. As Professor Neuman has persuasively argued, the Chief Justice’s dictum concerning *Eisen-trager*’s holding is selective and unnecessarily broad. *Eisen-trager* can and should be viewed only as a *statutory* case, in which the Court held simply that self-declared enemy aliens who are imprisoned abroad and who have been tried and convicted of war crimes may not ask U.S. courts to have their convictions overturned.⁷⁴ Moreover, the force of *Eisen-trager*—and thus of the Chief Justice’s opinion in *Verdugo-Urquidez*—has been muted by *Rasul v. Bush*, where the Court stated explicitly that *Eisen-trager* was a case that turned on statutory rather than constitutional interpretation.⁷⁵

A second apparent hurdle that *Verdugo-Urquidez* poses for the adoption of our limited-government approach is the Chief Justice’s constricted reading of *Reid v. Covert*. The defendant in *Verdugo-Urquidez* relied on Justice Black’s plurality decision in *Reid* and his observations that the U.S. is “entirely a creature of the Constitution,”

72. *Id.* at 269.

73. *See, e.g.*, *Al Oldah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003), *overruled by* *Rasul v. Bush*, 542 U.S. 466 (2004); *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (citing *Verdugo-Urquidez* as support for its “decision that the Cuban and Haitian migrants [held at Guantánamo Bay] have no First Amendment or Fifth Amendment rights”). In the Guantánamo detainee litigation, the government continues to make this argument. *See, e.g.*, *In re Guantánamo Bay Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (describing government’s interpretation of *Rasul*, in context of a motion to dismiss post-*Rasul* petitions, as one in which district courts have jurisdiction to consider habeas petitions, but must immediately dismiss such petitions because non-citizens detained in Guantánamo possess no substantive constitutional rights).

74. *See* Neuman, *Guantanamo*, *supra* note 53, at 54-65. Neuman observes that *Eisen-trager* is outdated for several reasons: it relies on *Ahrens v. Clark*, 335 U.S. 188 (1948) (construing the habeas statute as making the location of petitioner key to habeas jurisdiction), which was overruled prior to *Rasul* by *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1972); it relies on a territorially-restrictive concept of constitutional rights exploded by *Reid v. Covert*, 354 U.S. 1 (1957); much of its rationale for limiting access to habeas for aliens located abroad — logistical and security concerns — has been undermined by technological advances enabling proceedings via telecommunication.

75. *Rasul*, 542 U.S. at 467. *See* Neuman, *Guantanamo*, *supra* note 53, at 54-65.

that its "power and authority have no other source," and that it "can only act in accordance with all the limitations imposed by the Constitution."⁷⁶ The Chief Justice dismissed Verdugo-Urquidez's argument that the Court "interpret this discussion to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act."⁷⁷ The holding of *Reid*, he explained, "stands for no such sweeping proposition," since it was ultimately the concurring justices, with their reliance on the fact that the defendants in *Reid* were U.S. citizens, that provided the narrowest grounds for decision in the case.⁷⁸ Although Chief Justice Rehnquist's discussion of *Reid* rejects application of the Fourth Amendment to aliens abroad, it is hardly fatal for our limited-government approach: a non-citizen does not lack protection from exercises of government power merely because he lacks a particular right.

Moreover, the Chief Justice's "majority" in *Verdugo-Urquidez* was more apparent than real. Justice Kennedy supplied the crucial fifth vote for the case and joined the majority, but he also wrote separately to provide "some explanation of my views," which, he wrote, "I do not believe . . . depart in fundamental respects from the opinion of the Court."⁷⁹ Importantly, Justice Kennedy rejected sweeping generalizations about the inapplicability of the Constitution to protect non-citizens abroad. Instead, specifically relying on Justice Harlan's *Reid* concurrence, Justice Kennedy focused on the particular "conditions and considerations" of particular cases, inquiring whether the application of certain constitutional provisions in certain circumstances would be "impracticable and anomalous."⁸⁰

Neither *Verdugo-Urquidez* nor *Eisentrager* forecloses the possibility that aliens held abroad by the United States possess certain constitutional protections, although *Verdugo-Urquidez* itself provides

76. *Verdugo-Urquidez*, 494 U.S. at 268 (quoting *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion)).

77. *Id.* at 271.

78. *Id.* As Gerald Neuman has observed, the opinion seems to disregard the fact that the *Reid* plurality became the majority in later cases involving U.S. citizens abroad. See Neuman, *Guantanamo*, *supra* note 53, at 12-13 & n.64; see also *Kinsella v. United States*, 361 U.S. 234 (1960) (majority opinion extending *Reid* to dependents of service personnel accused of noncapital crimes); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (majority opinion extending *Reid* holding from dependents of service personnel to civilian employees of the armed forces accused of capital crimes); *McElroy v. Guagliardo*, 361 U.S. 281, 284 (1960) (extending it to civilian employees of the armed forces accused of non-capital crimes).

