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#### Civilian interference causes backlash from the military

**Urben, 10 –** (Heidi, PhD from Georgetown, “CIVIL - MILITARY RELATIONS IN A TIME OF WAR : PARTY, POLITICS, AND THE PROFESSION OF ARMS,” <http://repository.library.georgetown.edu/bitstream/handle/10822/553111/urbenHeidi.pdf>)

Huntington’s model of objective control (1957) largely provides the foundation for one side of the debate what Cohen (2002) calls ―the normal theory‖ of civil military relations and what Feaver has termed the ―professional supremacist‖ (2010) school of thought or delegative control model (1995). Under Huntington’s objective control, the military and its civilian overseers maintain distinct, separate spheres of responsibility. The military is a professional force because it remains ―politically sterile and neutral‖ (1957, 84). And because the military is a professional, apolitical force, and civilian control of the military should never be in doubt, this model suggests that considerable deference should be given to military leaders in their realm of expertise. Professional supremacist or normal theory adherents often include senior and retired military leaders, such as Colin Powell, and its tenets are largely borne out of the lessons learned from the Vietnam War. In Michael Desch’s words, this system works best as it ― allows for substantial military autonomy in the military, technical, and tactical realms (how to fight wars) in return for complete subordination to civ ilian authority in the political realm (when and if to fight them)‖ (Myers et al. 2007). Professional surpemacists also attribute civil - military friction and even wartime failures to violations of the normal theory model. For example, Desch (2007) has argued that many of the failures in the Iraq war were a result of Secretary of Defense Donald Rumsfeld’s abrasive approach and meddling into the military’s business. Key to the normal theory or professional supremacist view is the need to maintain Hunting ton’s separate spheres and preserve the military’s autonomy over military matters. Civilian interference into the military’s domain, they argue, will almost surely lead to dysfunction

#### Backlash from the military causes them to “shirk” – turns the case by swelling executive military power and destroys civilian control

**Gurcan, 12 –** (Metin, PhD CandidateBilkent University- Department of Political Science, ARMED SERVANTS: AGENCY, OVERSIGHT AND CIVIL-MILITARY RELATIONS,” Academia)

Employing “principal-agent theory” from economics, Feaver endavours to explain how principals (elected civilian leaders in our case) gets the agent (the military) carry out orders, using the degree of monitoring as the variable. According to him, the main problem of CMR in mature democracies is a military that “shirks.” Based on their expectations of whether shirking will be detected or not, the military decides whether to obey the civilian leaders or not. These expectations, for Feaver, are a function of many factors, the primary of which is the cost of monitoring. In fact, for the military, the outcome of working with non-intrusive monitoring (the cases of 1 and 3 correspond to Huntington’s prescription of “objective control,” which can only be established by recognizing an autonomous, politically neutral and sterile military through professionalization. Likewise, the case of 2 is the Huntington’s nightmare scenario that implies the systemic violation of the autonomy of professional the “” military by the civilians. It is case 4, characterized by relatively high civil-military friction, the gap of which is filled by Feaver’s theory. Feaver uses the term “shirking” to refer to activities of militaries that are contrary to the “functional goal” or the “relational goal” of civilians. The functional goal includes whether the military is doing what civilians asked it to do in a style that civilians direct, whether the military is using its full capacity to implement the civilians’ orders and whether the military is capable of implementing its tasks. As for the relational goal, it includes whether key policy decisions belong to civilians or the military, whether civilians decide which decisions should be given by the military, and whether the military avoids any action that may undermine civilian supremacy. Feaver presents some features (or problems) that have important influences on principal-agent relationships. First of all, there is an information asymmetry between the principal and the agent. In the CMR, the advantage of information is on the side of the military. As stated by Feaver, in the case of operations and war, the information asymmetry increases in favor of the military because of difficulties in monitoring . Moreover, confidentiality restrictions that are common in defense matters reinforce the tendency of the military to hide information. Information asymmetry provides the military important power to pursue its own institutional interests. Second, adverse selection is one of the main problems of principal-agency relations. According to Feaver, adverse selection is the uncertainty of principal about the capability and qualifications of its agents . The final problem is moral hazard. In Feaver’s words, “moral hazard refers at a general level to the problem that principals cannot completely observe the true behavior of the agent and so cannot be certain whether the agent is working or shirking .” As stated by Feaver, agents or employees have incentives to do less, if they can get paid the same amount for doing so . Moreover, Feaver presents two main requirements to prevent the military from shirking: monitoring mechanisms and punishment mechanisms. He states that “Civilians still have means available with which to direct the military and thereby mitigate the adverse selection and moral hazard problems inherent in delegation. In essence, control or monitoring mechanisms are ways of overcoming the information problems perhaps by getting the agent to reveal information or perhaps by adjusting the incentives of the agent so that the principal can ‘know’ that the agent wants what the principal wants.”

**Civilian control and cooperation between the two is necessary for have an effective military which solves a host of problems**

**Owens, 12 –** (Mackubin, Associate Dean of Academics for Electives and Directed Research and Professor of Strategy and Force Planning at the U.S. Naval War College, “What military officers need to know about civil-military relations,” <http://www.thefreelibrary.com/What+military+officers+need+to+know+about+civil-military+relations.-a0287635112>)

