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**Detainees is a euphemism which hides the torture of prisoners**

**Roberts 13** [Rodney C. Roberts, .D. in philosophy from the University of Wisconsin-Madison. A Fulbright Scholar at the University of Cape Town, South Africa in 2005 and a former member of the University of Hawai‘i at Mānoa faculty, he is currently Associate Professor of Philosophy at East Carolina University He is the editor of Injustice and Rectification (Peter Lang, 2002) and recently completed a book manuscript entitled Rectifying Injustice] Against Scheid’s Utilitarian Argument for the Indefinite Detention of Key Terrorist Suspects http://pre.docdat.com/docs/index-209197.html

Second, while Scheid generally follows the prevailing usage and refers to the men being held at Guantánamo as “detainees,” I shall instead refer to them as prisoners. Although ‘detain’ and ‘imprison’ may be said to be roughly synonymous, use of the term ‘detainee’ to refer to these men strikes me as a euphemism for the reality of their situation—they are not simply being delayed, they were arrested and have been held for years under military guard. Moreover, they are being tortured. In spite of the government’s claim that “it has abided by international conventions barring torture, and that detainees at Guantánamo and elsewhere have been treated humanely,”2 the U.S. has violated Article 7 of the International Covenant on Civil and Political Rights (ICCPR). This “absolutely prohibits torture,” and carries “an obligation from which no derogation may be made even in the context of a national emergency so severe as to threaten the life of the nation.”3 The prisoners allege that (inter alia) they have been beaten, deprived of food and water for days, tortured in other countries and at U.S. military instillations outside of the U.S. prior to being brought to Guantánamo, held for periods exceeding a year in solitary confinement, and raped.4 According to one FBI agent’s account, prisoners were “shackled hand and foot in a fetal position on the floor… [and] kept in that position for 18 to 24 hours at a time[;] most had ‘urinated or defacated [sic]’ on themselves.”5 Hence, I shall employ the term ‘prisoners’ when referring to them.

**Vote neg – by insulating people from understanding the situations’ full meaning they become detached**

**Davidsson 03** (Elias Davidsson, Centre for Research on Globalization, 3 (<http://www.aldeilis.net/jus/econsanc/debate.pdf>)

In order to effectively describe a complex and highly politicized phenomenon, such as economic sanctions, the **utmost care in the choice of terminology is necessary**. Among the tools of politicians figure their creative use of language, including the invention of euphemisms and obfuscatory expressions. Discussing the role of euphemisms in political discourse, Stanley Cohen writes:The most familiar form of reinterpretation is the use of euphemistic labels and jargon. These are everyday devices for **masking, sanitising, and conferring respectability** by using **palliative terms** that deny or misrepresent cruelty or harm, giving them neutral or respectable status. Orwell's original account of the anaesthetic function of political language - how words **insulate their users and listeners** from **experiencing fully the meaning** of what they are doing - remains the classic source on the subject [28]. Judge Weeramantry, in his Separate Dissenting Opinion on The legality of nuclear weapons (International Court of Justice (Advisory Opinion) (1996)), castigates [...] the use of euphemistic language - the disembodied language of military operations and the polite language of diplomacy. They conceal the horror of nuclear war, diverting attention to intellectual concepts such as self-defence, reprisals, and proportionate damage which can have little relevance to a situation of total destruction. Horrendous damage to civilians and neutrals is described as collateral damage, because it was not directly intended; incineration of cities becomes "considerable thermal damage". One speaks of "acceptable levels of casualties", even if megadeaths are involved. Maintaining the balance of terror is described as "nuclear preparedness"; assured destruction as "deterrence", total devastation of the environment as "environmental damage". **Clinically detached** from their human context, such expressions **bypass the world of human suffering**, out of which humanitarian law has sprung

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**The aff sees indefinite detentions as a place that lack law – this necessarily calls on the ‘normal’ laws to be universally applied. This ignores how the normal law treats all prisoners, immigrants, and upholds suffering. Vote negative to challenge the normalization of law. Our alternative ends indefinite detentions by fighting against the law, not within the law.**

**Johns 05** [Fleur Johns is a lecturer, University of Sydney Faculty of Law, Sydney, Australia. Email: fleurj@law.usyd.edu.au. The author would like to thank the organizers of, and audience members and co-panelists at, each of the following events for insightful comments on, and interrogations of, oral presentations of earlier versions of this article: the Second Joint Workshop of Birkbeck Law School and the Foundation for New Research in International Law (9–11 May 2004, London, UK), the Inaugural Conference of the European Society of International Law (13–15 May 2004, Florence, Italy), the 12th Annual Australian and New Zealand Society of International Law Conference (18–20 June 2004, Canberra, Australia), and the 22nd Annual Australian Law & Society Conference (13–15 Dec. 2004, Brisbane, Australia). The author is also indebted to Professor Peter Fitzpatrick for generous and insightful comments on an earlier draft of this article and to two anonymous reviewers for their suggestions] Guantánamo Bay and the Annihilation of the Exception http://www.ejil.org/pdfs/16/4/311.pdf

Is Guantánamo Bay, Cuba, as one scholar has described it, an ‘anomalous zone’?1 In international legal terms, does Guantánamo Bay embody law’s absence, suspension or withdrawal – a ‘black hole’, as the English Court of Appeal has stated?2 Is it a space that international law ‘proper’ is yet to fill and should be implored to fill – a jurisdiction maintained before the law, against the law or in spite of the law? These are some of the questions with which I began the research from which this article emanates.

I commenced, too, with a sense of unease with the responses to these questions that may be elicited from the surrounding international legal literature. Implicit or explicit in most international legal writing on Guantánamo Bay is a sense that it represents an exceptional phenomenon that might be overcome by having international law scale the heights of the Bush administration’s stonewalling. Guantánamo Bay’s presence and persistence on the international legal scene, such accounts imply, may be understood as a singular, grotesque instance of law’s breakdown – an insurgence of ‘utter lawlessness’ in the words of Lord Steyn of the House of Lords.3 Of this, I am not so sure.

By my reading, **the plight of the Guantánamo Bay detainees is less an outcome of law’s suspension** or evisceration **than of elaborate regulatory efforts by a range of legal authorities. The detention camps of Guantánamo Bay** are above all works of legal representation and classification. They **are spaces where law and liberal proceduralism speak and operate in excess**. 4 This article will probe this intuition by examining law’s efforts in constituting the jurisdictional order of the Guantánamo Bay Naval Base (and, more specifically, Camps Delta and America at that Base). It will consider, in particular, the claim that the jurisdictional order of Guantánamo Bay renders permanent a state of the exception, in the sense (derived from the work of Carl Schmitt) of a space that ‘defies codification’ and subjects its occupants to the unfettered exercise of sovereign discretion.5 Such a claim has been put forward (usually without an express invocation of Schmitt) by a range of international legal commentators.6 It has also been famously put forward, with distinct and in many ways divergent implications, in the writings of Italian philosopher Giorgio Agamben. This article argues against that characterization, in both its legal scholarly and its Agamben-esque forms.

It will be contended here that understanding Guantánamo Bay as a domain of sovereign exception (and, as such, of political decision-making) in a Schmittian sense is a misnomer. Rather, Guantánamo Bay may be more cogently read as the jurisdictional outcome of exhaustive attempts to domesticate the political possibilities occasioned by the experience of exceptionalism – that is, of operating under circumstances not pre-codified by pre-existing norms. Far from emboldening sovereign and non-sovereign forms of political agency under conditions of radical doubt, the legal regime of Guantánamo Bay is dedicated to producing experiences of having no option, no doubt and no responsibility. Accordingly, in Schmittian terms, the contemporary legal phenomenon that is Guantánamo Bay may be read as a profoundly anti-exceptional legal artefact. The normative regime of Guantánamo Bay is one intensely antithetical to the forms of decisional experience contemplated by Schmitt in Political Theology and to modes of decisional responsibility articulated by other writers before and since.7 It is by reason of its norm-producing effects in this respect, I would argue, that the legal regime of the Guantánamo Bay detention camps and its replication beyond Cuba merit interrogation and resistance.

Section 1 of this article will present a brief sketch of the jurisdictional order of the Guantánamo Bay Naval Base, as constructed primarily in the final decade of the 20th century and the early part of the 21st. Section 2 will examine the claims to exceptionalism made in respect of this order, first as those claims are circulating in international legal scholarship, and second as they have been advanced in Giorgio Agamben’s writings. Section 3 will put forward a critique of these diagnoses (both international legal scholars’ and Agamben’s), advancing an argument that the legal order of Guantánamo Bay is noteworthy for its insistence upon constraining or avoiding experiences of the exceptional, rather than for its rendering permanent and all-encompassing a sense of the exceptional. Finally, in Section 4, a further argument will be made for resistance to the necessitarian normative architecture of Guantánamo Bay through a re-invigoration of that sense of the exception that may be derived from the work of Carl Schmitt. This final argument will be predicated on a reading of the exception as a political experience that may be de-linked from notions of centralized, sovereign authority, reading Schmitt’s decisionism away from Schmitt’s fetishism of the state.

1 The Legal Order of ‘Anomaly’

Guantánamo Bay is a 45 square mile area of Cuba occupied by the United States pursuant to a perpetual lease agreement entered into in 1903.8 Under that lease, the US obtained the right to use the area for coaling and naval operations.9 The text of the lease agreement provides inter alia that ‘the United States shall exercise complete jurisdiction and control over and within such areas’ while reserving to Cuba ‘ultimate sovereignty’.10 Accordingly, since December 1903, Guantánamo Bay has been operated as a US naval base, its area closed to private use, access and navigation without US authorization.11 The base maintains its own schools, power system, water supply and internal transportation system.12 According to recent accounts, ‘the base population has grown to 6,000, and . . . “in addition to McDonald’s, there are now Pizza Hut, Subway and KFC [franchises]. Another gym is being built, and town houses, and a four-year college opens next month”. . . The base commander describes it as “small-town America” ’.13 Having previously been dedicated wholly to military and related purposes, in the early 1990s this ‘small town’ was refashioned as a detention camp for those seeking asylum in the United States.14

Between 1991 and 1996, more than 36,000 Haitian and more than 20,000 Cuban asylum-seekers were interned for varying periods in Guantánamo Bay, pursuant to US immigration policies of interdiction, administrative detention, off-shore processing and, wherever possible, repatriation.15 Thereafter, other than short-term operations in 1996 and 1997, the migrant processing operation at Guantánamo Bay was wound down. In January 2002, however, shortly after initiating a military campaign in Afghanistan, the United States began transferring hundreds of persons captured during military operations in Afghanistan to Guantánamo Bay, where they have since been held without charge as ‘unlawful combatants’.16 According to the International Committee of the Red Cross, the detention facilities at Guantánamo Bay held approximately 550 detainees as of 5 November 2004.17 In a 2001 Military Order and a series of subsequent orders issued by the Department of Defense, the US Executive has constructed an elaborate legal regime surrounding these persons.18

The particular, tailored features of this regime have been justified, above all, by the detainees’ unorthodox and peculiarly threatening status: hence the language of compound illegality. As ‘unlawful combatants’, Guantánamo Bay detainees are cast both beyond the pale of non-violent political discourse and beyond the legal bounds of warfare. Yet although the terminology applied to the Guantánamo Bay detainees implies an extra-legal status, these detainees have, since the outset, been the focus of painstaking work of legal classification. In a press briefing on 13 February 2004, given by Paul Butler, Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, Mr. Butler detailed an elaborate, multi-stage screening and evaluation process through which each detainee is passed. In Mr. Butler’s description, an ‘integrated team of interrogators, analysts, behavioural scientists and regional experts’ works alongside military lawyers and federal law enforcement officials to decipher and consider ‘all relevant information’. ‘[W]e have a process’, Mr Butler announced confidently, ‘and . . . that process will take its own course’.19

Thus, even before the 28 June 2004 rulings of the US Supreme Court in Hamdi v Rumsfeld20 and Rasul v Bush21 affirmed the entitlement of Guantánamo Bay detainees to a ‘meaningful opportunity to contest the factual basis for th[eir] detention before a neutral decisionmaker’ and their capacity to invoke the jurisdiction of US federal courts,22 the Department of Defense had produced a panoply of regulations concerning the handling of detainees. These include mechanisms for annual administrative review of the necessity of each enemy combatant’s detention and procedures for detainees’ trial before specially convened Military Commissions.23

Since the US Supreme Court’s 28 June 2004 rulings, the normative and institutional network at Guantánamo Bay has become even denser. On 7 July 2004, the Deputy Secretary of Defense promulgated an order establishing a Combatant Status Review Tribunal. This Tribunal was charged with determining whether persons detained at Camps Delta and America (the detention camps now maintained at Guantánamo Bay, the former comprising six separate camps) have been properly classified as enemy combatants.24 This, alongside the Military Commissions and the Administrative Review Board, added a third body to the line-up of specialist legal institutions convened at Guantánamo Bay. Later in the same month, the Secretary of the Navy produced a lengthy memorandum outlining procedures to govern this Tribunal’s hearings, including (rather bizarrely) a standard form script for the conduct of a hearing.25 Furthermore, by order of the Defense Secretary Donald Rumsfeld on 16 July 2004, a new Office of Detainee Affairs was created within the Pentagon to coordinate ‘around 100 inquiries, investigations, or assessments’ that were then said to be ongoing in respect of detainees’ handling by US military police.26

Far from a space of ‘utter lawlessness’ then, one finds in Guantánamo Bay a space filled to the brim with expertise, procedure, scrutiny and analysis. Amid the work of the Military Commissions, the Administrative Review Board, the Combatant Status Review Tribunal and the other inquiries mentioned above, it is not upholding the rule of law that seems tricky. Rather it is the possibility of encountering the yet-to-begoverned exception that seems difficult to contemplate.

2 The Claim to Exceptionalism

As framed by Carl Schmitt (primarily in his 1922 work, Political Theology), the exception is that domain within jurisprudence in which decision-making ‘cannot be subsumed’ by existing norms.27 It is that space in which such norms are held open to suspension or transformation, and where programs of norm-implementation and norm-compliance cease to govern action and decision-making. Accordingly, the exception is synonymous with the attempt to exercise momentarily decisive agency or, as Schmitt put it, ‘principally unlimited authority’.28 I will argue in Section 3 of this article that it is precisely this sort of agency that the legal regime of Guantánamo Bay is designed to negate.29

To many commentators, however, the extraordinary procedural characteristics of the three primary legal institutions installed at Guantánamo Bay render the Guantánamo Bay Naval Base effectively ‘a prison outside the law’ (to quote the petitioners in Rasul v Bush) 30 or at least outside the pre-existing order of legality.31 Two eminent US constitutional lawyers, Professors Katyal and Tribe have, for instance, observed that ‘the [November 2001] Military Order’s procedural protections fall conspicuously short of those most Americans take for granted’. They concluded, further, that ‘its vagueness invites arbitrary and potentially discriminatory determinations’, it ‘installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law-applier’ and, accordingly, it ‘authorize[s] a decisive departure from the legal status quo’. Faced with what they construe as executive acts that ‘do not comport with [the US] Constitution’s structure’ being justified by ‘unilaterally defined emergenc[y]’, these commentators propose recourse to the US Congress to ensure legislative extension to Guantánamo Bay detainees of constitutional guarantees of equal protection and due process of law, thereby ‘[re]establish[ing] the rule of law’.32

Public international lawyers have, to a significant degree, echoed and compounded these concerns, lamenting that the Military Commissions ‘fail[ ] to deliver to justice that the world at large will find credible’ by ‘authoriz[ing] the [US] Department of Defense to dispense with the basic procedural guarantees required by the Bill of Rights, the International Covenant on Civil and Political Rights (ICCPR) and the Third Geneva Convention of 1949’.33 Following is an overview and brief analysis of such claims to exceptionalism made in respect of Guantánamo Bay, first in prevailing international legal scholarship, and second in the work of Giorgio Agamben.

A Appeals to the Exception in International Legal Scholarship

As indicated by the foregoing remarks, the exceptional status of Guantánamo Bay Naval Base has been a recurring theme of legal critiques of the internment, trial and interrogation practices that have been put into effect there.34 In international legal literature, development of this theme typically entails a two-part discursive move. First, the regime of the Guantánamo Bay Naval Base is isolated and distanced from the ambit of routine legality. By expressly disavowing the entitlement of detainees to certain due process guarantees enshrined in international law and US constitutional law, the US executive has, it is said, sought to create an abomination: a ‘legal no man’s land’;35 a place ‘beyond the rule of law’.36 The current US administration, such accounts report, ‘want[s] its own exceptional “rights-free zone” on Guantánamo’.37 At Guantánamo Bay, judgments are said to be ‘based on politics, not legal norms’.38 Guantánamo Bay is cast as a ‘black hole’ and ‘[t]he nature of th[at] black hole’, it is said, ‘is that there is no way out, except through the good grace of the military’.39

Next, this severance of Guantánamo Bay from the prevailing legal order – or the normative emptying out of this jurisdiction, ostensibly to make way for the political – is identified per se as a critical source of concern. As one scholar has observed, ‘[h]uman rights law abhors a vacuum’.40 Horror is directed as much towards the apparent refutation of law’s claim to completeness as it is towards the perceived effects of this, namely, the inability to subject detainees’ indefinite detention, torture and degradation to third party question or constraint. Thus, Professor Jordan Paust has insisted ‘under international law, no locale is immune from the reach of relevant international law’. ‘Despite claims that certain persons, including “enemy combatants” or so-called “unlawful combatants,” have no rights’, he continued, ‘no human being is without protection under international law . . . in every circumstance, every human being has some forms of protection under human rights law’.41

The notion of a domain from which law has withdrawn (or where it has been forced into exile) is thus first generated as a definitive diagnosis of the Guantánamo Bay ‘problem’, then cast as intolerable. The encounter with this prospect has, in turn, occasioned two main types of response, each dedicated to affirming the comprehensiveness of the systemic order of national-international legality.

