## 1NC

### 2

A. Interpretation – courts affs must specify grounds for ruling in their plantext

DoJ 5. Department of Justice 2005 (“Rules of the Supreme Court of the United States,” March 14,<http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf>)

(e) A concise statement of the basis for jurisdiction in this Court, showing: (i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petiti on is ﬁled under this Court’s Rule 11); (i i) the date of any order respecting rehearing, and the date and terms of any order granting an extensi on of time to ﬁle the petiti on for a writ of certi orari; (i i i) express reliance on Rule 12.5, when a crosspetiti on for a writ of certi orari is ﬁled under that Rule, and the date of docketing of the petiti on for a writ of certi orari in connecti on with which the cross-petiti on is ﬁled; (iv) the statutory provision believed to confer on this Court jurisdicti on to review on a writ of certi orari the judgment or order in questi on; and (v) if applicable, a statement that the notiﬁcati ons required by Rule 29.4( b) or (c) have been made. (f ) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisi ons involved are lengthy, their citati on alone sufﬁces at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i). (g) A concise statement of the case setting out the facts material to considerati on of the questi ons presented, and also containing the following: (i) If review of a state-court judgment is sought, speciﬁcati on of the stage in the proceedings, both in the court of ﬁrst instance and in the appellate courts, when the federal questi ons sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of speciﬁc porti ons of the record or summary thereof, with speciﬁc reference to the places in the record where the matter appears (e. g., court opini on, ruling on excepti on, porti on of court’s charge and excepti on thereto, assignment of error), so as to show that the federal questi on was timely and properly raised and that this Court has jurisdicti on to review the judgment on a writ of certiorari. When the porti ons of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i). (i i) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdicti on in the court of ﬁrst instance. (h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10. (i) An appendix containing, in the order indicated: (i) the opinions, orders, ﬁndings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed; (i i) any other relevant opinions, orders, ﬁndings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the capti on showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

A. Ground – competition and links best generated off of the reason for the court’s decision

B. Education – learning about specific mechanisms for court action creates an understanding of how we should approach national security law

C. Limits - overruling a case creates new law, which is impossible to predict

Dunn 3 (Pintip Hompluem, JD @ Yale Law School, former editor for the Yale Law Journal, Barry S. Cohen prize winner for best paper in law and literature, “How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis,” November, 113 Yale L. J. 493)

After all, Justices create new law when they overrule a case. Although the common law may be analogous to the written law by providing judges with an external source on which to rely, the common and written law are far from the same. The common law is composed entirely of itself; every decision joins the body of judicial decisions of the common law and must itself be followed. (64) In this way, stare decisis is a doctrine that is not only backward-looking, but also forward-looking; it dictates that a decision must be made in conformity with the decisions that came before it, but it also commands that all future decisions be made in conformity with the present one. (65) Thus, when judges overrule a previous decision, they do more than disagree with that decision--they substitute the old law for the new one that has just been created. (66)

D. Voting issue – the framework for procedural debates is how to create the most socially and politically productive version of the game of debate – this requires an incentivization of good future practices and deterrence of bad ones

### 3

Ontology precedes legal reform—the physical act of release is meaningless without addressing the structural failure of securitized detention law

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(Saby, 57 Wayne L. Rev. 163)

On the surface it seems the U.S. detention framework applied to detainees captured in war zones fighting U.S. forces has no ontological relationship with the detention framework applied to individual instances of terrorist detention. However, as long as the concept of Guantanamo is alive in the minds of the law enforcement community, no processing of a detainee can be decoupled, and thus, analyzed independent of Guantanamo. Because Guantanamo is an ontological space in itself, it pervades beyond individual events and engulfs anything and everything that falls within its ontological sphere of influence. This becomes apparent as we trace the genesis of Guantanamo further.

Guantanamo was created as a response to an unprecedented event. The response alternatives did not have a pre-codified legal framework. Rather, sets of alternative means of legal response have been abstracted [\*186] from the codified norms of international law and made to fit the desired goal. Unfortunately, a logical abstraction of the norms of international law would be contradictory to domestic aspirations n106 and thus would not be palatable for domestic consumption. n107 In addition, the U.S. Administration did not have the answers to all the possible legal outcomes that might emerge should a deterministic legal framework be applied vis-a-vis the terrorist detainees. n108 Thus, absent absolute clarity with respect to procedural steps, the Administration resorted to a nebulous framework, designed to be an **all-encompassing legal vacuum** adept at suspending procedural due process rights for the unforeseeable future, and yet, achieve the desired means to lock away the "evil." n109

It became clear as time passed that some detainees have no relationship to the crime they have been charged with, n110 yet allowing the justice mechanism to follow its logical contour was not an option for the Administration on two grounds. n111 First, the domestic political agenda was not conducive to the possibility of "release" of manifest "evil." n112 Second, the public has been sold the story of an existential threat and the valor of protection against such evil. n113 Releasing detainees held at Guantanamo will not only be monumentally embarrassing for the Administration, but also spear the bubble of the convenient narrative of good vs. evil.

 [\*187] As a result, the government created more layers, as revealed through the litany of procedural framework including the Combatant Status Review Tribunal. n114 Despite their appearance of legal maturity, these procedures provided no deterministic outcome related to detention relief. In time both the Guantanamo detainees and domestic terror suspects became embroiled in prolonged detention--which matured into a systemic phenomenon. n115 In this way, the engulfing influence of Guantanamo grew out of its legal representation as a physical facility and evolved into the phenomenological space. In this newly minted space, Guantanamo began exerting its influence across the wide spectrum of the law enforcement community, which became subconsciously aware of its ontological existence. Whenever there is a perception of a threat, actual or manufactured, construction of evil becomes easier. This enables a construction of sending the terrorist to Guantanamo. n116 Guantanamo also provides law enforcement with the much needed flexibility to determine what means must be resorted to in order to guarantee a desired outcome. n117

Indeed, Guantanamo or a Guantanamo-like detention facility allows for the detainee to be thrown into a framework where his procedural due process rights can be temporarily or permanently suspended, depending on the desired outcome. n118 Time and repetition not only enabled the security apparatus of the state to develop the systematic methodology, but allowed the general construct to **morph** **into a way of life**, far removed from exception and initial quandary. Thus, Guantanamo started acting like a vacuum that would attract anything procedurally undefined, legally indefensible, theoretically nebulous, or deterministically uncertain. n119

Does that mean Guantanamo is a black hole, as the prevailing legal literature seems to suggest and the above characteristics support to some [\*188] extent? n120 Let me provide some interpretive gloss to an existing construct. From the broader characterization that law is opaque in a region due to its inability to penetrate the region to either bring the events under the law's ambit or develop adequate legal representation of entities within the region, it may justifiably be called a legal black hole. Normal practice of civilized society exists under guidance of law, by imparting a legal construct on any living or physical entity. Therefore, the legal commentators understood a suspension of law or its absence as a manifestation of a legal black hole within Guantanamo. n121 As the astronomical black hole is opaque to light, similarly, Guantanamo is revealed as somewhat opaque to legal illumination; hence, the characterization of a legal black hole. I see this characterization as only partially correct. The related conversation is surprisingly silent on the rest of the story--a story which makes Guantanamo more of a black hole. Let us borrow from physics to further illustrate.

Classical physics defines a black hole as the entity that has an enormous gravitational pull by means of which it attracts anything and everything that comes within its territory. n122 Thus, a black hole can be seen as a giant vacuum which will attract and inhale everything without ever disclosing the identity of the material it has devoured. I want to bring this physical manifestation of Guantanamo and place it within a legal context. Like an astronomical black hole devours all other celestial bodies surrounding it, n123 I see the phenomenological construct of Guantanamo attempting to devour any and all other legal events that share the same ontological space with it--that is, any alleged instances of terrorism involving American interests. This is where the correct representation of Guantanamo as a narrative of legal black hole must be understood. Attention must be given to the sweepingly overpowering phenomenon that has existed for more than a decade now, and with no end of attenuation in sight. Unless this specter of sending an individual [\*189] into Guantanamo goes away, it is very difficult to take the next step in America's detainee jurisprudence. Therefore, it is of utmost importance that Guantanamo be decoupled from the legal discourse within American jurisprudence.

This decoupling, however, is not possible without the proper closure of Guantanamo--not only a legally difficult proposition n124 but an event that has existential ramifications for the American domestic political agenda. n125 Like the way a black hole distorts the traversal path of celestial objects near its sphere of influence, I see Guantanamo distorting not only the constitutional curvature, n126 but also the possible trajectory of [\*191] any legal event. In order for a legal event to proceed to its logical conclusion, it must traverse forward, sometimes in a linear fashion, often times, however, embracing non-linearity. n127 But, if the trajectory can never decouple itself from a larger gravitational pull, it will never reach its logical legal conclusion. This is where the closure of Guantanamo has the most significant socio-legal phenomena, n128 the immediacy of which must be both internalized and achieved. I would submit that consistent detainee jurisprudence is not possible without adequate closure of Guantanamo--the anatomy of which I dissect below.

C. Dissecting the Question of Adequate Closure of Guantanamo

Since announcing his candidacy, President Barack Obama emphasized his intention to close Guantanamo, n129 a sentiment echoed in a subsequent announcement by Attorney General Eric Holder. n130 Like the legal maneuverings surrounding the attempt to sanctify administrative actions at Guantanamo that, at times, revolved around legal fiction, n131 the [\*192] reality of physical closure has also remained more of a fiction. n132 The executive unilateralism that shaped the genesis and evolution of Guantanamo during the Bush Administration n133 was conspicuous by its absence during the formative years of the Obama Administration. Unfortunately, however, the early promise of the current Administration has not resulted in finding even a modicum of hope for the closure of Guantanamo. To be fair to the Obama Administration, although they have yet to achieve closure, it has not been because of lack of intention, but more so due to their inability to comprehend the nature of Guantanamo. n134 Much like everyone else, even this apparently well-intentioned Administration failed to internalize the phenomenological expanse of Guantanamo.

What do I mean by closure of Guantanamo? On the surface, it might seem that I am referring to the closure of Guantanamo as a physical facility, an eventuality which will mean bringing the existing detainees under a deterministic and predictable legal framework. In reality, however, this closure must be seen as the closure of a phenomenon, one which extends beyond the physical limit of a detention facility and exists in the metaphysical construct of people. Although the closure of the actual detention facility is a necessary event, it is not necessarily a sufficient one to achieve the closure of Guantanamo in the truest sense. n135 Therefore, when referring to the closure of Guantanamo, we must separate the physical detention unit from its phenomenological whole, as the closure of the smaller physical subset does not automatically guarantee the closure of the greater phenomenon. In my view, the broader phenomenon of Guantanamo arrived at our ontological [\*193] experience when the detention facility began its new manifestation post-9/11. n136

While a **victory on paper** for the human rights lawyers and progressive legal activists might center on the physical closure of the detention facility, there might never be an end to the complex phenomenon called Guantanamo. The closure of the phenomenon requires a complete understanding of the non-physical aspect centering on acknowledging the existence of a much deeper ontological representational space. This representational space straddles both the physical and philosophical dimensions as it exists in the juncture between socio-legal and domestic political spheres. In this shared space, manifestation of the two entities, Guantanamo and 9/11, become synonymous as they travel through a continuum to create a unique duality. It seems in our minds that we cannot think of 9/11 without Guantanamo, and alternatively, we cannot think of Guantanamo without 9/11. Given the depth and the indelible mark 9/11 has imprinted both in American history and in the American psyche, it is vitally important to decouple the ontological existence of Guantanamo from its metaphysical duality of 9/11. This is because, in a unique way, the deep wound of 9/11 and the existential threat it carries with it provides the American psyche with the relief that comes from this unique phenomenological evolution of Guantanamo--through its interplay between evil and its conquest. n137 The pursuit of this conquest, unbeknownst to its ardent consumers, forgets the meaning of dehumanization n138 as it is carefully cloaked under the interplay. Therefore it is vitally important to understand Guantanamo both through its more expansive manifestation and its consequences, intended or unintended.

D. Why It is Difficult to Frame a Closure of Guantanamo

Contemporary legal discourse vis-?vis Guantanamo closure is premised on identifying the appropriate legal framework for categorizing and processing the remaining detainees in the physical facility. n139 At the surface level, the discussion revolves around topics ranging from congruency of U.S. detention policy with the applicable international [\*194] norms, n140 to something along the lines of comparative advantages between criminal law and military law in framing appropriate legal process. n141 This is where the complexity of understanding Guantanamo begins. The distinction between criminal law and military law is premised on resolving straightforward questions surrounding the nature of alleged acts of terror, the characteristics of the actors, and the geopolitical attributes of the theater in which the act is to have been committed. n142 The closure of Guantanamo at the phenomenological level must be understood at a deeper fundamental level by recognizing the tension between neutral transparencies n143 versus inertia of symmetry n144--an area I shall now shed some revelatory gloss over.

To adjudicate a legitimate legal event within the context of customary international law, n145 the narrative process must breed neutral transparencies in the system. Without neutral transparency between the events and underlying supervisory mechanism, it is not possible to construct a legitimate legal framework. Even if we consider Guantanamo as a straightforward legal representation of the physical space and living entities within the space, there is neither neutrality nor normalcy in this space. At the very least, a modicum of neutral transparency is required to begin the necessary dialogue for the closure of Guantanamo. As revealed through discussion thus far, and as explained later in this article, the path to achieving neutral transparency is severely impeded by the problem of inertia of symmetry at an ontological level. In an earlier passage, I [\*195] discussed how practices bordering on legal illogicality n146 and their repetitions over the years have created a systemic adherence to illegal means, which in turn has evolved into a highly symmetric system of compliance among the enforcement and security agencies. n147 When it comes to Guantanamo, this symmetry-bred inertia prevented a constructive framework for closure to gain momentum within administrative discourse.

To understand this adherence to symmetry, n148 let us retrace the very genesis of Guantanamo. Not its original manifestation as the conduit to process Haitian refugees, but its new manifestation since 2002. In this reincarnation, Guantanamo exists in an ontological space where 9/11 and Guantanamo come in and out of duality along a multi-dimensional continuum. Here **we cannot separate Guantanamo from 9/11**, nor can we understand Guantanamo in the splendid isolation of its uniqueness. The events of September 11 posed such an existential threat to America that the very foundation of its vaunted exceptionalism was shattered to smithereens. Despite having eliminated or sufficiently contained most potential 9/11-like threats, n149 the existential fear remained within the American psyche. n150 This is the phenomenon of 9/11. This is also why most cannot separate 9/11 from Guantanamo--it is the framework of [\*196] existential threat that spawns the inertia of symmetry. Therefore, this inertia must be decoupled from the symmetry in order for any meaningful dialogue to even begin to take shape. The daunting query before us is how to achieve that.

This is difficult. In their heightened awareness of the existential threat, both the Administration and the security community seek to adhere to the symmetry n151 because adhering to symmetry protects them from making ill-advised moves with regard to Guantanamo, which means a desire to maintain the status quo. n152 And this status quo of indefinite detention can be maintained by continuing to embrace the ontological dimension of Guantanamo that is inseparable from 9/11. In a uniquely illogical way, both the Administration and the security community seek existential solace from the Guantanamo phenomena. Thus, at the most fundamental level, the decoupling from symmetry needs erasure of threat. Unless this existential threat is erased from the American psyche, the adherence to symmetry will continue, which in turn will not allow any constructive dialogue based on neutral transparency to emerge. Despite the plea for change in U.S. detention policy, n153 this existential threat has taken a life of its own vis-?vis Guantanamo. I suggest we internalize Guantanamo as a manifestation of this threat. This beckons us to understand Guantanamo in a new light.

Legal restraints motivated by conflict narratives cause endless intervention and WMD warfare

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In the ‘biopolitical nomos’ of camps and prisons in the Middle East and elsewhere, managing detainees is an important element of the US military project. As CENTCOM Commander General John Abizaid made clear to the Senate Armed Services Committee in 2006, “an essential part of our combat operations in both Iraq and Afghanistan entails the need to detain enemy combatants and terrorists”.115 However, it is a mistake to characterize as ‘exceptional’ the US military’s broader biopolitical project in the war on terror. Both Minca’s and Agamben’s emphasis on the notion of ‘exception’ is most convincing when elucidating how the US military has dealt with the ‘threat’ of enemy combatants, rather than how it has planned for, legally securitized and enacted, its ‘own’ aggression against them. It does not account for the proactive juridical warfare of the US military in its forward deployment throughout the globe, which rigorously secures classified SOFAs with host nations and protects its armed personnel from transfer to the International Criminal Court. Far from designating a ‘space of exception’, the US does this to establish normative parameters in its exercise of legally sanctioned military violence and to maximize its ‘operational capacities of securitization’.

A bigger question, of course, is what the US military practices of lawfare and juridical securitization say about our contemporary moment. Are they essentially ‘exceptional’ in character, prompted by the so-called exceptional character of global terrorism today? Are they therefore enacted in ‘spaces of exceptions’ or are they, in fact, simply contemporary examples of Foucault’s ‘spaces of security’ that are neither exceptional nor indeed a departure from, or perversion of, liberal democracy? As Mark Neocleous so aptly puts it, has the “liberal project of ‘liberty’” not always been, in fact, a “project of security”?116 This ‘project of security’ has long invoked a powerful political dispositif of ‘executive powers’, typically registered as ‘emergency powers’, but, as Neocleous makes clear, of the permanent kind.117 For Neocleous, the pursuit of ‘security’ – and more specifically ‘capitalist security’ – marked the very emergence of liberal democracies, and continues to frame our contemporary world. In the West at least, that world may be endlessly registered as a liberal democracy defined by the ‘rule of law’, but, as Neocleous reminds us, the assumption that the law, decoupled from politics, acts as the ultimate safeguard of democracy is simply false – a key point affirmed by considering the US military’s extensive waging of liberal lawfare. As David Kennedy observes, the military lawyer who “carries the briefcase of rules and restrictions” has long been replaced by the lawyer who “participate[s] in discussions of strategy and tactics”.118

The US military’s liberal lawfare reveals how **the rule of law is simply another securitization tactic in liberalism’s ‘pursuit of security’;** a pursuit that paradoxically eliminates fundamental rights and freedoms in the ‘name of security’.119 This is a ‘liberalism’ defined by what Michael Dillon and Julian Reid see as a commitment to waging ‘biopolitical war’ for the securitization of life – ‘killing to make live’.120 And for Mark Neocleous, (neo)liberalism’s fetishization of ‘security’ **– as both a discourse and a technique of government** – has resulted in a world defined by anti-democratic technologies of power.121 In the case of the US military’s forward deployment on the frontiers of the war on terror – and its juridical tactics to secure biopolitical power thereat – this has been **made possible by constant reference to a neoliberal ‘project of security’** registered in a language of ‘endless emergency’ to ‘secure’ the geopolitical and geoeconomic goals of US foreign policy.122 The US military’s continuous and indeed growing military footprint in the Middle East and elsewhere can be read as a ‘permanent emergency’,123 the new ‘normal’ in which geopolitical military interventionism and its concomitant biopolitical technologies of power are necessitated by the perennial political economic ‘need’ to securitize volatility and threat.

Conclusion: enabling biopolitical power in the age of securitization

“Law and force flow into one another. We make war in the shadow of law, and law in the shadow of force” – David Kennedy, Of War and Law 124

Can a focus on lawfare and biopolitics help us to **critique our contemporary moment’s proliferation of practices of securitization** – practices that appear to be primarily concerned with coding, quantifying, governing and anticipating life itself? In the context of US military’s war on terror, I have argued above that it can. If, as David Kennedy points out, the “emergence of a global economic and commercial order has amplified the role of background legal regulations as the strategic terrain for transnational activities of all sorts”, this also includes, of course, ‘warfare’; and for some time, the US military has recognized the “opportunities for creative strategy” made possible by proactively waging lawfare beyond the battlefield.125 As Walter Benjamin observed nearly a century ago, at the very heart of military violence is a “lawmaking character”.126 And it is this ‘lawmaking character’ that is integral to the biopolitical technologies of power that secure US geopolitics in our contemporary moment. US lawfare **focuses “the attention of the world on this or that excess**” whilst simultaneously arming “the most heinous human suffering **in legal privilege”,** redefining horrific violence as “collateral damage, self-defense, proportionality, or necessity”.127 It involves a mobilization of the law that is precisely channelled towards “**evasion**”, securing 23 classified Status of Forces Agreements and “offering at once the experience of safe ethical distance and careful pragmatic assessment, while **parcelling out responsibility, attributing it, denying it – even sometimes embracing it – as a tactic of statecraft and war”.128**

Since the inception of the war on terror, the US military has waged incessant lawfare to legally securitize, regulate and empower its ‘operational capacities’ in its multiples ‘spaces of security’ across the globe – whether that be at a US base in the Kyrgyz Republic or in combat in Iraq. I have sought to highlight here these tactics by demonstrating how the execution of US geopolitics relies upon a proactive legal-biopolitical securitization of US troops at the frontiers of the American ‘leasehold empire’. For the US military, legal-biopolitical apparatuses of security enable its geopolitical and geoeconomic projects of security on the ground; they plan for and **legally condition the ‘milieux’ of military commanders**; and in so doing they **render operational** **the pivotal spaces of overseas intervention of contemporary US national security conceived** in terms of ‘**global governmentality’**.129 In the US global war on terror, it is lawfare that facilitates what Foucault calls the “biopolitics of security” – when life itself becomes the “object of security”.130 For the US military, this involves the eliminating of threats to ‘life’, the creating of operational capabilities to ‘make live’ and the anticipating and management of life’s uncertain ‘future’.

Some of the most key contributions across the social sciences and humanities in recent years have divulged how discourses of ‘security’, ‘precarity’ and ‘risk’ function centrally in the governing dispositifs of our contemporary world.131 In a society of (in)security, such discourses have a profound power to invoke danger as “requiring extraordinary action”.132 In the ongoing war on terror, registers of emergency play pivotal roles in the justification of military securitization strategies, where ‘risk’, it seems, has become permanently binded to ‘securitization’. As Claudia Aradau and Rens Van Munster point out, the “perspective **of risk management”** seductively effects practices of military securitization to be seen as necessary, legitimate and indeed therapeutic.133 US tactics of liberal lawfare in the long war – the conditioning of the battlefield, the sanctioning of the privilege of violence, the regulating of the conduct of troops, the interpreting, negating and utilizing 24 of international law, and the securing of SOFAs – are vital security dispositifs of a broader ‘risk- securitization’ strategy involving the deployment of liberal technologies of biopower to “manage dangerous irruptions in the future”.134 It may well be fought beyond the battlefield in “a war of the pentagon rather than a war of the spear”,135 but it is lawfare that ultimately enables the ‘toxic combination’ **of US geopolitics and biopolitics defining the current age of securitization.**

Legal restraints guarantee increasing public resistance and executive secrecy

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If Bagehot’s theory is correct, the United States now confronts a precarious situation. **Maintaining the appearance that** Madisonian **institutions control the course of national security policy requires that those institutions play a large enough role in the decision-making process to maintain the illusion**. But the Madisonians’ role is too visibly shrinking, and the Trumanites’ too visibly expanding, to maintain the plausible impression of Madisonian governance.504 For this reason and others, public confidence in the Madisonians has sunk to new lows.505 **The Trumanites have resisted transparency** far more **successfully** than have the Madisonians, with unsurprising results. The success of the whole dual institutional model depends upon the maintenance of public enchantment with the dignified/ Madisonian institutions. This requires allowing no daylight to spoil their magic,506 as Bagehot put it. An element of mystery must be preserved to excite public imagination. But transparency—driven hugely by modern internet technology, multiple informational sources, and social media— leaves little to the imagination. “The cure for admiring the House of Lords,” Bagehot observed, “was to go and look at it.”507 **The public has gone and looked at Congress, the Supreme Court, and the President, and their standing in public opinion surveys is the result. Justices, senators, and presidents are not masters of the universe after all, the public has discovered. They are just like us**. Enquiring minds may not have read enough of Foreign Affairs508 to assess the Trumanites’ national security polices, but they have read enough of People Magazine509 to know that the Madisonians are not who they pretend to be. While the public’s unfamiliarity with national security matters has no doubt hastened the Trumanites’ rise, **too many people will soon be too savvy to be misled by the** Madisonian **veneer**,510 and those people often are opinion leaders whose influence on public opinion is disproportionate to their numbers. There is no point in telling ghost stories, Holmes said, if people do not believe in ghosts.511

It might be supposed at this point that the phenomenon of double government is nothing new. Anyone familiar with the management of the Vietnam War 512 or the un-killable ABM program 513 knows that double government has been around for a while. Other realms of law, policy, and business also have come to be dominated by specialists, made necessary and empowered by ever-increasing divisions of labor; is not national security duality merely a contemporary manifestation of the challenge long posed to democracy by the administrative state-cum-technocracy?515 Why is national security different?

There is validity to this intuition and no dearth of examples of the frustration confronted by Madisonians who are left to shrug their shoulders when presented with complex policy options, the desirability of which cannot be assessed without high levels of technical expertise. International trade issues, for example, turn frequently upon esoteric econometric analysis beyond the grasp of all but a few Madisonians. Climate change and global warming present questions that depend ultimately upon the validity of one intricate computer model versus another. The financial crisis of 2008 posed similar complexity when experts insisted to hastily-gathered executive officials and legislators that—absent massive and immediate intervention—the nation’s and perhaps the world’s entire financial infrastructure would face imminent collapse.516 In these and a growing number of similar situations, **the “choice” made by the Madisonians is increasingly hollow;** the real choices are made by technocrats **who present options** to Madisonians **that the Madisonians are in no position to assess**. Why is national security any different?

It is different for a reason that I described in 1981: the organizations in question “do not regulate truck widths or set train schedules. They have the capability of radically and permanently altering the political and legal contours of our society.”517 An unrestrained security apparatus has throughout history been one of the principal reasons that free governments have failed. **The Trumanite network** holds within its power something far greater than the ability to recommend higher import duties or more windmills or even gargantuan corporate bailouts: it has the power to kill and arrest and jail, the power to see and hear and read peoples’ every word and action, the power to instill fear and suspicion, the power to quash investigations and quell speech, the power to shape public debate or to curtail it, and the power to hide its deeds and evade its weak-kneed overseers. It **holds**, in short, **the power of irreversibility**. No democracy worthy of its name can permit that power to escape the control of the people.

