

*Charles R. Venator-Santiago**

El totalitarismo invertido estadounidense y la doctrina territorial

Inverted totalitarianism and the United States territorial doctrine

Fecha de recepción: 24 de septiembre de 2010

Fecha de aceptación: 20 de octubre de 2010

RESUMEN

La administración del Presidente George W. Bush intentó crear varios campos de tortura y detención sin limitaciones legales con el propósito de interrogar y detener a individuos sospechosos de cometer actos de terrorismo luego de los ataques de Septiembre 11. La administración del Presidente Bush seleccionó los campos localizados en la bahía de Guantánamo, Cuba, en gran medida por que este territorio había sido designado un territorio no-incorporado que le permitiera construir un campo de detención fuera del alcance de la ley. Este artículo demuestra que los fundamentos legales utilizados para justificar la creación de los campos en Guantánamo son parte de una larga tradición de anexión territorial que ha durado más de cien años y que fue desarrollada para justificar los esfuerzos de Estados Unidos por egresar el club internacional de Imperios. Además, este artículo sugiere que la noción del totalitarismo invertido de Sheldon S. Wolin describe de mejor manera los debates legales que se han desatado sobre el estatus constitucional de los campamentos en la bahía de Guantánamo, Cuba en los últimos años.

Palabras clave: Guantánamo, territorios no-incorporados, estado de excepción, totalitarismo invertido.

ABSTRACT

Following the attacks of September 11, the administration of President George W. Bush sought to create new torture and detention camps that could be used to interrogate and hold suspected terrorists without the limitations imposed by the rule of law. The Bush administration selected Guantánamo Bay, Cuba in large measure due to its unincorporated territorial status, a status that enabled the administration to claim that the law did not apply to this location. This article argues that the legal basis for the creation of these camps has been part of a longstanding territorial tradition developed by the United States to legitimate its efforts to join a club of global Empires. The article further suggests that Sheldon S. Wolin's notion of inverted totalitarianism best describes the ensuing legal debates over the constitutional status of the United States torture and detention camps situated in Guantánamo Bay, Cuba.

Key words: *Guantánamo, Unincorporated Territory, State of Exception, Inverted Totalitarianism.*

* I am thankful to the staff of the Library of the Department of the Interior and the Law Library of the U.S. Congress for their generous and rigorous support. A Large Grant from the University of Connecticut's Research Foundation provided me with the necessary resources to conduct

INVERTED TOTALITARIANISM, CAMPS, AND THE UNITED STATES TERRITORIAL DOCTRINE

*That is the current and constitutional meaning
of the nice formula “colonies are foreign in public law,
but domestic in international law”.*

Carl Schmitt, *The Crisis of Parliamentary Democracy*¹

Following the attacks of September 11, 2001, the administration of President George W. Bush sought to create torture and interrogation camps where suspected terrorists could be held outside of the reach of the rule of law. By early 2002, the Bush administration had agreed to use the United States Naval base located in Guantánamo Bay, Cuba as a staging point for the creation of detention facilities such as the infamous Camp X-Ray². Journalists like Jane Mayer suggested that the “notion” of “secretly holding terror suspects itself outside of the reach of any law was a new one, forged in the frantic weeks immediately after September 11”³. Critics like Giorgio Agamben argued that the Bush Administration had sought to create camps that could be placed in a “state of exception” located outside of the reach of the law and ruled by pure violence⁴. By 2004, the Supreme Court had begun ruling on various dimensions of the legality of the Guantánamo Bay camps in cases like *Rasul v. Bush* (2004)⁵ and *Hamdan v. Rumsfeld*

this research. I am thankful for the support and encouragement of Peter Fitzpatrick, Farid Samir-Benavides, Alex Betancourt Mark Boyer, and Guillermo Irizarry. Department of Political Science. Institute for Puerto Rican & Latino Studies. University of Connecticut. E-mail:charles.venator@uconn.edu

¹ Schmitt, Carl. *The Crisis of Parliamentary Democracy*, Trans. Ellen Kennedy, Cambridge, The MIT Press, 1988, p. 10.

² Cole, David. *Enemy Aliens, Double Standards and Constitutional Freedoms in the War on Terrorism*, New York, The New Press, 2003; and Margulies, Joseph. *Guantánamo and the Abuse of Presidential Power*, New York, Simon and Schuster, 2006.

