### Indefinite Detention 1AC

#### Despite promises by the Obama administration indefinite detention continues.

Huffington Post 8-7, 2013 (<http://www.huffingtonpost.com/rev-richard-l-killmer/force-feeding-must-stop_b_3713678.html>)

More than 11 years after the U.S. government transported the first prisoners from Afghanistan to the Guantanamo Bay Detention Center, and four years after President Obama signed an executive order promising to close the prison within a year, it remains open. The president has said he wants to close it, an envoy has been appointed to manage its closure, and last week, the president announced that two Algerian detainees will be transferred back to Algeria, but the detention center remains an open moral wound, a symbol of the violation of our nation's deepest values. Guantanamo represents a place where the United States broke faith with itself and used torture as an interrogation technique. It is a place where the moral wound of indefinite detention continues to cause immense pain and harm. The vast majority of the 166 people held in Guantanamo have never been tried, convicted or even charged with a crime. More than half of them have been cleared for release or have been approved for transfer.¶ Indefinite detention is not only harmful to the detainees themselves, it also diminishes the moral leadership of our nation, compromises our commitment to the rule of law, and undermines our struggle against terrorism.

#### The use of executive privilege over indefinite detention is the expansion of law to justify the dominance of life.

Butler 4 (2004, Judith Butler is a Professor of Rhetoric and Comparative Literature at U.C. Berkeley, “Precarious Life: The Powers of Mourning and Violence”, pg. 61-62 – AH)

My own ~~view~~ is that a contemporary version of sovereignty,¶ animated by an aggressive nostalgia that ~~see~~ks to do away with the¶ separation of powers, is produced at the moment of this withdrawal,¶ and that we have to consider the act of suspending the law as a¶ performative one which brings a contemporary configuration of¶ sovereignty into being or, more precisely, reanimates a spectral¶ sovereignty within the field of governmentality. The state produces, through the act of withdrawal, a law that is no law, a court that is no¶ court, a process that is no process. The state of emergency returns¶ the operation of power from a set of laws (juridical) to a set of rules¶ (governmental), and the rules reinstate sovereign power: rules that¶ are not binding by virtue of established law or modes of legitimation,¶ but fully discretionary, even arbitrary, wielded by officials who¶ interpret them unilaterally and decide the condition and form of their¶ invocation. Governmentality is the condition of this new exercise of¶ sovereignty in the sense that it first establishes law as a "tactic,"¶ something of instrumental value, and not "binding" by virtue of¶ its status as law. In a sense, the self-annulment of law under the¶ condition of a state of emergency revitalizes the anachronistic¶ "sovereign" as the newly invigorated subjects of managerial power.¶ Of course, they are not true sovereigns: their power is delegated, and¶ they do not fully control the aims that animate their actions. Power¶ precedes them, and constitutes them as "sovereigns," a fact that¶ already gives the lie to sovereignty. They are not fully self grounding;¶ they do not offer either representative or legitimating¶ functions to the policy. Nevertheless, they are constituted, within the¶ constraints of governmentality, as those who will and do decide on¶ who will be detained, and who will not, who may see life outside the¶ prison again and who may not, and this constitutes an enormously¶ consequential delegation and seizure of power. They are acted on,¶ but they also act, and their actions are not subject to review by any¶ higher judicial authority. The decision of when and where to convene¶ a military tribunal is ultimately executive, but here again, the¶ executive decides unilaterally, so that in each case the retraction of¶ law reproduces sovereign power. In the former case, sovereign power¶ emerges as the power of the managerial "official"-and a Kafkan¶ nightmare (or Sadean drama) is realized. In the latter case, sovereignty¶ returns to the executive, and the separation of powers is eclipsed.

#### This expansion of the law or governmentality works to extend Biopolitical managerial power over all aspects of life.

Houen 2006 (Alex [ecturer in Modern Literature and American Studies in the Department of English Literature at the University of Sheffield]; Sovereignty, Biopolitics, and the Use of Literature: Michel Foucault and Kathy Acker; Theory & Event 9(1); kdf)

What about the issue of biopolitical government, though? We saw earlier that Foucault in his article "Governmentality" maintains that with sovereignty "the instrument that allowed it to achieve its aim -- that is, obedience to the laws -- was the law itself." In contrast, he argues, "governmentality" uses "laws themselves as tactics -- to arrange things in such a way that, through a certain number of means, [certain] ends may be achieved." But if we accept Schmitt's characterisation of the sovereign as the one who decides legal exceptions, we must accept that sovereignty always potentiates governmentality to the extent that it tactically institutes new orders of legality. That this is the case with President Bush's military order is implicit in the statement of John Yoo, who was US Deputy-Assistant Attorney-General when the order was coming into effect: "What the administration is trying to do," he explained, "is create a new legal system."22 Judith Butler is thus right to argue that with the "war on terror" and the US detention camps we are witnessing a general convergence of sovereignty and the kind of governmentality that Foucault identifies:¶ I would like to suggest that the current configuration of state power, in relation both to the management of populations (the hallmark of [Foucault's] governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured in terms of the new war prison.23¶ ¶ Since the publication of Butler's article, though, sovereignty and US federal law have also come into conflict. According to the US administration, the Guantanamo Bay camps did not fall under the jurisdiction of US federal courts because although Guantanamo Bay is a US military base it is leased from the Cuban government. However, on 28 June 2004 the US Supreme Court ruled that unlawful combatants at the base do fall under federal jurisdiction and can thus plead for habeas corpus -- that is, the right to contest the grounds of their detention in US federal courts. Essentially, then, the juridical apparatus has sought to oppose the Bush administration's marriage of sovereignty and governmentality. How effective this challenge will be remains to be ~~see~~n -- only a small number of the detainees' cases have been ~~hear~~d in federal courts to date, and while the US Supreme Court granted detainees the right to habeas corpus, it did not grant them substantive rights, which means that they can still be tried subsequently by military tribunal rather than in a federal court. Moreover, extending habeas corpus to a foreign territory such as Guantanamo Bay has other ramifications. Meaning "you shall have the body" in Latin, "habeas corpus" was first introduced in 1215 in the Magna Carta to ensure that no one could be convicted in law without being brought before a court. So while it enshrines the right of an accused to have a fair legal ~~hear~~ing, it also ensures the right of the law to have the body of the accused bought before it. Extending habeas corpus to Guantanamo Bay as a foreign territory might mean its detainees have a right to challenge their case in US federal courts, then, but as Martin Puchner has argued, it also means that people residing in other foreign territories could be charged in the US and forced to appear in a US court.24¶ ¶ In light of these recent developments, I want to argue that there are two divergent strands of power emerging from the US: on the one hand, an executive administration acting against established laws in order to revive the sovereign's power over life, death, and exceptions; on the other hand, a disciplinary-juridical apparatus acting against the federal executive to extend its own jurisdiction over foreign territories and individuals. The contest between these two strands is literally a matter of fighting for power over the same foreign bodies, and to that extent they both contribute to spreading biopower globally. Admittedly, it is the Bush administration's resuscitation of sovereignty that has, to date, succeeded in retaining the upper hand. I would argue that effectively it is also succeeding in solving the question posed by Foucault at the end of Society Must be Defended: "How can one both make a biopower function and exercise the rights of war, the rights of murder and the function of death, without becoming racist?" (SMD, 263). By ratifying the category of "unlawful combatant," the US administration is not characterising its "non-citizen" enemy as a specific race or nationality. Rather, as someone declared to be waging war outside established laws and without state backing, the unlawful combatant is configured as anti-state, anti-national, and anti-political, and so cannot be ~~see~~n as a political citizen. And without the rights of a political subject, such human "non-citizens" are stripped of the rights to be human, while the question of whether they will live or die is held in suspension. That is to say, not only is their status as human suspended, so is their existence as living being. And in that respect, the exercise of sovereignty here has not been a matter of "taking life" so much as producing a state of suspended animation, a state of being that is neither alive nor dead, but latent. Furthermore, the longer such unlawful combatants are deemed a threat, the longer the new sovereignty can justify its powers of suspension. Indefinite detention is thus an infinite prolongation of sovereignty's resuscitated power.