It might also be supposed that existing, non-Madisonian, external restraints pose counterweights that compensate for the weakness of internal, Madisonian checks. The press, and the public sentiment it partially shapes, do constrain the abuse of power—but only up to a point. To the extent that **the “marketplace of ideas**” analogy ever was apt, that marketplace, like other marketplaces, **is given to distortion**. **Public outrage is** notoriously **fickle, manipulable, and selective**, **particularly when driven by anger, fear, and indolence**. **Sizeable segments of the public**—often egged on by public officials—**lash out unpredictably at imaginary transgressors, failing** even in the ability **to identify** sympathetic **allies**.518 "[P]ublic opinion," Sorensen wryly observed, "is not always identical with the public interest."519 **The influence of the media**, whether to rouse or dampen, **is** thus **limited**. The handful of investigative journalists active in the United States today are the truest contemporary example of Churchill's tribute to the Royal Air Force.520 In the end, though, access remains everything to the press. Explicit or implicit threats by the targets of its inquiries to curtail access often yield editorial acquiescence. Members of the public obviously are in no position to complain when a story does not appear. Further, **even the best** of investigative **journalists confront a high wall of secrecy. Finding** and communicating with (on deep background, of course) **a knowledgeable, candid source** within an opaque Trumanite network resistant to efforts to pinpoint decision-makers 521 **can take years**. Few publishers can afford the necessary financial investment; newspapers are, after all, businesses, and the bottom line of their financial statements ultimately governs investigatory expenditures. Often, **a second** corroborating **source is required**. Even after scaling the Trumanite wall of secrecy, **reporters** and their editors often **become victims of** the **deal-making** tactics they must adopt to live comfortably with the Trumanites. Finally, members of the mass media are subject to the same organizational pressures that shape the behavior of other groups. They eat together, travel together, and think together. A case in point was the Iraq War. The Washington Post ran twenty seven editorials in favor of the war along with dozens of op-ed pieces, with only a few from skeptics.522 The New York Times, Time, Newsweek, the Los Angeles Tunes, and the Wall Street Journal all marched along in lockstep.523 As Senator Eugene McCarthy aptly put it, reporters are like blackbirds; when one flies off the telephone wire, they all fly off.524

More importantly, the premise—that a vigilant electorate fueled by a skeptical press together will successfully fill the void created by the hollowed-out Madisonian institutions—is wrong.525 This premise supposes that those outside constraints operate independently, that their efficacy is not a function of the efficacy of internal, Madisonian checks.526 But the internal and external checks are woven together and depend upon one another.527 Non-disclosure agreements (Judicially-enforced gag orders, in truth) are prevalent among those best positioned to criticize/28 Heightened efforts have been undertaken to crush vigorous investigative journalism and to prosecute and humiliate whistleblowers and to equate them with spies under the espionage laws. National security documents have been breathtakingly over-classified. **The evasion of** Madisonian **constraints** by these sorts of policies **has the net effect of narrowing the marketplace of ideas, curtaining public debate, and gutting both the media and public opinion as effective restraints**.529 The vitality of external checks depends upon the vitality of internal Madisonian checks, and the internal Madisonian checks only minimally constrain the Trumanites.

Some suggest that the answer is to admit the failure of the Madisonian institutions, recognize that for all their faults the external checks are all that really exist, acknowledge that the Trumanite network cannot be unseated, and try to work within the current framework.530 But the idea that external checks alone do or can provide the needed safeguards is false**. If politics were** the **effective** restraint that some have argued it is,531 **politics**—intertwined as it is with law—**would have produced more effective legalist constraints**. It has not. The failure of law is and has been a failure of politics. If the press and public opinion were sufficient to safeguard what the Madisonian institutions were designed to protect, the story of democracy would consist of little more than a series of elected kings, with the rule of law having frozen with the signing of Magna Carta in 1215. Even with effective rules to protect free, informed, and robust expression—which is an enormous assumption—public opinion alone cannot be counted upon to protect what law is needed to protect. The hope that it can do so recalls earlier reactions to Bagehot’s insights—the faith that “the people” can simply “throw off” their “deferential attitude and reshape the political system,” insisting that the Madisonian, or dignified, institutions must “once again provide the popular check” that they were intended to provide.532

That, however, is exactly what many thought they were doing in electing Barack Obama as President. The results need not be rehearsed; little reason exists to expect that some future public effort to resuscitate withered Madisonian institutions would be any more successful. Indeed, the added power that the Trumanite network has taken on under the BushObama policies would make that all the more difficult. It is simply naive to believe that a sufficiently large segment of informed and intelligent voters can somehow come together to ensure that sufficiently vigilant Madisonian surrogates will somehow be included in the national security decisionmaking process to ensure that the Trumanite network is infused with the right values. Those who believe that do not understand why that network was formed, how it operates, or why it survives. They want it, in short, to become more Madisonian. The Trumanite network, of course, would not mind appearing more Madisonian, bul its enduring ambilion is lo become, in reality, less Madisonian.

It is not clear what precisely might occur should Bagehot's cone of government "fall to earth." United States history provides no precedent. One possibility is a prolongation of what are now long-standing trends, with the arc of power continuing to shift gradually from the Madisonian institutions to the Trumanite network. Under this scenario, those institutions continue to subcontract national security decisionmaking to the Trumanites; a majority of the public remains satisfied with tradeoffs between liberty and security; and members of a dissatisfied minority are at a loss to know what to do and are, in any event, chilled by widely-feared Trumanite surveillance capabilities. The Madisonian institutions, in this future, fade gradually into museum pieces, like the British House of Lords and monarchy; Madisonians kiss babies, cut ribbons, and read Trumanite talking points, while the Trumanite network, careful to retain historic forms and familiar symbols, takes on the substance of a silent directorate.

Another possibility, however, is that **the fall** to earth **could entail consequences** that are **profoundly disruptive**, both **for the government** and the people. This scenario would be more likely in the aftermath of a catastrophic terrorist attack that takes place in an environment lacking the safety-valve checks that the Madisonian institutions once provided. In this future, **an initial "rally round the flag" fervor and** associated **crack-down are followed**, later, **by an increasing spiral of recriminatory reactions and counter-reactions**. The government is seen increasingly by elements of the public as hiding what they ought to know, criminalizing what they ought to be able to do, and spying upon what ought to be private. The people are seen increasingly by the government as unable to comprehend the gravity of security threats, unappreciative of its security-protection efforts, and unworthy of its own trust. Recent public opinion surveys are portentous. A September 2013 Gallup Poll revealed that Americans' trust and confidence in the federal government's ability to handle international problems had reached an all-time low;533 a June 2013 Time magazine poll disclosed that 70% of those age eighteen to thirty-four believed that Edward Snowden "did a good thing" in leaking the news of the NSA's surveillance program.534 This yawning attitudinal gap between the people and the government could reflect itself in multiple ways. Most obviously, the Trumanite network must draw upon the U.S. population to fill the five million positions needed to staff its projects that require security clearances.535 That would be increasingly difficult, however, if the pool of available recruits comprises a growing and indeterminate number of Edward Snowdens—individuals with nothing in their records that indicates disqualifying unreliability but who, once hired, are willing nonetheless to act against perceived authoritarian tendencies by leaving open the vault of secrecy.

A smaller, less reliable pool of potential recruits would hardly be the worst of it, however. Lacking perceived legitimacy, **the government could expect a lesser level of cooperation, if not outright obstruction, from the general public**. Many national security programs presuppose public support for their efficient operation. This ranges from compliance with national security letters and library records disclosure under the PATRIOT Act to the design, manufacture, and sale of drones, and cooperation with counterintelligence activities and criminal investigations involving national security prosecutions. Moreover, distrust of government tends to become generalized; people who doubt governmental officials' assertions on national security threats are inclined to extend their skepticism.

**Governmental assurances concerning everything from vaccine and food safety to the fairness of stock-market regulation and IRS investigations** (not without evidence536) **become widely suspect**. **Inevitably**, therefore, **daily life would become more difficult**. Government, after all, exists for a reason. It carries out many helpful and indeed essential functions in a highly specialized society. When those functions cannot be fulfilled, **work-arounds emerge, and social dislocation results**. Most seriously, the protection of **legitimate national security interests would** itself **suffer** if the public were unable to distinguish between measures vital to its protection and those assumed to be undertaken merely through bureaucratic inertia or lack of imagination.

**The government** itself, meanwhile, **could not be counted upon to remain passive in the face of growing public obduracy** in response to its efforts to do what it thinks essential to safeguard national security. Here we do have historical precedents, and none is comfortably revisited. The Alien and Sedition Acts in the 1790s;537 the Palmer Raids of 1919 and 1920;538 the round-up of Japanese-American citizens in the 1940s;539 governmental spying on and disruption of civil rights, draft protesters, and anti-war activists in the 1960s and 1970s;540 and the incommunicado incarceration without charges, counsel, or trial of "unlawful combatants" only a few short years ago541—all are examples of what can happen when government sees limited options in confronting nerve-center security threats. No one can be certain, but **the ultimate danger** posed **if the system were to fall** to earth in the aftermath of a devastating terrorist attack **could be** intensely divisive and potentially **destabilizing**—not unlike what was envisioned by conservative Republicans in Congress who opposed Truman's national security programs when the managerial network was established.542 It is therefore appropriate to move beyond explanation and to turn to possibilities for reform—to consider steps that might be taken to prevent the entire structure from falling to earth.

Vote neg to debase the aff’s reliance securitized law in favor of democratic restraints on the President

Stephanie A. Levin 92, law prof at Hampshire College, Grassroots Voices: Local Action and National Military Policy, 40 Buff. L. Rev. 372

In this sense, what is important about federalism is not that it locates power "here" or "there" — not that some things are assigned irretrievably to the federal government or others to the states — but that it creates a tension about power, so that there are competing sources of authority rather than one unitary sovereign. Hannah Arendt has written that "perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same."194 Akhil Amar has expressed what is actually the same basic insight in a very different formulation, writing that the American innovation was to place sovereignty "in the People themselves. "I9S Whether one views unitary sovereignty as abolished or relocated to the people, the key point is that it is no longer considered to be in any unitary government. Governmental institutions are divided and kept in tension. At the federal level, this is the familiar doctrine of separation of powers. The same principle animates federalism. The tension is valued because it creates space for the expression of suppressed viewpoints and helps to prevent any one orthodoxy from achieving complete hegemony. Amar sums up the contribution that this governmental innovation makes to the liberty of the people by writing: "As with separation of powers, federalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal's affections by monitoring and challenging the other's misdeeds."196 This is a compelling insight, but the way Professor Amar has framed it presents two difficulties for present purposes. First, by naming only the "state" and "national" governments, it ignores the field of local government action, a field particularly accessible to the direct involvement of the very citizens who constitute Amar's sovereign "People."197 Second, by making the subject of the verb the "government agency," the sentence makes it sound as if it were the "government agency" which acts, rather than recognizing that it is people who act though the agencies of government. Since the focus here is on federalism as a means of fostering civic participation, both of these qualifications are crucial. While state government will sometimes be an excellent locus for citizen action, often local government will provide the best forum for ordinary citizens to find their voices in civic conversation. And because the value of federalism for our purposes is in the enhanced opportunities it provides for citizen participation in policy development, the focus must be not on government institutions acting, but on people acting through them. In summary, three key attributes of participatory federalism must be highlighted. The first is that what is most important is not where government power is assigned — to the federal government, the states, or the localities — but the very fact that there are shared and overlapping powers. This dispersion of power means that the citizen is better protected from the dangers that are inherent in being subject to any one unitary sovereign.198 A second key attribute is that the value of this federalism lies not in the empowerment of government, but in the empowerment of people. Its animating purpose is not to add to or detract from the powers of any particular level of government, but to provide the most fruitful arrangements for enhancing the possibility of genuine citizen control over government. Third, the only meaningful measure of the success or failure of this type of federalism is the extent to which it contributes to increased opportunities for citizens to have a voice in government. This must be not at the level of deceptive abstraction — "the People speak" — but at the very concrete level of actual people with actual voices. The goal is for more people to be able to speak up in settings more empowering than their living rooms — and certainly state and local governments, while not the only possible settings, provide such an opportunity. In conclusion, these general principles of participatory federalism must be linked to the specific case of federalism in connection with military policy. The constitutional arrangements concerning military power which were described in Section II fit with these three attributes of participatory federalism quite well. The first attribute calls for dispersing power by sharing it. As has already been suggested, the military arrangements in the Constitution were designed to achieve exactly this sort of liberating tension between the national government's military powers and the decentralized state and locally-controlled institutions by which these powers were to be carried out. The second attribute calls for empowering people rather than governmental institutions. Here, too, the constitutional arrangements seem to fit. The purpose of the grants of power in the relevant constitutional clauses was not to endow any unit of government with the prerogatives of military power for its own sake. The reason for creating these powers was not to strengthen government but to protect the citizenry — to "provide for the common defense." Given this, it seems anomalous for the federal government — or any branch of the American government — to claim a right to control or use military violence as an inherent attribute of sovereignty.'99 The only justification for this power is in whether it contributes to the security of the citizens. Finally, the idea that federalism should serve the purpose of enhancing citizen voice can also be linked to decentralized arrangements for the control of military power. In the eighteenth century, as I have suggested earlier, the mechanism for expressing "voice" was physical: the militiamember showed up at muster, rifle on shoulder, to participate bodily in a "conversation" about military force.200 Today, it can be hoped that our civic conversation can be more verbal. However, we should translate the underlying meaning of the eighteenth century mechanism — a meaning of citizen participation and consent — into a modality more appropriate to contemporary life rather than relinquish it altogether. I would argue that such a translation leads to three central conclusions. The first is theoretical: we must challenge those mental preconceptions which favor totally centralized power in the military policy arena. We must stop seeing control over military power as belonging "naturally" to the federal government and even more narrowly to the executive branch within it. Instead, we must reconceptualize our understanding of the national arrangements to envision a dynamic and uncertain balance among different sources of power, not only among the three branches of the federal government, but between centralized and decentralized institutions of government as well.201 While the role of the federal government is, of course, crucial, the roles of the states and localities are more than interstitial and should not be allowed to atrophy. Only in this dynamic tension does the best protection for the citizenry lie.

### 4

Indefinite detention is a political question—the plan destroys the doctrine

Pennelle ‘6

Laura, California Western Law School, “THE GUANTANAMO GAP: CAN FOREIGN NATIONALS OBTAIN REDRESS FOR PROLONGED ARBITRARY DETENTION AND TORTURE SUFFERED OUTSIDE THE UNITED STATES?,” 36 Cal. W. Int'l L.J. 303

Assuming there was a judicially cognizable remedy available to foreign national detainees, issues of justiciability present an additional barrier to recovery. The political question doctrine reflects concerns about keeping the federal judiciary from inappropriate involvement in sensitive political issues that are best addressed by the political branches of government." 3 Under the political question doctrine, a federal court can decline to hear a case that presents such a nonjusticiable political question.214 The doctrine generally "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'215 In addition, the political question doctrine may also exclude cases when there is an "impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;.., or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 2 6 Certainly, the detention of alien prisoners at the GBNB is a sensitive political issue that is likely to have consequences for U.S. foreign relations. However, the Supreme Court has stated that, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. 21 7 Nevertheless, the D.C. Circuit has warned, "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. '218 This warning applies to the situation in Guantanamo Bay and reflects the policy that courts should defer to the political branches in addressing problems best resolved by those branches, since the political question doctrine is "primarily a function of the separation of powers. ' 219 Arguably, the decision to detain foreign nationals at the GBNB during the "war on terror" involves decisions made by the political and not judicial branches of government. Indeed, Congress's passage of the AUMF and the President's subsequent Detention Order initiated "war on terror" and brought foreign nationals to the GBNB. 22° Furthermore, Article III of the Constitution, which defines the scope of judicial power, "provides no authority for policymaking in the realm of foreign relations or provision of national security. '22' Finally, it would be difficult for a court to award damages for detainees' alleged claims without "expressing lack of the respect due coordinate branches of government. 2 2

PQD key to global intelligence and cooperation—solves terrorism

Dhooge ‘7

Lucien, Sue and John Staton Professor of Law, Georgia Institute of Technology, “THE POLITICAL QUESTION DOCTRINE AND CORPORATE COMPLICITY IN EXTRAORDINARY RENDITION,” 21 Temp. Int'l & Comp. L.J. 311 2007

The complaint alleges the existence of a clandestine U.S. intelligence program involving the apparent cooperation of foreign intelligence services and law enforcement authorities **throughout the world**. 145 Adjudicating the complaint would result in further disclosures regarding the means and methods utilized to seize suspected terrorists by the United States and its allies to an **undesirable degree**. Such disclosures may include the policies and practices underlying **rendition**, including the number and identity of participants in rendition operations; the identity of their employer; the extent of CIA participation; operational details associated with the flights serviced by Jeppesen; and the other operational details which have not been publicly disclosed. This information **is essential** to prove the underlying human rights violations committed by the CIA and Jeppesen's complicity as a conspirator and aider and abettor. Access to this information would also be necessary, given the enhanced degree of specificity required of claims of conspiracy and aiding and abetting, as well as claims asserted pursuant to the ATS. 146 Access could also be justified based on the serious nature of the allegations and their potential to cause considerable financial injury to Jeppesen through the magnitude of potential damage awards and resulting harm to corporate reputation. The disclosure of such information would virtually **create an extraordinary rendition playbook.** The creation of such a playbook, however, interferes with the President's responsibility for national security and authority over foreign affairs. The **continued viability of antiterrorism programs** is essential to preserving national security, a responsibility clearly within the President's constitutional obligations and which includes authority to protect national security information. 147 Publishing the details of the extraordinary rendition program, necessitated by the complaint, to a branch of the government ill-suited to evaluate the consequences of the release of such sensitive information can only further harm the program and, as a result, weaken a course of action selected by the executive branch in furtherance of fulfilling its national security obligations. 148 The possibility of compulsive disclosures regarding the extraordinary rendition program may also disrupt U.S. diplomatic relations. The extraordinary rendition program has proven controversial; it has already led to two national investigations by British and Swedish authorities, with several more currently pending.149 Further strain may be placed on U.S. relations with European states as a result of the investigation conducted by the Council of Europe into the complicity of numerous national governments in extraordinary renditions. The number of potentially impacted relations with European states is significant and includes some of the United States' closest allies in the so-called "war on terror," such as Italy, Poland, Spain, and the United Kingdom. 150 Diplomatic relations with non-European states that have permitted extraordinary renditions to occur within their territories may also be negatively impacted. This group of states includes numerous crucial allies in U.S. antiterrorism efforts such as **Canada**, **Indonesia**, **Pakistan, and Turkey**. Another set of potentially impacted diplomatic relations are those with foreign states that have accepted persons subject to rendition and have subsequently utilized detention and interrogation methods that do not comport with U.S. law or international standards. States that fall within this category include Afghanistan, **Egypt, Iraq, Jordan, Morocco, Pakistan, Poland, Syria, Romania, Thailand, and Uzbekistan**.' 51 The vast majority of these states are key participants in combating terrorism on the basis of their own struggles against terrorist organizations. Such disclosures regarding the extent of national cooperation or indifference to extraordinary renditions occurring within their territories may embarrass these governments. Western European states may suffer embarrassment for their failure to uphold human rights protections deeply engrained in their national cultures as well as in regional and global instruments. Other governments may be reluctant to confirm their cooperation with U.S. intelligence forces in extraordinary renditions for other reasons, including previous denials of such cooperation, maintenance of standing in the international community, concerns about abdication of national sovereignty, and potential inflammation of public opposition within their constituencies. Particularly susceptible governments in this regard include states with populations deeply skeptical of U.S. foreign policy in general and those with antiterrorism initiatives such as Egypt, Indonesia, Iraq, Pakistan, and Turkey. Some of these governments may re-evaluate further operations with U.S. intelligence services if their complicity is exposed. 152 Such a result is not only inimical to present U.S. foreign policy goals and future initiatives, but also undermines the international consensus **necessary** to successfully combat the spread of global terrorism. **This potential impact upon U.S. foreign relations** **compel** imposition of the political question doctrine.

### 5

The plan decimates global adherence to LOAC—executive detention authority is key to enforcing the laws of war

Bialke, 4

(Lt. Colonel, MA & JD-University of North Dakota, LLM-University of Iowa, “Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict,” 55 A.F. L. Rev. 1, Lexis)

International Obligations & Responsibilities and the International Rule of Law

The United States (U.S.) is currently detaining several hundred al-Qaeda and Taliban unlawful enemy combatants from more than 40 countries at a multi-million dollar maximum-security detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba. These enemy detainees were captured while engaged in hostilities against the U.S. and its allies during the post-September 11, 2001 international armed conflict centered primarily in Afghanistan. The conflict now involves an ongoing concerted international campaign in collective self-defense against a common stateless enemy dispersed throughout the world. Domestic and international human rights organizations and other groups have criticized the U.S., n1 arguing that al-Qaeda and Taliban detainees in Cuba should be granted Geneva Convention III prisoner of war (POW) n2 status. They contend broadly that pursuant to the international laws of armed conflict (LOAC), combatants captured during armed conflict must be treated equally and conferred POW status. However, no such blanket obligation exists in international law. There is no legal or moral equivalence in LOAC between lawful combatants and unlawful combatants, or between lawful belligerency [\*2] and unlawful belligerency (also referred to as lawful combatantry and unlawful combatantry). The U.S. has applied well-established existing international law in holding that the al-Qaeda and Taliban **detainees are presumptively unlawful combatants** not entitled to POW status. n3 Taliban and al-Qaeda enemy combatants captured without military uniforms in armed conflict are not presumptively entitled to, nor automatically granted, POW status. POW status is a privileged status given by a capturing party as an international obligation to a captured enemy combatant, if and when the enemy's previous lawful actions in armed conflict demonstrate that POW status is merited. In the case of captured al-Qaeda and Taliban combatants, their combined unlawful actions in armed conflict, and al-Qaeda's failure to adequately align with a state show POW status is not warranted. The role of the U.S. in the international community is unique. The U.S., although relatively a young state, is the world's oldest continuing democracy and constitutional form of government. The U.S. is a permanent member of the United Nations Security Council, the world's leading economic power, and its only military superpower. The U.S. is the only country in the world capable of commencing and supporting effectively substantial international military operations with an extensive series of military alliances, and the required numbers of mission-ready expeditionary forces consisting of combat airpower, land and naval forces, intelligence, special operations, airlift, sealift, and logistics. Great influence and capabilities, however, exact great responsibility. As a result of its unique role and influence within the international community, the U.S. has been placed at the forefront of respecting LOAC and promoting international respect for LOAC. The U.S. military has the largest, most sophisticated and comprehensive LOAC program in the world. The U.S. demonstrates respect for LOAC by devoting an extraordinary and unequalled level of resources to the development and enforcement of these laws, through an unparalleled LOAC training and education regimen for U.S. and allied [\*3] military members, and a **conscientious and consistent requirement that its forces comply with these laws in all military operations**. Customary LOAC binds every country in the world including the U.S. **International collective security and U.S. national security may be achieved only through a steadfast commitment to the Rule of Law**. For the U.S. to grant POW status to captured members of al-Qaeda or the Taliban **would be an abdication of these international legal responsibilities** and obligations. It would set a **dangerous precedent contrary to the Rule of Law and LOAC,** and to the highest purpose of the laws of warfare, the protection of civilians during armed conflict. This article begins by explaining how LOAC protects civilians through the **enforcement of clear distinctions between lawful combatants, unlawful combatants, and protected noncombatants**. It summarizes the four conditions of lawful belligerency under customary and treaty-based LOAC, and instructs why combatants who do not meet these conditions do not possess combatant's privilege; that is, the immunity provided to members of the armed forces for acts in armed conflict that would otherwise be crimes in time of peace. The article then reviews why LOAC does not require that captured unlawful combatants be afforded POW status, and addresses specifically captured al-Qaeda and Taliban fighters. The practices and behavior of these fighters en masse in combat deny them privileges as lawful belligerents entitled to combatant's privilege. The article argues that al-Qaeda unlawful combatants are most appropriately described as hostes humani generis, "the common enemies of humankind." The article subsequently explains why al-Qaeda members, as hostes humani generis, are classic unlawful combatants, as part of a stateless organization that en masse engaged in combat unlawfully in an international armed conflict without any legitimate state or other authority. The article explicates al-Qaeda's theocratic-political hegemonic objectives and its use of global terrorism to further those objectives. The article expounds as to why international law deems a transnational act of private warfare by al-Qaeda as malum in se, "a wrong in itself." Related to al-Qaeda's status as hostes humani generis, the article describes one of the Taliban's many violations of international law; that is, willfully allowing al-Qaeda hostes humani generis to reside within Afghanistan's sovereign borders from where al-Qaeda could and did attack unlawfully other sovereign states. The article then details a state's inherent rights if and when attacked by such hostes humani generis. Following this, the article continues by asserting that there is no doubt or ambiguity as to the unlawful combatant status of the Taliban and al-Qaeda (shown by the failure of the Taliban en masse to meet the four fundamental criteria of lawful belligerency, al-Qaeda's statelessness en masse, and both their many acts of unlawful belligerency and violations of LOAC). As a result, the article states that **there is no need or requirement for proceedings** under [\*4] Geneva Convention III, art. 5 **to adjudicate their presumptive unlawful combatant status and non-entitlement to POW status pro forma.** The article subsequently illustrates that, even though captured al-Qaeda and Taliban are unlawful combatants and not POWs, the U.S. as a matter of policy has treated and continues to treat all al-Qaeda and Taliban detainees humanely in accordance with customary international law, to the extent appropriate and consistent with military necessity and in a manner consistent with the principles and spirit of the Geneva Conventions. The article discusses that, under LOAC, the detainees are captured unlawful combatants that **can be interned without criminal charges or access to legal counsel until the cessation of hostilities**. However, the article then points out that the U.S. has no desire to, and will not, hold any unlawful combatant indefinitely. The article then notes that al-Qaeda and Taliban detainees, as unlawful combatants, are subject to trial by U.S. military commissions for their acts of unlawful belligerency or other violations of LOAC and international humanitarian law. It expounds that, when an opposing force detains an unlawful combatant in time of armed conflict, the unlawful combatant's right to legal counsel or other representation only arises if criminal charges are brought against the unlawful combatant. The article illustrates the security measures, evidence procedures, and the many executive due process protections afforded to detainees subject to the jurisdiction of U.S. military commissions. The article states that; if tried and convicted in a U.S. military commission, a detainee may be required to serve the adjudged sentence, such as punitive confinement. The article concludes that it is in the immediate and long-term national security interests of the **U.S. to respect and uphold LOAC in all military operations**. Ultimately, the United States has an obligation to the international community and the Rule of Law not to afford POW status to captured unlawful combatants such as the al-Qaeda and Taliban detainees in furtherance of both domestic and international security.

Nuclear war

Delahunty, associate prof – U St. Thomas Law, and Yoo, law prof – UC Berkeley, ‘10

(Robert and John, 59 DePaul L. Rev. 803)

Finally, the extension of IHRL to armed conflict may have significant consequences for the success of international law in advancing global welfare. Rules of the LOAC represent the delicate balancing between the imperatives of combat and the humanitarian goals in wartime. The LOAC has been remarkably successful in achieving compliance from warring nations in obeying these rules. This is most likely due to the reciprocal nature of the obligations involved. Nations treat prisoners of war well in order to guarantee that their own captive soldiers will be treated well by the enemy; **nations will refrain from using** weapons of mass destruction because they are deterred by their enemy's possession of the same weapons. It has been one of the triumphs of international law to increase the restrictions on the use of unnecessarily destructive and cruel weapons, and to advance the norms of distinction and the humane treatment of combatants and civilians in wartime. IHRL norms, on the other hand, may suffer from much lower rates of compliance. This may be due, in part, to the non-reciprocal nature of the obligations. One nation's refusal to observe freedom of speech, for example, will not cause another country to respond by depriving its own citizens of their rights. If IHRL norms--which were developed without much, if any, consideration of the imperatives of combat--merge into the LOAC, it will be likely that compliance with international law will decline. If nations must balance their security [\*849] needs against ever more restrictive and out-of-place international rules supplied by IHRL, we hazard to guess that the latter will give way. Rather than attempt to superimpose rules for peacetime civilian affairs on the unique circumstances of the "war on terror," a better strategy for encouraging compliance with international law would be to adapt the legal system already specifically designed for armed conflict.

