# 1AC

### 1AC – Advantage

#### The status quo is characterized by antiseptic jurisprudence- epitomized by the Hamdi decision that uses judicial deference on indefinite detention as a means of silencing the rights of supposed “enemy combatants”.

#### This process masks the US commitments to preemptive violence, which makes extinction inevitable through permanent warfare waged under the guise of US exceptionalism.

Williams ‘7

[Williams, Daniel R. “After the Gold Rush – Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment.” Penn State Law Review 112.2 (2007). ETB]

The judiciary, through its antiseptic process jurisprudence, may thus collaterally sanction international lawlessness in the name of democratic forbearance. When we speak of judicial deference to the democratic branches of our government in times of war, we mean, in practical terms, that war operates as a constraint on civil liberties, a limitation on it. War does not silence law insofar as certain constitutional rules of governmentality are concerned-that much Hamdi assures us, 96 to much acclaim; but war may silence law insofar as certain individual liberties and rights may be dispensed with through a recalibration of the security/liberty balance. So, when the Court defers to the Executive in its decision to detain enemy combatants pursuant to the AUMF, and thus approves of Yaser Hamdi's detention without the judicial process that a criminal defendant would receive, it uses the war on terror as a silencing of-a constraint, a boundary, on-our commitment to a form of due process that characterizes what we long thought was the paradigm mechanism for justifying involuntary detentions of U.S. citizens. The alternative would be to flip the whole thing on its head and make civil liberties a constraint on how the Executive can prosecute a war. That is to say, law could operate to silence war, or at least contribute to the silencing of war. But that anti-deference approach would put the judiciary outside the antiseptic process framework, and there is little chance of accomplishing that. Hamdi (and the more recent case of Hamdan) confirms that assessment of our present jurisprudential consciousness.¶ Ah, jurisprudential consciousness. Judicial deference to the Executive in matters of foreign affairs and warmaking indeed has a strong hold on our jurisprudential consciousness. 97 That hold on our jurisprudential consciousness reflects an understanding of sovereignty that silently propels the Hamdi narrative forward, a fact hinted at by the evocative first line of the opinion that this Nation faces a "difficult time." 98 Guantanamo-understood as the expression of sovereignty as violence unchained from juridical restraints-cannot exist in a juridicopolitical scheme of divisible power. Sovereignty of this sort, it has long been understood, must be exercised through the power of the state that is indivisible.99 The crux of this form of sovereignty-the way it is expressed through the mechanics of governmentality-is the legislative power.100 And lo and behold, it is the wording of a congressional enactment, the AUMF, that anchors the legal analysis in Hamdi. It is the legislative power that gives Legality its prime role as lead character in¶ the Hamdi narrative. But, as this article has suggested and will pursue as an animating theme, this jurisprudential consciousness depends, crucially, on the unquestioned (and unquestionable) supposition that our nation acts only in self-defense when it comes to our use of military violence. Most discussions of Executive power in matters of foreign affairs and warmaking partake in the unquestioned assumption that the nation's warmaking is defensive, not aggressive, that we are protecting democracy, not pursuing empire, and indeed that judicial deference is vital because otherwise the very survival of this nation would otherwise¶ be imperiled.101¶ Whether the justifications for judicial deference are meritorious is beside the point when we confront, as an open question, the possibility that a pax Americana vision is fueling this era of permanent warfare, something the judiciary is simply unwilling to do, judging from Hamdi¶ and Hamdan. This unwillingness is another manifestation of the human inclination at the heart of the proposition that the stories we want to tell ourselves dictate the stories that we do tell. But, nevertheless, it is still worth commenting on a central justification for judicial deference-the claim of Executive expertise when it comes to foreign policy 102 because it spotlights a crucial shallowness in Hamdi.¶ The shallowness of Hamdi at the level of legal doctrine ultimately rests with the judiciary's obsession with "demonstrat[ing] its neutrality by adapting to the new order as it had supported the old."'10 3 The mutually reinforcing notions that the judiciary must defer to the executive and legislative branches because democratic commitments command that deference and because the executive has the expertise in foreign affairs are presented as if they were neutral facts, if not self evident. The non-neutrality of this deferential stance stems not only from the disturbing possibility that our democracy is tangibly and deeply debilitated, and that the executive branch is hardly populated with people who have any genuine expertise in foreign affairs; more profoundly, the deferential stance is a masquerade for power, for a commitment to a particular mode of life, and ultimately for a particular way of being and thinking.¶ Philosopher Alasdair Maclntyre, in his classic work After Virtue, debunks the idea of managerial expertise, revealing it to be a fictional notion.104 Foreign-policy expertise, like so-called managerial expertise, is also a fictional notion, something manufactured to facilitate the pursuit of a goal; in this case, the manufacturing of the notion of "foreign policy expertise" facilitated America's post-World War 1I quest for a particular global order enforced through unrivaled American military might.'0 5 "Foreign policy" is not something about which one can have actual expertise, if by expertise we mean the ability to make meaningful causeand-effect judgments and predictions. Foreign policy is not a thing, but is rather an expression and commitment to a particular way of living, which is why deferring to so-called "foreign policy experts" is a way of committing to a normative vision of the world and our role in it. 0 Deference in the service of a moral fiction like "foreign-policy expertise" is simply a way to abjure the hard work of thinking substantively about rights and obligations and of confronting genuine life-and-death matters.

#### This approach is dominated by considerations of necessity and emergency, creating a vacuum that sovereignty can only fill through an infusion of legality manufactured to maintain the state of exception. The Hamdi decision is emblematic of this jurisprudence in that it simultaneously reaffirms and masks our commitment to inflict sovereign violence without juridical impediment

#### Left out is how these determinations are produced by the sovereign’s commitment to an exceptionalist vision of world order and how we are equally committed to that vision. Hamdi’s significance lies in answering the question of why such determinations are formulated to sustain a coherent and exceptionalist national identity

Williams ‘7

[Williams, Daniel R. “After the Gold Rush – Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment.” Penn State Law Review 112.2 (2007). ETB]

The real danger is to see the so-called war on terror ahistorically, and thus nationalistically, to see it as something new, as sui generis, rather than as something along the lines of a fruition, a culmination within our modernist heritage-or, at the very least, as a resurgence of the manufactured permanent emergency this nation lived through during the Cold War, a time in which we created a "national security constitution. 1 59 Our "difficult time" speaks to the unleashing of powerful impulses within our culture, Enlightenment impulses to control and dominate,1 60 and more immediately, to bypass the cumbersome obstacle course that we regard as the sine qua non of due process in order to manage the phenomenon of "dangerousness." 9/11 has in effect given us permission to do so. That permission expresses itself in the language of necessity.¶ Opting for the abstract, the non-committal description, "difficult time," gives O'Connor the ability to package her narrative to establish necessity as the foundational juridical fact upon which the entire opinion will be built. Necessity is both a problem and an opportunity. The problem posed by an extreme necessity, arising from a state of emergency, is rooted in the fact that we profess a commitment to the rule of law, aspire to live by it within an institutional framework and milieu that we label a democracy. Indeed, the very fact that it poses as a problem, the fact that we are uncomfortable with the famous aphorism, necessitas legem non habet-necessity has no law-attests to our commitment to the rule of law. Necessitas legem non habet is probably best taken to mean that circumstances may be so dire that an obligation to follow a particular legal norm may be suspended to account for the necessities of those circumstances. A totalitarian regime need suffer no angst over the suspension of law to confront an emergency, since "law" is embodied in, rather than a barrier to, the will of the ruler.¶ In a rule-of-law democracy, it is often assumed, Legality protects us against the unleashing of the oppressive tendencies of the sovereign in a time of necessity.1 61 No sophisticated observer of American legal history would buy into that belief. As Bruce Ackerman put it while discussing the likely panic that would ensue after the next (inevitable) terrorist strike, "[t]he courts haven't protected us in the past, and they will do worse in the future." 162 The best that might be said is that in a rule-oflaw democracy "[n]ecessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm."' 163 When Lincoln suspended Habeas Corpus, he did so out of necessity, famously asking, "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"' 164 The rhetorical thrust of that question was not that Legality itself is illegitimate, or that the law ought not be observed, but rather that¶ the necessities of the particular case renders Legality itself momentarily inapplicable. But regardless of the political system and culture of a¶ particular nation, necessity creates a void in the juridical 65 universe; and like Nature herself, Sovereignty abhors a vacuum. Therein is the opportunity. This vacuum created by necessity is the source of opportunity that a state of emergency presents for the sovereign. It is filled through the Legality that is manufactured pursuant to the state of exception inaugurated by the necessity itself. Congress's authorization to the Executive to use military force (the AUMF) is the infusion of Legality into the vacuum created by an announced state of emergency that came in the wake of the 9/11 terrorist attacks. The birth of the War on Terror thus came in the form of law. It is in this sense that necessity is not outside of law, or suspends law, but instead creates the conditions for a new legal regime to bloom through the acts of the sovereign. Necessity is the soil for 1the 66 seeds of law to take root. Necessity does not exempt. It produces.¶ Necessity produces law in that it is a juridical fact, meaning that necessity is itself a state of affairs that exists according to a juridical judgment. To decree that federal courts may not entertain habeas petitions because necessity demands it is to speak in terms of law. 167 To authorize indefinite detentions without a jury trial, as Hamdi sanctions, is to act through law. To pass a law that allows torture is to remain true to the rule of law (unless one insists, as a natural law adherent, upon a semantic distinction between rule of law and rule by law). To decree a state of affairs as constituting a state of necessity is to announce something that has the force of law; it is a legal pronouncement, a speech-act by the sovereign that a particular state of affairs cannot be governed by ordinary norms (normal Legality) and that instead what must be produced is another regime of norms that can govern the emergency state of affairs implied by the juridical judgment of necessity.¶ But the juridical judgment of necessity is beyond Legality. There is no legal framework to guide the sovereign's claim to necessity.168¶ What we can say here is that whatever is the necessity arising from "this difficult time," it is not merely a product of some difficulty in governance. Something more is being said here. We know that because the stricken party, the character in this narrative who must endure this "difficult time," is not a litigant or an institution, but the "Nation" itself. It is a "difficult time" for the Nation, a character in its own right within this narrative. A drama with an imperiled Nation undoubtedly suggests that we are seized by an emergency moment where our current juridical universe contains a lacuna that the sovereign must fill. 169 An emergency moment is what we have, we surely understand, because our very survival is at stake. With this somber mood, infused with the (hyperbolic?) innuendo of our Nation teetering on annihilation with barbarians at the gate, with a world now gripped in a high-stakes drama in which our ultimate cultural heritage, the Enlightenment, is under siege, the Court is not merely presented with a set of legal issues. Nor is it confronted with the task of merely smoothing over conflicts among¶ lower courts. Something grander is happening, and so the Court is "called upon" to act, to take a stand, to enter into the drama of "this difficult time." What is the Court "called upon" to do? Look at how O'Connor frames the case:¶ [T]o consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such.17°¶ Let us observe three things from this framing of the issue.¶ First, can we doubt that the sovereign's power to detain so-called "enemy combatants" will be affirmed? The "display of tellability"-this¶ "difficult time in our Nation's history"-makes the resolution of the fundamental issue in Hamdi inevitable, the fundamental issue being the legalization of Guantanamo, a term I use in italicized form to distinguish it from the place we know as Guantanamo Bay. Guantanamo refers not to a place, but on one level to our nation's willingness-commitment, even-to inflict unimaginable suffering upon individuals with the skimpiest of proof that they merit such torture. 171 On another level, as stated earlier, Guantanamo is a shorthand gesture to a form of sovereignty that harkens back to the late sixteenth century, in which sovereign power rests ultimately on coercive power, on the sovereign's¶ ability to inflict violence without juridical impediment.¶ Second, the creation of an ontology whereby "enemy combatants" become a definable legal category reduces the moral complexity of our world (dangerously so, in my view), and most importantly, entirely obscures our nation's role in it, which arguably may be suitable if one accepts U.S. global dominance as both the appropriate defining feature of geopolitics and the justifiable displacement of international law. 72 It is as if the ontology of "enemy combatants" was foisted upon us by 9 /11,¶ thus eclipsing the very idea that "enemy combatant" is a construct we have injected into our cultural milieu to pursue our own global ambitions, as if the lexical menu heretofore in existence (prisoner of war, criminal, lawful and unlawful combatants, etc.) is somehow inadequate¶ to accommodate that pursuit. One might understand this to be an illustration of what is meant when claiming that knowledge is¶ perspectival, as arising from "human being[s] violently tak[ing] hold of a¶ certain number of things, react[ing] to a certain number of situations, and subject[ing] them to relations of force."'' 73¶ Third, and this is the upshot of repressing moral complexity and reshaping our lexical menu, notice how easy it is to glide over this sentence. Deciding upon the "legality of the Government's detention of a United States citizen"'174 is hardly a remarkable judicial task; courts, including the Supreme Court, do that all the time. It is in the nature of habeas litigation for a court to decide that "legality" question. Because the "legality" of detention in a "difficult time" triggers thoughts of Korematsu v. United States,175 it should be said, given the claims in this article, that the dilemma there-how willing should we be to accept the sovereign's announcement of an "emergency" as a justification for bypassing or suspending bedrock due-process norms-may not really be the dilemma that Hamdi genuinely presents. The necessity at the heart of Korematsu arose from a global conflagration initiated by nations that had overt and obviously odious imperial designs. 76 The dilemma in Hamdi may not be as simple as how willing we are to justify executive power in times of emergency; at stake may be our blindness, or inadequate resistance, to the growth of executive power-the growth of sovereignty-through an "emergency" that is linked to, if not produced by, the pre-existing global ambitions of the sovereign who is announcing the emergency. Being open to understanding the cultural significance of Hamdi in terms of how and why the "emergency" exists-to look at how the "difficult time" arose-takes a willingness to confront difficult questions about the identity of our nation.¶ That is why the most salient thing about how O'Connor frames the issue is the shifting locution from our "Nation" to "the Government's detention." To avoid talking about who we are as a nation, we have to change the subject. And so, within the first paragraph, from the "display of tellability" to the framing of the legal question to be decided, the language shifts from this "difficult time" that afflicts our "Nation" to the more prosaic, more rhetorically modest and antiseptic locution of governmentality-'"the Government's detention" is being questioned here, rather than, say, the Nation's resolve to incapacitate "enemy combatants" who have, for some undisclosed reason, decided to launch murderous assaults upon the world's oldest democracy. 177 This shift in locution-setting the rhetorical mood and analytical backdrop with the idea of nationhood and then formulating the issue with the familiar terminology of government action-is key to a prevailing imagery one finds in Hamdi: the image of law in control, of the sovereign acting always under law, not bypassing it or suspending it. Framing the issue in terms of the Nation acting to defend itself through the detention of its enemies-a framing hospitable to the Executive's position in Hamdi- forcibly shunts the law aside. Framing the issue that way would drive the narrative to adopt an image of the law receding as the sovereign struggles for the survival of the Nation. The imagery of law in control, of sovereignty acting under law, of law being in the center of this drama, would in that instance be impossible to sustain. And for the narrative ambitions that undergird this opinion, we shall see, that imagery must be sustained. So, shifting the locution from nationhood to governmentality is particularly vital to the opinion.¶ What is happening here is what always happens in judicial decisionmaking. The framing of the issue, constructing what it is a court is "called upon" to decide, is itself the fruition of an invisible process of evaluating, interpreting, and choosing among an array of values and preferences. 78 That is why it would be a mistake to conclude that O'Connor's shift in locution suggests that the idea of nationhood, rather than mere governmentality, is banished from the narrative arc of the opinion. The opposite remains true. Nationhood is crucial to the entire rhetorical architecture of the opinion. Counterterrorism-and make no mistake, the Supreme Court's activity here is explicitly part of the nation's counterterrorism effort-cannot occur without strong feelings of moral community that get expressed through nationalism. Yearnings for a moral community, and fears of it unraveling or of it being assailed, create a psychological amenability to violence and cruelty, largely because, under the right conditions where the moral community is perceived to be in danger, our consciousness strips reality of any genuine complexity in favor of the simple ontology of good versus evil. When nihilistic Islamic jihadists threaten our moral community, valued for its openness and pluralism, we quickly exclude them as fundamental enemies of our moral community precisely because they are understood by us to renounce that commitment to openness and pluralism. That core outlook, unrelentingly pumped up by government officials and media talking heads, fuels a nationalism that makes indefinite detention of "enemy combatants" quite easy to justify.¶ The point here is that it is not the justification of indefinite detention that is the challenge for the Court. That is the easy part. The challenge is the preservation of the image of our commitment to the rule of law, in the face of the already existing desire to indefinitely detain dangerous¶ jihadists. The challenge is refuting in advance a criticism like that of Judith Butler's: "'Indefinite detention' is an illegitimate exercise of power, but it is, significantly, part of a broader tactic to neutralize the rule of law in the name of security."'179 So, highlighting the shift in Legality must be bracketed to create space for sovereign prerogative so as to preserve Legality. The overt message is that a state of exception is a condition of necessity, a suspension of a juridical order to preserve it. What I will be suggesting here is that more than a condition, the creation of a state of exception is a practice, a technique of the sovereign-a tactic, to use Foucault's phraseology of law in the hands of the government183-which produces the suspension of the normal juridical order by a manufactured necessity that is tied to the sovereign's own global ambitions. t84 And those global ambitions-the true producer of law in this context, and one potent manifestation of the dark side of the Enlightenment-must be rendered invisible through the "useful myths" of our nationhood, the very thing we regard as under attack. 85