One response among legal critics has been to appeal to a variety of legal institutions to subject the Guantánamo Bay Naval Base to their purview, under the rubric of existing law and institutional procedures. Thus, while Professors Katyal and Tribe advocate congressional action within the US, international lawyers and others have instigated litigation and complaint procedures in a wide range of settings, from the US and UK courts to the Inter-American Commission on Human Rights and the United Nations’ Working Group on Arbitrary Detention.42 Others, like Paust above, have turned to the law review as a forum in which to avow the breadth of international law’s reach and the pertinence and inviolability of its precepts.43

A second approach has been to insist upon the necessity of reshaping the law to fit the ostensibly novel phenomena thrown up by the events of 11 September 2001, including the demand for indefinite detention of those suspected of terrorist allegiances. This too is based upon the invocation of emergency or exceptional circumstances, albeit to a very different end. ‘Terrorist attacks’, US constitutional law scholar Bruce Ackerman has written, ‘will be a recurring part of our future. The balance of technology has shifted . . . [and] we urgently require new constitutional concepts to deal with the protection of civil liberties. Otherwise, a downward cycle threatens’. Ackerman goes on to propose ‘a newly fashioned emergency regime’ so as to permit ‘short-term emergency measures[,] but draw[ing] the line against permanent restrictions’, thereby ‘rescu[ing] the concept [of emergency power] from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy’.44

Oren Gross has likewise announced, quoting Fred Schauer, that ‘the exception is no longer invisible’. Recent confrontations with ‘acute exigency’ have, according to Gross, demanded that law be reformulated in profound ways. ‘Taken together, the panoply of counterterrorism measures put in place since September 11th has created’, he writes, ‘ “an alternate system of justice” aimed at dealing with suspected terrorists’.45 Gross, however, diverges from Ackerman in the following significant respect. Although, according to Gross, ‘[s]eparation between normalcy and emergency along geographic lines has once again been resorted to’ and ‘the anomalous nature of Guantánamo . . . has been invoked once again’, those juridical mechanisms designed to keep emergency and normalcy separate have, in Gross’ view, repeatedly broken down.46 ‘[T]he exception has merged with the rule’, in Gross’ account, such that ‘belief in our ability to separate emergency from normalcy . . . is misguided and dangerous’.47

Gross nevertheless reaffirms the necessity and tenability of just such a distinction when he argues for the imperative of ‘going outside the legal order’ in order to tackle ‘extremely grave national dangers and threats’.48 While purporting to reject a normalcy-emergency distinction, Gross reinstates it in the form of a division between, on the one hand, ‘extremely grave . . . dangers’ such as require ‘extra-legal’ adventures and, on the other, conditions under which such adventures are not justifiable. Coming full circle, Gross argues that accommodating such extra-legal adventures will serve the ultimate goal of ‘preserv[ing] enduring fidelity to the law’ by fostering a combination of frank political self-explanation on the part of government officials, open and informed public deliberation, and robust individual rights protection on the part of courts in all but the overt extra-legal case.49

Among international lawyers, as opposed to US constitutional lawyers, reform discussions tracing their impetus to exigency have tended to focus on the question of international humanitarian law’s possible obsolescence.50 On the whole, however, international lawyers seem reluctant to engage in the sort of thought experiments in which Ackerman and Gross trade, that is, to entertain the prospect of international law’s wholesale reconfiguration to accommodate the apparent exigencies of recent times.

Regardless of the divergence in proposals that have emerged (or not) from the foregoing writings, these legal scholarly characterizations of Guantánamo Bay overwhelmingly rely on the archetype of the exception, taking a separation from normalcy and an apparent play-off between legal and political power as their starting points.51 In almost all of the preceding accounts, both the configuration of Guantánamo Bay as a detention camp, and the violence that has accompanied this, are imagined as nonlegal or quasi-legal phenomena. The encounter with such phenomena, moreover, is understood to necessitate some effort of conquest or accommodation on the part of law and lawyers, so as to close the circle of legal systematicity once more. But for efforts in this respect, they – law and lawyers – are imagined to stand well apart from the events under way at the Guantánamo Bay Naval Base, and (with a few significant exceptions, namely those who have advised the Bush administration) to remain exempt from responsibility for conditions there. It is this set of assumptions with which I will take issue in Section 3 of this article, after first discussing the further theorization of the exception, and its relationship to the detention camp, in the work of Giorgio Agamben.

B Giorgio Agamben and the State of the Exception

Giorgio Agamben has argued that the Military Order of November 2001 (by which the indefinite detention and trial of alleged enemy combatants at Guantánamo Bay was authorized) ‘produced a legally unnamable and unclassifiable being’ in the person of the detainee.52 This rendered each detainee ‘the object of a pure de facto rule’, subject to ‘a detention . . . entirely removed from the law’.53 According to Agamben, this embodies a juridical phenomenon – the ‘state of exception – that arose historically from the merging of two precepts: the extension of military power into the civil sphere (under the rubric of a state of siege) and the suspension of constitutional norms protecting individual liberties by governmental decree.54 This merger, Agamben characterizes as bringing into being a ‘kenomatic space, an emptiness of law’55 in which the sovereign affirms its authoritative locus within the legal order by acting to suspend the law altogether.56 As such, it is expressive of a ‘dominant paradigm of government in contemporary politics’.57 ‘[US President George W.] Bush’, Agamben claims, ‘is attempting to produce a situation in which the emergency becomes the rule, and the very distinction between peace and war . . . becomes impossible’.58

Unlike the commentators cited in the preceding section, Agamben is at pains to point out that this ‘state of exception’ is neither removed from the legal order, nor creates ‘a special kind of law’. Rather, it ‘defines law’s threshold or limit concept’.59 Agamben maintains that the ‘state of exception’ is juridical in form and effect – a vital scene for the development and deployment of governmental techniques of rule. Within the juridical order, the state of exception is said to embody an emptiness of law, ‘a space devoid of law, a zone of anomie in which all legal determinations . . . are deactivated’.60 More precisely, the state of exception is ‘neither external nor internal to the juridical order’; it is rather a ‘zone of indifference, where inside and outside do not exclude each other but rather blur with each other’.61 In Agamben’s account, law ‘employs the exception . . . as its original means of referring to and encompassing life’ so as to ‘bind[ ] and, at the same time, abandon[ ] the living being to law’.62 Law binds itself to ‘bare life’ – zo3 or biological life as such – in the space of the exception, whereby every outside, every limit of life and every possibility of transgression comes to be included within the purview of ‘a new juridico-political paradigm’.63

Of the November 2001 Military Order, Agamben observes that ‘it radically erases any legal status of the individual’ by reason of the detainees held thereunder enjoying neither ‘the status of POWs as defined by the Geneva Conventions’ nor ‘the status of persons charged with a crime according to American laws’.64 Accordingly, Agamben declares the operations at Guantánamo Bay ‘de facto proceedings, which are in themselves extra- or antijuridical’ but which have nonetheless ‘pass[ed] over into law’ such that ‘juridical norms blur with mere fact’.65

Agamben thus endorses, albeit in his own distinct terms, the claim that much of the legal scholarship surrounding Guantánamo Bay makes: that this jurisdiction represents a special, original case within the juridical order: ‘a zone of indistinction in which fact and law coincide’.66 In so doing, Agamben implies the existence, or preexistence, of a juridical zone – a space of non-exceptional character – in which fact and law do not coalesce; a secondary sphere in which maintaining ‘the very distinction between peace and war’ is or was possible. Agamben’s discussion of the ‘nourish[ment]’67 that the exception affords law suggests some other domain where, but for the exception, law might hold back (or be held back) from its voracious colonization of the preconditions of life and of politics (‘the normal situation’).68

Following the work of Duncan Kennedy and other legal scholars, however, one may read the juridical deployment of fact/law, peace/war, detainee/prisoner of war, law/politics, law/life ‘argument-bites’ as one of those operations by which ‘legal arguers generate the experience of necessity’.69 Read according to Kennedy’s semiotic schema, Agamben’s suggestion that, but for the state of exception, these sort of oppositions might hold and remain separable (however ‘fictitious[ly]’70) seems, itself, a necessitarian ‘argument-bite’ (state of exception/normal situation) open to cataloguing and interrogation within this very grid. This, as Kennedy points out, does not entail any overarching assertion of indeterminacy,71 nor does it indicate that Agamben’s analysis does not work or must be corrected.72 Agamben’s characterization of the state of the exception might work so well precisely because it more or less replicates, rather than upsets, familiar, necessitarian operations of legal argumentation.73 Reading Agamben in this way suggests that he might be ‘at least somewhat naïve about [legal argument’s] simultaneously structured and indeterminate (floating) character’, that is, about the characteristic operations of law and legal argument.74 From this vantage point, the ‘Eureka!’ tone of Agamben’s recent writings, his claim to be remedying the woeful shortcomings of public law theory, and his heralding the ‘deactivat[ion]’ of law’s hold on life and the ‘[de]contaminat[ion]’ of politics from law might be approached with some scepticism.75

One might question too Agamben’s assertion that the Guantánamo Bay detainees have been stripped of legal status, and thereby of all but bare life.76 Law frequently declares (indeed celebrates) a dearth of the normative where critical scrutiny discloses a hyper-regulatory abundance. Consider the rhetoric of the ‘free market’. The legal emptiness of the market is declared repeatedly and used to justify the erosion or suppression of regulatory initiatives pertaining to consumer protection, workers’ rights and environmental standards.77 At the same time, laws and rules of many sorts – securities laws, antitrust laws, contract laws, accounting standards, etc. – proliferate unabated in the very same space.78 In a comparable way, the records surrounding Guantánamo Bay suggest that the interactions of detainee and detainer in that jurisdiction are experienced as almost entirely pre-codified by the dictates of legal status.79 **It is by this means**, rather than, as Agamben has suggested, through ‘obliterat[ion] and contradict[ion]’ of the normative aspect of law, **that governmental violence is being effected**, or so it will be argued in Section 3 of this article.80

By focusing, at the outset, on the ‘abandoned’ being of the detainee in isolation (a humanitarian rather than a political impulse),81 Agamben neglects the particular, precarious experience of deciding that remains central to Schmitt’s theory of the exception. For Schmitt, on whose work Agamben purports to draw,82 the exception ‘cannot be circumscribed factually and made to conform to a preformed law’.83 The decision on and in the exception cannot, accordingly, be derived from the content of any code or norm, nor can responsibility for its taking be deflected; it is ‘a decision in the true sense of the word’.84 Agamben likewise maintains that the sovereign decision that occurs in the space of the exception – President Bush’s decision in relation to Guantánamo Bay, as he casts it at one instance85 – ‘is the position of an undecidable’.86 The ‘necessity’ triggering a state of the exception, Agamben writes, ‘ultimately come[s] down to a decision, but that on which it decides is, in truth, something undecidable in fact or law’.87 The law remains in force in the state of exception, Agamben maintains, but ‘the normative aspect of law’ is ‘obliterated’.88

Yet Agamben’s characterization of the state of exception amounts, in effect, to an insistence upon the historical and theoretical pre-codification of the decision thereon – pre-codification that negates its exceptionalism in Schmittian terms. Tracing a number of historical and etymological lineages, Agamben declares these to have culminated in an ‘extreme phase of the separation of the rights of man from the rights of the citizen’,89 such that ‘the state of exception has today reached its maximum worldwide deployment’.90 On one hand, Agamben declares the Military Order of November 2001 to have created a compulsion to decide upon the undecidable. On the other, he characterizes the space of that decision (and of detainee-detainer interaction) so as to suggest that its dynamics have been pre-codified and rendered ‘permanent’ by the onward march of history and language.91

Agamben imagines the camp (and the detention camps at Guantánamo Bay, specifically)92 as ‘the structure in which the state of the exception – the possibility of deciding on which founds sovereign power – is realized normally’.93 From this ‘extreme phase’, Agamben would lead his readers in ‘clear[ing] the way for a longoverdue renewal of categories in the service of a politics in which bare life is no longer separated and excepted, either in the state order or in the figure of human rights’.94 **What is this if not a** (partially) pre-codified program, or at least a **call for compliance** and implementation? **What is this if not an affirmation of the norm in the sense of an ‘attempt to spell out in detail the case in which law suspends itself’**?95 Agamben would nevertheless have us believe that the telos of his account runs in a contrary direction:

Of course, the task at hand is not to bring the state of exception back within its spatially and temporally defined boundaries in order to reaffirm the primacy of a norm and of rights that are themselves ultimately grounded in it . . . To live in the state of exception means . . . ceaselessly to try to interrupt the working of the machine that is leading the West toward global civil war.96

3 The Order of Exceptionalism and the Annihilation of the Exception

In arguing against Agamben and others that the experience of the exception anticipated by Schmitt is in retreat at the Guantánamo Bay Naval Base, it is important to acknowledge the extent to which the legal order of Guantánamo Bay often looks and sounds like a domain operating as one of ‘pure’ sovereign discretion and thus exceptionalism. Lawyers for the US Justice Department have asserted that the US President has unlimited discretion to determine the appropriate means for interrogating enemy combatants detained at Guantánamo Bay and elsewhere.97 Likewise, counsel for the US Government contended, before the US Supreme Court, that ‘[a] commander’s wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority’.98

By assuming the affect of exceptionalism, the normative order of Guantánamo Bay has soaked up critical energies with considerable effectiveness, for it is the exception that rings liberal alarm bells. Accordingly, **the focus falls on less than 600 persons being abused in Cuba, rather than upon the millions subjected to endemic sexual, physical and substance abuse in prisons across the democratic world**. In a similar way, attention is captured by the violation of rights of asylum-seekers, rather than by the over-representation of immigrants in the most informal and vulnerable sectors of the contemporary economy.99

For detention decisions taken at Guantánamo Bay to correspond to Schmitt’s understanding of the exception, however, ‘[t]he precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited’. ‘From the liberal constitutional point if view’, Schmitt wrote, ‘there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.’100 Yet in respect of Guantánamo Bay, both the content and competence of the US executive is repeatedly cast as pre-codified in presidential and governmental statements. At times, the ‘code’ is said to be that of ‘freedom’, ‘democracy’ or ‘justice’.101 At other times, it is that of God.102 On still further occasions, constitutional norms are invoked to frame a decision.103 The acts of the would-be sovereign, in each case, are characterized by repeated references to some higher source of competence and direction, overt deference to a pre-determined programme in the course of implementation, and insistence upon the conduit or vessel-like status of executive authority.

A little lower down the hierarchy, Secretary of the Navy Gordon England, speaking about the annual administrative review process at a press briefing on 23 June 2004, conceded: ‘[T]here’s no question there’s judgment involved. I doubt if many of these are black and white cases. I would expect most are going to be gray’. When pressed to define his role in the process, he confirmed that he was the one to make the final decision regarding release, transfer or continued detention in respect of each detainee, in the wake of an Administrative Review Board assessment. ‘I operate and oversee, organise the process, and I also make the ultimate decision’, he stated.104

Secretary England went on, however, to convey an impression of this judgment as one cabined by broad policy directives, notions of reasonableness, and the institutional demand for standardization: ‘[W]e do have some guidelines; . . . the boards do have some guidelines’, he assured the audience, ‘[e]very board doesn’t have a different standard’. He continued: ‘[I]t will be a judgment based on facts, data available . . . the best decision a reasonable person can make in this situation’. ‘[I]t’s what is the situation today and going forward in terms of a threat to America. And that is what we will decide, and that’s what the decision will be based on’.105

From expressing the decision he would be taking in personal, case-specific terms, Secretary England thus moved rapidly into the mode of generalization, depersonalization and necessity. ‘His’ decision became ‘the’ decision of the reasonable person, made not to assess the individual detainee’s responsibility, but rather to assess his or her proximity to a generalized ‘threat to America’.

Such an approach is also discernible in the Military Order issued by President Bush in 2001, pursuant to which the Military Commissions were convened before which Guantánamo Bay detainees were, until their suspension in November 2004, in the process of being tried. The ‘findings’ upon which the jurisdiction created by that order is predicated cast the steps taken thereby as inexorable reactions to a state of affairs of immeasurable proportions and persistent duration. Attacks by international terrorists are said to have ‘created a state of armed conflict that requires the use of the United States Armed Forces’.106 Likewise, it is said to be ‘necessary for individuals subject to [the] order . . . to be detained’, just as the issuance of the order itself is stated to be ‘necessary to meet the emergency’.107 Although expressed in terms of ‘an extraordinary emergency’, this order frames the Presidential decisions embodied in its text as matters of exigency – in other words, as non-decisions – dictated by a ‘state of armed conflict’. The only acknowledgement of discretion is buried in the final paragraph of the order’s ‘findings’, where the President is said to have ‘determined that an extraordinary emergency exists for national defense purposes’. The exercise of sovereign discretion is, accordingly, cast as a derivative matter: a question of classification after the fact.

One could, of course, read these claims as exercises in public relations, designed to cloak the deployment of unfettered sovereign power in the guise of liberal proceduralism. Yet regardless of how one might characterize the ‘real’ intent behind the military mandates governing Guantánamo Bay, the experience of decision-making reported by figures such as Secretary England seems, to a significant degree, to be one of deferral and disavowal – as though his job were more a matter of implementation than decision. Speaking of the determination, by the Combatant Status Review Tribunal, that one of the first 30 detainees to be heard by the Tribunal was not, in fact, an ‘enemy combatant’, Secretary England explained: ‘[I]n this case we – we set up a process, we’re following that process, we’re looking at all the data . . . Determinations were made he was an enemy combatant. We now have set up another process; more data is available. Time has gone by . . . I believe the process is doing what we asked the process to do, which is to look at the data as unbiased as you can, from a reasonable person point of view . . . and I believe the process is working . . . ’108 This is not the language of Schmittian exceptionalism. Rather, it is suggestive of efforts to construct a series of normatively airtight spaces in which the prospect of agonizing over an impossible decision may be delimited and, wherever possible, avoided. As such, the jurisdiction created at Guantánamo Bay is constituted, in Schmittian terms, in the liberal register of the norm (indeed, an overdetermined version thereof).109

This brings me to my final point, which is to sketch a reading of Schmitt whereby the experience of exceptional decisionism that his work evokes may be de-linked from the notion of self-founding, all-encompassing sovereignty and, as such, deployed against the centralization of political authority. I wish to suggest, moreover, that the political possibilities attendant upon such a de-frocked, wayward sense of the exceptional are ripe for reinvigoration in resistance to the initiatives being undertaken at Guantánamo Bay. **The legally sanctioned, indefinite detention of persons at Guantánamo Bay might be countered not through a return to the normative, but through an insistence upon the prevalence of the exception in these terms**.

