*I affirm: Resolved: The United States ought to extend to non-citizens accused of terrorism the same constitutional due process protections it grants to citizens.*

1. Aff gets RVIs to avoid making T a no-risk issue; otherwise, negs would exploit the aff time skew and run blippy shells to skew my strategy. Also, the AC is always vulnerable to T since the NC is reactive and can run theory on any of my interps, so aff RVI is key to avoiding unnecessary T. Further, RVIs are necessary to resolve the theory debate; they claim that my practice has skewed substance too much to evaluate it, which means you can’t vote on it. If they don’t allow me to turn the theory shell with an RVI, then I can’t gain offense off the only layer left in the round. That makes theory itself abusive unless I can correct for it. Lastly, if the neg presents a better interp, don’t drop me; let us debate under theirs and drop the argument. Not doing so allows the neg to pick the weakest part of reasonable aff interps and turn it into a no-risk issue even with marginal abuse.

2. I have a massive time skew since I only get 4 minutes to answer a 7 minute NC and preempt 6 minutes of negative responses. Also, negs choose their framework and advocacy after hearing the aff, giving them every advantage in the framework and case debate. If there is no clear offense, presume aff since I accomplished everything the neg did in far less time and thus did the better debating.

*3. Ought statements are evaluations of actions. Evaluations distinguish between good and bad, on the basis of features, and those features constitute our reasons. Having an obligation means that we have the best reason. If there were a better reason, then the obligation would instead apply to that action. All reasons to take or not take an action are evaluated comparatively on the basis of the strength of those reasons. Sufficient strength requires only that the reason be equal to the comparative reasons. If no valid justification exists, then all reasons are sufficient in comparison to the other equally invalid justifications. Therefore, any purported justification would constitute a sufficient reason. As you ought to do what you have sufficient reason to do, you ought to take the action.*

4. Two violations of side constraints means both are permissible. Statman:  
 [Statman, Daniel. "Moral Tragedies, Supreme Emergencies, and National Defence." *Journal of Applied Philosophy* 23.3 (2006): 311-20. Print.]

Supreme emergencies, I believe, are not instances of genuine paradox. They are, rather, cases of moral tragedy. **A moral tragedy occurs when**, all things considered, **every viable option one is confronted with involves a serious moral violation.** In a supreme emergency, this is clear: if one violates jus in bello, one commits murder and perhaps other crimes. On the other hand, if one does not violate jus in bello, one’s omissions may contribute causally to the death and devastation of one’s people at the hands of a brutal, rights-violating aggressor.7Perceiving supreme emergencies as cases of moral tragedy implies that, **in such cases, one faces a ‘moral blind alley’** (ibid.), with nowhere to turn, and no way to stay morally clean. **But precisely because the alley is blind, i.e. all options are morally unacceptable, one cannot be blamed for choosing one option** (committing murder or other crimes) **over the other** (negatively contributing to the death of one’s own people and the devastation of one’s own land), **because such choice does not amount to neglecting the right course of action.**

It’s impossible to weigh violations for that’s not how side-constraints work. You either violate or you don’t; there’s no middle ground where you comparably violate less than something else. This means everything’s permissible as moral prohibition implicitly posits one action as preferable to another, but if there are multiple violations we can’t make such conclusions.

I value MORALITY, as ought indicates a moral obligation.

Moral rules can only be derived non-observationally. Kant:  
Immanuel Kant, the only philosopher the common man recognizes, “Critique of Pure Reason”

**Because** this **empirical character** itself **must be drawn from appearances as effect**, and from the rule which experience provides, **all the actions of the human being in appearance are determined** in accord with the order of nature **by his empirical character** and the other cooperating causes; **and if we could investigate** all **the appearances of his power of choice down to their basis, then there would be no human action that we could not predict with certainty, and recognize as necessary given its preceding conditions. Thus[,] in regard to this empirical character[,] there is no freedom**, and according to this character we can consider the human being solely by observing, and, as happens in anthropology, by trying to investigate the moving causes of his actions physiologically.