#### The Hamdi court’s determinations are based on an overfixation with mythical executive expertise and maintaining the appearance of neutrality in the government’s pursuit of an exceptionalist world order. These are expressions our own anxiety towards the criminal justice process and our impulse to make it administrative, resulting in an over-commitment to means-ends rationality that threatens the life-affirming qualities of the law and risks annihilation.

Williams ‘8

[Daniel R. Williams, Associate Professor of Law, Northeastern University School of Law. “After the Gold Rush - Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere.” 113 Penn St. L. Rev. 55 ETB]

After the Gold Rush - Part I, I claim that foreign-policy expertise is the same sort of fiction as managerial expertise. n225 From that claim, I argue that judicial deference to the Executive in matters of foreign affairs is an overblown manifestation of our legitimate commitment to separated powers. n226 Judicial deference in the service of a moral fiction like "foreign-policy expertise" amounts to an avoidance of thinking substantively about rights and obligations and of confronting urgent globalization issues. The upshot is this: what is important to the Court in Hamdi is not the globalization issues that generate the controversy, but the maintenance of domestic orderliness and neutrality in the government's pursuit of its global ambitions. This concern for neutrality and orderliness manifests in the Court's institutional refusal to address the fundamental concern that Guantanamo-style detention exists not to serve the so-called war on terror, but the war on terror exists to serve Guantanamo. In that sense, the war on terror is really a war on ourselves, a form of auto-immune crisis, as Jacques Derrida characterizes it. n227 Hamdi expresses our own internal war against the criminal-justice system, exhibiting not just our ambivalence about it, but our impulse to detach it from its Kantian moorings and to make it administrative, and tribunal-like. Just as our technological prowess on 9/11 was whipsawed back against us, thereby threatening to eliminate the distinction between war and peace, so too the fundamental anxiety we feel towards our criminal justice process is whipsawed back to strike us hard, causing us [\*110] to unleash that other collective drive, the drive towards a form of governmental administration at the heart of Foucault's "political dream of the plague," n228 the drive to overcome inhibitions in constructing an MMDI system, and a drive that threatens the elimination of the distinction between civil detention and criminal punishment. Viewed from this prism, Hamdi is an emblem of how our legal culture, and indicative of how Western culture itself, has become paralyzed by an over-commitment to a form of system-sphere reasoning atrophied by a fetish for means-ends maximization. The dark side of the Enlightenment, which has produced a mighty economic machine that is backed by incredible scientific and technological achievements, has created a world that for over a half century has existed on a precipice of annihilation. We are perhaps even more precariously situated, largely because the internal drive within our culture to measure most everything in terms of financial profitability - a drive unleashed by the Enlightenment project to control and dominate - is a compulsion with such overwhelming power that the most economically benefitted inhabitants of this planet simply cannot see beyond their own short-term material interests for the sake of their own children and grandchildren. n229 My point here is that this overwhelming cultural drive threatens the vital and already-eroded life-affirming foundation of our criminal-justice system.

#### Hamdi signifies capitulation to this means-end rationality. It banishes consideration of how sovereignty predicated on exceptionalism has turned jurisprudence to a shell game, by accepting as fact the manufactured myth that US hegemony is in the pursuit of benevolent goals.

#### This stacks the deck in favor of judicial technocracy and leaves fundamental questions about why we undertake such actions unanswered. Answering these questions- questions about the legality of detention, about American adventurism, and about the dangers of means-end rationality– is the most important action we could take

Williams ‘07

Williams, Daniel R. “After the Gold Rush – Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment.” Penn State Law Review 112.2 (2007). 341-423. 357-361.

The very idea of a yardstick of propriety requires a prior acceptance¶ of two ideas: one, that we are part of something larger, that we are¶ properly accountable to others and to that larger circumstance; and two,¶ that it is not a betrayal or traitorous for a people within a nation to look¶ within itself.¶ Issacharoff and Pildes, the most prominent process¶ theorists, observe that process jurisprudence may be inadequate to¶ address the risk that we "might succumb to wartime hysteria.,¶ I would¶ broaden that observation so as to be open to the possibility that the risk¶ goes beyond just wartime hysteria, that our desire for security and¶ military victory, rooted in our repudiation of a genuine universal¶ yardstick of propriety that we willingly apply to ourselves (often called¶ American exceptionalism¶ )-which means that security and military¶ victory are not ipso facto the same thing-could easily slide us into¶ sanctioning a form of sovereignty that is dangerously outmoded and far¶ out of proportion to what circumstances warrant.¶ Process jurisprudence supposedly has the merit of putting the¶ balance of security and liberty into the hands of the democratic¶ institutions of our government. But what it cannot bring into the field of¶ vision-and what is absolutely banished from view in Hamdi-is the possibility that the democratic institutions themselves, and perhaps even¶ the democratic culture generally, the public sphere of that culture, have been corrupted so severely as to reduce process jurisprudence to a shell game.¶ More specifically, the formal processes of governmentality¶ responding to crisis is judicially monitored, but the mythos of our¶ national identity, particularly the idea that every international crisis boils¶ down to the unquestioned fact that the United States at least endeavors to¶ act solely in self defense and to promote some benevolent goal that the¶ entire world ought to stand behind, is manufactured and thus some¶ hegemonic pursuit in this global "war on terror" remains not just¶ juridically ignored, but muted and marginalized in much of our public discussions about it.¶ Under process jurisprudence, it is the wording of a piece of legislation, not the decoding of the slogan national security, that¶ ultimately matters. And under process jurisprudence, fundamental¶ decisions have already been made-fundamental decisions concerning¶ the nature of our global ambitions and the way we will pursue them before the judiciary can confront the so-called security-liberty balance,¶ which means that the analytical deck has been stacked by the time the¶ justiciable question-that is, what we regard as the justiciable¶ question-is posed. Stacking the analytical deck in this way reduces the Court members to the role of technicians in the service of whatever pursuit the sovereign happens to choose. This is why it is worth asking what many might regard as a naive, if¶ not tendentious, question: is it true that in the case of Hamdi and other¶ post-9/1 I cases, the judiciary's quandary over allocation of power is¶ actually in the service of genuine security, meaning physical safety of the¶ populace? Does the seemingly obvious answer that we seek only to¶ protect the safety of our communities against naked violence blind us to¶ a deeper ailment within our culture? Is it possible that the allocation of¶ power, at bottom, is rooted in a dark side of our Enlightenment heritage,¶ an impulse within Legality that threatens us in a way similar to the¶ Thanatos drive Freud identified as creating civilization's discontent?¶ Perhaps Hamdi itself, as a cultural document, signals yet another¶ capitulation to the impulse to embrace a form of means-ends rationality¶ that supports the Enlightenment drive to control and subdue.¶ Perhaps¶ what Hamdi shows is that 9/11 has not really triggered a need to¶ recalibrate the security-liberty balance, but has actually unleashed that¶ which has already filtered into and corrupted our culture Enlightenment's dark side, as the Frankfurt School understood it¶ -and¶ is thus one among many cultural documents that ought to tell us we are¶ not averting a new dark age, but are already in it, or at least, to borrow a¶ phrase from Wendell Berry, that we are "leapfrogging into the dark.”¶ It is impossible, without the benefit of historical distance, to answer¶ these questions with what amounts to comforting certitude. But they are worth confronting, since the fate of so many people depends on it, given¶ our unrivaled ability and frightening willingness to use military force.¶ Our culture's inability to ask such questions in any meaningful way, as¶ opposed to marginalizing those who plead for them to be confronted, is¶ somewhat reminiscent of how early Enlightenment culture treated¶ scientific endeavors. "Science," during the rise of Enlightenment¶ culture, rebuffed the why question, banished it as a remnant of medieval¶ darkness, because the why-ness of a certain scientific pursuit suggested¶ that certain domains of knowledge were bad, off-limits, taboo. The¶ whole cultural mindset of the Enlightenment was to jettison precisely¶ such a suggestion. That cultural mindset produced a faith all its own,¶ that all scientific pursuits, and by extension all human quests for¶ knowledge, will in the end promote human flourishing. It has taken the devastation of our planet to reveal the folly of that faith, a blind-spot in¶ the Western mind. It may turn out, as a sort of silver lining on a dark¶ cloud, that the terrorism arising from Islamic jihadists may do something¶ similar.

#### We have entered a new age in history: the failure of multipolarity does not mean a power vacuum filled with struggles for unipolarity but proves the failure of any attempts at global political control.

Hardt and Negri ‘11

Hardt, Michael and Antonio Negri. Commonwealth. Cambridge, MA: Belknap Press. 2011. 214-219.