The combination of civil-military relations patterns and service doctrines affect military effectiveness. In essence, the ultimate test of a civil-military relations pattern is how well it contributes to the effectiveness of a state's military, especially at the level of strategic assessment and strategy making. (50) However, Richard Kohn has explicitly called into question the effectiveness of the American military in this realm, especially with regard to the planning and conduct of operations other than those associated with large-scale conventional war. "Nearly twenty years after the end of the Cold War, the American military, financed by more money than the entire rest of the world spends on its armed forces, failed to defeat insurgencies or fully suppress sectarian civil wars in two crucial countries, each with less than a tenth of the U.S. population, after overthrowing those nations' governments in a matter of weeks." (51) He attributes this lack of effectiveness to a decline in the military's professional competence with regard to strategic planning. "In effect, in the most important area of professional expertise--the connecting of war to policy, of operations to achieving the objectives of the nation--the American military has been found wanting. The excellence of the American military in operations, logistics tactics, , weaponry, and battle has been manifest for a generation or more. Not so with strategy." (52) This phenomenon manifests itself, he argues, in recent failure to adapt to a changing security environment in which the challenges to global stability are "less from massed armies than from terrorism; economic and particularly financial instability; failed states; resource scarcity (particularly oil and potable water); pandemic disease; climate change; and international crime in the form of piracy, smuggling, narcotics trafficking, and other forms of organized lawlessness." He observes that this decline in strategic competence has occurred during a time in which the U.S. military exercises enormous influence in the making of foreign and national security policies. He echoes the claim of Colin Gray: "All too often, there is a black hole where American strategy ought to reside." (53) Is there something inherent in current U.S. civil-military affairs that accounts for this failure of strategy? The failure of American civil-military relations to generate strategy can be attributed to the confluence of three factors. The first of these is the continued dominance within the American system of what Eliot Cohen has called the "normal" theory of civil-military relations, the belief that there is a clear line of demarcation between civilians who determine the goals of the war and the uniformed military who then conduct the actual fighting. Until President George W. Bush abandoned it when he overruled his commanders and embraced the "surge" in Iraq, the normal theory has been the default position of most presidents since the Vietnam War. Its longevity is based on the idea that the failure of Lyndon Johnson and Robert McNamara to defer to an autonomous military realm was the cause of American defeat in Vietnam. The normal theory can be traced to Samuel Huntington's The Soldier and the State, in which he sought a solution to the dilemma that lies at the heart of civil-military relations--how to guarantee civilian control of the military while still ensuring the ability of the uniformed military to provide security. His solution was a mechanism for creating and maintaining a professional, apolitical military establishment, which he called "objective control." Such a professional military would focus on defending the United States but avoid threatening civilian control. (54) But as Cohen has pointed out, the normal theory of civil-military relations often has not held in practice. Indeed, such storied democratic war leaders as Winston Churchill and Abraham Lincoln "trespassed" on the military's turf as a matter of course, influencing not only strategy and operations but also tactics. The reason that civilian leaders cannot simply leave the military to its own devices during war is that war is an iterative process involving the interplay of active wills. What appears to be the case at the outset of the war may change as the war continues, modifying the relationship between political goals and military means. The fact remains that wars are not fought for their own purposes but to achieve policy goals set by the political leadership of the state. The second factor, strongly reinforced by the normal theory of civil-military relations, is the influence of the uniformed services' organizational cultures. Each military service is built around a "strategic concept" that, according to Samuel Huntington, constitutes "the fundamental element of a military service," the basic "statement of [its] role ... or purpose in implementing national policy." (55) A clear strategic concept is critical to the ability of a service to organize and employ the resources that Congress allocates to it. It also largely determines a service's organizational culture. Some years ago, the late Carl Builder of the RAND Corporation wrote The Masks of War, in which he demonstrated the importance of the organizational cultures of the various military services in creating their differing "personalities," identities, and behaviors. His point was that each service possesses a preferred way of fighting and that "the unique service identities ... are likely to persist for a very long time." (56)

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#### US Drone Strikes are decreasing

Pakistan News & Views 7/26/13 (“U.S Drones Strikes has Decreased Due To Its Criticism”, http://pakistannewsviews.com/u-s-drone-strikes-has-decreased-due-to-its-criticism/)

The tempo of CIA drone strikes in Pakistan has slowed significantly in recent months, and anonymous officials tell The Associated Press that the reason has to do with the public’s intensifying criticism of the program, which has reportedly killed hundreds of civilians since 2004. ¶ While the attacks are by no means stopping, their frequency has reached a low not seen since the secret program began in Pakistan, with 16 strikes occurring so far this year. That’s a far cry from the peak of 122 strikes in 2010, according to data from the New America Foundation; whose most recent estimates show those strikes killed 97 alleged “militants” and four “others” in 2013. Current and former intelligence officials tell AP that public scrutiny has led the program to be more focused on “high value” targets, supposedly dropping the controversial practice of “signature strikes,” which attack anonymous individuals based solely on behavior observed in the field.¶ The statements seem to be in line with those from President Obama, who said during a speech in May that he would roll back the CIA program and limit targets to those who constitute a “continuing, imminent threat.” But a Justice Department legal memo leaked prior to the speech broadly defines “imminent” to include any plot which “may or may not occur in the near future.” The administration has also defended its demonstrated ability to execute — without charge or trial — American citizens who fit that criteria.¶ The decreased number of strikes comes after massive public outrage in Pakistan, where the high court in Peshawar has ruled that US drone strikes constitute war crimes and violations of the country’s sovereignty. Ben Emmerson, the UN’s special rapporteur on civil rights, reached similar conclusions during his own investigation of the ongoing US drone campaign. In the past, Pakistani officials have publicly spoken out against drone strikes while secretly consenting to them behind closed doors. But anonymous US officials told the AP that the strikes decreased after Pakistani officials made it clear the attacks could not continue at the current rate, citing concerns over the civilian death toll.

#### Detainee protections increase the incentives for kill rather than capture

Crandall 13 Carla, Law Clerk to the Honorable Carolyn Dineen King, U.S. Court of Appeals for the Fifth Circuit. J.D., J. Reuben Clark Law School, Brigham Young University. "If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing,"Seton Hall Law Review: Vol. 43: Iss. 2, Article 3. http://erepository.law.shu.edu/shlr/vol43/iss2/3

But while these developments have been hailed as victories by civil libertarians, they have not come without significant cost. With increasing frequency, journalists and scholars have begun to document the marked expansion in the government’s use of drones to kill targets who purportedly pose a threat to U.S. national security.12 Though a few observers have intimated that there may be a causal connection between the increase in targeted killing and the growing dearth of unfettered detention options,13 the actual link between these phenomena has not been thoroughly explored. This Article fills that gap. Examining the connection between the government’s detention and targeted killing policies, this Article argues that attempts to remove the “stain” of Guantánamo Bay have created what might be an even greater crisis. Specifically, while civil libertarians have claimed success in executive and judicial efforts to grant detainees greater protections, this success has produced an unintended incentive for the government to kill rather than capture individuals involved in the war on terror. This perverse outcome has occurred not as a result of a foreseeable linear process whereby one phenomenon caused the other, but rather as an unanticipated reaction to changes thrust into the nonlinear dynamic systems14 of warfare and national security law.15 To uncover the relationship between the government’s detention and targeted killing programs, this Article invokes the insights of complex adaptive systems theory.16 While scholars have employed chaos and complexity theory to examine legal issues for some time,17 the more nuanced theory of complex adaptive systems is a relative newcomer.18 Nevertheless, scholars are increasingly making the case that the theory offers a useful means by which to understand the legal system and the effects that flow from changes introduced thereto.19 This Article explains and builds upon that work by arguing that legal policies regulating the war on terror actually implicate two systems—that of both warfare and law. Because these two systems “interact complexly with each other, as well as with all . . . other complex social and physical systems with which they are interconnected,”20 introducing even small changes into either of these complex adaptive systems can generate dramatic effects that are unforeseeable when the intervention initially is introduced.21 Within the context of the war on terror, altering detainee policies may have led to the unintended consequence of encouraging the government to dismiss the option of capturing high-value targets in favor of simply eliminating them with drones.22 This important insight suggests a broader one: thinking of war and national security law as interrelated complex adaptive systems can help policymakers, lawmakers, and judges gain a better appreciation of the practical consequences of their decision-making processes. 22 The law of unintended consequences suggests that well-intentioned efforts to attain a specific goal may actually produce results antithetical to the hoped for effect. See Frank B. Cross, Paradoxical Perils of the Precautionary Principle, 53 WASH. & LEE L. REV. 851, 862 (1996). To make these arguments, the Article proceeds as follows. Part II introduces the theory of complex adaptive systems and explains that law and war both exhibit properties of these systems. Part III provides a summary of significant post-9/11 legal developments related to war on terror detentions and interrogations, and describes how these developments gradually increased the protections afforded to detainees. Part IV argues that these efforts to protect the civil liberties of detainees may actually have had the perverse effect of encouraging targeted killing. More specifically, using complex adaptive systems theory, Part IV argues that the rise of the drone may be evidence of the adaptive and self-organizing properties inherent within the systems of law and war. Part V concludes that the government’s expanded use of drones is representative of an unexpected and unintended consequence that can arise as a result of human intervention into complex adaptive systems.