79. *Verdugo-Urquidez*, 494 U.S. at 282 (Kennedy, J., concurring).

80. *Id.* at 282.

little guidance about which protections are available to which persons and in which locations.

Still, it seems clear to us that any theoretical approach to the question of whether aliens detained abroad possess constitutional rights must be supported by the center point of the doctrine—the Harlan-Kennedy approach outlined in their *Reid* and *Verdugo-Urquidez* concurrences. It is the limited-government theory that best harmonizes the Harlan-Kennedy approach with the earlier precedent: the limited-government approach is the common thread that runs through the full range of “extraterritoriality” cases. In *Downes*, Justice White described the core constitutional protections afforded to residents of unincorporated territories as “absences” of government power, not as “fundamental rights.”⁸¹ As discussed above, in their respective *Reid* concurrences, Justices Frankfurter and Harlan analyzed whether the government was empowered by the Constitution to try the civilian defendants by court martial.⁸² Justice Harlan, in particular, treated the scope of government power as a threshold issue to be analyzed before considering how to apply the specific constitutional rights in a foreign context.⁸³ Justice Kennedy essentially adopted Justice Harlan’s approach wholesale in his *Verdugo-*

81. See *Downes v. Bidwell*, 182 U.S. 244, 297-98 (1901) (White, J., concurring) (asserting that “those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status”). The *Downes* opinions can be understood as an argument about the appropriate application of a limited-government approach. Chief Justice Fuller’s dissenting opinion, joined by three other justices, also struck the limited-government theme. See *id.* at 359 (Fuller, C.J., dissenting) (“The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of question.”). Even Justice Brown acknowledged the existence of “such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place,” mentioning as examples the provisions forbidding ex post facto laws, titles of nobility, and even the First Amendment. *Id.* at 277 (majority opinion). In *Lamont v. Woods*, the Second Circuit concluded that an overseas religious program violated the Establishment Clause, relying on *Downes* for the proposition that “the constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description — irrespective of time or place.” *Lamont v. Woods*, 948 F.2d 825, 834-35 (2d Cir. 1991). See Roosevelt, *supra* note 18, at 2049 (“Invocations of limited government are common in the extraterritoriality case law.”).

82. See *Reid v. Covert*, 354 U.S. 53 (1956) (Frankfurter, J., concurring); *id.* at 70 (Harlan, J., concurring).

83. See *id.* at 70 (Harlan, J., concurring). Justice Frankfurter, in contrast, analyzed the power and the right together. See *id.* at 53 (Frankfurter, J., concurring).

Urquidez concurrence.⁸⁴ Indeed, the limited-government approach ties together, in an unstrained fashion, the full range of opinions in *Verdugo-Urquidez*⁸⁵ with the exception of Chief Justice Rehnquist's plurality-like majority.⁸⁶

The door remains open for the Supreme Court to clarify that a limited-government theory provides an appropriate way of analyzing questions of extraterritoriality, and the Court can utilize such a theory in future cases without engendering an upheaval in its own precedent. The same cannot be said of other popular theories regarding the application of the Constitution abroad.

III. THEORIES OF A GLOBAL CONSTITUTION

Many theoretical approaches to the question of the extraterritorial application of the Constitution have, of course, been proposed over the years and were utilized by the Supreme Court in developing the doctrine. But for the most part, these methods have focused attention on the circumstances under which particular constitutional rights should be extended to particular individuals in particular locations. These "who-where-what" theories share at least one of two essential flaws: they either do not fully explain Supreme Court doctrine, or they would allow for the creation of legal black holes. In this section, we discuss the major theories.

84. See *Verdugo-Urquidez*, 494 U.S. at 272 (Kennedy, J., concurring). Justice Kennedy began with, as a "first step," the principle that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* He then quoted extensively from Justice Harlan's concurrence and used the identical language to evaluate whether the application of the Fourth Amendment to this presumably valid exercise of government power, the extraterritorial search of Verdugo-Urquidez's home, would be "impractical and anomalous." *Id.* at 277.

85. See *id.* at 262 (noting that Mexican law enforcement officials authorized the search of Verdugo-Urquidez's residence); *id.* at 282 (Brennan, J., dissenting) ("The Court today creates an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be."); *id.* at 289 (Blackmun, J., dissenting) ("Although the Government's exercise of power abroad does not ordinarily implicate the Fourth Amendment, the enforcement of domestic criminal law seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey.").