4 Of the Exception, the Decision and Resistance

When Schmitt wrote of the ‘independent meaning of the decision’, he rejected the assumption (attributed to Robert von Mohl) ‘that a decision in the legal sense must be derived entirely from the content of a norm’. Likewise, as noted above, Schmitt observed that the exception occasioning a decision ‘cannot be circumscribed factually and made to conform to a preformed law’.110 He went on, nevertheless, to attempt to do precisely this. Envisaging the jurisdictional competence exercised in the decisional space of the exception as ‘necessarily unlimited’ and insisting on its correspondence with an absolute, indivisible sovereignty, Schmitt himself sought to anchor the exception to a preformed law of political order.111 Accordingly, the prospect of sovereignty operating as ‘a play between two [or more] parties’ was, in Schmitt’s assessment ‘contrary to all reason and all law’.112 ‘The law’ in this context seemingly referred to some predetermined mandate higher than the law of liberal constitutionalism that would, according to Schmitt’s account, always be susceptible to suspension by the sovereign.

Schmitt’s resistance to the diffusion of decisional power on the exception was undoubtedly bound up with his critique of the pluralism of the Weimar Republic and his hopes for a state order beyond it.113 Yet one need not follow the suggestive perplexities of Schmitt’s exception down his particular centralizing route. Instead one could identify the absence of precodification characteristic of the exception with immersion in the contingencies of the social and the ubiquity of power. Far from circumscribing the exception, acknowledgement of the immersion of decision-making in the social, and thus the impossibility of a sovereign state retaining a monopoly on decision, allows the exception to retain its exceptional character. Schmitt himself acknowledged this when he wrote: ‘[T]here is no irresistible highest or greatest power that operates according to the certainty of natural law’. 114

**Only when the question ‘who decides?’ forms part of the ‘concrete case that [the law] cannot factually determine in any definitive manner’ is the potential of the exception to ‘confound the unity and order of the rationalist scheme’ held open**, as Schmitt contemplated.115 Schmitt himself wrote: ‘[a] distinctive determination of which individual person or which concrete body can assume [the authority to decide] cannot be derived from the mere legal quality of a maxim’.116 Were authority to decide on the exception already known to be monopolized, then the exception would no longer embody ‘the power of real life [to] break[ ] through the crust of a mechanism that has become torpid by repetition’: that is, the crust of acceptance of the norm or, what Kierkegaard termed ‘comfortable superficiality’.117 Schmitt’s exception, accordingly, evokes a political experience that is amenable to delinking from Schmitt’s fetishism of the state. The exception, in this sense, arises from the vertiginous combination of, on one hand, responsibility assumed and, on the other, faith in one’s determinative authority and autonomy relinquished. In **this mode**, I believe, it **offers scope for interruption of the normative order of Guantánamo Bay.**

To delink the experience of deciding on/in the exception from the sovereign state is not to deny Schmitt’s claim that such a decision entails (indeed, derives its political character from) an effect of ‘group[ing] . . . according to friend and enemy’; that is, that every decision involves a would-be exclusion.118 Nor is it to configure the state as ‘an association that competes with other associations’, the sort of pluralism targeted by Schmitt in The Concept of the Political. 119 Rather, it is to argue that Schmitt’s decisionism is not necessarily contingent upon an insistence upon the state’s (or any selfsustaining sovereign’s) monopolization of all political decisions (that is, decisions in/ on the exception).120 Nor, for that matter, is it contingent upon any theorization of the structure of the political order per se (whatever Schmitt might say).121 Rather, it is possible to conceive – indeed, proceeding from Schmitt’s open characterization of the exception,122 it is almost impossible not to conceive – as both political and exceptional a much broader range of decisions, approached by or among a much broader range of agents, aggregations or arrogations, than those which Schmitt entertained as such. That is, in the sense of their ‘def[ying] general codification’, involving, potentially, a ‘think[ing] [of] the general with intense passion’ and thereby ‘becom[ing] instantly independent of argumentative substantiation’.123

5 Conclusion

International lawyers’ and activists’ appeals to the Geneva Conventions124 and the appeals by legal theorists, activists and commentators to the work of Giorgio Agamben125 both lay claim to the juridical phenomenon of Guantánamo Bay by way of invoking a code and seeking to follow that code to an exit point and/or a point of origination. The foregoing critique has been directed against this particular invocation of Agamben’s work, and its relationship to prevailing invocations of international law, rather than to that work or that law as such (amenable, as it is, to many readings that would defy the accounts presented above). In so far as it pursues this end, the effect of such commentary is to compound efforts to curtail the experience of deciding on/in the exception – efforts that are already well under way at Guantánamo Bay. For notwithstanding all the liberal heartache that they provoke, the law and legal institutions of Guantánamo Bay are working to negate the exception in tandem with, rather than in opposition to, what Schmitt identified as ‘[t]he tendency of liberal constitutionalism to regulate the exception as precisely as possible’.126

To corrode the experience of the exception in this way is to eviscerate the experience of politics as Schmitt characterized it. That is, it is to lose or avoid the experience of deciding in circumstances where no person or rule offers assurance that the decision that one takes will be the right one or, indeed, whether one does in fact exert the decisive authority that one envisages oneself to hold. The exception poses, as Schmitt observed, ‘a case of extreme peril’ because it permits both righteousness and self-knowledge to be placed at risk; because the decision taken remains ‘independent of the correctness of its content’.127 Notwithstanding all the talk of threats that surrounds Guantánamo Bay, it is this sense of peril that is lacking within its legal order. Moreover, it may be, in part, the absence of such a risk that contributes to the strange assurance with which Secretary England announces, as he did at a press briefing on 8 September, ‘we have a lot of very bad people’ in detention at Guantánamo Bay.128

It is, therefore, to a renewed sense of the exception and the decision that ‘emanates from nothingness’129 within law, rather than to a vehement insistence upon the norm, that I suggest turning in order to raise doubts about the work of Secretary Rumsfeld, Secretary England and the other ‘good’ people of Guantánamo Bay. By understanding Guantánamo Bay as a legal order dedicated to the annihilation or codification of the exception, we may come to appreciate the scope for political action within such a juristic zone. Recognizing in herself or himself Schmitt’s exceptional decision-maker, the functionary implementing a programme might come to experience that programme as a field of decisional possibility and impossibility, with all the danger and difference that that implies. It is precisely this experience that critics of the Guantánamo Bay programme might strive to evoke in Secretary England and in the other officials upon whose concrete decisions that programme depends, as well as in the audiences with which they – critics and officials alike – perpetually dance.

# 3

### 1NC

#### Authority over indefinite detention is the authority TO DETAIN enemy combatants

GLAZIER 06 Associate Professor at Loyola Law School in Los Angeles, California [David Glazier, ARTICLE: FULL AND FAIR BY WHAT MEASURE?: IDENTIFYING THE INTERNATIONAL LAW REGULATING MILITARY COMMISSION PROCEDURE, Boston University International Law Journal, Spring, 2006, 24 B.U. Int'l L.J. 55]

President Bush's decision to consider the terrorist attacks of September 11, 2001, as an act of war has significant legal ramifications. Endorsed by Congress in the Authorization for the Use of Military Force ("AUMF"), n1 this paradigm shift away from treating terrorism as a crime to treating terrorism as an armed conflict allows the United States to exercise "fundamental incidents of waging war." n2 Among these fundamental war powers are the authorities to detain enemy personnel for the duration of hostilities, to subject law of war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law of war, rather than over only those offenses defined in U.S. criminal statutes. n3

#### Restriction is a prohibition on an ACTION – the aff must restrict indefinite detention – not legal counsel

Northglenn 11 (City of Northglenn Zoning Ordinance, “Rules of Construction – Definitions”, http://www.northglenn.org/municode/ch11/content\_11-5.html)

Section 11-5-3. Restrictions. As used in this Chapter 11 of the Municipal Code, the **term "restriction**" shall mean a prohibitive regulation. Any use, activity, operation, building, structure or thing which is the subject of a restriction is prohibited, and no such use, activity, operation, building, structure or thing shall be authorized by any permit or license.

#### The aff restricts immigration authority – it’s a preclusive power of the Executive

Chow 11 (Samuel, JD Benjamin N. Cardozo School of Law, “THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS”, 19 Cardozo J. Int'l & Comp. L. 775 2011)

The facts that legitimized the Court's holding in Munaf are substantially different from the facts in Kiyemba. In Kiyemba, the D.C. Circuit Court also held that it did not have the authority to order the petitioners' release into the United States, but for different reasons from those espoused in Munaf. There, the circuit court determined that such release would violate the traditional distribution of immigration authority-a problem that did not exist with the American petitioners in Munaf.2 z As in Munaf, the government concluded that the Kiyemba petitioners' request amounted to a request for "release-plus. ' 23 Unlike Munaf, however, a troubling paradox is raised under the Kiyemba facts as it now stands, the Executive has determined that certain detainees being held unlawfully may, nonetheless, remain indefinitely detained.24 There are three primary elements that contributed to the Uighur 25 plaintiffs' dilemma. First, because of the high risk of torture, the Uighurs could not return to their home country of China.26 Second, diplomatic solutions had failed and no third-party country had been willing to accept them.27 Third, the D.C. Circuit Court determined that release into the United States would violate immigration laws and undermine the Executive's ability to administer those laws. 28 Lacking refuge and possibility of asylum, the Uighurs were forced to remain, indefinitely, as prisoners at Guantanamo Bay.

#### Vote neg

#### 1. Limits – It’s also not an authority of the president which explodes limits – they can talk about anything related to the 4 topic areas which makes research impossible.

#### 2. Ground – the courts have NO AUTHORITY to decide to release prisoners – this is necessary to CORE NEGATIVE GROUND about circumvention and interbranch conflict.

#### 3. Extra topicality is an independent voting issue – artificially inflates aff ground and forces us to read counterplans to get back to square one.

# 4

#### Immigration will pass – Boehner will allow a vote – Obama’s leadership is key

HUFFINGTON POST 10 – 26 – 13 GOP Rep Emerges As First House Republican To Join Democrats' Immigration Efforts, <http://www.huffingtonpost.com/2013/10/26/jeff-denham-immigration_n_4166654.html>

With less than three weeks to go in Congress' 2013 legislative calendar, one Republican serving in a heavily Hispanic district has moved to join House Democrats on immigration reform.

The Washington Post reported Saturday that Rep. Jeff Denham (R-Calif.) is ready to sign on with 185 of his House colleagues as a co-sponsor for a pathway to citizenship. The Senate passed an immigration reform bill in June with a strong 68-32 majority, but House Republican leaders have said it will not be considered without majority Republican support.

Denham would be the lone GOP rep at this point, but he does not see that circumstance lasting for very long.

“I’m the first Republican,” he told the Post. “I expect more to come on board.”

Denham's decision comes amid hope from leaders on both sides of the political aisle that a deal can come to fruition. On Wednesday, House Speaker John Boehner (R-Ohio) told reporters just that, vowing that it was an issue that needs to be addressed. One day later, President Barack Obama had his focus on the same issue, arguing that there was still time for immigration reform to make it through.

"If House Republicans have new and different additional ideas for how we should move forward, then we want to hear them," Obama said. "I'll be listening. ... But what we can't do is just sweep the problem under the rug one more time."

Denham also spoke about his decision during a Spanish-language interview with Univision's Jorge Ramos, set to air on "Al Punto" Sunday. Asked whether Obama was right that Boehner was the only thing preventing immigration reform from moving forward, Denham replied, "No."

"That's just not true," he said, adding that issues such as Syria and government spending have impeded progress on immigration reform. "You know, we need the president to show real leadership on this issue, as well as other issues that have really held up our schedule."

He said he expects Boehner to keep his word and bring immigration reform for a vote.

"I’m confident he’s going to bring it to the floor, but we’re going to continue to make sure that the entire country focuses on this, and that we actually get more Republicans that are willing to take a stand and get out there," Denham told Ramos. "Yes, it’s risky. We will get hit from the left and the right, and there will be a lot of different media that portrays us in different ways in our districts. But what is right for the American people and our economy should be the focus on the entire Congress."

Immigration reform activists are also hopeful. HuffPost's Elise Foley reported Friday that nearly 600 supporters will be in Washington next week, partaking in a series of vigils, marches and visits to congressional offices. Advocacy group PICO National Network is planning to knock on doors in nine districts, including Denham's 10th district in California, which sits to the south of Sacramento and east of the San Francisco bay area.

#### Plan kills Obama’s agenda

KRINER 10 Assistant professor of political science at Boston University [Douglas L. Kriner, “After the Rubicon: Congress, Presidents, and the Politics of Waging War”, page 276-77]

One of the mechanisms by which congressional opposition influences presidential cost-benefit calculations is by sending signals of American disunity to the target state. Measuring the effects of such congressional signals on the calculations of the target state is always difficult. In the case of Iraq it is exceedingly so, given the lack of data on the non-state insurgent actors who were the true “target” of the American occupation after the fall of the Hussein regime. Similarly, in the absence of archival documents, such as those from the Reagan Presidential Library presented in chapter 5, it is all but impossible to measure the effects of congressional signals on the administration’s perceptions of the military costs it would have to pay to achieve its objectives militarily.

By contrast. measuring the domestic political costs of congressional opposition, while still difficult, is at least a tractable endeavor. Chapter 2 posited two primary pathways through which congressional opposition could raise the political costs of staying the course militarily for the president. First. high-profile congressional challenges to a use of force can affect real or anticipated public opinion and bring popular pressures to bear on the president to change course. Second, congressional opposition to the president’s conduct of military affairs can compel him to spend considerable political capital in the military arena to the detriment of other major items on his programmatic agenda. On both of these dimensions, congressional opposition to the war in Iraq appears to have had the predicted effect.

**Immigration reform expands skilled labor --- spurs relations and growth in China and India.**

**Los Angeles Times, 11/9/2012** (Other countries eagerly await U.S. immigration reform, p. <http://latimesblogs.latimes.com/world_now/2012/11/us-immigration-reform-eagerly-awaited-by-source-countries.html>)

"Comprehensive immigration reform will see **expansion of skilled labor visas**," predicted B. Lindsay Lowell, director of policy studies for the Institute for the Study of International Migration at Georgetown University. A former research chief for the congressionally appointed Commission on Immigration Reform, Lowell said he expects to see at least a **fivefold increase** in the number of highly skilled labor visas that would provide "a **significant shot in the arm for India and China**." There is **widespread consensus among economists and academics** that skilled migration **fosters new trade and business relationships** between countries and **enhances links to the global economy**, Lowell said. "Countries like India and China weigh the opportunities of business abroad from their expats with the possibility of brain drain, and I think they still see the immigration opportunity as a bigger plus than not," he said.

**US/India relations averts South Asian nuclear war.**

**Schaffer**, Spring **2002** (Teresita – Director of the South Asia Program at the Center for Strategic and International Security, Washington Quarterly, p. Lexis)

Washington's increased interest in India since the late 1990s reflects India's economic expansion and position as Asia's newest rising power. New Delhi, for its part, is adjusting to the end of the Cold War. As a result, both giant democracies see that they can **benefit by closer cooperation**. For Washington, the advantages include a wider network of friends in Asia at a time when the region is changing rapidly, as well as a **stronger position** from which to help **calm possible future nuclear tensions in the region**. Enhanced trade and investment benefit both countries and are a **prerequisite for improved U.S. relations with India**. For India, the country's ambition to assume a stronger leadership role in the world and to maintain an economy that lifts its people out of poverty depends critically on good relations with the United States.

**China collapse causes nuclear war**

**Kaminski 7** (Antoni Z., Professor – Institute of Political Studies, “World Order: The Mechanics of Threats (Central European Perspective)”, Polish Quarterly of International Affairs, 1, p. 58)

As already argued, the economic advance of China has taken place with relatively few corresponding changes in the political system, although the operation of political and economic institutions has seen some major changes. Still, tools are missing that would allow the establishment of political and legal foundations for the modem economy, or they are too weak. The tools are efficient public administration, the rule of law, clearly defined ownership rights, efficient banking system, etc. For these reasons, many experts fear an economic crisis in China. Considering the importance of the state for the development of the global economy, the crisis would have serious global repercussions. Its political ramifications could be no less dramatic owing to the special position the military occupies in the Chinese political system, and the existence of many potential vexed issues in East Asia (disputes over islands in the China Sea and the Pacific). A potential hotbed of conflict is also Taiwan's status. Economic recession and the related destabilization of internal policies could lead to a political, or even military crisis. The likelihood of the **global escalation** of the conflict is high, as the interests of Russia, China, Japan, Australia and, first and foremost, the US clash in the region.

# 5

**Text: The Office of Legal Counsel should determine that the Executive Branch lacks the legal authority to deny federal legal counsel to immigrants indefinitely detained under suspicion of terrorism. The President should require the Office of Legal Counsel to publish any legal opinions regarding policies adopted by the Executive Branch. The Executive Branch should abide by all policies recommended by the Office of Legal Counsel.**

**The CP is competitive and solves the case—OLC rulings do not actually remove authority but nevertheless hold binding precedential value on the executive.**

Trevor W. Morrison, October 2010. Professor of Law, Columbia Law School. “STARE DECISIS IN THE OFFICE OF LEGAL COUNSEL,” Columbia Law Review, 110 Colum. L. Rev. 1448, Lexis.

