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

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

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

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

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

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

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

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

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

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

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

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

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

#### Plan kills Obama’s agenda

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

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

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

#### Ag industry’s collapsing now---immigration’s key

Alfonso Serrano 12, Bitter Harvest: U.S. Farmers Blame Billion-Dollar Losses on Immigration Laws, Time, 9-21-12, http://business.time.com/2012/09/21/bitter-harvest-u-s-farmers-blame-billion-dollar-losses-on-immigration-laws/

The Broetjes and an increasing number of farmers across the country say that a complex web of local and state anti-immigration laws account for acute labor shortages. With the harvest season in full bloom, stringent immigration laws have forced waves of undocumented immigrants to flee certain states for more-hospitable areas. In their wake, thousands of acres of crops have been left to rot in the fields, as farmers have struggled to compensate for labor shortages with domestic help.¶ “The enforcement of immigration policy has devastated the skilled-labor source that we’ve depended on for 20 or 30 years,” said Ralph Broetje during a recent teleconference organized by the National Immigration Forum, adding that last year Washington farmers — part of an $8 billion agriculture industry — were forced to leave 10% of their crops rotting on vines and trees. “It’s getting worse each year,” says Broetje, “and it’s going to end up putting some growers out of business if Congress doesn’t step up and do immigration reform.”¶ (MORE: Why Undocumented Workers Are Good for the Economy)¶ Roughly 70% of the 1.2 million people employed by the agriculture industry are undocumented. No U.S. industry is more dependent on undocumented immigrants. But acute labor shortages brought on by anti-immigration measures threaten to heap record losses on an industry emerging from years of stiff foreign competition. Nationwide, labor shortages will result in losses of up to $9 billion, according to the American Farm Bureau Federation.

#### Extinction

Lugar 2k Chairman of the Senator Foreign Relations Committee and Member/Former Chair of the Senate Agriculture Committee (Richard, a US Senator from Indiana, is Chairman of the Senate Foreign Relations Committee, and a member and former chairman of the Senate Agriculture Committee. “calls for a new green revolution to combat global warming and reduce world instability,” pg online @ http://www.unep.org/OurPlanet/imgversn/143/lugar.html)

In a world confronted by global terrorism, turmoil in the Middle East, burgeoning nuclear threats and other crises, it is easy to lose sight of the long-range challenges. But we do so at our peril. One of the most daunting of them is meeting the world’s need for food and energy in this century. At stake is not only preventing starvation and saving the environment, but also world peace and security. History tells us that states may go to war over access to resources, and that poverty and famine have often bred fanaticism and terrorism. Working to feed the world will minimize factors that contribute to global instability and the proliferation of [WMDs] weapons of mass destruction. With the world population expected to grow from 6 billion people today to 9 billion by mid-century, the demand for affordable food will increase well beyond current international production levels. People in rapidly developing nations will have the means greatly to improve their standard of living and caloric intake. Inevitably, that means eating more meat. This will raise demand for feed grain at the same time that the growing world population will need vastly more basic food to eat. Complicating a solution to this problem is a dynamic that must be better understood in the West: developing countries often use limited arable land to expand cities to house their growing populations. As good land disappears, people destroy timber resources and even rainforests as they try to create more arable land to feed themselves. The long-term environmental consequences could be disastrous for the entire globe. Productivity revolution To meet the expected demand for food over the next 50 years, we in the United States will have to grow roughly three times more food on the land we have. That’s a tall order. My farm in Marion County, Indiana, for example, yields on average 8.3 to 8.6 tonnes of corn per hectare – typical for a farm in central Indiana. To triple our production by 2050, we will have to produce an annual average of 25 tonnes per hectare. Can we possibly boost output that much? Well, it’s been done before. Advances in the use of fertilizer and water, improved machinery and better tilling techniques combined to generate a threefold increase in yields since 1935 – on our farm back then, my dad produced 2.8 to 3 tonnes per hectare. Much US agriculture has seen similar increases. But of course there is no guarantee that we can achieve those results again. Given the urgency of expanding food production to meet world demand, we must invest much more in scientific research and target that money toward projects that promise to have significant national and global impact. For the United States, that will mean a major shift in the way we conduct and fund agricultural science. Fundamental research will generate the innovations that will be necessary to feed the world. The United States can take a leading position in a productivity revolution. And our success at increasing food production may play a decisive humanitarian role in the survival of billions of people and the health of our planet.

# 0001

#### Text: The Office of Legal Counsel should determine that the Executive Branch lacks the legal authority to indefinitely detain without Third Geneva Conventions Article Five rights.

#### The President should require the Office of Legal Counsel to publish any legal opinions regarding policies adopted by the Executive Branch.

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

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

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

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

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

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

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

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

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

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

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

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

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

# 0010

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

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

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

#### the aff must legally restrict indefinite detention – restriction is “a limiting condition or measure, especially a legal one” – that’s **Online Dictionary no date**

re·stric·tion/riˈstrikSHən/

Noun:

A limiting condition or measure, esp. a legal one.

The limitation or control of someone or something, or the state of being limited or restricted.

#### Geneva requires release

Zayas, ‘5 [Alfred de Zayas\* J.D. (Harvard), Dr. phil. (Göttingen), member of the New York Bar, former Secretary of the Human Rights Committee and Head of the Petitions Unit, visiting professor of law, University of British Columbia and of the Graduate Institute of International Studies, Geneva. “Human rights and indeﬁnite detention”. International Review of the Red Cross. http://www.icrc.org/eng/assets/files/other/irrc\_857\_zayas.pdf]

In addition to the protection of international human rights law, persons subjected to detention enjoy the more specific protection of international humanitarian law in times of armed conflict. Of particular relevance are the Third and Fourth Geneva Conventions of 1949 and the 1977 Additional Protocols I and II thereto. Article 118 of the Third Geneva Convention20 clearly stipulates that prisoners of war cannot be detained indefinitely: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” The test here is the cessation of active hostilities, whether or not a peace treaty has been signed. This provision goes well beyond Article 75 of the 1929 Geneva Prisoners-of-War Convention, which stipulated: “When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war.” The vague language of the 1929 Convention allowed the victorious Allies to circumvent the spirit of the Convention and keep German prisoners of war in detention for many years after Germany’s unconditional surrender. The clear intention of Article 118 of the 1949 Convention was therefore to ensure that prisoners of war would be released “without delay” and not held in indefinite detention.21

Important in this context is, of course, the determination of who is entitled to prisoner-of-war status. Article 5 of the Third Geneva Convention requires that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

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

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

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

#### Vote neg

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

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

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

# 0011

**Appeals to the legal restraint of the Geneva conventions magnify the violence of the liberal legal order. This prevents questioning the larger system of legal imperialism.**

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

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

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

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

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

The camp and the nomos

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

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

**Turns the case – framing indefinite detentions as a place that lacks law relies on the norms that oppress all prisoners and immigrants. Vote negative to challenge the normalization of law. Our alternative ends indefinite detentions by fighting against the law, not creating or applying more law.**

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

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

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

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

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

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

1 The Legal Order of ‘Anomaly’

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

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

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

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

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

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

2 The Claim to Exceptionalism

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

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

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

A Appeals to the Exception in International Legal Scholarship

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

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

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

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

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

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

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

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

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

B Giorgio Agamben and the State of the Exception

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

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

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

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

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

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

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

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

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

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

3 The Order of Exceptionalism and the Annihilation of the Exception

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

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

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

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

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

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

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

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

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

4 Of the Exception, the Decision and Resistance

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

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

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

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

5 Conclusion

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

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

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

# case

## Model

### No model

#### No modeling

**Law & Versteeg 12**—Professor of Comparative Constitutional Law @ Washington University & Professor of Comparative Constitutional Law @ University of Virginia [David S. Law & Mila Versteeg, “The Declining Influence of the United States Constitution,” New York University Law Review, Vol. 87, 2012

The appeal of American constitutionalism as a model for other countries appears to be waning in more ways than one. Scholarly attention has thus far focused on global judicial practice: There is a growing sense, backed by more than purely anecdotal observation, that foreign courts cite the constitutional jurisprudence of the U.S. Supreme Court less frequently than before.267 But the behavior of those who draft and revise actual constitutions exhibits a similar pattern. Our empirical analysis shows that the content of the U.S. Constitution is¶ becoming increasingly atypical by global standards. Over the last three decades, other countries have become less likely to model the rights-related provisions of¶ their own constitutions upon those found in the Constitution. Meanwhile, global adoption of key structural features of the Constitution, such as federalism, presidentialism, and a decentralized model of judicial review, is at best stable and at worst declining. In sum, rather than leading the way for global¶ constitutionalism, the U.S. Constitution appears instead to be losing its appeal as¶ a model for constitutional drafters elsewhere. The idea of adopting a constitution may still trace its inspiration to the United States, but the manner in which constitutions are written increasingly does not.

If the U.S. Constitution is indeed losing popularity as a model for other countries, what—or who—is to blame? At this point, one can only speculate as to the actual causes of this decline, but four possible hypotheses suggest themselves: (1) the advent of a superior or more attractive competitor; (2) a general decline in American hegemony; (3) judicial parochialism; (4) constitutional obsolescence; and (5) a creed of American exceptionalism.

With respect to the first hypothesis, there is little indication that the U.S. Constitution has been displaced by any specific competitor. Instead, the notion that a particular constitution can serve as a dominant model for other countries may itself be obsolete. There is an increasingly clear and broad consensus on the types of rights that a constitution should include, to the point that one can articulate the content of a generic bill of rights with considerable precision.269 Yet it is difficult to pinpoint a specific constitution—or regional or international human rights instrument—that is clearly the driving force behind this emerging paradigm. We find only limited evidence that global constitutionalism is following the lead of either newer national constitutions that are often cited as influential, such as those of Canada and South Africa, or leading international and regional human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Although Canada in particular does appear to exercise a quantifiable degree of constitutional influence or leadership, that influence is not uniform and global but more likely reflects the emergence and evolution of a shared practice of constitutionalism among common law countries.270 Our findings suggest instead that the development of global constitutionalism is a polycentric and multipolar¶ process that is not dominated by any particular country.271 The result might be likened to a global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution.

Another possibility is that America’s capacity for constitutional leadership is at least partly a function of American “soft power” more generally.272 It is reasonable to suspect that the overall influence and appeal of the United States and its institutions have a powerful spillover effect into the constitutional arena. The popularity of American culture, the prestige of American universities, and the efficacy of American diplomacy can all be expected to affect the appeal of American constitutionalism, and vice versa. All are elements of an overall American brand, and the strength of that brand helps to determine the strength of each of its elements. Thus, any erosion of the American brand may also diminish the appeal of the Constitution for reasons that have little or nothing to do with the Constitution itself. Likewise, a decline in American constitutional influence of the type documented in this Article is potentially indicative of a broader decline in American soft power.

There are also factors specific to American constitutionalism that may be¶ reducing its appeal to foreign audiences. Critics suggest that the Supreme Court has undermined the global appeal of its own jurisprudence by failing to acknowledge the relevant intellectual contributions of foreign courts on questions of common concern,273 and by pursuing interpretive approaches that lack acceptance elsewhere.274 On this view, the Court may bear some responsibility for the declining influence of not only its own jurisprudence, but also the actual U.S. Constitution: one might argue that the Court’s approach to constitutional issues has undermined the appeal of American constitutionalism more generally, to the point that other countries have become unwilling to look either to American constitutional jurisprudence or to the U.S. Constitution itself for inspiration.275

It is equally plausible, however, that responsibility for the declining appeal of American constitutionalism lies with the idiosyncrasies of the Constitution itself rather than the proclivities of the Supreme Court. As the oldest formal constitution still in force, and one of the most rarely amended constitutions in the world,276 the U.S. Constitution contains relatively few of the rights that have become popular in recent decades,277 while some of the provisions that it does contain may appear increasingly problematic, unnecessary, or even undesirable with the benefit of two hundred years of hindsight.278 It should therefore come as little surprise if the U.S. Constitution¶ strikes those in other countries–or, indeed, members of the U.S. Supreme Court279–as out of date and out of line with global practice.280 Moreover, even if the Court were committed to interpreting the Constitution in tune with global fashion, it would still lack the power to update the actual text of the document.

Indeed, efforts by the Court to update the Constitution via interpretation may actually reduce the likelihood of formal amendment by rendering such amendment unnecessary as a practical matter.281 As a result, there is only so much that the U.S. Supreme Court can do to make the U.S. Constitution an¶ attractive formal template for other countries. The obsolescence of the Constitution, in turn, may undermine the appeal of American constitutional jurisprudence: foreign courts have little reason to follow the Supreme Court’s lead on constitutional issues if the Supreme Court is saddled with the interpretation of an unusual and obsolete constitution.282 No amount of ingenuity or solicitude for foreign law on the part of the Court can entirely divert attention from the fact that the Constitution itself is an increasingly atypical document.