³ Mayer, Jane. *The Dark Side, The Inside Story of How the War on Terror Turned into a War on American Ideals*, New York, Doubleday, 2008, p. 146.

⁴ Agamben, Giorgio. *State of Exception*, Trans. Kevin Attell, Chicago, The University of Chicago Press, 2005.

⁵ *Rasul v. Bush*, 542 U.S. 466 (2004).

(2006)⁶. However, it would not be until 2008 when the Court ruled on the constitutionality of the camps in *Boumediene v. Bush*⁷, where a majority of justices (5-4) citing the precedents established by the *Insular Cases* began to temper the Bush administration's efforts to run camps "outside" of the rule of law by recognizing the extension of the *writ of habeas corpus* to the detainees⁸. In its last major opinion on the subject, the Supreme Court had both affirmed the relevance of a century-old set of precedents and *tempered* the efforts by the Bush administration to create a "legal black-holes" without questioning the legality of the camps themselves.

In this article, I argue that the legal basis for the United States (U.S.) creation of torture and detention camps is not new, but is rather based on a century-old set of precedents established by the *Insular Cases* beginning in 1901⁹. I also argue that while the Bush administration may have sought to create "state of exception" to detain suspected terrorists, the Supreme Court's intervention in *Boumediene* is rather reminiscent of what Sheldon S. Wolin has described as a form of "inverted totalitarianism"¹⁰. This article begins by explaining and contextualizing the origins of the *Insular Cases* and its relationship to U.S. territorial expansionism. I argue that the ensuing precedents, precedents that guide the continued reliance on camps located in Guantánamo Bay, were originally developed to govern non-white populations and to affirm a form of U.S. global Empire. This discussion is followed by a brief discussion of the ways in which Agamben and Wolin's theories can help us understand the use of camps to enforce various forms of legal violence¹¹. I conclude the article

⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁷ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

⁸ For a useful summary of this legal history, see Dorf, Michael C., "What's at Stake in the Latest Guantánamo Bay Case?", en *Findlaw.com*, <http://writ.news.findlaw.com/dorf/20071205.html> (16.02.2009).

⁹ For an alternative interpretation of the role of the *Insular Cases* see generally Rivera Ramos, Efrén. *American Colonialism in Puerto Rico: The Judicial and Social Legacy*, Princeton: Markus Wiener Publishers, 2007; Torruella, Juan R. *The Supreme Court and Puerto Rico, The Doctrine of Separate and Unequal*, Río Piedras: Ed. de la Universidad de Puerto Rico, 1988; Duffy Burnett, Christina and Burke Marshall, eds. *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, Durham: Duke University Press, 2001; and Sparrow, Bartholomew H. *The Insular Cases and the Emergence of the American Empire*, Lawrence: University Press of Kansas, 2006.

¹⁰ Wolin, Sheldon S. *Democracy Incorporated, Managed Democracy and the Specter of Inverted Totalitarianism*, Princeton, Princeton University Press, 2008.

¹¹ For a more generous interpretation see Neuman, Gerald L. "The Extraterritorial Constitution After *Boumediene v. Bush*", *Southern California Law Review*, No. 82 (2009), pp. 259-260; and Duffy Burnett, Christina, "A Convenient Constitution? Constitutionality After *Boumediene v. Bush*", *Columbia Law Review*, No. 109 (2009), pp. 973-1046.

with an update on the continuities and discontinuities of the use of camps by the administration of President Barack H. Obama.

FROM COLONIALISM TO U.S. GLOBAL EMPIRE

Since its inception, the United States has developed three legal traditions of state-sponsored territorial expansionism with corresponding interpretations of the applicability of constitutional rights. The United States simultaneously developed a colonialist and an imperialist tradition of territorial expansionism throughout the 19th century. However, during the 1890s a group of Republican Party members began to develop a new form of territorial expansionism premised on the annexation of islands strategically located throughout the globe. This new form of global expansionism combined features of both the colonialist and imperialist traditions enabling the United States to enter the elite club of global Empires.