86. See *id.* at 261 (majority opinion).

A. *Territoriality and Membership*

Our overview begins with two approaches, commonly referred to as the “territoriality” and “membership” theories, which have in practice merged in the case law and scholarship.⁸⁷

Under a strict territoriality approach, the Constitution is understood to apply only within U.S. territory. This view was articulated by the Supreme Court near the end of the nineteenth century in *In re Ross*, where Justice Field stated succinctly that “the Constitution can have no operation in another country.”⁸⁸ This straightforward approach, however, has not fared well over the years. As noted above, for instance, *Reid v. Covert* established that constitutional rights *can* apply extraterritorially, at least for U.S. citizens.⁸⁹ In addition, the approach is inconsistent with the indisputable fact that certain constitutional provisions, such as the Commander-in-Chief Clause and the clause granting Congress the power to punish crimes “on the high Seas,”⁹⁰ explicitly contemplate extraterritorial application of the powers they endow. A strict territoriality approach would also fail to account for Congress’s undisputed power to enact legislation with extraterritorial effect.⁹¹ As Kermit

87. Gerald Neuman describes these two approaches as composing a single, “membership” approach that “treats certain individuals or locales as participating in a privileged relationship with the constitutional project, and therefore entitled to the benefit of constitutional provisions.” Neuman, *Guantanamo*, *supra* note 53, at 6-7. Neuman has analyzed the history of the application of the Constitution in the territories and abroad as essentially a conflict between this general membership approach and a mutuality-of-obligation approach, which we discuss below. See NEUMAN, *supra* note 39.

88. *In re Ross*, 140 U.S. 453, 464-65 (1891). The petitioner in *Ross* was a seaman on an American merchant vessel charged with murder of a fellow crewmember aboard the ship in a harbor in Japan. He was tried and sentenced to death by a court consisting of a U.S. consul general and four U.S. citizens (his sentence was later commuted and he was imprisoned in the U.S.). See Cleveland, *supra* note 42, at 204-06 (discussing *In re Ross*). He argued that this process deprived him of the right to a grand jury indictment and jury trial. Relying largely on the rationale that the Constitution did not apply outside U.S. territory, the Court rejected his appeal. See *In re Ross*, 140 U.S. at 465.

89. *Reid v. Covert*, 354 U.S. 12 (1956) (“The *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases.”).

90. U.S. CONST. art. II, § 2, cl. 1 (the Commander-in-Chief Clause); U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas”).

91. See Roosevelt, *supra* note 18, at 2044; Neuman, *Guantanamo*, *supra* note 53 at 45.

Roosevelt has observed, “[I]f Congress and state legislatures can project power beyond their borders, so too can We the People.”⁹²

But the territoriality approach is far from dead. As discussed above, it was an important part of Chief Justice Rehnquist’s analysis in *Verdugo-Urquidez*.⁹³ In addition, Justice Kennedy cited *In re Ross*, which has never been explicitly overruled, in his concurrence in *Verdugo-Urquidez*, though he interpreted it (along with the *Insular Cases*) as standing “for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”⁹⁴ Territoriality, in short, has survived as a single factor in a broader constitutional analysis.

A component of that broader analysis is the membership approach to extraterritoriality. Under a membership theory, constitutional rights are understood to increase as an individual’s connection to U.S. society increases. It is the membership approach that is really at the heart of Chief Justice Rehnquist’s opinion in *Verdugo-Urquidez*.⁹⁵ Drawing on dicta in *Eisentrager*, Chief Justice Rehnquist describes a series of concentric circles in which non-citizens can be placed closer or further from the center of the “national community,” depending on their status as residents or nonresidents in the U.S. and whether they are in the country voluntarily or involuntarily.⁹⁶ As a person is located further and further from the center of the circles—further and further from the national community—his or her rights are diminished accordingly. Pursuant to this approach, aliens who are detained abroad and have no previous connection to the United States are on the far outer edge of this framework and are entitled to virtually no constitutional protections from the exercise of U.S. governmental power.

92. Roosevelt, *supra* note 18, at 2044.

93. See 494 U.S. 259, 267 (1990).

94. See *id.* at 282 (Kennedy, J., concurring).

95. This approach has also been labeled a “social contract” model because it would reserve the benefits of the Constitution largely to “the People” of the American community who, in a general sense, established the Constitution. See Roosevelt, *supra* note 18, at 2046-47.

96. NEUMAN, *supra* note 39, at 106-07. Chief Justice Rehnquist quoted Justice Jackson’s statement that an “alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.” *Verdugo-Urquidez*, 494 U.S. at 269 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)). As Professor Neuman has pointed out, however, it is not clear whether Justice Jackson was discussing statutory, rather than constitutional, rights. See NEUMAN, *supra* note 39, at 250 n.21.