One way to put a more positive spin upon the U.S. Constitution’s status as a global outlier is to emphasize its role in articulating and defining what is unique about American national identity. Many scholars have opined that formal constitutions serve an expressive function as statements of national identity.283 This view finds little support in our own empirical findings, which suggest instead that constitutions tend to contain relatively standardized packages of rights.284 Nevertheless, to the extent that constitutions do serve such a function, the distinctiveness of the U.S. Constitution may simply reflect the uniqueness of America’s national identity. In this vein, various scholars have argued that the U.S. Constitution lies at the very heart of an “American creed of exceptionalism,” which combines a belief that the United States occupies a unique position in the world with a commitment to the qualities that set the United States apart from other countries.285 From this perspective, the Supreme Court’s reluctance to make use of foreign and international law in constitutional cases amounts not to parochialism, but rather to respect for the exceptional character of the nation and its constitution.286

Unfortunately, it is clear that the reasons for the declining influence of American constitutionalism cannot be reduced to anything as simple or attractive as a longstanding American creed of exceptionalism. Historically, American exceptionalism has not prevented other countries from following the example set by American constitutionalism. The global turn away from the American model is a relatively recent development that postdates the Cold War. If the U.S. Constitution does in fact capture something profoundly unique about the United States, it has surely been doing so for longer than the last thirty years. A complete explanation of the declining influence of American constitutionalism in other countries must instead be sought in more recent history, such as the wave of constitution-making that followed the end of the Cold War.287 During this period, America’s newfound position as lone superpower might have been expected to create opportunities for the spread of American constitutionalism. But this did not come to pass.

Once global constitutionalism is understood as the product of a polycentric evolutionary process, it is not difficult to see why the U.S. Constitution is playing an increasingly peripheral role in that process. No evolutionary process favors a specimen that is frozen in time. At least some of the responsibility for the declining global appeal of American constitutionalism lies not with the Supreme Court, or with a broader penchant for exceptionalism, but rather with the static character of the Constitution itself. If the United States were to revise the Bill of Rights today—with the benefit of over two centuries of experience, and in a manner that addresses contemporary challenges while remaining faithful to the nation’s best traditions—there is no guarantee that other countries would follow its lead. But the world would surely pay close attention. Pg. 78-83

### Afghanistan Model—1nc

#### Not reverse cauasal – Afghanistan is already developing the US model

#### Coin fails

Wipfli and Metz 8. [Ralph, Dr. Steven, "COIN of the Realm: US Counterinsurgency Strategy" Colloquim Brief - Strategic Studies Institute -- <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=846>]

The conflict in Iraq demonstrates that counter- insurgency is difficult when strategic objectives change or remain unclear. It also shows that the U.S. obsession with clear metrics and indicators of success complicates counterinsurgency. Success in COIN is often difficult to measure. There are as many setbacks as victories. National level metrics may have little relevance at the local level. Local ones may vary from place to place. This means that strategic planners and policymakers may not know with certainty what works and what does not. Sustaining public and congressionalsupport under such conditions is an enduring challenge. A seminar participant suggested that the United States also needs clear indicators of failure so that it can decide when it might be best to disengage. This would allow weighing the cost of continuing a COIN campaign against the desired outcome. Disengagement or changes in strategy would be easier to justify, plan, and execute if the conditions for them were specified from the outset

#### Security framework prevents escalation

**Maksutov 06** (Ruslan, Stockholm International Peace Research Institute, “The Shanghai Cooperation Organization: A Central Asian Perspective”, August, http://www.sipri.org/contents/worldsec/Ruslan.SCO.pdf/download)

As a starting point, it is fair to say that all Central Asian countries—as well as China and Russia—are interested in security cooperation within a multilateral framework, such as the SCO provides. For Central Asia this issue ranks in importance with that of economic development, given the explosive environment created locally by a mixture of external and internal threats. Central Asia is encircled by four of the world’s eight known nuclear weapon states (China, India, Russia and Pakistan), of which Pakistan has a poor nuclear non-proliferation profile and Afghanistan is a haven for terrorism and extremism. Socio-economic degradation in Central Asian states adds to the reasons for concern and makes obvious the interdependence between progress in security and in development. Some scholars argue that currently concealed tendencies evolving in various states of Central Asia—such as the wide-ranging social discontent with oppressive regimes in the region, and the growing risks of state collapse and economic decline—all conducive to the quick growth of radical religious movements, could have far-reaching implications for regional stability once they come more into the light.41 At first sight, the instruments established by the SCO to fulfill its declared security building objectives seem to match the needs that Central Asian states have defined against this background. While the existence of the SCO further reduces the already remote threat of conventional interstate war in the region,42 it allows for a major and direct focus on the non-state, non-traditional and transnational threats that now loom so large by comparison.

#### Bribery will determine the outcome. US action is irrelevant

**Eviatar 12** - Senior counsel in the Law and Security Program of Human Rights First [Daphne Eviatar, “U.S. must aid Afghan judicial system,” Politico, March 13, 2012 09:38 PM EDT, pg. http://tinyurl.com/cmvkfkv

Afghanistan’s justice system, meanwhile, is notoriously corrupt, failing to provide even the most basic elements of fair trials, including defense lawyers. When I was in Kabul last year, Afghan defense lawyers and human-rights activists told me that defense lawyers for the accused are still a rarity in much of the country. Even when a defense lawyer is assigned, that attorney often can’t meet with his client for many months, particularly in national security cases. In the meantime, the suspect may be tortured into confessing to a crime he didn’t commit.

Once the case gets to court, getting a judge to even listen to a defense lawyer’s objections or allow presentation of real evidence is challenging. Most Afghans I interviewed insist that evidence is irrelevant in any case. The popular sentiment is that with money, anyone can buy his way out of jail. Those without, guilty or innocent, will be left to rot in prison.

The United States is aware of these problems. Washington knows that a successful U.S. withdrawal depends on the Afghan government’s eventual ability to deliver law, order and justice to its people.

To the U.S. military’s credit, it’s been trying to improve Afghan trials in national security cases by providing mentoring and training for judges and prosecutors handling trials in a U.S.-built facility on the Bagram Air Base and ensuring the accused get a lawyer. But that’s made only small improvements so far, judging from the poor quality of the Afghan trial I observed at Bagram last year. It’s also not clear if that project will continue after the U.S. hands authority to Afghanistan.

It should. Despite mounting pressure to withdraw U.S. troops from Afghanistan, the United States needs to remain involved by providing assistance not only to the military and police, as it’s doing now, but also to the Afghan justice system.

This judicial system needs far more than a few mentors for judges and prosecutors. It needs investigators trained to produce reliable evidence, prosecutors who understand its value and defense lawyers trained to demand that evidence and challenge confessions resulting from torture. It also needs to be able to ensure the safe and humane treatment of detainees.

#### Afghanistan will stay stable

#### Sediqi 12 [Rafi, "Nato Says New Framework Assures Afghan Stability After 2014," 10-16, http://tolonews.com/en/afghanistan/7967-nato-says-new-framework-assures-afghan-stability-after-2014-]

Some Nato forces will remain in Afghanistan after 2014, assuring ongoing stability as the alliance moves from a combat role to a training mission, Nato-led Isaf spokesman Brig. Gen. Gunter Katz said in Kabul on Monday. Addressing fears of rising insecurity once foreign forces leave in 2014, Katz emphasised the ongoing support of the international community towards Afghan security forces. "Afghanistan will stay stable after 2014. The commitment from the international community at the Chicago and Tokyo summit shows that Afghanistan will be supported in the future as well," Katz said at a briefing in Kabul. Nato civilian spokesman Dominic Medley made similar remarks, saying that the framework for Nato's post-2014 engagement in Afghanistan was decided on last week in Brussels. "Nato defence ministers and the ministers from potential operational partners concluded the first stage of planning for that new mission. This will guide the military experts as they take the planning process forward. It is expected to agree on a detailed outline early next year, and to complete the plan well before the end of 2013," Medley said Monday in Kabul. "This new mission will not be a combat mission. It will be a mission to train, advise and assist," he added. He pointed out that Afghan security forces are already responsible for security of 75 percent of the Afghan people and that they will lead all the military operations by the first half of 2013. "International community and Nato are committed towards Afghanistan and promised billions of dollars to the country. Afghan forces will be supported in the future and their training mission will continue," Medley added. The Nato office in Kabul also introduced new senior civilian envoy to replace Simon Gass who completed his term last month.

#### Alt caus

**Kjaernet and Torjeson 8** – \*Research Fellow in the Energy Programme and the Department of Russia and Eurasia at the Norwegian Institute of International Affairs and Senior Research Fellow at the Norwegian Institute of International Affairs (Heidi and Stina, “Afghanistan and Regional Instability: A Risk Assessment”, Norwegian Institute of International Affairs, http://english.nupi.no/Publications/Books-and-reports/2008/Afghanistan-and-regional-instability-A-risk-assessment)

The regional context of Afghanistan poses a range of challenges for the country’s stabilisation process: Pakistan Pakistan’s central government has lacked control of developments in the areas bordering Afghanistan (Baluchistan, the Federally Administered Tribal Areas and the North-West Frontier Province), making President Musharraf unable to implement the US-encouraged crackdown on Pakistani Taleban supporters. The Pakistani border areas have become a key source of weapons, equipment and new recruits for anti-government militant groups in Afghanistan, while Pakistan–Afghanistan bilateral relations remain, as so often before, strained. The Pakistani election results from February 18 2008 give grounds for cautious optimism. Nevertheless, the serious challenges stemming from Pakistan will continue in the short to medium term for Afghanistan. Iran–US tensions The standoff between Iran and the USA over Iran’s nuclear programme has introduced difficulties in Iran–Afghan relations. Iran remains an important supporter of the Western-backed Hamid Karzai government. Nevertheless, in the face of US pressure, Iran is beginning to demonstrate, according to some reports, its ability to destabilise Afghanistan and derail Washington’s Afghan campaign, as a means of enhancing its overall leverage regarding the USA.1 Geopolitical rivalries Geopolitical rivalries in the region preclude any optimal co-ordination of support to Afghanistan by neighbours and great powers. These tensions include the long-standing conflict between India and Pakistan as well as the serious Russian and Chinese unease over the US and NATO military presence in the region. Regional trade difficulties Security concerns and post-Soviet bureaucratic inertia prevent Afghanistan’s northern neighbours from fully endorsing the vision, promoted by the USA and other nations, of Afghanistan’s economic recovery being facilitated by denser integration into regional trade and communication links. Uzbekistan The government of Uzbekistan is highly authoritarian and deeply unpopular. Large-scale political and social upheaval remains one likely future scenario for the country. Upheaval in Uzbekistan would pose a serious challenge to the stability of Afghanistan’s northern and western territories, including Mazar-e-sharif and possibly Meymaneh, where Norwegian troops are stationed. The German-run ISAF base located in Termez in Uzbekistan near the Uzbekistan–Afghanistan border, and Mazar-e-sharif would be particularly vulnerable in case of upheaval in Uzbekistan. Drugs Drugs production and trafficking constitute one of Afghanistan’s central domestic challenges, but drugs trafficking can also be seen as a regional problem. The large-scale criminal activities and incomes associated with regional drug flows are undermining the states of the region: in this way Afghanistan’s neighbours – Tajikistan and Kyrgyzstan in particular – are becoming weaker, more criminalised, more unstable and less able to act as constructive partners for Afghanistan. Water Afghanistan’s northern neighbours have a lengthy history of water disputes. If Afghanistan in the medium or long term decides to claim its legitimate share of the region’s water resources – as it may well do in order to further its economic development – then water-sharing in the region will become even more difficult. Bilateral and multilateral relations between and among the Central Asian states have been severely strained at times, although fully fledged ‘water wars’ have remained a remote prospect.

### Indopak

### Pakistan

**Military crackdowns control instability**

**Bandow 09** – Senior Fellow at the Cato Institute (Doug, “Recognizing the Limits of American Power in Afghanistan,” Huffington Post, 11/31/09, <http://www.cato.org/pub_display.php?pub_id=10924>, MMarcus)

From Pakistan's perspective, limiting the war on almost any terms would be better than prosecuting it for years, even to "victory," whatever that would mean. In fact, the least likely outcome is a takeover by widely unpopular Pakistani militants. The Pakistan military is the nation's strongest institution; while the army might not be able to rule alone, it can prevent any other force from ruling. Indeed, Bennett Ramberg made the important point: "Pakistan, Iran and the former Soviet republics to the north have demonstrated a brutal capacity to suppress political violence to ensure survival. This suggests that even were Afghanistan to become a terrorist haven, the neighborhood can adapt and resist." The results might not be pretty, but the region would not descend into chaos. In contrast, warned Bacevich: "To risk the stability of that nuclear-armed state in the vain hope of salvaging Afghanistan would be a terrible mistake."

**Won’t escalate -- Paki loose nukes aren’t a threat.**

**Innocent 10** - foreign policy analyst at the Cato Institute (Malou, “Away from McChrystal and Back to the Basics,” Huffington Post, 6/28/10, <http://www.cato.org/pub_display.php?pub_id=11934>, MMarcus)

Pakistan has an elaborate command and control system in place that complies with strict Western standards, and the country's warheads, detonators, and missiles are not stored fully-assembled, but are scattered and physically separated throughout the country. In short, the danger of militants seizing Pakistan's nuclear weapons in some Rambo-like scenario remains highly unlikely.

### China

#### China will not risk war—economics and diplomacy

Fravel 12—Associate Professor of Political Science and member of the Security Studies Program at MIT. Taylor is a graduate of Middlebury College and Stanford University, where he received his PhD. He has been a Postdoctoral Fellow at the Olin Institute for Strategic Studies at Harvard University, a Predoctoral Fellow at the Center for International Security and Cooperation at Stanford University, a Fellow with the Princeton-Harvard China and the World Program and a Visiting Scholar at the American Academy of Arts and Sciences(M. Taylor, “All Quiet in the South China Sea,” March 22nd, 2012, <http://www.foreignaffairs.com/articles/137346/m-taylor-fravel/all-quiet-in-the-south-china-sea>)

Little noticed, however, has been China's recent adoption of a new -- and much more moderate -- approach. The primary goals of the friendlier policy are to restore China's tarnished image in East Asia and to reduce the rationale for a more active U.S. role there.