The state-sponsored tradition of colonialism was premised on the *annexation* of territories that could be settled and subsequently admitted as states of the Union¹². Since its inception, the United States has annexed and subsequently admitted thirty-seven states¹³. This tradition was also rooted on an interpretation of the Territories Clause¹⁴ and Statehood Article¹⁵ of the Constitution of the

¹² Although it is outside of the scope of this article, it is important to note that the U.S. developed both a state-sponsored form of colonialism *and* a popular-sovereignty form of colonialism. The latter form of colonialism was premised on the idea that individual settlers would conquer and colonize territories independent of the state. Examples of these non-state sponsored forms of colonialism or popular sovereignty initiatives abound including the creation of Mormon State of Deseret and Jefferson Territory in the U.S. and around the world (e.g. Isle of Pines, Cuba). For an interesting history of popular sovereignty forms of colonialism, see Trinklein, Michael J. *Lost States, True Stories of Texlaboma, Transylvania, and Other States That Never Made It*, Philadelphia: Quirk Books, 2010.

¹³ Congressional Research Service, *Admission of States Into the Union After the Original Thirteen: A Brief History and Analysis of the Statehood Process*, prepared by Peter B. Sheridan, Government Division, Congressional Research Service, 85-765 GOV, Washington, D.C., 1985.

¹⁴ U.S. Constitution, Art. 4, §3, cl. 2.

¹⁵ U.S. Constitution, Art. 4, §4. For more detailed histories of the admission of new states into the Union see generally Farrand, Max. *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895*, Newark: Ed. Wm. A. Baker, 1896; Farrand, Max, "Territory and District", in *The American Historical Review*, 5, no. 4 1900, 676-681; Willoughby, William F. *Territories and Dependencies of the United States, Their Government and Administration*, New York: The Century Co., 1905; Grupo de Investigadores Puertorriqueños. *Breakthrough From Colonialism: An Interdisciplinary Study of Statehood*, 2 vols. Río Piedras: Ed. de la Universidad de Puerto Rico, 1984; and López Baralt, José. *The Policy of the United States Towards its Territories with Special Reference to Puerto Rico*, Río Piedras: Editorial de la Universidad de Puerto Rico, 1999.

United States. These constitutional provisions gave Congress a plenary power to make all needful rules and regulations in order to govern the colonial territories as well as a power to determine when to admit these territories into the Union as states on an equal-footing with the original thirteen¹⁶.

Throughout the 19th Century the Supreme Court established that colonial territories were a constitutional part of the United States, albeit in a temporary state of tutelage contingent on its subsequent admission as a state. For example, in *Loughborough v. Blake* (1820) Chief Justice Marshall wrote:

*Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but one answer. It is the name given to our great republic, which is composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observe in the one, than in the other (emphasis added)*¹⁷.

While it is true that colonial territories were governed as inferior localities within the Federalist arrangement, an arrangement that privileged statehood as the epicenter of equal territorial membership in the United States, all constitutional provisions not locally inapplicable were operational in these territories. More precisely, the Constitution extended to the territories *ex proprio vigore* or on its own terms, just like it would extend to any state of the Union within the jurisdiction of the United States.

As a result of the territorial status of colonies, the bill of rights extended to the colonial territories on its own force and imposed constitutional limitations on the powers of Congress. Prior to the enactment of the 14th Amendment, the Supreme Court had established that Congressional power could not infringe on the individual civil rights of citizens residing in the territories¹⁸. For example, in *Dred Scott v. Sandford* (1856) the Court invalidated congressional legislation prohibiting the extension of slavery to the northern territories on account that it violated the individual rights to property of U.S. citizen-settlers¹⁹.

¹⁶ *Coyle v. Smith*, 221 U.S. 559 (1911).

¹⁷ *Loughborough v. Blake*, 18 U.S. 317, at 319 (1820).

¹⁸ *American Insurance Co. v. Canter*, 26 U.S. 511 (1828).

¹⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

Moreover, amidst the U.S. Civil War, Congress began to enact legislation that extended equal constitutional rights to the citizens of these territories. Most notably, Congress enacted the *Civil Rights Act of 1866*, the precursor to the 14th Amendment, extending equal protection of the laws to all territories within the jurisdiction of the United States²⁰. In addition, by 1878 Congress had formally extended all constitutional provisions not locally inapplicable to the territories under the terms of the Revised Statutes §1992²¹. This meant that individuals residing in the territories would be entitled to the same civil rights protections available in the states, including the bill of rights and other privileges like the *writ of habeas corpus*.