#### **The extra-legal practices justified by the war on terror enable the most violent forms of governmentality**

Butler ‘4 (2004, Judith Butler is a Professor of Rhetoric and Comparative Literature at U.C. Berkeley, “Precarious Life: The Powers of Mourning and Violence”, pg. 94-95 – AH)

For Foucault, then, governmentality regards laws as tactics; their¶ operation is "justified" through their aim, but not through recourse¶ to any set of prior principles or legitimating functions. Those¶ functions may be in place, but they are not finally what animates the¶ field of governmentality. Understood in this way, the operations of¶ governmentality are for the most part extra-legal without being¶ illegal. When law becomes a tactic of governmentality, it ceases to¶ function as a legitimating ground: governmentality makes concrete the¶ understanding of power as irreducible to law. Thus governmentality¶ becomes the field in which resurgent sovereignty can rear its¶ anachronistic head, for sovereignty is also ungrounded in law. In the¶ present instance, sovereignty denotes a form of power that is fundamentally¶ lawless, and whose lawlessness can be found in the way in which law itself is fabricated or suspended at the will of a designated¶ subject. The new war prison literally manages populations, and thus¶ functions as an operation of governmentality. At the same time, however,¶ it exploits the extra-legal dimension of governmentality to assert¶ a lawless sovereign power over life and death. In other words, the new¶ war prison constitutes a form of governmentality that considers itself¶ its own justification and ~~see~~ks to extend that self-justificatory form¶ of sovereignty through animating and deploying the extra-legal¶ dimension of governmentality. After all, it will be "officials" who¶ deem suspected terrorists or combatants "dangerous" and it will be¶ "officials," not representatives of courts bound by law, who ostensibly¶ will re~~view~~ the cases of those detained indefinitely. Similarly, the¶ courts themselves are conceived explicitly as "an instrument" used in¶ the service of national security, the protection of principality, the¶ continuing and augmented

#### **Those who are detained indefinitely by the US have no ability to challenge their detention because of the extra-legal practices that justify their subjugation. This leads to the detainees being deemed as less than human which makes them ungrievable lives.**

Butler 4 (2004, Judith Butler is a Professor of Rhetoric and Comparative Literature at U.C. Berkeley, “Precarious Life: The Powers of Mourning and Violence”, pg 56-59 – AH)

With the publication of the new regulations, the US government¶ holds that a number of detainees at Guantanamo will not be given trials at all, but will rather be detained indefinitely. It is crucial to ask¶ under what conditions some human lives cease to become eligible for¶ basic, if not universal, human rights. How does the US government¶ construe these conditions? And to what extent is there a racial and¶ ethnic frame through which these imprisoned lives are ~~view~~ed and¶ judged such that they are deemed less than human, or as having¶ departed from the recognizable human community? Moreover, in¶ maintaining that some prisoners will be detained indefinitely, the state¶ allocates to itself a power, an indefinitely prolonged power,¶ to exercise judgments regarding who is dangerous and, therefore,¶ without entitlement to basic legal rights. In detaining some prisoners¶ indefinitely, the state appropriates for itself a sovereign power that is¶ defined over and against existing legal frameworks, civil, military,¶ and international. The military tribunals may well acquit someone of¶ a crime, but not only is that acquittal subject to mandatory executive¶ re~~view~~, but the Department of Defense has also made clear that¶ acquittal will not necessarily end detention. Moreover, according to¶ the new tribunal regulations, those tried in such a venue will have no¶ rights of appeal to US civil courts (and US courts, responding to¶ appeals, have so far maintained that they have no jurisdiction over¶ Guantanamo, which falls outside US territory). Here we can see that¶ the law itself is either suspended or regarded as an instrument that the¶ state may use in the service of constraining and monitoring a given¶ population. Under this mantle of sovereignty, the state proceeds to¶ extend its own power to imprison indefinitely a group of people¶ without trial. In the very act by which state sovereignty suspends law,¶ or contorts law to its own uses, it extends its own domain, its own¶ necessity, and develops the means by which the justification of its¶ own power takes place. Of course, this is not the "state" in toto, but¶ an executive branch working in tandem with an enhanced administrative¶ wing of the military. The state in this sense, then, augments its own power in at least¶ two ways. In the context of the military tribunals, the trials yield no¶ independent conclusions that cannot be reversed by the executive¶ branch. The trials' function is thus mainly advisory. The executive¶ branch in tandem with its military administration not only decides¶ whether or not a detainee will stand trial, but appoints the tribunal,¶ re~~view~~s the process, and maintains final say over matters of guilt,¶ innocence, and punishment, including the death penalty. On May 24,¶ 2003, Geoffrey Miller, commanding officer at Camp Delta, the new¶ base on Guantanamo, explained in an inter~~view~~ that death chambers¶ were in the process of being built there in anticipation of the death¶ penalty being meted out. 5 Because detainees are not entitled to these¶ trials, but offered them at the will of the executive power, there is no¶ semblance of separation of powers in these circumstances. Those¶ who are detained indefinitely will have their cases re~~view~~ed by¶ officials--not by courts--on a periodic basis. The decision to detain¶ someone indefinitely is not made by executive re~~view~~, but by a set of¶ administrators who are given broad policy guidelines within which to¶ act. Neither the decision to detain nor the decision to activate the¶ military tribunal is grounded in law. They are determined by¶ discretionary judgments that function within a manufactured law or¶ that manufacture law as they are performed. In this sense, both of¶ these judgments are already outside the sphere of law, since the¶ determination of when and where, for instance, a trial might be¶ waived and detention deemed indefinite does not take place within a¶ legal process, strictly ~~speak~~ing; it is not a decision made by a judge for¶ which evidence must be submitted in the form of a case that must¶ conform to certain established criteria or to certain protocols of¶ evidence and argument. The decision to detain, to continue to detain¶ someone indefinitely is a unilateral judgment made by government¶ officials who simply deem that a given individual or, indeed, a group poses a danger to the state. This act of "deeming" takes place in the¶ context of a declared state of emergency in which the state exercises¶ prerogatory power that involves the suspension of law, including due¶ process for these individuals. The act is warranted by the one who¶ acts, and the "deeming" of someone as dangerous is sufficient to¶ make that person dangerous and to justify his indefinite detention.¶ The one who makes this decision assumes a lawless and yet fully¶ effective form of power with the consequence not only of depriving¶ an incarcerated human being of the possibility of a trial, in clear¶ defiance of international law, but of investing the governmental¶ bureaucrat with an extraordinary power over life and death. Those¶ who decide on whether someone will be detained, and continue to be¶ detained, are government officials, not elected ones, and not members¶ of the judiciary. They are, rather, part of the apparatus of governmentality;¶ their decision, the power they wield to "deem" someone¶ dangerous and constitute them effectively as such, is a sovereign¶ power, a ghostly and forceful resurgence of sovereignty in the midst¶ of governmentality.¶