Inductive reasoning must be circular since it relies on experiential knowledge we don’t have about future expectations. Hume:  
David Hume, “An Enquiry Concerning Human Understanding”

That there are no demonstrative arguments in the case seems evident; since it implies no contradiction that **the course of nature may change, and** that **an object**, seemingly like those which we have experienced, **may be attended with different** or contrary **effects**. May I not clearly and distinctly conceive that a body, falling from the clouds, and which, in all other respects, resembles snow, has yet [has] the taste of salt or feeling of fire? Is there any more intelligible proposition than to affirm, that all the trees will flourish in December and January, and decay in May and June? Now whatever is intelligible, and can be distinctly conceived, implies no contradiction, and can never be proved false by any demonstrative argument or abstract reasoning a priori. If we be, therefore, engaged by **arguments [that]** to **put trust in past experience, and make it the standard of our future judgment,** these arguments **must be probable only,** or such as regard matter of fact and real existence according to the division above mentioned. But that there is **no argument of this kind**,must appear, if our explication of that species of reasoning **[can] be** admitted as solid and **satisfactory.** We have said that all **[these]** **arguments** [that trust in past experience] concerning existence **are founded on the relation of cause and effect**; that **[O]ur knowledge of that relation is** derivedentirely **from experience**; **and** that all **our** experimental **conclusions proceed upon the supposition that the future will be conformable to the past.** To endeavour, therefore, **the proof of this last supposition by probable arguments**, or arguments regarding existence, **must be** evidently **going in a circle**, and taking that for granted, which is the very point in question.

Unless the neg proves some inherent quality of non-citizens justifying different truth testing methods, affirm since we presume the two types of defendants deserve equal protections.

Moral statements rely upon our cognitive capacities to construct and act according to maxims; the objective validity of moral statements is determined by the universalizeability of subjective judgment. Engstrom:  
Stephen Engstrom, “The Form of Practical Knowledge”, Harvard University Press 2009. Pg 202-203

As we saw, **rational cognition is characterized by a universality that has both a subjective and an objective aspect,** each grounded in a conception of a single shared capacity. **On the subjective side, this conception is of an identical capacity to know, by which all cognizing subjects** share a capacity to **communicate** uniting them as members in a community of knowers; **on the objective side, it is cognition's original representation of the possibility of its objects' coexistence, by which all cognizable objects** share a capacity to **interact uniting them as members in a law-governed system.** But we have just seen that practical knowledge is distinctive in that, on account of its efficacy, its object and its subject must be one and the same. It follows that in the case of such cognition these two conceptions necessarily coincide, so that every subject that shares the capacity for practical knowledge must, precisely through possessing it, likewise be a member of the system of coexisting, interacting agents represented in such cognition. We also saw that the two-sided universality of rational knowledge entails that such cognition's validity is likewise universal in two corresponding senses, that **rational knowledge is both valid *for* every subject capable of grasping the concept** determined in such cognition **and valid *of* every object falling under its concept.** Given the self-relation of practical knowledge, it follows that **in such knowledge subjective and objective universal validity** necessarily **coincide in the sense that the subjects for which the cognition is valid are the** very **beings to which it applies.** This necessary coincidence of practical cognition's subjective and objective universal validity entails that the act of practical self-determination is inherently universal, in that any particular act of practical cognition, whether **a practical judgment** of the primary or the secondary type, **is** always, as knowledge of the particular in the universal, based in doubly universal knowledge, **knowledge *every* practically cognizing subject can have of what *every* such subject** is, or **ought**, **to do.** Practical **self-determination is**, accordingly, **a universal self-relation**, whereas the practical self-specification characteristic of bare practical thought is merely particular, indeed singular. Practical self-determination is never the bare self-relation of an isolated practical *I*; it always has a footing the self-relation of the *we* of practical knowledge.