On the other hand, an OLC that says "yes" too often is not in the client's long-run interest. n49 Virtually all of OLC's clients have their own legal staffs, including the White House Counsel's Office in the White House and the general counsel's offices in other departments and agencies. Those offices are capable of answering many of the day-to-day issues that arise in those components. They typically turn to OLC when the issue is sufficiently controversial or complex (especially on constitutional questions) that some external validation holds special value. n50 For example, when a department confronts a difficult or delicate constitutional question in the course of preparing to embark upon a new program or course of action that raises difficult or politically sensitive legal questions, it has an interest in being able to point to a credible source affirming the  [\*1462]  legality of its actions. n51 The in-house legal advice of the agency's general counsel is unlikely to carry the same weight. n52 Thus, even though those offices might possess the expertise necessary to answer at least many of the questions they currently send to OLC, in some contexts they will not take that course because a "yes" from the in-house legal staff is not as valuable as a "yes" from OLC. But that value depends on OLC maintaining its reputation for serious, evenhanded analysis, not mere advocacy. n53

The risk, however, is that OLC's clients will not internalize the long-run costs of taxing OLC's integrity. This is in part because the full measure of those costs will be spread across all of OLC's clients, not just the client agency now before it. The program whose legality the client wants OLC to review, in contrast, is likely to be something in which the client has an immediate and palpable stake. Moreover, the very fact that the agency has come to OLC for legal advice will often mean it thinks there is  [\*1463]  at least a plausible argument that the program is lawful. In that circumstance, the agency is unlikely to see any problem in a "yes" from OLC.

Still, it would be an overstatement to say that OLC risks losing its client base every time it contemplates saying "no." One reason is custom. In some areas, there is a longstanding tradition - rising to the level of an expectation - that certain executive actions or decisions will not be taken without seeking OLC's advice. One example is OLC's bill comment practice, in which it reviews legislation pending in Congress for potential constitutional concerns. If it finds any serious problems, it writes them up and forwards them to the Office of Management and Budget, which combines OLC's comments with other offices' policy reactions to the legislation and generates a coordinated administration position on the legislation. n54 That position is then typically communicated to Congress, either formally or informally. While no statute or regulation mandates OLC's part in this process, it is a deeply entrenched, broadly accepted practice. Thus, although some within the Executive Branch might find it frustrating when OLC raises constitutional concerns in bills the administration wants to support as a policy matter, and although the precise terms in which OLC's constitutional concerns are passed along to Congress are not entirely in OLC's control, there is no realistic prospect that OLC would ever be cut out of the bill comment process entirely. Entrenched practice, then, provides OLC with some measure of protection from the pressure to please its clients.

But there are limits to that protection. Most formal OLC opinions do not arise out of its bill comment practice, which means most are the product of a more truly voluntary choice by the client to seek OLC's advice. And as suggested above, although the Executive Branch at large has an interest in OLC's credibility and integrity, the preservation of those virtues generally falls to OLC itself. OLC's nonlitigating function makes this all the more true. Whereas, for example, the Solicitor General's aim of prevailing before the Supreme Court limits the extent to which she can profitably pursue an extreme agenda inconsistent with current doctrine, OLC faces no such immediate constraint. Whether OLC honors its oft-asserted commitment to legal advice based on its best view of the law depends largely on its own self-restraint.

2. Formal Requests, Binding Answers, and Lawful Alternatives. - Over time, OLC has developed practices and policies that help maintain its independence and credibility. First, before it provides a written opinion, n55 OLC typically requires that the request be in writing from the head or general counsel of the requesting agency, that the request be as specific and concrete as possible, and that the agency provide its own written  [\*1464]  views on the issue as part of its request. n56 These requirements help constrain the requesting agency. Asking a high-ranking member of the agency to commit the agency's views to writing, and to present legal arguments in favor of those views, makes it more difficult for the agency to press extreme positions.

Second, as noted in the Introduction, n57 OLC's legal advice is treated as binding within the Executive Branch until withdrawn or overruled. n58 As a formal matter, the bindingness of the Attorney General's (or, in the modern era, OLC's) legal advice has long been uncertain. n59 The issue has never required formal resolution, however, because by longstanding tradition the advice is treated as binding. n60 OLC protects that tradition today by generally refusing to provide advice if there is any doubt about whether the requesting entity will follow it. n61 This guards against "advice-shopping by entities willing to abide only by advice they like." n62 More broadly, it helps ensure that OLC's answers matter. An agency displeased with OLC's advice cannot simply ignore the advice. The agency might  [\*1465]  construe any ambiguity in OLC's advice to its liking, and in some cases might even ask OLC to reconsider its advice. n63 But the settled practice of treating OLC's advice as binding ensures it is not simply ignored.

In theory, the very bindingness of OLC's opinions creates a risk that agencies will avoid going to OLC in the first place, relying either on their general counsels or even other executive branch offices to the extent they are perceived as more likely to provide welcome answers. This is only a modest risk in practice, however. As noted above, legal advice obtained from an office other than OLC - especially an agency's own general counsel - is unlikely to command the same respect as OLC advice. n64 Indeed, because OLC is widely viewed as "the executive branch's chief legal advisor," n65 an agency's decision not to seek OLC's advice is likely to be viewed by outside observers with skepticism, especially if the in-house advice approves a program or initiative of doubtful legality.

OLC has also developed certain practices to soften the blow of legal advice not to a client's liking. Most significantly, after concluding that a client's proposed course of action is unlawful, OLC frequently works with the client to find a lawful way to pursue its desired ends. n66 As the OLC Guidelines put it, "when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives." n67 This is a critical component of OLC's work, and distinguishes it sharply from the courts. In addition to "providing a means by which the executive branch lawyer can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals," n68 in more instrumental terms the practice can also reduce the risk of gaming by OLC's clients. And that, in turn, helps preserve the bindingness of OLC's opinions. n69

 [\*1466]  To be sure, OLC's opinions are treated as binding only to the extent they are not displaced by a higher authority. A subsequent judicial decision directly on point will generally be taken to supersede OLC's work, and always if it is from the Supreme Court. OLC's opinions are also subject to "reversal" by the President or the Attorney General. n70 Such reversals are rare, however. As a formal matter, Dawn Johnsen has argued that "the President or attorney general could lawfully override OLC only pursuant to a good faith determination that OLC erred in its legal analysis. The President would violate his constitutional obligation if he were to reject OLC's advice solely on policy grounds." n71 Solely is a key word here, especially for the President. Although his oath of office obliges him to uphold the Constitution, n72 it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President's oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith. Yet even assuming the President has some space here, it is hard to see how his oath permits him to reject OLC's advice solely on policy grounds if he concludes that doing so is indefensible as a legal matter. n73 So the President needs at least a plausible legal basis for  [\*1467]  disagreeing with OLC's advice, which itself would likely require some other source of legal advice for him to rely upon.

The White House Counsel's Office might seem like an obvious candidate. But despite recent speculation that the size of that office during the Obama Administration might reflect an intention to use it in this fashion, n74 it continues to be virtually unheard of for the White House to reverse OLC's legal analysis. For one thing, even a deeply staffed White House Counsel's Office typically does not have the time to perform the kind of research and analysis necessary to produce a credible basis for reversing an OLC opinion. n75 For another, as with attempts to rely in the first place on in-house advice in lieu of OLC, any reversal of OLC by the White House Counsel is likely to be viewed with great skepticism by outside observers. If, for example, a congressional committee demands to know why the Executive Branch thinks a particular program is lawful, a response that relies on the conclusions of the White House Counsel is unlikely to suffice if the committee knows that OLC had earlier concluded otherwise. Rightly or wrongly, the White House Counsel's analysis is likely to be treated as an exercise of political will, not dispassionate legal analysis. Put another way, the same reasons that lead the White House to seek OLC's legal advice in the first place - its reputation for  [\*1468]  providing candid, independent legal advice based on its best view of the law - make an outright reversal highly unlikely. n76

Of course, the White House Counsel's Office may well be in frequent contact with OLC on an issue OLC has been asked to analyze, and in many cases is likely to make it abundantly clear what outcome the White House prefers. n77 But that is a matter of presenting arguments to OLC in support of a particular position, not discarding OLC's conclusion when it comes out the other way. n78The White House is not just any other client, and so the nature of - and risks posed by - communications between it and OLC on issues OLC is analyzing deserve special attention. I take that up in Part III. n79 My point at this stage is simply that the prospect of literal reversal by the White House is remote and does not meaningfully threaten the effective bindingness of OLC's decisions.

# Case

## Solvency

#### No evidence the aff does anything. They don’t have ev any immigrants are indefinitely detained.

#### Wartime will force Obama to resist. The intractable battle creates a national diversion and impairs military wartime decisions

Lobel 8—Professor of Law @ University of Pittsburgh [Jules Lobel, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War,” Ohio State Law Journal, Vol. 69, 2008, pg. 391]

The critical difficulty with a contextual approach is its inherent ambiguity and lack of clarity, which tends to sharply shift the balance of power in favor of a strong President acting in disregard of congressional will. For example, the application of the Feldman and Issacharoff test asking whether the congressional restriction makes realistic sense in the modern world would yield no coherent separation of powers answer if applied to the current Administration’s confrontation with Congress. It would undoubtedly embolden the President to ignore Congress’s strictures. The President’s advisors would argue that the McCain Amendment’s ban on cruel and inhumane treatment, or FISA’s requirement of a warrant, does not make realistic sense in the context of the contemporary realities of the war on terror in which we face a shadowy, ruthless nonstate enemy that has no respect for laws or civilized conduct, a conclusion hotly disputed by those opposed to the President’s policies. Focusing the debate over whether Congress has the power to control the treatment of detainees on the President’s claim that the modern realities of warfare require a particular approach will merge the separation of powers inquiry of who has the power with the political determination of what the policy ought to be. Such an approach is likely to encourage the President to ignore and violate legislative wartime enactments whenever he or she believes that a statute does not make realistic sense—that is, when it conflicts with a policy the President embraces. 53

The contextual approach has a “zone of twilight” quality that Justice Jackson suggested in Youngstown. 54 Often constitutional norms matter less than political realities—wartime reality often favors a strong President who will overwhelm both Congress and the courts. While it is certainly correct— as Jackson noted—that neither the Court nor the Constitution will preserve separation of powers where Congress is too politically weak to assert its authority, a fluid contextual approach is an invitation to Presidents to push beyond the constitutional boundaries of their powers and ignore legislative enactments that seek to restrict their wartime authority.

Moreover, another substantial problem with a contextual approach in the war powers context is that the judiciary is unlikely to resolve the dispute. 55 The persistent refusal of the judiciary to adjudicate the constitutionality of the War Powers Resolution strongly suggests that courts will often refuse to intervene to resolve disputes between the President and Congress over the constitutionality of a statute that a President claims impermissibly interferes with her conduct of an ongoing war. 56 This result leaves the political branches to engage in an intractable dispute over the statute’s constitutionality that saps the nation’s energy, diverts focus from the political issues in dispute, and endangers the rule of law.

Additionally, in wartime it is often important for issues relating to the exercise of war powers to be resolved quickly. Prompt action is not usually the forte of the judiciary.

If, however, a constitutional consensus exists or could be consolidated that Congress has the authority to check the President’s conduct of warfare, that consensus might help embolden future Congresses to assert their power. Such a consensus might also help prevent the crisis, chaos, and stalemate that may result when the two branches assert competing constitutional positions and, as a practical matter, judicial review is unavailable to resolve the dispute.

Moreover, the adoption of a contextual, realist approach will undermine rather than aid the cooperation and compromise between the political branches that is so essential to success in wartime. In theory, an unclear, ambiguous division of power between the branches that leaves each branch uncertain of its legal authority could further compromise and cooperation. However, modern social science research suggests that the opposite occurs. 57 Each side in the dispute is likely to grasp onto aspects or factors within the ambiguous or complex reality to support its own self-serving position. This self-serving bias hardens each side’s position and allows the dispute to drag on, as has happened with the ongoing, unresolved dispute over the constitutionality of the War Powers Resolution. Pg. 407-409

#### Stalemate creates an antiwar congressional coalition that guts our commitment to Afghanistan

Lieberman 10—Independent Democratic senator from Connecticut [Joseph I. Leiberman, “Back to a Bipartisan Foreign Policy,” Wall Street Journal, November 16, 2010, pg. http://tinyurl.com/m5z623w]

This year's midterm elections marked the first time since 9/11 that national security was not a major consideration for American voters. But it is precisely in the realm of foreign policy and national security that we may have the greatest opportunities for bipartisan cooperation between President Obama and resurgent Republicans in Congress.

Seizing these opportunities will require both parties to break out of a destructive cycle that has entrapped them since the end of the Cold War and caused them to depart from the principled internationalist tradition that linked Democratic presidents like Truman and Kennedy with Republican presidents like Nixon and Reagan.

During the 1990s, too many Republicans in Congress reflexively opposed President Clinton's policies in the Balkans and elsewhere. Likewise, during the first decade of the 21st century, too many Democrats came to view the post-9/11 exercise of American power under President Bush as a more pressing danger than the genuine enemies we faced in the world.

The larger truth was that the foreign policy practices and ideals of both President Clinton and Bush were within the mainstream of American history and values. And if one can see through the fog of partisanship that has continued to choke Washington since President Obama was elected in 2008, the same is true of the new administration as well.

President Obama has moved to the internationalist center on several key issues of national security. Although both parties are hesitant to acknowledge it, the story of the Obama administration's foreign policy is as much continuity as change from the second term of the Bush administration—from the surge in Afghanistan to the reauthorization of the Patriot Act, and from drone strikes against al Qaeda to a long-term commitment to Iraq.

Republicans have also stayed loyal to the internationalist policies they supported under President Bush. When they have criticized the Obama administration, it has reflected this worldview—arguing that the White House has not been committed enough in its prosecution of the war in Afghanistan or done enough to defend human rights and democracy in places like Iran and China.

The critical question now, as we look forward to the next two years, is whether this convergence of the two parties towards the internationalist center can be sustained and strengthened. There are three national security priorities where such a consensus is urgently needed.

The first is the war in Afghanistan. To his credit, President Obama last December committed more than 30,000 additional troops to Afghanistan as part of a comprehensive counterinsurgency campaign, despite opposition within the Democratic Party.

Having just returned from Afghanistan, I am increasingly confident that the tide there is turning in our favor, with growing signs of military progress. But as Gen. David Petraeus, the top U.S. commander in Afghanistan, has warned, success will come neither quickly nor easily, and there is still much tough fighting ahead. It is all but certain that no more than a small number of U.S. forces will be able to withdraw responsibly in July 2011, and that success in Afghanistan is going to require a long-term commitment by the U.S. beyond this date.

Sustaining political support for the war in Afghanistan therefore will increasingly require President Obama and Republicans in Congress to stand together. Failure to sustain this bipartisan alliance runs the risk that an alternative coalition will form in Congress, between antiwar Democrats and isolationist Republicans. That would be the single greatest political threat to the success of the war effort in Afghanistan, which remains critical to our security at home.

#### Nuclear instability and great power adventurism

Miller 12—Professor of International Security Affairs & Director for the Afghanistan-Pakistan program @ National Defense University [Paul D. Miller (Former Director for Afghanistan on the National Security Council staff under Presidents Bush and Obama), “It’s Not Just Al-Qaeda: Stability in the Most Dangerous Region,” World Affairs Journal, March-April 2012, pg. http://tinyurl.com/lnplsb7]

In fact, the war is only now entering its culminating phase, indicated by the willingness of both US and Taliban officials to talk openly about negotiations, something parties to a conflict do only when they see more benefit to stopping a war than continuing it. That means the war’s ultimate outcome is likely to be decided by the decisions, battles, and bargaining of the next year or so. And its outcome will have huge implications for the future of US national security. In turn, that means the collective decision to ignore the war and its consequences is foolish at best, dangerous at worst. While Americans have lost interest in the war, the war may still have an interest in America. Now is the time, more than ten years into the effort, to remind ourselves what is at stake in Afghanistan and why the United States must secure lasting stability in South Asia.

It was, of course, al-Qaeda’s attack on the US homeland that triggered the intervention in Afghanistan, but wars, once started, always involve broader considerations than those present at the firing of the first shot. The war in Afghanistan now affects all of America’s interests across South Asia: Pakistan’s stability and the security of its nuclear weapons, NATO’s credibility, relations with Iran and Russia, transnational drug-trafficking networks, and more. America leaves the job in Afghanistan unfinished at its peril.

The chorus of voices in the Washington policy establishment calling for withdrawal is growing louder. In response to this pressure, President Obama has pledged to withdraw the surge of thirty thousand US troops by September 2012—faster than US military commanders have recommended—and fully transition leadership for the country’s security to the Afghans in 2013. These decisions mirror the anxieties of the electorate: fifty-six percent of Americans surveyed recently by the Pew Research Center said that the US should remove its troops as soon as possible.

But it is not too late for Obama (who, after all, campaigned in 2008 on the importance of Afghanistan, portraying it as “the good war” in comparison to Iraq) to reformulate US strategy and goals in South Asia and explain to the American people and the world why an ongoing commitment to stabilizing Afghanistan and the region, however unpopular, is nonetheless necessary.

The Afghanistan Study Group, a collection of scholars and former policymakers critical of the current intervention, argued in 2010 that al-Qaeda is no longer in Afghanistan and is unlikely to return, even if Afghanistan reverts to chaos or Taliban rule. It argued that three things would have to happen for al-Qaeda to reestablish a safe haven and threaten the United States: “1) the Taliban must seize control of a substantial portion of the country, 2) Al Qaeda must relocate there in strength, and 3) it must build facilities in this new ‘safe haven’ that will allow it to plan and train more effectively than it can today.” Because all three are unlikely to happen, the Study Group argued, al-Qaeda almost certainly will not reestablish a presence in Afghanistan in a way that threatens US security.