The failure of the U.S. unilateral project leads many analysts to search about for successor candidates to global hegemony. Will a new caliphate emerge that can order large parts of the globe on the basis of Muslim unity under theocratic control? Will Europe now united reclaim its dominant position and dictate global affairs? Or is the rest of the world just waiting for the moment when China is ready to exert its unilateral hegemony? We find all these notions of "new pretenders to the throne" implausible, however, because they are based on the assumption that the form of global order remains imperialist and that, although the United States is incapable of achieving unilateral hegemony, some other nation-state or sovereign power is. The breakdown of U.S. unilateralism demonstrates, in our view, the failure not only of a U.S. project but also and more important of unilateralism itself. The form of global order has irreversibly shifted. We are living today in a period of transition, an interregnum in which the old imperialism is dead and the new Empire is still emerging.¶ Giovanni Arrighi offers one of the most trenchant and astute analyses of the waning of U.S. hegemony The rising period of a hegemonic power in the global economic system, according to Arrighi's reading of cycles of accumulation, is characterized by steady investment in new productive processes, whereas the shift from production to finance is a symptom of decline. The financialization of the U.S. economy since the 1970s thus signals an "autumnal" phase, parallel in his view to the period of diminishing British economic hegemony almost a century earlier. The military failures of the United States, coordinated with its retreating economic hegemony, are further evidence of decline for Arrighi, such that the Vietnam War, not long after the decoupling of the dollar from the gold standard and the first oil crisis, marked its signal crisis and the occupation of Iraq its terminal crisis. Arrighi thus hypothesizes that the U.S.-led cycle of global accumulation will be succeeded by a new cycle centered in East Asia (with Japan seen at the helm in his earlier work and China in his more recent). It is a mistake, however, to read Arrighi's argument, even though some elements in his work do point in this direction, as projecting that China or any other nation-state will repeat the form of U.S. hegemony, which itself repeated the British, and further back the Dutch, the Genoese, and the Venetian. Instead the new cycle of accumulation requires a new global political order and a reorganization of the geography and mode of operation of world capital. China will not be the new imperialist power, in other words, and neither will there emerge a global mega-state that repeats the features of nation-state hegemony on a larger scale. The most innovative aspect of Arrighi's analysis, in fact, is his proposal of an emerging "world-market society based on greater equality among the world's civilizations," which he articulates through a creative and attentive reading of Adam Smith. He views the ascent of China most significantly as one piece of the general rise of the subordinated nations as a whole with respect to the dominant, inaugurating a fundamentally new form of accumulation not based on the hegemony of a single nation-state. An important consequence of Arrighi's argument, then, is that the decline of U.S. hegemony marks the end of hegemony based on a single nation-state--in imperialist, unilateralist, and all other forms--over the global economic and political system. The global order that emerges now must take a fundamentally novel form."¶ The theorists and policymakers previously dedicated to U.S. hegemony who are intelligent enough to recognize this shift are now forced to find another paradigm of global order and confront the threat of global disorder. Their imaginations are so limited, though, that with the collapse of unilateralism to solve the problem of global order, they run quickly back to multilateralism, that is, an international order directed by a limited group of dominant nation states in collaboration. Henry Kissinger declares it openly: "the world resembles Europe of the seventeenth century; it needs to become Europe of the nineteenth century:' In seventeenth-century Europe, before the Thirty Years' War, the world was chaotic. Only the Peace of Westphalia, which brought the war to an end, created a European order, the organizing principle of which was religion and absolute sovereignty. There was thus no international order outside of the agreements among sovereign powers and no structure that exercised power outside of the nation-states. By the nineteenth century, the Westphalian political world had reached its perfection, in Kissinger's view. The only difference desirable today, he adds, would be the disappearance of religion in favor of ideology, and thus the renovation of the plural concert of sovereign states. Even Kissinger recognizes that the sixteenth-century European principle *cuius* re,~io, *eius religio,* which links political rule to religious authority, cannot today serve as the foundation of planetary order. He focuses not on any clash of civilizations but on the multilateral concert among nation-states. Francis Fukuvama, having renounced neoconservative, unilateralist dreams, echoes Kissinger in his call for a multilateral order based on the collaboration of strong states. Fukuyama and Kissinger both, however, imagine a multilateral arrangement of states that does not rely on international institutions for support." That is perhaps why Kissinger's imagination goes back to the nineteenth century to describe such an order.¶ The international system that could sustain a multilateral order has, in fact, completely fallen apart. All the international and supra-national institutions constructed after 1945 to support the postwar order are in crisis. With the creation of the United Nations, to take just one of those, it was thought that an "ought," a juridical *sollen,* could be constructed internationally and imposed by a concert of nation-states. Today, however, multilateralist moral obligation has lost its power. This is not to say that at the foundation of the United Nations the effort to constitutionalize fundamental aspects of the international order was in vain. Despite the injustices that it covered over and its frequent manipulation by the dominant powers, the United Nations did succeed at times in imposing a minimal standard of peace. Consider simply some of the many disasters that the juridical order of the United Nations dealt with during the cold war: in the two great crises of 1956, for instance, at Suez and in Hungary, the United Nations' realistic political orientation helped avoid much more destructive world explosions. The U.N. order was not a "Holy Alliance" or an imperial dictatorship but rather an international system of law, contradictory and always open to breakdowns but solid, in the end, and realistically active. Its beginnings are rooted not really in the nineteenth century but rather in the twentieth-century defeat of fascism, which unleashed so many democratic aspirations. But its conditions of effectiveness have been exhausted. The letter and the spirit of the United Nations Charter are now undone. In short, a multilateral order, a new Westphalia capable of orchestrating international agreement and collaboration, is impossible today in large part because the institutional order on which it would rest - from the United Nations to the Bretton Woods institutions - is no longer effective.¶ The failure of unilateralism, then, cannot lead to the resurgence of what seemed for a period its primary competitor: multilateralism. In effect the international system could not survive the United States' attempted coup d'etat. In defeat, Samson pulled his enemies down with him. But really the international institutions necessary to support a multilateral order were already tottering before unilateralism dealt the decisive blow. In any case, with unilateralism defeated, multilateralism and its international structures are not able to respond--on the military, economic, ideological, or legal terrain-to the contemporary challenges. In this context it is thus not even possible to heed Kissinger's call for a return to Westphalia.

### 1AC - Plan

#### The federal judiciary of the United States should impose a clean-hands doctrine on the indefinite detention authority of the executive of the United States.

#### A clean hands doctrine would constrain the executive. More importantly, however, is that the 1ac has shown why the US would never pursue such a doctrine; the thought experiment of the 1ac acknowledges this while endorsing the plan, which exposes the mythos of US exceptionalism

Williams ‘7

[Williams, Daniel R. “After the Gold Rush – Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment.” Penn State Law Review 112.2 (2007). ETB]

All this brings me to an irreverent proposal, articulated here, in sketchy form, more as a thought experiment than as an aspiration. What may be worth considering, should we care to take Zizek's question¶ seriously, is a clean-hands doctrine overlaying the process jurisprudence on display in Hamdi (and, with greater ardor, in Hamdan). The¶ Executive would have to show, under this doctrine, its entitlement to judicial deference-that is, its entitlement to have war as a constraint on civil liberties-through proof that its use of military force, including the detention and treatment of enemy combatants, complies with, at the very least, international treaties to which the United States is bound. An aggressive and expansive clean-hands doctrine would include less binding international norms as well (such as customary international law). Unclean hands would mean that existing legal frameworks protecting civil liberties (notably, for our purposes here, the paradigm regime of rights associated with our criminal process) would be a constraint on how the illegal war could be pursued. 01 7¶ So, the clean-hands doctrine would add a caveat to what Justice Breyer said in Hamdan. Recall that he concurred in the Court's decision to strike down the Bush Administration's military-commission regime for trying suspected Al Qaeda operatives. 0 8 He explained that the Hamdan holding fit within our tradition and institutions of democracy:¶ Where... no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine-through democratic means-how best to do so. The Constitution places its faith 1 9 in those democratic means. Our Court today simply does the same. 0¶ What are we to say if "that consultation" between the Executive and Congress amounts to a quest to embark on something illegal-a conspiracy, if you will? It may be too much to ask the judicial branch to put a stop to that quest, but this clean-hands proposal offers the view that the Supreme Court, as the last arbiter of judicial rights, ought not permit the bypassing of adjudicatory rights to facilitate the pursuit of that illegal quest. A full explication of this clean-hands doctrine is unnecessary for our purposes, because the thought experiment I invite is to articulate why our nation, for the foreseeable future, would never pursue a path to develop such a doctrine. I surmise that this thought experiment, if honestly pursued, would illuminate how deep our commitment is to a mythological and dangerous American exceptionalism.110

#### The unwillingness to be bound to legality makes academic debates over the outcome of the plan sterile and leaves ontological and epistemological foundations behind US exceptionalism unquestioned. The plan creates an effective legality that limits sovereign violence, which, combined with discursive problematization of US policy, is necessary to prevent extinction

Williams ‘7

[Williams, Daniel R. “After the Gold Rush – Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment.” Penn State Law Review 112.2 (2007). ETB]

I offer this clean-hands doctrine as a thought experiment rather than as a serious proposal because, I submit, the evidence regrettably demonstrates that we as a nation are unwilling to submit ourselves to a regime of legality when it comes to global affairs. If we were willing, it might be possible to answer the obvious objection to the clean-hands proposal-namely, that issues of foreign policy are for the Executive and are not properly juridical concerns-with the claim that our ominous¶ global crisis, and the menacing future it portends, demands an overhaul of our notion of what is properly a juridical concern. Scholars, lawyers and jurists may quarrel mightily over whether Guantanamo-style detention should be subject to judicial oversight, but the quarrel will always have a sterile quality if the notion of what is subject to judicial oversight is treated as a fixed given-sterile in the most practical sense that the judiciary is shut down from actually investigating what is going on out there in the world. Whether a practice falls within a particular category may be a worthy question to ask, but sometimes the practice itself forces upon us the more fundamental question of whether the categorizations themselves are valid. The practice of Guantanamo-style detention can never provoke a genuine questioning of our notion of what is properly a juridical concern so long as we as a nation remain unwilling to submit ourselves to a regime of legality in global affairs.¶ Students of history will see that our unwillingness to submit to international legality, that our understanding of sovereignty as indivisible¶ power, characterizes the days of Woodrow Wilson's futile efforts to win approval of his League of Nations proposal-a proposal very much in line with what Kant expressed in his well-known essay, Perpetual Peace.126 The U.S. Senate in Wilson's day could not abide the idea that international legality would abrogate Congress's constitutional power to declare war, for that would rupture the indivisibility of sovereignty (expressed in terms of legislative power). The right to use violence to achieve political ends is a sovereign right, the anti-League position insisted, and thus not to be rendered divisible through some globalized social contract that would tame the state of nature that characterizes the environment in which nations interact with each other. 127 The irony, of course, is that the United States Constitution is radical precisely in the way that it overcame the notion that a nation could only express its sovereignty through a state of indivisible powers, thus exemplifying a new understanding of sovereignty predicated on divided powers. The question for the Senate faced with Wilson's advocacy for the League of Nations, and the question that my clean-hands proposal raises now, is whether this new understanding of sovereignty can be globalized.¶ Aside from this theoretical question, there was also the concrete impediment that undercut Wilson's advocacy and that remains with us today: submitting to international legality, in a post-World War I world, entailed the virtually unthinkable thought of dismantling an empire-¶ building system that Europe still clung to and that the United States was rapidly acquiring a taste for; that dismantling was simply not something an Enlightenment culture, infected with the virus of racism and beholden¶ to the dark impulse to control and dominate, was willing to accept. 28¶ We as a nation have advanced very little, if at all, beyond this nationalist stance; it seems, judging from the 2002 National Security Strategy document, we have become more devoted to empire, and thus more nationalistic in our repudiation of the Wilsonian ideal of international legality. The clean-hands doctrine could never take hold in such a¶ society because it essentially takes the Wilsonian ideal a step further: not only would our nation's warmaking power be justiciable in some international tribunal, but our own judiciary would have the obligation to investigate the legality of it as well.¶ This judicial demand for clean hands, for American submission to and compliance with international norms-most especially, the renunciation of aggressive military actions-necessarily entails no longer treating as definitional the notion that the United States never acts aggressively, but only defensively. Treating that question as a problem of fact, rather than just a matter of definition, is a necessary first step toward seeing that clean hands warrants juridical (and thus, civic) attention. The upshot is that this proposal would help protect our core constitutional values against rapid erosion that will surely ensue in this era of permanent warfare. It also would enforce the idea that "one cannot achieve 'justice between nations' through moralization but only through juridification of international relations."'129 It would demonstrate our genuine commitment to the rule of law and would be one strong step in remedying a deep flaw in the United Nations, which is its dependence on countries like the United States that pursue their own national interests despite global ramifications that threaten human survival.¶ More broadly, the judiciary's deployment of a clean-hands doctrine would contribute to the vital need that the American public develops a global consciousness where legality, not naked military might, is the medium of international relations. It would promote "an emergent global public sphere that mobilizes the conscience and political participation of citizens all over the world, because 'violations of law in one place of the earth are felt in all.'" 30 Lest the warmaking proclivities of the Executive are put in check by some juridical imposition of a legality framework on United States actions in our new globalization reality, there is little reason to be optimistic that we will continue to have the blessings of living in a society governed by a regime of rights that we have heretofore largely taken for granted.¶ But that may well be the least of it. It is fashionable to say, as a justification for curtailing or even overriding the demands of liberty, that our Constitution is not a suicide pact. 13' It is the specter of weakening our "national security," and thus putting our nation in jeopardy, that prompts the call for sober realism against the idealistic quest to preserve civil liberties. But it may be that the converse is more apt. The rhetoric of "national security" to mask the pursuit of particular global designs and the abdication of foreign policy to the so-called "experts," as the source for Guantanamo, may be the true threat to civil liberties and legality itself. It may be a textual fact that the Constitution instructs the judiciary to defer such matters to the Executive and Legislative branches. But if¶ the quest for empire is what ultimately threatens this nation, then the siren call that "the Constitution is not a suicide pact" should be in the service of unshackling the judiciary from this catastrophic deference to¶ the Executive.¶ A clean-hands doctrine in the hands of a judiciary willing to promote serious dialogue and argument about globalization and America's quest for empire through military force may be an essential component to human survival. For, as Jonathan Schell summarizes the situation, a neo-imperialism leaves the entire planet in peril, not just the idea of Legality:¶ A policy of unchallengeable military domination over the earth, accompanied by a unilateral right to overthrow other governments by military force, is an imperial, an Augustan policy.... [I]f the wealthy and powerful use globalization to systematize and exacerbate exploitation of the poor and the powerless; if the poor and the powerless react with terrorism and other forms of violence; ... and if¶ the United States continues to pursue 32 an Augustan policy, then the¶ stage will be set for catastrophe.'¶ All the quibbling about Executive powers vis a vis the power of Congress reduces to just that-quibbling-when we confront this harsh reality. The reality is sufficiently dire-that is, the threat to the hoped-for juridification of global relations is sufficiently pressing, for a permanent state of global civil war is rapidly descending upon us-that those who argue that the Framers would never countenance a judiciary intruding into vital matters of war and peace should bear the burden of¶ proving that the Framers would not be sufficiently alarmed by our pax Americana and by the palpably degraded public sphere within American society to reconsider their conviction that the sovereignty-in-the-people¶ principle demands judicial deference to the political branches. The Framers could never have contemplated a global order such as the one we seem to be inhabiting, where this nation unabashedly is pursuing empire in a "globalization" world dominated by multinational corporations and met with resistance in many forms, with jihadist terrorism being the most visible, and, needless to say, the most odious.¶ So much ink is spilled (wasted?) over what the Framers have contemplated about who has the power to do what, when it comes to military pursuits-an inquiry that thrusts us into seventeenth and eighteenth-century political philosophy-but precious little over what those pursuits really are in the here-and-now, in this darkness of the twenty-first century, and whether our judicial institutions, through proceduralist analytical infighting, should be agnostic about the sacrificing of fundamental rights to engage in those pursuits. 133 Are we equipped as a democratic polis--do we have a vibrant enough democratic culture-to confront this harsh reality and get beyond empty slogans about "national security?" Hamdi as a narrative construct, a cultural document which serves as a microcosm of our cultural state of affairs, does not promise a rosy answer to that question.¶ powerful."'' 36 This project of de-familiarization will provoke questions, very provocative but necessary questions, about where we are heading in¶ this condition we are in as a nation-a condition I call, our "9/11 anxieties."¶ What drives this particular narrative forward is the belief that Hamdi does not just exist within, or even just contributes to shaping, a larger system of jurisprudential understanding of procedural due process. One aspect of the project here is to understand the discourse of rights as more than a process of legitimating sovereign power (which is the traditional conceptualization), but to apprehend how that discourse produces consciousness or reinforces an existing consciousness.137 In that vein, it would be unduly limiting to understand Hamdi-and to applaud it-as a case where legal rights enter into a juridical calculus that ultimately limits the prerogatives of sovereignty. The project here aims to open ourselves to the fact that Hamdi, as an exemplar in what we might call war-on-terror jurisprudence, facilitates and produces a consciousness and nomos that ought to be interrogated. And so the discussion that follows treats Hamdi as a justificatory document where law and narrative combine, as a text that is more than a piece of legal rhetoric, for it signals and helps to create "a world in which we live., 138¶ Perhaps it signals and mutely expresses how our 9/11 anxieties bespeak our uncertainty about the nomos we live in, the normative universe¶ within which our legal discourse operates and which that discourse helps shape.¶ Robert Cover says that "[t]o inhabit a nomos is to know how to live in it.' ' 139 If that is so, and I believe it to be so, then it must be true that the Hamdi opinion can be evaluated and interrogated according to a yardstick beyond the doctrinal, beyond the constitutional, that it can be regarded as speaking to something larger than the legal issue it purports to resolve. It may be, to continue on with Cover's insight, that lurking within the shadowy regions of Hamdi, we can sense that perhaps we do not yet know how to live in our nomos because, within our collective psyche, 9/11 destroyed the one we thought we knew and is thus now forcing us to forge a new one. Perhaps that is partly what we mean when we partake in the mantra that 9/11 changed everything. For many suffering people throughout the world, 9/11 provoked a welcome-to-theclub reaction-some sorrowful, some gleeful-and that new¶ Necessity is crucial to law. One might say that necessity has 1no4 4 law, but the better formulation is that "necessity creates its own law.¶ It is hard to find a better illustration of this adage than the very creation of the term enemy combatant and the ensuing jurisprudence of military commissions and enemy-combatant detentions. 145 International law does not recognize the term "enemy combatant," which is precisely why the Bush Administration created it. Necessity, Attorney General Alberto Gonzales advised the President, demands that we jettison the constraints of the Geneva Convention in "this new paradigm [of war]," which entails¶ jettisoning the international-law lexicon of lawful and unlawful combatants and creating the entirely new category of "enemy combatant" that is beyond the reach of international law. 146 So, this "difficult time,"¶ this necessity, creates a juridical vacuum which the sovereign seeks to fill by a new category in the law, that of enemy combatant. One available task for the Hamdi Court was to decide whether to resist the creation of this new ontology. And whether it would take on that ontological issue undoubtedly depended on what the Court meant when it said this Nation faces a "difficult time."' 147¶ What, precisely, is the "difficulty" or the true nature of the necessity that generates the legal controversy in Hamdi is unmentioned at this early point in the narrative. O'Connor simply declares that we are within a "difficult time"-not simply faced with, but within, meaning we may not avoid our reckoning with this "difficult time," but are obligated to confront it.148 Is the "difficulty" trying to preserve liberty against an overreaching Executive? Is it the brute reality that we must now worry about mass killing in the Homeland? Is it that we are on a mission to stamp out terrorists, a mission global in scope? Is the "difficulty" our need to redefine ourselves and our role in the world? Whatever it might mean, the reference to "difficult time," undefined and evocative, surely signals the pressure to situate this case outside the normal paradigm of legality, which in this case is the criminal adjudicatory process, the vitalizing institutional embodiment of our Enlightenment heritage.¶ And this pressure to situate this case outside the normal criminal adjudicatory process further signals that the Court will not impede the sovereign's power to create a new legal category, enemy combatant, and that it will not consider the deeper implication of that fact-namely, that the United States seeks to assert a form of sovereignty beyond the¶ juridical constraints of international law. We know the outcome to this narrative drama already: Guantanamo-as-detention-facility for "enemy combatants" will ultimately receive legal approval. But what we might note immediately is that Guantanamo-as-detention-facility is not beyond the law, or outside the law, or an exception to the law. For the effect of Hamdi is that the sovereign has succeeded in asserting itself-and that is the irreducible core of sovereignty, the assertion of power over individual subjects-and has thus remade itself, through the operation of American jurisprudence. In fact, before Hamdi, and certainly after, an entire legal regime has been constructed to infuse legality into the enterprise of detaining enemy combatants. All the talk of Guantanamo as a place of lawlessness is therefore incomplete-and hence,¶ misleading. It is a place bubbling with law-law produced by a¶ necessity captured in the phrase, difficult time. 149¶ Note that O'Connor does not assert outright, to infuse added weight to the phrase difficult time, that we are in a "war," though she will broach that subject later in the opinion with overt timidity. For now, there is no suggestion that the issues presented in this case revolve around that essential fact. Perhaps this is so because, on one level, "difficult time" cannot equate with "war." Not because war is so exceptional, so horrible and horrifying, that it transcends the restrained locution of "difficult time." Rather, the opposite is true: "difficult time" is far too somber, too grave, to merely refer to something as prosaic as "war." Professor John Yoo, an architect of and apologist for the Bush Administration's embrace of torture as a tool of warfare, argues that we ought to reorient our thinking about war and consider the benefits of going to war more often. 150 "It is no longer clear," he writes, "that the default state for American national security is peace.''15 As chilling as this argument is, it traffics in the myth that military violence, war, is aberrational. Our "default state" is not peace. We are actually a militarized society, a nation "founded on military conflict" and willing to "resort[] frequently... to military force," a nation "at war or engaged in significant military action for most of its corporate life."152 We are, then, not unlike other empires, in which expansion and control-in particular, control that permits access to certain natural and other economic resources-is the dominant feature of our behavior as a nation, 153 a nation which "can no longer insulate itself from the planet" and thus "must, in effect, rule the planet," 154 and in that quest uses violence to stamp out whatever impedes those global designs. 155¶ This means, at the very least, that O'Connor's reference to this "difficult time in our Nation's history" cannot mean, at its core, that we are engaged in a military conflict, for warring is a usual condition for us. More than that, war does not, of itself, produce an exceptional state of affairs; on the contrary, empires use war to produce stability in a global order, which thus makes war a state of normality. 56 "War, in a word, is modernity incarnate."' 157 So, "difficult time" cannot mean that we are confronting a supreme emergency "where we exit the moral realm and enter the harsh Hobbesian realm of pure survival"' 58-though the Bush Administration rhetoric purportedly justifying torture and other extreme measures often gives that impression.¶ The "difficulty" is something else, perhaps something deeper.