Moral theories must judge action as a unified whole. If they did not, the separate steps in the chain of action would not be justified. In the process of doing a whole action, the steps are not disconnected, but rather so connected that one interruption would disrupt the entire action. Rodl:  
**Rodl I** (Rödl, Sebastian. Self-Consciousness, Harvard University Press, 2000)

**Suppose** I walked from a to c, via b. It may be that **I decided to walk from a to b, and, having got there, decided to walk from b to c. Or I decided to walk from a to c, and did**. In the former case, I was walking from a to b, and then I was walking from b to c. But **only in the latter case**, not in the former, **was I walking from a to c. As a movement, an action is not an aggregate, but a unity of phases.**

Calculations from desire do not account for the unity of action. This means changeable end states are morally irrelevant as reasons to act. Rodl 2:  
**Rodl II** (Rödl, Sebastian. Self-Consciousness, Harvard University Press, 2000)

**Calculations from desire does not yield a premise for instrumental reasoning because its conclusion represents a changeable state**, while an instrumental reasoning proceeds from athought that represents something with the temporality of a movement. But the instrumental syllogism is a necessary form of practical reasoning, for practical reasoning arrives at a thought on which a movement may rest. And **if a movement rests on thought, then the unity of its phases**, which constitutes it as a movement, **must rest on thought.** So it does **if** I reason from the same thought now, “**I want to do B. So let me do [X]”, and then, “I want to do B. So let me do [Y]**”, and so on. As “I want to do B” expresses the same thought all the while that I am doing B and until I have done it, **the unity of the phases of my doing B consists in the fact that they all hang on that thought. By contrast, if “I want to do B” represented a changeable state** I would not reason from the same thought, now to doing A1, and then to doing A2. In consequence, my doing A1 and my doing A2 would bear no unity. **These would not be phases of a movement, and I would not**, in doing A1 and A2, **be doing B.**

Calculations from desires that reference time cannot account for the unity of action because there is no constant intention linking the parts of an action together. Rodl 3:  
**Rodl II** (Rödl, Sebastian. Self-Consciousness, Harvard University Press, 2000)

**An intention to do A2 cannot rest on a judgment that desires earlier were best served by doing B. It can rest only on a judgment that doing B is best given all desires now**. If appetite unified by a calculation is the order of practical reason, then she who conforms to it forms two intentions to do B: one is the ground of her intention to take the first step and do A1, another the ground of her intention to take the second step and do A2. One might think that there are not two intentions, but one that remains, if the desires on which the intention is based remains. But this is wrong. The ground of an intention is a judgment that desires, all in all, speak in favor of doing A. **As desires come and go, that judgment contains a reference to a time. It is a judgment that desires now present all in all speak in favor of doing A. Such a judgment made at t1 bears no logical connection with the judgment expressed by the same words at t2**, no matter whether the same things are present at t1 and t2, no matter whether it was probably or even necessary that the same things would be present. On Davidson;s account, the same holds true of all-out judgments, or intentions, as their basis is an all-things considered judgment: **judging all out at t1 to do B and judging all out at t2 to do B are different judgments, regardless of whether the desires changed in the meantime,** whether it was unlikely or even impossible that they would change.

Maximization doesn’t account for freedom as a necessary condition for morality. Maximization standards preclude moral freedom since they hold us responsible for empirical limitations on achieving the true greatest good. Rodl 4:  
Sebastian Rodl, University of Basel, “Comments on Guyer: Forms of Desire”

Guyer describes freedom in two ways. One is: freedom is unhindered activity. Our desire to be free is a desire to maximize unhindered activity, or the possibility of unhindered activity.11 If we want to maximize, we need a measure of quantity. Guyer suggests we maximize the number of free acts, or of acts that may be, or might have been, free.12 This makes no sense[.] for two reasons. First, **[A]ny temporally extended action contains** within itself **an indefinite number of actions**, **its parts or phases, that are subordinated to it as means to end.**13 Hence, **if I have done something, I am no longer in a position to increase the number of acts I have performed.** Secondly, **someone who wants as much X as possible**, or as many Xs as possible (e.g., as much money as possible, or as many sports wagons as possible), **when this is his ultimate end**, necessarily suffers from pleonexia. He **will never have enough, always want more, and always be lacking. Phrases of the form ‘‘as much X as possible’’ or ‘‘as many X as possible’’ do not specify a highest good because an ultimate end of this form precludes happiness of him who pursues it.**