### 6

The United States executive branch should grant the right of release to those in indefinite detention who have won their habeas corpus hearings. The United States executive branch should publically clarify that its authority for indefinite detention derives from the Laws of Armed Conflict.

Solves—their author

Noah Feldman 13, Professor of Law – Harvard, “Obama Can Close Guantanamo. Here’s How.” 7 May 2013, http://www.bloomberg.com/news/2013-05-07/obama-has-leverage-to-get-his-way-on-guantanamo.html

It’s easy to blame Congress for standing in the way of a rational solution. But if the Obama administration would take some of the legal ingenuity that it has applied in justifying indefinite detention and apply it instead to closing the island prison, maybe something could actually be done, despite the organized madness that is our constitutional separation of powers.

Start with the most fundamental reason that Obama should be able to act unilaterally. The president is commander in chief, and the Guantanamo detainees were all held pursuant to the executive power to wage war. The Obama administration says the detainees are being held as, in effect, prisoners of war pursuant to the Geneva Conventions, until the end of hostilities with al-Qaeda -- whenever that may be. So why doesn’t the president, who has the absolute power to hold and release the detainees, have the authority to move them around according to his sound judgment?

Reputation Cost

To deepen the argument beyond executive power, the president is also in charge of foreign affairs. Keeping the detainees at Guantanamo is very costly to international relations, since most nations see the prison there as a reminder of the era of waterboarding and abuses at the Abu Ghraib prison in Iraq. Surely the president should be able to salvage the U.S.’s reputation without being held hostage by Congress?

### Solvency

The president will circumvent the plan

**Margulies ‘11**

Joseph, 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., 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., “Terrorizing Academia,” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf

In an observation more often repeated than defended, we are told that the attacks of September 11 “changed everything.” Whatever merit there is in this notion, it is certainly true that 9/11—and in particular the legal response set in motion by the administration of President George W. Bush—left its mark on the academy. Nine years after 9/11, it is time to step back and assess these developments and to offer thoughts on their meaning. In Part II of this essay, we analyze the post-9/11 scholarship produced by this “emergency” framing. We argue that legal scholars writing in the aftermath of 9/11 generally fell into one of three groups: unilateralists, interventionists, and proceduralists. Unilateralists argued in favor of tilting the allocation of government power toward the executive because the state’s interest in survival is superior to any individual liberty interest, and because the executive is best able to understand and address threats to the state. Interventionists, by contrast, argued in favor of restraining the executive (principally through the judiciary) precisely to prevent the erosion of civil liberties. Proceduralists took a middle road, informed by what they perceived as a central lesson of American history.1 Because at least some overreaction by the state is an inevitable feature of a national crisis, the most one can reasonably hope for is to build in structural and procedural protections to preserve the essential U.S. constitutional framework, and, perhaps, to minimize the damage done to American legal and moral traditions. Despite profound differences between and within these groups, legal scholars in all three camps (as well as litigants and clinicians, including the authors) shared a common perspective—viz., that repressive legal policies adopted by wartime governments are temporary departures from hypothesized peacetime norms. In this narrative, metaphors of bewilderment, wandering, and confusion predominate. The country “loses its bearings” and “goes astray.” Bad things happen until at last the nation “finds itself” or “comes to its senses,” recovers its “values,” and fixes the problem. Internment ends, habeas is restored, prisoners are pardoned, repression passes. In a show of regret, we change direction, “get back on course,” and vow it will never happen again. Until the next time, when it does. This view, popularized in treatments like All the Laws but One, by the late Chief Justice Rehnquist,2 or the more thoughtful and thorough discussion in Perilous Times by Chicago’s Geoffrey Stone,3 quickly became the dominant narrative in American society and the legal academy. **This narrative also figured heavily in the many challenges to Bush-era policies,** including by the authors. The narrative permitted litigators and legal scholars to draw upon what elsewhere has been referred to as America’s “civic religion”4 and to cast the courts in the role of hero-judges5 **whom we hoped would restore legal order.**6 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. Board16 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. In the end, we urge a fuller embrace of what Scheingold called “the politics of rights,” which recognizes the contingent character of rights in American society. We agree with Mari Matsuda, who observed more than two decades ago that rights are a necessary but not sufficient resource for marginalized people with little political capital.20 To be effective, therefore, we must look beyond the courts and grapple with the hard work of long-term change with, through and, perhaps, in spite of law. These are by no means new dilemmas, but the post-9/11 context raises difficult and perplexing questions that deserve study and careful thought as our nation settles into what appears to be a permanent emergency.

Plan causes drone strikes and rendition—worse for cred

Goldsmith, 12

(Law Prof-Harvard, 6/29, Proxy Detention in Somalia, and the Detention-Drone Tradeoff, www.lawfareblog.com/2012/06/proxy-detention-in-somalia-and-the-detention-drone-tradeoff/

There has been speculation about the effect of the Obama administration’s pinched detention policy – i.e. no new detainees brought to GTMO, and no new detainees to Parwan (Afghanistan) from outside Afghanistan – on its other counterterrorism policies. I have long believed there must be some tradeoff between narrowing U.S. detention capabilities and other counterterrorism options, at least implicitly, and not necessarily for the better. As I wrote three years ago, in response to news reports that the Obama administration’s cutback on USG detentions resulted in more USG drone strikes and more outsourcing of rendition, detention, and interrogation: There are at least two problems with this general approach to incapacitating terrorists. First, it is not ideal for security. Sometimes it would be more useful for the United States to capture and interrogate a terrorist (if possible) than to kill him with a Predator drone. Often the United States could get better information if it, rather than another country, detained and interrogated a terrorist suspect. Detentions at Guantanamo are more secure than detentions in Bagram or in third countries. The second problem is that terrorist suspects often end up in less favorable places. Detainees in Bagram have fewer rights than prisoners at Guantanamo, and many in Middle East and South Asian prisons have fewer yet. Likewise, most detainees would rather be in one of these detention facilities than be killed by a Predator drone. We congratulate ourselves when we raise legal standards for detainees, but in many respects all we are really doing is driving the terrorist incapacitation problem out of sight, to a place where terrorist suspects are treated worse. The main response to this argument – especially as it applies to the detention-drone tradeoff – has been to deny any such tradeoff on the ground that there are no terrorists outside of Afghanistan (a) whom the United States is in a position to capture on the ground (as opposed to kill from the sky), and (b) whom the USG would like to detain and interrogate. Dan Klaidman’s book provides some counter-evidence, but I will save my analysis of that for a review I am writing. Here I would like to point to an important story by Eli Lake that reveals that the “United States soldiers have been hunting down al Qaeda affiliates in Somalia”; that U.S. military and CIA advisers work closely with the Puntland Security Force in Somalia, in part to redress piracy threats but mainly to redress threats from al-Shabab; that the Americans have since 2009 captured and brought to the Bosaso Central Prison sixteen people (unclear how many are pirates and how many are al-Shabab); and that American interrogators are involved in questioning al-Shabab suspects. The thrust of Lake’s story is that the conditions of detention at the Bosaso Central Prison are atrocious. But the story is also important for showing that that the United States is involved outside of Afghanistan in capturing members of terrorists organizations that threaten the United States, and does have a national security need to incapacitate and interrogate them. It does not follow, of course, that the USG can or should be in the business of detaining every al-Shabab suspect currently detained in the Bosaso Central Prison. But the Lake story does show that the alternatives to U.S. detention are invariably worse from a human rights perspective. It portends (along with last month’s WPR Report and related DOD press release) that our creeping involvement on the ground in places like Somalia and Yemen mean that the USG will in fact be in a position to capture higher-level terrorists in al Qaeda affiliates. And that in turn suggests that the factual premise underlying the denial of a detention-drone tradeoff will become harder and harder to defend.

### Adv 1

Data disproves hegemony impacts

Fettweis, 11

Christopher J. Fettweis, Department of Political Science, Tulane University, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO

It is perhaps worth noting that there is no evidence to support a direct relationship between the relative level of U.S. activism and international stability. In fact, the limited data we do have suggest the opposite may be true. During the 1990s, the United States cut back on its defense spending fairly substantially. By 1998, the United States was spending $100 billion less on defense in real terms than it had in 1990.51 To internationalists, defense hawks and believers in hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities,” argued Kristol and Kagan, “doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace.”52 On the other hand, if the pacific trends were not based upon U.S. hegemony but a strengthening norm against interstate war, one would not have expected an increase in global instability and violence.

The verdict from the past two decades is fairly plain: The world grew more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable United States military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums, no security dilemmas drove insecurity or arms races, and no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. Most of all, the United States and its allies were no less safe. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and kept declining as the Bush Administration ramped the spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated.

Military spending figures by themselves are insufficient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was significantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered.

However, even if it is true that either U.S. commitments or relative spending account for global pacific trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never final; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conflict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation.

It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulfilled. If increases in conflict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are unrelated to U.S. military spending. Evidently the rest of the world can operate quite effectively without the presence of a global policeman. Those who think otherwise base their view on faith alone.

Soft power fails - empirics

Drezner 11

Daniel W. Drezner, Professor of International Politics at the Fletcher School of Law and Diplomacy at Tufts University, Foreign Affairs, July/August 2011, "Does Obama Have a Grand Strategy?", <http://www.foreignaffairs.com/print/67869>

What went wrong? The administration, and many others, erred in believing that improved standing would give the United States greater policy leverage. The United States' standing among foreign publics and elites did rebound. But this shift did not translate into an appreciable increase in the United States' soft power. Bargaining in the G-20 and the UN Security Council did not get any easier. Soft power, it turns out, cannot accomplish much in the absence of a willingness to use hard power. The other problem was that China, Russia, and other aspiring great powers did not view themselves as partners of the United States. Even allies saw the Obama administration's supposed modesty as a cover for shifting the burden of providing global public goods from the United States to the rest of the world. The administration's grand strategy was therefore perceived as promoting narrow U.S. interests rather than global public goods.

Snowden tanks legitimacy

Parisella 6/27/13

John Parisella is a contributing blogger to AQ Online. He is the former Québec delegate general in New York and currently an invited professor at University of Montréal’s International Relations Center, The Americas Quarterly, June 27, 2013, "The Effect of Edward Snowden-A Canadian Perspective", http://www.americasquarterly.org/content/effect-edward-snowden-canadian-perspective

To some, former CIA and National Security Administration (NSA) employee Edward Snowden is seen as a classic whistleblower, who divulged government secrets that contradict the U.S. Constitution and its 4th amendment. Many who espouse his view—on both the left and right—have applauded his courage and regard him as a hero. To others—especially within the U.S. political class—he is now considered a charged felon, who has willingly pursued a plan to embarrass his government, and in so doing, has breached matters of national security and made the United States less safe. His weekend flight from Hong Kong to Russia may lead some to go as far as to label him a “traitor”. Which is it—hero, felon or traitor? It is too early to answer this. But the longer the situation drags on, the more damage it will inflict on the reputation of the United States on the world stage. The 4th amendment of the U.S. Constitution sets guidelines to protect individual privacy. Even in matters of national security, we are told that due process must be followed. NSA programs, including the ones covering telephone records as well as internet activity that Snowden denounced, must be subjected to safeguards that protect the right to privacy. President Barack Obama has since justified these NSA programs as the necessary balance between privacy and security in this post-9-11 world. While his administration has been careful in its choice of vocabulary, it has decided to charge Snowden with contravening the Espionage Act. The spectacle of the strongest power on earth chasing Snowden around the globe is not reassuring to those who believe in the value of U.S. diplomacy, U.S. intelligence capacity or U.S. military might. The ease with which Snowden accessed sensitive material and subjected his government to this embarrassing game of “cat and mouse” is also not comforting to those who count on U.S. intelligence forces to keep them safe. Clearly, at the outset, the initial effect of Snowden’s action was to spark a legitimate debate about privacy, security and the importance of the 4th amendment. Libertarian politicians like Rand Paul did not condemn Snowden outright. Snowden also has significant support in progressive circles. Others, like influential Democratic Senator Diane Feinstein and Republican Congressman Mike Rogers—normally on opposite sides, argued that maintaining national security and keeping America safe requires measures that could affect some privacy issues. Together, however, they have vehemently condemned Snowden’s actions .The flight to Russia may have deviated what was becoming a necessary debate in a democracy from matters of substance to theatrics. Snowden detractors refer to another famous whistleblower incident: that of Daniel Ellsberg and the release of the Pentagon papers, which gradually led to the questioning of the Vietnam War. Unlike Snowden, they argue, Ellsberg stayed in the U.S. and faced the justice system. In contrast, Snowden’s behavior, which has been backed by some advocacy journalists such as Glen Greenwald of The Guardian and Wikileaks, seems set on evading the U.S. justice system. The polemics around Snowden’s whereabouts seem to confuse the nature of the conversation America should be having at this time in its history. In the meantime, The United States’ image is not improving around the world. Its government seems hesitant and vulnerable. The ‘soft power’ strengths of the U.S. are being questioned. Countries such as China and Russia, with poor human rights records, are openly defying the wishes of the world’s oldest and strongest democracy, and its rule of law. At the end of the day, the privacy versus security debate is rapidly becoming a secondary issue, and this entire episode is turning into a zero-sum game for the United States where no individual or principle wins the day. And this may well be the unintended consequence of Edward Snowden’s actions.

Detention’s not key to terror

Joscelyn, 10

(Sr. Fellow-Foundation for Defense of Democracies, 12/27, “Gitmo is not Al Qaeda’s Number One Recruitment Tool,” http://www.weeklystandard.com/blogs/gitmo-not-al-qaedas-number-one-recruitment-tool\_524997.html)

During a press conference on December 22, President Obama was asked about the difficulties his administration has encountered in trying to close Guantanamo. The president explained (emphasis added): Obviously, we haven’t gotten it closed. And let me just step back and explain that the reason for wanting to close Guantanamo was because my number one priority is keeping the American people safe. One of the most powerful tools we have to keep the American people safe is not providing al Qaeda and jihadists recruiting tools for fledgling terrorists. And Guantanamo is probably the number one recruitment tool that is used by these jihadist organizations. And we see it in the websites that they put up. We see it in the messages that they're delivering. President Obama and his surrogates have made this argument before, but they have provided no real evidence that it is true. In fact, al Qaeda’s top leaders rarely mention Guantanamo in their messages to the West, Muslims and the world at large. No journalist in attendance had the opportunity to challenge President Obama’s assertion. The president should have been asked: If Guantanamo is such a valuable recruiting tool, then why do al Qaeda’s leaders rarely mention it? THE WEEKLY STANDARD has reviewed translations of 34 messages and interviews delivered by top al Qaeda leaders operating in Pakistan and Afghanistan (“Al Qaeda Central”), including Osama bin Laden and Ayman al Zawahiri, since January 2009. The translations were published online by the NEFA Foundation. Guantanamo is mentioned in only 3 of the 34 messages. The other 31 messages contain no reference to Guantanamo. And even in the three messages in which al Qaeda mentions the detention facility it is not a prominent theme. Instead, al Qaeda’s leaders repeatedly focus on a narrative that has dominated their propaganda for the better part of two decades. According to bin Laden, Zawahiri, and other al Qaeda chieftains, there is a Zionist-Crusader conspiracy against Muslims. Relying on this deeply paranoid and conspiratorial worldview, al Qaeda routinely calls upon Muslims to take up arms against Jews and Christians, as well as any Muslims rulers who refuse to fight this imaginary coalition. This theme forms the backbone of al Qaeda’s messaging – not Guantanamo. To illustrate this point, consider the results of some basic keyword searches. Guantanamo is mentioned a mere 7 times in the 34 messages we reviewed. (Again, all 7 of those references appear in just 3 of the 34 messages.) By way of comparison, all of the following keywords are mentioned far more frequently: Israel/Israeli/Israelis (98 mentions), Jew/Jews (129), Zionist(s) (94), Palestine/Palestinian (200), Gaza (131), and Crusader(s) (322). (Note: Zionist is often paired with Crusader in al Qaeda’s rhetoric.) Naturally, al Qaeda’s leaders also focus on the wars in Afghanistan (333 mentions) and Iraq (157). Pakistan (331), which is home to the jihadist hydra, is featured prominently, too. Al Qaeda has designs on each of these three nations and implores willing recruits to fight America and her allies there. Keywords related to other jihadist hotspots also feature more prominently than Gitmo, including Somalia (67 mentions), Yemen (18) and Chechnya (15). Simply put, there is no evidence in the 34 messages we reviewed that al Qaeda’s leaders are using Guantanamo as a recruiting tool. Undoubtedly, “Al Qaeda Central” has released other messages during the past two years that are not included in our sample. Some of those messages may refer to Guantanamo. And some of the al Qaeda messages provided by NEFA, which does a remarkable job collecting and translating al Qaeda’s statements and interviews, may be only partial translations of longer texts. However, the messages we reviewed also surely include most of what al Qaeda’s honchos have said publicly since January 2009. These messages do not support the president’s claim.

Terrorists won’t use WMD

Forest 12 (James, PhD and Director of Terrorism Studies and an associate professor at the United States Military Academy, “Framework for Analyzing the Future Threat of WMD Terrorism,” Journal of Strategic Security, Volume 5, Number 4, Article 9, Winter 2012, <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1193&context=jss>) \*\*NOTE---CBRN weapon = chemical, biological, radiological or nuclear weapon

The terrorist group would additionally need to consider whether a WMD attack would be counterproductive by generating, for example, condemnation among the group's potential supporters. This possible erosion in support, in turn, would degrade the group's political legitimacy among its constituencies, who are viewed as critical to the group's long-term survival. By crossing this WMD threshold, the group could feasibly undermine its popular support, encouraging a perception of the group as deranged mass murders, rather than righteous vanguards of a movement or warriors fighting for a legitimate cause.16 The importance of perception and popular support—or at least tolerance—gives a group reason to think twice before crossing the threshold of catastrophic terrorism. A negative perception can impact a broad range of critical necessities, including finances, safe haven, transportation logistics, and recruitment. Many terrorist groups throughout history have had to learn this lesson the hard way; the terrorist groups we worry about most today have learned from the failures and mistakes of the past, and take these into consideration in their strategic deliberations. Furthermore, a WMD attack could prove counterproductive by provoking a government (or possibly multiple governments) to significantly expand their efforts to destroy the terrorist group. Following a WMD attack in a democracy, there would surely be a great deal of domestic pressure on elected leaders to respond quickly and with a massive show of force. A recognition of his reality is surely a constraining factor on Hezbollah deliberations about attacking Israel, or the Chechen's deliberations about attacking Russia, with such a weapon.

Russia rule of law impossible

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The First Alternative: Strong Rule of Law

First, Russia's current leaders **have few incentives** to make the dominance of formal

institutions their political goal. The existing legal framework of Russia is such that the

president's constitutional powers are almost unlimited, and he or she is not accountable to

any other actors and/or institutions. Having firm control over other political actors--both

chambers of parliament, major political parties, regional and business elites, as well as

military and security--the Kremlin has also increased its non-constitutional powers. In

these circumstances, there are few incentives for Russia's rulers to seek out and

implement policies that would curb the powers of their offices, **since this would**

**undermine their status as the dominant actors in Russian politics**. At the same time,

subordinated actors who are involved in bargaining with the Kremlin can gain more benefits (or lose fewer resources) through these informal deals, and thus no longer pursue

formal rules and norms as weapons in their struggle for political survival. In the absence

of visible opposition (both among elites and the masses), Russia's major political actors

**would rather agree on the very existence of a status quo than risk the uncertainty of**

**institutional changes**.

The other possible scenario of institutional reforms that could be used by the Kremlin

would be the installation of a biased set of formal institutions that serves as a facade for

arbitrary rule. The federal reform initiated by Putin immediately upon his election is a

typical example. As Putin himself noted during the parliamentary debates on these

proposals, his major goal here was the opportunity to impose sanctions against regional

governors, rather than the actual imposition. One would expect that the imposing of these

formal sanctions as a tool of the Kremlin's regional policy would depend upon informal

center-region relations. This kind of legal innovation has little in common with the

dominance of formal institutions; rather, it undermines the foundations of the rule of law

in Russia. In sum, **the rule of law can be established only within a competitive political**

environment. Since the degree of political contestation in Russia seems to be limited

(both on the national and regional level), we can hardly expect the dominance of formal

institutions.

### Adv 2

**Munson says there are structural non-court factors that make CMR disputes inevitable**

Don’t solve bioweapons – their link author is talking about informed consent protocols – research will continue (and empirically denied)

Parasidis, their link article, 2012

(Efthimios, Assistant Professor of Law, Center for Health Law Studies, Saint Louis University School of Law, 2012, "Justice and Beneficence in Military Medicine and Research" Ohio State Law School, Lexis)

[START OF ARTICLE]

The United States military has a long and checkered history of experimental research involving human subjects. It has sponsored clandestine projects that examined if race influences one's susceptibility to mustard gas, n1 the extent to which radiation affects combat effectiveness, n2 and whether psychotropic drugs could be used to facilitate interrogations or develop chemical weapons. n3 In each of these experiments, the government deliberately violated legal requirements and ethical norms that govern human-subjects research and failed to provide adequate follow-up medical care or compensation for those who suffered adverse health effects. In defending its decisions, the government argued that the studies and research methods were necessary to further the strategic advantage of the United States. n4

The military's contemporary research program is motivated by the same rationale. As the U.S. Defense Advanced Research Projects Agency (DARPA) explains, its goal is to "create strategic surprise for U.S. adversaries by maintaining the technological superiority of the U.S. military." n5 Current research sponsored by DARPA and the U.S. Department of Defense (DoD) [\*725] aims to ensure that soldiers have "no physical, physiological, or cognitive limitations." n6 The research includes drugs that keep soldiers awake for seventy-two hours or more, a nutraceutical that fulfills a soldier's dietary needs for up to five days, a vaccine that eliminates intense pain within seconds, and sophisticated brain-to-computer interfaces. n7

The military's emphasis on neuroscience is particularly noteworthy, with recent annual appropriations of over $ 350 million for cognitive science research. n8 Projects include novel methods of scanning a soldier's brain to ascertain physical, intellectual, and emotional states, as well as the creation of electrodes that can be implanted into a soldier's brain for purposes of neuroanalysis and neurostimulation. n9 One of the goals of the research is to create a means by which a soldier's subjective experience can be relayed to a central command center, and, in turn, the command center can respond to the soldier's experience by stimulating brain function for both therapeutic and enhancement purposes. n10 For example, the electrodes can be used to activate brain function that can help heal an injury or keep a soldier alert during difficult moments. n11 Another goal is to create a "connected consciousness" whereby a soldier can interact with machines, access information from the Internet, or communicate with other humans via thought alone. n12

In the context of military research, human subjects play an integral role in the development of new medicines and technologies. Although regulatory guidelines mandate that military physicians and researchers obtain voluntary and informed consent prior to experimentation on human subjects, n13 these protocols have not been followed faithfully. Moreover, in a number of instances, the DoD has sought and obtained informed consent waivers by [\*726] arguing that national security interests require that soldiers not be permitted to opt-out of "treatment" with investigational products. n14

The DoD's policies and practices violate fundamental tenets of medical ethics and expose countless service members to unknown and potentially serious health risks. These dangers are not illusory. An investigational drug that was administered pursuant to an informed consent waiver during the Gulf War has recently been correlated with serious adverse health effects that have debilitated over 174,000 service members. n15 This equates to more than one in four soldiers who fought during the war. n16 Despite the revelation, the military continues to mandate experimental use of medical products, and the informed consent waiver remains a strategic option for the DoD.

In addition to the health and bioethical concerns raised by widespread administration of experimental products and the failure to obtain informed consent, military law dictates that service members are legally obligated to submit to medical treatments deemed necessary for the good of the armed forces. n17 Pursuant to this authority, the DoD has mandated that soldiers take investigational medical substances as a requirement of service. n18 For the DoD, refusing "treatment" equates to disobeying an order, which can result in punitive measures that include a court-martial and dishonorable discharge from the military. n19

Coupled with the threat of severe punitive measures, military hierarchy often compels soldiers to submit to experimental treatment in instances where they otherwise may not have provided consent. n20 Given the socio-economic [\*727] demographics of U.S. service members, current military medical policies and conventions arguably propagate discriminatory practices that are reminiscent of the four decades of illegal and unethical research conducted by the U.S. government during the Tuskegee syphilis experiments. n21 Studies have consistently found that the odds of a person entering the military are correlated with economic status, race, family structure, high school academic achievement, and parental education. n22 In this respect, and notwithstanding our current all- volunteer military, the societal implications of permitting an individual the ability to contract away their freedom are troubling. n23

 [\*728]

Further troubling is the fact that, if experimental treatment or research harms a service member, sovereign immunity precludes the ability of the service member to seek legal remedies against the U.S. government. n24 Under the Feres doctrine, service members are precluded from raising tort claims against the government, government employees, or third-party contractors working in furtherance of governmental research if the underlying injury is sustained "in the course of activity incident to service" or relates to a discretionary function of military policy. n25 The United States Supreme Court has interpreted the Feres doctrine broadly to encompass claims that arise from experimental research, even in instances where the government covertly experimented on soldiers and intentionally disregarded legal requirements and informed consent protocols. n26

The purpose of this Article is not to challenge the legitimacy of the government's justification for engaging in experimental research. Research that furthers national security interests is not inherently unethical or unjustifiable. Rather, the goal of this Article is to examine the history of military medicine and research and propose amendments to the legal and regulatory regime. Given the military's emphasis on human enhancement and biomedical innovations, a reevaluation of the underlying legal and regulatory framework is both timely and prudent, particularly since the U.S. Department of Health and Human Services (HHS) is currently considering amendments to the federal requirements for human-subjects research. n27

Russia is a bigger threat

James Martin Center for Nonproliferation Studies at the Monterey Institute of International Studies January 2014

http://www.nti.org/country-profiles/russia/biological/

Russia's BW program legacy poses biological proliferation risks and environmental contamination challenges. With extensive international assistance, Russia has taken steps to mitigate biological proliferation risks—however, the majority of nonproliferation programs since the collapse of the USSR have addressed nuclear rather than biological threats. Analysts continue to express proliferation concerns over the security of Russia's pathogen culture collections, which have not been consolidated, and the possibility that former Soviet BW scientists could be recruited into BW programs elsewhere.