#### Drone strikes cause thousands of civilian deaths and do psychological violence to those who must constantly live with the threat of a strike.

Stanford Human Rights Clinic 12 “Living Under Drones Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan” Stanford International Human Rights and Conflict Resolution Clinic (IHRCRC) and Global Justice Clinic (GJC) at NYU School of Law September http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf

First, while civilian casualties are rarely acknowledged by the US government, there is significant evidence that US drone strikes have injured and killed civilians. In public statements, the US states that there have been “no” or “single digit” civilian casualties.”2 It is difficult to obtain data on strike casualties because of US efforts to shield the drone program from democratic accountability, compounded by the obstacles to independent investigation of strikes in North Waziristan. The best currently available public aggregate data on drone strikes are provided by The Bureau of Investigative Journalism (TBIJ), an independent journalist organization. TBIJ reports that from June 2004 through midSeptember 2012, available data indicate that drone strikes killed 2,562-3,325 people in Pakistan, of whom 474-881 were civilians, including 176 children.3 TBIJ reports that these strikes also injured an additional 1,228-1,362 individuals. Where media accounts do report civilian casualties, rarely is any information provided about the victims or the communities they leave behind. This report includes the harrowing narratives of many survivors, witnesses, and family members who provided evidence of civilian injuries and deaths in drone strikes to our research team. It also presents detailed accounts of three separate strikes, for which there is evidence of civilian deaths and injuries, including a March 2011 strike on a meeting of tribal elders that killed some 40 individuals. Second, US drone strike policies cause considerable and under-accounted for harm to the daily lives of ordinary civilians, beyond death and physical injury. Drones hover twenty-four hours a day over communities in northwest Pakistan, striking homes, vehicles, and public spaces without warning. Their presence terrorizes men, women, and children, giving rise to anxiety and psychological trauma among civilian communities. Those living under drones have to face the constant worry that a deadly strike may be fired at any moment, and the knowledge that they are powerless to protect themselves. These fears have affected behavior. The US practice of striking one area multiple times, and evidence that it has killed rescuers, makes both community members and humanitarian workers afraid or unwilling to assist injured victims. Some community members shy away from gathering in groups, including important tribal dispute-resolution bodies, out of fear that they may attract the attention of drone operators. Some parents choose to keep their children home, and children injured or traumatized by strikes have dropped out of school. Waziris told our researchers that the strikes have undermined cultural and religious practices related to burial, and made family members afraid to attend funerals. In addition, families who lost loved ones or their homes in drone strikes now struggle to support themselves.

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#### Interpretation. War powers authority means the warrant and justification to exercise those powers, not simply the ability to do so.

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Adam, "The Politics Economics Make." March 22, 2009, http://www.thepresidency.org/storage/documents/Fellows2009/Colgate\_Zimmerman.pdf

**Skowronek distinguishes between presidential power and authority. Power is the formal and informal resources of the presidency. Authority is the warrant to exercise the powers of the presidency**. Skowronek asserts that presidential authority is a function of a recurrent pattern that he refers to as political time. Political time is the “historical medium through which authority structures have recurred,” whereas secular time is “the medium through which power structures have evolved.”1 Political time describes the ability of the president to exercise authority over the formal powers of the office, whereas secular time is the emergent pattern that describes how those formal powers have developed and evolved. **Skowronek employs these conceptions of secular and political** **time to understand how “contingent structures of authority have affected the reorganization of presidential power, and how changes in the organization of the presidential power have affected the political range of different claims to authority**.”2 In short, Skowronek attempts to employ these two patterns – secular and political – to describe the president’s ability to exercise authority over the formal powers of the office changed. **Skowronek concludes that as the formal powers of the presidency expands; the** **ability of the president to exercise those powers has narrowed**.

#### The aff restricts an instance of indefinite detention without restricting the war powers authority that makes it possible

#### Vote neg on predictable limits--infinitely many mechanisms to restrict power’s application—restricting authority is distinct and provides a clear litmus--which is key to predictable ground.

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**The law is an ineffective counter-weight against the executive**

burgh 13 Colin, writer for Dissent magazine, Dissent, 5-27, http://www.dissentmagazine.org/blog/partial-readings-the-rule-of-law