Thus, for a moral judgment to be truly normative, one must be able to act on it indefinitely. Rodl 5:  
**Rodl III** (Rödl, Sebastian. Self-Consciousness, Harvard University Press, 2000)

**[Because] judgments that represent changeable states cannot be the ground of an intention**, which is the principle of a movement. So the necessarily represented **[a] unity of ends must bear a different kind of temporality**. We shall now suggest that the relevant unity is a unity not of desire, but of what we shall call infinite ends. Just as the concept of desire, so is our concept of an infinite end defined by the form of a thought that constitutes adherence to it. As a man may desire noble things, so may his infinite ends be base, if base things figure in his thoughts of the relevant form. All-things-considered **[while desire] judgments join subject and action**-form **at a time**. An intention joins them progressively, guiding the progress of the action. If the representation of **an infinite end** is to **provide[s] the principle of temporal synthesis of an action [and]**, it **must [not] join subject and action**-form neither **at a time** nor progressively, but in a way that, metaphorically speaking, always already contains the whole of a temporally extended action. We shall see that **this means that its predication is time-general.** “I am getting my tools because I want to repair my bicycle”, I say. “Why do you want to repair your bicycle?,” you ask. “ I want to go cycling.” But why go cycling? It is healthy. Is this an instrumental syllogism? It appears so. Does not it represent health as an end and cycling as a means? It is true, we call **[for example if] health [is] an infinite end.** But it is an end in a different sense from repairing a bicycle; the end and what is done in its service relate differently in these cases. Infinite ends are time-general; this distinguishes them from desires. I may one moment feel like going to the movies, the next moment feel like staying home, and a minute later again think that going to the movies would be nice. But it makes no sense to say that, one moment, I cared about my health, was completely indifferent to it the next moment, and a bit later again cared greatly about it. If I want health, **then [health] manifests itself in actions at various times; wanting health is time-general and not tied to a moment.**

Agency is an inescapable form of the human condition, so it is the only infinite end. Ferrero:

**Ferrero I** (Luca Ferrero, “Constitutivism and the Inescapability of Agency,” Oxford Studies in Metaethics, January 2009)

First, **intentional transitions** in and out **of particular enterprises might not count as moves within those enterprises, but they are still instances of intentional agency**, of bare intentional agency, so to say. Second, **agency is the locus where we adjudicate the merits** and demerits **of participating in an**y ordinary **enterprise**. Reasoning whether to participate in a particular enterprise is often conducted outside of that enterprise, even while one is otherwise engaged in it. **Practical reflection is a manifestation of** full-fledged **intentional agency but it does not** necessarily **belong to any other** specific **enterprise.** Once again, it might be an instance of bare intentional agency. In the limiting case, **agency is the only enterprise that would** still **keep a subject busy if she were to attempt a** ʻradical **re-evaluation**ʼ **of** all of **her engagements and** at least **temporarily suspend her participation** in all ordinary enterprises.

Thus, the standard is CONSISTENCY WITH HUMAN AGENCY.

I contend that granting due process rights is necessary to respect the universal value of human agency.

Due process rights are essential to respecting human worth and authority over oneself and what is done to them. Allan:  
Allan, T.R.S. Procedural Fairness and the Duty of Respect. Oxford Journal of Legal Studies, Vol. 18, No. 3 (Autumn, 1998), pp. 497-515. Oxford University Press. Accessed JSTOR. <<http://www.jstor.org/stable/764676>>.

**In a democratic society which respects** certain **fundamental rights,** where each person is dealt with in accordance with the laws, **and** **where certain other important values are respected in legal processes, people are treated with dignity and respect.** **Treatment in accordance with authoritative legal standards**, in particular, **upholds a person's legitimate normative expectations—an element of fair treatment which cannot be collapsed into other values** such as privacy or equality or comprehensibility. This broadly instrumental approach is persuasively recommended as robustly practical and in tune with common sense: 'Procedures in the air, procedures good in themselves, and procedures edged with mystery are eliminated'.3 The important part played by non-outcome values—values independent of the accuracy or soundness of the substantive decision or verdict—in any complete and convincing analysis is readily acknowledged; but Laurence Tribe's suggestion, that the 'rights to interchange' between citizen and official conferred by a fair hearing have intrinsic value [and], is typical of the dignitarian assertions which attract Galligan's scepticism. According to Tribe, **such rights ‘express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one’.**