These ungrievable lives are subjected to endless violence and ontologically excluded.

Butler ‘4 (2004, Judith Butler is a Professor of Rhetoric and Comparative Literature at U.C. Berkeley, “Precarious Life: The Powers of Mourning and Violence”, pg. 33-34 – AH)

I am referring not only to humans not regarded as humans, and thus to a restrictive conception of the human that is based upon their exclusion. It is not a matter of a simple entry of the excluded into an established ontology, but an insurrection at the level of ontology, a critical opening up of the questions, What is real? Whose lives are real? How might reality be remade? Those who are unreal have, in a sense, already suffered the violence of derealization. What, then, is the relation between violence and those lives considered as unreal? Does violence effect that unreality? Does violence take place on the condition of that unreality? If violence is done against those who are unreal, then, from the perspective of violence, it fails to injure or negate those lives since those lives are already negated. But they have a strange way of remaining animated and so must be negated again (and again). They cannot be mourned because they are always already lost or, rather, never “were,” and they must be killed, since they ~~see~~m to live on, stubbornly, in this state of deadness. Violence renews itself in the face of the apparent inexhaustibility of its object. The derealization of the¶ “Other” means that it is neither alive nor dead, but interminably ¶ spectral. The infinite paranoia that imagines the war against terrorism¶ as a war without end will be one that justifies itself endlessly in¶ relation to the spectral infinity of its enemy, regardless of whether or¶ not there are established grounds to suspect the continuing operation¶ of terror cells with violent aims.

#### **This judgment of what lives are “livable” is a form of Biopolitics that justifies the extermination of all that falls outside of the norm. This current form of extra-legal justification is what allows for atrocities to continually be justified, which leads to total domination of all forms of life.**

Pugliese 2013 (Joseph [Associate professor of cultural studies @ Macquarie University]; State Violence and the Execution of Law Biopolitical Caesurae of Torture, Black Sites, Drones; p. 224-6; kdf)

For me, these other possibilities are cryptically encoded in another oracular¶ pronouncement by Foucault in which he identifies 'the human as a transitory¶ postulate.'7 A postulate is, by definition, an axiom, a principle and a prerequisite.¶ 'The human,' as qualified euro-anthropocentric axiom, has functioned as the biopolitical¶ figure that has ordered the earth's life forms into speciesist hierarchies,¶ thereby legitimating the exercise of violence, control and regularization over all¶ those other life forms that are ranked below it. This postulate, however, is inscribed¶ by its own unthought prerequisite and the torsions of a double movement. On the¶ one hand, 'the animal' founds 'the human' as its unthought precisely because, as¶ a priori, its status in articulating this di~~vision~~ is always-already given; on the other¶ hand, even as it supplies the conditions of possibility for this conceptual order, 'the¶ animal' is relegated to the domain of the nonconceptual where it assumes the emblematic status of 'nature' - outlaw locus of unthinking instinct and unmediated¶ materiality. As such, anything that is captured within this domain is presented¶ as open to conquest, enslavement, domestication and/ or execution. As Spillers'¶ work attests, a critical re~~view~~ of the colonial history of 'the human' only too quickly¶ evidences the positioning of non-European peoples within the vestibularity of nature¶ in opposition to the culture. Da Silva's work theorizes this di~~vision~~ as what is¶ constructed and maintained by the arsenal of raciality and its production of the self¶ determined ethical-:furidicalfigure- 'the human'- and the ciffictable I that stands before¶ the horizon of death - the 'no body.' The operation of this dense biopolitical¶ matrix has enabled the violent history of preclusion of non-European subjects¶ from the very category of 'the human.' Relatedly, this biopolitical matrix also¶ explains why the international apparatus of 'human rights' fails to deliver its¶ universalist promises as it remains 'generally compatible with the maintenance of¶ existing geopolitical structures of wealth and authority in the world. •B¶ As I write, this very argument is buttressed by the release of the US Department¶ of State's Country Reports on Human Rights Practices for 2011, a weighty and detailed¶ report that lists the human rights violations of all countries except the United¶ States.9 Nowhere in this report are the gross violations of human rights perpetrated¶ by the US state documented or called to account. Occupying a transcendent¶ locus of positional superiority, as imperial state it enjoys the prerogative to absent¶ itself from this catalogue of violence even as it plays an instrumental role in its¶ production. This absence, this striking lacuna, also signifies otherwise. Reading¶ against the grain, this act of exception marks the outlaw status of a rogue state that¶ cannot, because of its own intra- and international gross violations of human¶ rights, be incorporated ·within the very (problematic) domain that it sets itself the¶ task of surveying and adjudicating. As a global purveyor of state terrorism, it is¶ logically excluded from the very field that it effectively renders void. As the war on¶ terror - with its regime of torture and extraordinary rendition, its domestic and¶ international black site prisons, its ecocidal expropriation and destruction of¶ Native American lands, and its ongoing drone strikes has demonstrated, neither¶ the category of 'the human' nor the legal apparatus of'human rights' will work to¶ stop the imperial state from deploying strategies of biopolitical violence when it¶ chooses to exercise its will to power in order to secure and reproduce its positional¶ superiority: the imperial right to open access of targeted territories and bodies¶ overrides the so-called universalist status of the human rights apparatus. In the US¶ state's coding of anonymous but 'suspect' Afghan or Pakistani subjects as mere¶ 'patterns of life' and their consequent extermination by drones, human rights fail¶ to figure as they do not apply to these human subjects: the civilian dead of US¶ drone strikes signify as nothing more than biopolitical substance that can be killed¶ with impunity. When human rights are invoked and activated, retrospectively as in the case of the torture victims or civilian drone casualties, they operate as¶ ameliorative, legalistic interventions that largely leave intact the structures of¶ biopolitical power that actually produced the violence in the first place. Having¶ said this, I do not want to dismiss the apparatus of human rights wholesale in a¶ facile gesture that fails to acknowledge that human rights can be mobilized in¶ counter-discursive ways within contemporary biopolitical configurations of state¶ power; neither do I negate the critical overturning of unjust practices that they¶ have enabled nor their power, contingently, to preclude or circumscribe certain¶ forms of state violence. Rather, the issue is to disclose the violent biopolitical¶ assumptions that continue to inform this apparatus in order to begin to reorganize¶ and redistribute the relations of asymmetrical power that inform it.¶ I close this book on a note of tenuous hope pinned to the concept of the euroanthropocentric¶ figure of 'the human' as a transitory postulate. As I remarked¶ above, a postulate is inscribed with the force of the axiom, as that a priori that¶ aspires to determine what is to come. A postulate, however, also signifies a claim¶ or assertion that has been assumed without proof. 'The human,' as euroanthropocentric¶ construct, emerges as that being that has organized the earth and¶ its life forms on the unfounded principle of an assumed superiority, violently¶ secured through the ceaseless deployment ofbiopolitical caesurae. I contrast this¶ with a number oflndigenous cultures that challenge the anthropocentric distribution¶ of life across speciesist hierarchies and that refuse the violence ofbiopolitical¶ di~~vision~~s by conceptualizing relations between humans and everything in nature¶ in interconstitutive and intersubjective ways. 10 The very speciesist apparatus -¶ discursive, juridical and philosophical - that has worked to constitute the euroanthropocentric¶ figure of 'the human' has been instrumental in producing and¶ demarcating all those other savage-animal subjects/ objects that continue to figure¶ as its inverse. Unmasked as a transitory postulate, without due proof of its assumed¶ superiority given the exorbitance of its unethical demands and the enormity of the¶ violence it visits upon the life of the planet, the euro-anthropocentric figure of 'the¶ human' emerges as a figure generated by the contingency of geopolitical, historical¶ and discursive determinations. Conceptualizing 'the human' as a transitory¶ postulate establishes the possibility of beginning the difficult work of rendering this¶ euro-anthropocentric figure predicated on the violence of biopolitical caesurae¶ inoperative. It opens the possibility to establish ethical relations with those very¶ subjects and entities that have been outlawed from the ground of the ethical.