As discussed above, however, we do not believe that this membership approach has prevailed, notwithstanding Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* for a technical majority. Instead, Justice Kennedy's *Verdugo-Urquidez* concurrence is probably closer to the actual position of the Court today. While Justice Kennedy denies the existence of a "juridical relation" between "our country and some undefined, limitless class of noncitizens who are beyond our territory," he also acknowledges that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."⁹⁷ Justice Kennedy's concurrence thus assigns the membership approach, like the territoriality approach, an important, though not exclusive, role in analyzing the application of the Constitution abroad.

B. *Mutuality-of-Obligation*

A mutuality-of-obligation theory is also worth considering here because it has played an important, albeit primarily dissenting, role in the development of extraterritoriality doctrine. Adherents to this approach contend that when the U.S. government compels a non-citizen to act pursuant to its legitimate legal authority, the U.S. government itself simultaneously assumes a reciprocal obligation to afford the non-citizen concomitant constitutional rights. Variations of this approach can arguably be found in Justice Brennan's dissent in *Verdugo-Urquidez* and Justice Harlan's dissenting opinion in *Downes*.⁹⁸ Neuman, among the strongest defenders of this theory, argues for a version that would establish a presumption that constitutional rights apply "to aliens abroad only in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority."⁹⁹ Against this presumption, according to Professor Neuman, the government may assert only "specific textual or other arguments [that] may exceptionally demonstrate that a particular right is either reserved to citizens or geographically limited."¹⁰⁰

97. *Verdugo-Urquidez*, 494 U.S. at 272 (Kennedy, J., concurring).

98. Neuman believes that Harlan expounded a mutuality-of-obligation approach in his *Downes* dissent. See NEUMAN, *supra* note 39, at 87. We read Harlan as ultimately adopting the same limited-government approach as his colleagues. See *Downes v. Bidwell*, 182 U.S. 244, 385 (1901) (Harlan, J., dissenting) ("By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its Government, the validity or invalidity of that which is done must be determined by the Constitution.").

99. NEUMAN, *supra* note 39, at 99-100.

100. *Id.* at 99.

The mutuality-of-obligation approach has strong intuitive appeal. However, it does not provide any protection to non-citizens who are detained extraterritorially (and without charges or trial) if the government is not itself asserting any obligation on the part of the non-citizen to comply with U.S. laws. That, of course, is precisely the position in which the detainees at Guantánamo, Bagram, Kandahar, and other detention centers around the world find themselves. Because the government asks for nothing from these prisoners, even under a mutuality-of-obligation theory it would consider itself obliged to provide no constitutional protections in return. Indeed, the detention of aliens in black-box prisons is, and is meant to be, an exercise of raw power for which no justification is deemed necessary.¹⁰¹ Professor Neuman acknowledges this difficulty in his discussion of the status of detainees at Guantánamo Bay. After arguing that the detainees have rights under a mutuality-of-obligation approach, he concludes: “If the Government denies that foreign nationals have any rights, then it is engaging in an exercise of naked force in confining them at Guantánamo. Force may be justified on the battlefield, but not in secure territory against helpless captives who protest their innocence.”¹⁰² The ultimate issue is not whether the detainees’ “rights” are being respected in the process that has been provided them, but whether the government’s exercise of power is justified—that is, whether it is authorized by the Constitution. This, of course, is a question of limited government.

C. *Pragmatic Due Process or Global Due Process*

As we discussed above, the current theoretical approach to extraterritoriality in the Supreme Court is evolving. For now, Justice Kennedy’s concurrence in *Verdugo-Urquidez*, which leaves open the possibility that non-citizens are entitled to certain constitutional protections, appears to be the reigning analysis. The challenge for Justice Kennedy’s approach going forward, however, is to give specific content to the constitutional protections that may be available to non-citizens being detained extraterritorially.

Justice Kennedy’s approach to the extraterritoriality question has been described as a “global due process” theory.¹⁰³ Only recently have defenders of a flexible due process approach come to the fore, including Professor Tung Yin, who argues that no prece-

101. See Neuman, *Guantanamo*, *supra* note 53, at 52.

102. *Id.*

103. NEUMAN, *supra* note 39, at 113-14.

dent actually precludes recognition of procedural due process rights for non-citizens detained abroad in the war on terror. Indeed, Professor Yin has articulated a general framework for those rights based on other non-criminal detention contexts.¹⁰⁴

We are sympathetic to Professor Yin's project, and we agree that neither the Constitution itself nor anything in the case law forecloses the possibility that non-citizens detained abroad are entitled, at a minimum, to fundamental due process rights. We believe, however, that there is a serious problem with purely pragmatic approaches to constitutional interpretation, since the content of the "rights" theoretically available under such approaches remains ungrounded and is ultimately dependent on the values that the decisionmaker brings to his or her analysis of the question.¹⁰⁵