The US is constitutionally bound to grant non-citizens due process by the Fifth and Fourteenth Amendments. Gutfeld:  
Gutfeld, Rose. “THE US CONSTITUTION AND THE RIGHTS OF NON-CITIZENS.” Ford Foundation Report (Independent Nonprofit Organization). Fall 2003. <http://www.freerepublic.com/focus/fr/1005311/posts>

**The Supreme Court** has **ruled**, as recently as 2001, **in Zadvydas v. Davis**, involving the detention of foreign nationals ordered deported but whose country will not accept them, **that due process applies to all persons in the U**nited **S**tates**, whether citizens or foreign nationals.** Our courts have not unfortunately always lived up to the promise of the Constitution. The Court has sometimes allowed the government to take measures against foreign nationals that it presumably would not accept toward citizens. This year, for example, in Demore v. Kim, a case challenging the automatic detention of so-called "criminal aliens," the Court for the first time upheld a statute mandating preventive detention without any individualized showing of danger to the community or flight risk, and did so explicitly by reasoning that the government has greater leeway vis-à-vis foreign nationals. But that makes no sense. Foreign nationals have just as strong an interest in not being locked up unnecessarily as citizens do, and the government's interests in preventive detention are identical with respect to citizens and foreign nationals. Isn't such a double standard effective in terms of boosting security? Putting aside their morality or legality, these double standards are also counterproductive as a security matter, because they alienate the very communities that we need to be working with most if we are going to find the few al Qaeda operatives out there. We have reason to believe that they're likely to be Arab or Muslim. That's not a stereotype, that's based on intelligence about the membership of al Qaeda. But there are millions and millions of Arabs and Muslims in the U.S. It seems to me that if you treat the entire community as suspect by virtue of where they come from or what religion they practice, then you're going to alienate that community and make it less likely that you will have the kind of positive relationships that would lead to good and useful information that helps us identify actual terrorists. When other nations see us imposing on their citizens burdens we are not willing to tolerate ourselves, we forfeit the legitimacy of the struggle against terrorism, and make it less likely that we will obtain the cooperation we need from those countries. In addition, we contribute to anti-American sentiment, which has never been higher than it is today. That cannot be good for our long-term interests, and it plays right into the hands of the terrorists' recruitment propaganda. Can you give examples from cases you are handling of the government's disregard for the rights of immigrants and foreign nationals? Rabih Haddad is a Muslim cleric in Ann Arbor who was arrested and tried in secret after September 11. With the law firm of Arnold & Porter and the Center for Constitutional Rights, we obtained a ruling that his secret hearing violated his due process rights. Haddad was deported in July when his immigration appeals ran out. I also was co-counsel with the American Civil Liberties Union in a First Amendment challenge by New Jersey newspapers to the same policy. We won in district court, but lost before a divided court of appeals, and the Supreme Court denied review. In Brooklyn, I'm working with the Center for Constitutional Rights in a class action lawsuit on behalf of Arab, Muslim and South Asian immigration detainees picked up and held under abusive conditions for long periods of time in New York and New Jersey, ostensibly in connection with the September 11 investigation. In that case, Turkmen v. Ashcroft, some of our clients were picked up on pretextual immigration charges, but then held for as long as six months after their immigration cases had been fully resolved, so that the F.B.I. could keep them locked up while it investigated them. In each case, the government has exploited immigration law for purposes it was not designed to serve, violated the most basic due process rights and treated individuals in ways that it could never get away with had they been citizens. Why has there been relatively little public outcry in this country against the ways the government has treated foreigners and immigrants? If Americans think their own rights are safe and we can target foreigners without implicating ourselves, then Americans don't believe they have a reason to protest. Our rights are secure, and our security is secure. It's unfortunate, but I think that is much of what is going on here. In contrast, strong protest has been heard over measures that actually apply to American citizens. Take, for example, the proposal to have a national ID card; the Justice Department's Operation TIPS, which would have created an army of 11 million citizen spies to spy on each other and provide information to the government; and the Total Information Awareness Program, a massive data mining system. All of those proposals, which would have had substantial effects on the privacy rights of all Americans, generated significant objections in Congress and were killed or substantially delayed. Even the measures against foreign nationals have not gone uncriticized. In particular, significant dissenting voices have been raised by