Beijing is also unlikely to be more assertive if that sustains Southeast Asian countries' desires to further deepen ties with the United States.

The first sign of China's new approach came last June, when Hanoi dispatched a special envoy to Beijing for talks about the countries' various maritime disputes. The visit paved the way for an agreement in July 2011 between China and the ten members of the Association of Southeast Asian Nations (ASEAN) to finally implement a declaration of a code of conduct they had originally drafted in 2002 after a series of incidents in the South China Sea. In that declaration, they agreed to "exercise self-restraint in the conduct of activities that would complicate or escalate disputes."

Since the summer, senior Chinese officials, especially top political leaders such as President Hu Jintao and Premier Wen Jiabao, have repeatedly reaffirmed the late Deng Xiaoping's guidelines for dealing with China's maritime conflicts to focus on economic cooperation while delaying the final resolution of the underlying claims. In August 2011, for example, Hu echoed Deng's approach by stating that "the countries concerned may put aside the disputes and actively explore forms of common development in the relevant sea areas."

Authoritative Chinese-language media, too, has begun to underscore the importance of cooperation. Since August, the international department of People's Daily (under the pen name Zhong Sheng) has published several columns stressing the need to be less confrontational in the South China Sea. In January 2012, for example, Zhong Sheng discussed the importance of "pragmatic cooperation" to achieve "concrete results." Since the People's Daily is the official paper of the Central Committee of the Chinese Communist Party, such articles should be interpreted as the party's attempts to explain its new policy to domestic readers, especially those working lower down in party and state bureaucracies.

In terms of actually setting aside disputes, China has made progress. In addition to the July consensus with ASEAN, in October China reached an agreement with Vietnam on "basic principles guiding the settlement of maritime issues." The accord stressed following international law, especially the UN Convention on the Law of the Sea. Since then, China and Vietnam have begun to implement the agreement by establishing a working group to demarcate and develop the southern portion of the Gulf of Tonkin near the disputed Paracel Islands.

China has also initiated or participated in several working-level meetings to address regional concerns about Beijing's assertiveness. Just before the East Asian Summit last November, China announced that it would establish a three billion yuan ($476 million) fund for China-ASEAN maritime cooperation on scientific research, environmental protection, freedom of navigation, search and rescue, and combating transnational crimes at sea. The following month, China convened several workshops on oceanography and freedom of navigation in the South China Sea, and in January it hosted a meeting with senior ASEAN officials to discuss implementing the 2002 code of conduct declaration. The breadth of proposed cooperative activities indicates that China's new approach is probably more than just a mere stalling tactic.

Beyond China's new efforts to demonstrate that it is ready to pursue a more cooperative approach, the country has also halted many of the more assertive behaviors that had attracted attention between 2009 and 2011. For example, patrol ships from the Bureau of Fisheries Administration have rarely detained and held any Vietnamese fishermen since 2010. (Between 2005 and 2010, China detained 63 fishing boats and their crews, many of which were not released until a hefty fine was paid.) And Vietnamese and Philippine vessels have been able to conduct hydrocarbon exploration without interference from China. (Just last May, Chinese patrol ships cut the towed sonar cable of a Vietnamese ship to prevent it from completing a seismic survey.) More generally, China has not obstructed any recent exploration-related activities, such as Exxon's drilling in October of an exploratory well in waters claimed by both Vietnam and China. Given that China retains the capability to interfere with such activities, its failure to do so suggests a conscious choice to be a friendlier neighbor.

The question, of course, is why did the Chinese shift to a more moderate approach? More than anything, Beijing has come to realize that its assertiveness was harming its broader foreign policy interests. One principle of China's current grand strategy is to maintain good ties with great powers, its immediate neighbors, and the developing world. Through its actions in the South China Sea, China had undermined this principle and tarnished the cordial image in Southeast Asia that it had worked to cultivate in the preceding decade. It had created a shared interest among countries there in countering China -- and an incentive for them to seek support from Washington. In so doing, China's actions provided a strong rationale for greater U.S. involvement in the region and inserted the South China Sea disputes into the U.S.-Chinese relationship.

By last summer, China had simply recognized that it had overreached. Now, Beijing wants to project a more benign image in the region to prevent the formation of a group of Asian states allied against China, reduce Southeast Asian states' desire to further improve ties with the United States, and weaken the rationale for a greater U.S. role in these disputes and in the region.

So far, Beijing's new approach seems to be working, especially with Vietnam. China and Vietnam have deepened their political relationship through frequent high-level exchanges. Visits by the Vietnamese Communist Party general secretary, Nguyen Phu Trong, to Beijing in October 2011 and by the Chinese heir apparent, Xi Jinping, to Hanoi in December 2011 were designed to soothe spirits and protect the broader bilateral relationship from the unresolved disputes over territory in the South China Sea. In October, the two also agreed to a five-year plan to increase their bilateral trade to $60 billion by 2015. And just last month, foreign ministers from both countries agreed to set up working groups on functional issues such as maritime search and rescue and establish a hotline between the two foreign ministries, in addition to starting talks over the demarcation of the Gulf of Tonkin.

Even if it is smooth sailing now, there could be choppy waters ahead. Months of poor weather have held back fishermen and oil companies throughout the South China Sea. But when fishing and hydrocarbon exploration activities resume in the spring, incidents could increase. In addition, China's new approach has raised expectations that it must now meet -- for example, by negotiating a binding code of conduct to replace the 2002 declaration and continuing to refrain from unilateral actions.

Nevertheless, because the new approach reflects a strategic logic, it might endure, signaling a more significant Chinese foreign policy shift. As the 18th Party Congress draws near, Chinese leaders want a stable external environment, lest an international crisis upset the arrangements for this year's leadership turnover. And even after new party heads are selected, they will likely try to avoid international crises while consolidating their power and focusing on China's domestic challenges.

China's more moderate approach in the South China Sea provides further evidence that China will seek to avoid the type of confrontational policies that it had adopted toward the United States in 2010. When coupled with Xi's visit to Washington last month, it also suggests that the United States need not fear Beijing's reaction to its strategic pivot to Asia, which entails enhancing U.S. security relationships throughout the region. Instead, China is more likely to rely on conventional diplomatic and economic tools of statecraft than attempt a direct military response. Beijing is also unlikely to be more assertive if that sustains Southeast Asian countries' desires to further deepen ties with the United States. Whether the new approach sticks in the long run, it at least demonstrates that China, when it wants to, can recalibrate its foreign policy. That is good news for stability in the region.

### Russia

#### About accidents, not Afghanistan

**US-Russian Relations Resilient**

**BAZHANOV 10**. [Yevgeny, vice chancellor of research and international relations at the Foreign Ministry’s Diplomatic Academy in Moscow “5 Barriers to a Western Partnership” Moscow Times -- Aug 20]

But despite these significant obstacles, there is still a lot of potential for strengthening Russia’s partnership with the West. The driving force behind this natural convergence is Russia’s pressing need to modernize and diversify its economy. Post-Soviet Russia is committed to build a market economy and a democratic society. As a result, for the first time in history, the Russian economic, social and political models are not antagonistic to the Western model. For its part, the West has an objective — if not self-serving — interest in seeing Russia become a well-functioning civil society with a prosperous market economy. The process of globalization and modernization necessarily means that Russia will never return to Soviet-style isolationism. The economic centers of the modern world — Europe, the United States, China, India and Southeast Asia — are becoming increasingly dependent on one another. If Russia were to reject economic ties with those power centers, the country would become so weak that it would disintegrate. In addition, common security risks and threats — mainly terrorism — will naturally bring Russia and the West together to fight the common enemies on all fronts. One other factor that will help the partnership is that Russia will gradually cure itself of its complex as a “defeated superpower” and will come to terms with its more modest geopolitical role in the global arena. For its part, the West will cease to view Moscow as a geopolitical rival.

### Africa

#### Africa is not reverse causal – says authoritarian regiems spin US as a justification to violate human rights – not that the plan change policy

#### Only uniqueness for Egypt is before the revolution

### 1NC Mideast

**Empirics go neg – leaders default toward regime preservation**

**Cook 07** – CFR senior fellow for MidEast Studies. BA in international studies from Vassar College, an MA in international relations from the Johns Hopkins School of Advanced International Studies, and both an MA and PhD in political science from the University of Pennsylvania (Steven, Ray Takeyh, CFR fellow, and Suzanne Maloney, Brookings fellow, 6 /28, Why the Iraq war won't engulf the Mideast, http://www.iht.com/bin/print.php?id=6383265)

Underlying this anxiety was a scenario in which Iraq's sectarian and ethnic violence spills over into neighboring countries, producing conflicts between the major Arab states and Iran as well as Turkey and the Kurdistan Regional Government. These wars then destabilize the entire region well beyond the current conflict zone, involving heavyweights like Egypt. This is scary stuff indeed, but with the exception of the conflict between Turkey and the Kurds, the scenario is far from an accurate reflection of the way Middle Eastern leaders view the situation in Iraq and calculate their interests there. It is abundantly clear that major outside powers like Saudi Arabia, Iran and Turkey are heavily involved in Iraq. These countries have so much at stake in the future of Iraq that it is natural they would seek to influence political developments in the country. Yet, the Saudis, Iranians, Jordanians, Syrians, and others are very unlikely to go to war either to protect their own sect or ethnic group or to prevent one country from gaining the upper hand in Iraq. The reasons are fairly straightforward. First, Middle Eastern leaders, like politicians everywhere, are primarily interested in one thing: self-preservation. Committing forces to Iraq is an inherently risky proposition, which, if the conflict went badly, could threaten domestic political stability. Moreover, most Arab armies are geared toward regime protection rather than projecting power and thus have little capability for sending troops to Iraq. Second, there is cause for concern about the so-called blowback scenario in which jihadis returning from Iraq destabilize their home countries, plunging the region into conflict. Middle Eastern leaders are preparing for this possibility. Unlike in the 1990s, when Arab fighters in the Afghan jihad against the Soviet Union returned to Algeria, Egypt and Saudi Arabia and became a source of instability, Arab security services are being vigilant about who is coming in and going from their countries. In the last month, the Saudi government has arrested approximately 200 people suspected of ties with militants. Riyadh is also building a 700 kilometer wall along part of its frontier with Iraq in order to keep militants out of the kingdom. Finally, there is no precedent for Arab leaders to commit forces to conflicts in which they are not directly involved. The Iraqis and the Saudis did send small contingents to fight the Israelis in 1948 and 1967, but they were either ineffective or never made it. In the 1970s and 1980s, Arab countries other than Syria, which had a compelling interest in establishing its hegemony over Lebanon, never committed forces either to protect the Lebanese from the Israelis or from other Lebanese. The civil war in Lebanon was regarded as someone else's fight. Indeed, this is the way many leaders view the current situation in Iraq. To Cairo, Amman and Riyadh, the situation in Iraq is worrisome, but in the end it is an Iraqi and American fight. As far as Iranian mullahs are concerned, they have long preferred to press their interests through proxies as opposed to direct engagement. At a time when Tehran has access and influence over powerful Shiite militias, a massive cross-border incursion is both unlikely and unnecessary. So Iraqis will remain locked in a sectarian and ethnic struggle that outside powers may abet, but will remain within the borders of Iraq. The Middle East is a region both prone and accustomed to civil wars. But given its experience with ambiguous conflicts, the region has also developed an intuitive ability to contain its civil strife and prevent local conflicts from enveloping the entire Middle East.

**No superpower draw-in.**

**Dyer, ‘2**

[Gwynne, Ph.D. in Military and Middle Eastern History from the University of London and former professor at the Royal Military Academy Sandhurst and Oxford University Queen’s Quarterly, “The coming war”, December, Questia]

All of this indicates an extremely dangerous situation, with many variables that are impossible to assess fully. But there is one comforting reality here: this will not become World War III. Not long ago, wars in the Middle East always went to the brink very quickly, with the Americans and Soviets deeply involved on opposite sides, bristling their nuclear weapons at one another. And for quite some time we lived on the brink of oblivion. But that is over. World War III has been cancelled, and I don't think we could pump it up again no matter how hard we tried. The connections that once tied Middle Eastern confrontations to a global confrontation involving tens of thousands of nuclear weapons have all been undone. The East-West Cold War is finished. The truly dangerous powers in the world today are the industrialized countries in general. We are the ones with the resources and the technology to churn out weapons of mass destruction like sausages. But the good news is: we are out of the business.