No impact

Mueller 99, John Mueller, Prof. Pol. Sci. @ Ohio State and Karl Mueller, June, ’99 (Foreign Affairs, l/n)

Biological weapons seem a promising candidate to join nuclear ones in the WMD club because, properly developed and deployed, they might indeed kill hundreds of thousands, perhaps even millions, of people. The discussion remains theoretical, however, because biological weapons have scarcely ever been used, even though knowledge of their destructive potential goes back centuries. (The English, for example, made some efforts to spread smallpox among American Indians during the French and Indian War.) Belligerents have eschewed such weapons with good reason, because biological weapons are extremely difficult to deploy and control. Although terrorist groups or rogue states may overcome such problems in the future through advances in knowledge and technology, the record thus far is not likely to encourage them. Japan reportedly infected wells in Manchuria and bombed several Chinese cities with plague-infested fleas before and during World War II. These ventures may have killed thousands of Chinese but apparently also caused thousands of unintended casualties among Japanese troops and had little military impact. In the 1990s the large and extremely well funded Japanese cult Aum Shinrikyo apparently tried at least nine times to set off biological weapons by spraying pathogens from trucks and wafting them from rooftops. these efforts failed to cause a single fatality -- in fact, nobody even noticed that the attacks had taken place. For best results biological weapons need to be dispersed in very low-altitude aerosol clouds, which is very difficult to do. Explosive methods of dispersion, moreover, may destroy the organisms. And except for anthrax spores, long-term storage of lethal organisms in bombs or warheads is difficult; even if refrigerated, most have a limited lifetime. The effects of such weapons are gradual, very hard to predict, and could spread back onto the attacker, and they can be countered with civil defense measures.

No court modeling

Law, Professor of Law and Professor of Political Science, Washington University in St. Louis, and Versteeg, Associate Professor, University of Virginia School of Law, June 2012

(David S. and Mila, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION,” 87 N.Y.U.L. Rev. 762, Lexis)

In 1987, to mark the bicentennial of the U.S. Constitution, Time magazine released a special issue in which it called the Constitution "a gift to all nations" and proclaimed proudly that 160 of the 170 nations then in existence had modeled their constitutions upon our own. n2 As boastful as the claim may be, the editors of Time were not entirely without reason. Over its two centuries of history, the U.S. Constitution has had an immense impact on the development of constitutionalism around the world. n3 Constitutional law has been called [\*765] one of the "great exports" of the United States. n4 In a number of countries, constitutional drafters have copied extensively, and at times verbatim, from the text of the U.S. Constitution. n5 Countless more foreign constitutions have been characterized as this country's "constitutional offspring." n6

It is widely assumed among scholars and the general public alike that the United States remains "the hegemonic model" for constitutionalism in other countries. n7 The U.S. Constitution in particular continues to be described as "the essential prototype of a written, single-document constitution." n8 There can be no denying the popularity of [\*766] the Constitution's most important innovations, such as judicial review, entrenchment against legislative change, and the very idea of written constitutionalism. n9 Today, almost 90% of all countries possess written constitutional documents backed by some kind of judicial enforcement. n10 As a result, what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state. n11

There are growing suspicions, however, that America's days as a constitutional hegemon are coming to an end. n12 It has been said that [\*767] the United States is losing constitutional influence because it is increasingly out of sync with an evolving global consensus on issues of human rights. n13 Indeed, to the extent that other countries still look to the United States as an example, their goal may be less to imitate American constitutionalism than to avoid its perceived flaws and mistakes. n14 Scholarly and popular attention has focused in particular upon the influence of American constitutional jurisprudence. The reluctance of the U.S. Supreme Court to pay "decent respect to the opinions of mankind" n15 by participating in an ongoing "global judicial dialogue" n16 is supposedly diminishing the global appeal and influence of American constitutional jurisprudence. n17 **Studies conducted by** [\*768] **scholars in other countries** have begun to **yield empirical evidence that citation to U.S. Supreme Court decisions by foreign courts is** in fact **on the decline**. n18 By contrast, however, the extent to which the U.S. Constitution itself continues to influence the adoption and revision of constitutions in other countries remains a matter of speculation and anecdotal impression.

**With** the help of **an extensive data set** of our own creation **that spans all national constitutions over the last six decades**, this Article explores the extent to which various prominent constitutions - including the U.S. Constitution - epitomize generic rights constitutionalism or are, instead, increasingly out of sync with evolving global practice. **A stark contrast can be drawn between the declining attraction of the U.S. Constitution as a model for other countries and the increasing attraction of the model provided by America's neighbor to the north**, **Canada**. We also address the possibility that today's constitution makers look for inspiration not only to other national constitutions, but also to regional and international human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Our findings do little to assuage American fears of diminished influence in the constitutional sphere.

Part I introduces the data and methods used in this Article to quantify constitutional content and measure constitutional similarity. Part II describes the global mainstream of rights constitutionalism, in the form of a set of rights that can be found in the vast majority of the [\*769] world's constitutions. From this core set of rights, we construct a hypothetical generic bill of rights that exemplifies current trends in rights constitutionalism. We then identify the most and least generic constitutions in the world, measured by their similarity to this generic bill of rights, and we pinpoint the ways in which the rights-related provisions of the U.S. Constitution depart from this generic model.

Part III documents the growing divergence of the U.S. Constitution from the global mainstream of written constitutionalism. Whether the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same: **The U.S. Constitution has become an increasingly unpopular model for constitutional framers elsewhere**. Possible explanations include the sheer brevity of the Constitution, its imperviousness to formal amendment, its omission of some of the world's generic constitutional rights, and its inclusion of certain rights that are increasingly rare by global standards.

Parts IV and V tackle the question of whether a prominent constitution from some other country has supplanted the U.S. Constitution as a model for global constitutionalism. Part IV contrasts the growing deviance of the U.S. Constitution from global constitutional practice with the increasing popularity of the Canadian approach to rights constitutionalism. Unlike its American counterpart, the Canadian Constitution has remained squarely within the constitutional mainstream. Indeed, **when Canada departed from the mainstream by adopting a new constitution**, **other countries followed its lead**. Closer examination reveals, however, that the popularity of the Canadian model is largely confined to countries with an Anglo-American legal tradition. In other words, our analysis suggests that Canada is in the vanguard of what might be called a Commonwealth model of rights constitutionalism, but not necessarily of global constitutionalism as a whole.

Part V considers whether the widely celebrated constitutions of Germany, South Africa, or India might instead be leading the way for global constitutionalism. **Although all** three are currently **more mainstream than the U.S. Constitution**, we find little evidence that global constitution-writing practices have been strongly shaped by any of the three.

Part VI explores the possibility that transnational human rights instruments have begun to shape the practice of formal constitutionalism at the national level. The evidence that international and regional human rights treaties may be serving as models for domestic constitutions varies significantly from treaty to treaty. In particular, [\*770] we find that the average constitution has increasingly grown to resemble the International Covenant on Civil and Political Rights and the European Convention on Human Rights, as well as the African Charter on Human and Peoples' Rights and the Charter of Civil Society for the Caribbean Community. There is little evidence, however, that any of these treaties is actually responsible for generating global consensus as to what rights demand formal constitutional protection. Although these treaties may express and reinforce preexisting global constitutional trends, they do not appear to define those trends in the first place.

Finally, the Conclusion discusses **possible explanations for the declining influence of American constitutionalism**. These **include a broad decline in American hegemony** across a range of spheres, **a judicial aversion to constitutional comparativism**, **a historical and normative commitment to American exceptionalism**, **and sheer constitutional obsolescence**.

SOP promotion fails

Thomas Carothers is vice president for studies at the Carnegie Endowment for International Peace, 06 (“Promoting the Rule of Law Abroad: In Search of Knowledge,” Chapter 1, http://carnegieendowment.org/2006/01/01/promoting-rule-of-law-abroad-in-search-of-knowledge/35vq)

The effects of this burgeoning rule-of-law aid are generally positive,¶ though usually modest. After more than ten years and hundreds of millions¶ of dollars in aid, many judicial systems in Latin America still function¶ poorly. Russia is probably the single largest recipient of such aid,¶ but is not even clearly moving in the right direction. The numerous ruleof-¶ law programs carried out in Cambodia after the 1993 elections failed¶ to create values or structures strong enough to prevent last year’s coup.¶ Aid providers have helped rewrite laws around the globe, but they have¶ discovered that the mere enactment **of laws accomplishes little** **without**¶ considerable investment in **changing the conditions** for implementation¶ and enforcement. Many Western advisers involved in rule-of-law assistance¶ are new to the foreign aid world and have not learned that aid¶ must support domestically rooted processes of change, not attempt to¶ artificially reproduce preselected results.¶ **Efforts to strengthen basic legal institutions have proven slow and difficult.¶** Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor¶ impact. The desirability of embracing such values as efficiency, transparency,¶ accountability, and honesty seems self-evident to Western aid¶ providers, but for those targeted by training programs, such changes¶ may signal the loss of perquisites and security. Major U.S. judicial reform¶ efforts in Russia, El Salvador, Guatemala, and elsewhere have foundered¶ on the assumption that external aid can substitute for the internal¶ will to reform.¶ Rule-of-law aid has been concentrated on more easily attained type¶ one and type two reforms. Thus it has affected the most important elements¶ of the problem least. Helping transitional countries achieve type¶ three reform that brings real change in government obedience to law is¶ the hardest, slowest kind of assistance. It demands powerful tools that¶ aid providers are only beginning to develop, especially activities that¶ help bring pressure on the legal system from the citizenry and support¶ whatever pockets of reform may exist within an otherwise selfinterested¶ ruling system. It requires a level of interventionism, political¶ attention, and visibility that many donor governments and organizations¶ cannot or do not wish to apply. Above all, it calls for patient, sustained¶ attention, as breaking down entrenched political interests, transforming¶ values, and generating enlightened, consistent leadership will¶ take generations.¶ The experience to date with rule-of-law aid suggests that it is best to¶ proceed with caution. The widespread embrace of the rule-of-law imperative¶ **is heartening, but it represents only the first step** for most transitional¶ countries on what will be a long and rocky road. Although the¶ United States and other Western countries can and should foster the¶ rule of law, even large amounts of aid will not bring rapid or decisive¶ results. Thus, it is good that President Ernesto Zedillo of Mexico has¶ made rule-of-law development one of the central goals of his presidency,¶ but the pursuit of that goal is certain to be slow and difficult,¶ as highlighted by the recent massacre in the south of the country. Judging¶ from the experience of other Latin American countries, U.S. efforts¶ to lighten Mexico’s burden will at best be of secondary importance. Similarly,¶ Wild West capitalism in Russia should not be thought of as a brief¶ transitional phase. The deep shortcomings of the rule of law in Russia¶ **will take decades to fix**. The Asian financial crisis has shown observers¶ that without the rule of law the Asian miracle economies are unstable.¶ Although that realization was abrupt, remedying the situation will be a¶ long-term enterprise.

This is an instance where law has zero impact

F. Joseph Dresen is a program associate at the Woodrow Wilson Center's Kennan Institute, 08 [“Vladimir Putin and the Rule of Law in Russia,” Wilson Center, April 2008, last date cited, http://www.wilsoncenter.org/publication/vladimir-putin-and-the-rule-law-russia]

"I give a faint-hearted endorsement to the effect of Putin's past eight years on the rule of law in Russia," said Jeffrey D. Kahn, assistant professor of law, Southern Methodist University at a 17 April 2008 Kennan Institute seminar. **There are plenty of good laws on the books in Russia**, according to Kahn, and Putin deserves credit for implementing important reforms and adhering to international legal obligations. "**But there is not enough** law with a capital L in Russia. There is not, for the most part, a legal culture."¶ Kahn focused on three "windows" of law under the Putin administration: the Second Chechen War, Russian membership in the Council of Europe, and Putin's efforts at legal codification—especially the new criminal procedure code. These three windows present different views of the state of Russian law. The first is bleak, the second hopeful, and the third ambivalent. In considering these themes, Kahn stressed that "although our standards for Russian law should be high, and our measures for whether the Russian government and society meets them rather inflexible, our expectations in the short run should be rather low."¶ When Vladimir Putin became prime minister, he was immediately confronted by renewed rebel activity in Chechnya as well as a series of bombings in Moscow and other Russian cities. Putin, with tremendous popular support, launched an immediate military campaign in Chechnya. Characterizing the war as a campaign on terrorism, Putin used the war to justify the centralization of executive power, according to Kahn. Putin's war substantially retarded the growth of a rule of law state. As the Russian military campaign in Chechnya continued, Kahn observed, "a certain callousness toward law spread north from the Caucasus as everything was covered in the sticky patina of fighting terrorism."¶ Yet as Putin expanded his power, Russia's membership in the Council of Europe proved to be a positive influence on the rule of law in Russia. Turning to this second "window" on Russia, Kahn stated: "I think that history will show the Council of Europe to have done more to advance the rule of law in Russia **than any other single institution**, political circumstance, or individual actor." In allowing Russia to join its club, the Council of Europe undertook the risk that Russian noncompliance with Council norms would undermine the institution's credibility. Another source of strain proved to be the caseload from Russia for the European Court of Human Rights—Russia accounts today for more than 20 percent of the Court's docket.¶ Yet Russia's acceptance of the jurisdiction of the Court has been so important to the rule of law that the risks are worthwhile, Kahn argued. Because the Court undertakes a close examination of Russian domestic law for compliance with the European Convention on Human Rights, which Russia has ratified, Kahn believes that "every judgment is a recipe for further reform." Kahn noted that while Russia loses case after case in the Court, the Court "commands the respect of the present Russian leadership." Russia's representatives to the Court abide by its rules, and the Russian state has paid every judgment against it, without exception.¶ Kahn's third "window" on legal reform was the adoption of a new criminal procedure code. "I think the most constructive reform of the Putin years…is the reform of **the criminal justice system**," Kahn declared. The reform was largely catalyzed by Russia's quest to join the Council of Europe, and resulted in important changes in Russia's criminal procedure. On paper, some aspects are an improvement on procedure in the United States, according to Kahn. For example, unlike in the United States, Russian police are not permitted to arrest individuals for offenses where incarceration is not a potential penalty. The power to detain individuals has shifted from prosecutors to judges, as well as the power to issue warrants to search homes or seize property. **Greater protections for defendants and witnesses are written into the code**, as well as the right to jury trials.¶ Kahn stressed that his description of the **remarkable reforms** in the Code reflect what is written rather than what is in practice on the ground. "There are stillgenerationsof police, prosecutors, judges, and defense lawyers **trained under the old regime**," Kahn cautioned. Yet while the older generations have resisted reforms, they are increasingly being displaced by a new cadre of younger professionals.¶ "How do we reconcile the positive effects of reforms in regular cases with the destructive effects of transparently political machinations in high-profile cases?" The short answer, Kahn answered, is we cannot. The state destroys respect for the rule of law by using law as a political tool to oppress its opponents. "But a more balanced answer takes into account that the new criminal procedure code **makes it** harder, although clearly not impossible, to conduct political trials," Kahn argued.

Russia is stable – only the plan risks collapse

Alexei Bayer, Economist, 12 [“Putin's Regime Won't Collapse Anytime Soon,” August 6, http://www.themoscowtimes.com/opinion/article/putins-regime-wont-collapse-anytime-soon/463185.html]

Russia has never been a normal country, but lately things have been getting a little too odd even by Russia's own standards.¶ The government has responded to public protests against corruption, incompetence and lack of legitimacy by flaunting those very qualities. It blatantly rigged parliamentary and presidential elections and then gave medals to those who did the rigging. It threw protesters and opposition figures in prison on trumped-up charges and rushed repressive, unconstitutional laws through the rubber-stamp State Duma. Even as the global economic situation becomes increasingly unstable, it continues to blithely waste public funds, ignoring alarming trends in international prices for oil and gas, Russia's main export commodities. Pilfering at all levels of government continues on a massive scale.¶ Two recent events epitomized this theater of the absurd: the trial of three young women from the Pussy Riot punk band for staging a performance at a Moscow church and the flood in the southern city of Krymsk in which a still-undetermined number of people died. National disasters have started to occur this year even before the advent of August, a traditionally difficult month for the country.¶ **A screw seems to be seriously loose within the government structure.** Today's Russia is a surreal place that seems to have emerged from the pages of 19th-century satirists Nikolai Gogol and Mikhail Saltykov-Shchedrin. It is a rogues' gallery of venal bureaucrats, lying politicians, sanctimonious priests, shifty businessmen, cops on the take and citizens pining away for the strong arm of Stalin. They are comic as literary caricatures but pathetic as the face of a nation.¶ With the government acting in an irrational and self-destructive manner, quite a few political commentators in Russia have concluded that President Vladimir Putin's regime, which appropriately enough will mark its 13th anniversary in August, is on its last legs. **Unfortunately, they are mistaken.¶** In 1974, when I left the Soviet Union, I voraciously read the literature put out by the original White Russian emigres who had escaped the Bolshevik Revolution. Strangely, throughout the Soviet period they were convinced that the Communist system was too perverted to survive for long. There was even a funny story about an exile from Petrograd who, upon arriving to Paris, refused to unpack his bags because he expected to go home soon.¶ Countless studies, books and journal articles were written by learned authors analyzing the inherent bankruptcy of the Communist economic theory, the foolishness of an atheist campaign in a pious country and the self-destructive nature of collectivization. The starvation of the early 1930s was sure to topple the regime, they proclaimed. When the Bolsheviks began purging each other, it was taken as a sign of a terminal crisis. The killing of top Red Army brass was seen as the swan song of the Bolsheviks. And so on, through Nikita Khrushchev's campaign to plant corn beyond the Arctic Circle and the decades of Leonid Brezhnev's senility.¶ In the end, the Soviet regime did collapse, **but it took 80 years**, not a few months as the White emigres had originally expected. Besides, it didn't perish because of the truculence or incompetence of its leaders. On the contrary, communism crumbled only when Soviet President Mikhail Gorbachev, overwhelmed by the surreal idiocy of its ideology and astonishing economic failures, decided to make the Soviet system a little more normal.¶ So never fear. As **long as no one in the current Russian government attempts any reforms**, the system is likely to endure § Marked 12:26 § for the remainder of Putin's natural life and beyond.

## 2NC

### spec

### GSpec – Limits

#### Our argument indicts solvency – court decisions are hollow without explicit grounds

Banks, 99 (Christopher P., Assistant Professor of Political Science, Butchel College of Arts and Sciences, “Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change,” 32 Akron L. Rev. 233, lexis)

A typical discussion of stare decisis and its impact on precedent often begins  [\*235]  with posing the question of whether there is a "special justification" [n9](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n9) for overruling past law. While this term defies simple definition, it is clear that the Court tries to adopt a principled approach in its stare decisis decision-making where "society [can] presume that bedrock principles are founded in law rather than in the proclivities of individuals." [n10](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n10) Using this rhetoric allows the Supreme Court to preserve the popular conception that it is a legitimate and neutral arbiter of public law. Justice Antonia Scalia's comments in Hubbard v. U.S. [n11](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n11) illustrate this point. Scalia, who has said that stare decisis is merely an "administrative convenience," [n12](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n12) cautioned in Hubbard against calling the underlying decision "wrongly decided." [n13](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n13) More justification in reversing precedent is needed, he said, because a judge "who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong." [n14](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n14) To do otherwise would completely nullify the doctrine's effect. [n15](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n15) Where to draw the judicial line between whimsical and principled behavior is less than clear if one acknowledges the inherent tendency of judges to manipulate the doctrine politically. Nevertheless, an examination of the Court's precedent cases indicates that there are at least five traditional legal criteria that the Court looks to whenever it tries to justify a departure from precedent. [n16](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n16) Ironically, the preeminent legal realist, Justice Benjamin Cardozo, best expressed these traditional legal standards. In his classic The Nature of the Judicial Process Cardozo reminds us that "adherence to precedent should be the rule and not the exception." [n17](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n17) But, while remaining true to the values of stare decisis boasts several advantages (including stability, predictability, and uniformity of law), [n18](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n18) Cardozo accepts the reality that judges are not irrevocably committed to what has gone on before. Rather, when faced with a decision to depart from stare decisis, he states that judges  [\*236]  should give more or less weight to precedent according to several factors, including: First, whether the court is deciding a constitutional or statutory case; second, whether the underlying decision is inconsistent with justice or the social welfare; and third, whether the precedent has produced a substantial reliance interest that prevents the court from overruling it. [n19](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n19) Supplementing the Cardozo formulation are two other legal criteria which are integral components of the judicial decision to overrule. The fourth factor is whether the underlying court spoke with one voice in pronouncing the rule of law; that is, the force of precedent depends upon whether the court making the precedent is unanimous or divided. [n20](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n20) The last key variable of the traditional paradigm is the age of the precedent, where the weight afforded the principle is contingent upon whether it has emerged as an authoritative rule over time. [n21](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n21)

### GSpec – Plantext key

#### 1. Plantext specifying grounds is key - Supreme Court procedure dictates that a file must be submitted with the grounds physically attached

WSCR 9. Washington State Court Rules 2009 (Rule 4.1, Direct Review of Superior Court Decision by Supreme Court, rules accurate as of September 2009,<http://www.courts.wa.gov/court_rules/?fa=court_rules.display&ruleid=apprap04.2>)

(b) Service and Filing of Statement of Grounds for Direct Review. A party seeking direct review of a superior court decision in the Supreme Court must within 15 days after filing the notice of appeal or notice for discretionary review, serve on all other parties and file in the Supreme Court a statement of grounds for direct review in the form provided in section (c). (c) Form of Statement of Grounds for Direct Review. The statement should be captioned "Statement of Grounds for Direct Review," contain the title of the case as provided in rule 3.4, and contain under appropriate headings and in the order here indicated: (1) Nature of the Case and Decision. A short statement of the substance of the case below and the basis for the superior court decision; (2) Issues Presented for Review. A statement of each issue the party intends to present for review; and (3) Grounds for Direct Review. The grounds upon which the party contends direct review should be granted. The statement of grounds for direct review should not exceed 15 pages, exclusive of appendices and the title sheet. (d) Answer to Statement of Grounds for Direct Review. A respondent may file an answer to the statement of grounds for direct review. In an appeal, the answer should be filed within 14 days after service of the statement on respondent. In a discretionary review, the answer should be filed with any response to the motion for discretionary review. The answer should not exceed 15 pages, exclusive of appendices and the title sheet.

### S

### 2nc circumvention—ov

Court oversight is a myth – judges are cherrypicked for being pro-executive hacks – empirics are overwhelming

Michael J. Glennon 14, I-law prof at Tufts, National Security and Double Government, <http://harvardnsj.org/wp-content/uploads/2014/01/Glennon-Final.pdf>

**The courts**, which Hamilton called the “least dangerous” branch, 243 **pose the least danger to the** silent transfer of power from the nation’s Madisonian institutions to the **Trumanite network. Federal judicial appointees are selected, and vetted** along the way, **by those whose cases they will later hear**: the Trumanites and their associates in the White House and Justice Department. Before an individual is named to the federal bench, a careful investigation takes place to ensure that that individual is dependable. What this means, in practice, is that **appointees end up as trusted friends of the Trumanites** in matters touching upon national security. Presidents do not appoint individuals who are hostile to the Trumanites, nor does the Senate confirm them. The deck is stacked **from the start against challenges to Trumanite policies**.

**Judicial nominees** often **come from the ranks of** prosecutors, law enforcement, and **national security officials, and they have often participated in the same** sorts of **activities the lawfulness of which they will later be asked to adjudicate**.244 A prominent example was former Chief Justice William Rehnquist.245 Before his 1971 appointment to the Supreme Court by President Richard Nixon, Justice Rehnquist served as Assistant Attorney General for the Office of Legal Counsel (“OLC”) under Attorney General John Mitchell.246 In that capacity, Rehnquist participated directly in military surveillance of domestic political groups, including the preparation of a memorandum for Mitchell in 1969 dealing with the Army’s role in the collection of intelligence on civilians in the United States.247 He also “played a critical role in drafting the 1969 presidential order that established the division of responsibility between the military and the Justice Department for gathering of intelligence concerning during civil disturbances.”248 He testified before the Senate Judiciary Committee’s Subcommittee on Constitutional Rights in March 1971 that there were no serious constitutional problems with respect to collecting data or keeping under surveillance persons who are merely exercising their right of a peaceful assembly or petition to redress a grievance.249 After his confirmation hearings to become Chief Justice, however, he wrote in August 1986 in response to written questions from Senator Mathias that he could not recall participating in the formulation of policy concerning the military surveillance of civilian activities.250 The Senate confirmed his appointment by a vote of sixty-eight to twenty-six on December 10, 1971.251 Shortly thereafter, the Court began considering Laird v. Tatum, 252 a case involving the lawfulness of Army surveillance of civilians who were engaged in political activities critical of the government.253 Justice Rehnquist declined to recuse himself, and the case was decided five to four.254 The result was that the case was not sent back to the trial court to determine, as the Court of Appeals had ordered, the nature and extent of military surveillance of civilian groups.255 Instead, Justice Rehnquist’s vote most likely prevented the discovery of his own prior role and that of his Justice Department colleagues in developing the Nixon Administration’s military surveillance policy.256

Justice Rehnquist’s case is but one example of the symbiosis that binds the courts to the Trumanite network. Justice Rehnquist was not the only member of the judiciary with Trumanite links. Other potential appointees had ample opportunity to prove their reliability. Justice Antonin Scalia, before his appointment to the Supreme Court, also served as Assistant Attorney General for OLC and also was appointed initially by President Nixon.257 During his tenure from 1974 to 1977 at OLC, Scalia later recalled, it fell to him to pass upon the legality of proposed covert operations by the intelligence community: “believe it or not, for a brief period of time, all covert actions had to be approved by me.”258 He attended daily meetings in the White House Situation Room with Director of Central Intelligence William Colby and other top intelligence officials and decided what classified documents should be made available to Congress.259 He was the legal point-person in dealing with congressional requests for information on intelligence matters; on behalf of the Ford Administration he asserted executive privilege before a House investigating committee when it recommended that Henry Kissinger be cited for contempt of Congress for failing to produce classified documents concerning U.S. covert operations abroad.260

Justice Samuel Alito is a former captain in the Army Signal Corps, which manages classified communication systems for the military. He later became an Assistant U.S. Attorney, prosecuting drug and organized crime cases, and then an assistant to Attorney General Ed Meese before moving to OLC. There he worked, as he put it, to “increase the power of the executive to shape the law.”261 He was nominated to be a federal court of appeals judge in 1990 by President (and former Director of Central Intelligence) George H. W. Bush. Once confirmed, Judge Alito established his reliability by voting against the daughters of civilians killed in a military plane crash to uphold the government’s refusal to show a federal judge the official accident report, on grounds of the state secrets privilege.262

Chief Justice John Roberts was a law clerk for Justice Rehnquist.263 In that capacity he reportedly264 contributed significantly to the preparation of Rehnquist’s opinion in Dames & Moore v. Regan, 265 in which the Court upheld the Executive’s power to extinguish pending law suits by Americans seeking compensation from Iran for property seized by the Iranian government.266 He moved on to the Justice Department and then President Reagan’s White House Office of General Counsel, where he drafted a letter for the President responding to retired Justice Arthur Goldberg, who had written Reagan that the U.S. invasion of Grenada was of doubtful constitutionality.267 Roberts wrote in the reply that the President had “inherent authority in international affairs to defend American lives and interests and, as Commander-in-Chief, to use the military when necessary in discharging these responsibilities.”268 Roberts’s memos, Charlie Savage has reported, “regularly took more extreme positions on presidential power than many of his colleagues.”269 Appointed to the U.S. Court of Appeals for the District of Columbia in 2003,270 Roberts, like Alito, further confirmed his reliability. He voted to uphold the system of military tribunals established by the Bush Administration271 (which the Supreme Court overturned in Hamdan v. Rumsfeld, 272 a decision in which Roberts recused himself)273 and to uphold the power of the President, pursuant to statute, to prevent the courts from hearing certain lawsuits (in that case, brought by members of the U.S. military who had been captured and tortured during the Gulf War).274

It might be thought that these and other similarly inclined judges who adhere to views congenial to the Trumanite network have been appointed not because of Trumanite links but because of their judicial philosophy and particular interpretation of the Constitution—because they simply believe in a strong Executive Branch, a viewpoint that appointing Presidents have found attractive. Justice Scalia seemingly falls into this category.275 As Assistant Attorney General he testified twice before Congress in opposition to legislation that would have limited the President’s power to enter into sole executive agreements.276 In judicial opinions and speeches before his appointment to the Supreme Court he frequently expressed opposition to judicial involvement in national security disputes. “[J]udges know little” 277 about such issues, as he wrote in one such case decided while he was a member of the U.S. Court of Appeals for the District of Columbia.278 He argued again for deference in another national security case that came before that court that raised claims of “summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities.”279 It was brought by plaintiffs that included twelve members of Congress, who argued violations of the Constitution, War Powers Resolution,280 and the Boland Amendments281 (which cut off funds for the activities at issue).282 Judge Scalia refused to hear arguments on the merits; where a policy had been approved by "the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA," he wrote, discretionary relief is inappropriate.283 After his appointment to the Supreme Court, Justice Scalia supported the executive oriented approach to treaty interpretation that the Reagan Administration relied upon in arguing that deployment of a space-based anti-ballistic missile ("ABM") system would not violate the ABM treaty (referring in his opinion to various Washington Post articles on the controversy).284 Later, in Rasul v. Bush,2\*5 the Court's majority held that federal district courts may exercise jurisdiction under the federal habeas statute to hear claims by foreign nationals detained by the United States. Justice Scalia dissented, denouncing the majority for "judicial adventurism of the worst sort."286 In Hamdan v. Rumsfeld?\*1 the majority held that a military commission established by the Executive lacked power to try the defendant; Justice Scalia dissented again, insisting that that conclusion was "patently erroneous."288 In Boumediene v. Bush,2\*9 the majority held that the defendant, a foreign national, had a constitutional privilege of habeas corpus; again Justice Scalia dissented. It came as no surprise when Justice Scalia expressed concern in a 2013 speech that the lawfulness of NSA surveillance could ultimately be decided by judges—"the branch of government that knows the least about the issues in question, the branch that knows the least about the extent of the threat against which the wiretapping is directed."290 **When the Trumanites' actions are at issue, submissiveness, not second-guessing, is the appropriate judicial posture**.