The shamelessness of the endeavor is impressive—a far cry, in many ways, from the CIA’s secretive Cold War–era assassination plots. Obama has succeeded in anchoring a legal infrastructure for state-sponsored assassinations on foreign soil while trumpeting it, in broad daylight, as a framework for accountability. Peppered with allusions to the Constitution and to “the law” more generally, the call for transparency instead appears to provide an Orwellian foil for a remarkable expansion of executive powers. Existing laws, domestic or international, are proving a hopelessly inadequate framework with which to hold the Obama administration accountable for arbitrary assassinations abroad. No doubt it is tempting to turn to the Constitution, the Universal Declaration of Human Rights, and other relevant legal documents as a litmus test for the validity of government actions. Many progressive media outlets have a tendency to seize on international law, especially, as a straightforward barometer of injustice: this is particularly true in the case of the Israel-Palestine conflict, as an editorial in the curreKinnint issue of Jacobin points out. Both domestic and international legal systems often do afford a certain clarity in diagnosing excesses of state power, as well as a certain amount of leverage with which to pressure the states committing the injustices. To hope, however, that legal systems alone can redress gross injustices is naive. Many leftists—and not just “bloodless liberals”—feel obliged to retain faith in laws and courts as a lifeline against oppression, rather than as mere instruments of that same oppression. Even Marx, when he was subjected, along with fellow Communist League exiles, to a mass show trial in Prussian courts in the 1850s, was convinced that providing sufficient evidence of his innocence would turn the case against his accuser, Wilhelm Stieber, a Prussian secret agent who reportedly forged his evidence against the communists. In his writings, Marx expressed his disillusionment with all bourgeois institutions, including the courts; in practice, he hoped that the law would serve him justice. Richard Evans highlights this tension in his insightful review of Jonathan Sperber’s Karl Marx: A Nineteenth-Century Life, published in the most recent London Review of Books. “Naively forgetting,” writes Evans, “what they had said in the Manifesto – that the law was just an instrument of class interests – Marx and Engels expected [their evidence against Stieber] to lead to an acquittal, but the jury found several of the defendants guilty, and Stieber went unpunished.” Marx’s disappointment is all too familiar. It is familiar from situations of international conflict, illustrated by Obama’s drone strikes justifications; it is evident, too, when a police officer shoots dead an unarmed Bronx teenager in his own bathroom, and the charge of manslaugher—not murder—brought against the officer is dropped for procedural reasons by the presiding judge. This is hardly the first such callous ruling by a New York court in police violence cases; the last time charges were brought against an NYPD officer relating to a fatal shooting on duty, in 2007, they were also dropped. Dozens of New Yorkers have died at the hands of the police since then, and Ramarley Graham’s case was the first that even came close to a criminal conviction—only to be dropped for ludicrous reasons. Yet New York’s stop-and-frisk opponents are still fighting their battle out in the courts. In recent months, many activists have invested their hopes for fairer policing in a civil class action suit, Floyd, et. al. vs. City of New York, which may just convict the NYPD of discrimination despite the odds. District court judge Shira Scheindlin, profiled in this week’s New Yorker, has gained a reputation for ruling against the NYPD in stop-and-frisk cases, even when it has meant letting apparently dangerous criminals off the hook. In coming weeks, she is likely to do the same for the landmark Floyd case, in what may be a rare affirmation of constitutional law as a bulwark against state violence and for civil liberties. Even if the city wins the case, the spotlight that stop-and-frisk opponents have shined on the NYPD has already led to a 51 percent drop in police stops in the first quarter of this year. Still, when the powerful choose the battlefield and write the laws of war, meeting them on their terms is a dangerous game.

Authority debates are worthless – they become symbolic fig leafs to play legalistic pretend

Greenwald 13 Glenn, The Guardian, 5-17, http://www.theguardian.com/commentisfree/2013/may/17/endless-war-on-terror-obamaon security and liberty

In response to that, the only real movement in Congress is to think about how to enact a new law to expand the authorization even further. But it’s a worthless and illusory debate, affecting nothing other than the pretexts and symbols used to justify what will, in all cases, be a permanent and limitless war. The Washington AUMF debate is about nothing other than whether more fig leafs are needed to make it all pretty and legal. The Obama administration already claims the power to wage endless and boundless war, in virtually total secrecy, and without a single meaningful check or constraint. No institution with any power disputes this. To the contrary, the only ones which exert real influence – Congress, the courts, the establishment media, the plutocratic class – clearly favor its continuation and only think about how further to enable it. That will continue unless and until Americans begin to realize just what a mammoth price they’re paying for this ongoing splurge of war spending and endless aggression.

Executive constraints are rooted in the central fallacies of liberal legalism. These constraints fail on the ground. Political mechanisms are more effective

Huq 12 + Aziz Z. Assistant Professor of Law, University of Chicago Law School. University of Chicago Law Review, Spring, 79 U. Chi. L. Rev. 777

Echoing Crit themes, The Executive Unbound mounts a sustained assault on dominant pieties of legal scholarship - the autonomy and relevance of legal and constitutional rules. 33 Its central target is "liberal legalism." This is defined as the view that "representative legislatures govern and should govern ... [and] that law does and should constrain the executive" (p 3). Liberal legalists, in PV's telling, emphasize two ways in which law limits executive power. First, law binds via the separation of powers - that is, by fashioning Congress and the courts as institutional counterweights to the executive. Second, it works through framework statutes and by specifying absolute limits in the form of enacted statutes. What the legalist focus on institutions and legal rules fails to discern, PV contend, is that both such mechanisms are ineffectual on the ground (p 7). 34 By contrast, it is political mechanisms that do the real work in imposing limits on what the executive can do. Fleshing out the idea of a political mechanism, PV identify a "reelection constraint" on Presidents operating "in a polity dominated by a mass public accustomed to exercising a large degree of democratic control" (p 12). 35 This in turn fosters in the White House a need to sustain "popularity and credibility" (p 13). In consequence, opponents of political liberalism such as Weimar-and Nazi-era legal theorist Carl Schmitt exaggerate in their criticism of democratic rule and their advocacy of "decisionism" the claim that power rests in the entity with authority to determine when rules apply or not (pp 32-34, 90-91). 36

#### Grey holes: administrative legal constraints are built around too many adjustable parameters to be effective. They create grey holes where the law pretends to constrain.

Vermeule 9 \*Adrian, John H. Watson, Jr. Professor of Law, Harvard Law School. Harvard Law Review, 122 Harv. L. Rev. 1095, February