### 1NC iran Israel

**No Impact – exaggerated and Israel and the US would crush Iran**

**Parsi 12** (Rouzbeh, Foreign Policy, research fellow at the European Union Institute for Security Studies (EUISS), “The dominoes of war with Iran,” March 2, 2012, http://mideast.foreignpolicy.com/posts/2012/03/02/the\_inevitabilities\_of\_a\_bad\_iran\_policy)

Unlearning the Cold War¶ The cultural component in this game is inescapable. Iranian propaganda portrays the U.S. as devilishly cunning, thereby imputing a great measure of rationality on the part of Washington that would lead it to never risk an attack on Iran. In the U.S, on the other hand, there is a return to an intellectually sloppy and familiar Cold War archetype -- an irrational and nefarious enemy -- when describing Iran. But the actual experience and lessons from the Cold War seem to have been totally forgotten. Iran is often portrayed as an existential threat, mainly to Israel but transitively to the U.S.. Yet this very idea is belied by the fact that Iran is also threatened with war on a regular basis -- keeping all the options on the table is to say that war is an option.¶ One particularly forceful elucidation of this simplistic understanding of the consequences of war is Matthew Kroenig's recent piece in Foreign Affairs. The article articulates a bizarre notion that a war with Iran would be limited to a set of strikes to which Iran may not retaliate. Nonetheless, it is interesting how Orwellian rhetoric has evolved: that somehow the use of military power against another sovereign state can be portrayed as not war, but as "just" a strike. While it may be news to some pundits and hawkish politicians, there is no such thing as "a bit of war" in international law. A similar doublespeak is present in the U.S. Congress where there is talk of an oil embargo, i.e. to physically prevent vessels from reaching or leaving Iranian harbors carrying oil products. Under international law, that constitutes an act of war. ¶ On the one hand, some deem Iran to be an existential threat, implying a serious military risk; and on the other hand, that threat seems to be rather negligible, since threatening Iran with war is not expected to have any serious retaliatory consequences. The fixation on Iran's nuclear program and the many projections of the Islamic Republic's ever-imminent breakout as a nuclear weapon state would be hyperbole were it not for the serial amnesia afflicting public and political discourse. New predictions are made as soon as the old ones expire.¶ An Iranian nuclear bomb will not pose a existential threat to the United States, but it will bring home a reality that most politicians in Washington have learned to ignore over the years: Iran is a major regional actor that wants a seat at the table. In this regard many may scoff at the notion of nuclear weapons as a status symbol yet it is quite evident that possessing them can very well play a role in enhancing to stature of a country. ¶ The real fear behind especially the Israeli hyperbole on Iran is not an imminent existential threat either, but rather the prospect of losing its regional monopoly on nuclear weapons, forcing the country to finally deal with a geopolitical reality that requires reciprocal relationships. One of the reasons the Israeli leadership can afford (so far) to evade the political reality and consequences of their own actions and the make up of the region is their sway (real and imagined) in U.S. policymaking with regard to the Middle East. ¶ With regard to the threat assessment it should be pointed out that in the case of the Soviet Union the threat was of course existential in the sense that there was an actual, rather than imagined, parity between the parties and that was exactly the reason why neither party threw threats of war around lightly (the doctrine of mutually assured destruction kept everyone alert and sufficiently cautious). ¶ Iran's military capabilities pale in comparison to that of the U.S. (and Israel). Furthermore, the Iranian regime is not half as mad as it is often portrayed. The primary objective of the leadership in Tehran is regime survival; its secondary aim is to achieve and maintain regional prominence. Neither of these two goals are irrational (though they may be unpalatable for many), nor is the behavior of elite coalitions indicative of some reckless urge to fulfill a death wish.

**No chance of Israeli strikes now**

**-They’ve shifted to a diplomatic political strategy for deterrence vs. Iran**

**-They are more focused on the arab spring**

**Gordon, et al, 2-17** [David Gordon, head of research at Eurasia Group; Cliff Kupchan is director of the films Eurasia practice, “Odds are Israel won't attack Iran”, February 17, 2011, http://eurasia.foreignpolicy.com/posts/2011/02/17/odds\_are\_israel\_wont\_attack\_iran, VS]

"You don't want a messianic apocalyptic cult controlling atomic bombs," Israeli Prime Minister Benjamin Netanyahu **told a journalist** in 2009, in reference to Iran's nuclear program. He wasn't the first or last Israeli official to use such inflammatory rhetoric. References to Iran as an existential threat or to the country's nuclear program as raising the specter of another Holocaust have been typical among Israeli officials. But on a recent research trip to Israel, we heard surprisingly little anxiety. No official spoke about a threshold beyond which Iran's program would be unstoppable -- a deadline that in the past was always one year off. And elites across the political spectrum for now favor sanctions and covert action, rather than military force, to deter Iran. As a result, the chance of Israeli strikes in the next eighteen months is very low. So what accounts for the sea-change in the Israeli approach? Success, essentially. Iranian officials **have claimed** that successive rounds of international sanctions have benefitted the country by forcing it to adopt necessary economic reforms. But top Israeli officials stressed to us that sanctions are crippling Iran's economy and sparking debate about nuclear policy among the ruling elite. Likewise, the triumph of the Stuxnet computer worm -- credited with destroying 1,000 Iranian centrifuges and widely believed (though not confirmed) to be an **American-Israeli creation** -- and possibly other covert measures have encouraged Israeli policymakers. While officials wouldn't talk in detail, they said that Iran's nuclear program has been slowed. Buying time is an important reason to stick with sanctions and covert action. For one, as the repercussions of ever harsher sanctions sink in, Tehran may be forced to make concessions at the negotiating table. Second, in the wake of Stuxnet, Israel is probably more optimistic about its ability to impair Iran's nuclear program over the long term. Third, an extended time horizon opens the door for domestically induced regime change in Iran -- a remote but real possibility that bears monitoring as disaffected crowds **again take to the streets** of Tehran. There's probably also a public relations angle to Israel's transformed rhetoric. As some sources noted, breathless statements about existential threats and points of no return likely strengthened Iran's hand, both diplomatically and publicly. Moreover, Israeli public opinion has turned its gaze elsewhere, to what it considers the more imminent threats of Gaza, Lebanon, and **Egypt**.

## Hr cred

#### Human rights credibility doesn’t solve anything.

Moravcsik, ‘1

[Andrew, Professor of Politics and International Affairs and Director, European Union Program Princeton University, “Why Is U.S. Human Rights Policy So Unilateralist?” <http://www.princeton.edu/~amoravcs/library/unilateralism.pdf>]

It is often argued that U.S. nonparticipation undermines international human rights institutions, as well as the global human rights movement. As Patricia Derian asserted before the Senate in 1979: “Ratification by the United States significantly will enhance the legitimacy and acceptance of these standards. It will encourage other countries to join those that have already accepted the treaties. And, in countries where human rights generally are not respected, it will aid citizens in raising human rights issues.“58 Deputy Secretary of State Warren Christopher went even further, arguing that human rights policy is “a way of taking the ideological initiative, instead of merely reacting,” President Carter himself added that it “might possibly reverse the tide that has been going against democracies in the past.” Many similar quotations could be cited, since drawing a direct link between U.S. behavior and the effectiveness of international norms has, of course, a powerful rhetorical appeal. Yet little evidence suggests a close link between U.S. behavior and international norms, let alone domestic democratization. Everywhere in the world, human rights norms have spread without much attention to U.S. domestic policy. Under the European Convention on Human Rights, the Europeans have established the most effective formal system for supranational judicial review of human rights claims, based in Strasbourg, without U.S. participation. In the wake of the “third wave” of democratization in Eastern Europe, East Asia, and Latin America, government after government moved ahead toward more active domestic and international human rights policies without paying much attention to U.S. domestic practice. Indeed, emerging democracies in the Westem Hemisphere are following Europe’s lead in ratifying and accepting compulsory jurisdiction of a regional human rights court, while ignoring U.S. unwillingness to ratify the American Convention on Human Rights, let alone accept jurisdiction of a supranational court. One might argue with equal plausibility that the pride of Latin American democracies in full adherence to the American Convention on Human Rights is strengthened by the unwillingness of the United States, Canada, Mexico, and the stable democracies in the anglophone Caribbean to adhere. Likewise, 191 countries have ratified the CRC in record time without waiting to see what the United States would do. There is little evidence that Rwandan, Serbian, or Iraqi leaders would have been more humane if the United States had submitted to more multilateral human rights commitments. The human rights movement has fiily embedded itself in public opinion and NGO networks, in the United States as well as elsewhere, despite the dubious legal status of international norms in the United States. In sum, the consequences of U.S. nonadherence to global norms, while signaling a weakening in theory, is probably of little import in practice.

#### No impact – no scenario for escalation

Inconsistency doesn’t destroy our ability to influence anything.

Moravcsik, ‘1

[Andrew, Professor of Politics and International Affairs and Director, European Union Program Princeton University, “Why Is U.S. Human Rights Policy So Unilateralist?” <http://www.princeton.edu/~amoravcs/library/unilateralism.pdf>]

More focused criticisms are directed at U.S. human rights policy itself. A genuine commitment to multilateralism is often seen as a necessary element in an effective human rights policy. A Senate Foreign Relations Committee report in 1979 concluded that “in view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.“67 Such arguments recur constantly in debates in the United States.68 Most such critiques of U.S. policy equate domestic adherence to intemational norms with commitment to human rights policy. Yet the United States enjoys many of the benefits of an active human rights policy through its active unilateral policy and support for the formation of new human rights institutions. These go a considerable distance to balance the United States’ occasional absence or rhetorical embarrassment.69 The United States is in the enviable position of having a unilateral policy that is effective, salient, and legitimate. Thus it remains unclear how much domestic enforcement adds to the effectiveness or legitimacy of U.S. policy. Since the Carter administration, U.S. unilateral human rights policy appears to have had a considerable impact on global perceptions, despite the country’s failure to ratify multilateral treaties. Vogelgesang reports that “from the moment Latin Americans, Africans, and Asians started looking at President Carter as a politician interested in human rights, the United States Embassy ceased being seen by thousands of Third World liberals as a headquarters for conservative maneuvers; it became identified with the nation it represents. “70 In the mid-1970s, and again in response to Reagan administration policies in the mid-1980s, a Democratic Congress, led by a Democratic House of Representatives, passed important legislation to link U.S. foreign policy spending to human rights. Recent U.S. human rights enforcement efforts in Haiti, Guatemala, Kosovo, the Philippines, China, and elsewhere-often conducted in collaboration with global or regional bodies seems unimpaired by the apparent U.S. hypocrisy.

#### Alt causes to human rights cred.

AFP, 10-25-2010

[“China paper slams US after WikiLeaks claims,” 10-25, <http://www.google.com/hostednews/afp/article/ALeqM5hyOtgF1U_tr4QQjGibCzDx2_Zn2g?docId=CNG.6f4b5aa5633087bf3a787c537dc06ab9.6c1>]

BEIJING — China's state media on Monday said the revelations in Iraq war documents published by WikiLeaks has tarnished the credibility of the United States as a protector of human rights. The comments in the China Daily come after Beijing criticised a report by a commission of US lawmakers and government officials that condemned an "increasingly harsh" crackdown by Beijing on rights activists and lawyers. The issue of human rights is always a sensitive one in Sino-US relations. Earlier this month Washington called for the immediate release of jailed Chinese dissident Liu Xiaobo after he was awarded the Nobel Peace Prize. The documents published by the whistleblowing website WikiLeaks appear to show that the US military turned a blind eye to evidence of torture and abuse of civilians by the Iraqi authorities. "The magnitude of the crimes should make every righteous person angry. It again puts a big question mark against the US self-proclaimed image as the world human rights champion," the China Daily said in a commentary. "For years, the US has been wielding the banner of human rights to criticise others, especially developing countries," it said. "However, the US refuses to either clarify or rectify its own human rights violations as recorded by the WikiLeaks documents," it said, adding the documents let the world see through US "unilateralism and double standards". "The US will lose credibility if it cannot face its own human rights violations squarely," the China Daily said. Human rights is one of a long list of issues that will likely be on the US agenda when Chinese President Hu Jintao visits Washington in January. The world's top two economies have also been at odds in recent months over the value of the Chinese yuan, a litany of trade disputes, web censorship and US arms sales to Taiwan.

### Terrorism

**Zero risk of nuclear terrorism**

**Chapman 12** 5/22, \*Stephen Chapman is a columnist and editorial writer for the Chicago Tribune, “CHAPMAN: Nuclear terrorism unlikely,” http://www.oaoa.com/articles/chapman-87719-nuclear-terrorism.html, AJ

Ever since Sept. 11, 2001, Americans have had to live with the knowledge that the next time the terrorists strike, it could be not with airplanes capable of killing thousands but atomic bombs capable of killing hundreds of thousands. The prospect has created a sense of profound vulnerability. It has shaped our view of government policies aimed at combating terrorism (filtered through Jack Bauer). It helped mobilize support for the Iraq war. Why are we worried? Bomb designs can be found on the Internet. Fissile material may be smuggled out of Russia. Iran, a longtime sponsor of terrorist groups, is trying to acquire nuclear weapons. A layperson may figure it’s only a matter of time before the unimaginable comes to pass. Harvard’s Graham Allison, in his book “Nuclear Terrorism,” concludes, “On the current course, nuclear terrorism is inevitable.” But remember: After Sept. 11, 2001, we all thought more attacks were a certainty. Yet al-Qaida and its ideological kin have proved unable to mount a second strike. Given their inability to do something simple — say, shoot up a shopping mall or set off a truck bomb — it’s reasonable to ask whether they have a chance at something much more ambitious. Far from being plausible, argued Ohio State University professor John Mueller in a presentation at the University of Chicago, “the likelihood that a terrorist group will come up with an atomic bomb seems to be **vanishingly small**.” The events required to make that happen comprise a multitude of Herculean tasks. First, a terrorist group has to get a bomb or fissile material, perhaps from Russia’s inventory of decommissioned warheads. If that were easy, one would have already gone missing. Besides, those devices are probably no longer a danger, since weapons that are not maintained quickly become what one expert calls “radioactive scrap metal.” If terrorists were able to steal a Pakistani bomb, they would still have to defeat the arming codes and other safeguards designed to prevent unauthorized use. As for Iran, no nuclear state has ever given a bomb to an ally — for reasons even the Iranians can grasp. Stealing some 100 pounds of bomb fuel would require help from rogue individuals inside some government who are prepared to jeopardize their own lives. Then comes the task of building a bomb. It’s not something you can gin up with spare parts and power tools in your garage. It requires millions of dollars, a safe haven and advanced equipment — plus people with specialized skills, lots of time and a willingness to die for the cause. Assuming the jihadists vault over those Himalayas, they would have to deliver the weapon onto American soil. Sure, drug smugglers bring in contraband all the time — but seeking their help would confront the plotters with possible exposure or extortion. This, like every other step in the entire process, means expanding the circle of people who know what’s going on, multiplying the chance someone will blab, back out or screw up. That has heartening implications. If al-Qaida embarks on the project, it has only a minuscule chance of seeing it bear fruit. Given the formidable odds, it probably won’t bother. None of this means we should stop trying to minimize the risk by securing nuclear stockpiles, monitoring terrorist communications and improving port screening. But it offers good reason to think that in this war, it appears, the worst eventuality is **one that will never happen**.