The United States also developed alternative imperialist legal policies and jurisprudence in order to legitimate the *occupation* of territories without being bound to *permanently annex* these. Since its inception the United States has occupied territories for belligerent or military purposes, for commercial exploitation (e.g. Guano Islands), and for expansionist purposes (e.g. Native American lands). However, rather than invoking the Territories Clause, a provision that could lead to governing occupied territories as a part of the Union for constitutional purposes, the United States has invoked alternative constitutional provisions such as the Commander-in-Chief Clause (belligerent occupation)²² and the Commerce Clause²³ to legitimate the indefinite occupation of a territorial possession. The invocation of these constitutional provisions enabled U.S. lawmakers to create exceptions in how the law governs the occupied territories and their respective inhabitants based on international or customary principles of law, and approach that has been curtailed by the proliferation of international laws and norms throughout the 20th century.

Throughout the 19th century, the Supreme Court generally ascribed a “foreign” constitutional status to occupied territories. This meant that Congress and the President, acting in a capacity of Commander-in-Chief, could selectively

²⁰ *Civil Rights Act of April 9, 1866*, Chapter 31, 39th Cong. 1st sess., *United States Statutes at Large* 14 (1866), p. 27.

²¹ United States Congress, *Revised Statutes of the United States*, 1873-1874, 43rd Cong., 1st sess. Washington: Government Printing Office, 1878, p. 356.

²² U.S. Constitution, Article 2, §2, cl. 1.

²³ U.S. Constitution, Article 1, §8, cl. 3. In the case of the occupation of Native American territories, United States legal actors have also constantly invoked constitutional provisions that exclude “Indians” not subject to Federal taxation laws in order to justify imperialist laws and policies.

determine when and how to treat an occupied territory as a foreign location for the purposes of applying Federal law. Perhaps the most important iteration of this interpretation was established by the Supreme Court in *Fleming v. Page* (1850), a case addressing the constitutionality of the imposition of tariffs on goods imported into the U.S. from the Port of Tampico while it was under U.S. occupation²⁴. To be sure writing for the Court, Chief Justice Roger B. Taney argued:

*As regarded by all other nations, it (the port of Tampico, Mexico) was a part of the United States, and belong them exclusively as the territory included in our established boundaries.... But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws*²⁵.

In other words, the United States, acting as a belligerent occupying force, could exercise a plenary power to include the occupied territory within the United States for international purposes, while simultaneously exclude this territory for constitutional purposes. Throughout, the Court has employed variant versions of this logic to govern other occupied territories. Yet, what is important to note is that under the imperialist tradition the occupied territories can be selectively governed as foreign localities for the purposes of extending the constitution.

The imperialist tradition has treated occupied territories as foreign countries for the purposes of extending constitutional rights and protections to the inhabitants of these localities. Historically, this has meant that Congress wields a power to choose what constitutional provisions it would extend or withhold from an occupied territory. The Supreme Court best summarized this logic in its ruling on *Ross v. McIntyre* (1891):

The constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree; the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes, constructively as territory of the United States; yet persons on board of such vessels,

²⁴ *Fleming v. Page*, 50 U.S. 603 (1850).

²⁵ *Id.*, at 615.

*whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States*²⁶.

In other words, the Constitution, or more precisely the bill of rights does not extend *ex proprio vigore* or on its own force to locations situated *outside* of the United States. It is true however that during the 1950s the Court began to shift away from this logic as it applied to U.S. citizens, establishing in cases like *Reid v. Covert* (1957) that U.S. citizens subject to criminal proceedings are entitled to constitutional protections when being tried outside of the United States²⁷. But it is also true that the Court has affirmed in cases like *U.S. v. Verdugo-Urquidez* (1990) that basic constitutional rights like the 4th Amendment's protection against unreasonable searches and seizures does not protect non-U.S. citizens from the arbitrary actions of U.S. officials²⁸. Stated differently, Federal officials have been constitutionally empowered to detain and prosecute "foreigners" outside of the United States without being bound to extend these detainees any substantive constitutional protections.