How do the Administrative Procedure Act 1 (APA) and the larger body of administrative law respond to real or perceived emergencies? I suggest that our administrative law contains, built right into its structure, a series of legal "black holes" and "grey holes." 2 Legal black holes arise when statutes or legal rules "either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude[] judicial review of executive action." 3 Grey holes, which are "disguised black holes," 4 arise when "there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases." 5 Grey holes thus present "the facade or form of the rule of law rather than any substantive protections." 6 David Dyzenhaus and other theorists of the rule of law show that black holes and grey holes are best understood by drawing upon the thought of Carl Schmitt, in particular his account of the relationship between legality and emergencies. If this is so, and in this sense, my claim is that the administrative law of emergencies just is Schmittian. 7 [\*1097] Moreover, the existence of these black and grey holes is inevitable. The aspiration to extend legality everywhere, so as to eliminate the Schmittian elements of our administrative law, is hopelessly utopian. Although I will examine both the black and grey holes of our administrative law, I will focus especially on the latter. Administrative law is built around a series of open-ended standards or adjustable parameters - for example, what counts as "arbitrary" or "unreasonable," whether evidence is "substantial," whether a statute is or is not "clear" - that courts can and do adjust during perceived emergencies to increase deference to administrative agencies. When the intensity of judicial review is reduced sufficiently far, it becomes effectively a sham, and a grey hole arises. This process requires no change in any of the nominal legal rules, and is difficult even to specify in the abstract, let alone to monitor or check. Importantly, these grey holes are a product both of legislative action in the text of the APA, and of judicial action in subsequent cases. As we will see, rule-of-law theorists find grey holes more objectionable than black holes, because the latter are at least openly lawless, whereas the former present a facade of law; but as we will also see, grey holes are unavoidable in administrative law, so decrying their existence is pointless. I explain these claims through an overview of the APA and surrounding legal doctrine. My focus is on administrative law in the trenches - in the federal courts of appeal - rather than on the Supreme Court's administrative law. The former is the terrain in which administrative law actually operates, and I will attempt to show that lower courts after 9/11 have applied the adjustable parameters of the APA - "arbitrariness," "reasonableness," and so on - in quite deferential ways, creating grey holes in which judicial review of agency action is more apparent than real. Part I briefly introduces Schmitt's thought on emergencies and the critiques offered by theorists committed to a strong version of the rule of law. Against this backdrop, I state my main theses and clarify my limited ambitions. Part II documents the black and grey holes of administrative law. Part III argues that the black and grey holes are unavoidable, for practical and institutional reasons; that contrary to the suggestions of several scholars, there is no such thing as "ordinary" administrative law, conceived as an alternative to exceptional deference [\*1098] to the executive during emergencies; and that proposals to handle executive emergency powers through an "institutional process" approach that focuses on congressional authorization are largely futile, because vague statutory authorizations just create grey holes in any event.

**The alt is to reject the aff in favor of changing our understanding of where authority, politics and power emanates from---public discourse and building a culture of resilience are the most effective checks on executive power**

Vermeule and Posner 11 Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, *Executive Unbound: After the Madisonian Republic*, Oxford University Press 2011

We do not yet live under a plebiscitary presidency. In such a system, the president has unchecked legal powers except for the obligation to submit to periodic elections. In our system, Congress retains the formal power to make law. It has subjected presidential lawmaking to complex procedures and bureaucratic checks,1 and it has created independent agencies over which the president in theory has limited control. The fed­eral courts can expect the executive to submit to their orders, and the Supreme Court retains certain quasi-lawmaking powers, which it exercises by striking down statutes and blocking executive actions. The federal system is still in place. State legal institutions retain considerable power over their populations. But these legal checks on executive authority (aside from the electoral constraint) have eroded considerably over the last two hundred years. Congress has delegated extensive powers to the executive. For new initia­tives, the executive leads and Congress follows. Congress can certainly slow down policymaking, and block bills proposed by the executive; but it cannot set the agenda. It is hard to quantify the extent of congressional control over regulatory agencies, but it is fair to say that congressional intervention is episodic and limited, while presidential control over both the executive and independent agencies is strong and growing stronger. The states increasingly exercise authority at the sufferance of the national government and hence the president. The federal courts have not tried to stop the erosion of congressional power and state power. Some commentators argue that the federal courts have taken over Con­gress’s role as an institutional check. It is true that the Supreme Court has shown little compunction about striking down statutes (although usually state statutes), and that it rejected some of the legal theories that the Bush administration used to justify its counterterrorism policies. However, the Court remains a marginal player. The Court ducked any legal rulings on counterterror policies until the 2004 Hamdi decision, and even after the Boumediene decision in 2008, no detainee has been released by final judicial order, from Guantanamo or elsewhere, except in cases where the government chose not to appeal the order of a district judge. The vast majority of detainees have received merely another round of legal process. Some speculate that judicial threats to release detainees have caused the administration to release them preemptively. Yet the judges would incur large political costs for actual orders to release suspected terrorists, and the government knows this, so it is unclear that the government sees the judi­cial threats as credible or takes them very seriously. The government, of course, has many administrative and political reasons to release detainees, quite apart from anything the courts do. So the executive submits to judi­cial orders in part because the courts are careful not to give orders that the executive will resist. In general, judicial opposition to the Bush administration’s counterter­rorism policies took the form of incremental rulings handed down at a gla­cial pace, none of which actually stopped any of the major counterterrorism tactics of that administration, including the application of military power against Al Qaeda, the indefinite detention of members of Al Qaeda, tar­geted assassinations, the immigration sweeps, even coercive interrogation. The (limited) modifications of those tactics that have occurred resulted not from legal interventions but from policy adjustments driven by changed circumstances and public opinion, and by electoral victory of the Obama administration. However, the Obama administration has mostly confirmed and in some areas even expanded the counterterrorism policies of the Bush administration. Strong executive government is bipartisan. The 9/11 attack provided a reminder of just how extensive the presi­dent’s power is. The executive claimed the constitutional authority to, in effect, use emergency powers. Because Congress provided redundant stat­utory authority, and the Supreme Court has steadfastly refused to address the ultimate merits of the executives constitutional claims, these claims were never tested in a legal or public forum. But it is worth trying to ima­gine what would have happened if Congress had refused to pass the Autho­rization for Use of Military Force and the Supreme Court had ordered the executive to release detainees in a contested case. We think that the execu­tive, backed up as it was by popular opinion, would have refused to obey. And, indeed, for just that reason, Congress would, never have refused its imprimatur and the Supreme Court would never have stood in the execu­tive’s way. The major check on the executives power to declare an emer­gency and to use emergency powers is—political. The financial crisis of 2008-2009 also revealed the extent of executive power. Acting together, the Fed, the Treasury, and other executive agencies spent hundreds of billions of dollars, virtually nationalizing parts of the financial system. Congress put up a fuss, but it could not make policy and indeed hardly even influenced policy. Congress initially refused to supply a blank check, then in world-record time changed its mind and gave the blank check, then watched helplessly as the administration adopted pol­icies different from those for which it said the legislation would be needed. Courts played no role in the crisis except to ratify executive actions in tension with the law.2 What, then, prevents the executive from declaring spurious emergencies and using the occasion to consolidate its power—or for that matter, consolidating its power during real emergencies so that it retains that power even after normal times return? In many countries, notably in Latin America, presidents have done just that. Citing an economic crisis, or a military threat, or congressional gridlock, executives have shut down independent media, replaced judges with their cronies, suppressed political opposition, and ruled by dictate. Could this happen in the United States? The answer is, very probably, no. The political check on the executive is real. Declarations of emergency not justified by publicly visible events would be met with skepticism. Actions said, to be justified by emergency would not be approved if the justification were not plausible. Separation of powers may be suffering through an enfeebled old age, but electoral democracy is alive and well. We have suggested that the historical developments that have under­mined separation of powers have strengthened democracy. Consider, for example, the communications revolution, which has culminated (so far) in the Internet Age. As communication costs decrease, the size of markets expand, and hence the scale of regulatory activity must increase. Localities and states lose their ability to regulate markets, and the national govern­ment takes over. Meanwhile, reduced communication costs increase the relative value of administration (monitoring firms and ordering them to change their behavior) and reduce the relative value of legislation (issuing broad-gauged rules), favoring the executive over Congress. At the same time, reduced communication costs make it easier for the public to mon­itor the executive. Today, whistleblowers can easily find an audience on the Internet,; people can put together groups that focus on a tiny aspect of the government s behavior; gigabytes of government data are uploaded onto the Internet and downloaded by researchers who can subject them to rigorous statistical analysis. It need not have worked out this way. Govern­ments can also use technology to monitor citizens for the purpose of suppressing political opposition. But this has not, so far, happened in the United States. Nixon fell in part because his monitoring of political enemies caused an overwhelming political backlash, and although the Bush administration monitored suspected terrorists, no reputable critic suggested that it targeted domestic political opponents. Our main argument has been methodological and programmatic: researchers should no longer view American political life through the Madisonian prism, while normative theorists should cease bemoaning the decline of Madisonianism and instead make their peace with the new political order. The center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states. It is pointless to bewail these developments, and futile to argue that Madisonian structures should be reinvigorated. Instead, attention should shift to the political constraints on the president and the institutions through, which those political con­straints operate—chief among them elections, parties, bureaucracy, and the media. As long as the public informs itself and maintains a skeptical attitude toward the motivations of government officials, the executive can operate effectively only by proving over and over that it deserves the public s trust. The irony of the new political order is that the executive, freed from the bonds of law, inspires more distrust than in the past, and thus must enter ad hoc partnerships with political rivals in order to persuade people that it means well. But the new system is more fluid, allowing the executive to form those partnerships when they are needed to advance its goals, and not otherwise. Certain types of partnership have become recurrent pat­terns—for example, inviting a member of the opposite party to join the president’s cabinet. Others are likely in the future. In the place of the clockwork mechanism bequeathed to us by the Enlightenment thinking of the founders, there has emerged a more organic system of power sharing and power constraint that depends on shifting political alliances, currents of public opinion, and the particular exigencies that demand government action. It might seem that such a system requires more attention from the public than can reasonably be expected, but the old system of checks and balances always depended on public opinion as well. The centuries-old British parliamentary system, which operated in. just this way, should provide reason, for optimism. The British record on executive abuses, although hardly perfect, is no worse than the American record and arguably better, despite the lack of a Madisonian separation of legislative and executive powers