such groups as Amnesty International, the Center for Constitutional Rights, the American Immigration Lawyers' Association, the A.C.L.U., Human Rights Watch, and the American-Arab Anti-Discrimination Committee. But if you're looking for broad political opposition, you generally won't find it where the government targets foreign nationals. Katherine Lambert In his new book, David Cole explains how, after September 11, 2001, the U.S. government's treatment of Arab and Muslim immigrants has not only denied many their rights but hindered national security. Last June, the Bush administration issued guidelines banning the use of race or ethnicity in routine investigations but allowing such practices to continue in narrow circumstances involving terrorism or national security. Does such a policy make sense? If you're talking about the use of race as an identifying factor in trying to capture a suspect, then I don't consider that to be profiling. So if there's a report that two Italian men in their 40's just robbed a bank, and the police go looking at Italian men in their 40's and don't look at African-American women in their 60's, they're taking race into account there. They're not doing it in a way that is based on stereotypes and generalizations, but rather based on specific identification. I think that's appropriate before and after September 11. What's not justified is using race as a generalization in deciding whom to stop or whom to target with law enforcement resources, this kind of broad presumption that a foreign national, simply because he is coming from a country that's predominantly Arab or Muslim, ought to be suspect. How does the government's treatment of foreigners since September 11 conform to the historical pattern of how it has treated foreigners during other crises? Much of my book argues that there's a recurring pattern of targeting foreign nationals in times of national security crisis. It goes back to the Alien and Sedition Acts of 1798, which were targeted at French and Irish immigrants who were considered to be rabble-rousers. The first federal law targeting subversive speech was a 1903 immigration law. The first guilt-by-association provisions were enacted in 1917, again in the immigration law, and made it a deportable offense to be a member of anarchist or communist parties. Those laws became the basis of the Palmer raids of 1919-1920, which were a response to a series of terrorist bombings in the United States. The federal government went out and exploited immigration law—not to identify and lock up and punish the bombers, but instead to lock up several thousand foreign nationals on pretextual immigration charges and political association charges. Ultimately hundreds were deported—again, not for their involvement in the bombings, but for their political associations. But what I also show in the book is that historically or inevitably, government officials grow accustomed to exercising these broad authorities and seek out ways to extend them to U.S. citizens. 'When other nations see us imposing on their citizens burdens we are not willing to tolerate ourselves, we forfeit the legitimacy of the struggle against terrorism, and make it less likely that we will obtain the cooperation we need from those countries.' Are there examples of that happening now? I think one example is this whole use of military custody, of holding enemy combatants, as the government is doing in Guantánamo Bay. The government is asserting the power to hold these people indefinitely, incommunicado, without any kind of a hearing to determine whether they are in fact combatants. This was initially defended on the ground that these people we're holding are foreigners. They're not on U.S. soil. They don't have the same constitutional rights that we do. Then we discovered that one of the people there was probably a U.S. citizen, Yasser Hamdi. Then José Padilla, another U.S. citizen, who was suspected of plotting to detonate a dirty bomb, was arrested in O'Hare airport. In these cases, we have extended the concept of military justice to U.S. citizens, and we're holding them just as we're holding the people in Guantánamo, without charges, without a hearing, incommunicado, indefinitely, on the President's say-so that they are enemy combatants. Another example is the criminalization of what the government calls material support for terrorist organizations. This is a practice that was introduced, again through the immigration law, against foreign nationals, but has now become part of the criminal law, and applies to both U.S. citizens and foreign nationals. It criminalizes any support of any blacklisted terrorist organization without regard to whether one's support actually had any connection whatsoever to terrorist activity that the group undertakes. I represent a human rights organization in Los Angeles in a lawsuit challenging this statute. The group, the Humanitarian Law Project, has been providing human rights advocacy training and peacemaking negotiation training to the Kurdistan Workers Party in Turkey, which is essentially the political representative of the Kurdish population in Turkey. They've been doing so because they view the Kurds as a discriminated-against and abused minority in Turkey and want to encourage peaceful ways to resolve the conflict between Turkey and the Kurds. Yet once the material support statute was enacted in 1996 and the U.S. State Department designated the Kurdistan Workers Party as a terrorist organization in 1997, it became a crime for this human rights group to continue to provide human rights advocacy training to the organization. 