In fact, none of those three steps are necessary for al-Qaeda to regain its safe haven and threaten America. The group could return to Afghanistan even if the Taliban do not take back control of the country. It could—and probably would—find safe haven there if Afghanistan relapsed into chaos or civil war. Militant groups, including al-Qaeda offshoots, have gravitated toward other failed states, like Somalia and Yemen, but Afghanistan remains especially tempting, given the network’s familiarity with the terrain and local connections. Nor does al-Qaeda, which was never numerically overwhelming, need to return to Afghanistan “in strength” to be a threat. Terrorist operations, including the attacks of 2001, are typically planned and carried out by very few people. Al-Qaeda’s resilience, therefore, means that stabilizing Afghanistan is, in fact, necessary even for the most basic US war aims. The international community should not withdraw until there is an Afghan government and Afghan security forces with the will and capacity to deny safe haven without international help.

Setting aside the possibility of al-Qaeda’s reemergence, the United States has other important interests in the region as well—notably preventing the Taliban from gaining enough power to destabilize neighboring Pakistan, which, for all its recent defiance, is officially a longstanding American ally. (It signed two mutual defense treaties with the United States in the 1950s, and President Bush designated it a major non-NATO ally in 2004.) State failure in Pakistan brokered by the Taliban could mean regional chaos and a possible loss of control of its nuclear weapons. Preventing such a catastrophe is clearly a vital national interest of the United States and cannot be accomplished with a few drones.

Alarmingly, Pakistan is edging toward civil war. A collection of militant Islamist groups, including al-Qaeda, Tehrik-e Taliban Pakistan (TTP), and Tehrik-e Nafaz-e Shariat-e Mohammadi (TNSM), among others, are fighting an insurgency that has escalated dramatically since 2007 across Khyber Pakhtunkhwa, the Federally Administered Tribal Areas, and Baluchistan. According to the Brookings Institution’s Pakistan Index, insurgents, militants, and terrorists now regularly launch more than one hundred and fifty attacks per month on Pakistani government, military, and infrastructure targets. In a so far feckless and ineffectual response, Pakistan has deployed nearly one hundred thousand regular army soldiers to its western provinces. At least three thousand soldiers have been killed in combat since 2007, as militants have been able to seize control of whole towns and districts. Tens of thousands of Pakistani civilians and militants—the distinction between them in these areas is not always clear—have been killed in daily terror and counterterror operations.

The two insurgencies in Afghanistan and Pakistan are linked. Defeating the Afghan Taliban would give the United States and Pakistan momentum in the fight against the Pakistani Taliban. A Taliban takeover in Afghanistan, on the other hand, will give new strength to the Pakistani insurgency, which would gain an ally in Kabul, safe haven to train and arm and from which to launch attacks into Pakistan, and a huge morale boost in seeing their compatriots win power in a neighboring country. Pakistan’s collapse or fall to the Taliban is (at present) unlikely, but the implications of that scenario are so dire that they cannot be ignored. Even short of a collapse, increasing chaos and instability in Pakistan could give cover for terrorists to increase the intensity and scope of their operations, perhaps even to achieve the cherished goal of stealing a nuclear weapon.

Although our war there has at times seemed remote, Afghanistan itself occupies crucial geography. Situated between Iran and Pakistan, bordering China, and within reach of Russia and India, it sits on a crossroads of Asia’s great powers. This is why it has, since the nineteenth century, been home to the so-called Great Game—in which the US should continue to be a player.

Two other players, Russia and Iran, are aggressive powers seeking to establish hegemony over their neighbors. Iran is seeking to build nuclear weapons, has an elite military organization (the Quds Force) seeking to export its Islamic Revolution, and uses the terror group Hezbollah as a proxy to bully neighboring countries and threaten Israel. Russia under Vladimir Putin is seeking to reestablish its sphere of influence over its near abroad, in pursuit of which it (probably) cyber-attacked Estonia in 2007, invaded Georgia in 2008, and has continued efforts to subvert Ukraine.

Iran owned much of Afghan territory centuries ago, and continues to share a similar language, culture, and religion with much of the country. It maintains extensive ties with the Taliban, Afghan warlords, and opposition politicians who might replace the corrupt but Western-oriented Karzai government. Building a stable government in Kabul will be a small step in the larger campaign to limit Tehran’s influence.

Russia remains heavily involved in the Central Asian republics. It has worked to oust the United States from the air base at Manas, Kyrgyzstan. It remains interested in the huge energy reserves in Kazakhstan and Turkmenistan. Russia may be wary of significant involvement in Afghanistan proper, unwilling to repeat the Soviet Union’s epic blunder there. But a US withdrawal from Afghanistan followed by Kabul’s collapse would likely embolden Russia to assert its influence more aggressively elsewhere in Central Asia or Eastern Europe, especially in the Ukraine.

A US departure from Afghanistan will also continue to resonate for years to come in the strength and purpose of NATO. Every American president since Harry Truman has affirmed the centrality of the Atlantic Alliance to US national security. The war in Afghanistan under the NATO-led International Security Assistance Force (ISAF), the Alliance’s first out-of-area operation in its sixty-year history, was going poorly until the US troop surge. Even with the limited success that followed, allies have complained that the burden in Afghanistan has been distributed unevenly. Some, like the British, Canadians, and Poles, are fighting a shooting war in Kandahar and Helmand, while others, like the Lithuanians and Germans, are doing peacekeeping in Ghor and Kunduz. The poor command and control—split between four regional centers—left decisionmaking slow and poorly coordinated for much of the war. ISAF’s strategy was only clarified in 2008 and 2009, when Generals David McKiernan and Stanley McChrystal finally developed a more coherent campaign plan with counterinsurgency-appropriate rules of engagement.

A bad end in Afghanistan could have dire consequences for the Atlantic Alliance, leaving the organization’s future, and especially its credibility as a deterrent to Russia, in question. It would not be irrational for a Russian observer of the war in Afghanistan to conclude that if NATO cannot make tough decisions, field effective fighting forces, or distribute burdens evenly, it cannot defend Europe. The United States and Europe must prevent that outcome by salvaging a credible result to its operations in Afghanistan—one that both persuades Russia that NATO is still a fighting alliance and preserves the organization as a pillar of US national security.

## Contention 1

### Impact calc

**Role of the ballot is to evaluate consequences before ethical justifications**

**Isaac 2** – Professor of Political Science, Indiana (Jeffrey, “Ends, Means and Politics,” Dissent 49.2, p 35-6, ebsco)

As writers such as Niccolo Machiav elli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one's intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with "good" may engender impotence, it is often the pursuit of "good" that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one's goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

#### Existence outweighs – gateway for valuation

**Gelven ’94** (Michael, Prof. Phil. – Northern Illinois U., “War and Existence: A Philosophical Inquiry”, p. 136-137)

The personal pronouns, like "I" and "We," become governed existentially by the possessive pronouns, like "ours," "mine," "theirs"; and this in turn becomes governed by the adjective "own." What is authentic becomes what is our own as a way of existing. The meaning of this term is less the sense of possession than the sense of belonging to. It is a translation of the German eigen, from which the term eigentlich (authentic) is derived. To lose this sense of one's own is to abandon any meaningfulness, and hence to embrace nihilism. To be a nihilist is to deny that there is any way of being that is our own; for the nihilist, what is one's own has no meaning. The threat here is not that what is our own may yield to what is not, but rather that the distinction itself will simply collapse. Unless I can distinguish between what is our own and what is not, no meaningfulness is possible at all. This is the foundation of the we-they principle. The pronouns in the title do not refer to anything; they merely reveal how we think. Like all principles, this existential principle does not determine specific judgments, any more than the principle of cause and effect determines what the cause of any given thing is. The we-they principle is simply a rule that governs the standards by which certain judgments are made. Since it is possible to isolate the existential meanings of an idea from the thinglike referent, the notions of we-ness and they-ness can be articulated philosophically. On the basis of this primary understanding, it is possible to talk about an "existential value," that is, the weight o. rank given to ways of existing in opposition to other kinds of value, such as moral or psychological values. But the principle itself is not, strictly speaking, a principle of value; it is an ontological principle, for its foundation is in the very basic way in which I think about what it means to be. The ground of the we-they principle is, quite simply, the way in which we think about being. Thus, it is more fundamental than any kind of evaluating or judging. One of the things that the authentic I can do, of course, is to concern itself with moral questions. Whether from a deontological sense of obligation or from a utilitarian projection of possible happiness, an I that considers these matters nevertheless is presupposed by them. Although authenticity and morality are distinct, a sense of who one is must precede a decision about how to act. Thus, the question of authenticity comes before the question of obligation. And since the worth of the I is generated from the prior worth of the we, it follows there can be no moral judgment that cancels out the worth of the I or the We. This is not to say that anything that benefits the we is therefore more important than what ought to be done. It is merely to say that any proper moral judgment will in fact be consistent with the integrity of the we. Thus, I would be morally prohibited from offending someone else merely for my own advantage, but no moral law would ever require me to forgo my existential integrity. This is true not only for moral questions but for any question of value whatsoever: all legitimate value claims must be consistent with the worth of the I and the We. It is only because my existence matters that I can care about such things as morality, aesthetics, or even happiness. Pleasure, of course, would still be preferable to pain, but to argue that one ought to have pleasure or even that it is good to have pleasure would simply reduce itself to a tautology: if I define pleasure as the satisfaction of my wants, then to say I want pleasure is tautological, for I am merely saying that I want what I want, which may be true but is not very illuminating. The existential worth of existing is therefore fundamental and cannot be outranked by any other consideration. Unless I am first meaningful, I cannot be good; unless I first care about who I am, I cannot genuinely care about anything else, even my conduct. To threaten this ground of all values, the worth of my own being, then becomes the supreme assault against me. To defend it and protect it is simply without peer. It is beyond human appeal or persuasion.

#### Structural violence is an obscure metaphor. Its use cannot lead to positive changes because it conflates distinct and generally unrelated problems of violence and poverty.

**Boulding ’77** (Kenneth, Faculty – U. Colorado Boulder, Former Pres. American Economic Association, Society for General Systems Research, and American Association for the Advancement of Science, Journal of Peace Research, “Twelve Friendly Quarrels with Johan Galtung”, 14:1, JSTOR)

Finally, we come to the great Galtung metaphors of 'structural violence' 'and 'posi- tive peace'. They are metaphors rather than models, and for that very reason are suspect. Metaphors always imply models and meta- phors have much more persuasive power than models do, for models tend to be the preserve of the specialist. But when a meta- phor implies a bad model it can be very dangerous, for it is both persuasive and wrong. The metaphor of structural violence I would argue falls right into this category. The metaphor is that poverty, deprivation, ill health, low expectations of life, a condi- tion in which more than half the human race lives, is 'like' a thug beating up the victim and 'taking his money away from him in the street, or it is 'like' a conqueror stealing the land of the people and reducing them to slavery. The implication is that poverty and its associated ills are the fault of the thug or the conqueror and the solution is to do away with thugs and conquerors. While there is some truth in the metaphor, in the modern world at least there is not very much. Vio- lence, whether of the streets and the home, or of the guerilla, of the police, or of the armed forces, is a **very different phenome- non from poverty**. **The processes which create and sustain poverty are not at all like the processes which create and sustain violence**, although like everything else in 'the world, everything is somewhat related to every- thing else. There is a very real problem of the struc- tures which lead to violence, but unfortu- nately Galitung's metaphor of structural vio- lence as he has used it has diverted atten- tion from this problem. Violence in the be- havioral sense, that is, somebody actually doing damage to somebody else and trying to make them worse off, is a 'threshold' phenomenon, rather like the boiling over of a pot. The temperature under a pot can rise for a long time without its boiling over, but at some 'threshold boiling over will take place. The study of the structures which un- derlie violence are a very important and much neglected part of peace research and indeed of social science in general. Thresh- old phenomena like violence are difficult to study because they represent 'breaks' in the systenm rather than uniformities. Violence, whether between persons or organizations, occurs when the 'strain' on a system is too great for its 'strength'. The metaphor here is that violence is like what happens when we break a piece of chalk. Strength and strain, however, especially in social systems, are so interwoven historically that it is very difficult to separate them. The diminution of violence involves two possible strategies, or a mixture of the two; one is Ithe increase in the strength of the sys- tem, 'the other is the diminution of the strain. The strength of systems involves habit, cul- ture, taboos, and sanctions, all these 'things which enable a system to stand lincreasing strain without breaking down into violence. The strains on the system 'are largely dy- namic in character, such as arms races, mu- tually stimulated hostility, changes in rela- tive economic position or political power, which are often hard to identify. Conflicts of interest 'are only part 'of the strain on a sys- tem, and not always the most important part. It is very hard for people ito know their in- terests, and misperceptions of 'interest take place mainly through the dynamic processes, not through the structural ones. It is only perceptions of interest which affect people's behavior, not the 'real' interests, whatever these may be, and the gap between percep- ti'on and reality can be very large and re- sistant to change. However, what Galitung calls structural violence (which has been defined 'by one un- kind commenltator as anything that Galitung doesn't like) was originally defined as any unnecessarily low expectation of life, on that assumption that anybody who dies before the allotted span has been killed, however unintentionally and unknowingly, by some- body else. The concept has been expanded to include all 'the problems of poverty, desti- tution, deprivation, and misery. These are enormously real and are a very high priority for research and action, but they belong to systems which are only peripherally related to 'the structures whi'ch produce violence. This is not to say that the cultures of vio- lence and the cultures of poverty are not sometimes related, though not all poverty cultures are cultures of violence, and cer- tainly not all cultures of violence are pover- ty cultures. But **the dynamics lof poverty and the success or failure to rise out of it are of a complexity far beyond anything which the metaphor of structural violence can offer**. While **the metaphor of structural violence** performed a service in calling attention to a problem, it **may have done a disservice in preventing us from finding the answer**.

### 1NC otherization

**No Impact---Democracy and economic liberalization checks the effects of state power---**the large-scale genocides that have occurred have only been from totalitarian regimes

**O’Kane,** 19**97** (“Modernity, the Holocaust, and politics”, Economy and Society, February, ebsco)

Chosen policies cannot be relegated to the position of immediate condition (Nazis in power) in the explanation of the Holocaust. Modern bureaucracy is not ‘intrinsically capable of genocidal action’ (Bauman 1989: 106). Centralized state coercion has no natural move to terror. In the explanation of modern genocides it is chosen policies which play the greatest part, whether in effecting bureaucratic secrecy, organizing forced labour, implementing a system of terror, harnessing science and technology or introducing extermination policies, as means and as ends. As Nazi Germany and Stalin’s USSR have shown, furthermore, those chosen policies of genocidal government turned away from and not towards modernity. The choosing of policies, however, is not independent of circumstances. An analysis of the history of each case plays an important part in explaining where and how genocidal governments come to power and analysis of political institutions and structures also helps towards an understanding of the factors which act as obstacles to modern genocide. But it is not just political factors which stand in the way of another Holocaust in modern society. Modern societies have not only pluralist democratic political systems but also economic pluralism where workers are free to change jobs and bargain wages and where independent firms, each with their own independent bureaucracies, exist in competition with state-controlled enterprises. In modern societies this economic pluralism both promotes and is served by the open scientific method. By ignoring competition and the capacity for people to move between organizations whether economic, political, scientific or social, Bauman overlooks crucial but also very ‘ordinary and common’ attributes of truly modern societies. It is these very ordinary and common attributes of modernity which stand in the way of modern genocides.

#### Group identification is inevitable. Evolution through most of human history.

**Shaw and Wong ’87** (R. Paul, U. British Columbia, and Yuwa, Simon Fraser U., International Studies Quarterly, “Ethnic Mobilization and the Seeds of Warfare: An Evolutionary Perspective”, 31:1, March, JSTOR, p. 11-12)

Summing up, we propose that inclusive fitness considerations (an ultimate cause), have combined with competition over scarce resources (environment), intergroup conflict and weapon development (changing environment), to (1) reinforce humanity's propensity to band together in groups of genetically related individuals, (2) predispose group members to act in concert for their own well-being, first and foremost, and (3) **promote xenophobia, fear, and antagonism among genetically related individuals towards strangers**. We interpret these responses as "emerging" or reinforcing proximate causes which shaped the structure of social behavior in hunter/gatherer groups **for 99 percent of humanity's existence**. In keeping with Shaw (1985a, 1985b), we submit that such behaviors have proven functional in terms of enhancing reproduction and survival of close relatives and that evolution has "taken these behaviors with it." This interpretation is not based on genetic reductionism—that a specific gene, or more appropriately an allele, is responsible for conflict/warfare. 3 It derives only from implications of inclusive fitness theory which, as Masters (1983) puts it, offers an alternative to explaining the evolution of several forms of behavior that is consistent with the widely observed tendency of animals to adjust their behavior to maximize their long-run reproductive success.

#### In-group favoritism inevitable

**Lobell et al, 9** – Steven E Lobell, Norrin M Ripsman, Jeffery W Talliaferro, professors of political science. (Neoclassical Realism, the State, and Foreign policy, pp 21.)