#### *Thus, Austin and I advocate the following: The Supreme Court of the United States should mandate in the next available test case that the president’s war power authority to indefinitely detain should be eliminated.*

#### The only way to solve for indefinite detention is the release of detainees.

Chow 2011 [Samuel [JD @ Cardozo]; The Kiyemba Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions; 19 Cardozo J. Int'l & Comp. L. 775; kdf)

This Note examines the availability of habeas re~~view~~ in executive terrorist detentions. Specifically, the scope of habeas is examined in light of recent interpretations of the judicial branch's ability, or lack thereof, to order release as a remedy. Courts have a rightful place in the foreign relations debate and recent detainee cases point to habeas review as a means to exercise that role. n41 For habeas review to be meaningful, the ability to order functional release, or release where the detainees are no longer being physically detained, must be available. The restraints Munaf has placed on functional release are not problematic so long as the detainees' liberty interests are adequately accounted for. This Note will argue that Kiyemba poses the archetypal situation where detainees have been unlawfully held for an unreasonable length of time, eroding that liberty interest. If release-plus is necessary to effectuate functional release under these conditions, courts must have the authority to grant it - even if those circumstances only occur in a limited class of cases. Indeed, both historical evidence of the judicial branch's role in such circumstances and the Zadvydas v. Davis n42 line of cases has already answered the question of what balance must be struck between the liberty interests of a detainee held unlawfully and the executive immigration prerogative. Limits must be placed on how long a detainee may be held and the liberty interest, under circumstances where the detention has become unreasonably lengthy, must win out. n43 Functional release, therefore, must apply when unlawful detentions reach a point where they can be characterized as unreasonable.

Part II examines the historical evolution of habeas corpus and demonstrates that its significance as a judicial remedy depends on the courts' ability to order a detainee's functional release. Part III [\*782] introduces the contemporary application and scope of habeas corpus in the context of executive terrorist detentions. Part IV examines the application of immigration paradigms to habeas jurisprudence. Part V argues, based on the Kiyemba paradox, that the courts' role in reviewing such detention cases is substantially diminished if they are unable to meaningfully offer release as a remedy for unlawful detentions. Ultimately, this Note concludes that under particular circumstances, the courts must have the authority to order release into the United States because the availability of release as a remedy is an essential element of habeas corpus. Furthermore, if the availability of habeas re~~view~~ is constitutionally-guaranteed, then as a general rule, the availability of release as a remedy must also be guaranteed. This Note will show that these propositions do not, contrary to what the government argued in Kiyemba, run counter to current understandings of the executive immigration authority.

#### **The application of *Munaf* and *Kiyemba* will create a restriction on the president’s ability to indefinitely detain.**

Chow 2011 [Samuel [JD @ Cardozo]; The Kiyemba Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions; 19 Cardozo J. Int'l & Comp. L. 775; kdf)

