ISLANDS AND THE LAW: AN INTERVIEW WITH CHRISTINA DUFFY BURNETT

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Bounded by water, circumscribed, and discrete, islands arguably constitute a natural geographical model for the classic territorial conception of a state (where sovereignty is thought to extend homogenously across a defined terrestrial region and terminate at the border). At the same time, the historical evolution of imperialism in both the East and the West has meant that most of the world's actual islands became, at some point, off-shore colonial possessions of a distant metropolitan power. Treated as way stations, outposts, and resupply harbors, these *outre-mer* acquisitions tended to be spatially and legally marginal, regardless of their economic importance.

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This is a very general question, but let's take a stab at it anyway: do islands matter in the law?

The best way to get at this may be to start with something quite specific. In the summer of 2003, I stumbled on a 969-page typescript treatise which is kept in the library of the US State Department. Flipping through this great leather-bound brick of onion-skin pages, I gradually absorbed that the whole massive volume had been put together in the 1930s by a lawyer working for the US Government who'd been given a killer assignment. Apparently somebody had walked over to the desk of this poor functionary, scribbling away in some basement office, and said something along the lines of: "You know, we have a bunch of islands in the Pacific and the Caribbean—little islands. How about you figure out what the deal is with all these places, legally speaking." I was holding the result: *The Sovereignty of Islands Claimed Under the Guano Act and of the Northwest Hawaiian Islands, Midway, and Wake*. And it was splendid to behold: nearly a thousand pages of intricate legal arguments and historical documentation on the strange history of the United States' nearly invisible, but surprisingly vast, insular empire.

The Guano Act? What is guano? It's bat excrement, right?

Yes. And bird doo, too. In this case, it refers to the bird version.

So there was a US law about bird droppings that somehow proves important for thinking about the law of sovereignty?

Indeed. The Guano Islands Act of 1856 arguably laid the legal groundwork for American imperialism.

Can you explain how?

Basically what happened was that in the first half of the nineteenth century, Europeans and Latin Americans figure out that the phosphate-rich deposits of seabird droppings that had accumulated on many small Pacific islands make spectacular fertilizer. The stuff is like magic, and farmers everywhere are suddenly clamoring to get their hands on some. There's a boom, the price skyrockets, the Peruvians more or less control the market, and supplies are short. Everybody is looking for new sources, there's tons of fake guano trading hands—it's chaos. Enter the US farm lobby. Farmers in the United States start pressuring Congress to pass some sort of legislation that will improve domestic access to this vital excrement. The result is the Guano Islands Act, legislation that authorized the United States to take control of a guano island if a citizen discovered it and undertook certain actions to take possession of it.

What was new about that? Hadn't Americans been taking possession of new lands more or less since the Mayflower?

Right. In a way, yes. But in another way, not exactly. The history of US territorial expansion is actually very interesting, and not straightforward, legally speaking. As you know, initially there were those original thirteen colonies. But several of them also had "territories." These were kind of their backlands to the west. When the newly independent states came together to form a union, and to write a constitution, they spent a certain amount of time trying to sort out how the territories were going to fit into the new nation. Hanging over all these negotiations was this broadly shared notion that the United States were destined to expand—indeed, that this emerging polity was likely, eventually, to extend across the continent. To be fair, not absolutely everybody was on board with this, but we are painting with a broad brush here. At any rate, the future of the territories eventually became clear: they were going to become