**\*\*\*Squo solves---defense capabilities**

**Daniel 12** 2/16, \*Lisa Daniel: American Forces Press Service, Defense News, “U.S. Faces Broad Spectrum of Threats, Intel Leaders Say,” http://www.defense.gov/news/newsarticle.aspx?id=67231, AJ

Intelligence shows the next three years will be a critical transition time in counterterrorism, as groups like al-Qaida diminish in importance and terrorist groups become more decentralized, Clapper said. U.S. counterterrorism has caused al-Qaida to lose so many top lieutenants since 2008 “that a new group of leaders, even if they could be found, would have difficulty integrating into the organization and compensating for mounting losses,” the director said. Al-Qaida’s regional affiliates in Iraq, the Arabian peninsula and North Africa are expected to “surpass the remnants of core al-Qaida in Pakistan,” he said. With continued, robust counterterrorism efforts and cooperation from international partners, Clapper said, “there is a better-than-even chance that decentralization will lead to fragmentation of the movement within a few years,” although he added that terrorist groups will continue to be a dangerous transnational force. **Intense counterterrorism pressure has made it unlikely that a terrorist group would launch a chemical, biological, radiological or nuclear mass attack** against the United States in the next year, Clapper said, but groups such as al-Qaida in the Arabian Peninsula continue to show interest in such an attack. Most terrorist groups, however, remain locally focused, Clapper said, noting that al-Qaida in Iraq remains focused on overthrowing the Shiia-led government in Baghdad in favor of a Sunni-led government. In Africa, the al-Qaida in the Islamic Maghreb and al-Shabaab organizations struggle with internal divisions and outside support, and have been diminished by government and military pressure in Somalia, Kenya and Ethiopia, he said. Still, intelligence shows no nation states have provided weapons of mass destruction assistance to terrorist groups, and no nonstate actors are targeting WMD sites in countries with unrest, the director said. But that could change as governments become more unstable, he added.

### Balkans

#### They don’t solve Balkans and there’s no internal link to interstate war – their ev is about govenrments without the ability to police nonstate actors

**Crime and instability decreasing – better data**

**United Nations Office on Drugs and Crime 08** Greater stability in the Balkans is lowering crime, reports UNODC <http://www.unodc.org/unodc/en/frontpage/greater-stability-in-the-balkans-is-lowering-crime.html>

29 May 2008 - The Balkan area is, surprisingly, one of the safest in Europe. The report Crime and its Impact on the Balkans by the United Nations Office on Drugs and Crime (UNODC) belies enduring stereotypes of the region as a hotbed of organized crime and violence. People are as safe, or safer, on the streets and in their homes as they are in most parts of the world. Released today, the study concludes that the Balkans have become a low-crime region after the decade-long turmoil that followed the break-up of Yugoslavia. But it also warns that links between business, politics and organized crime continue to hamper the region's path to stability. "**The vicious circle of political instability leading to crime, and vice versa, that plagued the Balkans in the 1990s has been broken**", said the Executive Director of UNODC Antonio Maria Costa at the launch of the report. Yet, he warned, "the region remains vulnerable to instability caused by enduring links between business, politics and organized crime". The report makes three main points. A safer region The UNODC report shows that, in general, levels of crime against people and property (like homicide, robbery, rape, burglary, and assault) are lower than in Western Europe, and the number of murders is falling throughout the region. In fact, regional murder rates fell by almost a half from 2185 in 1998 to 1130 in 2006. Or consider these trends in violent crime: Albania's 2002 murder rate of six per 100,000 was about the same as the United States while Croatia had a lower murder rate than the United Kingdom. Romania was safer than Finland or Switzerland. If we look at property crime, Western Europe has twice the rate of burglary and fifteen times as much robbery as South-East Europe This positive trend has been particularly noticeable in the past few years. Even the number of Balkan nationals being held in Western European prisons has gone down. Low vulnerability to crime This progress is likely to continue since the region lacks the usual vulnerabilities that lead to crime elsewhere in the world: mass poverty, income inequality, run-away urbanisation and large-scale youth unemployment. Other factors also come into play. Greater regional stability and democracy have put an end to war profiteering. Assistance from the international community, particularly the European Union, has helped place the region on the path to a fast recovery. Closer integration with the rest of Europe has opened borders and reduced the lure of illicit trans-frontier trade. Organized crime is also receding as a major threat. The smuggling of drugs, guns and human beings through the region is in decline, although the Balkans remain the premier transit zone for heroin destined for Western Europe (about 100 tons each year).

### Environment

#### Don’t solve environment – domestic political opposition to warming legislation obviously prevents leadership

**won’t cause extinction**

**Easterbrook, 95** (Gregg, Senior Editor of the New Republic, 1995, A Moment on Earth, p. 25, Hensel)

In the aftermath of events such as Love Canal or the Exxon Valdez oil spill, every reference to the environment is prefaced with the adjective "fragile." "Fragile environment" has become a welded phrase of the modern lexicon, like "aging hippie" or "fugitive financier." But the notion of a fragile environment is profoundly wrong. Individual animals, plants, and people are distressingly fragile. The environment that contains them is close to indestructible. The living environment of Earth has survived ice ages; bombardments of cosmic radiation more deadly than atomic fallout; solar radiation more powerful than the worst-case projection for ozone depletion; thousand-year periods of intense volcanism releasing global air pollution far worse than that made by any factory; reversals of the planet's magnetic poles; the rearrangement of continents; transformation of plains into mountain ranges and of seas into plains; fluctuations of ocean currents and the jet stream; 300-foot vacillations in sea levels; shortening and lengthening of the seasons caused by shifts in the planetary axis; collisions of asteroids and comets bearing far more force than man's nuclear arsenals; and the years without summer that followed these impacts. Yet hearts beat on, and petals unfold still. Were the environment fragile it would have expired many eons before the advent of the industrial affronts of the dreaming ape. Human assaults on the environment, though mischievous, are pinpricks compared to forces of the magnitude nature is accustomed to resisting.

**\*\*\*Status quo solves**

**Berg 8** (Chris, Columnist – The Age, “Isn't All This Talk of an Apocalypse Getting a Bit Boring?”, The Age, 1-27,

http://www.theage.com.au/news/opinion/isnt-all-this-talk-of-an-apocalypse-getting-a-bit-boring/2008/01/26/12011 57736917.html)

But there are substantial grounds for optimism — on almost every measure, the state of the world is improving. Pollution is no longer the threat it was seen to be in the 1970s, at least in the developed world. Changes in technology, combined with our greater demand for a clean environment, have virtually eliminated concerns about pungent waterways and dirty forests. Legislation played some role in this, but as Indur Goklany points out in his recent study, The Improving State of the World, the environment started getting better long before such laws were passed. Goklany reveals that strong economies, not environment ministers, are the most effective enforcers of cleanliness in our air and water. Indeed, the world's 10 most polluted places are in countries where strong economic growth has historically been absent — Russia, China, India and Kyrgyzstan have not really been known for their thriving consumer capitalism. Other indices, too, show that humanity's future is likely to be bright. Infant mortality has dramatically declined, as has malnutrition, illiteracy, and even global poverty. And there are good grounds for hope that we can adapt to changing climates as well. History has shown just how capable we are of inventing and adapting our way out of any sticky situation — and how we can do it without crippling our economies or imposing brutal social controls. Environmental alarmists have become more and more like those apocalyptic preachers common in the 19th century — always expecting the Rapture on this date and, when it doesn't come, quickly revising their calculations. Optimism is in too short supply in discussions about the environment. But four decades after The Population Bomb, if we remember just how wrong visions of the apocalypse have been in the past, perhaps we will look to the future more cheerfully.

## Solvency

### 1NC No Solvency—Prez Says No

#### The ruling changes nothing. President will win the ground game

Scheppele 12—Professor of Sociology and Public Affairs @ Princeton University [Kim Lane Scheppele (Dir. of the Program in Law and Public Affairs @ Princeton University), “The New Judicial Deference,” Boston University Law Review, 92 B.U.L. Rev. 89, January 2012]

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides—the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.

Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won  [\*92]  in these cases—and they prevailed overwhelmingly in their claims, especially at the Supreme Court—but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question.

Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference. n7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another. n8 After 9/11, it appears that deference is dead.

 [\*93]  But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. n9 Suspected terrorists have received  [\*94]  from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.

Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.

This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted—often bold, ambitious, and brave solutions—nonetheless fail to address the plights of the specific individuals who brought the cases.

This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something—an appearance not entirely false in the long run—while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

**2NC Law K**

**Third is turns the case – Ignore relations WITHIN the state – their reliance on restrictions miss the fact that we must question the structures and NOT the law**

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

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

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

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

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

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

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

Just as we see a widening gap between judicial recognition of rights in the abstract and the observation of those rights as a matter of fact, there appears to be an emerging dominance of proceduralist approaches, which take as a given that rights dissolve under political pressure, and, thus, are best protected by basic procedural measures. But that stance falls short in its seeming readiness to trade away rights in the face of political tension. **First**, it accepts the tropes du jour surrounding radical Islam—namely, that it is a unique, and uniquely apocalyptic, threat to U.S. security. In this, proceduralists do not pay adequate heed to the lessons of American history and sociology. And **second**, it endorses too easily the idea that procedural and structural protections will protect against substantive injustice in the face of popular and/or political demands for an outcome-determinative system that cannot tolerate acquittals. Procedures only provide protection, however, if there is sufficient political support for the underlying right. Since the premise of the proceduralist scholarship is that such support does not exist, it is folly to expect the political branches to create meaningful and robust protections. **In short, a witch hunt does not become less a mockery of justice when the accused is given the right to confront witnesses. And a separate system (especially when designed for demonized “others,” such as Muslims) cannot, by definition, be equal.**

**The question of this debate is not if the plan is good, but rather if their epistemology is good**

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

III. Literature Beyond Ethics

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

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

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

So, it is necessary to expose and criticize torture, but the brutality of the experience must somehow be represented in its unrepresentability. A criticism in search of ethical possibilities, in whatever form, must find ways to avoid "either looking on in horrified fascination as the blows fall or turning one's eyes away."47 **It must situate itself at the level of epistemology, rather than fixating on singular eruptions of violence and state brutality. Otherwise, critique is already "play[ing] the game by the rules of the state," operating within the dialectic of visibility endemic to the epistemology of the burrow.**

**Our alternative is good, your aff is bad**

**Rana 11** Aziz RANA Law @ Cornell ’11 “Who Decides on Security?” Cornell Law Faculty Working Papers. Paper 87. http://scholarship.law.cornell.edu/clsops\_papers/87 p. 45-51

If both objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this mean for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that the central problem with the procedural solutions offered by constitutional scholars – emphasizing **new statutory frameworks** or **greater judicial assertiveness** – is that they **mistake** a question of **politics** for one of law. In other words, such scholars ignore the extent to which governing practices are the product of **background political judgments** about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants – danger too complex for the average citizen to comprehend independently – it is **inevitable** that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any **systematic** effort to challenge the current framing of the relationship between security and liberty must begin by **challenging** the **underlying assumptions** about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be **no substantive shift** in our constitutional politics. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements to become ever more entrenched.