The Kiyemba petitioners were seventeen Uighurs from China's Xinjiang Province who had traveled to Afghanistan and then to Pakistan prior to September 11, 2001. n124 They were subsequently captured by United States military in Pakistan during its military campaign in Afghanistan. n125 All seventeen had been held in Guantanamo Bay since 2002 on CSRT determinations made in 2004 that they were enemy combatants. n126 After Parhat v. Gates, n127 the government retracted that determination. n128 There, the D.C. Circuit Court determined that there was insufficient evidence linking the petitioner, Huzaifa Parhat, to the ETIM. n129 In fact, the court acknowledged that even if it had determined that Parhat was affiliated with the ETIM, that determination would be insufficient to sustain an enemy combatant status in light of the unreliability of the evidence linking the group to al Qaeda or the Taliban. n130 This finding was subsequently applied to all the [\*794] Kiyemba petitioners. n131¶ Following Parhat, the government conceded that the Uighurs' detention was unlawful. n132 In Kiyemba, the government admitted that it no longer had a legal basis to hold the Uighurs. n133 Indeed, the D.C. Circuit Court agreed that the Uighurs may be entitled to release based on their habeas petition. n134 However, it also held that it did not have the authority to release the detainees into the United States nor could it overturn the government's transfer determinations. n135 This conclusion was based on the understanding that the court had no authority to intrude on the Executive's immigration authority, n136 which effectively precluded the court's ability to provide a meaningful remedy for release. The Uighurs sought release into the United States because the United States government could not legally return them to their home country of China on the basis of a high likelihood of torture upon their return. n137 Additionally, despite the Executive's attempts to find an alternative asylum destination, no other third-party countries were willing to receive them. n138 Political pressure from the Chinese government n139 and the Executive's prior [\*795] determination that the Uighurs were enemy combatants n140 may have contributed to the government's inability to resettle them.¶ After the D.C. Circuit Court issued its opinion and while the petition for certiorari was pending, the Executive expressly recognized the troubling scenario that the continued detention of the Kiyemba petitioners posed. Defense Secretary Robert M. Gates concluded that it was "difficult for the State Department to make the argument to other countries they should take these people that we have deemed, in this case, not to be dangerous, if we won't take any of them ourselves." n141 Indeed, the Executive was poised to send as many as seven of the petitioners to the United States in 2009. n142 However, in response to the threat of such action, Congress attached a rider to the Supplemental Appropriations Act which prevented the use of defense funds to release any Guantanamo detainees into the United States. n143 Congress also passed two additional pieces of legislation restricting the ability of Guantanamo detainees to enter the United States. n144 The National Defense Authorization Act n145 granted Congress a substantial degree of control over such releases and a spending provision banned the Department of Homeland Security from effectuating such release. n146 The detainees' hope for release, therefore, turned again on the pending petition for certiorari.¶ By the time the Supreme Court granted certiorari in Kiyemba on October 2009, ten of the seventeen petitioners had been [\*796] granted refuge and transferred; four to Bermuda and six to Palau. n147 The offer extended by Palau was qualified as being an offer for temporary relocation pending permanent resettlement without the hope of obtaining citizenship. n148 Six of the remaining seven petitioners were also given the opportunity to transfer to Palau, but declined. n149 Only one petitioner, Arkin Mahmud, had not received an offer of refuge from any country, prompting his brother and the five other petitioners to reject the offer from Palau. n150 A favorable decision by the Supreme Court seemed to be Arkin Mahmud's only hope of escaping his unlawful detention, until the Swiss government announced it would provide refuge for both Mahmud and his brother. n151 The Supreme Court, deciding that the underlying facts of the case had changed because all of the petitioners had now received at least one offer of resettlement, vacated the D.C. Circuit Court decision and remanded the case to allow the lower courts to make a determination in the first instance. n152 The D.C. Circuit Court promptly reinstated its original decision, holding that regardless of any settlement offers (of lack thereof), the petitioners had "no right to be released into the United States." n153 The remaining five petitioners, still detained at Guantanamo, have since filed a second petition for writ of certiorari. n154¶ The facts in Munaf and Kiyemba are vastly different. Yet, both sets of petitioners sought release-plus, and in both circumstances, the "plus" they sought was release into the United States. The courts' reasoning for refusing such a remedy, however, is entirely distinguishable in each respective case. In Munaf, the immigration issue faced by the Kiyemba petitioners was absent since both Munaf petitioners had been American citizens. n155 In that case, denial of the "plus" factor turned on the fact that the petitioners were attempting to ride roughshod over an international obligation the United States had to hand over [\*797] individuals who had committed crimes on Iraqi soil to Iraqi officials, n156 an analogous element that did not exist in Kiyemba.¶ Ultimately, the outcomes in Munaf and Kiyemba point to the overarching principle that courts may have the legal authority to hear a habeas petition, but are limited as to the allocation of relief. A desirable remedy may not be appropriate, particularly when the remedy sought is release-plus. However, it is unlikely that Munaf intended to preclude release-plus in all circumstances because doing so could potentially create unconstitutional suspension. With this in mind, the next issue that must be confronted is determining when restrictions on the effectiveness of release are appropriate and when they are not. Munaf serves as an example of the former, where limits on release are appropriate. Kiyemba, arguably, serves as an example of when such limits are inappropriate.¶ IV. Immigration in Habeas Jurisprudence¶ ¶ It is well-established that the availability of habeas in the context of executive detentions is its most significant role. n157 "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." n158 A remedy is typically granted where the detention is unlawful; for executive detentions, that remedy has historically meant release. n159 Munaf's relevance after Boumediene concerned the Supreme Court's interpretation of "release." While Munaf is factually different from Kiyemba, it provided a window into the government's interpretation of what constitutes release. Munaf is also instructive in determining, ultimately, how release should be viewed as a constitutional matter.¶ The historical development of habeas corpus and the holding in Boumediene demonstrated first, that release is imperative to maintain the integrity of the writ n160 and second, that habeas corpus [\*798] is a constitutionally-guaranteed right for certain individuals. n161 These two principles support the argument that efforts to limit the availability of release as a habeas remedy should, in the very least, require a high degree of scrutiny. Indeed, in Boumediene, Justice Kennedy noted that there are instances of unlawful detention where release may not be appropriate. n162 Therefore, in a limited set of circumstances the grant of release may not be constitutionally required. Munaf suggested that requests for release-plus go beyond what the Constitution requires. In Kiyemba, the government successfully argued that the detainees should be denied release into the United States based on Munaf's release-plus analysis. n163 However, preclusion of functional release is arguably inappropriate there. In fact, this understanding of release-plus in Kiyemba may have been an unconstitutional reading of the immigration laws that the court had relied on.¶ The government's argument in Kiyemba was based on Shaughnessy v. Mezei n164 and broad interpretations of Boumediene and Munaf. n165 The government's argument was twofold. First, the government relied on Mezei to ground the legal authority for excluding the Kiyemba petitioners from entering the United States. n166 Second, Munaf was used to reconcile the petitioners' right to release with their continued detention. n167¶ A. Mezei and the Government's Immigration-Based Framework¶ ¶ In Mezei, the Supreme Court held that the indefinite detention of a non-citizen on Ellis Island was not a "[deprivation] of any statutory or constitutional right." n168 The petitioner, Ignatz Mezei, was born in Gibraltar and lived in the United States for [\*799] over twenty-five years. n169 He left to visit his dying mother in Romania but was denied entry to the country and attempted to return to the United States, only to discover that a change in immigration laws while he was abroad meant that he could no longer legally re-enter. n170 He was stuck on Ellis Island and attempts at resettling him failed miserably. n171 The government argued that rather than viewing Mezei's confinement as detention, it should be construed as exclusion n172 - the authority of which was, the government argued, based on well-founded legal foundations in United States immigration law. n173 The Court agreed. n174 Employing habeas corpus to order the release of Mezei into the United States, it argued, was an improper exercise of judicial discretion. n175 In Kiyemba, much like in Mezei, the government argued that releasing the petitioners into the United States would amount to an unlawful intrusion into the authority of the political branches to exclude non-citizens from entering United States territory. n176¶ However, there are serious flaws with the government's Mezei-based argument. The government was correct in asserting that it was "unprecedented" to grant the courts authority to order the Executive to release detainees into the United States. n177 It is also true, however, that a Kiyemba-type situation is unprecedented. One of the glaring differences between the immigration analysis adopted in Mezei and the facts in Kiyemba is the nature of the detentions. First, in immigration cases, detainees voluntarily come under the jurisdiction of the United States government upon choosing to enter the country - this is simply the nature of immigration-based detentions. The Uighurs, in contrast, [\*800] were captured in Pakistan and forcibly brought under the jurisdictional umbrella of the United States. n178 This is relevant to determine the source of the detainees' predicament, or how the detainees came under United States authority. This suggests that indefinite executive detention is less disconcerting when the situation is created by the detainee himself. The government recognized, despite its reliance on immigration-based analysis, that judicial review based on immigration laws is inappropriate. n179 Second, the government in Mezei determined that the plaintiff posed a threat to national security. n180 The same cannot be said for the petitioners in Kiyemba. While the petitioners were initially characterized as enemy combatants - and, therefore, national security threats - the government has since withdrawn support for that determination. n181 Additionally, the government had not made any further allegations or arguments to that effect. This indicates the government conceded there was no legal basis for the indefinite detention of the Uighurs. By applying Mezei in the Kiyemba proceedings, the government ignored the significant elements that distinguish immigration-based detentions founded on the concept of exclusion from terrorist detentions. In light of the pronounced factual differences, that application is troubling.