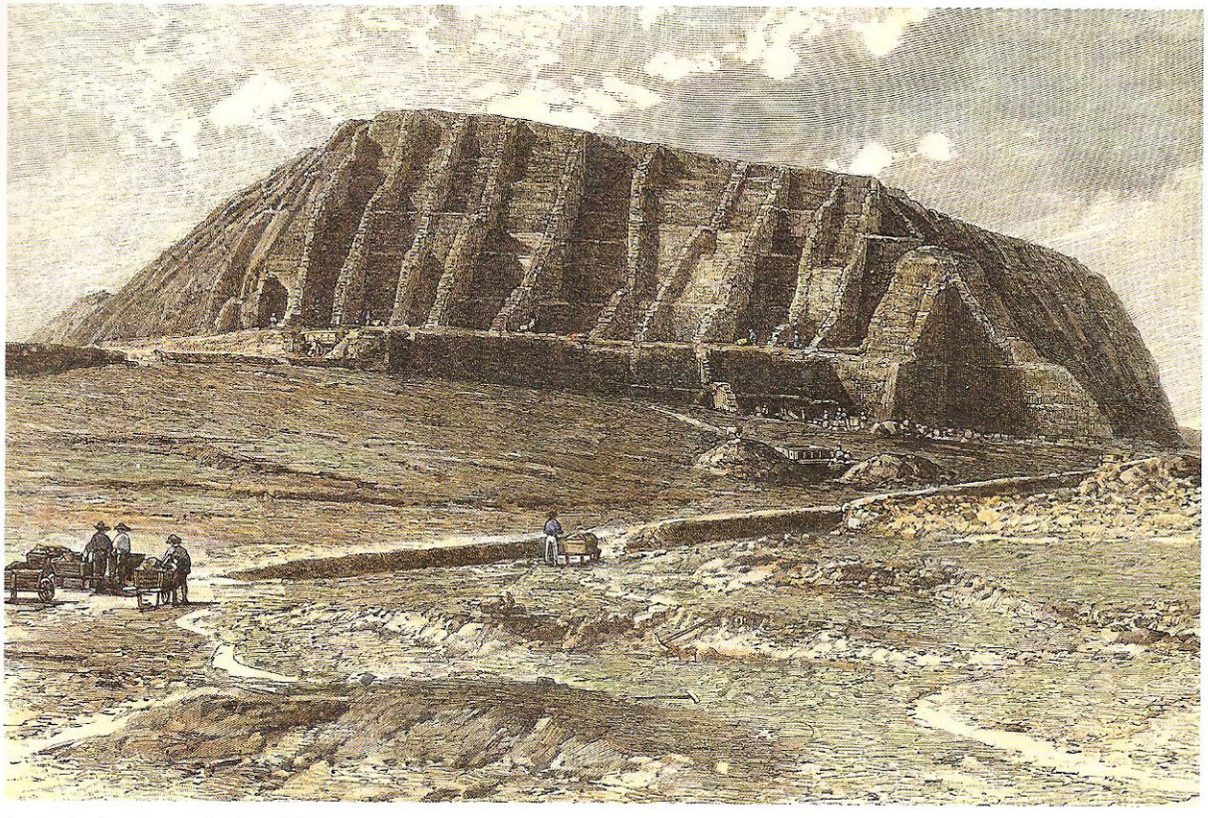
states someday, once there was a proper population, sufficient political organization, etc. So the actual US Constitution contains precious little about the territories: basically there's a clause stating that Congress will govern them, and another about their admission into statehood.

Is there a provision for acquiring new territories?