**Any residual link is a DA to the perm – the reliance on legal restraint greases the skids of high-tech structural violence. Wrong starting point.**

**Smith 02** Thomas Gov’t & Int’l Affairs @ South Florida “The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence” *Int’l Studies Quarterly* 46 p. 370-371

The utility of law to legitimize modern warfare should not be underestimated. Even in the midst of war, **legal arguments** retain an **aura of legitimacy** that is missing in “political” justifications. The aspirations of humanitarian law are sound. Rather, it is the **instrumental use** of law that has **oiled the skids** of hi-tech violence. Not only does the law defer to military necessity, even when very broadly defined, but more importantly it bestows on those same military demands all the moral and psychological trappings of legality. The result has been to legalize and thus to justify in the public mind “inhumane military methods and their consequences,” as violence against civilians is carried out “**behind the protective veil of justice**” ~af Jochnick and Normand, 1994a:50!. Hi-tech states can defend hugely destructive, essentially unopposed, aerial bombardment by citing the authority of seemingly secular and universal legal standards. The growing gap between hi- and low-tech means may exacerbate inequalities in moral capital as well, as the sheer barbarism of “premodern” violence committed by ethnic cleansers or atavistic warlords makes the methods employed by hi-tech warriors seem all the more clean and legal by contrast. This **fusion of law and technology** is likely to **propel** **future American interventions**. Despite assurances that the campaign against terrorism would differ from past conflicts, the allied air war in Afghanistan, marked by record numbers of unmanned drones and bomber flights at up to 35,000 feet, or nearly 7 miles aloft, rarely strayed from the hi-tech and legalistic script. While the attack on the World Trade Center confirmed a thousand times over the illegality and inhumanity of terrorism, the U.S. response has raised further issues of legality and inhumanity in conventional warfare. Civilian deaths in the campaign have been substantial because “military objects” have been targeted on the basis of extremely low-confidence intelligence. In several cases targets appear to have been chosen based on misinformation and even rank rumor. A liberal reading of dual use and the authorization of bombers to strike unvetted “targets of opportunity” also increased collateral damage. Although 10,000 of the 18,000 bombs, missiles, and other ordnance used in Afghanistan were precision-guided munitions, the war resulted in roughly 1000 to 4000 direct civilian deaths, and, according to the UNHCR, produced 900,000 new refugees and displaced persons. The Pentagon has nevertheless viewed the campaign as “a more antiseptic air war even than the one waged in Kosovo” ~Dao, 2001!. General Tommy Franks, who commanded the campaign, called it “the most accurate war ever fought in this nation’s history” ~Schmitt, 2002!.9 No fundamental change is in sight. Governments continue to justify collateral damage by citing the marvels of technology and the authority of international law. One does see a widening rift between governments and independent human rights and humanitarian relief groups over the interpretation of targeting and dual-use law. But these disputes have only underscored the ambiguities of humanitarian law. As long as interventionist states dominate the way that the rules of war are crafted and construed, hopes of rescuing law from politics will be dim indeed.

**The perm reproduces the violence of the 1ac – they fill critique with institutionalism**

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

Despite these essential differences, it is possible, through Coetzee's consideration of the danger of rendering the state's "vile mysteries the occasion of fantasy," to discern the properly ethical stakes involved in disrupting the prevailing politics of representation at work in instances of state violence.9 Intervention must be careful to avoid complicity with the institutionally determined limits of discourse as it attempts to challenge an abhorrent, authoritarian legitimacy codified through the deafening silence of apartheid's dark chambers, a challenge voiced on behalf of its smothered, suffering victims. Intervention in the politics of representation within the context of counterterrorism may similarly be understood as a matter of ethical concern; **such an intervention might defer criticism of the historical foundations of both state and non-state violence by emphasizing specific aberrations** like those of Abu Ghraib, **risking an accidental complicity with larger world-ordering projects such as the war on terror.** Or, intervention may prioritize the deficiencies and contradictions within a war-fighting narrative reliant upon simplistic moral judgments such as those discerning the "good" from the "evil" or "freedom" from "tyranny."

Either strategy is necessarily insufficient. That is, in order to determine the nature of what might be called an ethical concern for the representational practices surrounding torture and the war on terror, it is not enough to simply expose the contradictions inherent in this new global conflict, to reveal the contents and practices of the dark chamber. Once the details of the United States' politics of vengeance and the disturbing visual representation of the sovereign right to punish bleed into the field of public discourse, **the task of critique concerns how to respond to this broken silence without instantiating a new or more dangerous violence against that which was previously hidden**.

As increasingly disturbing information regarding specific detention and interrogation practices within the war on terror is revealed, the danger of reproducing or merely dislocating representational violence, especially in this context, is anything but abstract.

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

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

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

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

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

**Framing issue – all of their claims of inevitability are used to hide genocide**

**Herbert 03** Brent, The Genocidal Mentality Pt 3: In defense of Idealistic Moralism vs 'Pragmatism' http://portland.indymedia.org/en/2003/10/273190.shtml

Genocidal ideology can be found to be cloaked in the language of 'pragmatism. Indeed, it is impossible for those who have given their adherence to systems of genocide or ecocide to speak of their allegiance using anything other than the language of pragmatism. The genocidal enterprise is 'inevitable' and to reject it is to be a 'utopian', an 'idealist' who refuses to face reality, and whose 'moralizing' attitude fails to comprehend that compromises are required for the sake of being practical. **This attitude can be particularly troublesome when it is espoused by socialized critics who find it necessary to 'work within' the genocidal system**, recognizing its genocidal and ecocidal nature, and adopting the 'pragmatic' approach of making a system of genocide 'm ore humane'. After all, they don't do it, someone else will. If good people do not become pragmatic and work with the system of genocide then only evil people will do so, and the result will be a system of genocide that would be even less humane than is the case today. Adopting the pragmatic approach of the moderate is the sensible way to deal with genocidal systems in that it represents 'the lesser of two evils.' Thus, in being pragmatic, even the socialized critic is frequently forced to acknowledge that 'working for change within the system of genocide' **results in the doing of evil, in effect, acts as another pillar of support for systems of genocide,** but this is rationalized using the language of pragmatism that is found to permeate genocidal societies, in that while the doing of evil is foregone conclusion, one should choose 'the lesser of two evils' and strive for a more humane system of genocide. Being an idealistic moralist myself I have grown accustomed over the years to being dismissed as a matter of course. No sooner do people understand that they are listening to the words of an Idealistic Moralist than they automatically dismiss what is being said as 'unrealistic', the great criticism that an Idealistic Moralist must face being that one is 'unrealistic' and 'unpragmatic'. Now if the truth be told, Idealistic Moralism is the only truly pragmatic philosophical approach, and the fact that so called 'moderates' or 'humanists' are perpetually unable to see this simple fact has always been one of the great puzzles and frustrations of my life. Let us consider 'the war on poverty.' A pragmatic moderate would suggest that we fight poverty the way Democrats fight poverty, by giving everyone 'a New Deal' or by striving to build 'a Great Society'. A true Idealistic Moralist would never consent to join in on such an internally inconsistent project, because, you see, Idealist Moralists are much to pragmatic to be wasting their time on something so uselessly contradictory. As I mentioned previously, it is an unavoidable fact of free market systems that poverty be created (the process being called 'fighting inflation' which results in the creation of slums and poverty, since by definition, to do otherwise would be to nullify the free market). While pragmatic Democrats will adopt the moderate position of normalizing genocidal systems by striving to make the slums 'more humane' an Idealistic Moralist will go carping from the sidelines about what a waste of time such an endeavor really is. This will anger pragmatists, who will then attempt to get people on board for evil, which is a lesser form of evil, a more humane form of genocide, and great is their outrage when there are those who dissent, their rational being that in doing this you are 'allowing greater evil.' One is therefore left with the choice between evil or evil, and if one is sensible, one always knows that any so called 'war on poverty' waged in this context will be nothing but a conscience easing exercise in futility, and the only good thing that can result from such a thing is that moderates can feel better about themselves, even though a sensible analysis demonstrates that they will accomplish next to nothing. Even worse is that the repressed psychological doubling and internal logical contradictions result in new forms of evil, moderate 'liberal' evils, such as blaming the victim. What is even more ironic is that 'moderates' who practice what they like to call 'pragmatism' lend credibility to the genocidal enterprise, and in doing so they contribute to very 'inevitability' of genocide, which they then decry as the very reason for the need for pragmatism. Sometimes you will hear the bit about 'losing the middle class' by abandoning some supposed middle road. This is curious, since one would be lucky to have half the population turn out for an election in a place like America, where **half the population is already alienated from the** entire **political** system. This is not surprising when you consider that they are being offered choices in evil. The choice is between genocide and genocide, and the wide spread alienation is a symptom of the very 'inevitability' of systems of genocide which pragmatic moderates help to cement into place by lending credibility to the system by functioning as 'moderate critics' and thus normalizing genocidal systems. So then we can see two problems immediately, in that not only is 'moderation' not pragmatic at all, even though there are those who constantly insist that reconciling two impossible contradictions is supposed to represent 'progressive thought' and 'pragmatism' this approach also contributes to the inevitability of genocidal systems, which has resulted in the wide spread alienation that we see in societies today. Nevertheless, socialized critics will insist on taking a pragmatic approach toward genocide on the supposed grounds that in just this way they will avoid being seen as 'idealistic utopians' and thus alienate what they seem to think is some great base of support that exists for humane systems of genocide. Now by criticizing the genocidal system, and working to expose its ideological functions, perhaps one cannot hope to immediately change the architects of genocide by stripping them of their supposed armor plating, but at the very least one could hope to make them less comfortable in their skins. One could hope to make them conscious of the workings of the genocidal system of which they have become a part through the process of cultural socialization, and by exposing its contradictions, one can make it more and more difficult for the 'natural self' to coexist with the 'genocidal self' in the act of doubling and dissociation which is required by all systems of genocide. One can hopefully make more difficult the process of derealization which allows great harm to be done to people while remaining numb to the pain genocidal systems cause, and in this way, at the very least, socialized 'progressives' can be made more uncomfortable in their skins, rather than being shielded and protected from genocide through the mythological comforts afforded by a self image of 'progressive dissent'. And who knows, an Idealist Moralist might even someday be able to work some real changes by hurling acid onto the genocidal coat of armor that reinforces the socialization to genocide in this place, and by exposing the contradictions of the system of genocide, the time might come when something worthwhile can be done to protect the planet from the wide spread destruction of both genocide and ecocide. In the end, it is ironic, but **the only really practical and pragmatic approach is to become an Idealistic Moralist**, since every other approach is simply not practical. In truth, Idealistic Moralism is the world's only truly pragmatic philosophy, and the so called 'utopian' solutions are the only ones that actually stand a chance of working, since they have been stripped of the contradictions which plague all so called 'real world' solutions, which is why the real world is going to hell in hand basket after being left for so long in the destructive hands of pragmatists, and subject to the reforms of moderates, who, because they actually empower systems of genocide, are often left puzzled as to why after years and years of effort, they find the planet moving irresistibly towards an abyss despite all their years of effort. Of course, when you look at the world through the eyes of pragmatist, an Idealistic Moralist, it becomes obvious that they never could have succeeded and one must wonder what sort of powerful socializing force was present that left them so enraptured by the prevailing genocidal ideology that they were unable to accept this simple fact.

**Legally restricting war enables the very violence it attempts to prevent. Legal restrictions on war are more important for what they enable then what they restrain.**

Francisco J. **CONTRERAS** Prf. Philosophy of Law @ Seville **AND** Ignacio de la

**RASILLA** Ph.D. candidate in international law, Graduate Institute of International Studies, Geneva **‘8** “On War as Law and Law as War” Leiden Journal of International Law Vol. 21 Issue 3 p. 770-773