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### 1NC

#### Statutory restrictions are controls or limits imposed by the legislative body

Blacks Online Legal Dictionary 13

(2nd Edition, http://thelawdictionary.org/statutory-restriction/)

Statutory Restriction- Limits or controls that have been place on activities by its ruling legislation.

#### Judicial restrictions are court rulings

Lobel 2 Jules Lobel, Bessie McKee Wathour Endowed Chair at the University of Pittsburgh School of Law THE WAR ON TERRORISM AND CIVIL LIBERTIES University of Pittsburgh Law Review Summer, 2002 63 U. Pitt. L. Rev. 767

Even the bright spot in judicial restriction of executive emergency power- Youngstown Sheet and Tube Co. v. Sawyer n38-had the effect of muddying the line between emergency and non-emergency power. Although advocates of congressional authority look to Youngstown's invalidation of the President's seizure of the steel mills as the basis for imposing limits on [\*775] executive authority, n39 the decision contains the seeds for an expansion of the President's emergency power. The legal realist perspective of the concurrences of Justice Jackson and Justice Frankfurter, rather than the formalism of Justice Black's majority opinion, now dominates the national security establishment's view of the Constitution. n40 By emphasizing fluid constitutional arrangements between Congress and the President instead of the fixed liberal dichotomies bounding executive power, the legal realist approach to the Constitution and foreign affairs has effectively supported the extension of executive emergency authority. n41 The Burger and Rehnquist courts have subsequently utilized Youngstown to uphold broad assertions of executive power. n42

#### The aff says the USFG- they don’t defend which branch

#### USFG consists of three branches

Thefreedictionary.com http://www.thefreedictionary.com/United+States+government

United States government - the executive and legislative and judicial branches of the federal government of the United States

#### It’s extra T- they can claim the executive does the plan- that’s not a statutory or judicial restriction- destroys the most critical neg CP- debates over executive self-restraint are a core controversy of the topic

#### On this topic, specifying your agent is important- we should pay attention to who has authority and where it is vested- its necessary for CP competition- if we PICed out of the Court they could clarify in the 2ac that USFG means the Court

### CASE

#### The aff should defend the theoretical implementation of the plan- ethics must be tempered by feasibility and concerned with consequences otherwise its just an empty ethic.

Demenchonok 9, Institute of Philosophy of the Russian Academy of Sciences, Moscow, (Edward, The American Journal of Economics and Sociology, 68.1 (Jan): p9)

However, the further development of an ethical approach faces challenges that need to taken in consideration. Ethical criticism assumes a great burden, since it **must couch its challenges in terms that point to viable alternatives.** One of the many obstacles facing ethical criticism (and so another objection to the ethical project) is the weakened if not exhausted status of ethical language in contemporary public discourse. Ethical language is, after all, **regularly manipulated** by those who frame existing politics. When they function in the language of power, ethical appeals to the promotion of freedom and democracy become ritualized expressions that may be **ideologically useful to certain politicians**, but encourage public cynicism. Other historical factors have weakened the role of ethical language in public discourse as well (for example, the erosion of concerns with the public good in favor of the pursuit of private satisfactions). The cumulative effect is the difficulty of using ethical language in a way that will, or even should, be taken seriously.