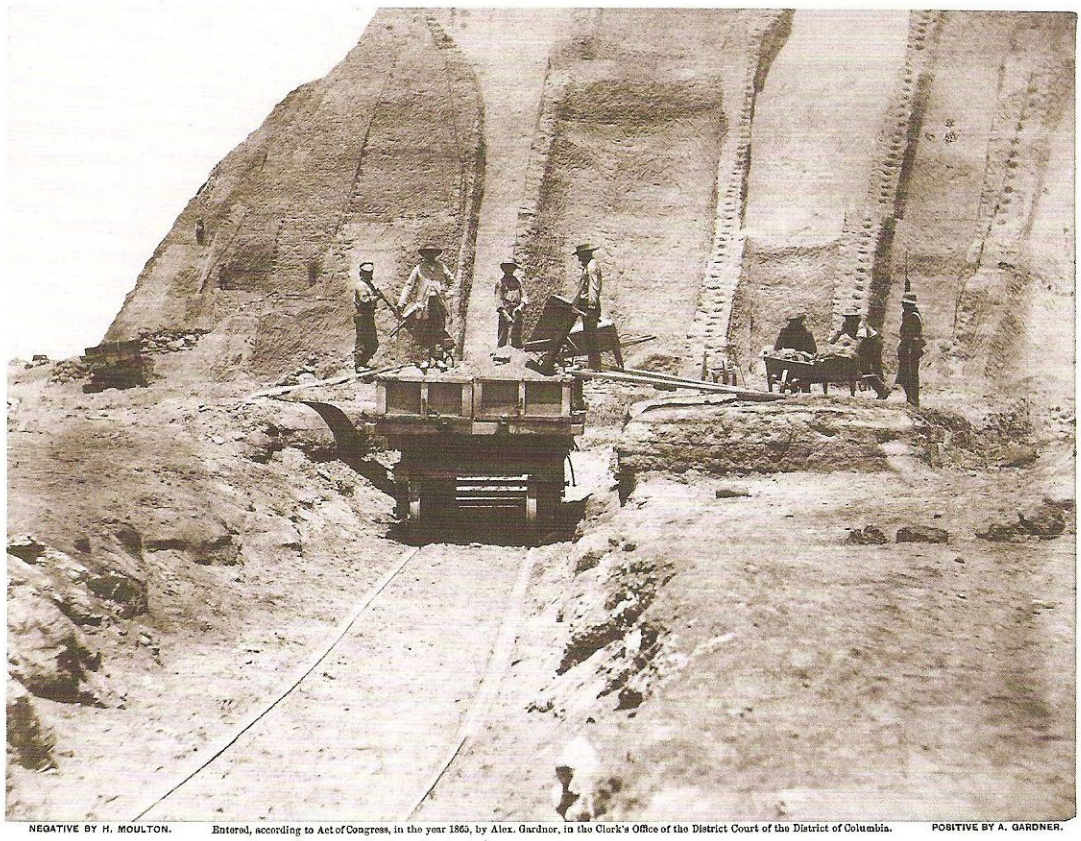
Interestingly, no. And this famously worried Thomas Jefferson circa 1800 when the French government offered him something like a third of North America at a fire-sale price—what would eventually be called the Louisiana Purchase. Actually, it's a great moment, because Jefferson—who tended to be very strict in his constitutional interpretation—even went so far as to draft a constitutional amendment empowering him to acquire new territories for the nation. But then he gets cold feet and sticks the draft in a drawer. About that time, he writes a fantastic letter to a friend about all this, and he says, basically, "Well, you know, the less said about the constitutional difficulties here the better." Which is pretty much contrary to everything he ever said about the Constitution. Oops. That can happen when you become President.

That process of territorial acquisition continues throughout the nineteenth century. How is territorial expansion out to islands any different?

The answer brings us back around to that thousand-page treatise sleeping in the bowels of the State Department. The key difference has to do with *sovereignty*. It turns out that there was quite a bit of debate around the passage of the Guano Islands Act. The whole thing made a few people pretty nervous. Was all this, they wondered, some sort of secret plot to start setting up overseas island colonies? There's resistance to this notion in various quarters. So the bill's main sponsors—to avoid controversy—go to great lengths to spell out that this business about "claiming" the islands is just about scooping up the guano, nothing more. The



Hand-colored wood engraving from 1894 depicting guano being collected on one of Peru's three Chincha islands in the mid-1870s. By this time, very little guano was left on the islands.



Rays of Sunlight from South America.

LOADING CARS WITH GUANO AT THE GREAT HEAP, CHINCHA ISLANDS.

Alexander Gardner, "Loading Cars with Guano at the Great Heap, Chincha Islands," 1865. Spain, which did not recognize Peru's independence until 1879, occupied the Chincha islands in April 1864 but lost the ensuing war. Courtesy Library of Congress.

original draft of the legislation used the formal language of legal expansion—"territory," "sovereignty," and so on—but then, when the objections start, all that comes under a red pen. Out goes the word "territory," which sounded too permanent, too much like the prelude to statehood. In comes a new word, "appertaining"—as in, these islands *appertain* to the United States as "possessions."

And what does that mean, legally speaking?