Neoclassical realism identifies states as the most important actors in international politics. Gilpin writes, “The essence of social reality is the group. The building blocks and ultimate units of social and political life are not the individuals of liberal thought nor the classes of Marxism [but instead] conflict groups.”63 Tribalism is an immutable aspect of the human condition and political life. Human beings cannot survive in an anarchic environment as individuals, but only as members of a larger group. While groups may come into existence for a variety of reasons, the one necessary condition is that they differ from some outside entity. Fear plays a crucial role in group formation, if only because physical security is a prerequisite for the pursuit of any other individual or collective goal. Metus hostilis or the fear of enemies – whether manifested in the form of xenophobia directed at internal minorities or a fear of external groups – is indispensable for the creation and maintenance of political groups, because it offers a way of overcoming collective action barriers. The concept of the metus hostilis appears, in one form or another, in the writings of Thucydides, Hobbes, Morgenthau, Waltz, and Mearsheimer.64 Research in the fields of evolutionary biology and social psychology provides additional support for long-standing realist assumptions about the centrality of in-group/out-group discrimination, intergroup comparison, and competition in political life.65

#### The link is not reverse causal. Giving legal counsel to immigrants won’t affect broader political movements. The social process of otherization is too complicated to be manipulated.

**Sterling-Folker, ‘9** – Jennifer, associate professor in the Department of Political Science at the University of Connecticut (Neoclassical Realism, the State, and Foreign policy, pp 115. Edited by Steven E Lobell, Norrin M Ripsman, Jeffery W Talliaferro (professors of poli sci). )

Neoclassical realism argues, then, that because inter-national competition has significant ramifications for intra-national competition and vice versa, these logics of competition should not be analytically isolated from one another. Group formation simultaneously links individual identity to internal political and economic decision-making practices and juxtaposes this identity to something normatively different, external, and, ultimately less desirable. These are constructed fictions, of course, since internal decision-making practices do not always work in the individual’s favor, and external difference may actually be normatively more desirable, but they are fictions dependent on the competitive interaction with other collectives, who are themselves engaged in similar intra-group processes. Given that group identities are never settled and remain ongoing processes, it is impossible to understand those processes and their particular contents unless we consider how group formation is always, simultaneously, driven by internal and external competitions that are crosscutting and interrelated. The interrelation between national internals and externals is one of the reasons why national group formation and transformation are not easily subject to conscious and rational manipulation. While leaders and particular subgroups certainly attempt such manipulations, crosscutting competitive developments, opportunities, and challenges will deflect and surprise both leaders and scholars alike. So too will the vehemence and power of national identities, which, once galvanized, can take off in unexpected, and at times deadly, directions that, in the dual context of intra- and inter-national competition, cannot be anticipated or controlled by leaders and subgroups. This should really come as no surprise, however, since the formation and maintenance of nations is ultimately an individual-level phenomenon, involving the construction and maintenance of individual identity which is bound to and developed within the context of group social practices and institutions. As Wilmer notes, “the ability to arouse powerful emotions by invoking solidarity on the basis of group identities derived from symbolic as much as (or more than) substantive differences remains as pervasive as ever in modern societies.”34 No wonder, then, that national identity is a force well beyond the control of rational actors and that while “politics must be understood through reason, yet it is not in reason that it finds its model,” because “the social world is always complicated, incongruous, and concrete.”35

## Contention 2

#### No spillover – aff doesn’t change pluralizatic politics in areas like global warming etc

# 2NC Law K

**There is zero risk of a solvency deficit. The law cannot solve**

**Aradau 07** (Claudia Aradau is in the Department of Politics and International Studies, Open University, Milton Keynes) Law Transformed: Guantánamo and the 'Other' Exception Author(s): Claudia Aradau Source: Third World Quarterly, Vol. 28, No. 3 (2007), pp. 489-501 Published by: Taylor & Francis, Ltd. Stable URL: http://www.jstor.org/stable/20454942 . Accessed: 09/07/2013 14:29

The consensus about the exceptionality of Guant'anamo has led, however, to a series of problematic positions. On the one hand, we have witnessed an increased endorsement of the norm, of international law and the rule of law generally against the sovereign practices of the USA. The norms that have been suspended, e.g. habeas corpus, the Geneva Conventions, the right to a fair trial and, more generally, international human rights law are to be reinstated as the limit of sovereign practices. The recent declaration by the Pentagon that Article 3 of the Geneva Convention is to be applied to the Guant'anamo detainees is an instance of law prevailing over sovereign exceptional practices.7 On the other hand, there has been a sustained engagement with what the 'state of exception' means. As the exception is constitutive of law, some have followed Agamben in the proposal to reduce the exception to the temporary status it had in modernity.8 In this argument, what differentiated fascist regimes from liberal democratic ones was not the absence of the exception in the latter, but its temporal expansion in the former. Others still have claimed the re-judicialisation of law against its suspension 'in order to heighten the discretionary power of those who are asked to rely on their own judgment to decide fundamental matters of justice, life and death' .9

**Yet all these well meaning strategies are aporetic**, as Butler has already noted in her analysis of Guant'anamo and the US exceptional practices in the 'war on terror'. **If the state of exception is triggered by the 'suspension of law' as a result of the 'extraordinary character of terror', reinstating law is an aporetic answer**. The Geneva Conventions, Butler argues, have already regarded 'terrorists' as 'outside the protocols' and even 'outside the law' by extending "'universal" rights only to those imprisoned combatants who belong to "recognizable" nation-states, but not to all people'.10

Thus, the Convention gives grounds for a distinction between legal and illegal combatants. Human rights law has its own exceptions and its own space of exceptional categorisations, which are constitutive of the order it delimits: non-state persons, spies, saboteurs or partisans. The category of 'unlawful combatant' has always been foundational to the laws of war, being applied to 'spies' or other irregular participants in an armed conflict.11 As Schmitt presciently warned, law cannot regulate irregular combatants: some categories remain 'exceptional' to the normative realm.12

However, the exception of international humanitarian or domestic constitutional law is not the same as the exceptional space of Guant'anamo or the exceptional practices of the 'war on terror'. This article explores the difference between these forms of exception and argues that, rather than constitutive of law, the space of current exceptions is indicative on an ongoing transformation of law.'3 Law transformed allows us to gauge the impact and extent of another exception, a concrete exception rather than a decisionistic one, **which cannot be reduced to the exceptional status of Guant'anamo**, but which is implicated in a particular functioning of law. To this purpose, I shall unpack the relation between the space of the camp and nomos, a term coined by Carl Schmitt and used by Agamben to refer to the exceptionality of the camp in modernity. Nomos as the understanding of law as both order and orientation of space undergirds a different understanding of the exception, as the 'other' exception that reveals the political consequences of the transformation of law. As the 'other' exception, Guant'anamo will be considered in the context of law transformed for the purposes of governing the social. I start by sketching out the understanding of law as nomos in Schmitt and the correlate definition of the exception. I move on to explore the implications of this 'other' exception for Guantianamo and the transformation of the function of law. Guant'anamo is not constitutive outside of law, but is itself governed through detailed rules and norms. Finally, I consider the political effects of law transformed and the concrete exception associated with it.

The camp and the nomos

The exception, developed by Schmitt in relation to sovereign authority 'Sovereign is he who decides on the exception'14-has gained renewed significance in the 'war on terror'. The exception appears as an anomaly, a limbo state between law and non-law, the realm where law is suspended. The camp is a hvbrid of law and fact in which the two have become indistinguishable.' Although Schmitt's insight on the arbitrary decision at the heart of law could become a tool for critical thought inasmuch as it made norms contestable and exposed their reliance on an initial decision and foundational violence,16 the new discussions of the exception vs the norm rely on different assumptions. Labelling Guant'anamo as the space of exception has led to the endorsement and fortification of the legal space of the norm**. Yet Schmitt made explicit the inextricable dependence and co-constitution of norm/law and exception**.

To understand the specificity of the new forms of exception in relation to the norm, I consider the camp as an object of governmentality. What matters in the governing of space is not the distinction between exception and law, but what practices are deployed and how. **Law is not suspended in Guant'anamo, but its function is changed**. In an analysis of the changing function of law with the rise of disciplinary and biopolitical power, Fran,ois Ewald has argued that **law does not disappear any more than sovereignty does; it becomes a technique of government, no longer constituted with respect to universal principles but 'with reference to the particular society it claims to regulate'**.17 Foucault's well known example concerns laws that do not just punish crimes, but take into account the psychological profile of the delinquent.18 Law would therefore relate to the nature of that which is given, it would be formulated in relation to its description and essence rather than universally and formally. Tony Blair's anti-social behaviour orders (ASBOs) are just one illustration of ever-expanding laws that attempt to govern conduct and set down a rule that is putatively expressive of the desires of society.

**Margulies and Metcalf 11** [\*Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago. Margulies expresses his thanks in particular to Sid Tarrow, Aziz Huq, Baher Azmy, Hadi Nicholas Deeb, Beth Mertz, Bonnie Honig, and Vicki Jackson. \*\*Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush. Metcalf expresses her thanks to Muneer Ahmad, Stella Burch Elias, Margot Mendelson, Jean Koh Peters, and Judith Resnik for their feedback, as well as to co-teachers Jonathan Freiman, Ramzi Kassem, Harold Hongju Koh and Michael Wishnie, whose dedication to clients, students and justice continues to inspire.] “Terrorizing Academia” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf

President Obama’s speech on national security May 21, 2009 at the National Archives is a case study in symbolic reassurance. As a number of observers have noted, despite Obama’s campaign promises, his post-9/11 counter-terror policies are most striking for their similarity to Bush’s, rather than their differences, which are mostly modest and incremental.130 Yet in his only major speech on national security, Obama—invoking the mythical power of the Constitution, the Declaration of Independence, and the Bill of Rights— said the Bush Administration “went off course” when it made a series of “hasty decisions” that “established an ad hoc legal approach for fighting terrorism… that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass.” To correct these mistakes, Obama said he had made “dramatic changes” that represented “a new direction from the last eight years,” and that his approach to terrorism, unlike that of his predecessor, was faithful to “our most fundamental values…[to] liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.” These changes, he vowed, would allow us to resume our timeless “American journey…toward a more perfect union.”131

This rhetoric built on both the anti-Bush narrative of indifference to the rule of law and Obama’s campaign promise of change. The speech left a powerful impression that the Obama Administration had reclaimed America’s moral standing, ending the abuses of a shameful past, and returning to our foundational principles. At least for those who are inclined to look to Obama as a trusted voice, his speech provided all the reassurance they could possibly want that change had finally come, and that the democratic process worked. Obama had reaffirmed their vision of American identity as a law-abiding and honorable nation, committed to a set of ideals that had been cast aside in the madness after 9/11. Lost in the comforting rhetoric, however, were the policy details, which included—for the first time in U.S. history—support for a preventive detention regime, something even the Bush Administration had not proposed.132

Among opponents to Bush-era policies, **Obama’s remarks produced quiescence and calm, a sense that the nation had finally “recovered” and that attention could safely be devoted to more pressing matters like the economy. But immediately after Obama’s speech, the cameras shifted to former Vice President Cheney, who offered a vigorous defense of Bush-era counter-terror policies, including in particular Guantánamo and the use of “enhanced interrogation techniques**.” Relying on his position as an insider with presumed access to secrets unknown to most Americans, Cheney hinted darkly of the dangers that would befall Americans now that President Obama was carving holes in the security net carefully woven by the Bush Administration.133 Republicans have hammered on this theme throughout Obama’s Administration (just as, it must be acknowledged, Democrats hammered on the theme of lawlessness and incompetence throughout the Bush Administration).134

Both speeches presented powerful narratives that appealed to particular audiences. But where Obama’s speech produced quiescence, Cheney’s produced the far more potent sense of threat. Once again, the nation was dangerously at risk and no more pressing matter faced the country than to thwart Obama’s recklessness.135 In reflecting on the relative impact of these two speeches, it is worth recalling the nature of counter-terror policy in the American imagination. It exists only as a collection of evocative images and ideas—black sites, torture, Guantánamo, terrorists—all of which are entwined with the most powerful political symbols in American life: race, national security, and the most elusive of all, “American values.” This intimate connection not only to our perceived safety but to our most potent national symbols means that Americans can be roused to attach inordinate significance to the debates, creating the appearance of a cultural consensus. But at the same time, their attachments will be superficial and easily changed, perhaps with bewildering rapidity.136

For the moment, it seems that the success of Obama’s narrative produced quiescence on the Left and alarm on the Right. **Conservatives were invigorated and mobilized just as the Left was abandoning the public square**. The result has been a counter-mobilization against Obama and his national security policies that was much more vitriolic and effective than anything during the campaign.137

**EVEN if they can drive lawlessness out of the state, it is just recreated underground**

**Gorelick 08** [Nathan Gorelick is a Ph.D. student of Comparative Literature at the State University of New York at Buffalo, where he holds a Presidential Fellowship. His research concerns theories of excess from Blanchot, Bataille and Foucault, and these thinkers' indebtedness to 18th century literatures of death and sexuality in England and France.] “Imagining Extraordinary Renditions: Terror, Torture and the Possibility of an Excessive Ethics in Literature” http://muse.jhu.edu/journals/theory\_and\_event/v011/11.2.gorelick.html

Extraordinary rendition, torture, the war on terror and the security of the state are thus various nodal points within the larger epistemology of liberal humanism -- a humanism that produces its dark chambers in its flight from the black void at its own core. Césaire's "thingification" is the product of this flight. **It would therefore be misguided to assume that the violence endemic to the war on terror can be cured by simply exposing its contradictions**. If images from Abu Ghraib become a common rallying cry against American militarism for disparate political factions around the globe, this cry is unheeded. If legal challenges to abominable state violence are successful, inventive re-interpretations of the law emerge, or lawlessness is simply driven underground. **Instead,** **it is necessary to challenge the systems of thought from which these practices emerge; the task of criticism must be to interrupt the epistemology of the burrow**.

The dark chamber (extraordinary rendition) ought to be understood as a metaphor for this epistemology, and ethical criticism must expose the totality of violence that this metaphor represents without enabling morally totalizing recuperations of the larger world ordering project currently embodied and deployed by the United States. Such a project entails a reconfiguration of the political terrain, or a reconstitution of the limits of political antagonism, but it also implies the need for an even more profound challenge to the ways in which discourses and representations of "self" and "other" are constituted. The task is not simple: as Michael J. Shapiro suggests, "Recognition of the extraordinary lengths to which one must go to challenge a given structure of intelligibility, to intervene in resident meanings by bringing what is silent and unglimpsed into focus, is an essential step toward opening up possibilities for a politics and ethics of discourse."45 If, however, an ethical regard is rendered possible through the work of rigorous critique -- through the establishment of a critical distance between the critic and the object of criticism -then the question for critique concerns the very nature of the ethical itself.

Because the crisis in representation by which the dark chamber is constantly being suppressed is constitutive of politics as such, then the problem, as Coetzee reminds us, is "how not to play the game by the rules of the state, how to establish one's own authority, how to imagine torture and death on one's own terms."46 Coetzee's suggestion that torture and death might be "imagined" implies that an effective intervention should not adopt a strategy of representational verisimilitude -- the goal should not be to take and disseminate photographs of Uzbek or Russian torture chambers, or to produce comprehensive, anatomical descriptions of horrendous state-sanctioned violence. Such efforts risk a different kind of satisfaction than that which is demonstrated by a smiling prison guard at Abu Ghraib, a voyeuristic pleasure in consuming images of a suffering other and a dangerous appropriation of that suffering as something to be easily understood and made one's own. The image thus commodified, its subject's pain is reduced to a political bargaining chip, a source for aesthetic elaboration, a sensational news item; the singularly unrepresentable experience of torture -- the reason for which it is inexcusable -- is polluted by its representation.

**The belief that our activism must occur through particular institutional appeals is what nullifies our ethical potential – that internal link turns the aff and creates new forms of otherization**

**Hershock ’99** [Scholar at the East-West Center. “Changing the Way Society Changes” The Journal of Buddhist Ethics, Vol 6. 1999. MUSE//JVOSS]

I have argued at some length (Hershock, 1999) that evaluating technologies on the basis of the tools they generate commits us to taking individual users and not the dramatic patterns of our lived interdependence as the primary locus of evaluation. In doing so, we effectively exclude from consideration precisely that domain in which the values informing our technological bias have the most direct bearing on the quality of our personal and communal conduct -- the movement of our shared narration. This has led to a stubborn and at times even righteous blindness regarding our slippage into a new era of colonization -- a colonization, not of lands or cultural spheres, but of consciousness as such. Indeed, the disposition to ignore the critical space of interdependence has been so thoroughly prevalent that the conditions of possibility for this new form of colonialism are widely championed -- in both the "developed" and the "developing" world -- as essential to establishing and safeguarding our individual and collective dignity, a crucial component of our growing equality and autonomy. By using the same information technologies employed by those individuals and institutions perpetrating and perpetuating the inequitable distribution of power and wealth, social activists may have enjoyed the opportunity to "beat them at their own game." However, they have also insured that everyone remains on the same playing field, playing the same game. Social activist successes have in this way blinded us to our deepening submission to technologies of control and the consequent depletion of precisely those attentive resources needed to meaningfully accord with our changing circumstances and contribute to them as needed. The costs of such blindness are practically limitless. The more "successful" a technology is, the more indispensable it becomes. That is, all technologies are liable to crossing thresholds beyond which they generate more new problems than they solve. Because technologies arise as patterns of value-driven conduct, they function as ambient amplifiers of our individual and cultural karma -- our experience-conditioning, intentional activity. In crossing the threshold of their utility, technologies create the karmic equivalent of a gravitational black hole, funneling all available attention-energy into themselves. For the dominant technological lineage correlated with the rise of liberal democracy and the imperative for social activism, this has meant an intensification of our karma for both controlling and being controlled. The more successfully we extend the limits of control, the more we extend the range of what can and must be controlled. In capsule form: the better we get at getting what we want, the better we get at wanting; but the better we get at wanting, the better we get at getting what we want, though we won't want what we get. This karmic circularity is pernicious, and the attention-energy invested in it to date has already brought about an epidemic depletion of precisely those resources needed for realizing dramatically satisfying -- and not merely factually sufficient -- solutions to our troubles, both personal and communal. The methodological irony of social activism is that it does not free us from dependence, but rather sustains its very possibility. This is not as paradoxical as it might sound. Insuring our independence by means of restructuring the institutions that mediate our contact with one another renders us dependent on those institutions -- on the structure, and hence the technologies, of our mediation. In consequence, our freedom comes to be increasingly dependent on the rationalization and regulation of our relationships with one another -- the realization of secure and yet generic co-existence. Just as the technology-driven transformation of societies in the industrial and post-industrial eras has involved an ever more detailed refinement of class divisions and labor categories, social activism advances through an ever more varied identification of *populations in need* of guaranteed freedoms. In valorizing both autonomy and equality, social activism denies our dramatic interdependence and tacitly endorses not-seeing (*avidyĀ*) or not-attending to the full set of conditions sponsoring our present situation. Although unique and deeply local patterns of injustice may be important in building a legal case, the work of social activism is not to encourage our liberating intimacy with such patterns. Rather, it consists of constructing legal mechanisms for exerting reformative control over institutional structures and the processes by means of which (generically) given individuals play or are forced to play particular roles therein. Unfortunately, as generic 'women', 'children', 'workers', or 'minorities', the beneficiaries of social activism are effectively cut off from precisely those aspects of their circumstances, relationships, and self-understanding which provide them with the resources necessary for locally realizing meaningful -- and not merely factual -- alternatives to the patterns of injustice in which they find themselves embedded. Among the products of social activism are thus virtual communities of individuals having no immediate and dramatically responsive relationship with one another -- individuals who have relinquished or been deprived of intimate connection with the causes and conditions of both their troubles and those troubles' meaningful resolution. With no intended disregard of the passion many activists bring to their work, social activism has aimed at globally re-engineering our political, economic and societal environments in much the same way that our dominant technological lineage has been committed to re-making our world -- progressively "humanizing" and "rationalizing" the abundantly capricious natural circumstances into which we human beings have found ourselves "thrown." This shared strategic genealogy is particularly disturbing, suggesting that -- like all technologies oriented toward control -- social activism is liable to rendering itself indispensable. If the history of social activism is inseparable from the rise and spread of influential technologies and subject to similar accelerating and retarding conditions, so is its future. Social Activist Strategy: Legally Leveraging Institutional Change While it has become common practice to decry the excessive legalism of contemporary societies, the ramifications of strategic collusion between social activism and the way we have technically and legally tooled our factual co-existence have remained largely unattended. In part, this is because the legal bias of social activism has appeared so incontestably "practical." Legislation allows for directly restructuring power relations and negotiating justice at the "highest" possible levels. The legislative process has also become the dominant technology for mediating divergent claims about the facts of our (often troubled) co-existence and for preserving "fair" definitions of 'being right' and 'being wronged'.