Kennedy begins by coldly contradicting those opponents of the Bush administration ‘that have routinely claimed that the United States has disregarded these rules’ (p. 40) by pointing out that both opponents and supporters of the Iraq war as well as both opponents and supporters of the great panoply of US legal measures related to the war on terror ‘were **playing with the same deck’** (p. 40) in presenting ‘professional arguments about how recognised rules and standards, as well as recognised exceptions and jurisdictional limitations, should be interpreted’ (p. 40). The author’s only concession with reference to the Bush administration’s legal advisers is to point out that ‘as professionals, these lawyers failed to advise their client adequately about the consequences of the interpretations they proposed, and about the way others would read the same texts – and their memoranda’ (p. 39).Thus Kennedy does not adopt any legal position to the detriment of any other, as his assessment does not seemingly pretend to persuade his reader at the level of the world of legal validity presented in the vocabulary of the UN Charter. The extent to which that excludes the author from the category of being a ‘true jus-internationalist’, according to A. Canc¸ado Trindade’s understanding of those who actually ‘comply with the ineluctable duty to stand against the apology of the use of force which is manifested in our days through distinct “doctrinal” elaborations’,42 is not for us to judge. Suffice it to note that the starting point of Kennedy’s convoluted perspective on the matter is that ‘the law of force’ is a form of ‘vocabulary for assessing the legitimacy’ (p. 41) of a form of conduct (e.g. amilitary campaign) or ‘for defending as well as attacking the “legality”’ (p. 41) of an act (e.g. distinguishing legitimate from illegitimate targets) in which the same law of force becomes a two-edged sword, everybody’s and no one’s strategic partner in a contemporary world where ‘legitimacy has become the currency of power’ (p. 45). For the author, in today’s age of ‘**lawfare’** (p. 12), ‘to resist war in the name of law . . . is to **misunderstand** the delicate **partnership of war and law’** (p. 167). In Kennedy’s view, therefore, ‘there is little comfort in knowing that law has become the vernacular for evaluating the legitimacy of war and politics where it has done so by itself becoming a **strategic** **instrument** of war and the continuation of politics by similar means’ (p. 132). 3. LAW AS A MODERN LEGAL INSTITUTION Of War and Law seems, indeed, to be animated by a certain philosophical perplexity regarding the ambiguous relation between the apparently antithetical nature of the terms appearing in its title. Since antiquity both jurists and philosophers have taught that the law’s raison d’eˆ tre is that of making social peace possible, of overcoming what would later be commonly known as the Hobbesian state of nature: bellum omnium contra omnes. Kant noted that law should be perceived first and foremost as a pacifying tool – in other words, ‘the establishment of peace constitutes, not a part of, but the whole purpose of the doctrine of law’43 – and Lauterpacht projected that same principle onto the international sphere: ‘the primordial duty’ of international law is to ensure that ‘there shall be no violence among states’.44 The paradox lies, of course, in that law performs its pacifying function not by means of edifying advice, but by the **threat of the use of force**. In this sense, as Kennedy points out, ‘to use law is also to invoke violence, at least the violence that stands behind legal authority’ (p. 22). Hobbes himself never concealed the fact that the state, ‘that mortal god, to which we owe under the immortal God our peace and defence’,would succeed in eradicating inter-individual violence precisely due to its ability to ‘inspire terror’;45 but Weber – ‘the State is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’46 – Godwin,47 and Kelsen48 have also provided support for the same proposition. This ambivalent and paradoxical relationship between law and violence,which is obvious in the domestic or intra-state realm, becomes even more obvious in the interstate domain with its classical twin antinomy of ubi jus, ibi pax and inter arma leges silent until the law in war emerges as a bold normative sector which dares to defy this conceptual incompatibility; even war can be regulated, be submitted to conditions and limitations. The hesitations of Kant in addressing jus in bello49 or the very fact that the Latin terms jus ad bellum and jus in bello were coined, as R. Kolb has pointed out,50 at relatively recent dates, seem to confirm that this has never been per se an evident aspiration.51 Kennedy explains his own calling as international lawyer as being partly inspired by his will to participate in the law’s civilizing mission (p. 29)52 as something utterly distinct from war: We think of these rules [law in war] as coming from ‘outside’ war, **limiting and restricting** the military. We think of international law as a broadly humanist and civilizing force, standing back from war, judging it as just or unjust, while offering itself as a code of conduct to limit violence on the battlefield. (p. 167) The author notes how this virginal confidence in the pacifying efficiency of international law – its presumed ability to forbid, limit, humanize war ‘from outside’ – becomes progressively nuanced, eroded, almost discredited by a series of considerations. The disquieting image of the ‘delicate partnership of war and law’ becomes more and more evidenced; the lawyer who attempts to regulate warfare inevitably also **becomes its accomplice**. As Kennedy puts it, The laws of force provide the vocabulary not only for restraining the violence and incidence of war – but also for wagingwar and deciding to go to war. . . . [L]aw no longer stands outside violence, silent or prohibitive. Law also permits injury, as it privileges, channels, structures, legitimates, and facilitates acts of war. (p. 167) Unable to suppress all violence, law typifies certain forms of violence as legally admissible, thus ‘privileging’ them with regard to others and investing some agents with a ‘privilege to kill’ (p. 115). Law thereby becomes, in Kennedy’s view, a tool not so much for the **restriction** of war as for the **legal construction of war**.53 Elsewhere we have labeled Kennedy ‘a relative outsider’54 who, peering from the edge of the vocabulary of international law, tries to ‘highlight its inherent structural limits, gaps, dogmas, blind spots and biases’, as someone ‘specialised in speaking the unspeakable, disclosing ambivalences and asking awkward questions’.55 The ‘unspeakable’, in the case of the ‘law of force’, is precisely, in Kennedy’s view, this process of involuntary complicity with the very phenomenon one supposedly wants to prohibit. Prepared to ‘stain his hands’ a` la Sartre, in his attempt to humanize the military machine from within, to walk one step behind the soldier reminding him constantly, as an imaginary CNN camera, of the legal limits of the legitimate use of force, the lawyer starts to realize, in the author’s view, that he is becoming but an accessory to the war machine. Kennedy maintains that law, in its attempt to subject war to its rule, has been absorbed by it and has now become but another war instrument (p. 32);56 **law has been weaponized** (p. 37).57 Contemporary war is by definition a legally organized war: ‘no ship moves, no weapon is fired, no target selected without some review for compliance with regulation – not because the military has gone soft, but because there is simply no other way to make modern warfare work. Warfare has become rule and regulation’ (p. 33).War ‘has become a modern legal institution’ (p. 5), with the result that the international lawyer finds himself before an evident instance of Marxian reification, in other words ‘the consolidation of our own products as a material power erected above us beyond our control that raises a wall in front of our expectations and destroys our calculations’.58 Ideas and institutions develop ‘a life of their own’, an autonomous, **perverted dynamism.**

**The multilateral vision of American leadership divides the world between liberal democracies and illiberal peoples – ensures Orientalist violence**

**Falk 09** Richard FALK Emeritus Int’l Law @ Princeton ‘9 Achieving Human Rights p. 52-53

The transition to a regulated structure of world order is underway and is assured unless a catastrophic breakdown occurs, due to ecological, economic, or political collapse. That is, the Westphalian form of world order, based on the state system, while resilient, is essentially being displaced from above and below. It is not only the case that the main struggle since 9/11 is being waged by a global state on the one side and a loosely linked headless network on the other side; the impact of multi-dimensional globalization is also making borders less important in most respects (although more important in some-for instance, restricting transnational migrants). And normative developments are now associated with international accountability for gross violations of human rights and for the commission of such crimes as genocide, torture, and ethnic cleansing. Much of the literature that recognizes this emergent global governance stresses the **inevitability** of **American leadership**. The **mainstream** debate is whether this leadership will take a **cooperative**, economic form as it did in the 1990s or move in direction of the unilateralist, coercive form of the early years of the twenty-first century.36 The outcome of the November 2004 American presidential elections, together with the impact of the purported transfer of sovereignty to Iraq on June 30, 2004, as well as the anti-war outcome of the 2006 congressional elections seemed to supply a short-term answer. The main argument being made seems likely to be unaffected by a change in the elected leadership of the United States, although the 2008 presidential elections might produce some **tactical adjustments** associated with the high costs of continuing the Iraq War. **Either** foreign policy **path** is **essentially Orientalist** in the sense of building a future world order on the basis of **American interests**, **an American worldview**, and an **American model** of constitutional democracy. Neither is sensitive, in the slightest, to the ordeal of the Palestinian people, and thus bitter resentments directed at the United States will be kept alive, especially in the Arab world. International law will continue to play a double role, facilitating the pretensions of the American model of "democracy" as an expression of a commitment to the realization of international human rights and offering opponents of this model legal standards and principles by which to validate their anti-imperial, antiAmerican resistance. In my view, only a **non-Orientalist reshaping** of global governance can be beneficial for the peoples of the world and **sustainable** over time. In that process, the **de-Orientalizing** of the **normative order** is of **paramount importance**, providing positive images of accountability, participation, and justice that do not universalize the mythic or existential realities of the American experience and that draw fully upon the creative energies and cultural worldviews of the diverse civilizations that together constitute the world. Such expectations may presently seem utopian , but that is only because our horizons are now clouded by **warmongering "realists"** and **global imperialists**. To **dream freely** of a benevolent future is the only way to encourage the **moral and political imagination** of people throughout the world to take responsibility for their own future, thereby repudiating in the most decisive way the deforming impacts of Orientalism in all of its sinister forms.

**Judicial independence models are liberal imperialism. They are top-down, easily captured by elites, and fail to account for local context.**

**TRUBEK 06** David Law @ Wisconsin [*The New Law and Economic Development: A Critical Appraisal* eds. Trubek and Santos p. 85-86]

The rule of law as a common goal. Once the economic development agencies realized that the neoliberal turn involved positive intervention to create the institutional conditions for markets, development agencies were committed to investing in legal reform. They found their concerns overlapped with those of the proponents of human rights and democracy. For both, the rule of law was a common goal. While the project of democracy and the project of markets seem very different, they both identified “the rule of law” as an **essential step** toward their objectives. Both thought it important to have constitutional guarantees for certain rights, even if they differed on the rights to be given primacy. Both thought that an **independent judiciary**, preferably armed with powers of judicial review, was desirable, even though they had different ideas about what the judges were to be independent of and what was the purpose of such independence. And they agreed that efficiently functioning courts providing cost effective access to justice were needed, although they probably had different ideas about who should get such access and for what ends they would use it. Ironically, both the market builders and the democracy promoters showed a faith in formalism, albeit a modernized neoformalism, which was seen as an inherent part of a “rule of law.” For some of the promoters of democracy and freedom, it seemed **self-evident** that **independent judges** would possess a method of adjudication that would **resolve all questions** without resort to **ideology**, politics, or even policy-oriented balancing. However, at the same time that ROL proponents were championing formalism, they also were arguing that it was necessary to make legal systems more effective and efficient, and promoting instrumental thought and greater sensitivity to policy concerns. The reform agenda that came from this curious amalgam of markets and democracy was wide-ranging, covering all aspects of the legal system from education and drafting of new rules to organization of the bar. This was especially true for programs in former command economies where, it was thought, the whole institutional structure of market society had to be built from scratch. Thus, unlike the L&D movement, which focused on education, ROL projects sought to bring about change in all aspects of the legal system. This meant that there were projects to strengthen the bar and bench as well as the academy, and to reform legal rules in almost all areas. Practicing lawyers, prosecutors, judges, and court administrators from Western countries joined legal academics in this new phase of law reform and transplantation. However, special emphasis was placed on the administration of justice. This includes the efficient management of cases, increased access to justice through the construction of alternative dispute resolution mechanisms, enhanced means of enforcing judicial decisions, and the promotion of judicial independence. While there are many reasons why the administration of justice loomed so large in the ROL programs, it is worth noting that because of their shared faith in the role of judges, this is an area in which the project of markets and the project of democracy overlap. Several distinctive features marked the first phase of the ROL era. In addition to neoformalism and a focus on the administration of justice, there was great emphasis on contract and property, seen as core ingredients of a market economy, a strong belief in the possibility of legal transplantation, a willingness to conduct reforms at once in all parts and levels of the legal order, and a view that there was **one model of “the rule of law”** that made sense for all countries. Further, there was a faith that the needed reforms could be imposed from the top, and would be quickly and easily accepted. Looking at some of the ideas and projects of this period, L&D veterans could only sigh as they saw many of the errors of the past being repeated. For them, the emphasis on top-down, one size fits all reform, suggested that little had been learned from prior experiences. What about all the experience with the limits of transplants, the need for adaptation to local contexts, the possibility of multiple paths to growth,the risk that reforms would be captured by elites for their own ends, and the gap between law on the books and law in action? And what could they make of the apparent return to formalism? After a personal encounter with the managers of the new ROL program in USAID in the early 1990s, I felt about that agency as Tallyrand felt about the Bourbons after the Restoration: they had forgotten nothing and learned nothing!

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#### Extra Topicality – they can talk about any authority un-related to war powers authority –that multiplies the case list by infinity

Huldah 11 (Pubulis, Publius Huldah is a retired litigation attorney who now lives in Tennessee. Before getting a law degree, she got a degree in philosophy where she specialized in political philosophy and epistemology, “The President’s Enumerated Powers, Rulemaking by Executive Agencies, & Executive Orders.”, <http://publiushuldah.wordpress.com/2011/08/30/the-presidents-enumerated-powers-rulemaking-by-executive-agencies-executive-orders/>)

What are the Enumerated Powers of the President?

The powers of the President are “carefully limited” and precisely defined by our Constitution. In Federalist Paper No. 71 (last para), Alexander Hamilton asks,

…what would be … feared from an elective magistrate of four years’ duration, with the confined authorities of a President of the United States?…[emphasis added] 2

The answer to Hamilton’s question is this: There would be nothing to fear if Presidents obeyed the Constitution. But they don’t obey it because the dolts in Congress don’t make them obey it!

Well, then! Here is the complete list of the President’s enumerated powers:

Art. I, Sec. 7, cls. 2 & 3, grants to the President the power to approve or veto Bills and Resolutions passed by Congress.

Art. I, Sec. 9, next to last clause, grants to the executive Branch – the Treasury Department – the power to write checks pursuant to Appropriations made by law – i.e., by Congress.

Art. II, Sec. 1, cl.1, vests “executive Power” [see below] in the President.

Art. II, Sec. 1, last clause, sets forth the President’s Oath of Office – to “preserve, protect and defend the Constitution of the United States”.

Art. II, Sec. 2, cl.1: makes the President Commander in Chief of the armed forces when they have been called by Congress into the actual service of the United States. 3authorizes the President to require the principal Officers in the executive Departments to provide written Opinions upon the Duties of their Offices.grants the President power to grant Reprieves and Pardons for offenses against the United States, 4 but he can not stop impeachments of any federal judge or federal officer.

Article II, Sec. 2, cl. 2 grants to the President the power: to make Treaties – with the advice and consent of the Senate. 5 to nominate Ambassadors, other public ministers and Consuls, federal judges, and various other officers – with the advice and consent of the Senate.

Article II, Sec. 2, cl. 3 grants to the President the power to make recess appointments, which expire at the end of Congress’ next session.

Art. II, Sec. 3: Imposes the duty on the President to periodically advise Congress on the State of the Union, and authorizes the President to recommend to Congress such measures as he deems wise.

Authorizes the President, on extraordinary Occasions, to convene one or both houses of Congress [e.g., when he asks Congress to declare War]; and if both houses can not agree on when to adjourn, he is authorized to adjourn them to such time as he deems proper.

Imposes the duty upon the President to receive Ambassadors and other public Ministers.

Imposes the duty upon the President to take care that the Laws be faithfully executed, and

Imposes the duty upon the President to Commission all the Officers of the United States.

That’s it! Anything else the President does is unlawful and a usurpation of powers not granted.

What is the “executive Power”?

So! The granting of the “executive Power” to the President is not a blank check giving him power to do whatever he wants. The “executive Power” is merely the power to put into effect – to implement – those Acts of Congress which are within Congress’ enumerated powers.

Thus, if Congress establishes “an uniform Rule of Naturalization” (as authorized by Art. I, Sec. 8, cl. 4), it is the President’s duty to implement and enforce the law Congress makes. The President is to carry out – to execute – Acts of Congress.

But note well: His Oath of Office – to “preserve, protect and defend the Constitution”, shows that the President must use his independent judgment 6 as to which acts of Congress are and are not constitutional. Thus, as shown in this paper, “The Oath Of Office: The Check On Usurpations By Congress, The Executive Branch, & Federal Judges“, the President has the duty, imposed by his Oath, to act as a “check” on Congress (and on federal courts, as well).