It is of course true that Justice Scalia and other such judges were and are appointed because of their judicial philosophy. The cause of their beliefs, however, is as irrelevant as it is unknowable; whatever the cause, the effect is the same—**they are reliable supporters** of the Trumanites. People tend to end up in organizations with missions compatible with their larger worldview, just as people once in an organization tend to adopt a worldview supportive of their organization’s mission. Position and judicial philosophy both are indicia of reliability. The question is not why a potential judicial appointee will come down the right way. The question is whether the appointee might reasonably be expected to do so.

It might also be argued that these justices were not sufficient in number ever to comprise a majority on the Supreme Court. In an era of increasingly close decisions, however, **one or two votes can be decisive**, and it must be remembered that this cursory review embraces only the Supreme Court; **numerous district and appellate court judges with ties to the Trumanite network also adjudicate national security cases. This group includes**, most prominently, the closest that the nation has to a national security court 291—the eleven members of the Foreign Intelligence Surveillance Court.

The court, or FISC as it is commonly called, was established in 1978 to grant warrants for the electronic surveillance of suspected foreign intelligence agents operating in the United States.292 Each judge is selected by the Chief Justice of the Supreme Court from the pool of sitting federal judges.293 They are appointed for a maximum term of seven years; no further confirmation proceedings take place, either in the Senate or the Executive Branch.294 The Chief Justice also selects a Chief Judge from among the court’s eleven judges.295 **All eleven of the sitting judges** on the FISC **were selected by** Chief Justice John **Roberts**; ten of the eleven were initially appointed to the federal bench by Republican presidents.296 A study by the New York Times concluded that since Roberts began making appointments to the court, 50% have been former Executive Branch officials.297

Normally, of course, courts proceed in public, hear arguments from opposing counsel, and issue opinions that are available for public scrutiny. Not so with the FISC. **All of its proceedings are closed to the public**.298 **The adversarial system** integral to American jurisprudence **is absent**. **Only government lawyers appear as counsel**, unanswered by any real or potential adverse party.299 The FISC has pioneered a two-tiered legal system, one comprised of public law, the other of secret law. FISC opinions—even redacted portions of opinions that address only the FISC’s interpretation of the constitutional rights of privacy, due process, or protection against unreasonable search or seizure—are rarely available to the public.300 Nancy Gertner, a former federal judge in Massachusetts, summed up the court: “The judges that are assigned to this court are judges that are not likely to rock the boat . . . . **All of the structural pressures that keep a judge independent are missing** there. **It’s one-sided, secret, and the judges are chosen in a selection process by one man**.”301 The Chief Judge of the FISC candidly described its fecklessness. “The FISC is forced to rely upon the accuracy of the information that is provided to the Court,” said Chief Judge Reggie B. Walton. “The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders.”302 The NSA’s own record proved him correct; an internal NSA audit revealed that it had broken privacy rules or overstepped its legal authority thousands of times since 2008.303 The judiciary, in short, does not have the foremost predicate needed for Madisonian equilibrium: “a will of its own.”304 Whatever the court, judges normally are able to find what appear to the unschooled to be sensible, settled grounds for tossing out challenges to the Trumanites’ projects. **Dismissal of** those **challenges is couched in arcane doctrine that harks back to early precedent, invoking implicitly the courts’ mystical pedigree and an aura of politics-transcending impartiality. But challenges to the Trumanites’ projects regularly get dismissed before the plaintiff ever has a chance to argue the merits** either before the courts or, sometimes more importantly, the court of public opinion. Try challenging the Trumanites’ refusal to make public their budget 305 on the theory that the Constitution does, after all, require “a regular statement and account of the receipts and expenditures of all public money”;306 or the membership of Members of Congress in the military reserve 307 on the theory that the Constitution does, after all, prohibit Senators and Representatives from holding “any office under the United States”;308 or the collection of phone records of the sort given by Verizon to the NSA on the theory that the law authorizing the collection is unconstitutional.309 Sorry, no standing, case dismissed.310 Try challenging the domestic surveillance of civilians by the U.S. Army311 on the theory that it chills the constitutionally protected right to free assembly,312 or the President’s claim that he can go to war without congressional approval 313 on the theory that it is for Congress to declare war.314 Sorry, not ripe for review, case dismissed.315 Try challenging the introduction of the armed forces into hostilities in violation of the War Powers Resolution.316 Sorry, political question, non-justiciable, case dismissed.317 Try challenging the Trumanites’ refusal to turn over relevant and material evidence about an Air Force plane accident that killed three crew members through negligence,318 or about racial discrimination against CIA employees,319 or about an “extraordinary rendition” involving unlawful detention and torture.320 Sorry, state secrets privilege, case dismissed.321Sometimes the courts have no plausible way of avoiding the merits of national security challenges. Still, the Trumanites win. The courts eighty years ago devised a doctrine—**the "non-delegation doctrine**"—that forbids the delegation of legislative power by Congress to administrative agencies.322 Since that time it **has rarely been enforced, and never has the Court struck down any delegation of national security authority to the Trumanite apparatus**.323 **Rather, judges stretch to find "implied" congressional approval of Trumanite initiatives.** Congressional silence**, as construed by the courts,** constitutes acquiescence.324 Even if that hurdle can be overcome, the **evidence** necessary to succeed **is difficult to get**; as noted earlier,325 **the most** expert **and informed** witnesses **all** have signed nondisclosure agreements, which prohibit any discussion of "classifiable" information without pre-publication review by the Trumanites. As early as 1988, over three million present and former federal employees had been required to sign such agreements as a condition of employment.326 Millions more have since become bound to submit their writings for editing and redaction before going to press. And as the ultimate trump card, **the Trumanites are cloaked in**, as the Supreme Court put it, "the very delicate, **plenary** and exclusive **power** of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."327 The basis of their power, the Court found, is, indeed, not even the Constitution itself; the basis of Trumanile power is external sovereignly—the membership of the United States in the community of nations, which confers extra-constitutional authority upon those charged with exercising it.32s

As is true with respect to the other Madisonian institutions, there are, of course, instances in which the judiciary has poached on the Trumanites' domain. The courts rebuffed an assertion of the commander-in chief power in ordering President Truman to relinquish control of the steel mills following their seizure during the Korean War.329 Over the Trumanites' objections, the courts permitted publication of the Pentagon Papers that revealed duplicity, bad faith, and ineptitude in the conduct of the Vietnam War.330 The Supreme Court did overturn military commissions set up to try enemy combatants for war crimes,331 and two years later found that Guantanamo detainees had unlawfully been denied habeas corpus rights.332 Personnel does sometimes matter. **Enough apparent** counterexamples **exist to** preserve the facade.

Yet the larger picture remains valid. Through the long list of military conflicts initiated without congressional approval—Grenada, Panama, Kosovo, and, most recently, Libya—**the courts have never stopped a war**, with one minor (and temporary) exception. In 1973, Justice William O. Douglas did issue an order to halt the bombing of Cambodia 333—which lasted a full nine hours, until the full Supreme Court overturned it.-34 The Court's "lawless" reversal was effected through an extraordinary telephone poll of its members conducted by Justice Thurgood Marshall. "[S]ome Nixon men." Douglas believed, "put the pressure on Marshall to cut the corners."135 Seldom do judges call out even large-scale constitutional violations that could risk getting on the wrong side of an angry public, as American citizens of Japanese ethnicity discovered during World War II.-36 Whatever the cosmetic effect, the four cases representing the Supreme Court's supposed "push-back" against the War on Terror during the Bush Administration freed, at best, a tiny handful of detainees.337 As of 2010 fewer than 4% of releases from Guantanamo followed a judicial release order.338 A still-unknown number of individuals, numbering at least in the dozens, fared no better. These individuals were detained indefinitely— without charges, based on secret evidence, sometimes without counsel—as "material witnesses" following 9/11.339 One can barely find a case in which anyone claiming to have suffered even the gravest injury as the result of the Bush-Obama counterterrorism policies has been permitted to litigate that claim on the merits—let alone to recover damages. The Justice Department's seizure of Associated Press ("AP") records was carried out pursuant to judicially-approved subpoenas, in secret, without any chance for the AP to be heard.340 **The FISC** 341 **has barely pretended to engage in real judicial review**. Between 1979 and 2011, the court received 32,093 requests for warrants. It granted 32,087 of those requests, and it turned down eleven.342 In 2012, the court received 1,789 requests for electronic surveillance, one of which was withdrawn. All others were approved.343 The occasional counterexample notwithstanding, the courts cannot seriously be considered a check on America's Trumanite network.

Judges can do whatever they want

McGuire, 2005

Kevin McGuire, associate professor of Political Science at UNC, and Michael MacKuen, professor of Political Science at UNC, ‘5, “Precedent and Preferences on the U.S. Supreme Court,” http://www.unc.edu/~kmcguire/papers/precedent.pdf

An alternative approach examines the alteration of precedent, analyzing when and why the Supreme Court overturns its past policies. If stare decisis genuinely constrained the members of the Court, then they should be unwilling to reconsider precedents, even those with which they may personally disagree. It turns out, however, that precedents are quite vulnerable, especially those that conflict with the policy dispositions of the justices (see, e.g., Brenner and Spaeth 1995; Segal and Howard 2000). Again, the evidence supports the attitudinal, rather than the legal model. No doubt the best evidence on the importance of stare decisis measures the degree to which justices who oppose a newly established precedent modify their behavior by accepting the authority of that precedent in subsequent cases (Spaeth and Segal 1999). In landmark decisions (i.e., cases for which there are no genuine precedents), the members of the Court are not bound by the dictates of stare decisis and are free to follow their preferences. If the justices were truly affected by precedent, then they would adjust accordingly, supporting the application of that new precedent in later litigation. By this standard, **precedent does not exert much influence**; it turns out that, **across the Court’s entire history**, the justices have rarely modified their behavior after the Court adopts new policies with which they disagree. This is quite powerful; it convincingly demonstrates that individual justices see little need to support the decisions of their brethren, even when there are strong legal reasons for doing so. Given the choice between a disagreeable principle and their own attitudinal inclinations, most members of the Court simply stand by their preferences.

Legal rights for detention are a complete farce

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(Saby, 57 Wayne L. Rev. 163)

Rights can be suspended if the bestowal process contains the adequate construct to suspend them, perhaps an impossible or even a circular argument. But fundamentally, rights have to be created or their existence mutually agreed upon or admitted into the prevailing construct for them to be suspended. They cannot be unilaterally disinherited from people by advancing the argument of evilness. n184 Despite its recognition of certain inherent inalienable rights for individuals within American [\*201] jurisprudence, n185 it was never recognized for the "evil-doers" n186 at Guantanamo. I mention this development, not because rights were [\*202] suspended or denied, but rather because the discussion should turn on whether these rights were ever envisioned for humans that were brought to Guantanamo for the purpose of detention. The existential threat posed by the detainees was so overpowering, as revealed through the narrative of evil, or what Professor Muneer Ahmad alludes to as the narrative of monstrosity, n187 that certain rights were never envisioned for individuals painted as the bearer of that existential threat. Therefore, if a right has never been introduced within a construct, can it ever be suspended? The rights inquiry for Guantanamo detainees should center on this frame, as conversations must continue to develop a more deterministic rights framework for the two-hundred or so detainees who are yet to have their day in court. n188

B. Legal Rights

Legal rights are not created in a vacuum. Whenever there is a physical entity or a living entity residing within that physical space, legal rights ought to be created. Universally, we can frame legal rights as those that are created whenever a physical space or a living entity is recognized. Therefore, whenever any combination of physical space and living entity is recognized, legal rights are created. These legal rights act as a supervisory framework that defines the movement of living entities within the physical space without taking away the set of inherent inalienable rights to which all humans are entitled. n189 As I have [\*203] established through discussions so far, the supervisory regime at Guantanamo went to great lengths to deny legal rights to detainees most of the time. n190 Despite a few cases of individual detainees emerging through obscurity, as revealed through their successes in advancing the Supreme Court jurisprudence, n191 the legal rights narrative at Guantanamo has largely been that of non-recognition. The appearance of providing legal rights has been a carefully orchestrated event, as revealed through various firsthand accounts from lawyers and rights groups. n192 Despite publicly admitting to the contrary, n193 there has been a systemic and [\*204] deliberate effort by the Administration to deny basic rights, as seen from the images of the very first shackled detainee being loaded on a helicopter on his way to Camp Delta in Guantanamo. n194 Suspension of rights, to loosely connote the broader narrative of rights denial of Guantanamo, has been legally sanctioned from the very outset. n195 Some actions remained and continue to remain within the sphere of illegality, such as inhumane torture, which has not been seen by a civilized nation since the slave trade days. n196 Other illegal acts of human degradation, such as water boarding n197 and extraordinary rendition n198 remained under a fog of suspicion, whose instances have been established but never sufficiently explained. n199 Various other suspicious acts at the detention facility, such as excessive instances of cardiac arrest n200 and death in custody, n201 continue to be occluded from transparency in the name of security, territorial integrity, and the classified nature of the details. n202

Thus, the paradox of Guantanamo lies in the realization that when we construct a dialogue surrounding the nature of legal rights of detainees, we cannot escape the fact that any abdication of such rights was done in a meticulously calibrated and cogently framed sophisticated framework. This has manifested itself in torture memos, n203 internal [\*205] White House communications, n204 a multitude of review panels and tribunals, n205 periodic farcical review boards, n206 and scholarly military law journal articles. n207 However, throughout the concoction of this legal "absurdism" n208 to establish legality within the multitude of illegal acts, we acquire the realization that **legal rights were never envisioned for the detainees.** Thus, not recognizing those rights was the primary objective and it was designed not as a-means-to-an-end, but rather an end to be achieved by any means.

C. Human Rights

In my examination of the rights narrative at Guantanamo, I seek to examine whether the detainees' human rights were ever recognized or even envisioned at Guantanamo. This inquiry centers on understanding under what framework the detainees' human rights are processed. Understanding the human rights construct of Guantanamo would perhaps allow us to envision a prospective end game, besides attempting to place the Guantanamo narrative within its intended ontological space. Earlier, I suggested that rights must be envisioned in order to be executed. Professor Muneer Ahmad examined the coercive dimension of rights by posing two questions: "Is there a right without a remedy?" and "Are rights self-executing?" n209 In my view, answers to these questions go back to the fundamental issue of whether rights can be recognized if the other parties to this mutual execution of rights were never part of the original discussion. If there is a unilateral play, however, the answer depends on [\*206] whether we recognize remedy without rights, part of what the Guantanamo-related Supreme Court jurisprudence centered on. n210

The context here takes us to the next level of discussion vis-?vis Guantanamo--can we locate a right, even without recognizing its emergence? Indeed, most discussions of Guantanamo begin with "rights" and end with "rights," in part due to the more popular representation framework. The difficulty of this restricted approach lies in the fact that this viewpoint does not allow for an in-depth understanding of Guantanamo's complexity or it's inter-relationship with other socio-cultural narratives that I introduce in this current discourse. "Lack of rights" or "suspension of rights," in this context, is only part of the story, a perspective that has also been supported by Professor Ahmad's work. n211 However, if Guantanamo is viewed from existing within an ontological space, the argument turns on whether an ontological space consists of any combination of living entity and physical space. This abstraction would suggest that we must be able to locate rights within Guantanamo--the ontological space. By default, every living entity, including the much maligned detainees, should have human rights while they are in Guantanamo. n212

While pondering over the argument that rights are acquired over time, we must recognize that we cannot allow eternity to pass before rights of detainees become accepted within the applicable legal framework. Professor Ahmad reflected on this, by capturing the observations of Sarat and Kearns, "Rights, which are claimed to be natural and unalienable, do not spring fully formed at the conclusion of some philosophical argument or analysis: instead, they take a long time to be realized and instantiated." n213 I must ask: How long is a long time? When one's very existence is at stake, the basic fundamental human right to existence is being violated, could we rely on the ephemeral nature of rights and wait for eternity for them to be realized? Neither the slaves of Amistad, nor the hundreds of detainees in Guantanamo would think so. That would mean humans can be thrown into the deep vortex of the [\*207] paradigmatic legal black hole never to be heard from again in this life--a logically anomalous proposition that we must reject outright.

The contemporary human rights jurisprudence guides us to deal with a set of doctrinal conditions along the lines of which each individual human, detainee or non-detainee, must be allowed to live within a physical space. By virtue of rights that emanate from being in a physical space, n214 the doctrinal developments would seem to be at odds with the various torture mechanisms, the indefinite detentions and lack of access to justice mechanisms. We are not necessarily focusing on the severity of the punishment that may be the logical outcome for some of the hardcore terrorists. However, not having the adequate procedure to get to that endpoint would defy logic according to contemporary human rights jurisprudence. n215 So, while we might locate rights in the ontological space, they still are not flowing from the current Administration of the ontological space--an act of illegality that Guantanamo should be viewed from. n216

To understand the illegality, let us analyze the framework of detention in its various phases. First, there is the detention without recourse to legal process. n217 Second, there is detention with inhumane conditions, not resulting in torture. n218 Third, detention punctuated with periodic torture and frequent trips to non-Guantanamo destinations. n219 Does modern human rights jurisprudence support any of the above procedural treatments? n220 If it does not, why was this allowed to continue [\*208] and most likely still continue? n221 This is a difficult scenario to accept. We are not talking about a smaller, less developed nation. Rather we are talking about a civilized society, a nation that not only is the moral leader of the civilized world, but is the self-proclaimed champion of human rights discourse. n222 This exuberance of inhumanity n223 has to be internalized from all coercive measures at play. Not only are there individual detainees existing within the physical space of Guantanamo, but also these detainees go in and out of the physical space of the Guantanamo detention facility from various external extraordinary rendition locations. n224 Based on evidence uncovered so far, not only did the U.S. engage in such activities, n225 but the deception, layering, and premeditation of such actions caused much debilitating harm to the broader world community. n226 Even if, for the sake of argument, we set aside the treatment of detainees as subject to judicial determination, the collateral consequences of such actions alone cause grave concerns from a human rights discourse. n227 This concern should be part of the narrative of rights to adequately understand the construct of Guantanamo.

 [\*209] For example, when Moroccan security personnel, at the behest of the Americans, knife through the penis of a human, n228 or when Egyptian security personnel keep a detainee chained in the fetal position inside an ice-like closet for more than eighteen hours, n229 or when a Syrian security officer mercilessly whips a cable across the open palm of a weakened detainee, n230 what broader message gets sent to the rest of the world? The more serious inquiry centers on where these human actions of inhumanity find support, legally, morally and sociologically? This is the very essence of Guantanamo as an existential phenomenology--that which goes beyond legal realism in encapsulating humanity's mortal fear, deep-seated inhumane instincts, and violent virulence. Perhaps, in a paradoxical representation, these actions may not be happening in the physical space called Guantanamo, but are happening within that ontological construct of Guantanamo. n231 In this way, we must begin to think of Guantanamo as a phenomenon which extends far beyond its actual physical manifestation. Sadly, this manifestation also represents the devolution of humanity. Unfortunately, pursuit of an existential objective has annihilated the human rights construct of Guantanamo mostly due to the focus of our contemporary discourse on the end to be achieved, where not much critical analysis has been focused on the means to that goal.

### Adv 1

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The advantage is the logic of continuous expansion-of influence, of power, of legal norms—which underlies the US imperial regime---their author concludes Boumediene made judicial power SUFFICIENT to solve heg

Knowles, assistant professor at the New York University school of law, Spring 2009

(Robert, “American Hegemony and the Foreign Affairs Constitution,” 41 Ariz. St. L.J. 87, Lexis)

The hegemonic model generally values courts' institutional competences more than the anarchic realist model. The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations - liberty, accountability, and effectiveness - against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

[End of Cal’s “key to U.S. leadership” card]

The domestic deference doctrines - such as Chevron and Skidmore - are hardly models of clarity, but they are applied and discussed by the courts much more often than foreign affairs deference doctrines, and can be usefully applied to foreign affairs cases as well. n387 The domestic deference doctrines are a recognition that legal interpretation often depends on politics, just as it does in the international realm. n388 Most of the same functional rationales - expertise, accountability, flexibility, and uniformity - that are advanced in support of exceptional foreign affairs deference also undergird Chevron. Accordingly, Chevron deference provides considerable latitude for the executive branch to change its interpretation of the law to adjust to foreign policy requirements. Once courts determine that a statute is ambiguous, the reasonableness threshold is [\*149] easy for the agency to meet; that is why Chevron is "strong medicine." n389 At the same time, Chevron's limited application ensures that agency interpretations result from a full and fair process. Without such process, the courts should look skeptically on altered interpretations of the law.

Returning to domestic deference standards as a baseline clarifies the ways in which foreign affairs are truly "special." The best response to the special nature of foreign affairs matters does not lie simply in adopting domestic deference on steroids. Instead, accurate analysis must also take into account the ways in which the constitutional separation of powers already accommodates the uniqueness of foreign affairs. Many of the differences between domestic and foreign affairs play out not in legal doctrine, but in the relationship between the President and Congress. Under the hegemonic model, courts would still wind up deferring to executive branch interpretations much more often in foreign affairs matters because Congress is more likely to delegate law-making to the executive branch in those areas. n390

Nonetheless, foreign relations remain special, and courts must treat them differently in one important respect. In the twenty-first century, speed matters, and the executive branch alone possesses the ability to articulate and implement foreign policy quickly. Even non-realists will acknowledge that the international realm is much more susceptible to crisis and emergency than the domestic realm. But speed remains more important even to non-crisis foreign affairs cases. n391 It is true that the stable nature of American hegemony will prevent truly destabilizing events from happening without great changes in the geopolitical situation - the sort that occur over decades. The United States will not, for some time, face the same sorts of existential threats as in the past. n392 Nonetheless, in foreign affairs matters, it is only the executive branch that has the capacity successfully to conduct [\*150] treaty negotiations, for example, which depend on adjusting positions quickly.

The need for speed is particularly acute in crises. Threats from transnational terrorist groups and loose nuclear weapons are among the most serious problems facing the United States today. The United States maintains a "quasi-monopoly on the international use of force," n393 but the rapid pace of change and improvements in weapons technology mean that the executive branch must respond to emergencies long before the courts have an opportunity to weigh in. Even if a court was able to respond quickly enough, it is not clear that we would want courts to adjudicate foreign affairs crises without the deliberation and opportunities for review that are essential aspects of their institutional competence. Therefore, courts should grant a higher level of deference to executive branch determinations in deciding whether to grant a temporary restraining order or a preliminary injunction in foreign affairs matters. Under the super-strong Curtiss-Wright deference scheme, the court should accept the executive branch interpretation unless Congress has specifically addressed the matter and the issue does not fall within the President's textually-specified Article I powers.

But there are limits. Although speed matters a great deal during crises, its importance diminishes over time and other institutional competences assume greater importance. When decisions made in response to emergencies are cemented into policy over the course of years, the courts' institutional capabilities - information-forcing and stabilizing characteristics - serve an important role in evaluating those policies. n394 Once a sufficient amount of time has passed, the amount of deference given to executive branch determinations should be reduced so that it matches domestic deference standards.

One of the core realist arguments for deference, the risk of collateral consequences, carries far less weight under a hegemonic model. Court decisions have consequences for third parties in the domestic realm all of the time. Given the hierarchical nature of U.S. hegemony, the response from other nations is likely to be more similar to the response by domestic parties than in the past. A typical example invoked by deferentialists involves a court decision - for example, recognizing the government of Taiwan - that angers the Chinese government. n395 Although such a scenario is not out of the question, there are several reasons why the consequences would not be as dire as often predicted by deferentialists. American military dominance [\*151] makes it highly unlikely that war would result from such an incident. n396 Moreover, China, too, cares about legitimacy and is far more likely to retaliate in some other way, possibly harming the United States' interests, but through means that would capture attention in the U.S. domestic realm, leading to accountability opportunities. Assuming that the decision is non-constitutional, the Chinese government could seek to have its preferred interpretation enacted into law.