**That turns their ability to solve war powers**

**Margulies and Metcalf 11** [\*Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago. Margulies expresses his thanks in particular to Sid Tarrow, Aziz Huq, Baher Azmy, Hadi Nicholas Deeb, Beth Mertz, Bonnie Honig, and Vicki Jackson. \*\*Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush. Metcalf expresses her thanks to Muneer Ahmad, Stella Burch Elias, Margot Mendelson, Jean Koh Peters, and Judith Resnik for their feedback, as well as to co-teachers Jonathan Freiman, Ramzi Kassem, Harold Hongju Koh and Michael Wishnie, whose dedication to clients, students and justice continues to inspire.] “Terrorizing Academia” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf

But by framing the Bush Administration’s response as the latest in a series of regrettable but temporary deviations from a hypothesized liberal norm, the legal academy ignored the more persistent, and decidedly illiberal, authoritarian tendency in American thought to demonize communal “others” during moments of perceived threat. Viewed in this light, what the dominant narrative identified as a brief departure caused by a military crisis is more accurately seen as part of a recurring process of intense stigmatization tied to periods of social upheaval, of which war and its accompanying repressions are simply representative (and particularly acute) illustrations. It is worth recalling, for instance, that the heyday of the Ku Klux Klan in this country, when the organization could claim upwards of 3 million members, was the early-1920s, and that the period of greatest Klan expansion began in the summer of 1920, almost immediately after the nation had “recovered” from the Red Scare of 1919–20.7 Klan activity during this period, unlike its earlier and later iterations, focused mainly on the scourge of the immigrant Jew and Catholic, and flowed effortlessly from the anti-alien, anti-radical hysteria of the Red Scare. Yet **this period is almost entirely unaccounted for in the dominant post-9/11 narrative of deviation and redemption**, which in most versions glides seamlessly from the madness of the Red Scare to the internment of the Japanese during World War II.8

**And because we were studying the elephant with the wrong end of the telescope, we came to a flawed understanding of the beast**. In Part IV, we argue that the interventionists and unilateralists came to an incomplete understanding by focusing almost exclusively on what Stuart Scheingold called “the myth of rights”—the belief that if we can identify, elaborate, and secure judicial recognition of the legal “right,” political structures and policies will adapt their behavior to the requirements of the law and change will follow more or less automatically.9 Scholars struggled to define the relationship between law and security primarily through exploration of structural10 and procedural questions, and, to a lesser extent, to substantive rights. And they examined the almost limitless number of subsidiary questions clustered within these issues. Questions about the right to habeas review, for instance, generated a great deal of scholarship about the handful of World War II-era cases that the Bush Administration relied upon, including most prominently Johnson v. Eisentrager and Ex Parte Quirin. 11

Regardless of political viewpoint, a common notion among most unilateralist and interventionist scholars was that when law legitimized or delegitimized a particular policy, this would have a direct and observable effect on actual behavior. The premise of this scholarship, in other words, was that policies “struck down” by the courts, or credibly condemned as lawless by the academy, would inevitably be changed—and that this should be the focus of reform efforts. Even when disagreement existed about the substance of rights or even which branch should decide their parameters, **it reflected shared acceptance of the primacy of law**, often **to the exclusion of underlying social or political dynamics**. Eric Posner and Adrian Vermeule, for instance, may have thought, unlike the great majority of their colleagues, that the torture memo was “standard fare.”12 But their position nonetheless accepted the notion that if the prisoners had a legal right to be treated otherwise, then the torture memo authorized illegal behavior and must be given no effect.13

Recent developments, however, cast doubt on two grounding ideas of interventionist and unilateralist scholarship—viz., that post-9/11 policies were best explained as responses to a national crisis (and therefore limited in time and scope), and that the problem was essentially legal (and therefore responsive to condemnation by the judiciary and legal academy). One might have reasonably predicted that in the wake of a string of Supreme Court decisions limiting executive power, apparently widespread and bipartisan support for the closure of Guantánamo during the 2008 presidential campaign, and the election of President Barack Obama, which itself heralded a series of executive orders that attempted to dismantle many Bush-era policies, the nation would be “returning” to a period of respect for individual rights and the rule of law. Yet the period following Obama’s election has been marked by an increasingly retributive and venomous narrative surrounding Islam and national security. Precisely when the dominant narrative would have predicted change and redemption, we have seen retreat and retrenchment.

This conundrum is not adequately addressed by dominant strands of post-9/11 legal scholarship. In retrospect, **it is surprising that much post-9/11 scholarship appears to have set aside critical lessons from previous decades as to the relationship among law, society and politics**.14 Many scholars have long argued in other contexts that rights—or at least the experience of rights—are subject to political and social constraints, particularly for groups subject to historic marginalization. Rather than self-executing, rights are better viewed as contingent political resources, capable of mobilizing public sentiment and generating social expectations.15

**From that view, a victory in Rasul or Boumediene no more guaranteed that prisoners at Guantánamo would enjoy the right to habeas corpus than a victory in Brown v. Board**16 **guaranteed that** schools in **the South would be desegregated**.17 Rasul and Boumediene, therefore, should be seen as part (and probably only a small part) of a varied and complex collection of events, including the fiasco in Iraq, the scandal at the Abu Ghraib prison, and the use of warrantless wiretaps, as well as seemingly unrelated episodes like the official response to Hurricane Katrina. These and other events during the Bush years merged to give rise to a powerful social narrative critiquing an administration committed to lawlessness, content with incompetence, and engaged in behavior that was contrary to perceived “American values.”18 Yet the very success of this narrative, culminating in the election of Barack Obama in 2008, produced quiescence on the Left, even as it stimulated massive opposition on the Right. The result has been the emergence of a counter-narrative about national security that has produced a vigorous social backlash such that most of the Bush-era policies will continue largely unchanged, at least for the foreseeable future.19

**Two external disads – First is sidestepping; it ignores the major issues and says legal confrontation can resolve our issues. This re-entrenches a society that ignores society at large. Second is legitimization; the aff glorifies the war on terrorism and only blames the tactics**

**Gorelick 08** [Nathan Gorelick is a Ph.D. student of Comparative Literature at the State University of New York at Buffalo, where he holds a Presidential Fellowship. His research concerns theories of excess from Blanchot, Bataille and Foucault, and these thinkers' indebtedness to 18th century literatures of death and sexuality in England and France.] “Imagining Extraordinary Renditions: Terror, Torture and the Possibility of an Excessive Ethics in Literature” http://muse.jhu.edu/journals/theory\_and\_event/v011/11.2.gorelick.html

The problem with legal confrontations, though, is not simply that they continue to be side-stepped by the offending parties, but that they presuppose the legitimacy of the war on terror, a project which has become a floating signifier for neoconservative political agendas, easily attaching itself to any effort toward the advancement of Pax Americana, the geopolitical hegemony of a militarized, neoliberal United States. The most disturbing and violent of state secrets remain tenable, necessary war-fighting tactics precisely because they are secret, and they will not be revealed through any strategy of confrontation or representation that acquiesces to the ground rules for political participation laid out by the state. **Any such strategy grants legitimacy to the violent state apparatus of which torture is only a small part, and strengthens the humanitarian legitimacy of neoimperialism**. Prior to the publication of his report to the Council of Europe, Marty demonstrated the truth of this contention when he explained the "moral obligation" to reveal any illegal detention or interrogation activities: "We do not want to weaken the fight against terrorism... but this fight has to be fought by legal means. Wrongdoing only gives ammunition to the terrorists and their sympathizers."31 Here, Marty is clearly not criticizing the larger project underpinning the war on terror; rather the specific tactics through which this project attempts to actualize itself are considered in need of adjustment, so that the moral authority of American expansionism may be preserved.

**AND combination is impossible**

**Zizek ‘4** [Slav. Soc Sci Ljublana. Conversations with Zizek, 2004//JVOSS]

On the one hand, I do not consider myself an extreme Stalinist philosopher. That is to say, it’s clear where I stand. I don’t believe in combining things. I hate this approach of taking a little bit from Lacan, a little bit from Foucault, a little bit from Derrida. No, I don’t believe in this; I believe in clear-cut positions. I think that the most arrogant position is this apparent, multidisciplinary modesty of ‘what I am saying now is not unconditional, it is just a hypothesis’, and so on. It really is a most arrogant position. I think that the only way to be honest and to expose yourself to criticism is to state clearly and dogmatically where you are. You must take the risk and have a position.

**Legal debate displaces the question of effective personal solutions**

**Contreras and Rasilla 08** Francisco J. CONTRERAS Prf. Philosophy of Law @ Seville AND Ignacio de la RASILLA Ph.D. candidate in international law, Graduate Institute of International Studies, Geneva ‘8 “On War as Law and Law as War” Leiden Journal of International Law Vol. 21 Issue 3 p. 779-780 [Gender paraphrased]

War’s ubiquity, its discontinuity, and the blurring of its outline are not without psychological and moral consequences in the military: ‘Experts have long observed that when warfare itself seems to have no clear beginning or end, no clear battlefield, no clear enemy, military discipline, as well as morale, breaks down’ (p. 119). This dispiriting confusion that affects soldiers also concerns the international lawyer, who sees the old rules of jus belli evaporate and be replaced by much vaguer ‘standards’. The last pages of Of War and Law convey, in fact, a clear feeling of defeat or loss, showing the demoralization of the international lawyer who still tries to take the law of war seriously: ‘How can ethical absolutes and instrumental calculations be made to lie down peacefully together? How can one know what to do, how to judge, whom to denounce?’ (p. 117). The former categorical imperatives (‘thou shalt not bomb cities’, ‘thou shalt not execute prisoners’, etc.) give way to an elastic and blurred logic of more and less, within which instrumental might triumphs definitively over the ethical (p. 132).89 As the new flexible ‘standards’ seem more susceptible to strategic exploitation and modulation than do the old strict rules, the various actors will play with the labels of jus belli – now definitively versatile – according to their strategic needs: Ending conflict, calling it occupation, calling it sovereignty – then opening hostilities, calling it a police action, suspending the judicial requirements of policing, declaring a state of emergency, a zone of insurgency – all these are also tactics in the conflict. . . . All these assertions take the form of factual or legal assessments, but we should also understand them as arguments, at once messages and weapons. (p. 122)90 Kennedy reiterates a new aspect of the ‘weaponization of the law’: the legal qualification of facts appears as a means of conveying messages to the enemy and to public opinion alike, because in the age of immediate media coverage, wars are fought as much in the press and opinion polls as they are on the battlefield. The skilled handling of jus belli categories will benefit one side and prejudice the other (p. 127);91 as the coinage of the very term ‘lawfare’ seems to reflect, the legal battle has already become an extension of the military one (p. 126).92 In cataloguing some of the dark sides of the law of war, Kennedy also stresses how the legal debate tends to smother and displace discussions which would probably be more appropriate and necessary. Thus the controversy about the impending intervention in Iraq, which developed basically within the discursive domain of the law of war, largely deprived lawyers of participating in an in-depth discussion on the neo-conservative project of a ‘great Middle East’ – more democratic and Western-friendly and less prone to tyranny and terrorism – the feasibility of ‘regime change’, an adequate means of fostering democracy in the region, and so on: We never needed to ask, how should regimes in the Middle East . . . be changed? Is Iraq the place to start? Is military intervention the way to do it? . . .Had our debates not been framed by the laws of war, we might well have found other solutions, escaped the limited choices of UN sanctions, humanitarian aid, and war, thought outside the box. (p. 163) 6. CONCLUSIONS Those familiar with the author’s previous works93 will certainly have already identified the Derridean streak in Kennedy’s thought in the underlying claim that every discourse generates dark zones and silences or represses certain aspects, renders the formulation of certain questions impossible (a Foucauldian streak in the author could be suspected as well: every discourse – be it administrative, legal, medical, or psychiatric – implies simultaneously ‘knowledge’ and ‘power’; each discourse amounts somehow to a system of domination, insofar as it defines ‘conditions of admission’ into the realm of the legally valid, the ‘sane society’, etc.).94 In the picture resulting from the application of this analytical framework to the domain of the use of force, international lawyers and humanitarian professionals appear gagged, restricted by the language they try to utter effectively to themselves and others. As if the legal language had imposed on them its own logic, it now speaks through their voices and what is, evidently, once again, the Marxian-structuralist idea of cultural products gaining a life of their own and turning against their own creators. Kennedy, however, does not stop at noting that jurists have become ‘spoken’ by their language amidst a dramatically changing war scenario. More disquietingly, he stresses the evident corollary of the previous proposition: the evaporation of a sense of individual moral responsibility: [A]ll these formulations, encouraged by the language of law, displace human responsibility for the death and suffering of war onto others . . . . In all these ways, we step back from the terrible responsibility and freedom that comes with the discretion to kill. . . .Violence and injury have lost their author and their judge as soldiers, humanitarians, and statesmen [statespeople] have come to assess the legitimacy of violence in a common legal and bureaucratic vernacular. (pp. 168–9) While depersonalization and a lack of sense of personal responsibility are evidently also favoured by external structural factors, among which is the bureaucratic political complexity of modern states themselves (p. 17),96 Kennedy stresses that the language of international law would thus trivialize and conceal the gravity of decisions: In all these ways, we step back from the terrible responsibility and freedom that comes with the discretion to kill. . . . The problem is loss of the human experience of responsible freedom and free decision – of discretion to kill and let live. (p. 170)

**You make it worse**

**Margulies and Metcalf 11** [\*Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago. Margulies expresses his thanks in particular to Sid Tarrow, Aziz Huq, Baher Azmy, Hadi Nicholas Deeb, Beth Mertz, Bonnie Honig, and Vicki Jackson. \*\*Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush. Metcalf expresses her thanks to Muneer Ahmad, Stella Burch Elias, Margot Mendelson, Jean Koh Peters, and Judith Resnik for their feedback, as well as to co-teachers Jonathan Freiman, Ramzi Kassem, Harold Hongju Koh and Michael Wishnie, whose dedication to clients, students and justice continues to inspire.] “Terrorizing Academia” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf

President Obama’s speech on national security May 21, 2009 at the National Archives is a case study in symbolic reassurance. As a number of observers have noted, despite Obama’s campaign promises, his post-9/11 counter-terror policies are most striking for their similarity to Bush’s, rather than their differences, which are mostly modest and incremental.130 Yet in his only major speech on national security, Obama—invoking the mythical power of the Constitution, the Declaration of Independence, and the Bill of Rights— said the Bush Administration “went off course” when it made a series of “hasty decisions” that “established an ad hoc legal approach for fighting terrorism… that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass.” To correct these mistakes, Obama said he had made “dramatic changes” that represented “a new direction from the last eight years,” and that his approach to terrorism, unlike that of his predecessor, was faithful to “our most fundamental values…[to] liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.” These changes, he vowed, would allow us to resume our timeless “American journey…toward a more perfect union.”131

This rhetoric built on both the anti-Bush narrative of indifference to the rule of law and Obama’s campaign promise of change. The speech left a powerful impression that the Obama Administration had reclaimed America’s moral standing, ending the abuses of a shameful past, and returning to our foundational principles. At least for those who are inclined to look to Obama as a trusted voice, his speech provided all the reassurance they could possibly want that change had finally come, and that the democratic process worked. Obama had reaffirmed their vision of American identity as a law-abiding and honorable nation, committed to a set of ideals that had been cast aside in the madness after 9/11. Lost in the comforting rhetoric, however, were the policy details, which included—for the first time in U.S. history—support for a preventive detention regime, something even the Bush Administration had not proposed.132