#### The merits of Guantanamo-style indefinite detention are irrelevant- its true function as a manufactured ontology of happy, liberal, American consumers against violent freedom-hating terrorists is the apotheosis of American exceptionalism and transcends its value as a policy instrument.

#### Theory and practice are inseparable- the praxis of the 1ac affirms the legal process, because of its inherent life-affirming qualities and respect for human dignity, as an end in itself, rather than a means. Just it is impossible to bracket Hamdi from the means-ends rationality that spawned it, it is impossible to isolate the plan from its justifications. Evaluate all neg offensive links through the text of the 1ac it purports to refute.

Williams ‘8

[Daniel R. Williams, Associate Professor of Law, Northeastern University School of Law. “After the Gold Rush - Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere.” 113 Penn St. L. Rev. 55 ETB]

What if we looked upon a legal process, such as the criminal-justice process, as an end in itself rather than as simply a means to adjudicate? What if a legal process elicits our allegiance because it expresses a particular form of human solidarity and community engagement? What if a legal process pursues a justification that warrants the assent of the losing party simply because that assent-ability is a good in itself? What if a legal process is a commitment, not a tactic or instrumental feature of governmentality or epistemic method? What if a legal process were a "fact" in our regime of legality - meaning, it exists in a way that justifies [\*111] itself rather than as an instrument for some other goal - and thereby becomes a source of value within our culture?¶ Habermas's reconstruction of "communicative competence" - his ideal-speech theory - helps illuminate the stakes in our war-on-terror jurisprudence. n230 The point of Habermas's reconstruction is not so much to point the way to establishing a discursive utopia, but rather, to show that internal to the structure of speech is a telos, a direction for humanity to achieve truth, freedom, and justice. Ethics can be rationally grounded; facts and values, and theory and practice, can be made inseparable. Habermas's reconstruction provides a way to understand the jury trial, and the whole criminal adjudicatory process, as an idealized expression of a way of life, an anticipation of a way of life where truth, freedom and justice are possible. Internal to the criminal adjudicatory process is the answerability thesis, and internal to the answerability thesis is a set of values that we have come to regard as constitutive of who we are as human beings worthy of respect and dignity. The practice of adjudicating conflict through a jury trial - a practice that partakes in the construction of an ideal-speech situation - contains within it a telos for humanity, a telos that correlates with that contained in Habermas's ideal speech situation wherein "the truth of statements is linked in the last analysis to the intention of the good and true life." n231 Hamdi, then, does not just bypass a fact-finding process, it denigrates the vitalizing aspect of the jury trial through a form of reasoning that is suffocating humanity and putting it on an irreversible path towards a brave new world. It does so through a framework of necessity that is linked to geo-political activity that must be understood without the distorting effects of an American exceptionalism that regards "America" as a normative concept.¶ \*\*\* What says it all is this 2004 testimony before the House Armed Services Committee. General James Hill, responsible for military readiness in Latin America, essentially complained of being ignored in this age of 9/11 anxieties. His sphere of command ought to get more war-on-terror money, he argued, because Latin America is filled with "radical populists," by which he meant, "you know, emerging terrorists." n232 In the pursuit of empire, we are forever threatened by [\*112] "emerging terrorists"; forever and everywhere threatened by the plague, all the better to pursue the political dream of the plague.¶ The merits or demerits of Guantanamo Bay as a detention site is beside the point, an incidental issue in the larger struggle over the future of globalization and America's vision of its place within that future. Guantanamo-style detention signifies, despite how it may betray our values, our need for military hegemony, a military hegemony that could hardly be justified where the only threat to American hegemony in a globalized marketplace is the surging economic strength of China or a unified Europe. It is in that sense that the war on terror serves Guantanamo, rather than the other way around. What Guantanamo-style detention ratifies - and thus the key to its true function, which transcends its merits or demerits as an instrument of policy in our so-called war on terror - is an ontology manufactured through a resurgent sovereignty, one marked by a dividing line between compliant laborers and consumers on the one hand, and on the other, violent terrorists who are said to hate our liberty-loving way of life. Guantanamo-style detention may betray our values, but it inscribes in our pax Americana consciousness the existence of an evil, a plague, that must be vanquished. n233 It may betray our professed self-identity, but it inscribes the major duality of our time, the happy consumer in a globalized wonderland and the religiously fanatical terrorist bent on sabotaging the entire edifice. Hamdi's veil of administrative decency, then, can mute the betrayal, alleviate a bit the sting of it, all the while silently deepening that inscription, through its Weberian rationality, through its means-ends rationality that characterizes a system-sphere logic that Habermas warns us against.¶ It is upon this platform of critique that one can understand Hamdi to be, not a bracketed scenario, a case arising from a state of exception, but rather an ominous cultural document of our post-9/11 anxieties, an expression and reinforcement of the Western quest for control and domination, born of the Enlightenment, that has, centuries later, generated this "difficult time in our Nation's history."

# 2AC

### A2- Circumvention

Pres and all executive lawyers are trained to follow Court decisions—ensures compliance

Green ’11(Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School) Craig 105 Nw. U.L. Rev. 983)

Jackson's hard-nosed analysis may seem intellectually bracing, but it understates the real-world power of judicial precedent to shape what is politically possible. n306 Although presidential speeches occasionally declare a willingness to disobey Supreme Court rulings, actual disobedience of this sort is rare and would carry grave political consequences. n307 Even President [\*1037] Bush's losses in the GWOT cases did not spur serious consideration of noncompliance de-spite broad support from a Republican Congress. n308 Likewise, from the perspective of strengthening presidential pow-er, Korematsu-era decisions emboldened President Bush in his twenty-first-century choices about Guantanamo and military commissions. n309 Thus, the modern historical record shows that judicial precedent can both expand and restrict the political sphere of presidential action.¶ The operative influence of judicial precedent is even stronger than a court-focused record might suggest, as the past sixty years have witnessed a massive bureaucratization and legalization of all levels of executive government. n310 From the White House Counsel, to the Pentagon, to other entities addressing intelligence and national security issues, lawyers now occupy such high-level governmental posts that almost no significant policy is determined without multi-ple layers of legal review. n311 And these executive lawyers are predominantly trained to think - whatever else they may believe - that Supreme Court precedent is authoritative and binding. n312

### T

### 2ac- K of ID as Lacking Law

**Hamdi instantiated a new state of exception under the aumf. The plan, by voiding the decision in Hamdi, exposes the ontological bareness of our legal system and thus undermines the entire regime of American legal exceptionalism- and the alternative of judicial passivity is uniquely worse**

**Williams ‘8**

[Daniel R. Williams, Associate Professor of Law, Northeastern University School of Law. “After the Gold Rush - Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere.” 113 Penn St. L. Rev. 55 ETB]