During the 1890s, and more specifically following the Spanish-American War of 1898, the United States began to develop a new theory of territorial expansionism with a corresponding territorial policy that combined features from both the colonialist and imperialist traditions. The new form of expansionism drew upon the theories of retired Naval Captain Alfred T. Mahan and was premised on the indefinite *annexation* of strategically located islands throughout the globe that could house naval and/or military stations²⁹. Proponents of this global form of expansionism envisioned annexing "real estate" that could be held indefinitely without having to admit these into the Union new as states. From a constitutional perspective, U.S. legal actors invoked an imperialist interpretation of the Territories Clause that would enable Congress to selectively govern *annexed territories*, as foreign or occupied localities in a domestic or constitutional sense.

²⁶ *Ross v. McIntyre*, 140 U.S. 453, 464 (1891).

²⁷ *Reid v. Covert*, 354 U.S. 1 (1957).

²⁸ *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²⁹ Mahan, A. T. *The Interest of America in Sea Power, Present and Future*, Boston, Little, Brown and Company, 1898; LaFeber, Walter, "The 'Lion in the Path': The U.S. Emergence as a World Power", en *Political Science Quarterly*, vol. 101, no. 5, 1986, 705-718; and Rodríguez Beruff, Jorge. *Strategy as Politics: Puerto Rico on the Eve of the Second World War*. Río Piedras, La Editorial, 2007.

The new theory of global expansionism was premised on the creation of a new territorial status selectively located somewhere in-between a foreign country and a state of the Union. Advocates of this form of global expansionism introduced this theory during the debates over the U.S. annexation of the Spanish territories following the War of 1898 and the subsequent organization of local governments for the islands, in an effort to curtail the attempts by the residents of the islands to invoke constitutional rights against the Federal government, rights that were readily available to the residents of colonial territories. Lawmakers invented a new theory of territorial incorporation to govern the islands without constitutional restraints. Presumably, unincorporated territories were not meant to become a constitutional part of the United States until Congress decided to extend this territorial status to the islands. During the debates over the *Foraker Act of 1900*³⁰, the act which organized a local civilian government for Puerto Rico, Senator John C. Spooner (R-WI) summarized this logic by arguing that “(t)erritory belonging to the United States, as I think Puerto Rico and the Philippine Archipelago do, become a part of the United States in the *international sense*, while not being a part of the United States in the *constitutional sense*”³¹. According to this logic, Congress could exercise a plenary power to govern the annexed territories without constitutional limits.

By 1901, however, the Supreme Court began to affirm a tempered interpretation of this logic in a series of rulings known as the *Insular Cases* by establishing that although Congress held a plenary power to govern the territories in a different manner than colonial or “incorporated territories”, this power did not exist outside of the Constitution. More specifically, the Court established that the congressional power to govern the unincorporated territories was limited by the “fundamental rights” of the local inhabitants. Stated differently, the Court’s interpretation established that the Constitution did not extend on its own force or *ex proprio vigore* to the unincorporated territories, but Congress had the power to select which constitutional provisions could be extended or withheld to an unincorporated territory³². All territories acquired after 1898 have been governed as unincorporated territories and these precedents have been continuously affirmed. The Supreme Court’s ruling in *Boumediene*

³⁰ *Foraker Act of 1900*, Chapter 191, 56th Cong., 1st sess. *United States Statutes at Large* 31 (April 12, 1900), p. 77.

³¹ Senator Spooner of Wisconsin, speaking for the *Foraker Act of 1900*, on April 2, 1900, H.R. 8245, 56th Cong., 1st sess., *Congressional Record* 33, part 4: 3629.

³² *Downes v. Bidwell*, 182 U.S. 244, 290-291 (1901).

stands as the latest affirmation of this expansionist tradition, a tradition that was originally developed to affirm a U.S. global Empire.

UNINCORPORATED TORTURE AND DETENTION CAMPS

As previously noted, at least two theories have been offered to examine the legal and political implications of the camps in Guantánamo Bay. On the one hand, Giorgio Agamben has suggested that the camps represent the use of a state of exception to legitimate the detention of suspected terrorists. Alternatively, Sheldon S. Wolin's argument suggests that the camps are an expression of what he has coined as a form of inverted totalitarianism. My contention is that while Agamben's theory can help us understand the underlying ideologies informing the Bush administration's argument, Wolin's argument better explains the overall ideology used by the United States to continue to sustain the torture and detention camps in Guantánamo, an ideology that is rooted in the Supreme Court's rulings tempering the power of the Bush administration.