Accordingly, when Congress makes a “law” which is not authorized by the Constitution, it

…would not be the supreme law of the land, but a usurpation of power not granted by the Constitution”… Federalist No. 33 (last two paras); 7

and since the President’s Oath requires him to “preserve, protect and defend the Constitution“, the President must refuse to enforce an unconstitutional “law” made by Congress. Otherwise, he’d be in collusion with the legislative branch to usurp power over The People. 8

So, then! Acting as a check on Congress (and federal courts) by refusing to enforce unconstitutional “laws” (and opinions), as well as the duty of entertaining foreign dignitaries, are the only occasions where the President may act alone. His prime responsibility is to do what Congress tells him.

Article I, Sec. 1 & The Unconstitutional Administrative Law State

Now, you must learn of “administrative law” – i.e., rulemaking by Executive Agencies. 9

Article I, Sec.1, U.S. Constitution, says:

All legislative Powers herein granted shall be vested in a Congress of the United States.

That little phrase is of immense importance. It means what it says, that only Congress may make laws: laws are to be made only by Representatives whom we can fire every two years, and by Senators whom we can fire every six years.

But in Joseph Postell’s “must read” paper, “Constitution in Decline“, he shows that during the administration of the nefarious Woodrow Wilson, Congress began delegating its lawmaking powers to agencies within the Executive Branch. Since then, Congress passes an overall legislative scheme, and delegates the details to be written by un-elected, un-accountable bureaucrats in the various Executive Agencies. They write the “administrative rules” which implement the Legislation. The result is the execrable Code of Federal Regulations (CFR), which is accepted, by the indoctrinated members of my profession, as “law”. Go here to see the abominable CFR.

May the President Lawfully Make “Executive Orders”?

The Guiding Principle is this: The President has no authority to do ANYTHING apart from constitutional authority or statutory authority (assuming the statute itself is constitutional).

1. So! Respecting those matters within his constitutional authority & duties, and authority & duties imposed by constitutional statutes, the President may make “orders” – call them “executive orders” if you like.

For example: It is the President’s constitutional duty “to take care that the Laws be faithfully executed”. Thus, he has the duty to enforce [constitutional] laws made by Congress. How does he enforce the laws? Sometimes, by means of “orders”.

To illustrate: Say Congress makes a law, as authorized by Art. I, Sec. 8, clause 6, making it a felony to counterfeit the Securities and current Coin of the United States. If U.S. Attorneys are not prosecuting counterfeiters, the President should “order” them to do it. Or fire them.

But say Congress makes a law which purports to make possession of shotguns shorter than 18 inches a crime. Since the President’s Oath requires him to “preserve, protect and defend the Constitution”, he is obligated to “order” the U.S. Attorney General and the U.S. Attorneys to refuse to prosecute anyone for possession of sawed-off shotguns. Why? Because such a “law” is unconstitutional as outside the scope of the legislative powers granted to Congress in Our Constitution. It also violates the Second Amendment.

Clearly, such an order to refuse prosecution falls within the President’s constitutional duties (enforce the Constitution), and he is giving an order to people within the Executive Branch. The President is the one who is charged with carrying out the Acts of Congress – he has the “executive Power”. But because of his Oath, he may not carry out unconstitutional “laws”. That is one of the checks on Congress.

The President may also properly make orders addressing housekeeping issues within the Executive Branch: Dress codes, no smoking or drinking on the job, he may encourage executive agencies to hire qualified handicapped people, and the like. Just as if you have a business, you may make orders addressing such matters.

So! Do you see? The President may lawfully make orders to carry out his constitutionally imposed powers and duties, and powers bestowed by statutes which are constitutional; and he may address “housekeeping” issues within the Executive Branch.

2. But a President may not lawfully, by means of “orders”, exercise powers not delegated to him by the Constitution or by (constitutional) Acts of Congress.

Yet Obama has issued various executive orders which are unlawful because they are not authorized by the Constitution or by (constitutional) Acts of Congress. Here are two executive orders which are particularly pernicious because they undermine our foundational Principle of “Federalism”, and have as their object the “improper consolidation of the States into one … republic.”: 10

E.O.13575 – Establishment of the White House Rural Council: This E.O. provides for over 25 federal departments & agencies to run every aspect of rural life!

E.O. Establishing Council of Governors: The effect of this E.O. is to erase the Independence and Sovereignty of the States and consolidate us into a national system under the boot of the Executive Branch.

**There is a precise difference between immigration authority and war powers authoirty**

**Klein and Wittes 11** (Adam Klein, third year J.D. candidate at Columbia Law School and Articles Editor of the Columbia Law Review, Benjamin Wittes, senior fellow in Governance Studies at The Brookings Institution, “Preventive Detention in American Theory and Practice,” http://harvardnsj.org/wp-content/uploads/2011/01/Vol.-2\_Klein-Wittes\_Final-Published-Version.pdf)

As noted above, the President’s power to detain alien enemies during wartime rests on explicit statutory authority — **not, in contrast to combatant detention,** as an incident to the political branches’ **constitutional war powers.** 70 This section first describes the history of that statute, the Alien Enemies Act of 1798. It then considers the historical roots of the power to detain enemy aliens during wartime and the permissibility of this practice under modern international law.

#### War powers authority has been removed – immigration is the fallback – if the aff is topical they can’t solve

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

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

#### Admission and release are immigration issues

Gartenstein-Ross, ’10 [Daveed Gartenstein-Ross is an American counter-terrorism scholar and analyst. He is the Director of the Center for the Study of Terrorist Radicalization at the Foundation for Defense of Democracies, a Washington-based think tank. “Government Files Responsive Motion in Kiyemba Uighur Litigation”, The Weekly Standard. http://m.weeklystandard.com/blogs/government-files-responsive-motion-kiyemba-uighur-litigation]

The United States Court of Appeals for the D.C. Circuit is now considering the case of several Uighurs, currently detained at Gitmo, who are asking to be released into the Washington metropolitan area. The D.C. Circuit has already ruled against the Uighurs once, affirming the government’s power to exclude them from the country because immigration law bars the admission of aliens that the government reasonably suspects of engaging in certain terrorism-related activities. (In this case, the Uighurs received military training at a camp in Tora Bora, or supported the camp). When I wrote about this case two weeks ago, the Uighurs had submitted a brief urging the litigation to be sent to the district court for further factual development, and the government had not yet filed a responsive brief. The government’s brief was filed last week.

The Uighurs, it is worth recalling, initially were held in military detention in Gitmo as enemy combatants, but in 2008 the U.S. agreed that they should no longer be designated as such. Pursuant to established policy, the Uighurs will not be returned to China due to concerns that they would face torture. Thus, the issue in the Kiyemba litigation has been whether the detainees should be released into the United States. After the D.C. Circuit’s first ruling against the Uighurs, the U.S. Supreme Court granted certiorari. However, the Obama administration was subsequently able to ensure that all the detainees originally part of the litigation were either resettled in third countries, had accepted offers of resettlement, or received but declined such offers. This caused the Supreme Court to vacate the D.C. Circuit’s judgment and remand the case for determination of “what further proceedings … are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.”

The fact that the Uighurs would like the case before the district court makes sense; after all, the district court found that they were entitled to release in the U.S. before its decision was overruled by the D.C. Circuit. When I last wrote about this case, I predicted that the government’s brief would “argue that factual developments in the case are immaterial to what the D.C. Circuit said in its previous decision, and to urge the circuit court to reaffirm that opinion.”

The Government did indeed make this argument, urging the D.C. Circuit to reinstate its own prior decision. The reasoning is simple, since the detainees’ refusal of offers of resettlement overseas does nothing but make their case less compelling than before, when the D.C. Circuit rejected it the first time. As the Government’s brief states:

If an alien who has not been offered resettlement elsewhere has no right to be brought into the United States for release outside the framework of immigration laws, as this Court held, then a fortiori an alien who has been offered resettlement opportunities but turned them down has no such right.

#### Release means immigration

Vaughns, ’13 [Katherine L., Professor of Law, University of Maryland Francis King Carey School of Law. “Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11”. Asian American Law Journal 20:7]

This Article considers the ramifications of the Kiyemba litigation, focusing particularly on what the case means to our understanding of the rule of law more than ten years after September 11. This Article makes three primary arguments: First, although the Supreme Court provided Guantanamo Bay detainees access to U.S. courts through the writ of habeas corpus, it has failed to provide a meaningful remedy for habeas petitioners, despite ample constitutional and doctrinal authority for doing so. This rights-remedy gap is problematic from a rule of law standpoint, and the gap is well illustrated by the Kiyemba litigation.8 Second, the Court’s failure to consider the merits of the case, thus allowing a problematic lower court opinion to stand, has perpetuated confusion in a doctrinal area of constitutional, political, and rhetorical significance. A dissent to the per curiam dismissal would, at the very least, have served the significant purpose of articulating core constitutional values. Finally, the D.C. Circuit’s application of immigration law to the habeas remedy question in its reinstated opinion in Kiyemba v. Obama9 effectively trumps the detainees’ constitutional right to obtain release by substituting immigration law’s doctrinally exceptional deference to the Executive for what long has been understood as the core function of habeas corpus: undoing illegal detention by the Executive.

#### **Immigration law is central – restricting it dodges core negative ground about detention and separation of powers – and if they’re topical Obama can use immigration law to circumvent the plan.**

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

Immigration law is a central justification for why five men remain detained indefinitely at Guantánamo despite having writs of habeas approved in 2008. Since then, the Court of Appeals in Kiyemba v. Obama I, II, and III has used plenary powers reasoning to justify detentions. This reasoning defers immigration issues to the political branches and denies rights protections because of alien status or presence overseas. These five detainees are Uighurs, Turkic Muslims from China, and are noncombatants. Their cases have raised significant constitutional habeas issues, but use immigration law to justify detention.

This Article makes two arguments. First, immigration law—that is, plenary powers and statutory law—provides a fallback justification for Guantánamo detentions. Even though the Kiyemba decisions are viewed as habeas cases, immigration law plays a central role in making detention legal. Second, a complex political quagmire in the United States and in foreign affairs explains why political, as opposed to judicial, solutions cannot free these men. The executive branch has not used its parole power to release these men into the United States, thus avoiding indefinite detention and separation of powers concerns. A transnational analysis of the relevant political considerations highlights the influence of law’s assumptions regarding alienage, culture, geopolitics, and the War on Terror.

Immigration law is playing a central role in justifying detentions on Guantánamo, nine years after detentions began and after detainees have secured three victories in the Supreme Court.1 In the Kiyemba v. Obama cases, immigration law doctrine provided the legal basis for keeping five noncombatant men in indefinite detention, even after a district court approved their writ of habeas in 2008. In these cases, immigration law appeared as a norm barring judicial review for political questions and a rights limitation based on alien status or their location outside domestic borders. These are hallmark norms of immigration law’s plenary power doctrine. Court opinions refer to immigration law in the form of the plenary power doctrine and statutory law. The Kiyemba cases concerned Uighurs who are still unable to secure release from Guantánamo after nine years of detention, though they have writs of habeas corpus and the executive has not classified them as unlawful enemy combatants since 2008.2 Consequently, in all three Kiyemba v. Obama cases, the Court of Appeals for the District of Columbia Circuit has rejected judicial remedies for these detainees. These remedies could secure their release or enjoin their resettlement in China. The Supreme Court has repeatedly denied certiorari review of Kiyemba appellate decisions, most recently in April of 2011. The five Uighur detainees remain unable to secure their release from Guantánamo—the appellate decisions bar their habeas release and use immigration law to justify detention. These detentions are particularly significant given Boumediene v. Bush, in which the Supreme Court found that detainees have the right of constitutional habeas corpus, even as aliens held in an extraterritorial location.

#### Winning that the aff has to do with WPA isn’t enough – it’s a legal concept

LEWITTES 92 Associate, Rogers & Wells, New York City; J.D., New York University School of Law [David I. Lewittes, CONSTITUTIONAL SEPARATION OF WAR POWERS: PROTECTING PUBLIC AND PRIVATE LIBERTY, Brooklyn Law Review, WINTER, 1992, 57 Brooklyn L. Rev. 1083]

The President's public war power includes the authority to defend the nation and permits punishment of aggression and the prevention of future conflict. n164 This authority also comprehends collective self-defense. n165 The power to declare war clearly is not a defense power. n166 The legislative authorities essential to the common defense are the powers to raise and support armies, to provide and maintain a navy, and to prescribe rules for their government and regulation. n167 The defense power, once armed forces are provided, resides with the President (except with respect to prescribing rules for the government and regulation of the forces). Congress may not intrude upon the President's power to "protect and defend" the nation, which includes the power to punish aggression.

There is no constitutional limitation or check on the commander-in-chief power, once Congress provides manpower and money, other than that it extends only so far as its object: The power must be exercised to "preserve, protect and defend" the nation. n168 Nonetheless, the people (as the electorate) and Congress [\*1124] (possessing the impeachment power) have some authority to ensure that the President stays within these bounds, as well as within the bounds of his foreign affairs power.

The commander-in-chief power, indeed, necessarily, is very broad. Its purpose is to protect public liberty. The contours of this authority may be defined only by an understanding of the powers vested in the legislature to guard against oppression by the executive of the people and of the states. n169 Together, the President's war and foreign affairs powers equip him with the necessary authority to make peace and to keep the peace. One method of accomplishing this is diplomacy -- another is war.