That's the beauty of it. Nothing! Or, rather, no one had any idea. It was just a sort of a vague way of saying, "It's, like, ours, pretty much." The term "appertaining" had no previous usage in this context. At some point I even tried to sort out where the drafters of the bill got it from. As I recall, the term originated in property law as a way of talking about stuff that came attached to something else, like "the waters appertaining to the estate" or railway sidings that "appertained" to a railway, etc., etc. You can sort of see it drift from talking about the waters and other resources "appurtenant" to the guano islands, to being used to talk about the relationship between the islands themselves and the United States. It was basically a fudge. A way of taking the places as *possessions*, while being careful not to call them *territories*, since that implied constitutional entanglements. It was a way of taking the places without really taking responsibility for them within the federal system. The bill also carefully removed the language of "sovereignty," since that, too, seemed potentially to entail various obligations under domestic and international law. And finally, to get the bill to pass, they also stuck in a bit about how the United States could get rid of the places if it wanted—that there was no commitment to hang onto these islands after the resources had been stripped or their utility otherwise terminated.

And the act passes in that form?

It does, and boom, there are all these wildcatters and roughnecks throwing up the Stars and Stripes on little mounds of manure all over the world. In the end, more than seventy such islands are actually secured under the act, and many more are claimed (unsuccessfully, for one reason or another). But that's not the interesting part, really—although it's curious enough, and there are some great stories about what goes down on these islands: shanghaiing Polynesian laborers, piracy (of course), mutiny, etc. Some of the islands are still claimed by various shady types. Indeed, a rather mysterious gentleman contacted me some years ago in connection with his alleged title to an uninhabited guano island in the Caribbean.

A James Bond villain-type?

I don't think I can speak any further on that matter over an unsecure line. Now, legally speaking, what's significant about all this is that the act created a very important and new kind of place in the American legal system. A weird sort of non-place, from a constitutional perspective. These islands "belong" to the US, but they aren't really a "part" of the United States. What law applies there? Not really so clear. What rights does an American citizen have on such an island? Again, not clear. In one sense, you might say, "Who cares? These are just some rocks out in the middle of nowhere," but the deeper issue is that this move—*withholding* sovereignty—turns out to be a key aspect of the expansion of imperial power in the nineteenth century. And in certain disconcerting ways, we see the same move being made more recently in connection with the war on terror: extend power, but disclaim sovereignty—in order to retrench in terms of legal commitments.

So this is what you mean by saying that the Guano Islands Act established a significant aspect of the legal framework for American imperialism.

Right. We tend to think of empires in expansive terms, as *projecting* across space, but in fact, as far as the law is concerned, the projection of imperial power has frequently traded on the careful *refusal* to extend formal sovereignty, since this often comes with unpleasant obligations. European empires were especially good at all this: trust territories, informal control, etc. You didn't want to go out and claim sovereignty over all these messy places. From a legal perspective, that would be a total pain!

But given that the US is born in an anti-colonial revolution, or so Americans like to tell themselves, there must have been resistance to modeling American legal structures on those of, say, the British Empire.

Some, sure. But it is also the case that the United States does very much have its imperial meridian, a moment when it embraces the ideal of a global colonial empire. This is 1898, of course—the Spanish-American War. The US flexes its muscle, crushing an Old World power, and winning, in the process, a mess of islands: the

Philippines, Guam, and Puerto Rico. For a while there is a sort of Iraq-style situation in Cuba, too: the US has "liberated" the place, but occupies it, claiming it needs to be "pacified"; US officials insist they want to leave, but don't. Complicated. In the end, we micromanage their writing of a constitution, and then formally leave, except, of course, for Guantánamo, which we keep.

A legally ambiguous place, for sure.

Indeed, but the whole episode raised vexing constitutional problems from the get-go. Suddenly the US has all these new insular possessions overseas—the spoils of war. And once again, the question is: What's the status of these places, legally speaking? Are they "territories" in the constitutional sense? They have to be, because that is the only way, under the US Constitution, that Congress can be authorized to *govern* them. This hadn't really been an issue on the guano islands, since they had no "governments."

What about the guys with guns?