For instance, how is the court to determine what process is due to a non-citizen being detained abroad as an "enemy combatant" and accused of sending money to an organization that, unbeknownst to her, itself funnels money to a terrorist organization?¹⁰⁶ Is the detainee entitled to a hearing? To speak in her own defense? To obtain counsel? Does the military context of the detention factor into the equation? Is the U.S. government's assertion that the entire world is a battlefield in our "Global War on Terror" entitled to any weight when addressing these questions? What process, if any, is due to persons who are caught up in the U.S. military's terror-war dragnet? Due process is, of course, the most protean of concepts, appropriately flexible in practice but notoriously difficult to generalize about in theory in a manner that would give guidance to jurists. Adopting a pragmatic approach to the question, it is impossible to determine *a priori* the scope of due process rights to

104. See Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 354 (2006). Professor Yin offers a model that suggests detainees should be afforded a hearing, appointed counsel, and reasonable right to present evidence. *Id.* at 400-414.

105. See R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 145-61 (2004).

106. Senior Judge Joyce Hens Green offered this hypothetical to counsel for Respondents in a hearing addressing the Government's motion to dismiss the habeas petitions of all of the Guantánamo prisoners:

A little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance al-Qaeda activities. Would she be considered an enemy combatant or supporting [a terrorist organization]?" The Government's remarkable response was that the "little old lady" could indeed be taken into custody and held by the military as an "enemy combatant."

See Transcript of Motion to Dismiss, at 25-26, *Rasul v. Bush* (D.D.C. 2004) (No. 03-334).

which detainees would be entitled. Giving content to the due process rights must ultimately reduce, whether tacitly or overtly, the credence given to other theoretical approaches to the Constitution, such as the territoriality or membership approaches that we discussed earlier.

In addition, as a practical matter, flexible approaches are inherently more susceptible to manipulation.¹⁰⁷ If, for example, a court holds that on balance a non-citizen held at Guantánamo Bay must be afforded access to counsel, since the base is in a secure zone far from the battlefield, the United States will simply stop transferring non-citizens to that location in the future,¹⁰⁸ and may even seek to move detainees out of Guantánamo to avoid giving effect to the court's ruling.¹⁰⁹

A healthy dose of pragmatism and a willingness to balance competing governmental and private interests are certainly necessary to achieve a workable approach to constitutional interpretation in the extraterritorial context. We acknowledge that in the realm of foreign affairs the government must be afforded more deference and allowed more flexibility than in the domestic context. But these

107. See NEUMAN, *supra* note 39, at 115.

108. In fact, the Government ceased transferring detainees to Guantánamo in 2003. See Mayer, *supra* note 17, at 37-38 (describing internal wrangling in the Bush administration over the value of shipping detainees to Guantánamo once the courts established that the Executive was not immune from judicial oversight).

109. Fearing such a course of events, in March 2005 we filed an emergency application for a temporary restraining order and preliminary injunction to keep the military from transferring our clients from Guantánamo unless they afforded us 30-days' advance notice. Our fears were that such a transfer would remove the court's de facto jurisdiction over our clients' habeas cases and that our clients might be subjected in the foreign country either to torture or indefinite detention at the behest of the U.S. government. See Petitioners' *Ex Parte* Motion for Temporary Restraining Order to Prevent Respondents from Removing Petitioners from Guantánamo Until Petitioners' Motion for Preliminary Injunction is Decided, *Abdah v. Bush*, 04-CV-1254, (D.D.C. Mar. 11, 2005) (on file with the authors) (noting, among other things, that a "classified document in the factual return of [a petitioner], for example, demonstrates beyond doubt that the Department of Defense, as recently as March 17, 2004, contemplated rendering [petitioner] to a foreign country for interrogation under torture"). The motion for a temporary restraining order and preliminary injunction was granted. Subsequently, many detainees have applied for and received similar protection from the courts. Sadly, not all have. For example, several ethnic Uighurs—men whom the military conceded were not enemy combatants and had been detained wrongfully at Guantánamo for more than four years—were transferred from Guantánamo to a refugee camp in Albania. China is at present pressuring Albania to extradite these men and, if the extradition demand is successful, the ethnic Uighurs face the prospect of torture and likely execution upon return to China. Abu Bakker Qassim, Op-Ed, *The View From Guantánamo*, N.Y. TIMES, Sep. 17, 2006, at 4.15.

same realities also counsel that some solid boundaries be identified beyond which our government may not stray. Some fundamental principles of restraint must be acknowledged, lest our government actors come to believe that the flexibility and deference to which they are entitled means, in practice, that there are no limits to their power and that they are entirely unconstrained by our Constitution.