'Unlike in prior crises, there is today a significant civil society presence speaking out for those without a voice in the political process. And those voices, over the long run, will make a difference and probably already have.' How has the judiciary responded in cases involving the civil liberties of noncitizens? I think the judiciary's response has been mixed. Historically courts are not effective protectors of liberty in times of crisis. In World War I, the Supreme Court upheld the criminalization of antiwar speech. In World War II, the Supreme Court upheld the internment of Japanese-Americans. In the cold war, the court permitted guilt by association to go on essentially until [Sen. Joseph] McCarthy was censured. The majority of decisions thus far in the current crisis have ruled in favor of the government. Courts have upheld the secrecy of immigration proceedings, upheld secret arrests, have refused to even question the detention of the people in Guantánamo Bay, and have upheld the detention of Yasir Hamdi as an enemy combatant. But a surprising number of courts have ruled against the government. We've had courts rule that trying immigrants in secret violates the Constitution; that holding immigrants after an immigration judge has ordered their release, simply because the prosecutor wants to keep them in detention, is unconstitutional; that arresting individuals in secret violated the Freedom of Information Act; that using the material witness law to hold people who are actually cooperating with the government is a violation of the material witness law; that criminalizing the provision of "personnel" and "training" to terrorist organizations violates due process; that locking up a foreign national without charges for 19 days violates federal law; and that a citizen held as an enemy combatant must be given access to a lawyer. The government has appealed most of these rulings. The F.O.I.A. ruling was overturned on appeal, and appeals courts have divided on the constitutionality of secret immigration trials, but the bottom line is that there have been more adverse decisions against the government and for civil liberties than one might expect in the early phase of a national security crisis. Given the courts' past record, I'd say they have done better this time around than in prior crises. What has been most disturbing and most admirable about the government's approach to fighting terrorism since September 11? To me, the most disturbing aspect has been the failure to confront the hard choices presented by balancing liberty and security, and the consistent cheating on that balance by targeting the most vulnerable among us—foreign nationals without a voice in the political process. The most admirable thing about America's response has been the robust dissent that has been voiced, and tolerated, with respect to these measures. Unlike in prior crises, there is today a significant civil society presence speaking out for those without a voice in the political process. And those voices, over the long run, will make a difference and probably already have. Safeguarding Liberty Protecting the human rights of migrants and refugees has been an aim of the Ford Foundation since the 1950's, when it first began to make grants in response to worldwide migration flows. In the United States, these issues have taken on increasing importance since the attacks of September 11, 2001, as government officials have strived to enhance national security. Support for Prof. David Cole's book represents one of several grants made to safeguard human rights and civil liberties of non-U.S. citizens and to inform policy makers and the public about these issues. An excerpt from Chapter 14, "The Bill of Rights as Human Rights," in Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism The Constitution does distinguish in some respects between the rights of citizens and noncitizens: the right not to have one's vote discriminatorily denied and the right to run for federal elective office are expressly restricted to citizens. All other rights, however, are written without such a limitation. **The Fifth and Fourteenth Amendment due process and equal protection guarantees extend to all "persons." The rights attached to criminal trials**—including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses—all **apply to "the accused."** **And** **both the First Amendment**'s protections of political and religious freedoms **and the Fourth Amendment**'s protection of privacy and liberty **apply to "the people."** **The fact that the Framers chose to limit to citizens only the rights to vote and to run for federal office indicates that they did not intend these other rights to be limited to citizens.** Accordingly, the Supreme Court has squarely stated that neither the First Amendment nor the Fifth Amendment "acknowledges any distinction between citizens and resident aliens." For more than a century, the Court has recognized that the Equal Protection Clause is "universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of …nationality." The Court has repeatedly stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." **When noncitizens**, no matter what their status, **are tried for crimes, they are entitled to all of the rights that attach to the criminal process, without any distinction based on** their **nationality.**