Here is the stripped-down institutional justification for detaining ¶ enemy combatants. **Congress passed a bill, entitled the Authorization for** ¶ **Use of Military Force** (**AUMF**),¶ 31¶ **which** in many ways **is the** ¶ **contemporary version of the Roman senatus consultum ultimatum, the** ¶ **Roman senate decree authorizing Roman consuls to “take whatever** ¶ **measures they considered necessary for the salvation of the state.**”¶ 32¶ **In granting through the AUMF similar authority to the Executive, Congress instantiates a state of exception, the bracketing of existing legal norms** and injunctions, **which is not** at all **unusual when a nation that** ¶ **considers itself peaceful** (and what nation has ever thought otherwise ¶ about itself?) **pursues military conquest. Rooting a state of exception in** ¶ something like **the AUMF**—that is, **linking the bracketing of** existing ¶ **legal norms** and injunctions **to legality itself**—**is a critical justificatory** ¶ **maneuver**, as Walter Benjamin observed long ago:¶ **What the law can never tolerate**—what it feels as a threat with which ¶ it is impossible to come to terms—**is the existence of a violence** ¶ **outside the law**; and **this is not because the ends of such a violence** ¶ **are incompatible with law, but because of “its mere existence outside** ¶ **the law**.”¶ **With any inkling of violence** existing **outside the law there must** ¶ **immediately follow a thoroughgoing search for a regime of legality to** ¶ **either sanction or condemn it. The violence of Guantanamo brings** with ¶ it **precisely this search, and in Hamdi v. Rumsfeld the search yielded the** ¶ **AUMF**.¶ 35¶ Finding some legislative enactment (a “law”) to encompass ¶ the violence of enemy-combatant detention at Guantanamo Bay was ¶ urgent for less-than-obvious reasons. **The** obvious **need for the search is the imperative to sanction the practice itself in order to preserve our claim of being a society governed by law**. But there is more to it. **To not** ¶ **find a source of legal authority would be to risk witnessing the infliction** ¶ **of state violence outside the law, with the legitimation of that violence** ¶ **resting solely on the political assertion of necessity. But necessity alone** ¶ **cannot ground violence**, though it might (and does) ground a regime of ¶ legality that legitimates violence; if it were otherwise, **if necessity were** ¶ **not absorbed into law, then necessity will vanquish law itself. State** ¶ **violence outside the law betrays a fidelity to the rule of law**; when ¶ accepted within a society, it establishes a juridical ontology that is itself ¶ troubling. **State violence outside the law establishes the existence of** ¶ **extra-legal violence which**, in the end, **fatally undercuts the foundation of** ¶ **legal violence**. “The proper characteristic of **[extra-legal] violence**,” ¶ Giorgio Agamben writes in his summary of Walter Benjamin’s view of ¶ violence outside the law, “is that it **neither makes nor preserves law, but** ¶ **deposes it**.”¶ 36¶ And so, **Guantanamo violence, without the AUMF, would** ¶ **not merely be lawless; it would expose, in its pretense of legitimacy rooted in bare necessity, the ontological barrenness of the criminal justice system itself, the quintessence of legal violence in society**. In that ¶ sense, **Hamdi’s invocation of the AUMF not only legitimates particular** ¶ **Executive activity, it more importantly preserves the criminal justice** ¶ **system itself, and all legality, from the vanquishing power of extra-legal violence. The AUMF brackets the criminal justice system in order to save it.** ¶That might seem an odd conclusion. After all, according to a ¶ majority of the Justices in Hamdi, the AUMF includes the authorization ¶ to suspend the most vitalizing institutional embodiment of our ¶ Enlightenment heritage, the criminal justice process, with its crown ¶ jewel, the criminal trial.¶ 37¶ But that suspension is mitigated by the ¶ suggestion that this detention practice is extraordinary, exceptional, a ¶ consequence of what we might term a “state of exception” in which we ¶ find ourselves. **The state of exception instantiated by the AUMF has** ¶ **come to be called the “war on terror.” Detaining enemy combatants** ¶ **through the suspension of the criminal justice process is an aspect of that** ¶ **“war.”** It is important to grasp, at this point, that “war” is not a state of¶ affairs or an observable circumstance, but more in the nature of an ¶ expression by government actors bearing the weight of sovereignty that a ¶ certain sovereign power must be exerted for the sake of the health and ¶ safety of the population: **a form of biopower**. Hence, one hears of “war” ¶ on poverty, or on drugs; we might recall President Franklin D. ¶ Roosevelt’s “war” against the scourge of the Great Depression—these ¶ are significations of the exertion of sovereign power, a surge in ¶ biopolitical sovereignty. Here, the “war on terror,” among other things, ¶ expresses through the Hamdi opinion itself an ambivalence over, even ¶ outright aversion to, the prospect of allowing trial by jury of persons ¶ whom we label terrorist, and thereby signals a specific surge of ¶ sovereignty—or, as one theorist puts it, a “resurgence” of sovereignty.¶ So, **the state of exception**, as it might be understood **in** the context ¶ of **Hamdi, consists of the Sovereign’s prerogative, through** the passage of ¶ **the AUMF, to withhold from a U.S. citizen the legal status of criminal defendant, without disrupting** or calling into question **the legal category of “criminal defendant.” Being indicted** is not good news for the ¶ indicted individual, but it **does confer** upon him a certain **legal status** ¶ within a regime of law **built upon the Fourth, Fifth, Sixth, and Eighth** ¶ **Amendments** to the Constitution. **The conferral of a legal status is a** ¶ **highly significant fact**, not only for the indicted defendant, but for us, we ¶ the people, who absorb and propagate our identity as a nation. Yaser ¶ **Hamdi wanted that legal status conferred upon him**, wanted we the ¶ people to grant it to him, but the Sovereign refused—lawfully, the ¶ Supreme Court held, notwithstanding our nation’s presumed ¶ commitment to limited government under law.¶ 39 ¶ The Sovereign’s power ¶ to instantiate a state of exception, then, is a power of refusal, a refusal to ¶ maintain a citizen’s integration within the existing political apparatus of ¶ the state, of which the criminal-justice system is a vitalizing part, and a ¶ refusal to maintain a citizen’s integration within a community whereby ¶ that citizen’s detention must be authorized by representatives of that ¶ community (i.e., a jury), unless that citizen lawfully consents to the ¶ detention (i.e., pleads guilty).¶ **Because forcible detention must occur within some regime of law—**¶ **because all violence must be subsumed within legality**—Yaser **Hamdi** ¶ **must be given some other legal status. No person can exist as bare life in** ¶ **the realm of political spectacle. Bare life must be clothed in some** ¶ **juridical garb. What garb does the Sovereign say** Yaser **Hamdi must** ¶ **drape over his bare life**? ¶ [\*66] **The Sovereign has the power to do that, to drape some juridical garb over bare life, by saying what legal status shall be conferred upon the likes of Yaser Hamdi. The state of exception**, as I use the term in this article, **marks the conditions in which the Sovereign invokes its ability to withhold from a detainee the status of criminal defendant and to drape bare life with a new garb, a new legal status and category - that of enemy combatant**. n40 **The Sovereign can instantiate this state of exception, framed as a war on terror, with the associated authority to accomplish indefinite detention by withholding one legal status (criminal defendant) and replacing it with another (enemy combatant),** **because we the people consent to it, demand it even, as part of our expectation that the Sovereign, through the machinery of government, keep us safe.**¶The suspension of the criminal-justice process, and the expansion of sovereign power through the state of exception, is a price we are called upon to pay in the prosecution of this war. Actually, if we take democracy seriously, the tenor of my use of the term, Sovereign, as if the Sovereign were some actor in the world separate and apart from the subjects who are beholden to it, should seem jarring. The People as sovereign entity, rule-giver, and possessor of biopower, acts to protect the security of the people (the population itself, the actual living individuals who hear politicians speak sanctimoniously of "the People") by segmenting a certain slice of the people (designated as "enemy combatants" or "terrorists," or "sexual predator," or whatever category of dangerousness inaugurated by the People) and decreeing them ineligible for certain rights that are regarded as crucial ingredients in the identity of the People. If we take democracy seriously, it would then be more appropriate to say, without at all blushing, that **this state of exception is a price we have willed upon ourselves, a price worked out b**y, so we tell ourselves, **a re-calibration of the security-liberty balance**. This re-calibration is carried out for the benefit of the people within the branches of our government that are, so we tell ourselves, an organ of the People, in theory meaning, responsive to the will of the people. Congress and the Executive struggle over that re-calibration, and though it may not be elegant governmental activity, it is what our constitutional founders have bequeathed us.¶ **The judiciary has a role**, too, **in this** story of democracy in action. It engages in a different sort of calibration. **It eschews this overt balancing of security and liberty**, being too skittish to second-guess the People's decision to will upon itself a state of exception emanating from a [\*67] commitment to prosecute a war - even if it is a war unlike the wars we heretofore have fought or have read about in history books. **The judiciary's calibration hones in on the mechanics of governance, the hard-wiring of governmentality that we have inherited** from 1789. n41 The judiciary calibrates the allocation of power between the democratic branches of the American state so that those branches may, consistent with the rule of law, which could just as well be restated as consistent with our Enlightenment heritage, n42 re-calibrate the security-liberty balance. The touchstone of the judiciary's calibration of this allocation of power is some appropriate vision of limited government under law. n43 The idea of limited government under law, which is the core feature of our constitutional republic, owes its meaning, its force, and its very existence to Enlightenment political philosophy. n44 So, **when the Court in Hamdi struggles over this particular calibration** - and the Court splintered over it n45 - **the Court is expressing** our Enlightenment heritage and **its underlying vision of law as the manifestation of power**. Let us leave aside the irony that this expression of our Enlightenment heritage leads to the suspension of the most vitalizing institutional embodiment of that heritage - the criminal process rooted in trial by jury n46 - because the more important focus for now should be on the myopic nature of the Court's vision of limited government.¶ Hamdi reminds us that the constraints imposed on sovereign activity by our fidelity to the idea of limited government concern the mechanics of governmentality. n47 What we pursue as a nation, rather than simply [\*68] what our government may pursue in its day-to-day operations to keep the bureaucracy functioning, is beyond the constraining idea of limited government, and thus beyond judicial purview. n48 The idea of limited government, and thus the judiciary's own power, doesn't extend to the Sovereign's instantiation of the state of exception. But the juridical mechanics of how the state machinery is used to detain individuals as enemy combatants, as a defining feature of this state of exception, may be, to some as yet unclear degree, within the limited-government constraint and thus within the reviewing power of the courts.¶ What is troublesome with this picture - and what will herein be a continuation of a theme introduced in After the Gold Rush, Part I - is that the **instantiation of the state of exception has become a technique of governance deployed in a globalization environment embroiled in a war** of sorts that is **unlike other "hot" wars we have experienced.** It used to be that a "hot" war called upon the total mobilization of a populace, but no more, for this "war" depends on the acquiescence, or the passivity, of we the people. n49 So, **when the judiciary** begs off the task of imposing the constitutional vision of limited government upon this particular technique of governance, when it too **becomes part of the** **passivity** that surrounds war-on-terror governmentality, **it permits by omission what we are witnessing as the bloating of sovereign power** - indeed, **the eruption of a new kind of sovereignty**. n50 One might say, then, that because [\*69] "sovereignty emerges within the field of governmentality," n51 Hamdi mocks the very idea of our commitment to limited government under law, which is the very foundation of our nation, and thus by extension disavows a crucial feature of our Enlightenment heritage. This disavowal is done in the name of preserving that heritage, or so we tell ourselves.

**2AC Court Capital DA**

**Schuette decision coming now – saps capital**

**Feder 9/2**

[Jody, Legislative Attorney, Banning the Use of Racial Preferences in Higher Education: A Legal Analysis of Schuette v. Coalition to Defend Affirmative Action, 9/2/13, <http://www.fas.org/sgp/crs/misc/R43205.pdf>]

In the more than three decades since the Supreme Court’s ruling in Regents of the University of California v. Bakke affirmed the constitutionality of affirmative action in public colleges and universities, many institutions of higher education have implemented race-conscious admissions programs in order to achieve a racially and ethnically diverse student body or faculty. Nevertheless, **the pursuit of diversity in higher education remains controversial**, **and** **legal challenges** **to** such **admissions programs routinely continue to occur.** Currently, **the Court is poised to consider a novel question** **involving affirmative action** in higher education **during its upcoming 2013-2014 term**. **Unlike earlier rulings**, in which the Court considered whether it is constitutional for a state to use racial preferences in higher education, the new case, **Schuette** v. Coalition to Defend Affirmative Action, **raises the question of whether it** **is constitutional** for a state **to ban** such **preferences in higher education**. Schuette arose in the wake of a pair of cases involving admissions to the University of Michigan’s law school and undergraduate programs. Although the Court struck down the undergraduate admissions program, it upheld the law school’s program in a decision that affirmed the constitutionality of the limited use of race-conscious admissions programs in public higher education. In the wake of the University of Michigan cases, opponents of affirmative action in Michigan successfully lobbied for the passage of Proposal 2, which amended the Michigan state constitution to prohibit preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting. Opponents of Proposal 2 sued, and a federal appeals court ruled that Proposal 2’s ban on racial preferences in public education violates the equal protection clause of the United States Constitution. This decision was subsequently upheld in a divided ruling by the full court of appeals, sitting en banc, and **the Supreme Court will review the case during the upcoming term.**

**Interbranch conflicts don’t spill over—individual court cases are decided on specific issues**

**Redish and Drizen 87**, Professor of Law and Law Clerk

[April, 1987, Martin H. Redish (Professor of Law, Northwestern University) and Karen L. Drizin (Law Clerk to the Honorable Seymour Simon, Illinois Supreme Court) “CONSTITUTIONAL FEDERALISM AND JUDICIAL REVIEW: THE ROLE OF TEXTUAL ANALYSIS”. NEW YORK UNIVERSITY LAW REVIEW V. 62]

Dean **Choper's fundamental assumption**, then, **is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or** at least **curtail loss of, limited capital for the more vital area of individual liberty.** However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessarily follow. **The problem is that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another.** As one of the current authors has previously argued: **It is difficult to imagine . . . that the widespread negative public reactions to Miranda v. Arizona, Engle v. Vitale, or Roe v. Wade would**  [\*37] **have been affected at all by the Court's practices on issues of separation of powers and federalism.** Rather, **public reaction in each seems to have focused on the specific, highly charged issues of rights for criminals, prayer in public schools, and abortions**. **It is doubtful that the Court would have had an easier time if it had chosen to stay out of interbranch and intersystemic conflicts**. 146

**Curtailing executive authority causes greater Judicial activism—war powers specific**

**Paulsen 02**, Professor of Law

[Michael, Prof of Law @ Minnesota, Spring, 19 Const. Commentary 215]

**Judicial triumphs** tend to **beget more judicial triumphs** - and sometimes judicial triumphalism and hubris. It is probably only a slight exaggeration to say that **if there had been no Youngstown there would have been no Brown v. Board of Education**, 10 no **Cooper v. Aaron**, 11 **no Warren Court criminal procedure and civil rights revolution, no United States v. Nixon**, 12 **no Roe v. Wade** 13 **and Planned Parenthood v. Casey.** 14 Still more, had Youngstown played out differently in the end - had Truman resisted or evaded the Court's judgment against his seizure of the steel industry - the aftermath of the Nixon Tapes case might have played out differently, too. Had Truman successfully held on to the steel mills in the face of an adverse decision, Nixon probably would have held on to the tapes, too, no matter what the Court said. And perhaps the Court would not even have tried to order Nixon to produce the tapes in the first place. Finally, **if Youngstown had been decided the other way, The Pentagon Papers Case** 15 probably **would have played out differently**, too. **The federal government probably would have won in court the power to enjoin a newspaper's publication of materials the government deems detrimental to national security** (or affirmance of an executive order banning such publication). 16 Or, had Youngstown been decided as it was but Truman successfully defied the judgment, Nixon might have seized the printing [\*220] presses of The New York Times and The Washington Post and ignored any judicial decrees to the contrary. 17

### Cp 1

**The court will narrow the amendment**

**Segal & Spaeth 02** - Professor of Political Science at SUNY & Professor of Political Science at Michigan State University (Jeffrey Allan & Harold J., 2002, The Supreme Court and the Attitudinal Model Revisited, Cambridge University Press, p. 5

If action by Congress to undo the Court’s interpretation of one of its laws does not subvert judicial authority, a fortiori neither does the passage of a constitutional amendment, for example, the Twenty-Sixth Amendment reducing the voting age to eighteen and thereby undoing the decision in Oregon v. Mitchell,18 which held that Congress could not constitutionally lower the voting age in state elections. **Furthermore, not only does a constitutional amendment not subvert judicial authority, courts themselves** - ultimately, **the Supreme Court - have the law word when determining the sanctioning amendment’s meaning**. Thus, the Court is free to construe any amendment **- whether or not it overturns one of its decisions -** as it sees fits, even though its construction deviates appreciably from the language or purpose of the amendment.