#### The 1AC is a site of resistance to the power of the War Prison in the debate space.

Butler ‘4 (2004, Judith Butler is a Professor of Rhetoric and Comparative Literature at U.C. Berkeley, “Precarious Life: The Powers of Mourning and Violence”, pg. 98-99 – AH)

It may ~~see~~m that the normative implication of my analysis is that I wish the state were bound to law in a way that does not treat the law merely as instrumental or dispensable. This is true. But I am not interested in the rule of law per se, however, but rather in the place of law in the articulation of an international conception of rights and obligations that limit and condition claims of state sovereignty. And I am further interested in elaborating an account of power that will produce effective sites of intervention in the dehumanizing effects of the new war prison. I am well aware that international models¶ can be exploited by those who exercise the power to use them to their advantage, but I think that a new internationalism must nevertheless strive for the rights of the stateless, and for forms of self-determination that do not resolve into capricious and cynical forms of state sove ei?nty. There are advantages to conceiving power in such a way that It IS not centered in the nation-state, but conceived, rather, to operate as well through non-state institutions and discourses since the points of intervention have proliferated, and the aim of politics is not only or merely the overthrow of the state. A broader set of tactics ae opened up by the field of governmentality, including those discourses that shape and deform what we mean by "the human."

#### Our exposure of law reveals the mythico- juridical violence of governmentality by studying the law through the aff.

Lewis 2013 (Tyson E. Professor of Education at Montclair State University, “Education as Free Use: Giorgio Agamben on Studious Play, Toys, and the Inoperative Schoolhouse”, Study of Philosophy Education, May 2013, Pg. 6, Vance)

Although these two readings of play—positive and negative—are interesting, they both miss the central point of Agamben’s argument. The human being is not a homo ludens but a ‘‘homo profanes’’ (de la Durantaye 2008, p. 27). In Profanations it is not play as such that is endorsed. Following his analysis of play, Agamben immediately states the following: ‘‘It [profanation] is the sort of use that Benjamin must have had in mind when he wrote of Kafka’s The New Attorney that the law that is no longer applied but only studied is the gate to justice’’ (2007b, p. 76). Commenting further on Benjamin’s reflections on Kafka, Agamben continues, In the Kafka essay, the enigmatic image of a law that is studied but no longer practiced corresponds, as a sort of remnant, to the unmasking of mythico-juridical violence effected by pure violence. There is, therefore, still a possible figure of law after its nexus with violence and power has been deposed, but it is a law that no longer has force or application, like the one in which the ‘new attorney,’ leafing through ‘our old books,’ buries himself in study, or like the one that Foucault may have had in mind when he spoke of a ‘new law’ that has been freed from all discipline and all relation to sovereignty. (2005, p. 63) Suspended, the law that is studied is deactivated, no longer in force, and thus open to play. In this sense, it is not play but rather the relation between play and study that is most important. Summarizing, Agamben writes, ‘‘And this studious play is the passage that allows us to arrive at that justice that one of Benjamin’s posthumous fragments defines as state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical’’ (Ibid, p. 63). Studious play is therefore neither simply free play nor ritual but rather the zone of indistinction that lies between the two.

#### Governmentality uses tactics such as the politics of fear—The US refuses to release innocent people because of the slight risk they provide intelligence—this devalues life and justifies the worst atrocities imaginable

Debrix and Barder 2012 (Francois [prof of polis ci @ Virginia Tech] and Alexander D. [Dept of political Sci @ American U of Beirut]; Beyond Biopolitics: Theory, Violence, And Horror in World Politics; p. 58-60; kdf)