Due process rights are uniquely key because to give accused terrorists otherwise suspends the constitutional law to deny any agency they would have in the legal system. They become political tools instead of rational beings. Judith Butler:

Judith Butler [professor of rhetoric and criticism at Berkeley]. Precarious Life: the power of mourning and violence. 2004 Verso publishing.

"Indefinite Detention" considers the political implications of those **normative conceptions of the human** that **produce,** through an exclusionary process, a host of "**unlivable lives" whose legal and political status is suspended. The prisoners** indefinitely **detained** in Guantanamo Bay **are not considered "subjects" protected by** international law, are nOt entitled to **regular trials,** to **lawyers,** to **[or] due process.** The military **tribunals** that have, at this date, not been used, **represent a breach of constitutional law that makes final judgments of life and death into the prerogative of the President.** The decision to detain some, if not most, of the 680 inmates currently in Guantanamo is left to "officials" who will decide, on uncertain grounds, whether these individuals present a risk to US security. **Bound by no legal guidelines except those fabricated for the occasion, these officials garner sovereign power unto themselves**. Whereas Foucault argued that sovereignty and governmentality can and do coexist, the particular form of that coexistence in the contemporary war prison has yet to be charted. Governmentality designates a model for conceptualizing power in its diffuse and multivalent operations, focusing on the management of populations, and operating through state and non-state institmions and discourses. **In the current war prison, officials** of governmentality **wield** sovereign power, understood here as a lawless and unaccountable operation of **power**, once legal rule is effectively suspended and military codes take its place. Once again, a lost or injured sovereignty becomes reanimated **through rules that allocate final decisions about life and death to the executive branch** or to officials with no elected status and **bound by no constitutional constraints.**

The denial of due process rights to those accused of terrorism is justified through a state of emergency that allows human rights protections to be ignored, denying both citizen and non-citizen agency. This makes universal constitutional due process uniquely key. Butler 2:

Judith Butler [professor of rhetoric and criticism at Berkeley]. Precarious Life: the power of mourning and violence. 2004 Verso publishing.

We might, and should, object that rights are being suspended indefinitely, and that it is wrong for individuals to live under such conditions. Whereas **it makes sense that the US government would** take immediate steps to **detain those against whom there is evidence that they intend to wage violence** against the US, **it does not follow that suspects such as these should be presumed guilty or that due process ought to be denied to them.** This is the argument from the point of view of human rights. From the point of view of a critique of power, however, we also have to object, politically, to the indefinite extension of lawless power that such detentions portend**. If** detention may be indefinite, and **such detentions are presumably justified on the basis of a state of emergency, then the US government can protract an indefinite State of emergency.** It would seem that the state, in its executive function, now extends conditions of national emergency so that the stale will now have recourse to extralegal detention and the suspension of established law, both domestic and international, for the foreseeable future. Indefinite detention thus extends lawless power indefinitely. Indeed, **the** indefinite detention of the **untried prisoner**--<>r the prisoner **tried** by military tribunal **and detained regardless of the outcome of the trial-is a practice that presupposes the indefinite extension of the war on terrorism**. And if this war becomes a permanent part of the state apparatus, **a condition which justifies and extends the use of** military tribunals, then **the executive branch** has effectively set up its own judiciary function, one **that overrides the separation of power, the writ of habeas corpus** (gu.aranteed, it seems, by GuantamlillU Bay's geographical location outside the borders of the United States, on Cuban land, but not under Cuban rule), **and the entitlement to due process**. It is not just that constitutional protections are indefinitely suspended, but that **the state** (in its augmented executive function) **arrogates to itself the right to suspend the Constitution** or to manipulate the geography of detentions **and trials so that** constitutional and international **rights are effectively suspended.**