Right. There were always the guys with guns. But they tended to be freelance despots, overseers, cowboys with ships—pirate-types. With a few corporations in the mix. None of them focused on governance issues *per se*. They focused on resource extraction. So 1898 raises new problems. In fact, the acquisition of all these islands circa 1900 leads to something close to a constitutional crisis. If they are territories, then are they going to become *states*? But they are full of hot-blooded, swarthy types! The eugenicists, among others, don't like it. At the same time, the US Constitution makes no provision for an American empire—for federal "dominion" over peripheral colonies not intended for statehood. All the lawyers are busy reading up on how England and France run their imperial systems, and there are various proposals for how to tweak things in the US to make it all work. In the end, the issues are resolved in a set of Supreme Court decisions handed down in the first decades of the twentieth century, known collectively as the Insular Cases—since they were the cases that determined how the US would deal with all these *islands*.

So what happened?

Once again, islands serve as the site for legal experimentation and for some questionable legal innovations. It's clearly unacceptable to a majority of Americans to contemplate these new acquisitions as "really" part of the United States—as in, *on the way to statehood*. But at the same time, no one wants to just give them away. What about the White Man's Burden and everything? Kipling actually wrote that poem for this very occasion—to try to get the Americans to strap it on as imperialists. In the end, the court finesses it, and the justices conjure up a distinction between two kinds of US territory: "incorporated" (meaning "en route to statehood," i.e., "containing a good number of Caucasian Protestants with acceptable table manners") and "unincorporated" (meaning, more or less, "the US is in charge here"). The latter category was basically invented to give constitutional blessing to the US directly governing a network of colonial islands around the world: they were "unincorporated territories." In an international sense, they were part of the US, but they weren't really "*the US*," if you know what I mean. One legal opinion described the relationship this way: these islands were "foreign to the United States in a domestic sense." Got that? The Supreme Court resurrects the language of "appertaining," too: it says these places are not "part" of the United States, but merely "appurtenant" to it. Meaning what? Well, they're "ours," but not "us."

Does the US still have "territories"? Does the incorporated/unincorporated distinction still exist? If so, what significance does it have?

It does. The best way to get at this may again be to zero in on a very particular and legally anomalous island—or, in this case, archipelago—called Palmyra. Palmyra is basically in the middle of the Pacific, slightly south of Hawaii. There's pretty much nobody there—some sort of caretaker, a few biologists. Anyway, it's a bunch of little islets, very remote. Nevertheless, this place has the distinction of being the United States' unique "incorporated" territory. Which is to say, it is not a state, or a part of a state, but it is a "part" of the United States in a fundamental way.

Meaning what, exactly?

Well, people have argued a great deal about what the distinction between incorporated and unincorporated actually meant, legally speaking. In Puerto Rico, where I am from, this issue is positively explosive, since the island was one of those places designated as an unincorporated territory after the Spanish-American War. In fact, I would argue that it *remains* an unincorporated territory, but those are fighting words on the island—let's not get into it. Where territorial status is concerned,



Wreckage on Palmyra. The plane, carrying seven radio operators, veered off the island's sole runway as it tried to land on 5 January 1980. Courtesy Laura Beauregard / US Fish and Wildlife Service.

the basic issue has traditionally been understood to be: "Does the Constitution follow the flag?" Which is to say, if a place belongs to the US, does the Constitution apply there automatically—all the rights and protections it guarantees, etc.? The traditional story has gone like this: the Insular Cases, by making the distinction between incorporated and unincorporated territories, answered this question in the negative. No, just because we hoist the flag does not mean that all these dark people are suddenly entitled to equal protection, jury trials, and all that other good stuff. That stuff is only for the *incorporated* territories—as they make their way to statehood. With the unincorporated ones, the Constitution, it has been said, "doesn't apply." This sort of thing gets pretty hairy as a legal argument, and I do not want to get bogged down in a lot of technical stuff. Suffice it to say that figuring out what constitutional protections apply to what offshore islands has been—and remains!—a very difficult and important legal problem for the United States. As it happens, my own view is that the most important issue at stake in the incorporated/unincorporated distinction is, in fact, the issue of *permanence*. I've argued for some years that the thing that made everyone *most* nervous about the new insular possessions at the end of the nineteenth century was the idea that the US would be stuck with them forever. You have to remember that the Civil War was still very fresh in people's minds in that period. And what was the issue there? It was Lincoln's central claim that he *could not* accept the secession of the southern states—not even if he wanted to. He asserted that the Constitution did not permit a withdrawal of a part of the union. This was a situation where constitutional interpretation was performed in blood. I believe that the United States' imperial exuberance was haunted by this issue: What would happen if, later, there was a need to alienate these places—to get rid of them? Would this trigger a constitutional crisis? At its heart, the distinction between incorporated and unincorporated territories was a distinction between permanence and fungibility. The insular cases in effect smuggled a theory of secession into American law.