IV. RIGHTS AND LEGAL BLACK HOLES

Having canvassed the chief academic theories addressing the extraterritorial reach of the Constitution, we believe it is clear that the core problem with each of them is the manner in which they frame their inquiries: *Which* rights are possessed by *which* persons in *which* location? Such questions may have been appropriate in the past, when the U.S. government was essentially reactive and had not yet embarked on its post-9/11 efforts to find and detain suspected terrorists in overseas locations often hundreds if not thousands of miles away from any conventional battlefield. While a certain theoretical inconsistency may underlay the “who-what-where” rights approaches, in practice the flaws remained hidden from view. Indeed, historically such approaches provided the courts with a reasonable, if not particularly coherent, way in which to adjudicate what protections non-citizens are entitled to.

These approaches function reasonably well, in other words, when the non-citizen can be placed somewhere on a chart that measures his proximity to the U.S. in terms of geography, status, and rights. For example, if the non-citizen who invokes a constitutional right is an illegal alien living within the United States, he is entitled to due process of law.¹¹⁰ The same holds for a non-citizen living abroad who is sued in the United States.¹¹¹

The poverty of these approaches, however, has been made manifest since the initiation of our Global War on Terror. Since late 2001, the United States has taken into custody and detained literally thousands of non-citizens all around the globe and has uniformly denied them anything that remotely resembles constitu-

110. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of due process].”).

111. *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 108 (1987) (holding that a nonresident located abroad is entitled to due process when sued in a U.S. court).

tional protections.¹¹² With only rare exceptions, including, to a large extent, Judge Green's ruling in *In re Guantánamo Detainee Cases*,¹¹³ the courts have been flummoxed by the government's argument that precedent dictates that non-citizens detained abroad have no rights.

The U.S. government has argued that it may detain non-citizens extraterritorially without according them any due process because non-citizens detained extraterritorially possess no rights. The conventional understanding of limits on government power as being derived from rights and immunities possessed by the individual leaves such detainees with no protections from even arbitrary exercises of U.S. power against them.

Such a result is repulsive to anyone who retains respect for the rule of law. It is non-intuitive and defies common sense that the agents of the U.S. government may act utterly without restraint anywhere in the world against a non-citizen. May the U.S. detain an alleged "enemy combatant" in a secret site in Siberia, absolutely incommunicado, for a decade? May the U.S. torture the detainee or oversee his torture?¹¹⁴ May the U.S. summarily execute the detainee? On what theoretical grounds would the answer be no to any of these questions? Although Justice Kennedy's approach in *Verdugo-Urquidez* would appear to offer the possibility that the U.S. government would be restrained from acting in the above ways, it is

112. See, e.g., Josh White & Julie Tate, *4 Men Cleared of Terrorism Links But Still Detained*, WASH. POST, May 20, 2006, at A18 (noting that, according to a Pentagon spokesman, more than 10,000 persons have been taken into custody by the United States in and around Afghanistan since early 2002).

113. 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

114. The DTA ostensibly forbids any torture or inhuman treatment by any U.S. actor anywhere around the globe. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005 (2005) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."). The President, however, signaled in his executive signing statement that he would not be bound by the plain language of the law:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander-in-Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.

Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, P.L. 109-148, 2006, Statement of President George W. Bush Upon Signing of H.R. 2863, Dec. 30, 2005.

radically unclear to what protections such a detainee might be entitled.

These difficulties largely disappear, however, when we shift our focus away from trying to determine which rights the individual possesses and instead focus on which powers the government has been authorized by the Constitution to exercise. If the government is not empowered by the Constitution to take a certain action, then the geography, citizenship status of the individual, and legal context in which his claim is brought are made irrelevant. For example, if the Constitution does not empower the U.S. government to engage in torture, then the government may not torture an individual in its custody regardless of where the person is being detained. Whether the detainee is being kept in Kansas or Kazakhstan, the government is not empowered to torture him.

V.

PROBLEMS AND AREAS FOR FURTHER INQUIRY

The central problem facing any limited-government theory of constitutional interpretation is the difficulty of defining limits and discerning appropriate standards regarding the scope of government power.¹¹⁵ The case law provides little guidance, and it is in fact the rare case in which *any* exercise of government power has been declared unconstitutional on the ground that the government has exceeded its grant of power rather than on the ground that an individual's right has been violated.¹¹⁶ In general, decisions after the *Lochner* era hold that the legislature rather than the judiciary is better equipped to discern the limits of its own power.¹¹⁷ And in light of *United States v. Curtiss-Wright Export Corporation*,¹¹⁸ it is not