In many ways, the legal story of my argument begins with the Bush administration's efforts to create a "legal black hole" where it could interrogate and detain suspected terrorists outside of the scope of the law, both constitutional and international. While the Bush administration experimented with a host of tactics, including the creation of secret facilities throughout the world and the strategic use of planes and ships to continuously navigate around the law, it ultimately settled in the creation of camps in Guantánamo Bay because the administration's legal advisors believed that they could make a legal argument to legitimate the creation of a camp in an unincorporated territory³³. Between 2004 and 2008, the Supreme Court tempered this interpretation without challenging the ability of the Bush administration to maintain camps in Guantánamo, camps that continue to operate almost a decade later.

Perhaps seeking to exert a power of judicial review, the Supreme Court began to hear cases challenging parts of the Bush administration's policies in 2004. In *Rasul* the Court began to limit the administration's policies by ruling the policy of preventing detainees from gaining access to federal courts existing violated statutory laws. Soon after, a Republican Congress enacted the *Detainee*

³³ Yoo, John. *War by Other Means, An Insider's Account of the War on Terror*, New York, Atlantic Monthly Press, 2006.

Treatment Act of 2005, which affirmed the Bush administration's policies by amending the relevant statutes. The following year, the Court imposed some restrictions on the president's policies regarding the denial of the *writ of habeas corpus*. In *Hamdan*, however, the Court addressed the failure of the president's policies to comply with United States international obligations, international obligations that the U.S. had previously agreed to. That same year, Congress enacted the *Military Commissions Act of 2006* upholding the policies denying detainees the *writ to habeas corpus*. In 2008, the Court finally turned to the Constitution to invalidate the portions of the *Military Commissions Act* preventing detainees from exercising the *writ of habeas corpus*.

The Bush administration's policies are best represented in the brief written by then Solicitor General Theodore B. Olson on behalf of the United States in *Rasul*. In his brief, Olson relied on a two-prong logic to justify the camps. First, he argued that as "enemy combatants", the detainees were individually located outside of the law because they could not claim any rights under any nation-state or rather a signatory of an international convention. Citing the *Insular Cases* and subsequent related jurisprudence, the second prong of the argument, suggested that the camps located in Guantánamo were no part of sovereign United States *territory* and therefore the detainees lacked the necessary constitutional rights to claim access to the courts³⁴. Olson further argued that "by its terms, the ICCPR is inapplicable to the conduct by the United States *outside* its sovereign territory"³⁵. In other words, because Guantánamo Bay was located outside of the United States it was outside of the purview of the constitution, and because international law only applied inside a sovereign's territory, the camps were also outside of the purview of international law. While it is true that Olson attempted to further qualify the unincorporated status of Guantánamo by arguing that unlike other unincorporated territories, this was "leased" rather than annexed, but he still relied on the basic premise that unincorporated territories could be selectively governed as foreign in a domestic sense³⁶.

Agamben's argument suggests that the Bush administration sought to create a "zone of indistinction" where the law could be suspended and replaced with a normalized military rule. The camp, in Agamben's view becomes a

³⁴ Brief for Respondent, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334 and 030434), 14, <http://www.justice.gov/osg/briefs/2003/3mer/2mer/2003-0334.mer.aa.html> (18.02.2009).

³⁵ *Ibid.*, p. 49.

³⁶ *Ibid.*, p. 44.

space that is constantly negotiating its location inside and outside of the law, in doing so it seeks to create “zone of indifference that blurs the boundaries of the law”³⁷. In the camp, Agamben explains, the law is suspended and does not provide the detainee with rights, constitutional or legal. The detainee is merely subject to the rule of his or her guards, guards that exercise a form of pure power. The detainee is thus subject to the raw power of the military guard. In my opinion, this was the goal of the Bush administration’s policies, namely to create a space where the military could rule without legal constraints on its power. To this extent, Agamben’s analysis captured the logic of the Bush administration’s policies.

However, the Supreme Court consistently placed limitations on the ability of the Bush administration to exercise its policies without legal constraints. In *Boumediene* the Supreme Court synthesized its position through the affirmation of the *Insular Cases*. More specifically, the a majority of the Court held that even enemy combatants held in Guantánamo were entitled to “fundamental rights” and protections such as the *writ of habeas corpus*. Writing for the majority in *Boumediene*, Justice Anthony Kennedy argued:

Yet the government’s view is that the Constitution had no effect there, at least to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraints.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution”³⁸.