Indeed, it is entirely possible that other nations would be content with conflicting decisions from different branches of the U.S. government. Suppose that the President roundly condemns the offensive court decision and declares the judge to be an "activist." If the damage done by the court decision was largely dignitary, an angry denouncement from the executive branch may be all that is needed. Past empires relied on multi-vocal signaling to maintain imperial rule. n397 But with the advent of globalization, intra-executive branch multi-vocality is much more difficult because advances in communication permit various parts of the "rim" to communicate with one another. n398 The American separation-of-powers system provides a way around this problem, allowing the U.S. government to "speak in different voices" at once.

C. Applying the Hegemonic Model: The Enemy Combatant Cases

In the wake of 9/11, the United States invaded Afghanistan and toppled the Taliban government. n399 Thousands of men, most captured by our allies in Pakistan and Afghanistan (but also many other places around the world), were transferred to U.S. custody and detained in a network of prisons stretching from Afghanistan to Eastern Europe to Asia to Guantanamo Bay, Cuba. n400 The President made an executive determination that all detainees held at Guantanamo were "enemy combatants," and that the law of armed conflict - specifically, the Geneva Conventions - did not apply to them. n401 [\*152] The detainees were deliberately held in places where they were thought to have no rights under the U.S. Constitution or any other domestic law. n402 In 2003, the United States invaded Iraq, disrupting relationships with allies and leading to a decline in support around the world for U.S. foreign policy. n403 Theories of American Empire became a hot topic of discussion in the time leading up to, and following, the Iraq invasion. n404 Meanwhile, the Guantanamo detainees began to file habeas claims and the litigation wound its way up to the Supreme Court. n405 The Abu Ghraib prison abuse scandal broke in May 2004, n406 a month before the Court decided Rasul, n407 which was the first enemy combatant case and appeared to herald a shift in the Court's approach to special deference.

The Court may be finally adjusting to the reality of American power. The U.S. has been a global hegemon since 1991 and has used military means to enforce international law norms: for example, the U.S.-led bombing of Serbia in 1998 halted ethnic cleansing in Kosovo. n408 But the scope and impact of America's projection of power since 9/11 has underscored the significance of its unique status. The classic realist view of the world - with great powers achieving a consensus that preserves a precarious balance of power - no longer fits. n409 Accordingly, the institutional competences most valued for achieving governmental effectiveness in foreign affairs in the classic realist world (with the exception of speed) have become less important, and other competences have become more important.

 [\*153] Nonetheless, since 9/11, deferentialists have argued that the classic realist justifications for special deference apply with even more force to the war on terror. n410 This is the constitutional equivalent of a problem that has hobbled U.S. foreign policy in the twenty-first century - the persistence of Cold War paradigms in strategic thinking. Administration officials, in the early days after 9/11, tended to lump together terrorist groups such as al Qaeda and rogue states such as Iraq into one common existential enemy to occupy the position of the former Soviet Union. n411 The threat posed by al Qaeda is different because it cannot hope to remove the U.S. from its position as global hegemon - only another great power could do that. Instead, the terrorist threat presents a challenge of hegemonic management that can only be met by the combined effort of all branches of the U.S. government. In the enemy combatant cases, the Court seems to have recognized this shift and asserted its authority. But whether or not the enemy combatant cases were decided with these sorts of broad geopolitical concerns in mind, the changed hegemonic order justifies the jurisprudence.

The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation - the United States. n412 As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees.

Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. The [\*154] transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416

Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels. n420 The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests. n421 In the Guantanamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations.

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424

The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429

In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436

Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438

At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440

The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige.

Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449

Conclusion

When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

BUT their insistence that that’s NOT ENOUGH is the kneejerk drive for ordering that structures global violence

McClintock ‘9 (Anne, chaired prof of English and Women’s and Gender Studies at UW–Madison. MPhil from Cambridge; PhD from Columbia, “Paranoid Empire: Specters from Guantánamo and Abu Ghraib,” Small Axe Mar2009, Issue 28, p50-74, MUSE)

By now it is fair to say that the United States has come to be dominated by two grand and **dangerous hallucinations**: the promise of benign US globalization and the permanent threat of the “war on terror.” I have come to feel that we cannot understand the extravagance of the violence to which the US government has committed itself after 9/11—two countries invaded, thousands of innocent people imprisoned, killed, and tortured—unless we grasp a defining feature of our moment, that is, a deep and disturbing doubleness with respect to power. Taking shape, as it now does, around fantasies of global omnipotence (Operation Infinite Justice, the War to End All Evil) coinciding with nightmares of impending attack, the United States has entered the domain of **paranoia**: dream world and catastrophe. For **it is only in paranoia** that one finds simultaneously and in such condensed form both deliriums of absolute power and forebodings of perpetual threat. Hence the spectral and nightmarish quality of the “war on terror,” a limitless war against a limitless threat, a war vaunted by the US administration to encompass all of space and persisting without end. But the war on terror is not a real war, for “terror” is not an identifiable enemy nor a strategic, real-world target. The war on terror is what William Gibson calls elsewhere “a consensual hallucination,”4 and the US government can fling its military might against ghostly apparitions and hallucinate a victory over all evil only **at the cost of** **catastrophic self-delusion** **and the infliction of great calamities elsewhere**. I have come to feel that we urgently need to make visible (the better politically to challenge) those established but concealed circuits of imperial violence that now animate the war on terror. We need, as urgently, to illuminate the continuities that connect those circuits of imperial violence abroad with the vast, internal shadowlands of prisons and supermaxes—the modern “slave-ships on the middle passage to nowhere”—that have come to characterize the United States as a super-carceral state.5 Can we, the uneasy heirs of empire, now speak only of national things? If a long-established but primarily covert US imperialism has, since 9/11, manifested itself more aggressively as an overt empire, does the terrain and object of intellectual inquiry, as well as the claims of political responsibility, not also extend beyond that useful fiction of the “exceptional nation” to embrace the shadowlands of empire? If so, how can we theorize the phantasmagoric, imperial violence that has come so dreadfully to constitute our kinship with the ordinary, but which also at the same moment renders extraordinary the ordinary bodies of ordinary people, an imperial violence which in collusion with a complicit corporate media would render itself invisible, casting states of emergency into fitful shadow and fleshly bodies into specters? For imperialism is not something that happens elsewhere, an offshore fact to be deplored but as easily ignored. Rather, the force of empire comes to reconfigure, from within, the nature and violence of the nation-state itself, giving rise to perplexing questions: Who under an empire are “we,” the people? And who are the ghosted, ordinary people beyond the nation-state who, in turn, constitute “us”? We now inhabit a crisis of violence and the visible. How do we insist on seeing the violence that the imperial state attempts to render invisible, while also seeing the ordinary people afflicted by that violence? For to allow the spectral, disfigured people (especially those under torture) obliged to inhabit the haunted no-places and penumbra of empire to be made visible as ordinary people is to forfeit the long-held US claim of moral and cultural exceptionalism, the traditional self-identity of the United States as the uniquely superior, universal standard-bearer of moral authority, a tenacious, national mythology of originary innocence **now in tatters.** The deeper question, however, is not only how to see but also how to theorize and oppose the violence without becoming beguiled by the seductions of spectacle alone.6 Perhaps **in the labyrinths of torture we must also find a way to speak with ghosts**, for specters disturb the authority of vision **and the hauntings of popular memory disrupt the great forgettings of official history.** Why paranoia? Can we fully understand the proliferating circuits of imperial violence—the very eclipsing of which gives to our moment its uncanny, phantasmagoric cast—without understanding the pervasive presence of the paranoia that has come, quite violently, to manifest itself across the political and cultural spectrum as a defining feature of our time? By paranoia, I mean not simply Hofstadter’s famous identification of the US state’s tendency toward conspiracy theories.7 Rather, I conceive of paranoia as an inherent contradiction with respect to power: a double-sided phantasm that oscillates precariously between deliriums of grandeur and nightmares of perpetual threat, a deep and dangerous doubleness with respect to power that is held in unstable tension, but which, if suddenly destabilized (as after 9/11), **can produce pyrotechnic displays of violence.**

The pertinence of understanding paranoia, I argue, lies in its peculiarly intimate and peculiarly dangerous relation to violence.8 Let me be clear: I do not see paranoia as a primary, structural cause of US imperialism nor as its structuring identity. Nor do I see the US war on terror as animated by some collective, psychic agency, submerged mind, or Hegelian “cunning of reason,” nor by what Susan Faludi calls a national “terror dream.”9 Nor am I interested in evoking paranoia as a kind of psychological diagnosis of the imperial nation-state. Nations do not have “psyches” or an “unconscious”; only people do. Rather, a social entity such as an organization, state, or empire can be spoken of as “paranoid” if the dominant powers governing that entity cohere as a collective community around contradictory cultural narratives, self-mythologies, practices, and identities that oscillate between delusions of inherent superiority and omnipotence, and phantasms of threat and engulfment. The term paranoia is analytically useful here, then, not as a description of a collective national psyche, nor as a description of a universal pathology, but rather as an analytically strategic concept, a way of seeing and being attentive to contradictions within power, a way of making visible (the better politically to oppose) the contradictory flashpoints of violence that the state tries to conceal. Paranoia is in this sense what I call a hinge phenomenon, articulated between the ordinary person and society, between psychodynamics and socio-political history. Paranoia is in that sense dialectical rather than binary, for its violence erupts from the force of its multiple, cascading contradictions: the intimate memories of wounds, defeats, and humiliations condensing with cultural fantasies of aggrandizement and revenge, in such a way as to be productive at times of unspeakable violence. For how else can we understand such debauches of cruelty? A critical question still remains: does not something terrible have to happen to ordinary people (military police, soldiers, interrogators) to instill in them, as ordinary people, in the most intimate, fleshly ways, a paranoid cast that enables them to act compliantly with, and in obedience to, the paranoid visions of a paranoid state? Perhaps we need to take a long, hard look at the simultaneously humiliating and aggrandizing rituals of militarized institutions, whereby individuals are first broken down, then reintegrated (incorporated) into the larger corps as a unified, obedient fighting body, the methods by which schools, the military, training camps— not to mention the paranoid image-worlds of the corporate media—instill paranoia in ordinary people and fatally conjure up collective but unstable fantasies of omnipotence.10 In what follows, I want to trace the flashpoints of imperial paranoia into the labyrinths of torture in order to illuminate three crises that animate our moment: the crisis of violence and the visible, the crisis of imperial legitimacy, and what I call “the enemy deficit.” I explore these flashpoints of imperial paranoia as they emerge in the torture at Guantánamo and Abu Ghraib. I argue that Guantánamo is the territorializing of paranoia and that torture itself is paranoia incarnate, in order to make visible, in keeping with Hazel Carby’s brilliant work, those contradictory sites where imperial racism, sexuality, and gender catastrophically collide.11 C. P. Cavafy wrote “Waiting for the Barbarians” in 1927, but the poem haunts the aftermath of 9/11 with the force of an uncanny and prescient déjà vu. To what dilemma are the “barbarians a kind of solution? Every modern empire faces an abiding crisis of legitimacy in that it flings its power over territories and peoples who have not consented to that power. Cavafy’s insight is that an imperial state claims legitimacy **only** by evoking the threat of the barbarians. It is only the threat of the barbarians that constitutes the silhouette of the empire’s borders in the first place. On the other hand, the hallucination of the barbarians disturbs the empire with perpetual nightmares of impending attack. The enemy is the abject of empire: the rejected from which we cannot part. And without the barbarians the legitimacy of empire vanishes like a disappearing phantom. Those people were a kind of solution. With the collapse of the Soviet Union in December 1991, the grand antagonism of the United States and the USSR evaporated like a quickly fading nightmare. The cold war rhetoric of totalitarianism, Finlandization, present danger, fifth columnist, and infiltration vanished. Where were the enemies now to justify the continuing escalation of the military colossus? “And now what shall become of us without any barbarians?” By rights, the thawing of the cold war should have prompted **an immediate downsizing of the military**; any plausible external threat had simply ceased to exist. Prior to 9/11, General Peter Schoomaker, head of the US Army, bemoaned the enemy deficit: “It’s no use having an army that did nothing but train,” he said. “There’s got to be a certain appetite for what the hell we exist for.” Dick Cheney likewise complained: “The threats have become so remote. So remote that they are difficult to ascertain.” Colin Powell agreed: “Though we can still plausibly identify specific threats—North Korea, Iran, Iraq, something like that—**the real threat is the unknown,** the uncertain.” Before becoming president, George W. Bush likewise fretted over the post–cold war dearth of a visible enemy: “We do not know who the enemy is, but we know they are out there.” It is now well established that the invasion of Iraq had been a long-standing goal of the US administration, but there was no clear rationale with which to sell such an invasion. In 1997 a group of neocons at the Project for the New American Century produced a remarkable report in which they stated that to make such an invasion palatable would require “a catastrophic and catalyzing event—like a new Pearl Harbor.”12 The 9/11 attacks came as a dazzling solution, both to the enemy deficit and the problem of legitimacy, offering the Bush administration what they would claim as a political casus belli and the military unimaginable license to expand its reach. General Peter Schoomaker would publicly admit that the attacks were an immense boon: “There is a huge silver lining in this cloud. . . . War is a tremendous focus. . . . Now we have this focusing opportunity, and we have the fact that (terrorists) have actually attacked our homeland, which gives it some oomph.” In his book Against All Enemies, Richard Clarke recalls thinking during the attack, “Now we can perhaps attack Osama Bin Laden.” After the invasion of Afghanistan, Secretary of State Colin Powell noted, “America will have a continuing interest and presence in Central Asia of a kind we could not have dreamed of before.” Charles Krauthammer, for one, called for a declaration of total war. “We no longer have to search for a name for the post-Cold War era,” he declared. “It will henceforth be known as the age of terrorism.”13

Barnett

Thomas P.M. **Barnett,** chief analyst, Wikistrat, “The New Rules: Leadership Fatigue Puts U.S. and Globalization, at Crossroads,” WORLD POLITICS REVIEW, 3—7—**11**, www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads

Events in Libya are a further reminder for Americans that we stand at a crossroads in our continuing evolution as the world's sole full-service superpower. Unfortunately, we are increasingly seeking change without cost, and shirking from risk because we are tired of the responsibility. We don't know who we are anymore, and our president is a big part of that problem. Instead of leading us, he explains to us. Barack Obama would have us believe that he is practicing strategic patience. But many experts and ordinary citizens alike have concluded that he is actually beset by strategic incoherence -- in effect, a man overmatched by the job. It is worth first examining the larger picture: We live in a time of arguably the greatest structural change in the global order yet endured, with this historical moment's most amazing feature being its relative and absolute lack of mass violence. That is something to consider when Americans contemplate military intervention in Libya, because if we do take the step to prevent larger-scale killing by engaging in some killing of our own, we will not be adding to some fantastically imagined global death count stemming from the ongoing "megalomania" and "evil" of American "empire." We'll be engaging in the same sort of system-administering activity that has marked our stunningly successful stewardship of global order since World War II. Let me be more blunt: As the guardian of globalization, the U.S. military has been the greatest force for peace the world has ever known. Had America been removed from the global dynamics that

### terror

Broader US imperialism is the root cause

Harshe, professor of political science at the University of Hyderabad, 2008

(Rajen, *Economic and Political Weekly*, Vol. 43, No. 51, Dec. 20 - 26, pp. 67)

Unveiling the intricacies of the association between the US-led imperialism and the outgrowth of terrorism in contemporary international relations continues to be a daunting task owing to its paradoxical nature. There have been instances where several terrorist organisations were nurtured and sustained by the US imperialism. And at the same time. the terrorist outfits that flourished due to the US have proved capable of engaging themselves in adversarial encounters with the US, almost in a dialectical mode. This article would reflect on the changing dimensions of ties between the us-led imperialism and Al Qaida. a multinational terrorist outfit.

### Allied coop

Coop inev

Aldrich 09

Richard J. Aldrich is a Professor of International Security at the University of Warwick, British Journal of Politics and International Relations, February 2009, "US–European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion", Vol. 11, Issue 1, pgs. 122-139

Since 9/11, intelligence has been viewed as an integral part of a controversial ‘war on terror’. The acrimonious public arguments over subjects such as Iraqi WMD assessments, secret prisons and the interrogation of detainees suggest intense transatlantic discord. Yet improbably, some of those countries that have expressed strident disagreement in public are privately the closest intelligence partners. It is argued here that we can explain this seeming paradox by viewing intelligence co-operation as a rather specialist kind of ‘low politics’ that is focused on practical arrangements. Intelligence is also a fissiparous activity, allowing countries to work together in one area even while they disagree about something else. Meanwhile, the pressing need to deal with a range of increasingly elusive transnational opponents—including organised crime—compels intelligence agencies to work more closely together, despite their instinctive dislike of multilateral sharing. Therefore, transatlantic intelligence co-operation will continue to deepen, despite the complex problems that it entails.

### 2nc no WMD

Prefer our evidence – media “terrorism industry” generates $30 billion playing off fear of big attacks

BBC 8 Monitoring South Asia, 2/29/l/n

The grossly exaggerated threat of nuclear terrorism together with the hype created against Pakistan's nuclear assets, and labelling it a potential threat to the international security, is a singular achievement of the "terrorism industry" that mainly comprises, the US politicians as lead players alongside bureaucrats and the US media. According to a report in USA Today, the US market was expected to generate 29.1bn dollars in 2006 from the "threat of terror," and the US companies were expected to receive nearly all of it. No wonder an impressive number of top-ranking Homeland Security officials abandoned public service to serve the public by working and lobbying for such entrepreneurial firms, where they are offered huge salaries to maintain the momentum of the threat of "terrorism."

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This dynamic plays out in media coverage of the military, as well, leading to an insufficient criticality, or at least a lack of perspective, in much coverage. At worst, the media becomes a propaganda arm or engages in a cult of hero worship that perpetuates the dynamics above. As this coverage creates narratives that impact critical national security decisions, it likewise skews civil-military relations. The media is a central part of any civil-military dynamic in a democracy, providing the information that informs public discourse and shapes the decision-making space. If the media is incapable of being a relatively objective arbiter, this contributes to a flawed civil-military dynamic

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a more general way of thinking about military affairs, it has come to have an indirect effect on all forms of military decision making by civilian officials. Deference in a strictly legal sense is only a part of the broad cultural deference on military issues

### Ext – Parasidis Card

#### Their link is about the rights of experimental subjects, not whether they experiment – and the status quo solves

Parasidis, their link article, 2012

(Efthimios, Assistant Professor of Law, Center for Health Law Studies, Saint Louis University School of Law, 2012, "Justice and Beneficence in Military Medicine and Research" Ohio State Law School, Lexis)

**[THEIR CARD STARTS]**

VI. Conclusion

The military has long nurtured a culture and identity that is fundamentally distinct from civil society, n522 and the U.S. government has a history of bending [\*792] and breaking the law during times of war. n523 While the military has traditionally enjoyed great deference from civilian courts in the United States, n524 military discipline and national security interests should not grant government officials carte blanche to violate fundamental human rights. n525 To the contrary, Congress and the courts should work to ensure that military and intelligence agencies remain subordinate to the democratic rule of law. n526

The motto of the American military physician is "to conserve the fighting force," yet the last decade has seen a notable shift in emphasis to enhancing the fighting force through novel applications of biomedical enhancements. n527 The nefarious conduct of military officials during the course of the mustard gas, radiation, biological warfare, and psychotropic drug experiments provides ample evidence of the "lies and half-truths" that the DoD has utilized in the name of national security. n528 Indeed, the Army Inspector General has acknowledged the "inadequacy of the Army's institutional memory" regarding experimental research. n529 When one considers socio-economic dimensions of the armed forces, this history of neglect has served to further societal inequalities. n530 As a judge on the Sixth Circuit, and former Commander in Chief [\*793] of the Ohio National Guard explains, "in a democracy we have far more to fear from the lack of military accountability than from the lack of military discipline or aggressiveness." n531

**[THEIR CARD ENDS]**

Despite the Supreme Court's deference to military judgment, the Court has also indicated that service members are entitled to constitutional protections as Americans. n532 At the individual level, each service member should maintain patient autonomy and the right to refuse investigational products without fear of punitive repercussions. In the aggregate, the law should serve to instill a sense of confidence in service members that those with power will be held accountable for actions that violate individual rights. Experimentation without consent can never be justified, n533 and patient autonomy and human dignity ought not be extinguished because one elects to serve their country and defend American freedoms.

To the extent that changing levels of liability result in changing levels of accident avoidance, n534 Congress should disincentivize behavior that unnecessarily increases risks to service members by enacting legislation that limits the scope of the Feres doctrine. The primary purpose of military medicine must be to care for service members and veterans-to enhance each patient's expectation of recovery, reduce the severity of symptoms, and prevent long-term disability. n535

Service members have long been "out-of-sight, out-of-mind" for both Congress and academics n536 and have endured decades of unjust treatment at the hands of the military establishment. As Justice Brennan wisely observed in United States v. Stanley, "[s]oldiers ought not be asked to defend a Constitution indifferent to their essential human dignity." n537 Towards this end, the proposed reforms serve to harmonize national security interests with fundamental principles of patient autonomy and human dignity. The preferred method of protecting service members and preserving military order and discipline is to religiously follow policies that promote justice and beneficence in military medicine and research.

**[END OF ARTICLE]**

### Ext—Russia

#### Zero security at Russian facilities

James Martin Center for Nonproliferation Studies at the Monterey Institute of International Studies January 2014

http://www.nti.org/country-profiles/russia/biological/

Since the collapse of the Soviet Union, the U.S. government has been concerned by the possible proliferation of dangerous pathogen stocks and dual-use equipment due to the uncertain level of physical security and accountability at former BW-affiliated facilities. The economic transition and loss of central controls during and after the disintegration of the Soviet Union led to difficulties maintaining security at nuclear, chemical, and biological facilities throughout the former Soviet republics, raising the risk of theft, diversion, and trafficking of WMD-related materials. Physical security at such facilities in Russia has been a target for improvement since 1992, largely with U.S. Cooperative Threat Reduction money. In 1998, the U.S. Department of Defense (DOD) initiated projects to secure former Biopreparat facilities Vector and Obolensk, two of Russia's largest repositories of dangerous pathogens. [65]

However, a 2004 report by the U.S. Government Accountability Office observed little progress in DOD's efforts to address security concerns at Russia's former BW-affiliated facilities, and noted that a lack of Russian cooperation hindered DOD's access to facilities other than Vector and Obolensk. [66] In addition, some experts have assessed the effectiveness of physical security to protect against theft and diversion of biological materials to be limited at best, and the multitude of Russian facilities in possession of hazardous pathogen culture collections presents a considerable risk. [67] Despite appeals from the United States and its allies, Russia has neglected to consolidate its hazardous pathogen culture collections at fewer locations, which could reduce the risk of theft or diversion.

### Bioterror

Empirics are the trump card

Easterbrook, senior editor – The New Republic, ‘3

(Gregg, <http://www.wired.com/wired/archive/11.07/doomsday_pr.html>)

3. Germ warfare!Like chemical agents, biological weapons have never lived up to their billing in popular culture. Consider the 1995 medical thriller Outbreak, in which a highly contagious virus takes out entire towns. The reality is quite different. Weaponized smallpox escaped from a Soviet laboratory in Aralsk, Kazakhstan, in 1971; three people died, no epidemic followed. In 1979, weapons-grade anthrax got out of a Soviet facility in Sverdlovsk (now called Ekaterinburg); 68 died, no epidemic. The loss of life was tragic, but no greater than could have been caused by a single conventional bomb. In 1989, workers at a US government facility near Washington were accidentally exposed to Ebola virus. They walked around the community and hung out with family and friends for several days before the mistake was discovered. No one died. The fact is, evolution has spent millions of years conditioning mammals to resist germs. Consider the Black Plague. It was the worst known pathogen in history, loose in a Middle Ages society of poor public health, awful sanitation, and no antibiotics. Yet it didn’t kill off humanity. Most people who were caught in the epidemic survived. Any superbug introduced into today’s Western world would encounter top-notch public health, excellent sanitation, and an array of medicines specifically engineered to kill bioagents. Perhaps one day some aspiring Dr. Evil will invent a bug that bypasses the immune system. Because it is possible some novel superdisease could be invented, or that existing pathogens like smallpox could be genetically altered to make them more virulent (two-thirds of those who contract natural smallpox survive), biological agents are a legitimate concern. They may turn increasingly troublesome as time passes and knowledge of biotechnology becomes harder to control, allowing individuals or small groups to cook up nasty germs as readily as they can buy guns today. But no superplague has ever come close to wiping out humanity before, and it seems unlikely to happen in the future.

### no model

#### It’s been true for years—

Liptak, Supreme Court correspondent for the New York Times, 2008

(Adam, U.S. Court Is Now Guiding Fewer Nations,

http://topics.nytimes.com/top/reference/timestopics/people/l/adam\_liptak/index.html?inline=nyt-per&pagewanted=all)

Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.

But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.

“One of our great exports used to be constitutional law,” said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. “We are losing one of the greatest bully pulpits we have ever had.”

From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by half, to about six.

Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72.

The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, “they tend not to look to the rulings of the U.S. Supreme Court.”

The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court’s fading influence, legal experts said. The new courts are, moreover, generally more liberal than the Rehnquist and Roberts courts and for that reason more inclined to cite one another.

### SOP

International law promotion is a mask for imperialism, exporting and enforcing western norms—causes widespread violence

Scott Newton 6, Lecturer in Law and Chair of the Centre of Contemporary Central Asia and the Caucasus in the School of Oriental and African Studies at the University of London, Constitutionalism and imperialism Sub Specie Spinozae, Law and Critique17.3 (Nov 2006): 325-355

Turning from these sparse Spinozan allusions, one confronts a bewildering complexity and variety of legal-institutional arrangements undergirding the organisation and administration of colonial empires. One might, at least provisionally and schematically, discern three possible, nested levels of constitution in imperialism: colonies or imperial units, empire, and the imperial order. The ﬁrst two can be understood as relatively straightforward: respectively, the constitutionalising one after the other of the diverse individual spaces or regions of empire as so many quasi-polities (subordinate, subjugated) with territorial agencies and institutions of rule (for example, the Colonial Government of India, with its centralised structures and its local Government Agencies) and the constitutionalising of the general imperial space that encompasses them all (with its valence to the metropolitan pole), the properly imperial co-ordinating agencies and institutions of rule (e.g. the Colonial Ofﬁce, Parliamentary legislation relating to speciﬁc colonies or general colonial administration, etc.). The third level, the constitution of imperialism, would then equate to the overarching international legal order, which authorises and legitimises the amassing of empires on the part of European sovereigns and organises their relations inter se. It is in this sense that international law has, from its inception (an inception contemporaneous with that of the ﬁrst European empires), been fashioned as the constitution of the imperial order.25 As a ﬁrst step in understanding the Spinozan relations of imperialism to constitutionalism, it can now be suggested that modern empires arose ultimately by constituting and constitutionalising, and thus formally controlling/administering through the institutions thereby established, ever more expansive and diverse spaces for the exercise of potestas – not just geographic spaces, but spaces of activity (exchange, social interaction, scientiﬁc research, artistic production). To constitutionalise means to design and set up institutions of rule (and institutions of exchange) along the lines of existing municipal institutions in European states, systematically. The fact that the entities thus constitutionalised are constitutionalised ab initio as subordinate and not co-ordinate, as colonies and not as sovereignties (they are designed and organised to be ruled from outside), does not alter the analysis. Imperialism, then, would be the propagation or extension – whether by outright conquest and annexation or by subtler, more insidious hegemonic means – of particular legal-institutional arrangements, of particular sorts of constitutional paradigms, and of the general logic (establishing and conﬁguring basic institutions of rule and exchange) and juridical rationality (fundamental and entrenched structural forms and procedural norms to which subordinate forms and norms must conform) of constitutionalism. Imperialism is constitutionalism, writ larger, but partaking of the same structure or dynamics. A constitution creates a common juridical space over a national territory; an empire creates a common juridical space over a territory not bounded by national borders and establishes a series of subordinate bounded juridical spaces within that common space (which in time may become national territories ‘in their own right’).