115. See Roosevelt, *supra* note 18, at 2056; see generally NEUMAN, *supra* note 39.

116. See Roosevelt, *supra* note 18, at 2054.

117. See *id.* at 2053-54 (discussing cases).

118. 299 U.S. 304, 329 (1936) (rejecting a challenge, on non-delegation doctrine grounds, to a joint resolution permitting the President to enforce a criminal prohibition on the sale of arms in the United States to countries engaged in a war in South America). The doctrine articulated in Justice Sutherland's opinion is that the federal foreign affairs power was inherent in the sovereignty of the United States and not dependent on the Constitution for its source. See *id.* For an in-depth discussion of the roots of the doctrine articulated in *Curtiss-Wright*, see generally Cleveland, *supra* note 42. It is doubtful, however, that this "inherent powers" thesis remains valid in light of *Reid v. Curtiss-Wright*. *Curtiss-Wright* is cited in contemporary cases rather for the principle that the President is authorized by the Constitution, and not some other source, to take a lead role in foreign policy and may act without congressional authority. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 n.9 (2002) (referring to "Justice Sutherland's reading of the National Government's 'inherent' foreign affairs power"). In his *Verdugo-Urquidez* concurrence, Justice

absurd to ask whether any limits of this nature can or should be placed on the government's power in the realm of foreign affairs.¹¹⁹

These legitimate challenges are not insurmountable, although it is well beyond the scope of this brief article to provide the full response that they deserve. In order to lay the groundwork for a fuller exploration of these themes, however, we offer the following fundamental propositions relating to the extraterritorial detention of non-citizens.

First, even assuming that there exists a radical uncertainty regarding the limits of national power abroad, the limited-government theory has significant explanatory utility. As we discussed in Part IV, the limited-government approach best explains *why* certain protections should be afforded to all individuals, including those who are furthest from the geographical United States and furthest from the national community, even if the precise nature of those protections is uncertain.

Second, we believe that a fair reading of the extraterritorial cases we have discussed above clearly establishes that, whether or not the powers granted the government with respect to foreign affairs are necessarily broader and more flexible than their domestic counterparts, the detention of individuals by the U.S. government must still be justified as relating to a particular enumerated power.¹²⁰ Just as the Court in *Downes* considered the scope of the

Kennedy cited *Curtiss-Wright* for the proposition that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 282 (1990) (Kennedy, J., concurring).

119. See Roosevelt, *supra* note 18, at 2051-52 (noting that, despite intense criticism from scholars, *Curtiss-Wright* is still cited in support of broad authority for the government in foreign affairs matters). *Curtiss-Wright*, of course, has been roundly criticized by scholars. See Cleveland, *supra* note 42, at 6; see also David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 497 (1946) (*Curtiss-Wright* made a "shambles out of the very idea of a constitutionally limited government."); James Quarles, *The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?*, 32 GEO. L.J. 375 (1944); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 94 (1990) ("*Curtiss-Wright* painted a dramatically different vision of the National Security Constitution from that which [had] prevailed since the founding of the Republic."). Professors Jack Goldsmith and Curtis Bradley have also challenged *Curtiss-Wright* in a series of articles. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 861-70 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659-60 (1997).

120. Although scholars often assume that Congress has a "general" power to legislate with respect to foreign affairs, this assumption has little grounding in the

Territories Clause and the Court in *Reid* considered the scope of Congress's power to regulate the armed forces, the detention of non-citizens abroad should trigger a searching examination of the scope of Congress's and the President's power to deprive individuals of liberty.¹²¹ Although we acknowledge that the government has wider latitude for the exercise of its enumerated powers in foreign contexts than in domestic ones, there is still room for courts to determine whether a particular exercise of power is appropriate with reference to the purpose of the power being exercised.¹²²

Finally, it follows from this—and ultimately, from the *Insular Cases*—that the exercise of any foreign relations power, no matter how broadly conceived, is restricted by certain absolute constitutional limits on all government powers.¹²³ These limitations are concededly difficult to define and their relationship to specific rights enumerated in the Constitution is complex. But they are discernible from our founding documents, from our case law, from

text of the Constitution and “the enumerated foreign affairs powers of Congress, while seemingly broader than the President’s, also do not apparently encompass the full extent of the foreign affairs powers Congress is thought properly to exercise.” Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001). Professors Prakash and Ramsey have concluded that Article II of the Constitution vests the President with a broad array of foreign affairs powers not specified in the text; this is known as the “Vesting Clause Thesis” and has spurred an interesting debate. Compare Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551-52 (2004) (rejecting the Vesting Clause Thesis) with Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1687 (2005) (defending the Vesting Clause Thesis).

121. For example, the power to detain aliens may be said to derive from the President’s Commander-in-Chief power, while the rules governing the detention and treatment of alien detainees may derive from Congress’s power to regulate the armed forces.