Among opponents to Bush-era policies, **Obama’s remarks produced quiescence and calm, a sense that the nation had finally “recovered” and that attention could safely be devoted to more pressing matters like the economy. But immediately after Obama’s speech, the cameras shifted to former Vice President Cheney, who offered a vigorous defense of Bush-era counter-terror policies, including in particular Guantánamo and the use of “enhanced interrogation techniques**.” Relying on his position as an insider with presumed access to secrets unknown to most Americans, Cheney hinted darkly of the dangers that would befall Americans now that President Obama was carving holes in the security net carefully woven by the Bush Administration.133 Republicans have hammered on this theme throughout Obama’s Administration (just as, it must be acknowledged, Democrats hammered on the theme of lawlessness and incompetence throughout the Bush Administration).134

Both speeches presented powerful narratives that appealed to particular audiences. But where Obama’s speech produced quiescence, Cheney’s produced the far more potent sense of threat. Once again, the nation was dangerously at risk and no more pressing matter faced the country than to thwart Obama’s recklessness.135 In reflecting on the relative impact of these two speeches, it is worth recalling the nature of counter-terror policy in the American imagination. It exists only as a collection of evocative images and ideas—black sites, torture, Guantánamo, terrorists—all of which are entwined with the most powerful political symbols in American life: race, national security, and the most elusive of all, “American values.” This intimate connection not only to our perceived safety but to our most potent national symbols means that Americans can be roused to attach inordinate significance to the debates, creating the appearance of a cultural consensus. But at the same time, their attachments will be superficial and easily changed, perhaps with bewildering rapidity.136

For the moment, it seems that the success of Obama’s narrative produced quiescence on the Left and alarm on the Right. **Conservatives were invigorated and mobilized just as the Left was abandoning the public square**. The result has been a counter-mobilization against Obama and his national security policies that was much more vitriolic and effective than anything during the campaign.137

**AND cooption DA – the system will change the aff before the aff can change the system. This makes solvency impossible**

**Martin 98** [Brian Martin is Professor of Social Sciences at the University of Wollongong, Australia.] Information liberation Challenging the corruptions of information power by Brian Martin London: Freedom Press, 1998 189 pages, ISBN 0 900384 93 X http://www.bmartin.cc/pubs/98il/ilall.html

"Power tends to corrupt, and absolute power corrupts absolutely." This familiar saying originated as a comment in a letter written by Lord Acton, an English historian who lived from 1834 to 1902. His full name was John Emerich Edward Dahlberg Acton. He was a fierce opponent of state power, whether the state was democratic, socialist or authoritarian. Acton's aphorism has outlasted his other contributions because it captures an insight that rings true to many people. Power certainly seems to corrupt quite a few politicians. Early in their careers, many of them are eager to change the system. They want to help the poor and disadvantaged and to root out corruption and unjust privilege. Yet when they actually get into positions of power, it's a different story. The old slogans become memories. Instead, it becomes a higher priority to placate and reward powerful bureaucracies in both the government and corporate sectors. Most of all, it becomes a priority to increase the power and wealth of politicians themselves. In the 1960s the so-called "new left" demanded power to the people. But how to achieve it? Some activists advocated the "long march through institutions" -- in other words, left-wingers should work through the system to get into positions of power, climbing the ladder in government bureaucracies, corporations, political parties, professions and universities. Then they would be able to bring about desirable social change. Unfortunately, this strategy doesn't work. The institutions change the activists long before the activists have a chance to change the institutions. The idea that power tends to corrupt has an intuitive appeal, but is there anything more to it? A few social scientists have studied the corrupting effects of power. Pioneering sociologist Robert Michels studied the tendency of political parties to become less democratic. Even in the most revolutionary parties, the leaders have gained greater power and become entrenched in their positions. The party organisation becomes an end in itself, more important than the party's original aim. Michels concluded that every organisation is affected by these tendencies.[1] Pitirim Sorokin and Walter Lunden examined the behaviour of powerful leaders, such as kings of England. They found that those with the greatest power were far more likely to commit crimes, such as theft and murder, than ordinary citizens.[2] This is striking evidence that power tends to corrupt. But why does power corrupt? For the answer, it is worth consulting the excellent work by David Kipnis, a psychology researcher at Temple University. For a person to be autonomous is widely considered to be a good thing. It is a feature of being fully human. When a person exercises power over others, the powerholder gains the impression that the others do not control their own behaviour or, in other words, they are not autonomous. Hence, they are seen as less worthy. In short, a person who successfully exercises power over others is more likely to believe that these others are less deserving of respect. They thus become good prospects to be exploited. Kipnis organised numerous experiments to explore such dynamics. In one experiment, a "boss" oversaw the work of "subordinates" in a simulated situation. The experiment was contrived so that all subordinates did exactly the same work. But the subordinate who was thought to be self-motivated was rated to have done better work than the subordinate who was thought to have done the work only under instruction. As well as laboratory studies, Kipnis examined the effects of power on the powerholder through studies of couples, managers and protagonists in Shakespeare's dramas. The results were always the same. Kipnis followed through the implications of such evidence in a number of areas involving technology, including medical technology, workplace technology and the technology of repression. For example, technologies for surveillance or torture serve to control others: that is the obvious effect. But in addition, the psychology of the powerholder is changed when the technology promotes the reality or impression that others lack autonomy. Those subject to the technology are treated as less worthy, and any prospects for equality are undermined.

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#### immigration is the fallback

Hernandez 11 (Ernesto A. Hernandez, Chapman University School of Law Professor of Law, “Kiyemba, Guantanamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World”, Available at: <http://works.bepress.com/ernesto_hernandez/17>)

Immigration law doctrine provides a fallback in the form of an established set of legal tools to exclude foreign nationals, even after the Supreme Court found that significant constitutional and extraterritorial checks apply to these Guantánamo detentions.13 This fallback quality of immigration law now stands out, after three Supreme Court cases since 2004 have checked the Guantánamo detention program14 and detainees have won a majority of petitions for habeas release since Boumediene.15 The Kiyemba detainees,16 Yusef Abbas, Hajiakbar Abdulghupur, Saidullah Khalik, Ahmed Mohamed, and Abdul Razak,17 share similar identities with Chae Chan Ping,18 Ignatz Mezei,19 and Kestutis Zadvydas,20 the aliens in leading immigration cases. The detention or exclusion of these noncitizens is primarily justified by the plenary powers doctrine, while constitutional arguments in favor of release has proven ineffective. The plenary powers doctrine has kept the Uighurs detained for nine years. By framing legal issues, immigration law precludes habeas relief. The Uighurs’ detention is illegal, but release is not required by law, even after nine years and habeas approval.21

# circumvention

### Ext circumvention

#### War powers authority

-wartime

-history proves

-lobel

#### President will just reallocate funds. Reagan proves

Heder 9—JD, magna cum laude, from Brigham Young University [Adam S. Heder, “The Power to End War: The Extent and Limits of Congressional Power,” St Mary’s Law Journal, Volume 41 Number 3, 2009]

Moreover, Congress’s appropriation power may not be an altogether effective or efficient tool with which to limit or end a war. Professor Louis Fisher strenuously makes this point. He points out that, despite Congress’s best efforts to ensure otherwise, the Reagan Administration secured financing for the Nicaraguan Contras for many years before it finally was forced to stop.27 Congress not only denied the President any appropriations for the operations, but also held hearings to ensure the President was not securing funding from other sources.28 While arguing that the President’s arguments and actions were unconstitutional, Fisher points out that the Administration was able to accomplish its goals for some time even in the absence of properly appropriated funds.29 Indeed, he points out in a later article that at any given time a President has “billions of dollars in previously appropriated funds” and always can reallocate money from other accounts to achieve his purposes.30 Assuming the President and Congress disagree about how and whether a war ought to be concluded, Congress’s appropriation power is not always an effective limit on the President’s powers.31 pg. 452-453

#### Their restriction is a smokescreen and will not be enforced

Nzelibe 7—Professor of Law @ Northwestern University [Jide Nzelibe, “Are Congressionally Authorized Wars Perverse?” Stanford Law Review, Vol. 59, 2007]

These assumptions are all questionable. As a preliminary matter, there is not much causal evidence that supports the institutional constraints logic. As various commentators have noted, Congress's bark with respect to war powers is often much greater than its bite. Significantly, skeptics like Barbara Hinckley suggest that any notion of an activist Congress in war powers is a myth and members of Congress will often use the smokescreen of "symbolic resolutions, increase in roll calls and lengthy hearings, [and] addition of reporting requirements" to create the illusion of congressional participation in foreign policy.' 0 Indeed, even those commentators who support a more aggressive role for Congress in initiating conflicts acknowledge this problem," but suggest that it could be fixed by having Congress enact more specific legislation about conflict objectives and implement new tools for monitoring executive behavior during wartime. 12

Yet, even if Congress were equipped with better institutional tools to constrain and monitor the President's military initiatives, it is not clear that it would significantly alter the current war powers landscape. As Horn and Shepsle have argued elsewhere: "[N]either specificity in enabling legislation ... nor participation by interested parties is necessarily optimal or self-fulfilling; therefore, they do not ensure agent compliance. Ultimately, there must be some enforcement feature-a credible commitment to punish ....Thus, no matter how much well-intentioned and specific legislation Congress passes to increase congressional oversight of the President's military initiatives, it will come to naught if members of Congress lack institutional incentives to monitor and constrain the President's behavior in an international crisis.

Various congressional observers have highlighted electoral disincentives that members of Congress might face in constraining the President's military initiatives. 14 Others have pointed to more institutional obstacles to congressional assertiveness in foreign relations, such as collective action problems. 15 Generally, lawmaking is a demanding and grueling exercise. If one assumes that members of Congress are often obsessed with the prospect of reelection, 16 then such members will tend to focus their scarce resources on district-level concerns and hesitate to second-guess the President's response in an international crisis. 17 Even if members of Congress could marshal the resources to challenge the President's agenda on national issues, the payoff in electoral terms might be trivial or non-existent. Indeed, in the case of the President's military initiatives where the median voter is likely to defer to the executive

branch's judgment, the electoral payoff for members of Congress of constraining such initiatives might actually be negative. In other words, regardless of how explicit the grant of a constitutional role to Congress in foreign affairs might be, few members of Congress are willing to make the personal sacrifice for the greater institutional goal. Thus, unless a grand reformer is able to tweak the system and make congressional assertiveness an electorally palatable option in war powers, calls for greater congressional participation in war powers are likely to fall on deaf ears. Pg. 912-913

#### President will just reallocate funds. Reagan proves

Heder 9—JD, magna cum laude, from Brigham Young University [Adam S. Heder, “The Power to End War: The Extent and Limits of Congressional Power,” St Mary’s Law Journal, Volume 41 Number 3, 2009]

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#### Noncompliance is likely. President is obligated to follow their best interpretation of statutory requirements

Crocker 11—Professor of Law @ University of South Carolina [Dr. Thomas P. Crocker, (PhD in philosophy from Vanderbilt and JD from Yale) “Presidential Power and Constitutional Responsibility,” Boston College Law Review, 52 B.C. L. Rev 1551, November 2011]

How can the president take care to faithfully execute laws by ignoring them? This is a complex question of constitutional law--one without a clear answer. On the one hand, scarce resources and differential attention will change priorities and executory practices that can lead to some laws being ignored (relative to others). On the other hand, the president sometimes claims power to ignore laws with which he disagrees or that he thinks are unconstitutional. Executive refusal can therefore change the legal landscape through non-enforcement as much as it can through legal conflict.

 [\*1596]  One version of this controversy involves the president's independent authority to interpret the law. n213 Although it may be the case that the Supreme Court is supreme in the interpretation of the law, that does not preclude the president from an obligation to interpret the Constitution and laws. Indeed, because there are many executive actions that will remain closed to searching judicial review--either because of justiciability doctrines or judicial deference--the president is obligated to follow the best interpretation of constitutional and statutory requirements. These interpretations can come into conflict, as they did for President Lincoln over the authority to suspend habeas corpus. Lincoln ignored Chief Justice Roger Taney's 1861 decision in Ex Parte Merryman, n214 depending on later ratification by Congress. President Andrew Jackson disagreed with Chief Justice Marshall on the constitutionality of a national bank, though in this case no conflict with judicial orders ensued. n215 In each case, it is plausible to think that the President was taking care to faithfully execute the law as he understood it. Importantly, in each case the President publicly justified his decision with reasons reflecting broader constitutional commitments to both form and function. Like the structure of judicial review, presidential interpretation also unavoidably involves articulation of moral claims susceptible to public reason. n216

#### 4. Congress will continue to rubberstamp war efforts. President controls the crisis-escalation agenda

Nzelibe 6—Jide Nzelibe, Professor of Law @ Northwestern University [“A positive theory of the war-powers constitution,” *Iowa Law Review*, 2006; 91(3) pg. 993-1062]

The theoretical framework laid out in this Article suggests that as long as the President has control over the crisis-escalation agenda, it is unlikely that either more sophisticated institutional tools or greater judicial intervention will significantly alter Congress's war-powers role. Once the President has escalated an international crisis and mobilized the domestic audience in favor of war, there is a strong tendency that Congress will follow suit and accede to the President's agenda. In other words, electoral factors are more likely to influence the congressional role in war-powers issues than empire-building concerns." Moreover, even if the courts force Congress to play a more active role by requiring that it authorize ex-ante all uses of force, the President's unique ability to shape public opinion even before a war is initiated will make it very likely that members of Congress will simply rubberstamp the President's use-of-force initiatives. Thus, although the courts can plausibly force Congress to play a more formal role in initiating wars, this does not mean that Congress will have any incentive to take such a task seriously. Pg. 1000

#### 5. Congress will stand down. They don’t care about institutional power

Devins 9—Professor of Law and Professor of Government @ College of William and Mary [Neal Devins, “Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives,” Willamette Law Review, Vol. 45, Issue 3 (Spring 2009), pp. 395-416]

Unlike the presidency, the individual and institutional interests of members of Congress are often in conflict with one another. While each of Congress's 535 members has some stake in Congress as an institution, parochial interests will overwhelm this collective good. In particular, members of Congress regularly tradeoff their interest in Congress as an institution for their personal interests-most notably, reelection and advancing their (and their constituents') policy agenda. In describing this collective action problem, Moe and Howell note that lawmakers are "trapped in a prisoner's dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency.

For this reason, lawmakers have no incentive to stop presidential unilateralism simply because the President is expanding his powers vis-A-vis Congress. Consider, for example, the President's use of executive orders to advance favored policies and presidential initiatives to launch military initiatives. Between 1973 and 1998, Presidents issued about 1,000 executive orders. Only 37 of these orders were challenged in Congress and only 3 of these challenges resulted in legislation. 9

Presidential unilateralism in launching military operations is even more striking-because it involves the President's willingness to commit the nation's blood without congressional authorization. Notwithstanding the clear constitutional mandate that Congress play a significant role in triggering military operations, Congress has very little incentive in playing a leadership role. Rather than oppose thePresident on a potential military action, most members of Congress find it more convenient to acquiesce and avoid criticism that they obstructed a necessary military operation. Pg. 400-401

#### 6. Congressional restrictions on authority are doomed to failed and risks a constitutional crisis that severely damages US foreign policy

**Moore 88** – Professor of Law @ University of Virginia [Moore, John Norton (Director of the Center for Law and National Security, Former counselor on International Law to the Department of State (72-73), and has held five presidential appointments, including Member of the United States Delegation to the United Nations General Assembly (72-76), “Do We Have an Imperial Congress,” University of Miami Law Review, Vol. 43, Issue 1 (September 1988), pp. 139-154

There is also a timing problem. When Congress simply enacts its own views on the limits of presidential authority in foreign affairs, it often does so in times of crisis, which is when the nation can least afford it. The Congress may submit that it is acting to protect our constitutional values or system. But the President, not just the Congress, is sworn under the Constitution to protect the Constitution of the United States. He also has the duty to protect the Nation against our enemies. Consequently, in a foreign crisis, the President may be forced into a Hobson's choice. He can choose to perform his constitutional duties, thereby opposing Congress and creating an enormous brouhaha with threats of impeachment, or he can accept these restrictions and witness an erosion of his own constitutional responsibilities and powers. With either result, the Nation is the ultimate loser.

We could seek to have these issues addressed more actively in the courts. As a first step, I am in favor of encouraging the Supreme Court to consider appropriate cases that present these issues. I am hopeful that this will resolve the problem. Unfortunately, I do not believe that this will provide the ultimate solution because there are likely to be a series of case and controversy47 and political question problems." Additionally, the Court would likely focus solely on the legal issues, applying all of the restraint of the judicial system and not permitting a broader resolution of the issue. In any event, it will be a long, case-by-case process.

As an alternative proposal, I suggest that a bipartisan Presidential/ Congressional Commission be established. This commission, with half the members appointed by the President and half the members appointed by the Congress-one quarter from each chamber would have a broad mandate to examine the issue of separation of powers, in regard to foreign policy. It should make recommendations as to how the current executive/legislative process could be enhanced to formulate and conduct foreign policy more effectively. Such a commission can realistically deal with both the legal and policy issues. As an immediate counterargument, I realize that creating another commission is a classic way to avoid the issue. I think, however, that a commission approach is a practical and feasible approach. The alternative is to leave it to Congress to draw these lines on its own. This alternative, I believe, is doomed to failure, inherently¶ wrong in terms of the doctrine of separation of powers, and contrary to the principle that no branch can be the sole judge of its own powers. Furthermore, it invites an eventual collision between the branches¶ that could result either in a constitutional crisis of serious proportions¶ or severe damage to the foreign policy of the Nation in a crisis setting, at a time when we can least afford it. Pg. 152-153