So do you foresee a civil war breaking out over Palmyra?

I think we're in the clear there. My impression is that the Nature Conservancy is basically running the place these days. Very friendly people, I am sure. But I do think that, absurd as it may sound, there is a perfectly credible constitutional argument that, in view of Palmyra's "incorporation," the place forms an integral part of this indestructible union, and that, say, if the US wanted to cede it to Kiribati, there would need to be a constitutional amendment.

Can you explain how Palmyra ended up in this weird position?

It was originally claimed as a guano island, under the 1856 act. Then it turns out there is no guano, so it's abandoned. Eventually the Kingdom of Hawaii takes it, then we take Hawaii. Hawaii is deemed to have been formally "incorporated" into the United States circa 1900, and set on the road to statehood, but when statehood actually happens, the Palmyra chain isn't on the map. I'm not really clear on why, but the archipelago of Palmyra ends up an orphan in legal terms.

But if it was incorporated, then is it now on its way to statehood?

That's what I'm pulling for. You and I can be the senators. I mean, in some sense you are pointing to a kind of *reductio ad absurdum* of legal boundary drawing, which is fair enough, and, indeed, what I take to be striking about the Palmyra story is exactly the way it exemplifies the role of legal boundary drawing in the history of imperialism. Empires work by extending power and people, configuring concentric spheres of protection and influence—all of this is about sliding boundaries. Palmyra sits out there in the Pacific sun as a monument to all the boundary tweaking that has gone on at the periphery of an expansive American experiment.

Let's fast-forward for a moment. I know that the Supreme Court has cited your work on the Insular Cases in connection with recent litigation on Guantánamo. Can you talk for a moment about this island outpost and its liminal legal status?

Well, again, here the issue has been one of legal boundaries. Guantánamo is not a "territory" of the US in any of the senses we have been talking about. It is a strange sort of lease—a perpetual lease, the terms of which specify that the arrangement cannot be altered without the mutual consent of Cuba and the US. This is not the sort of lease that happens absent considerable pressure, and indeed the arrangement—very humiliating and annoying to Cubans—was a precondition of the withdrawal of US occupying forces after the Spanish-American War. The US wanted it as a naval base. This was the era of Alfred Thayer Mahan—*The Influence of Sea Power on History* (1890). Everybody needed coaling stations all over the world. Control over the oceans was the geostrategic obsession of the great powers. Much of the imperial island craze of the turn of the century is about this. Anyway, it is this odd status—the US is definitely in charge, but the place is, nominally anyway, part of Cuba—that facilitated the creative legal work by the Bush administration lawyers. In essence, they argued that the protections of the US Constitution were irrelevant to what went on there, since the US wasn't the sovereign.

So who is? Castro?

Basically. That was sort of their argument. Just to be clear, this stuff is also very complicated, because there are all sorts of special legal considerations when you are talking about military bases, and so on. But grossly speaking, you are dealing with another legal no-man's-land, another island put forward as beyond the constitutional pale. Significantly, of course, the Supreme Court has been chipping away at this posture. The Boumediene case in 2008 marked an important moment, because there the Court rejected the idea that the prisoners being held at Guantánamo were beyond the reach of some of the basic legal protections of the US system.

Maybe the CIA needs to call your James Bond villain friend.

You know, you say that, and I have to admit that when all of this first started going down—reports of secret prisons, extraordinary renditions, etc.—the first thing that occurred to me was that someone should be checking to see what was up on the seven guano islands that the US still holds. They were, in a way, the original law-free zones, and they are still out there. I think one or two might even have an airstrip.