122. Here we part ways with Kermit Roosevelt, who concludes that the nature of the powers granted Congress to legislate regarding foreign affairs would prevent the sort of analysis undertaken in the federalism cases such as *Lopez* or *Morrison*. See Roosevelt, *supra* note 18, at 2051-52 & n.170. As Roosevelt admits, however, even the existence of general, rather than enumerated, powers, does not preclude recognizing fundamental limitations that derive from the nature of the powers exercised. *Id.* at 2052. For example, the limitations on a state’s general “police” power can be ascertained by looking to the purposes of the police power and whether that purpose is advanced by a particular exercise of that power. See BARNETT, *supra* note 30, at 333-34.

123. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power.”); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (“The nature, and ends of legislative power will limit the exercise of it.”). For a discussion of these cases, see Roosevelt, *supra* note 18, at 2052.

our common-law traditions and—most intriguingly—from natural rights.¹²⁴ These sources establish that a zone of liberty exists, however narrow, into which no just government can intrude.¹²⁵

To take an example, the Bill of Rights can serve as a guide for determining the nature of fundamental limitations on the government's power. The courts are fully able to discern the fundamental principles of liberty and justice embodied in these enumerated rights and to hypothesize from them that we the people have chosen not to authorize the government to act in a manner contrary to the spirit of these fundamental dictates.¹²⁶ That is not to say that each of the rights enumerated in the Bill of Rights is necessarily applicable to non-citizens being held extraterritorially. To the contrary, the Supreme Court has, for better or worse, already established that this cannot be the case.¹²⁷ Rather, the government may be afforded an opportunity to demonstrate that the Constitution does somewhere authorize its exercise of such power. Only if the government is unsuccessful and fails to locate the source of its asserted power will the Court determine that it acts unconstitutionally.

CONCLUSION

Our purpose in this short piece has been to provoke discussion rather than to present our audience with a digested and fully formed theory of limited government and extraterritorial constitutionality. After years of litigating on behalf of clients who have

124. See BARNETT, *supra* note 30, at 54. It may seem contradictory to refer to natural "rights" when our enterprise is to move away from discussions of rights altogether and shift the focus to limits on government powers. However, we invoke the concept of natural rights because that is the way in which the founding generation conceptualized the core limitations on government power. Natural rights were believed to be universal, to have both preceded and survived the foundation of the government, and were a means of judging the propriety of governmental actions. See *id.*

125. See *id.* at 73 ("Together, these abstract natural rights define a boundary or jurisdictional space within which people should be free to make their own choices."); *Calder*, 3 U.S. (3 Dall.) at 388 ("It is against all reason and justice for people to entrust to a legislature with [certain] powers; and therefore, it cannot be presumed that they have done it.").

126. We do not believe that utilizing standards articulated in due process cases is to abandon the limited-government approach. *But see* Roosevelt, *supra* note 18, at 2055. Despite the predominant modern shift to a rights-centered understanding, a limited-government approach can co-exist with, and complement, rights-oriented approaches.

127. See *supra* Part II. This is why we cannot fully endorse the "universalist" approaches advocated by many scholars of foreign affairs. See *supra* note 39.

been imprisoned by the U.S. military without charge or trial, we have grown increasingly cognizant of the degree to which the present administration feels itself bound by no law when operating outside of the sovereign territory of the United States. As we note above, the courts may, in the end, find it unnecessary to determine the extraterritorial reach of the Constitution in order to resolve the rule-of-law crisis presented by Guantánamo, for the simple reason that Guantánamo is, practically speaking, not “extraterritorial” in anything but a technical sense. Soon, however, habeas corpus and similar court challenges will emanate from detainees being held in our detention facilities in Bagram, Kandahar, and “black sites” around the globe.

When the detainees or their representatives bring those challenges, will the courts struggle to discern what “rights” those men and women have? Or will the courts instead ask whether the U.S. government is empowered to engage in the extra-judicial, indefinite detention of non-citizens abroad and to treat those detainees in an inhumane manner? We believe that to ask the “rights” question—and *only* the “rights” question—would be myopic and that its effect would be to ignore the general thrust of extraterritorial case law that has developed over more than a century. Too narrow a focus on “rights” will unnecessarily exempt from scrutiny transgressions of the natural limits that any just and democratic society must be assumed to place on its government. We believe that whether or not non-citizens have a constitutional “right” to be free from torture or extra-judicial detention abroad by the U.S. government, the courts may recognize that the U.S. government does not have a “right” to act in this manner. Ours is a government of limited rights, and We the People have not empowered our government to torture non-citizens or to detain them abroad indefinitely without judicial supervision.