While it is possible to argue that the Court was merely using this interpretation to retain the power of judicial review, a power that would have been denied in

³⁷ Agamben, *The State of Exception*, op. cit., p. 23.

³⁸ *Boumediene*, 128 S. Ct. 2229, 2258-2259.

a place where the Constitution is inoperative, it is also important to note that the Court used the recognition of the *writ of habeas corpus* to place limitations on the power of the administration. Yet, while the a slight majority of the Court was consistently willing to curtail the efforts of the Bush administration to claim “absolute and unlimited” powers, it was unwilling to declare the torture and detention camps altogether unconstitutional. Here the Court was provided with an opportunity to revoke a century-old set of expansionist legal precedents, and the justices rather affirmed the continued legitimacy of the *Insular Cases*.

It is this failure to challenge the legitimacy of torture and detention camps in the first place that illustrates how the law is employed to maintain its violent power over Guantánamo and other unincorporated territories, a power that is reminiscent of what Wolin describes as a form of inverted totalitarianism. For Wolin, the genius of inverted totalitarianism lies in its ability to create a totalizing system, while simultaneously appearing to promote the rule of law and democracy³⁹. The notion of inverted totalitarianism explains how the U.S. can continue to maintain torture and detention camps while granting “fundamental” constitutional rights and protections. It is the power to reconcile the principle that the United States stands for limited powers and democracy under a totalitarian system that enables the military to continue to torture and detain suspected terrorists in an unincorporated territory⁴⁰.

My point is to suggest that the Supreme Court, like other branches of government, is complicity in affirming a totalitarian system while simultaneously claiming to grant due process rights and privileges to those who are subject to this violence. More importantly, the legal foundations of this interpretation are rooted in longstanding precedents that date back for more than a century. In addition, this is a legal logic that both claims to uphold a constitutional myth of limited government and democracy, while perpetuating a totalitarian system of detention. To this extent, Wolin’s analysis offers a clearer perception of the ways that the U.S. government employs the use of camps to exercise its power, a power that that in my opinion emphasizes might and fear over justice and democracy.

³⁹ Wolin, *Democracy Incorporated*, op. cit., p. 57.

⁴⁰ *Ibid.*, p. 286-287.

CONCLUSIÓN

This article affirms two interpretations that are central to understanding the how the United States has used the law to affirm its power to create torture and detention camps in Guantánamo Bay, Cuba. First, I argue that the legal basis for the creation of the camps in an unincorporated territory is not new and has been part of a century-old tradition of U.S. global expansionism. This tradition relied on a particular territorial law and policy that both departed from prior colonialist and imperialist territorial precedents, and simultaneously combined features from both traditions. My point is to establish that the legal logic of the torture and detention camps created in Guantánamo Bay was an continued expression of a legal logic used to govern unincorporated territories like Puerto Rico. There is little if anything that is new or innovative about the legal arguments used by the United States government to continue to affirm its exercise of violence over those unfortunate enough to fall prey to United States officials enforcing the related anti-terrorism policies.

As I have also noted above, my contention is that the Supreme Court's interventions to temper the Bush administration's policies towards Guantánamo were reproduced a form of inverted totalitarianism. Rather than creating a state of exception, a goal of the Bush administration as Agamben rightly notes, the U.S. government collectively relied on the use of legal precedents that affirmed the continuation of torture and detention camps while maintaining claiming to uphold the principles of limited government and democratic rule. Here lies the power of inverted totalitarianism.

Wolin's argument further suggests that the system of inverted totalitarianism, unlike the traditional totalitarian tradition, is not premised on the rule or cult of a personality, but rather it operates independently of leaders⁴¹. Wolin's argument suggests that President Obama, who has embraced more moderate and just positions, is subject to the power of inverted totalitarianism. To this extent, his failure to close Guantánamo Bay merely confirms the incredible power of this ideological apparatus, an apparatus that is beyond the control of mere presidents and leaders. Not only has President Obama refused to exercise his constitutional power as Commander-in-Chief to close the torture and detention camps in Guantánamo, but he has refused repudiate the underlying legal interpretations that sustain the camps. President Obama, like his predecessor, has become a subject and enforcer of a form of inverted totalitarianism.

⁴¹ Ibid., p. 44.

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