Causes backlash destroys rule of law promotion

Brian Z. Tamanaha is the William Gardiner Hammond Professor of Law at the Washington University School of Law, 08 [“The Dark Side of the relationship between the Rule of Law and Liberalism,” NYU Journal of Law and Liberty, Vol 3:516, 2008, http://www.law.nyu.edu/sites/default/files/ECM\_PRO\_060975.pdf]

**There is** also **a dark side for the rule of law** in this relationship.¶ As I have argued elsewhere,126 the rule of law originated prior¶ to liberalism and can exist independent of liberalism. Liberals tend¶ to obscure this in their jealous identification of the rule of law with¶ liberalism. From a broader perspective, the singular achievement of¶ the rule of law is its insistence that governments must act in accordance¶ with the law—an essential restraint that is valuable in all societies¶ regardless of their social, cultural, economic, or political orientation.¶ In view of the awesome power and resources governments¶ can wield, holding the government to legal restraints is a¶ universal good. The risk in recent developments is that the rule of law is¶ ripe to be tainted by its close identification with liberalism, **particu-¶ larly in developing countries.** A number of these countries have¶ suffered from the adverse consequences of neoliberal reforms;127 the disparity in wealth has increased to new heights in many countries, without any evident improvement for the poor majority; 128 and in many of these societies the populace had little say over whether to¶ accept or modify these reforms.¶ International development organi-¶ zations now **divert money away from infrastructure projects in fa-¶ vor of rule of law projects**, like training judges and police, and drafting and implementing legal codes that protect property and foreign investment. In all these various activities, the “rule of law” is put forth as the “front man” for the liberal package. If this initia-tive goes badly in any number of possible ways owing to an innu-¶ merable complex of local and global factors, as seems likely to occur¶ in many places, if substantial pain is suffered without the promised¶ economic benefits to the general public, if courts are perceived to¶ defend the rich who enjoy increasing wealth while most in society¶ are left wanting, the rule of law may be held responsible or tar-¶ nished, **viewed by the populace with suspicion or cynicism**—¶ **making it all the harder to implant and build the rule of law.¶** It would be a tragic paradox if the great liberal advocates¶ for the rule of law contributed to preventing it from taking hold and¶ spreading around the world.

Turns Russia

John Robles, journalist, translator, 9/22/13 [“Rule of law, morality and a return to multi-polarity - Putin at Valdai,” VOR, http://voiceofrussia.com/news/2013\_09\_22/Rule-of-law-morality-and-a-return-to-multi-polarity-Putin-at-Valdai-2237/]

On attempts to force a western model on Russia¶ The failure of the west in reshaping Russia in their own image **was due to the Russian people and not the state.** This rejection was something the West tried to change through overt and covert efforts, such as through the influence of USAID and supporting an opposition which had only one agenda, to remove President Putin and the government, **but their efforts failed due to the Russian people themselves**. Something the West has failed to understand.¶ “A spontaneously constructed state and society does not work, **and neither does mechanically copying other countries’ experiences.** Such primitive borrowing and attempts to civilize Russia from abroad were not accepted by an absolute majority of our people. This is because the desire for independence and sovereignty in spiritual, ideological and foreign policy spheres is an integral part of our national character. Incidentally, such approaches have often failed in other nations too. The time when ready-made lifestyle models could be installed in foreign states like computer programs has passed,” said President Putin.

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CMR – Their munson internal link says the military is becoming immune to civilian pressure because they’re entitled and self-righteous – only the alt solves embedded structural dynamics that are the root cause

Davidson 13

Janine Davidson is assistant professor at George Mason University’s Graduate School of Public Policy. From 2009-2012 she served as the Deputy Assistant Secretary of Defense, Plans in the Pentagon, Presidential Studies Quarterly, March 2013, " Civil-Military Friction and Presidential Decision Making: Explaining the Broken Dialogue", Vol. 43, No. 1, Ebsco

In the 2010 bestselling book, Obama’s Wars, Bob Woodward recounts President Barack Obama’s friction with his military chain of command as he sought options for ending the war in Afghanistan.1 Woodward paints a compelling picture of a frustrated president who felt “boxed in” by his military commanders who were presenting him with only one real option—deploy 40,000 more troops for a comprehensive counterinsurgency strategy and an uncertain timeline. The president and his civilian advisors could not understand why the military seemed incapable of providing scalable options for various goals and outcomes to inform his decision-making. Meanwhile the military was frustrated that their expert advice regarding levels of force required for victory were not being respected (Woodward 2010).

Such mutual frustration between civilian leadership and the military is not unique to the Obama administration. In the run-up to the Iraq War in 2002, Secretary of Defense Donald Rumsfeld famously chastised the military for its resistance to altering the invasion plan for Iraq. The military criticized him for tampering with the logistical details and concepts of operations, which they claimed led to the myriad operational failures on the ground (Gordon and Trainor 2006; Ricks 2007; Woodward 2004). Later, faced with spiraling ethnic violence and rising U.S. casualties across Iraq, George W. Bush took the advice of retired four-star General Jack Keane and his think tank colleagues over the formal advice of the Pentagon in his decision to launch the so-called surge in 2007 (Davidson 2010; Feaver 2011; Woodward 2010).

A similar dynamic is reflected in previous eras, from John F. Kennedy’s famous debates during the Cuban Missile Crisis (Allison and Zelikow 1999) to Lyndon Johnson’s quest for options to turn the tide in Vietnam (Berman 1983; Burke and Greenstein 1991), and Bill Clinton’s lesser-known frustration with the military over its unwillingness to develop options to counter the growing global inﬂuence of al-Qaeda.2 In each case, exasperated presidents either sought alternatives to their formal military advisors or simply gave up and chose other political battles. Even Abraham Lincoln resorted to simply ﬁring generals until he got one who would fight his way (Cohen 2002).

What accounts for this perennial friction between presidents and the military in planning and executing military operations? Theories about civilian control of the military along with theories about presidential decision making provide a useful starting point for this question. While civilian control literature sheds light on the propensity for friction between presidents and the military and how presidents should cope, it does not adequately address the institutional drivers of this friction. Decision-making theories, such as those focused on bureaucratic politics and institutional design (Allison 1969; Halperin 1974; Zegart 2000) motivate us to look inside the relevant black boxes more closely. What unfolds are two very different sets of drivers informing the expectations and perspectives that civilian and military actors each bring to the advising and decisionmaking table.

This article suggests that the mutual frustration between civilian leaders and the military begins with cultural factors, which are actually embedded into the uniformed military’s planning system. The military’s doctrine and education reinforce a culture of “military professionalism,” that outlines a set of expectations about the civil-military decision-making process and that defines “best military advice” in very speciﬁc ways. Moreover, the institutionalized military planning system is designed to produce detailed and realistic military plans for execution—and that will ensure “victory”—and is thus ill suited to the rapid production of multiple options desired by presidents. The output of this system, framed on specific concepts and definitions about “ends,” “ways,” “means,” and expectations about who provides what type of planning “guidance,” is out of synch with the expectations of presidents and their civilian advisors, which in turn have been formed from another set of cultural and institutional drivers.

Most civilian leaders recognize that there is a principal-agent issue at work, requiring them to rely on military expertise to provide them realistic options during the decision-making process. But, their definition of “options” is framed by a broader set of political objectives and a desire to winnow decisions based, in part, on advice about what various objectives are militarily feasible and at what cost. In short, civilians’ diverse political responsibilities combined with various assumptions about military capabilities and processes, create a set of expectations about how advice should be presented (and how quickly), how options might be defined, and how military force might or might not be employed. These expectations are often considered inappropriate, unrealistic, or irrelevant by the military. Moreover, as discussed below, when civilians do not subscribe to the same “hands off” philosophy regarding civilian control of the military favored by the vast majority of military professionals, the table is set for what the military considers “meddling” and even more friction in the broken dialogue that is the president’s decision-making process.

This article identifies three drivers of friction in the civil-military decision-making dialogue and unpacks them from top to bottom as follows: The first, civil-military, is not so much informed by theories of civilian control of the military as it is driven by disagreement among policy makers and military professionals over which model works best. The second set of drivers is institutional, and reflects Graham Allison’s organizational process lens (“model II”). In this case, the “outputs” of the military’s detailed and slow planning process fail to produce the type of options and advice civilians are hoping for. Finally, the third source of friction is cultural, and is in various ways embedded into the first two. Powerful cultural factors lead to certain predispositions by military planners regarding the appropriate use of military force, the best way to employ force to ensure “victory,” and even what constitutes “victory” in the American way of war. These cultural factors have been designed into the planning process in ways that drive certain types of outcomes. That civilians have another set of cultural predispositions about what is appropriate and what “success” means, only adds more fuel to the flame.

Credibility and the rule of law – the only way to get other countries to trust us is to stop allowing our policy to be motivated by self-serving security dynamics dominated by militarism

Aziz Rana, Assistant Professor of Law, Cornell University Law School; A.B., Harvard College; J.D., Yale Law School; PhD., Harvard University, July 2012, “NATIONAL SECURITY: LEAD ARTICLE: Who Decides on Security?,” 44 Conn. L. Rev. 1417

If anything, one can argue that the presumptive gulf between elite awareness and suspect mass opinion has generated its own very **dramatic** political and **legal pathologies.** In recent years, the country has witnessed a variety of security crises built on the basic failure of ‘expertise.’195 At present, part of what obscures this fact is the very culture of secret information **sustained by the modern security concept**. Today, it is commonplace for government officials to leak security material about terrorism or external threat to newspapers as a method of shaping the public debate.196 These ‘open’ secrets allow greater public access to elite information and embody a central and routine instrument for incorporating mass voice into state decision-making. But this mode of popular involvement comes at a key cost. Secret information is generally treated as worthy of a higher status than information already present in the public realm – the shared collective information through which ordinary citizens reach conclusions about emergency and defense. Yet, oftentimes, as with the lead up to the Iraq War in 2003, although the actual content of this secret information is flawed,197 its status as secret masks these problems and allows policymakers to cloak their positions in added authority. **This reality highlights the importance of approaching security information with far** greater collective skepticism; it also means that security judgments may be more ‘Hobbesian’ – marked fundamentally by epistemological uncertainty as opposed to verifiable fact – than policymakers admit.

If the objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this meahn 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 it remains unclear which popular base exists in society to raise these questions. Unless such a base fully emerges, we can expect our prevailing security arrangements to become ever more entrenched.

### perm

The kneejerk jump to legalism crowds out critical examination of state power

Robert Knox, PhD Candidate, London School of Economics and Political Science.2012, paper presented at the Fourth Annual Conference of the Toronto Group for the Study of International, Transnational and Comparative Law and the Towards a Radical International Law workshop, “Strategy and Tactics,”

this warning is of great relevance to the type of ‘strategic’ interventions advocated by the authors. there are serious perils involved in making any intervention in liberal-legalist terms for critical scholars. the first is that – as per their own analysis – liberal legalism is not a neutral ground, but one which is likely to favour certain claims and positions. Consequently, it will be incredibly difficult to win the argument. Moreover, **even if** the argument is won, the victory is likely to be a very particular one – inasmuch as **it will foreclose any wider consideration of the structural or systemic causes** of any particular ‘violation’ of the law. All of these issues are to some degree considered by the authors.44 However, given the way in which ‘strategy’ is understood, the effects of these issues are generally confined to the immediate, conjunctural context. As such, the emphasis was placed upon the way that the language of liberal legalism blocked effective action and criticism of the war.45 Much less consideration is placed on the way in which advancing such argument impacts upon the long term effectiveness of achieving the strategic goals outlined above. Here, the problems become even more widespread. Choosing to couch the intervention in liberal legal terms ultimately reinforces the structure of liberal legalism, rendering it more difficult to transcend these arguments.46 In the best case scenario that such an intervention is victorious, this victory would precisely seem to underscore the liberal position on international law. Given that international law is in fact bound up with processes of exploitation and domination on a global scale, such a victory contributes to the legitimation of this system, **making it very difficult to argue against its logic.** this process takes place in three ways. Firstly, by intervening in the debate on its own terms, critical scholars reinforce those very terms, as their political goals are incorporated into it.47 It can then be argued the law is in fact neutral, because it is able to encompass such a wide variety of viewpoints. Secondly, in discarding their critical tools in order to make a public intervention, these scholars abandon their structural critique **at the very moment when they should hold to it most strongly**. that is to say, that at the point where there is actually a space to publicise their position, they choose instead to cleave to liberal legalism. thus, even if, in the ‘purely academic’ context, they continue to adhere to a ‘critical’ position, in public political terms, they advocate liberal legalism. Finally, from a purely ‘personal’ standpoint, in advocating such a position, they undercut their ability to articulate a critique in the future, precisely because they will be contradicting a position that they have already taken. the second point becomes increasingly problematic absent a guide for when it is that liberal legalism should be used and when it should not. Although the ‘embrace’ of liberal legalism is always described as ‘temporary’ or ‘strategic’**,** there is actually very little discussion about the specific conditions in which it is prudent to adopt the language of liberal legalism. It is simply noted at various points that this will be determined by the ‘context’.48 As is often the case, the term ‘context’ is invoked49 without specifying precisely which contexts are those that would necessitate intervening in liberal legal terms. Traditionally, such a context would be provided by a strategic understanding. that is to say, that the specific tactics to be undertaken in a given conjunctural engagement would be understood by reference to the larger structural aim. But here, there are simply no considerations of this. It seems likely therefore, that again context is understood in purely **tactical terms.** Martti Koskenniemi can be seen as representative in this respect, when he argued: What works as a professional argument depends on the circumstances. I like to think of the choice lawyers are faced with as being not one of method (in the sense of external, determinate guidelines about legal certainty) but of language or, perhaps better, of style. the various styles – including the styles of ‘academic theory’ and ‘professional practice’ – are neither derived from nor stand in determinate hierarchical relationships to each other. the final arbiter of what works is nothing other than the context (academic or professional) in which one argues.50 On this reading, the ‘context’ in which prudence operates seems to the immediate circumstances in which an intervention takes place. this would be consistent with the idea, expressed by the authors, that the ‘strategic’ context for adopting liberal legalism was that the debate was conducted in these terms. But the problem with this understanding is surely evident. As critical scholars have shown time and time again, the contemporary world is one that is deeply saturated with, and partly constituted by, **juridical relations**.51 Accordingly, there are really very few contexts (indeed perhaps none) in which political debate is not conducted in juridical terms. A brief perusal of world events would bear this out.52 the logical conclusion of this would seem to be that in terms of abstract, immediate effectiveness, the ‘context’ of public debate will almost always call for an intervention that is couched in liberal legalist terms. This raises a final vital question about what exactly distinguishes critical scholars from liberal scholars. If the above analysis holds true, then the ‘strategic’ interventions of critical scholars in legal and political debates will almost always take the form of arguing these debates in their own terms, and simply picking the ‘left’ side. thus, whilst their academic and theoretical writings and interventions may (or may not) retain the basic critical tools, the public political interventions will basically be ‘liberal’. The question then becomes, in what sense can we really characterise such interventions (and indeed such scholars) as ‘critical’? The practical consequence of understanding ‘strategy’ in essentially tactical terms seems to mean always struggling within the coordinates of the existing order. Given the exclusion of strategic concerns as they have been traditionally understood, **there is no practical account for how these coordinates will ever be transcended** (or how the debate will be reconfigured). As such, **we have a group of people struggling within liberalism, on liberal terms,** who may or may not also have some ‘critical’ understandings which are never actualised in public interventions. We might ask then, apart from ‘good intentions’ (although liberals presumably have these as well) what differentiates these scholars from liberals? Because of course liberals too can sincerely believe in political causes that are ‘of the left’. It seems therefore, that just as – in practical terms – strategic essentialism collapses into essentialism, so too does ‘strategic’ liberal legalism collapse into plain old liberal legalism.53

### lobel

New link—their argument relies on a rigid theory/practice binary that makes critique impossible—some law is inevitable, but it’s a method question

Knox ‘12

Robert, PhD Candidate, London School of Economics and Political Science. !is paper was presented at the Fourth Annual Conference of the Toronto Group for the Study of International, Transnational and Comparative Law and the Towards a Radical International Law workshop, “Strategy and Tactics,”

this tactical understanding of strategy, and its attendant consequences, is deeply bound up with a particular understanding of the relationship between theory and practice. this is perhaps best encapsulated by Spivak’s comment that ‘[y]ou pick up the universal that will give you the power to fight against the other side, and what you are throwing away by doing that is your theoretical purity’.54 In this understanding, theory figures as an ‘abstract’ non-practical concern that needs to be discarded in order to make political interventions. Hence, in the above account, theoretical concerns about the structure of legal argument need to be jettisoned in order to intervene in real life political argument. **the problem with such a position is that it operates with an** overly rigid and ultimately untenable distinction **between theory and practice**. An obvious criticism is that if one’s theoretical position is such that it is entirely useless in providing an account of how to intervene in practical debates, perhaps what is needed is a new theory. One could, however, be even more radical in this criticism, and point out that there cannot be any practice without ‘theory’. Gramsci argues that ‘everyone is a philosopher’ because every action they take presupposes ‘a specific conception of the world’,55 the only questions then become the degree to which this ‘philosophy’ is explicit, and how coherent it is. What this points to is the fact that every practical action is necessarily rooted in an understanding of the world, and the place of the action within it. thus, it is not the case that when one makes an intervention one is ‘throwing away’ one’s theoretical purity, but rather that there must be some other theoretical conception that is underlying one’s action. this other conception may in fact contradict the stated ‘theoretical’ position that is being ‘thrown away’. the importance of this is that it undermines somewhat the claim that ‘good intentions’ will be enough to count in differentiating critical scholarship from liberal legalism. More importantly, it points us to the fact that if theory is to be taken at all seriously, **there must be a sense in which it is practically enacted.** However, the collapsing of prudence into tactical considerations precisely denies this. the rigid distinction between theory and practice is both a cause and a consequence of the failure to specify the distinction between strategy and tactics. An important part of any understanding of strategy, therefore, involves working out how to enact the theoretical position one claims to hold to in practical and political action. At a basic level, what might a more strategic intervention look like? China Miéville quotes David Kennedy to the effect that an alternative intervention might involve saying ‘international law doesn’t know what it’s doing here folks’.56 Such an approach does seem to take more seriously the strategic dimension of critical scholarship, but how does this actually look in practice? A useful example of an alternative approach can be seen in comparing yet more letters to the Guardian, this time in reaction to Operation Cast Lead: Israel’s highly controversial intervention in Gaza. the first letter57 – signed by several critical legal scholars – is analogous to ‘We are Teachers of International Law’. Couched in liberal legal language, it talks in very abstract terms about possible violations of international humanitarian law in the conflict, ultimately avoiding any broader political questions, such as that of taking sides.58 In contrast to this is the rather trenchant letter drafted by Petter Hallward and Slavoj Žižek.59 this letter, which was also signed by several of the signatories of the first letter, **did take sides**, arguing that ‘[t]here is nothing symmetrical about this war in terms of principles, tactics or consequences. Israel is responsible for launching and intensifying it, and for ending the most recent lull in hostilities’. As a consequence of this ‘[i]f we believe in the principle of democratic selfdetermination, if we affirm the right to resist military aggression and colonial occupation, then we are obliged to take sides ... against Israel, and with the people of Gaza and the West Bank.’ International law did not feature heavily in this letter, there were allusions to it via references to the 1967 borders and a reference to the ‘criminal use of force’, but ultimately it seems to figure much more as a rhetorical device, than as one around which the intervention was organised. the obvious point is that the second letter – **in not organising the intervention around** international **law**, indeed only invoking it briefly and obliquely – is able to avoid the perils of reinforcing liberal legalism. Equally, it remains an intervention that is specifically targeted at a debate, putting forward a coherent position. the problem here though, is that precisely because of this, one is left wondering what the precise role of the legal scholar would be here? Is it simply to counsel against the adoption of the tropes of liberal legalism in any intervention? Is it to adopt David Kennedy’s route, or to use the event to point international law’s complicity in the problems so identified? It is as a result of this very real dilemma that many scholars turn to a purely tactical understanding of legal struggle. Whilst ‘We are Teachers’ may be the most sophisticated articulation of this position, it is one that resurfaces again and again in critical scholarship. Many lengthier works follow a similar pattern. For the vast majority of the piece there will be a historical and/or theoretical examination of the ways in which international law has been deeply complicit with oppression, exploitation and domination. Yet in the final part, there will be a paragraph to the effect that – notwithstanding the previous critique – it is impossible to ‘give up’ on international law. this does not usually make explicit reference to the previous theoretical critique, but rather argues that since international law is the language of international relations (and debate about these relations) prudence demands we continue to use it. Antony Anghie puts it well when he notes: At the very least, I believe that the third World cannot abandon international law because law now plays such a vital role in the public realm and in the interpretation of virtually all international events. It is through the vocabulary of international law, concepts of ‘self-defence’, ‘human rights’ and ‘humanitarian intervention’ that issues of cause, responsibility and fault are being discussed and analysed, and interpretations of these doctrines which reproduce imperial relations must be contested.60 this particular move, although not necessarily couched in terms of strategy and tactics, nonetheless reproduces the basic structure criticised above. In it, prudence is once again confined to the short term, conjunctural sense. Yet one cannot simply brush aside such a line of argument, especially when expressed in these terms. If the alternative to the ‘strategic’ use of liberal legalism is ‘abandoning’ international law (or some other form of legal nihilism) then liberal legalism **would seem** to be only real option for those actually engaging in political struggle. the problem is that this counterposition of liberal legalism as against legal nihilism ultimately reproduces the rigid theory/practice divide outlined above, and essentially insists that strategy and tactics exist to the rigid exclusion of one and other. the particular form that this separation takes – associating the traditional meaning of strategy with theory and ‘principle’, and tactics with practice and ‘prudence’ – means that strategic concerns simply disappear from the picture.61 In contrast to this would be a position that understood that ‘theory’ is never simply an abstract consideration, but one which is always active in practice, whether implicitly or explicitly. From this would also flow the idea that long term, structural considerations are not to be understood in opposition to ‘prudence’ but rather as specific structural and temporal articulations of prudence. On this reading, the opposition would not be between ‘using the law’ (as a liberal) or ‘abandoning it’ (as a nihilist). Rather **the question is on what terms is it possible to use the law without fatally undermining longer term, structural considerations**.62 this is the understanding that has driven work from within the Marxist tradition to which this article now turns.

### altman

You should adopt the ethical perspective of the detainee – only galvanizing outside the juridical order can catalyze public resistance to technocracy and dehumanization

Andreja Zevnik 11, international politics prof at Aberystwyth University in Wales, Becoming-Animal, Becoming-Detainee: Encountering Human Rights Discourse in Guantanamo, Law Critique (2011) 22:155–169

The above discussion aims to testify to something that is more than a recognition of different forms of life, or of how the animal form of life the detainees previously saw as inferior now became dominant, or of a measure against which to ‘compare’ their own existence. Instead, this discussion aims to challenge the rationale upon which distinctions between various forms of life are being made. No inherent ‘safety’ derives from being human, the category of ‘human’, the animal etc. as such. Although highly valued in most cultures in the world, the category of ‘human’ in Guantanamo is empty. In the personal struggles behind the fence, the category lost its meaning. No rights or privileges arose from it. Nothing sacred came from one’s ‘belonging’ to human beings; in fact, one is better off by becoming something else, constantly changing one’s existence in ways which challenge or resist being captured by law, or which are left outside the existing legal categories. The detainees, in becoming-animal, demanded rights they were not supposed to demand, and challenged the law from positions by which law should not be, or is not prepared to be, challenged. Clearly, the detainees’ becoming-minoritarian in the face of the encounter with the animal is then also signiﬁcant from the standpoint of law. In the debates surrounding the situation in Guantanamo, it becomes rather obvious that the distinctions between different forms of being, categories of being that derive from western metaphysics and are part of the western legal system, no longer make sense. The humans are not humans by virtue of their biological characteristics, but by virtue of their citizenship, class, nationality, ethnicity, religion, and so on. Universal human rights are only a construct, here not to guarantee rights but to legitimise western ideas of thinking and living. In situations such as Guantanamo where foreign ‘non-western subjects’ realised their ‘humanity’ is not sufﬁcient for their enjoyment of rights, the detainees had to ﬁnd refuge in something different from humanity—‘animalisation’ and constant transformations offered one answer. At the same time, however, the detainees, or at least the majority of them, were never before subjected to the western legal system or western ideas of justice. Their encounter with the ‘American legal system’, be it in the form of habeas petitions, military commissions, or the Enemy Combatant Status Review Boards, introduced them to a type of justice and a legal system they had not encountered before. The American treatment ‘westernised’ detainees, making them ‘objects’ of a type of western law. What is more, the detainees’ presence and active engagement in the system in fact facilitated another transformation and an invention of another ‘self’. The detainees were not only becoming-animals, but also one could say they were becoming-western. By preparing their defences in a language they knew, they found a way of engaging with the western legal discourse on their own terms. Those terms were not common to the western legal system, and that same western legal system did not know how to deal with them. Yet, with their own ways of engagement, they addressed the law in such a way that the law could recognise parts of their discourse. This at least partial recognition was all the detainees asked for; they had, within the limits, an opportunity to be heard by the law. That was something the US government did not anticipate, having been convinced that the created conditions excluded the detainees from any interaction with the existing legal discourse—but they were wrong. As Flagg Miller, in the preface to a book of poems by detainees in Guantanamo, observes, ‘At Guantanamo, the detainees are preparing their arguments not in sophisticated legal terminology, which most of them lack knowledge of, but rather in the familiar idioms and vocabulary of their youth. Whether describing scenes of nurturing parents or destitute children, of valiant siblings bound by fate or worldwide victory for the oppressed, the idioms most apt for the detainees are those drawn from populist discourses of Arab national liberation’ (Miller 2007, p. 16). In the process of writing, the detainees stumbled upon something that made the existing order open up and, at least to an extent, hear their side of the story. Such intervention not only changed the existence of the detainees in that particular context, but it also changed law within the same parameters. With such identiﬁcation and transgression of a particular form of the detainees’ self, the detainees challenged the existing legal discourse. Despite radical oppositions from the legal side, the law became receptive to the detainees’ demands and gave into the detainees’ requests to be given a voice. They challenged the existing legal parameters and called for their re-negotiations. In such a way, the detainees’ becoming-western destabilised the foundations of legal discourse addressing their detention and their living in Guantanamo. The detainees’ becoming-western posed a challenge to the legal system as a whole and acted in the exact opposite way to that planned by the US; that is, to deny detainees the right to have their cases heard at the courts or to challenge the conditions of their detention. In a challenge to the designs of the US government by ‘becoming-western’, the detainees engaged with and challenged the conditions of their detention as well as disturbed the legal process. They did so by creating the conditions for their involvement in the discourse that was supposed to exclude them, and by recreating the discourse and tailoring it to the knowledge and language with which they were familiar. To an extent, the detainees, through becoming, challenged the legal order in ways which left the order no other option but to consider them in a relatively similar way to the way it treats all other subjects of law.