#### EXPOSURE becomes addictive. Your aff over-focuses on calling the state out, instead of fighting to relieve suffering

Isaac 2 New School for Social Research, (Jeffrey C., Social Research, Summer, p. EXAC)

More to the point, when such exposure becomes itself a political project, and **when it usurps the tasks of judgment, then it becomes insidious, for it lacks all nuance.** In a world of media manipulation and melodramatic sensationalism it may be clever, and may even be in a sense just, to **hoist politicians on their own moral petards**. But in a world of serious violence and injury, in which policies are not simply about rhetoric or appearances but about human consequences, **it is irresponsible** to make the exposure of official hypocrisy the ultimate public intellectual project. For this makes unnecessary, and cynical, concessions to a media culture that there is no reason to embrace and many reasons to resist. Even more significantly, to do so represents **a callous indifference** to real human suffering. For **it implies that the real issue is not what might be done to relieve the suffering**, but rather how certain (American) officials can be caught in their own verbal contradictions. To do so also ignores the important fact that politicians, try though they may, **do not control** moral symbols or political discourse. The discourse of human rights is **not a creation** of the Pentagon or the State Department. While these institutions may seek to use this discourse when it suits their purposes, **the discourse has a seriousness and a truth value independent** of these uses. Citizens, intellectuals, relief workers, and human rights activists who invoke this discourse to justify a range of actions, including but by no means reducible to military interventions in the name of humanitarian relief, are **not creatures of American propaganda**.

The administration won’t follow through – five reasons

- Can’t solve detention without getting rid of the AUMF

- Trying suspects in the US will raise security concerns

- The US will claim that some detainees are too dangerous to release

- the US knows its detaining people who don’t even fit the category of combatants

- even suspects who have been officially approved for transfer are not being released

Roth 13 Kenneth, Executive Director Human Rights Watch, Testimony from May 16 Senate Armed Services Committee Hearing on the AUMF, 5-16

The administration now clings to the AUMF, but the factual predicate for it—US involvement in the conflict with the Taliban and al-Qaeda—is also coming to an end. And, in any event, people detained in the context of an armed conflict between a government and an armed group—such as the current conflict in Afghanistan—should be charged and tried, not detained. The administration’s misuse of the AUMF to rationalize prolonged detention without trial in Guantanamo is another reason why the AUMF should not be extended. Moreover, when it comes to combatants in an armed conflict, the power to detain can easily be linked to the power to kill. If the United States is going to claim the right to detain “combatants” without end on the basis of a global war unconnected to a traditional battlefield, against a non-state enemy that does not control any substantial territory, other nations will undoubtedly make similar claims. And, once governments identify people as combatants, however wrongful that may be, they will inevitably claim the power not only to detain them without charge or trial but also to kill them. Although the United States currently detains many people who are clearly not combatants – those drivers, cooks, doctors and financiers, among others – it should be mindful of how its policies can be interpreted. The best solution is still to try suspects in regular federal courts, with their entrenched procedural protections designed to provide fair trials. Security concerns can reasonably be handled; for example, if trials in the regular United States Courthouse for the Southern District of New York are deemed too difficult despite its long history of trying dangerous criminals such as drug czars and mafia dons, trials could be held securely and with little disruption on nearby Governor’s Island. However, the United States has already tried former CIA- and Guantanamo-detainee Ahmed Ghailani without incident in the regular courthouse for the Southern District of New York. By contrast, Congress’s insistence on using military commissions at Guantanamo has been an unmitigated disaster. The only two convictions obtained after full trials have both been overturned by the United States Court of Appeals for the District of Columbia Circuit; the five other convictions obtained were by plea bargain. During the same time that the military commissions have obtained these seven convictions, federal courts have prosecuted some 500 terrorism suspects. In addition, there are profound and legitimate concerns about the fairness of a system that, among other things, permits the introduction into evidence of coerced statements from witnesses, allows the military to hand-pick the jury pool, and severely compromises the attorney-client privilege. Roughly half of the Guantanamo detainees have theoretically been approved for transfer to their home or third countries, and those transfers can proceed if the administration certifies that appropriate security arrangements have been made. The administration should accelerate its efforts to make those arrangements. However, the administration also claims that there remains a category of detainees who are “too dangerous” to release but who cannot be tried because either there is insufficient admissible evidence to prosecute them or their acts did not amount to a chargeable crime. The administration purports to hold these men under the above-described war powers. But even under war rules, the purpose of detention is to keep the enemy from returning to the battlefield. As the US involvement in the Afghan war winds down, it is not clear what war the men released from Guantanamo would return to. And if the fear is that they would join in criminal activity, the answer lies in criminal prosecution, including for such inchoate crimes as conspiracy or attempt, not the “Minority Report” approach of detaining them for crimes that they might at some future point plan to commit. Given Guantanamo’s enormous stain on America’s reputation, there is good reason to believe that these continuing detentions are causing more harm than good to America’s security and counterterrorism efforts. President Obama himself has stated that keeping Guantanamo open weakens US national security. And for the same reasons that long-term detention without trial is wrong and counterproductive in Guantanamo, it would be wrong and counterproductive if moved to the United States. That would simply replicate Guantanamo in another locale. Roughly half of the Guantanamo detainees have theoretically been approved for transfer to their home or third countries, and those transfers can proceed if the administration certifies that appropriate security arrangements have been made. The administration should accelerate its efforts to make those arrangements. However, the administration also claims that there remains a category of detainees who are “too dangerous” to release but who cannot be tried because either there is insufficient admissible evidence to prosecute them or their acts did not amount to a chargeable crime. The administration purports to hold these men under the above-described war powers. But even under war rules, the purpose of detention is to keep the enemy from returning to the battlefield. As the US involvement in the Afghan war winds down, it is not clear what war the men released from Guantanamo would return to. And if the fear is that they would join in criminal activity, the answer lies in criminal prosecution, including for such inchoate crimes as conspiracy or attempt, not the “Minority Report” approach of detaining them for crimes that they might at some future point plan to commit.

#### Congressional waiting periods will prevent release

Frakt 12 David, Barry Law School – rep for detainee at Guantanamo, American University Law Review, June, 61 Am. U.L. Rev. 1253

David Frakt: Hi, I'm David Frakt from Barry Law School, and actually my question goes directly to what Judge Kavanaugh was just saying, and it's something that's been bothering me for a couple of years. I represented a detainee at Guantanamo, in both the military commission and on habeas, and as we were getting very close to the hearing of the merits, the Justice Department changed their mind and decided that my client, Mohammed Jawad, was not, and was being unlawfully held, and asked the judge to grant the habeas petition, which he did. So you would think at that point that he would be released, but he wasn't right away, because Congress had passed a waiting period notification, that the Executive Branch had to notify Congress and there had to be a waiting period before a detainee could be transferred or released to a third country. So I wanted to ask you guys to comment on that, from a constitutional perspective. Does Congress have that power? Because they [\*1289] subsequently imposed a lot more of these waiting periods or transfer requirements. I think the President just did a signing statement on the NDAA, saying that he wasn't sure if that was constitutional. Any thoughts on that question?