Although never directly posed by Foucault, these questions are nevertheless¶ prompted by his reflections. If fear plays a part in biopolitical designs (something¶ Foucault implies), it is no longer to prevent a transgression of the¶ juridico-political order maintained by a central sovereign. Rather, it would¶ have to be to preserve or enhance the life-efficiency of a given population.¶ Thus, a new productivity of fear/terror seems to accompany the deployment¶ of regimes of biopolitical governance (in the eighteenth and nineteenth¶ centuries in particular, and possibly up until today). This productivity of fear¶ and its connection to biopolitics make sense, Foucault suggests, if we take¶ into account the way race comes into play in practices and discourses of¶ power in the seventeenth and eighteenth centuries. Foucault argues that,¶ around that time, Western European discourses of racial antagonism-found¶ not just in biological studies but also in war declarations, political treatises, or¶ nationalist pamphlets--start to introduce a knowledge that seeks to provide¶ criteria regarding who can or should live and who, on the contrary, can or¶ should die. This biopolitical discourse of race and racial enmity (a precursor¶ to the idea of representing the enemy as a racial other) hopes to dismantle¶ any understanding of the human species as a biological continuum and it¶ strives to impose hierarchical divisions based on categorical racial differences.¶ Geopolitically, this discourse and subsequent practice of biopolitical racism¶ attempt to re-territorialize the globe along the lines of such racial profiles and differences, a process that helps to "naturalize" the Western colonization¶ projects of the eighteenth and nineteenth centuries. Foucault concludes that¶ this biopolitical racism changes the "relationship between my life and the¶ death of the other [in] that it is not a military or warlike relationship of confrontation,¶ but a biological-type relationship."48¶ The normalized but supposedly "secure" society ("secure" from the racial¶ other, and with normal living conditions that are not those of the other) that¶ is created by what Mitchell Dean has called an "enwrapping of the modern¶ state" by biopower relies a great deal on representations and operations of¶ biological racism.49 In many ways, this generalized yet intricate racial discourse¶ of normalization (of the inside) and of antagonism (of the outside)¶ does not just work through a differentiation between races, but also through¶ all sorts of marginal forms of conduct, such as criminality, madness, underclass¶ habits, and so on. 5° Thus, the normalization of the inside (the population,¶ society) and the antagonism of the outside (the racial other, the enemy)¶ increasingly become blurred. The ways the state and its agents start to¶ conceive of relations with "other races" or with various forms of "counterconducts"¶ become similar and undistinguishable. In all cases, it is a relation¶ of permanent hostility (or, perhaps, "endemic enmity") that is being implemented¶ and that demands a productive disposition on the part of the population¶ vis-a-vis antagonism, enemy-construction, and moral and physical¶ confrontation. 51 As Foucault puts it: "[f]rom this point onward, war ... is not¶ simply a matter of destroying a political adversary, but of destroying the¶ enemy race, of destroying that [sort] of biological threat that those people¶ over there represent to our race."52¶ The nexus biopolitics-race-war highlighted by Foucault allows us to revisit¶ the relationship between power and fear in modernity. Instead of asking¶ how the sovereign can manage to keep dangers and fears in check, a more¶ pressing question seems to be to identify the extent to which biopolitical¶ techniques and mechanisms of government are indicative of a productive fear¶ of not being able to live one's normal, regulated, or optimized life as a¶ member of the public, population, or society. What the perspective on biopower¶ and the desire to preserve or even regenerate one's own race also¶ suggest is the possibility that various decentralized agents/agencies of government¶ will need to make efficient use of fear (once again, a fear of not being¶ able to live one's normal life as part of a given population). These governmentalized agents and agencies can still have recourse to violent techniques or¶ brutal force to protect a certain society. But, more often than not, they will¶ only need to rely on "benign" calculated, rationalized, and calibrated safety measures or security mechanisms that supposedly leave no physical marks on¶ individual bodies since they operate at the more abstract level of the organization,¶ normalization, and optimization of the body politic.¶ With the emergence of those agents/agencies of government and their constant¶ efforts to regenerate the population through a generalized sense of fear¶ of not being able to live one's own life in an era when racial others or unproductive counter-conducts abound, we enter the realm of what Foucault¶ refers to as governmentality. For Foucault, governmentality represents the¶ moment in configurations of power when methods of scientific, disciplinary,¶ and knowledge-based rationality and procedures of government come together¶ to organize social life, often "through a range of formally nonpolitical¶ knowledges and institutions."53 The "governmentalization of the state"¶ (as Wendy Brown puts it54) implies that this government, by institutions and¶ knowledges, can pluralize the supposedly centralized sites of sovereignty¶ and state power. With governmentality, the origin of the law is less relevant to¶ social and political designs (and to power's applications) since this particular¶ modality of government is "not a matter of imposing laws on men, but rather¶ of disposing things, that is to say, to employ tactics rather than laws, and if¶ need be to use laws themselves as tactics."55 It is indeed through techniques¶ and tactics of management and by way of organizational and procedural dispositifs¶ that governmentality takes charge of a population, fosters its vital¶ conditions (by trying to control endemic social "illnesses"), and "orchestrates¶ the conduct of the body individual, the body social, and the body politic."56¶ The "conduct of conducts" within the realm of biopolitics is the main objective¶ of governmentality's social, economic, and political, but also cultural,¶ religious, and educational agents and agencies. In a context of governmentalized¶ power, the biopolitical production of fear is the result of a series¶ of scare tactics or terror dispositifs put to "good" social effects by agents/¶ agencies of government.

#### Voting affirmative is a unique opportunity to challenge and expose the terror of governmentality

Debrix and Barder 2012 (Francois [prof of polis ci @ Virginia Tech] and Alexander D. [Dept of political Sci @ American U of Beirut]; Beyond Biopolitics: Theory, Violence, And Horror in World Politics; p. 62-3; kdf)

Asking how the productivity of fear by way of agents/agencies of governmentalized¶ terror is realized means questioning the ways in which a biopolitics¶ of fear, unease, or insecurity takes place and reproduces itself across¶ space and over time. It means wondering how the governmentality of fear¶ develops today the conditions of production of its eventual reproduction. And¶ at this point, we can start to perceive another limitation of biopolitical frames¶ of analysis. Indeed, whether we think about this management of unease or¶ fear-and the methods through which it is kept active-in terms of special¶ sites or exceptional events (Guantanamo's Camp Delta after 9/11), or as a¶ matter of everyday occurrence in public places or through mundane activities¶ (commuting to work via the London Underground transit system in the¶ aftermath of the July 7, 2005 attacks), 66 exploring how human bodies are¶ mobilized to provide their own responses to the governmental management of¶ fear/terror in the particular timescapes of (bio )power is crucial to assessing¶ the resilience of contemporary regimes of power, force, violence, and horror.¶ Human bodies primed for an acceptance of trauma and ready to take upon¶ themselves measures and technologies that can maim, disfigure, or bludgeon¶ their own flesh (and, as such, are also prepared to negate their humanity) are the kind of organisms and cognitive response systems regimes of fear and¶ terror under horrific conditions operate with and through these days.¶ Dean writes that "[o]ur present is one in which we are enjoined to take care¶ and responsibility for our own lives, health, happiness, sexuality, and financial¶ security. "67 As Dean intimates, the governmentality of fear unease terror¶ or insecurity demands that subjects/bodies act upon themselves first and¶ foremost. To borrow Dean's language, it is one's own "enfolding" of and in¶ governmental authority, the application of dispositifs of fear and security by¶ one's flesh and into one's flesh, that becomes the best guarantee that regimes¶ of governmentalized terror will remain effective. This embodiment or, better¶ yet, incarnation of "banoptic" techniques is a preferred disposition of contemporary¶ fear production. 68 It is by means of such a localized, disseminated,¶ disaggregated, and perhaps dismembered operation that the quotidian politics¶ of terror is best maintained and reproduced.

#### **The affirmatives recognition of the subjugation of bodies who are indefinitely detained allows for a political alternative.**

Debrix and Barder 2012 (Francois [prof of polis ci @ Virginia Tech] and Alexander D. [Dept of political Sci @ American U of Beirut]; Beyond Biopolitics: Theory, Violence, And Horror in World Politics; p. 81-2; kdf)