**Even they fiat immediacy, it takes years to have a meaningful effect**

**Joyce**, Prof of Public Administration at George Washington, **98**

“The Rescissions Process After the Line Item Veto: Tools for Controlling Spending”

<http://www.rules.house.gov/archives/rules_joyc07.htm>

In the final analysis, there is no clear fallback position for supporters of the Line Item Veto Act. The Supreme Court, in its majority opinion, stated flatly that a different role for the President in **the lawmaking process could only "come through the Article V amendment procedures". Deciding the issue through amending the Constitution,** however, **has two substantial drawbacks. The first is that Constitutional amendments are notoriously difficult to adopt**. **Even if a Constitutional amendment were adopted, it would likely not take effect for a number of years.** The second is more substantive. A constitutionally provided line item veto would only allow the President to veto items that were specifically provided for in appropriation bills. Most federal "line items", however, are found not in statute, but in report language accompanying statutes.

### CP 2

**Resolved means by vote**

**Webster’s 1998**

Webster’s Revised Unabridged Dictionary, 1998 (dictionary.com)

Resolved: 5**. To express, as an opinion or determination, by resolution and vote; to declare or decide by a formal vote; -- followed by a clause**; as, the house resolved (or, it was resolved by the house) that no money should be apropriated (or, to appropriate no money).

**Colon doesn’t matter – means resolved is irrelevant**

**Should means ought**

**Howard 5**

Taylor and Howard, 05 - Resources for the Future, Partnership to Cut Hunger and Poverty in Africa (Michael and Julie, “Investing in Africa's future: U.S. Agricultural development assistance for Sub-Saharan Africa”, 9/12, http://www.sarpn.org.za/documents/d0001784/5-US-agric\_Sept2005\_Chap2.pdf)  
Other legislated DA earmarks in the FY2005 appropriations bill are smaller and more targeted: plant biotechnology research and development ($25 million), the American Schools and Hospitals Abroad program ($20 million), women’s leadership capacity ($15 million), the International Fertilizer Development Center ($2.3 million), and clean water treatment ($2 million). Interestingly, in the wording of the bill, Congress uses the term shall in connection with only two of these eight earmarks; the others say that USAID should make the prescribed amount available. **The difference between shall and should may have legal significance—one is clearly mandatory while the other is a strong admonition**—but it makes little practical difference in USAID’s need to comply with the congressional directive to the best of its ability.

#### “Should” doesn’t require certainty

**Black’s Law 79** (Black’s Law Dictionary – Fifth Edition, p. 1237)

Should. The past tense of shall; ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from “ought.” It is not normally synonymous with “may,” and although often interchangeable with the word “would,” it does not ordinarily express certainty as “will” sometimes does.

#### No widespread prolif

Hymans 12

Jacques E. C. Hymans is Associate Professor of IR at USC [April 16, 2012, “North Korea's Lessons for (Not) Building an Atomic Bomb,” *Foreign Affairs*, http://www.foreignaffairs.com/articles/137408/jacques-e-c-hymans/north-koreas-lessons-for-not-building-an-atomic-bomb?page=show]

Washington's miscalculation is not just a product of the difficulties of seeing inside the Hermit Kingdom. It is also a result of the broader tendency to overestimate the pace of global proliferation. For decades, Very Serious People have predicted that strategic weapons are about to spread to every corner of the earth. Such warnings have routinely proved wrong -- for instance, the intelligence assessments that led to the 2003 invasion of Iraq -- but they continue to be issued. In reality, despite the diffusion of the relevant technology and the knowledge for building nuclear weapons, the world has been experiencing a great proliferation slowdown. Nuclear weapons programs around the world are taking much longer to get off the ground -- and their failure rate is much higher -- than they did during the first 25 years of the nuclear age. As I explain in my article "Botching the Bomb" in the upcoming issue of Foreign Affairs, the key reason for the great proliferation slowdown is the absence of strong cultures of scientific professionalism in most of the recent crop of would-be nuclear states, which in turn is a consequence of their poorly built political institutions. In such dysfunctional states, the quality of technical workmanship is low, there is little coordination across different technical teams, and technical mistakes lead not to productive learning but instead to finger-pointing and recrimination. These problems are debilitating, and they cannot be fixed simply by bringing in more imported parts through illicit supply networks. In short, as a struggling proliferator, North Korea has a lot of company.

#### No nuclear terror- lack of resources, expertise, facilities, and certainty

Stalcup ‘12

[Travis C. Stalcup is a George and Barbara Bush Fellow at the George H.W. Bush School of Government and Public Service at Texas A&M University. <http://journal.georgetown.edu/2012/09/11/a-better-plan-for-port-security-by-travis-stalcup/> ETB]

However, the most competent and well-financed terrorists groups would face difficulty in mustering the resources, expertise and facilities to enrich nuclear material in meaningful quantities. Randomized spot checks would create doubt that an attack using shipping containers would succeed. Even if a terrorist group were to obtain nuclear material or a weapon, it is unlikely that it would expend the vast resources required to deliver it on such an uncertain operation. The uncertainty created by spot checks in addition to the enormous technical and financial obstacles a terrorist group faces would serve to deter.

# 1AR

**“Should” doesn’t require certainty**

**Black’s Law 79** (Black’s Law Dictionary – Fifth Edition, p. 1237)

Should. The past tense of shall; ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from “ought.” It is not normally synonymous with “may,” and although often interchangeable with the word “would,” it does not ordinarily express certainty as “will” sometimes does.

**Critical intellectualism key to solve extinction – Voting aff to problematize the justifications of US policy outweighs hypothetical plan consequences**

**Jones 99** (Richard, IR, Aberystwyth, “6. Emancipation: Reconceptualizing Practice,” Security, Strategy and Critical Theory, http://www.ciaonet.org/book/wynjones/wynjones06.html)