#### Releasing detainees doesn’t solve habeus violations- they still can’t confront their accusers

Greenwald 12 Glenn Greenwald, is a former Constitutional and civil rights litigator and is the author of three New York Times Bestselling books: two on the Bush administration's executive power and foreign policy abuses, and his latest book, With Liberty and Justice for Some, an indictment of America's two-tiered system of justice. Greenwald was named by The Atlantic as one of the 25 most influential political commentators in the nation, “The Obama GITMO myth”, 7/23/2012,

¶ When the President finally [unveiled his plan](http://news.bbc.co.uk/2/hi/8413230.stm) for “closing Guantanamo,” it became clear that it wasn’t a plan to “close” the camp as much as it was a plan simply to re-locate it — import it — onto American soil, at a newly purchased federal prison in Thompson, Illinois. William Lynn, Obama’s Deputy Defense Secretary, [sent a letter](http://www.salon.com/news/opinion/glenn_greenwald/2009/12/15/gitmo/lynn1.pdf) to inquiring Senators that [expressly stated](http://www.salon.com/2009/12/15/gitmo_3/) that the Obama administration intended to [continue indefinitely to imprison](http://1.bp.blogspot.com/_MnYI3_FRbbQ/SyfuwMfLSHI/AAAAAAAACQo/WZg9i4n6gMc/s1600-h/lynn2.png) some of the detainees with no charges of any kind. The plan was classic Obama: a pretty, feel-good, empty symbolic gesture (get rid of the symbolic face of Bush War on Terror excesses) while preserving the core abuses (the powers of indefinite detention ), even strengthening and expanding those abuses by bringing them into the U.S.¶ Recall that the ACLU [immediately condemned](http://www.aclu.org/national-security/creating-gitmo-north-alarming-step-says-aclu) what it called the President’s plan to create “GITMO North.” About the President’s so-called “plan to close Guantanamo,” Executive Director Anthony Romero said:¶ The creation of a “Gitmo North” in Illinois is hardly a meaningful step forward. Shutting down Guantánamo will be nothing more than a symbolic gesture if we continue its lawless policies onshore.¶ Alarmingly, all indications are that the administration plans to continue its predecessor’s policy of indefinite detention without charge or trial for some detainees, with only a change of location. Such a policy is completely at odds with our democratic commitment to due process and human rights whether it’s occurring in Cuba or in Illinois.¶ In fact, while the Obama administration inherited the Guantánamo debacle, this current move is its own affirmative adoption of those policies. It is unimaginable that the Obama administration is using the same justification as the Bush administration used to undercut centuries of legal jurisprudence and the principle of innocent until proven guilty and the right to confront one’s accusers. . . . .The Obama administration’s announcement today contradicts everything the president has said about the need for America to return to leading with its values.¶

courts are overly deferent towards the executive

Cameron 13 Charles, Writer for Small Wars Journal, All Things Counterterrorism. Principal Researcher with Boston University’s Center for Millennial Studies and the Senior Analyst with the Arlington Institute. Zenpundit, 2-13, http://zenpundit.com/?page\_id=2

The proposal for judicial review of potential attacks during an armed conflict (not peacetime) is rife with a host of counterproductive second and third order constitutional and military effects. It represents a sweeping change in our political order by a technical legal fiat. It would also be an exceedingly dumb way to run a war. It might test our powers of imagination, but somehow, we faced down Hitler and the Imperial Japanese without Federal judges running our strategic bombing campaigns. . This preference for legalistic arguments is partly a product of over representation of lawyers among the American political elite. Highly competent attorneys are very skilled at framing arguments on behalf of clients so that they begin litigation not only from a favorable explicitly stated position but, where possible, with several layers of one-sided implicit premises built in that you accept uncritically only at your peril. When a lawyer comes into a public policy debate saying that a political question is a legal question, he is making a political argument to remove a political dispute in a democratic polity to the courts where the matter will be decided under very different procedures and will remain as a legal question thereafter. . Sometimes, this is the constitutionally correct thing to do; more often, it is simply an expedient thing to do that diminishes democratic accountability while rendering policy and process needlessly more complex and adversarial than even open public debate. It is also a self-aggrandizing feedback loop for lawyers as a class – when all political questions are legal questions, then should we not all defer to their superior expertise and training? It is the road to technocracy and the rule of law becoming “rule by lawyers”. . Does that mean the critics have no point whatsoever regarding the use of drones in “targeted killings”?

Judge rule is worse than relying on political disincentives

DYZENHAUS 6, Pf Philosophy @ Toronto, (David, “TERRORISM, GLOBALIZATION AND THE RULE OF LAW: SCHMITT V. DICEY: ARE STATES OF EMERGENCY INSIDE OR OUTSIDE THE LEGAL ORDER?” Cardozo Law Review, March, lexis)

I will argue, however, that in order to provide a workable version of the Identity Thesis, it is important to depart in some significant respects from Dicey. The regulative assumption just sketched does not require that judges always be the principal guardians of the rule of law. Certain situations, and emergencies are one, might require that Parliament or the executive play the lead role. The rule of law project does not require allegiance to a rigid doctrine of the separation of powers in which judges are the exclusive guardians of the rule of law. As I will argue, it is in seeing that judges are but part of the rule of law project that one can begin to appreciate the paradox that arises when rule by law, rule through a statute, is used to do away with the rule of law, to create a legal black hole. I will claim that there is a contradiction in the idea of legal black hole. In other words, one cannot have rule by law without the rule of law. But precisely because I want to argue that judges are but part of the rule of law project, I also am not committed to the conclusion that judges are always entitled to resist statutes that create legal black holes. Whether they are so entitled will depend on the constitutional structure of their legal order. But whatever that structure, they are under a duty to uphold the rule of law. Even if they are not entitled to invalidate a statute that creates a legal black hole, it is their duty to state that the legislature has made a decision to govern arbitrarily rather than through the rule of law. For example, Bruce Ackerman in his essay, The Emergency Constitution, 43 starts by claiming that we need "new constitutional concepts" in order to avoid the downward spiral in protection of civil liberties that occurs when politicians enact laws that become increasingly repressive with each new terrorist attack. 44 We need, he says, to rescue the concept of "emergency powers ... from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal [\*2016] democracy." 45 Because Ackerman does not think that judges are likely to do, or can do, better than they have in the past at containing the executive during an emergency, he proposes mainly the creative design of constitutional checks and balances to ensure, as did the Roman dictatorship, against the normalization of the state of emergency. Judges should not be regarded as "miraculous saviors of our threatened heritage of freedom." 46 Hence, it is better to rely on a system of political incentives and disincentives, a "political economy" that will prevent abuse of emergency powers. 47