In a recent analysis of Guantanamo's Camp Delta as an allegedly prototypical¶ contemporary site of exception, Derek Gregory sought to base his¶ critical study of what, in this chapter, we have called the nomos of exception¶ on both Schmittian and Agambenian theoretical foundations. 53 Drawing¶ insights from the work of political theorist Mick Dillon, 54 Gregory posited¶ that "conceptions of space need not be limited to the container model."55¶ This suggestion not to limit oneself to the "container model" of territoriality¶ is interesting because it echoes Schmitt's own invitation to consider the possibility¶ that any solid and durable legal and political order may be reliant on¶ "other constructs." Gregory's statement also parallels Agamben's claim that¶ the state of exception is "essentially unlocalizable." As was suggested above,¶ virtual spaces, expanses, or enclosures may be considered to be territorial¶ constructs necessary to the execution of the exception. Places and conditions¶ of life enacted through a virtuality of space may not always be immediately¶ evident, visible, or even realized. But they are nonetheless concrete and actual¶ geopolitical situations or events that often enable legal, political, and military¶ institutions to establish an order of the earth, even if such an order is¶ premised upon a banning of bodies and lives.¶ In addition to Queau's and Deleuze's respective insights with regards to¶ the virtual, Jean Baudrillard's theory of simulation has revealed that virtual territories matter because they often stand for the so-called real and can¶ become more real and truthful than reality and truth themselves. 56 Importantly,¶ one of Baudrillard's favorite images to theorize the hyperreality or¶ virtuality of simulation is that of the relationship between the map and the¶ territory. Baudrillard writes: "Simulation is no longer that of a territory,¶ a referential being, or a substance. It is the generation by models of a real¶ without origin or reality: a hyperreal. The territory no longer precedes the¶ map, nor survives it. Henceforth, it is the map that precedes the territory precession¶ of simulacra-it is the map that engenders the territory."57 While¶ Deleuze may object to the claim that the "real" of virtuality (or its actualization)¶ is "without origins" (as Baudrillard maintains), the key point for us is¶ to recognize (with Baudrillard) that, as hyperreal constructs, virtual territorialities¶ may indeed be our main guarantee that something which insists on¶ being real in the political domain still matters. As we saw above, it appears¶ that virtuality already served such a function for Schmitt.¶ Thus, when Gregory stated: "sites like Guantanamo Bay need to be seen¶ not as paradigmatic spaces of political modernity ... , but rather as potential¶ spaces whose realisation is an occasion for political struggle,"58 he may have¶ been gesturing towards the idea that the contemporary camp, this "limbo¶ zone" between life and death, can exist and produce meaningful political¶ effects precisely because it operates as a virtual territorial construct. As we¶ argued above, it is the always plausible actualization of camp-like conditions¶ anywhere and anytime that gives the space of the ban its powerful political¶ presence, its forceful and violent capacity to shape the contours of a generalized¶ space/order of exception or nomos. 59 However, to now take this analytical¶ logic one step further and to insert into it the perspective on the virtual offered¶ by Baudrillard, what is also virtual about Guantanamo (or other camp-like¶ sites) is the fact that the exceptional and banning potential of this space may¶ have already been realized in many other places not officially recognized,¶ described, or sanctioned as camps.60 In other words, the virtual "real possibility"¶ of the exception (Guantanamo, Abu Ghraib) may also seek to draw¶ our attention towards the idea of a supposedly unique, unusual, extreme, or¶ indeed "exceptional" zone as if such a site were not the norm, or as if it were¶ not supposed to be real or actualized anywhere else. As with other simulated¶ mechanisms or operations,61 the virtual space of exception hopes to make it¶ look like everywhere outside these supposedly punctual or fixed camps that¶ are recognized to entrap and abandon bodies, the logic of the ban is actually¶ not widespread or common whereas, once again, the exception may have¶ already (virtually) become the rule.62 There is thus a strategic (geo)political¶ dimension to the deployment of virtual spaces that, unlike Deleuze's perspective,¶ Baudrillard's conceptualization of the virtual makes us aware of. As¶ we will argue towards the end of this chapter, such a strategic deployment of¶ virtuality is important to contemporary instances of agonal terror and horror.

#### **Military tribunals are specifically a form of governmentality as an extra legal practice.**

Butler ‘4 (2004, Judith Butler is a Professor of Rhetoric and Comparative Literature at U.C. Berkeley, “Precarious Life: The Powers of Mourning and Violence”, pg. 74-76 AH)

The danger that these prisoners are said to pose is unlike dangers¶ that might be substantiated in a court of law and redressed through¶ punishment. In the news conference on March 21, 2002, Department¶ of Defense General Counsel Haynes answers a reporter's question in¶ a way that confirms that this equivocation is at work in their thinking.¶ An unnamed reporter in the news conference, concerned about the¶ military tribunal, asks: If someone is acquitted of a crime under this¶ tribunal, will they be set free? Haynes replied:¶ If we had a trial right this minute, it is conceivable that somebody¶ could be tried and acquitted of that charge, but might not¶ automatically be released. The people we are detaining, for example,¶ in Guantanamo Bay, Cuba, are enemy combatants that [sic) we¶ captured on the battlefield ~~see~~king to harm US soldiers or allies, and¶ they're dangerous people. At the moment, we're not about to¶ release any of them unless we find that they don't meet those¶ criteria. At some point in the future ...¶ The reporter then interrupted, saying: "But if you (can't] convict¶ them, if you can't find them guilty, you would still paint them with¶ that brush that we find you dangerous even though we can't convict¶ you, and continue to incarcerate them?" After some to and fro,¶ Haynes stepped up to the microphone, and explained that "the people that we now hold at Guantanamo are held for a specific reason that is¶ not tied specifically to any particular crime. They're not held they're¶ not being held on the basis that they are necessarily¶ criminals." They will not be released unless the US finds that "they¶ don't meet those criteria," but it is unclear what criteria are at work¶ in Haynes's remark. If the new military tribunal sets the criteria, then¶ there is no guarantee that a prisoner will be released in the event of¶ exoneration. The prisoner exonerated by trial may still be "deemed¶ dangerous," where that deeming is based in no established criteria.¶ Establishing dangerousness is not the same as establishing guilt and,¶ in Haynes's ~~view~~, and in ~~view~~s subsequently repeated by administrative¶ spokespersons, the executive branch's power to deem a¶ detainee dangerous preempts any determination of guilt or innocence¶ established by a military tribunal. In the wake of this highly qualified approach to the new military¶ tribunals (themselves regarded as illegitimate), we ~~see~~ that these are¶ tribunals whose rules of evidence depart in radical ways from both¶ the rules of civilian courts and the protocols of existing military¶ courts, that they will be used to try only some detainees, that the¶ office of the President will decide who qualifies for these secondary¶ military tribunals, and that matters of guilt and innocence reside¶ finally with the executive branch. If a military tribunal acquits a¶ person, the person may still be deemed dangerous, which means that¶ the determination by the tribunal can be preempted by an extra-legal¶ determination of dangerousness. Given that the military tribunal is¶ itself extra-legal, we ~~see~~m to be witnessing the replication of a¶ principle of sovereign state prerogative that knows no bounds. At¶ every step of the way, the executive branch decides the form of the¶ tribunal, appoints its members, determines the eligibility of those to¶ be tried, and assumes power over the final judgment; it imposes the¶ trial selectively; it dispenses with conventional evidentiary procedure. And it justifies all this through recourse to a determination of¶ "dangerousness" which it alone is in the position to decide. A certain¶ level of dangerousness takes a human outside the bounds of law, and¶ even outside the bounds of the military tribunal itself, makes that¶ human into the state's possession, infinitely detainable. What counts¶ as "dangerous" is what is deemed dangerous by the state, so that,¶ once again, the state posits what is dangerous, and in so positing it,¶ establishes the conditions for its own preemption and usurpation of¶ the law, a notion of law that has already been usurped by a tragic¶ facsimile of a trial.