**The central political task of** the **intellectuals is to** aid in the **construct**ionof **a counterhegemony and** thus **undermine** the **prevailing** patterns of **discourse** and interaction **that make up the** currently dominant **hegemony. This** task **is accomplished through educational activity**, because, as Gramsci argues, “every relationship of ‘hegemony’ is necessarily a pedagogic relationship” (Gramsci 1971: 350). Discussing the relationship of the “philosophy of praxis” to political practice, Gramsci claims: It [the **theory**] does not tend to leave the “simple” in their primitive philosophy of common sense, but rather to lead them to a higher conception of life. If it **affirms the need for contact between intellectuals and “simple”** it is not in order to restrict scientific activity and preserve unity at the low level of the masses, but precisely **in order to construct an intellectual–**moral **bloc which can make politically possible the intellectual progress of the mass** and not only of small intellectual groups. (Gramsci 1971: 332–333) According to Gramsci, this attempt to construct an alternative “intellectual–moral bloc” should take place under the auspices of the Communist Party—a body he described as the “modern prince.” Just as Niccolò Machiavelli hoped to see a prince unite Italy, rid the country of foreign barbarians, and create a virtù–ous state, Gramsci believed that the modern prince could lead the working class on its journey toward its revolutionary destiny of an emancipated society (Gramsci 1971: 125–205). Gramsci’s relative optimism about the possibility of progressive theorists playing a constructive role in emancipatory political practice was predicated on his belief in the existence of a universal class (a class whose emancipation would inevitably presage the emancipation of humanity itself) with revolutionary potential. It was a gradual loss of faith in this axiom that led Horkheimer and Adorno to their extremely pessimistic prognosis about the possibilities of progressive social change. But does a loss of faith in the revolutionary vocation of the proletariat necessarily lead to the kind of quietism ultimately embraced by the first generation of the Frankfurt School? The conflict that erupted in the 1960s between them and their more radical students suggests not. Indeed, contemporary critical theorists claim that the deprivileging of the role of the proletariat in the struggle for emancipation is actually a positive move. Class remains a very important axis of domination in society, but it is not the only such axis (Fraser 1995). Nor is it valid to reduce all other forms of domination—for example, in the case of gender—to class relations, as orthodox Marxists tend to do. To recognize these points is not only a first step toward the development of an analysis of forms of exploitation and exclusion within society that is more attuned to social reality; it is also a realization that there are other forms of emancipatory politics than those associated with class conflict. 1 This in turn suggests new possibilities and problems for emancipatory theory. Furthermore, the abandonment of faith in revolutionary parties is also a positive development. The history of the European left during the twentieth century provides myriad examples of the ways in which the fetishization of party organizations has led to bureaucratic immobility and the confusion of means with ends (see, for example, Salvadori 1990). The failure of the Bolshevik experiment illustrates how disciplined, vanguard parties are an ideal vehicle for totalitarian domination (Serge 1984). Faith in the “infallible party” has obviously been the source of strength and comfort to many in this period and, as the experience of the southern Wales coalfield demonstrates, has inspired brave and progressive behavior (see, for example, the account of support for the Spanish Republic in Francis 1984). But such parties have so often been the enemies of emancipation that they should be treated with the utmost caution. Parties are necessary, but their fetishization is potentially disastrous. **History furnishes examples of progressive developments that have been** positively **influenced by** organic **intellectuals operating outside the** bounds of a particular **party structure** (G. Williams 1984). Some of these developments have occurred in the particularly intractable realm of security. These examples may be considered as “resources of hope” for critical security studies (R. Williams 1989). They illustrate that **ideas are important** or, more correctly, that **change is the product of the dialectical interaction of ideas and material reality**. One clear security–related example of the role of critical thinking and critical thinkers in aiding and abetting progressive social change is the experience of **the peace movement of the 1980s**. At that time the ideas of dissident **defense intellectuals** (the “alternative defense” school) **encouraged** and drew strength from **peace activism**. Together **they had an effect** **not only on short–term policy but on the dominant discourses of** strategy and **security, a far more important result in the long run.** **The synergy between** critical security **intellectuals and** critical **social movements** and the potential influence of both working in tandem **can be witnessed** particularly clearly **in the fate of common security**. As Thomas Risse–Kappen points out, the term “common security” originated in the contribution of peace researchers to the German security debate of the 1970s (Risse–Kappen 1994: 186ff.); it was subsequently popularized by the Palme Commission report (Independent Commission on Disarmament and Security Issues 1982). **Initially,** mainstream **defense intellectuals dismissed the concept as** hopelessly **idealistic**; it certainly had no place in their allegedly hardheaded and realist view of the world. **However, notions of common security were taken up by** a number of **different intellectual communities**, including the liberal arms control community in the United States, Western European peace researchers, security specialists in the center–left political parties of Western Europe, and Soviet “institutchiks”—members of the influential policy institutes in the Soviet Union such as the United States of America and Canada Institute (Landau 1996: 52–54; Risse–Kappen 1994: 196–200; Kaldor 1995; Spencer 1995). **These communities were subsequently able to take advantage of public pressure exerted through social movements in order to gain** broader **acceptance for common security**. In Germany, for example, “in response to social movement pressure, German social organizations such as churches and trade unions quickly supported the ideas promoted by peace researchers and the SPD” (Risse–Kappen 1994: 207). Similar **pressures even had an effect on the Reagan administration**. As Risse–Kappen notes: When the Reagan administration brought hard–liners into power, the US arms control community was removed from policy influence. It was **the American peace movement** and what became known as the “freeze campaign” that **revived the arms control process** together with pressure from the European allies. (Risse–Kappen 1994: 205; also Cortright 1993: 90–110) Although it would be difficult to sustain a claim that the combination of critical movements and **intellectuals** persuaded the Reagan government to adopt the rhetoric and substance of common security in its entirety, it is clear that it did at least **have a substantial impact on ameliorating U.S. behavior. The most dramatic** and certainly the most **unexpected impact of alternative defense ideas was felt in the Soviet Union**. Through various East–West links, which included arms control institutions, Pugwash conferences, interparty contacts, and even direct personal links, a coterie of Soviet policy analysts and advisers were drawn toward common security and such attendant notions as “nonoffensive defense” (these links are detailed in Evangelista 1995; Kaldor 1995; Checkel 1993; Risse–Kappen 1994; Landau 1996 and Spencer 1995 concentrate on the role of the Pugwash conferences). This group, including Palme Commission member Georgii Arbatov, Pugwash attendee Andrei Kokoshin, and Sergei Karaganov, a senior adviser who was in regular contact with the Western peace researchers Anders Boserup and Lutz Unterseher (Risse–Kappen 1994: 203), then influenced Soviet leader Mikhail Gorbachev. Gorbachev’s subsequent championing of common security may be attributed to several factors. It is clear, for example, that new Soviet leadership had a strong interest in alleviating tensions in East–West relations in order to facilitate much–needed domestic reforms (“the interaction of ideas and material reality”). But what is significant is that **the Soviets’ commitment to common security led to significant changes in force sizes and postures**. These in turn aided in the winding down of the Cold War, the end of Soviet domination over Eastern Europe, and even the collapse of Russian control over much of the territory of the former Soviet Union. At the present time, in marked contrast to the situation in the early 1980s, common security is part of the common sense of security discourse. As MccGwire points out, the North Atlantic Treaty Organization (NATO) (a common defense pact) is using the rhetoric of common security in order to justify its expansion into Eastern Europe (MccGwire 1997). This points to an interesting and potentially important aspect of the impact of ideas on politics. As concepts such as common security, and collective security before it (Claude 1984: 223–260), are adopted by governments and military services, they inevitably become somewhat debased. **The hope is that enough of the residual meaning can survive to shift the parameters of the debate in a potentially progressive direction. Moreover, the adoption of the concept of common security by official circles provides critics with a useful tool for (immanently) critiquing aspects of security policy** (as MccGwire 1997 demonstrates in relation to NATO expansion). The example of common security is highly instructive. First, it indicates that critical intellectuals can be politically engaged and play a role—a significant one at that—in making the world a better and safer place. Second, it points to potential future addressees for critical international theory in general, and critical security studies in particular. Third, it also underlines the role of ideas in the evolution of society. Although most proponents of critical security studies reject aspects of Gramsci’s theory of organic intellectuals, in particular his exclusive concentration on class and his emphasis on the guiding role of the party, the desire for engagement and relevance must remain at the heart of their project. The example of the peace movement suggests that critical theorists can still play the role of organic intellectuals and that this organic relationship need not confine itself to a single class; it can involve alignment with different coalitions of social movements that campaign on an issue or a series of issues pertinent to the struggle for emancipation (Shaw 1994b; R. Walker 1994). Edward Said captures this broader orientation when he suggests that critical intellectuals “are always tied to and ought to remain an organic part of an ongoing experience in society: of the poor, the disadvantaged, the voiceless, the unrepresented, the powerless” (Said 1994: 84). In the specific case of critical security studies, this means placing the experience of those men and women and communities for whom the present world order is a cause of insecurity rather than security at the center of the agenda and making suffering humanity rather than raison d’état the prism through which problems are viewed. Here the project stands full–square within the critical theory tradition. If “all theory is for someone and for some purpose,” then critical security studies is for “the voiceless, the unrepresented, the powerless,” and its purpose is their emancipation. The theoretical implications of this orientation have already been discussed in the previous chapters. They involve a fundamental reconceptualization of security with a shift in referent object and a broadening of the range of issues considered as a legitimate part of the discourse. They also involve a reconceptualization of strategy within this expanded notion of security. But the question remains at the conceptual level of how these alternative types of theorizing—even if they are self–consciously aligned to the practices of critical or new social movements, such as peace activism, the struggle for human rights, and the survival of minority cultures—can become “a force for the direction of action.” Again, Gramsci’s work is insightful. In the Prison Notebooks, Gramsci advances a sophisticated analysis of how dominant discourses play a vital role in upholding particular political and economic orders, or, in Gramsci’s terminology, “historic blocs” (Gramsci 1971: 323–377). Gramsci adopted Machiavelli’s view of power as a centaur, half man, half beast: a mixture of consent and coercion. Consent is produced and reproduced by a ruling hegemony that holds sway through civil society and through which ruling or dominant ideas become widely dispersed. 2 In particular, Gramsci describes how ideology becomes sedimented in society and takes on the status of common sense; it becomes subconsciously accepted and even regarded as beyond question. Obviously, for Gramsci, **there is nothing immutable about the values that permeate society; they can and do change.** In the social realm, **ideas and institutions** that were **once seen as natural and beyond question** (i.e., commonsensical) in the West, **such as feudalism and slavery, are now seen as anachronistic, unjust, and unacceptable**. In Marx’s well–worn phrase, “All that is solid melts into the air.” Gramsci’s intention is to harness this potential for change and ensure that it moves in the direction of emancipation. To do this he suggests a strategy of a “war of position” (Gramsci 1971: 229–239). Gramsci argues that in states with developed civil societies, such as those in Western liberal democracies, any successful attempt at progressive **social change requires** a slow, **incremental**, even **molecular, struggle** to break down the prevailing hegemony and construct an alternative counterhegemony to take its place. Organic **intellectuals have a crucial role to play in this process** **by helping to undermine** **the “natural,”** “commonsense,” internalized **nature of the status quo**. This in turn helps **create political space within which alternative conceptions of politics can be developed** and new historic blocs created. I contend that Gramsci’s strategy of a war of position suggests an appropriate model for proponents of critical security studies to adopt in relating their theorizing to political practice. The Tasks of Critical Security Studies If the project of critical security studies is conceived in terms of a war of position, then **the main task of those intellectuals who align themselves with the enterprise is to attempt to undermine the prevailing hegemonic security discourse**. This may be accomplished by utilizing specialist information and expertise to engage in an immanent **critique of the prevailing** security **regimes**, **that is, comparing the justifications of those regimes with actual outcomes**. **When this is attempted** in the security field, **the** prevailing structures and **regimes are found to fail** grievously **on their own terms**. **Such an approach also involves** **challenging the pronouncements** **of those intellectuals**, traditional or organic, **whose views serve to legitimate, and hence reproduce, the prevailing world order.** This challenge entails teasing out the often subconscious and certainly unexamined assumptions that underlie their arguments **while drawing attention to the normative viewpoints that are smuggled into mainstream thinking about security behind its positivist facade.** In this sense, proponents of critical security studies approximate to Foucault’s notion of “**specific intellectuals”** who **use their expert knowledge to challenge the prevailing “regime of truth**” (Foucault 1980: 132). However, critical theorists might wish to reformulate this sentiment along more familiar Quaker lines of “speaking truth to power” (this sentiment is also central to Said 1994) or even along the eisteddfod lines of speaking “truth against the world.” Of course, traditional strategists can, and indeed do, sometimes claim a similar role. Colin S. Gray, for example, states that “strategists must be prepared to ‘speak truth to power’” (Gray 1982a: 193). But the difference between Gray and proponents of critical security studies is that, **whereas the former seeks to influence policymakers in** **particular directions without questioning the basis of their power, the latter aim at a** thoroughgoing **critique of all that traditional security** **studies has taken for granted.** Furthermore, critical theorists base their critique on the presupposition, elegantly stated by Adorno, that “the need to lend suffering a voice is the precondition of all truth” (cited in Jameson 1990: 66). The aim of critical security studies in attempting to undermine the prevailing orthodoxy is **ultimately educational**. As Gramsci notes, “Every relationship of ‘hegemony’ is necessarily a pedagogic relationship” (Gramsci 1971: 350; see also the discussion of critical pedagogy in Neufeld 1995: 116–121). Thus, by criticizing the hegemonic discourse and advancing alternative conceptions of security based on different understandings of human potentialities, the approach is simultaneously playing a part in eroding the legitimacy of the ruling historic bloc and contributing to the development of a counterhegemonic position. There are a number of avenues open to critical security specialists in pursuing this educational strategy. As teachers, they can try to foster and encourage skepticism toward accepted wisdom and open minds to other possibilities. They can also take advantage of the seemingly unquenchable thirst of the media for instant punditry to forward alternative views onto a broader stage. Nancy Fraser argues: “**As teachers, we try to foster an emergent pedagogical counterculture**.... As critical public intellectuals we try to inject our perspectives into whatever cultural or political public spheres we have access to” (Fraser 1989: 11). Perhaps significantly, support for this type of emancipatory strategy can even be found in the work of the ultrapessimistic Adorno, who argues: In the history of civilization there have been not a few instances when delusions were healed not by focused propaganda, but, in the final analysis, because scholars, with their unobtrusive yet insistent work habits, studied what lay at the root of the delusion. (cited in Kellner 1992: vii) Such “unobtrusive yet insistent work” does not in itself create the social change to which Adorno alludes. The conceptual and the practical dangers of collapsing practice into theory must be guarded against. Rather, through their educational activities, proponents of critical security studies should aim to provide support for those social movements that promote emancipatory social change. By providing a critique of the prevailing order and legitimating alternative views, critical theorists can perform a valuable role in supporting the struggles of social movements. That said, the role of theorists is not to direct and instruct those movements with which they are aligned; instead, the relationship is reciprocal. The experience of the European, North American, and Antipodean peace movements of the 1980s shows how influential social movements can become when their efforts are harnessed to the intellectual and educational activity of critical thinkers. For example, in his account of New Zealand’s antinuclear stance in the 1980s, Michael C. Pugh cites the importance of the visits of critical intellectuals such as Helen Caldicott and Richard Falk in changing the country’s political climate and encouraging the growth of the antinuclear movement (Pugh 1989: 108; see also Cortright 1993: 5–13). In the 1980s peace movements and critical intellectuals interested in issues of security and strategy drew strength and succor from each other’s efforts. If such critical social movements do not exist, then this creates obvious difficulties for the critical theorist. But even under these circumstances, the theorist need not abandon all hope of an eventual orientation toward practice. Once again, the peace movement of the 1980s provides evidence of the possibilities. At that time, the movement benefited from the intellectual work undertaken in the lean years of the peace movement in the late 1970s. Some of the theories and concepts developed then, such as common security and nonoffensive defense, were eventually taken up even in the Kremlin and played a significant role in defusing the second Cold War. Those ideas developed in the 1970s can be seen in Adornian terms of a “message in a bottle,” but in this case, contra Adorno’s expectations, they were picked up and used to support a program of emancipatory political practice. Obviously, one would be naive to understate the difficulties facing those attempting to develop alternative critical approaches within academia. Some of these problems have been alluded to already and involve the structural constraints of academic life itself. Said argues that many problems are caused by what he describes as the growing “professionalisation” of academic life (Said 1994: 49–62). Academics are now so constrained by the requirements of job security and marketability that they are extremely risk–averse. It pays—in all senses—to stick with the crowd and avoid the exposed limb by following the prevalent disciplinary preoccupations, publish in certain prescribed journals, and so on. The result is the navel gazing so prevalent in the study of international relations and the seeming inability of security specialists to deal with the changes brought about by the end of the Cold War (Kristensen 1997 highlights the search of U.S. nuclear planners for “new targets for old weapons”). And, of course, the pressures for conformism are heightened in the field of security studies when governments have a very real interest in marginalizing dissent. Nevertheless, opportunities for critical thinking do exist, and this thinking can connect with the practices of social movements and become a “force for the direction of action.” The experience of **the 1980s, when,** **in the depths of the second Cold War, critical thinkers risked demonization** and in some countries far worse in order **to challenge received wisdom**, thus arguably **playing a crucial role in the very survival of the human race**, should act as both an inspiration and a challenge to critical security studies.

**Their f/w doesn’t solve anything and causes extinction**

**Williams ‘8**

[Daniel R. Williams, Associate Professor of Law, Northeastern University School of Law. “After the Gold Rush - Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere.” 113 Penn St. L. Rev. 55 ETB]

k2 pub sphere

The classic Frankfurt School diagnosis of American culture is grim and pessimistic. Jurgen Habermas rebels against the pessimism that pervades Dialectic of the Enlightenment, but he does not repudiate the essential diagnosis found there, though he surely seeks to deepen it with what he regards as a more nuanced investigation into the true roots of Enlightenment rationality. n157 For our purposes, to this observation of humanity's destructive fetish with means-ends rationality, **we may add** Habermas's **emphasis on the public sphere as an optimistic source of rationality**. n158 In the idealized vision that Habermas presents, **the public sphere consists of voluntary associations dedicated to promoting unconstrained rational interchange among free and equal participants of good will**. n159 **It** **is in the public sphere, if truly healthy (free from the** [\*93] **distortions of domination), that the common good can be gleaned**. n160 It **is in the public sphere that government overreaching can be checked and averted**. n161 On this view, world public opinion, cultivated within **vibrant public spheres** that somehow escape the distortions of governmental and corporate propaganda, **may function, in this post-Cold War era that has bled into the Age of Terror, as the only potential countervailing force to the dominant super-power, the United States.**¶What **a vibrant public sphere provides** are **tools to resist naturalistic illusions undergirding social institutions and practices that preserve and promote spheres of inequality and regimes of domination**, but that seem to be socially necessary. The idea here is well-rehearsed in the literature of critical theory: **that which is socially constructed is made to appear fixed and natural; that which serves narrow interests of power and privilege is made to appear to serve everyone**. n162 **A culture beholden to means-ends thinking is a culture that has lost its capacity for critical theorizing, and such a culture is**, as a result, **at the mercy of its illusions.**¶ **A vibrant public sphere that successfully exposes illusions**, which conceal unhealthy conditions for society, **is crucial to social change, for** the **exposing** of **such illusions is** exactly **what loosens the screws that keep unworthy social institutions intact**. n163 **A vibrant public sphere is the environment for rendering institutions malleable and open to change,** which is why thinkers from Kant to Habermas regard "the public sphere as the definitive institution of democracy." n164 **The** big **problem**, however, **is that the "public sphere**" in consumerist societies such as ours **may** itself **have evolved into** **an illusion**, propping up the justificatory myth that the Sovereign's activity is in check and in harmony with the consent of the governed. n165 Consider the implications if we find, as an empirical matter, that the public sphere is beholden to the powerful and privileged but still retains the image of functioning largely in its idealized way. **That false consciousness**, to use a very unfashionable phrase, **creates manifold opportunities for a bloated sovereignty** - indeed, perhaps one like we are witnessing today - **and** **a bloated sovereignty coexists nicely with a consumerist mentality that cannot seem to imagine any alternative to the present, other than a future that consists only of the present just with more snazzy gadgets.**¶[\*94] **Evidence abounds that this false consciousness pervades America today, with disastrous consequences. Vital issues of war and peace** (let alone important issues revolving around health care, education, **and economic well-being) are presented in stage-managed fashion, with vast sums of money spent on manipulating over-worked, anxiety-riddled consumerists who cling to an anachronistic, jingoistic, pre-Cold War understanding of** what **this nation** stands for in the world. **Voting is no longer the culminating act that follows a period of reflection and probing dialogue and debate, but rather voting is a reaction to "campaigns**," operations not unlike military campaigns and Madison Avenue advertising campaigns, where the human commodity on display (the "candidate") has been selected largely through big-money donors and inside-power politics. n166¶ **If the hollowed-out nature of democracy captures something real in our culture, then is it really surprising that the great institutional embodiment of democracy and the most vitalizing expression of the Enlightenment, the right to trial by jury, has been under siege? n167 And if** [\*95] **we abide the erosion of it, if we find that trial by jury cannot purchase its way into our culture because it cannot satisfy our quest for means-ends efficiency and because we have lost our vocabulary for non-instrumentalist justificatory ways of thinking and being, then what democratic institutions are next?**¶V. Hamdi Within Habermas's Social Ontology¶ The West confronts other cultures, which owe their character to the imprint of one of the great world religions, only through the provocative and trivializing aura of a banal materialistic culture.¶ Jurgen Habermas n168¶ **Habermas's social ontology illuminates what is at stake in our war-on-terror jurisprudence, exemplified by** cases like **Hamdi**. Habermas's theory of communicative action entails a society with two basic spheres, which he calls the "lifeworld" and "system" spheres. n169 The lifeworld sphere - a construct Habermas acquired from Edmund Husserl, n170 which roughly correlates with, but broadens, the concept of the public sphere - consists of those domains in life that we experience with our family and friends, our cultural life, our political life outside of organized politics (especially party politics), and our voluntary associations. n171 The mass media, when performing independently of government and corporate interests, is part of the lifeworld sphere. Communication, participatory dialogue, and persuasion through reasoned discourse, as opposed to coercion, is the idealized medium of the lifeworld sphere. n172 Consensus is the animating feature of the lifeworld sphere, which promotes human bonding, community integration, and value-sharing. n173 The communicative action of the lifeworld sphere thus correlates with the "answerability" thesis discussed above, the non-instrumentalist understanding of the criminal trial as a process of rational persuasion, where even the accused, as a Kantian rational agent, is obliged to consent to her own punishment. It is that idealized integration of the accused with the judgment of the community that gives the criminal adjudicatory [\*96] process its preeminent moral standing in our Enlightenment culture - preeminent precisely because that idealized integration is most difficult in matters of crime and punishment.¶ So, as I have presented it here, **the criminal adjudicatory process**, in its idealized form, **with trial by jury as the centerpiece to the paradigm of how the Sovereign justifies and legitimates the detention of the dangerous, both exemplifies and nourishes the lifeworld sphere**. **Each time a jury deliberates fairly and reaches an honest verdict, it presents itself as a beacon of the lifeworld sphere, where rational persuasion among free and equal persons is the bedrock value. Each fair and honest verdict nourishes the lifeworld sphere by strengthening our commitment to this mode of communicating with each other, even with those who have breached social norms in the most horrific ways. The more awful the crime, the more powerful is the fair and honest verdict in nourishing the lifeworld sphere.** This idea perhaps explains, in part, why a criminal trial is usually more healing and more strengthening of a community, and hence more desirable, than a resolution through an administrative fact-finding tribunal. **The power of a fair and robust criminal process to heal and strengthen a community is emblematic of the larger point** being suggested here, **that instrumental rationality cannot bind a people together, but instead, when it predominates and seeps too deep into the culture, it ruptures what binds individuals, and leads to a passive consumerist individuality that characterizes modern American life.**¶Those who are familiar with the doctrinal struggles that take place within criminal procedure will understand that **the criminal adjudicatory process is constantly being tugged out of the lifeworld sphere (where rights are understood as trumps) and shoved into the system sphere (where the barometer of fairness is accurate outcomes and where "rights" must purchase their way into existence by promoting reliable outcomes**). n174 The system sphere is much more recognizable because of how our capitalist economy developed and because of the particular way in which we have cultivated our Enlightenment heritage. **The system sphere is characterized by communicative action motivated and prompted by instrumental reasoning; means-ends discourse is the language of the system world. n175 The system sphere is the world of** [\*97] **governmentality and bureaucracy, where more rigid role-playing dominates how people interact. This is a sphere where language and meaning are instrumental in nature and where people are regarded as atomistic, self-interested, and consumeristic**.

n176 The medium through which the system sphere operates in the United States is money and power. The more complex the society, and the more administrative and bureaucratic, the more important is the role of the system sphere in maintaining social cohesion. n177¶ If that is true, **then the Court's decision in Hamdi, as a cultural document rather than just a narrow jurisprudential one, ought to warn us about an important danger we face** in our culture as we proceed further along towards the darkness that is the so-called war on terror. Kant identified two forms of rationality that roughly correlate with Habermas's lifeworld and system spheres: instrumental rationality situates the reasoning agent in a particular role with a predetermined end; universal reason (what we typically regard as Kantian rationality) frees the reasoning agent to use reason as an end in itself, which is the sort of reasoning process that undergirds the lifeworld sphere and the jury trial. n178 In After the Gold Rush, Part I, I endeavor to show that **the Hamdi Court takes on a role within the so-called war on terror - a role that seems so utterly natural, given our pax Americana consciousness, that it is virtually unnoticeable - that conceals how that so-called war exists to hasten the development of Guantanamo-style detention**. n179 The suggestion here is that **this role with a predetermined end (winning the "war on terror," with no articulation of what "winning" means) propels the Court to use instrumental rationality to undercut the vitalizing expression of Kantian rationality**. In this sense, **Hamdi illuminates how deeply indeed we are at war with ourselves.**¶ **The implications are far-reaching. The more reductionist our language and the more reductionist our mode of adjudication, governed by instrumental reasoning alone, then the more mechanistic we become, not only in the legal "system" we use, but in the "system" sphere we inhabit, and thus in the consciousness we ultimately formulate**. It is a consciousness in which "whatever does not conform to the rule of computation and utility is suspect." n180 **The more mechanistic the [\*98] consciousness, the more total is the power of the Sovereign, with the endgame being one that the** **world has already experienced, a system-sphere Nazi regime that embraced "the same kind of mechanistic thinking that, in an outwardly very different form, contributed to what most people would consider the glories of modern science**." n181 **And lest we comfort ourselves with the view that the Holocaust is sui generis, an aberration in a Western culture imbued with an Enlightenment heritage that assures our essential goodness,** we would do well to consider the Scottish poet Edwin Muir's observation:¶ **Think of all the native tribes and peoples, all the** simple **indigenous forms** **of life** which Britain trampled upon, corrupted, **destroyed** ... in the name of commercial progress. **All these things, once valuable, once human, are now dead** and rotten.The nineteenth century thought that machinery was a moral force and would make men better. How could the steam-engine make men better? **Hitler marching into Prague is connected with all this.** If I look back **over** **the last hundred years** it seems to me that **we have lost more than we have gained, that what we have lost was valuable, and that what we have gained is trifling**, for what we have lost was old and what we have gained is merely new. n182¶ **The true spirit of trial by jury is the resistance against a mechanistic modality where means-ends consciousness is preeminent and where violence to accomplish control and domination, sweetened with nice-sounding words (freedom, democracy) that have devolved into mere gestures, is too easily unleashed.** The tension in criminal adjudication between this resistance and the attractions of instrumental rationality is no intrinsic feature of 9/11, for that tension permeates, if not defines, the entire enterprise of criminal procedure. n183¶ [\*99] **The more crucial the role of the system sphere in maintaining social cohesion, the more penetrating is that sphere's influence on human consciousness. The system sphere operates on and produces a consciousness beholden to means-ends thinking**. This consciousness is peculiarly well-suited to a consumer culture where people are passive and manipulable by corporate and governmental interests. One might, in a very loose sense, correlate the duality of the lifeworld sphere and the system sphere with Jean-Paul Sartre's distinction between pour-soi (being-for-itself) and en-soi (being-in-itself) - roughly, human existence versus the existence of things. n184 The lifeworld sphere promotes a person's embrace of his pour-soi character of his existence, his capacity for action, decision, and heightened consciousness. The system sphere tugs in the other direction, towards an en-soi consciousness, which is passive and more thing-like n185 - a consciousness marred by a repression that leads to self-destruction and aggression. n186¶ **The system-sphere consciousness loses the ability to appreciate the sacred in life, the non-instrumental ways of being, producing** what Arthur Koestler characterized as a "civilization in a cul de sac," an "everybody-for-himself civilization," n187 with **masses** who distract themselves with television and dim-witted movies, **who understand and respond to the world amoeba-like as a source of pain and pleasure**, and who cast about for cheap self-help recipes as a salve for a desiccated spiritual ennui. **Role-players through and through, persons within an all**- [\*100] **encompassing system sphere lose the ability to choose their own ends. That particular ability, the ability to express oneself authentically through the choosing of ones own ends in life, is the most redeeming feature of a healthy lifeworld sphere.** Thus, it is here where the entwining relationship of the lifeworld and system spheres becomes crucial in critical theory. Habermas speaks of the system sphere as a product of the lifeworld, for the latter is the locus of energy and meaning-making in a society - things that the "system" needs to function. n188 But **the "system" sphere**, **that domain of instrumental reasoning where the impulse to control and dominate always percolates, has a greediness that is hard to contain. It can only be contained within a society that takes seriously the nurturing and empowerment of the** **lifeworld**. Like the struggle between Eros and Thanatos, **the struggle between the lifeworld and the system spheres always contains the threat that the latter will override - "colonialize,"** to use Habermas's locution n189 - **the former.**¶Many observers of American culture have warned against this colonization, which continues largely unabated. n190 The mass media, properly in the domain of the lifeworld sphere, has been thoroughly hijacked by corporate power; **education no longer serves a democratic culture where critical thinking is the pedagogical aim, but instead aims to produce the human wrenches and pliers, the spare parts, or the disposable accoutrements, of an economic machinery that serves narrower and narrower interests**. **Students entering college today are said to resort more often to cheating than previous generations**, n191 **which is hardly surprising when the prevailing attitude among parents and students alike is focused on getting the credentials** so as not to be on the outside looking in (a quintessential system-sphere consciousness), when almost [\*101] every student shares the same major - upward mobility. **More and more decisions that are vital to our health and well-being are delegated to experts who fill slots within vast bureaucratic apparatuses**. **More and more of life is removed from democratic control - a symptom of the shrinkage of the lifeworld sphere brought on by the colonization of the system sphere. What we experience, as a culture, is greater and greater anomie and alienation, erosion of social bonds, passivity, drug and alcohol abuse, and violence.** **The triumph of the system sphere and the withering of the lifeworld sphere manifests itself in the cozy bomb-shelter consciousness, where we had once accepted as rational the construction of livable bomb shelters as a suitable response to the specter of nuclear annihilation because we abandoned the capacity to critique the irrationality of the Cold War system that produced the threat in the first place.** n192¶ **The democratic project within our Enlightenment heritage insists upon a civic maturation where "the people" have the capacity and the willingness to use their own reasoning powers to govern themselves, as opposed to delegate governance to elites, charismatic charlatans, and so-called experts, all of whom ultimately serve narrower and narrower interests of privilege**. n193 **It is hard to defend the view that American society has moved steadily in the direction of this civic maturation**. We seem to be moving away from it, with a populace deeply manipulated by a "public relations industry, whose objective is to engineer consent among consumers of mass culture." n194¶ [\*102] **So here is the grim message that is intricated in the Hamdi narrative. At the very moment when it was most propitious to fortify a non-instrumentalist foundation for our commitment to trial by jury** (**and the other procedural rights that are associated with our criminal justice process) the Court does the precise opposite**. n195 **It uses means-ends thinking to place a veil of administrative decency over what most now recognize to be a heinous practice in Guantanamo Bay. It endorses a style of thinking and a form of consciousness that is itself a key source of the problem we now find ourselves facing.** **If it is true,** as Habermas presents it, that **Islamic fundamentalism, and** the **terrorism** associated with it**, operate**s **in a medium of violence arising from a "communicative pathology" - a "spiral of violence" rooted in a "spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust**" n196 - **then** **our juridical response to it, culminating in opinions like Hamdi, replicates that "breakdown of communication" by bracketing the most crucial institutional embodiment of our commitment to rational and publicly transparent communication within our Enlightenment culture - the jury trial - and thereby sapping it of that significance**. n197 **This reinforcing "communicative pathology" in this so-called Age of Terror presents the most pressing challenge to our crippled democracy.**¶ **The challenge of a healthy democracy is overcoming the very real danger that the form of consciousness that the system sphere operates on** [\*103] **and produces** - what I'll abbreviate as the consumer-consciousness, for that captures the passivity and manipulability of the system-sphere person - squeezes out the participatory-dialogue consciousness that is most congenial to the lifeworld sphere. n198 Philosopher Albert Borgmann nicely captures the idea here, describing how **the Enlightenment project seemingly placed the individual at the center of its ontology, but somewhere along the way led to the individual becoming "little more than an accomplice to a gigantic and systematic enterprise that, though resting on the consent of most people, was given a shape and momentum of its own.**" n199 The very power of the Enlightenment to produce magnificent technological prosthetics that "subdued and tamed reality" has reduced the individual self to the status of ignoble "consumer." n200 The "consumer" is but an appendage to the system sphere, a mockery of the ennobled, high-functioning individuals who must populate the lifeworld sphere.¶ **The state is too beholden to moneyed interest, or to corporate power, to ally itself with promoting the lifeworld**. n201 So **government is not the solution to our cultural ills, but rather is one source of the problem, as it will do nothing to avert the relentless, inexorable expansion of markets and administration. The so-called** **war on terror, which in my view can be traced to that expansion, has only fueled the state's alliance with a system-sphere mentality.** This may partly explain why "some say that ours is a world in which real democracy has become impossible, perhaps even unthinkable." n202 **In Habermas's social ontology, Hamdi falls smack in the middle of the system sphere**. **Yaser Hamdi struggled unsuccessfully to remain in the lifeworld sphere against the state's quest to extend the system sphere, a quest to intensify the exertion of sovereign power through executive and administrative powers**. n203 **However, the Court cannot reconcile the Sovereign's desire to erect a simplistic, life-falsifying ontology that includes enemy combatants within a so-called war on terror with the juridical demand for due process merely by constructing a legal regime** from certain [\*104] conceptual remnants picked out of Mathews v. Eldridge. n204 **The fact remains that Hamdi endorses and exemplifies the deployment of law to pursue a system-sphere logic - a means-ends rationality - of detecting and detaining bare-life beings who are deemed "dangerous." The Court repudiates trial by jury, which can only be justified ultimately through a lifeworld logic, at the very moment our commitment to it is most acutely tested**. While civil libertarians applauded the Court's refusal to issue the blank check to the Executive, **too many have ignored the sinister displacement of** the most important expression of **what is sacred in our Enlightenment heritage with a mode of reasoning that expresses that heritage's threatening dark side**. n205¶ **We falsify the real force of that displacement by marginalizing it to the realm of some state of exception, as opposed to seeing it as a fortification of a certain global ambition on the part of the United States that continues to be unexamined within the juridical realm, despite the fact that what is supposedly sacred in that realm - an entire framework of rights that serve as genuine limits to governmental power - is precisely what must be protected by our courts.** n206 **It is indeed odd to affirm our commitment to the rule of law through the construction of a legal regime,** **at the hands of all three branches - which is the basis for some scholarly applause for Hamdi - that is itself prompted by a desire to jettison the very legal regime that is supposed to reflect our commitment to the rule of law. This is law as a shell game.** n207¶ **One would think that the rule of law contains some limit to the Sovereign's ability to further confine the domain of a particular legal** [\*105] **regime, like the criminal justice system, and erect another**. One would think that, before punting the issue of what is sacred within a constitutional democracy to the democratic branches of government - Issacharoff and Pildes's "process approach" n208 - the Court would note how far we have moved away from the political environment that the Founders knew, gripped now by partisan politics where political party affiliation is "a much more important variable in predicting the behavior of members of Congress vis-a-vis the President than the fact that these members work in the legislative branch." n209 Gripped, indeed, by something far more frightening and ominous:¶ Our Congress has been hijacked by corporate America and its enforcer, the imperial military machine... . We have allowed our institutions to be taken over in the name of a globalized American empire that is totally alien in concept to anything our founders had in mind. I suspect it is far too late in the day for us to restore the republic that we lost a half-century ago. n210¶ **One would think that, as part of our self-identity as a nation, our highest Court would confront the most elemental question: by what framework of legality may the Sovereign decide that a United States citizen** (or anyone, for that matter) **is unworthy of the sort of communicative enterprise that our Enlightenment heritage rightly regards to be the sine qua non of respect for human dignity? Hamdi is but a recent example of the Court's disinclination to investigate who we are as a nation as part of its obligation to preserve the noble facets of our Enlightenment heritage, all in the name of eschewing the dreaded sin of putting the Good before Liberty**. n211 **And so, rather than exemplify the triumph of the rule of law, Hamdi exposes its emptiness.** n212