### fw

Plan focus is the legalist logic of neutrality—that naturalizes violence

Dossa 99

Shiraz, Department of Political Science, St. Francis Xavier University, Antigonish, Nova Scotia, “Liberal Legalism: Law, Culture and Identity,” The European Legacy, Vol. 4, No. 3, pp. 73-87,1

Law's imperial reach, it massive authority, in liberal politics is a **brute**, recurring **fact**. In Law's Empire, Dworkin attests to its scope and power with candour: "We live in and by the law. It makes us what we are" (vii). But he fails to appreciate that law equally traduces others, it systematically unmakes them. For Dworkin, a militant liberal legalist, law is the insiders' domain: legal argument has to be understood internally from the "judge's point of view"; sociological or historical readings are irrelevant and "perverse".2 Praising the decencies of liberal law is necessary in this world: rule of law, judicial integrity, fairness, justice are integral facets of tolerable human life. Lawfulness is and ought to be part of any decent regime of politics. But **law's rhetoric on its own behalf** systematically scants law's violent, dark underside, it skillfully masks law's commerce with **destruction and death.** None of this is visible from the internalist standpoint, and Dworkin's liberal apologia serves to mystify the gross reality of law's empire. In liberal political science, law's presumed, Olympian impartiality, is thus not a contested notion. Liberals still presuppose as a matter of course the juristic community's impartiality and neutrality, **despite empirical evidence to the contrary**.3 One consequence of the assumed sanctity of the judicial torso within the body politic, has been that law's genealogy, law's chronological disposition towards political and cultural questions, have simply not been of interest or concern to most liberal scholars. A further result of this attitude is the political science community's nearly total ignorance of liberal law's complicity in western imperialism, and in shaping western attitudes to the lands and cultures of the conquered natives. Liberal jurisprudence's subterranean life, its invidious consciousness is, however, not an archaic, intermittent annoyance as sensitive liberals are inclined to think: **indeed law is as potent now as it has been in last two centuries in articulating a dismissive image of the native Other**.

That means the plan’s band-aid reform causes error replication

Andreja Zevnik 11, international politics prof at Aberystwyth University in Wales, Becoming-Animal, Becoming-Detainee: Encountering Human Rights Discourse in Guantanamo, Law Critique (2011) 22:155–169

Questions concerning being and forms of existence are central to any political or philosophical discussions. They are particularly pertinent when invoked in relation to human rights abuses, invasion of personal freedoms or any other form of personal harm. The situation in the detention facility at Guantanamo Bay, Cuba, on which this paper focuses in particular, is a demonstration of how limited conceptions of being and forms of existence inﬂuence the scope or the limits determining one’s treatment in the face of law. The ideas of being and existence are central to modern political thinking, yet frequently abused for political purposes in settings/contexts such as Guantanamo. To be more explicit, by looking at the discourse developed in relation to Guantanamo detainees, one could argue that the legal categories applied to the detainees, and the political strategies coming from the situation, do not take such degrading form by pure coincidence. That which allows for such abusive practices and the consequent slackening of norms and legal frameworks is, I argue, precisely the politics of deﬁning what or who is the subject of law, and what or who is outside or inside of the law. In other words, the form of existence recognised by the law as a legitimate form in full possession of rights and duties, the subject of law, determines one’s experience of legal treatment. There has been an extensive debate on the character of legal subjectivity; its genesis is particularly interesting if discussed in the light of the dominant liberal ontology of human rights. Although I will not discuss the notion of human rights as such, it is important to acknowledge the legal subjectivity as it emerges in this particular discourse. Legal subjectivity institutes a particular notion of the subject as the only full bearer of human rights. To be recognised as the subject of human rights one has to be more than a ‘biological human’. As Costas Douzinas (2000, pp. 371–372) writes: ‘I am human because the other recognises me as human which, in institutional terms, means as a bearer of human rights’. There is nothing that is inherently in ‘the human’ that makes human automatically the subject of human rights. For our discussion of Guantanamo detainees this observation is essential, as the inmates—not only of Guantanamo but also of concentration camps, prisons etc.—are always constructed as less human, non-human or barbarian. Thus, in this liberal tradition of rights, with its philosophical origins in Descartes and Kant, ‘the human’ who can claim to be a full possessor and the subject of human rights is not an inmate of a closed institution, a child, a women etc., but an autonomous, selfdisciplining, heterosexual, adult, white male who is also a rational citizen. It is this notion of legal subjectivity that facilitates the exclusionary legal subjectivity. For example, to look at the relationship between citizenship and law; the human rights provisions do not apply to those who do not legally belong to a community in which they live or who are not in possession of citizenship. Giorgio Agamben, in Means Without Ends (2000), explicitly addresses the relationship between human rights and citizenship.1 He observes that since the 1789 Declaration of Human Rights, such rights are ‘attributed to the human being only to the degree to which he or she is the immediately vanishing presupposition of the citizen’ (ibid., p. 20). In other words, Agamben is saying that human rights, or any kind of rights for that matter, belong to a subject in a community and not to the subject or to the being as such. Hence, the exclusion from community not only deprives the individual of its citizenship but also of (human) rights. On occasions when one falls outside the scope of either of the two categories, the legal subjectivity and the legal protection, the rights are brought into question or at least scrutinised. Similar is the example of Guantanamo. The Guantanamo detention facility has been from its early days, rightly or not, seen as an emblem for human rights abuses. If one thinks of the history of the western world, however, this situation is not exceptional; in fact, it is, as perhaps Agamben (2005) would point out, symptomatic of the very nature of the predominant liberal democratic system and of the liberal notion of human rights. Within this discourse, Guantanamo represents only one space where legal subjectivity of detainees is contested or even suspended. A degrading treatment of the detainees had foundations in legal and political discourse, in the way the detainees were perceived and talked about. Moreover, the treatment corresponds to the above-described reasoning and practices constituting and determining legal subjectivity. For example, the detainees released from Guantanamo and their lawyers commonly refer to the treatment as being ‘animalistic’ or ‘worse’. Jamal Al-Harith remembers that the detainees stopped asking for human rights and instead pleaded for ‘animal rights’ (Committee on Legal Affairs 2004). The discourse of de-personiﬁcation (or de-humanisation mentioned above) was central to the treatment in Guantanamo. The detainees were referred to as packages, as animals, as Bob or by numbers (Howell 2007, p. 36).2 Such treatment is of course not symptomatic of Guantanamo alone; rather, it is present in most facilities of the kind. Aside from this more political aspect there is another; a theoretical or a philosophical aspect of the human rights discourse. It concerns the above observation that it is by virtue of the recognition that one becomes the subject of human rights. On the one side the statement of course implies that legal subjectivity can be given or taken away arbitrarily as there is no ‘material essence’ on which the possession of it rests. On the other side, however, the statement uncovers the philosophical reasoning determining legal subjectivity, which is that the legal subject is at the same time constitutive and constituted by the law. In other words, the legal subject is an embodiment of the negotiation between the subjectum and the subjectus. The subjectum is the holder of rights and the bearer of duties and responsibilities; it is also a modern subject, an agent of freedom and morality. The subjectum is Kantian and Cartesian autonomous subject following the moral law (Douzinas 2000, p. 216); arguably it is a human or a thinking being (ibid. p. 204). In contrast, subjectus refers to one’s subjection and submission to the legal and political power; the term also implies hierarchy and domination (ibid.). Both aspects, representing two sides of a spectrum on which the legal subjectivity is negotiated, are to an extent limiting and exclusionary. On the one end, there is a subjection to law and legal domination; on the other end there is the imaginary notion of a free and a rational subject. The legal subjectivity is always constructed on this spectrum. This paper addresses the situation in Guantanamo by challenging the exclusionary understanding of ‘the subject of law’ embodied in the existing legal discourse. The paper proposes a theoretical framework through which an alternative understanding of human rights can be thought, based on a different notion of what constitutes a subject of law and its limits. When it comes to discussing alternative ways of making something or someone a ‘subject of law’ or a ‘subject of human rights’, I would argue that the central problem is a philosophical representation of the subject that feeds into a legal discourse and constitutes what or who is or can be the subject of law. The law embodies a particular notion of life, leaving many other forms of life (e.g. nature and natural phenomena, animals, etc.) largely unrecognised. The alternative might lie in what was above described as the subjectum. Yet, not in the form explained above, but as a foundation of being that goes ‘beneath’ the particularities of an actual ‘human’ or any other form of existence. Against Descartes and Kant, such subjectum can stand for a pure immanent force, such as Spinozist conatus, or an essence that is shared between various forms of existence. The question then is what changes if such immanent force instead of a thinking being is taken as the ‘foundation’ of rights or legal subjectivity. This paper problematises the idea of who/what constitutes the subject of law. It challenges the notion of a rational human being who is a citizen of a particular state in two distinct ways: theoretically, by exploring Deleuze and Lacan’s ideas of becoming and desire, and in a practical/political sense, by exploring how different conceptions of life and existence can challenge dominant human rights discourse in Guantanamo. After exploring both theoretical and practical/political challenges to the static idea of how one becomes a subject of law, I propose some alternative conceptualisations of ‘human rights’ and legal subjectivity.

Alt solves the case—questioning the underlying ideology of detention is a prerequisite to ending detention as a practice

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(Saby, 57 Wayne L. Rev. 163)

Second, Guantanamo has been called a legal black hole, but for the wrong reason. It was called a legal black hole to reveal its characteristic of opaqueness n326--as if to bring the connotation that the nature of Guantanamo is so uncertain, so nebulous, that law is opaque to its implementation. I again humbly suggest that this construct must be reinterpreted. Indeed, Guantanamo is a black hole, but because of the enormous, gigantic vortex of energy it exudes. It is a black hole because it has an enormous shaping effect on the broader American detainee jurisprudence. It deconstructs the contours and obliterates any progressive forward movement of transparent jurisprudence.

Third, Guantanamo should be seen as neither a legal representation nor a legal exception. It must be viewed through a broader narrative--a narrative that is constructed out of multiple dimensions of divergent and dichotomist elements which are rights, dehumanization, erasure, and exceptionalism. In this exploration of Guantanamo, the "rights" dimension unfolded through the expression of panoply of rights--some of which were manifested, and some of which were annihilated for the detainees of Guantanamo. A single set or dimension of rights can describe a phenomenon, but Guantanamo cannot be seen simply as a rights-based narrative. Rather, it should be seen as the manifestation of a socially mediated construct. Rights only illuminate the ontological dimension of this whole, in much the same way Amistad and Guantanamo illuminate different spectrums of the broader continuum in which the whole ontology of dehumanization resides.

 [\*224] Thus, dehumanization must be seen not as an isolated event. Rather, it is the vehicle that takes Guantanamo from a rights-based narrative n327 to its phenomenological representation, where dehumanization simply acts as a conduit from a means to the end. Furthermore, exceptionalism completes the final dimension of Guantanamo. It is this very dimension that gives Guantanamo the permanency n328 that is enabling it to continue today. Without this enabling factor, we might see the framework towards a closure construct begin to evolve. But until and unless that very factor of exceptionalism is decoupled, Guantanamo will continue to exist, and exist in permanence in a much broader framework than is currently being imagined in our dialogues.

V. CONCLUSION

This article proposed a narrative of Guantanamo based on an existential phenomenological representation that seeks to carve out a new ontological space for the infamous detention facility. This attempt to recast is not an attempt to rehabilitate Guantanamo, but to understand the inertia surrounding its closure paradigm. My inquiry has been prompted in part by the inconsistent quagmire in which the broader U.S. detention framework finds itself, and in part driven by the desire to understand the post-9/11 social construct behind state sanctioned organized violence. In this narrative, Guantanamo transcended from a mere physical detention facility to a Guantanamo which has evolved in space and time, to forge a construct made of interplay between existential threat and dehumanization.

### security

Their constructed scenarios cause extinction

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LATE MODERN TRANSFORMATIONS are often conceived in terms of the sociopolitical and economic manifestations of change emergent from a globalized arena. What is less apparent is how late modernity as a distinct era has impacted upon our conceptions of the social sphere, our lived experience, and our reflections upon the discourses and institutions that form the taken-for-granted backdrop of the known and the knowable. The paradigmatic certainties of modernity – the state, citizenship, democratic space, humanity’s infinite capacity for progress, the defeat of dogma and the culmination of modernity’s apotheosis in the free-wheeling market place – have in the late modern era come face to face with uncertainty, unpre- dictability and the gradual erosion of the modern belief that we could indeed simply move on, assisted by science and technology, towards a condition where instrumental rationality would become the linchpin of government and human interaction irrespective of difference. Progress came to be associated with peace, and both were constitutively linked to the universal, the global, the human, and therefore the cosmopolitan. What shatters such illusions is the recollection of the 20th century as the ‘age of extremes’ (Hobsbawm, 1995), and the 21st as the age of the ever-present condition of war. While we might prefer a forgetting of things past, a therapeutic anamnesis that manages to reconfigure history, it is perhaps the continuities with the past that act as antidote to such righteous comforts.

How, then, do we begin to conceptualize war in conditions where distinctions disappear, where war is conceived, or indeed articulated in political discourse, in terms of peace and security, so that the political is somehow banished in the name of governmentalizing practices whose purview knows no bounds, whose remit is precisely the banishment of limits, of boundaries and distinctions. Boundaries, however, do not disappear. Rather, they become manifest in every instance of violence, every instance of control, every instance of practices targeted against a constructed other, the enemy within and without, the all-pervasive presence, the defences against which come to form the legitimizing tool of war.

Any scholarly take on the present juncture of history, any analysis of the dynamics of the present, must somehow render the narrative in measured tones, taking all factors into account, lest the narrator is accused of exaggeration at best and particular political affiliations at worst. When the late modern condition of the West, of the European arena, is one of camps, one of the detention of groups of people irrespective of their individual needs as migrants, one of the incarceration without due process of suspects, one of overwhelming police powers to stop, search and detain, one of indefinite detention in locations beyond law, one of invasion and occupation, then language itself is challenged in its efforts to contain the description of what is. The critical scholarly take on the present is then precisely to reveal the conditions of possibility in relation to how we got here, to unravel the enabling dynamics that led to the disappearance of distinctions between war and criminality, war and peace, war and security. When such distinctions disappear, impunity is the result, accountability shifts beyond sight, and violence comes to form the linchpin of control. We can reveal the operations of violence, but far more critical is the revelation of power and how power operates in the present. As the article argues, such an exploration raises fundamental questions relating to the relationship of power and violence, and their mutual interconnection in the complex interstices of disrupted time and space locations. Power and violence are hence separable analytical categories, separable practices; they are at the same time connected in ways that work on populations and on bodies – with violence often targeted against the latter so that the former are reigned in, governed. Where Michel Foucault sought, in his later writings, to distinguish between power and violence, to reveal the subtle workings of power, now, in the present, this article will venture, perhaps the distinction is no longer viable when we witness the indistinctions I highlight above

The article provides an analysis of the place of war in late modern politics. In particular, it concentrates on the implications of war for our conceptions of the liberty–security problematique in the context of the modern liberal state. The first section of the article argues the case for the figure of war as analyser of the present. The second section of the article reveals the con- ditions of possibility for a distinctly late modern mode of war and its imbri- cations in politics. The final section of the article concentrates on the political implications of the primacy of war in late modernity, and in particular on possibilities of dissent and articulations of political agency. The aim through- out is to provide the theoretical and conceptual tools that might begin to meet the challenges of the present and to open an agenda of research that concentrates on the politics of the present, the capacities or otherwise of contestation and accountability, and the institutional locations wherein such political agency might emerge.

The Figure of War and the Spectre of Security

The so-called war against terrorism is constructed as a global war, transcend- ing space and seemingly defiant of international conventions. It is dis- tinguished from previous global wars, including the first and the second world wars, in that the latter two have, in historiography, always been analysed as interstate confrontations, albeit ones that at certain times and in particular locations peripherally involved non-state militias. Such distinc- tions from the old, of course, will be subject to future historical narratives on the present confrontation and its various parameters. What is of interest in the present discussion is the distinctly global aspect of this war, for it is the globality1 of the war against terrorism that renders it particularly relevant and pertinent to investigations that are primarily interested in the relation- ship between war and politics, war and the political processes defining the modern state. The initial premise of the present article is that war, rather than being confined to its own time and space, permeates the normality of the political process, has, in other words, a defining influence on elements con- sidered to be constitutive of liberal democratic politics, including executive answerability, legislative scrutiny, a public sphere of discourse and inter- action, equal citizenship under the law and, to follow liberal thinkers such as Habermas, political legitimacy based on free and equal communicative practices underpinning social solidarity (Habermas, 1997). War disrupts these elements and is a time of crisis and emergency. A war that has a permanence to it clearly normalizes the exceptional, inscribing emergency into the daily routines of social and political life. While the elements of war – conflict, social fragmentation, exclusion – may run silently through the assemblages of control in liberal society (Deleuze, 1986), nevertheless the persistent iteration of war into politics brings these practices to the fore, and with them a call for a rethinking of war’s relationship to politics.

The distinctly global spatiality of this war suggests particular challenges that have direct impact on the liberal state, its obligations towards its citizenry, and the extent to which it is implicated in undermining its own political institutions. It would, however, be a mistake to assume that the practices involved in this global war are in any way anathema to the liberal state. The analysis provided here would argue that while it is crucial to acknowledge the transformative impact of the war against terrorism, it is equally as important to appreciate the **continuities in social and political life that are the** enabling conditions of this global war**, forming its conditions of possibility**. These enabling conditions are not just present or apparent at global level, but incorporate local practices that are deep-rooted and institu- tionalized. The mutually reinforcing relationship between global and local conditions renders this particular war distinctly all-pervasive, and poten- tially, in terms of implications, far more threatening to the spaces available for political contestation and dissent.

Contemporary global politics is dominated by what might be called a ‘matrix of war’2 constituted by a series of transnational practices that vari- ously target states, communities and individuals. These practices involve states as agents, bureaucracies of states and supranational organizations, quasi-official and private organizations recruited in the service of a global machine that is highly militarized and hence led by the United States, but that nevertheless incorporates within its workings various alliances that are always in flux. The crucial element in understanding the matrix of war is the notion of ‘practice’, for this captures the idea that any practice is not just situated in a system of enablements and constraints, but is itself constitutive of structural continuities, both discursive and institutional. As Paul Veyne (1997: 157) writes in relation to Foucault’s use of the term, ‘practice is not an agency (like the Freudian id) or a prime mover (like the relation of produc- tion), and moreover for Foucault, there is no agency nor any prime mover’. It is in this recursive sense that practices (of violence, exclusion, intimidation, control and so on) become structurated in the routines of institutions as well as lived experience (Jabri, 1996). To label the contemporary global war as a ‘war against terrorism’ confers upon these practices a certain legitimacy, suggesting that they are geared towards the elimination of a direct threat. While the threat of violence perpetrated by clandestine networks against civilians is all too real and requires state responses, many of these responses appear to assume a wide remit of operations – so wide that anyone interested in the liberties associated with the democratic state, or indeed the rights of individuals and communities, is called upon to unravel the implications of such practices.

When security becomes the overwhelming imperative of the democratic state, its legitimization is achieved both through a discourse of ‘balance’ between security and liberty and in terms of the ‘protection’ of liberty.3 The implications of the juxtaposition of security and liberty may be investigated either in terms of a discourse of ‘securitization’ (the power of speech acts to construct a threat juxtaposed with the power of professionals precisely to so construct)4 or, as argued in this article, in terms of a discourse of war. The grammars involved are closely related, and yet that of the latter is, para- doxically, the critical grammar, the grammar that highlights the workings of power and their imbrications with violence. What is missing from the securitization literature is an analytic of war, and it is this analytic that I want to foreground in this article.

The practices that I highlight above seem at first hand to constitute differ- ent response mechanisms in the face of what is deemed to be an emergency situation in the aftermath of the events of 11 September 2001. The invasion and occupation of Iraq, the incarceration without due process of prisoners in camps from Afghanistan to Guantánamo and other places as yet un- identified, the use of torture against detainees, extra-judicial assassination, the detention and deportation – again without due process – of foreign nationals deemed a threat, increasing restrictions on refugees, their confine- ment in camps and detention centres, the construction of the movement of peoples in security terms, and restrictions on civil liberties through domestic legislation in the UK, the USA and other European states are all represented in political discourse as necessary security measures geared towards the protection of society. All are at the same time institutional measures targeted against a particular other as enemy and source of danger.

It could be argued that the above practices remain unrelated and must hence be subject to different modes of analysis. To begin with, these practices involve different agents and are framed around different issues. Afghanistan and Iraq may be described as situations of war, and the incarceration of refugees as encompassing practices of security. However, what links these elements is not so much that they constitute a constructed taxonomy of dif- ferentiated practices. Rather, what links them is the element of antagonism directed against distinct and particular others. Such a perspective suggests that the politics of security, including the production of fear and a whole array of exclusionary measures, comes to service practices that constitute war and locates the discourse of war at the heart of politics,

not just domes- tically, but, more crucially in the present context, globally. The implications for the late modern state and the distinctly liberal state are monumental, for a perpetual war on a global scale has implications for political structures and political agency, for our conceptions of citizenship and the role of the state in meeting the claims of its citizens,5 and for the workings of a public sphere that is increasingly global and hence increasingly multicultural.

The matrix of war is centrally constituted around the element of antago- nism, having an association with existential threat: the idea that the continued presence of the other constitutes a danger not just to the well-being of society but to its continued existence in the form familiar to its members, hence the relative ease with which European politicians speak of migrants of particular origins as forming a threat to the ‘idea of Europe’ and its Christian origins.6 Herein lies a discourse of cultural and racial exclusion based on a certain fear of the other. While the war against specific clandestine organiza- tions7 involves operations on both sides that may be conceptualized as a classical war of attrition, what I am referring to as the matrix of war is far more complex, for here we have a set of diffuse practices, violence, disci- plinarity and control that at one and same time target the other typified in cultural and racial terms and instantiate a wider remit of operations that impact upon society as a whole.

The practices of warfare taking place in the immediate aftermath of 11 September 2001 combine with societal processes, reflected in media representations and in the wider public sphere, where increasingly the source of threat, indeed the source of terror, is perceived as the cultural other, and specifically the other associated variously with Islam, the Middle East and South Asia. There is, then, a particularity to what Agamben (1995, 2004) calls the ‘state of exception’, a state not so much generalized and generalizable, but one that is experienced differently by different sectors of the global population. It is precisely this differential experience of the exception that draws attention to practices as diverse as the formulation of interrogation techniques by military intelligence in the Pentagon, to the recent provisions of counter-terrorism measures in the UK,8 to the legitimizing discourses surrounding the invasion of Iraq. All are practices that draw upon a discourse of legitimization based on prevention and pre-emption. Enemies constructed in the discourses of war are hence always potential, always abstract even when identified, and, in being so, always drawn widely and, in consequence, communally. There is, hence, a ‘profile’ to the state of exception and its experience. Practices that profile particular communities, including the citizens of European states, create particular challenges to the self-understanding of the liberal democratic state and its capacity, in the 21st century, to deal with difference.

While a number of measures undertaken in the name of security, such as proposals for the introduction of identity cards in the UK or increasing surveillance of financial transactions in the USA, might encompass the population as a whole, the politics of exception is marked by racial and cul- tural signification. Those targeted by exceptional measures are members of particular racial and cultural communities. The assumed threat that under- pins the measures highlighted above is one that is now openly associated variously with Islam as an ideology, Islam as a mode of religious identi- fication, Islam as a distinct mode of lifestyle and practice, and Islam as a particular brand associated with particular organizations that espouse some form of a return to an Islamic Caliphate. When practices are informed by a discourse of antagonism, no distinctions are made between these various forms of individual and communal identification. When communal profiling takes place, the distinction between, for example, the choice of a particular lifestyle and the choice of a particular organization disappears, and diversity within the profiled community is sacrificed in the name of some ‘pre- cautionary’ practice that targets all in the name of security.9 The practices and language of antagonism, when racially and culturally inscribed, place the onus of guilt onto the entire community so identified, so that its indi- vidual members can no longer simply be citizens of a secular, multicultural state, but are constituted in discourse as particular citizens, subjected to particular and hence exceptional practices. When the Minister of State for the UK Home Office states that members of the Muslim community should expect to be stopped by the police, she is simply expressing the condition of the present, which is that the Muslim community is particularly vulnerable to state scrutiny and invasive measures that do not apply to the rest of the citizenry.10 We know, too, that a distinctly racial profiling is taking place, so that those who are physically profiled are subjected to exceptional measures.

Even as the so-called war against terrorism recognizes no boundaries as limits to its practices – indeed, many of its practices occur at transnational, often indefinable, spaces – what is crucial to understand, however, is that this does not mean that boundaries are no longer constructed or that they do not impinge on the sphere of the political. The paradox of the current context is that while the war against terrorism in all its manifestations assumes a boundless arena, borders and boundaries are at the heart of its operations. The point to stress is that these boundaries and the exclusionist practices that sustain them are not coterminous with those of the state; rather, they could be said to be located and perpetually constructed upon the corporeality of those constructed as enemies, as threats to security. It is indeed the corporeal removal of such subjects that lies at the heart of what are constructed as counter-terrorist measures, typified in practices of direct war, in the use of torture, in extra-judicial incarceration and in judicially sanctioned detention. We might, then, ask if such measures constitute violence or relations of power, where, following Foucault, we assume that the former acts upon bodies with a view to injury, while the latter acts upon the actions of subjects and assumes, as Deleuze (1986: 70–93) suggests, a relation of forces and hence a subject who can act. What I want to argue here is that violence is imbricated in relations of power, is a mode of control, a technology of governmentality. When the population of Iraq is targeted through aerial bombardment, the consequence goes beyond injury and seeks the pacifica- tion of the Middle East as a political region.

When legislative and bureaucratic measures are put in place in the name of security, those targeted are categories of population. At the same time, the war against terrorism and the security discourses utilized in its legitimiza- tion are conducted and constructed in terms that imply the defence or protection of populations. One option is to limit policing, military and intel- ligence efforts through the targeting of particular organizations. However, it is the limitless construction of the war against terrorism, its targeting of particular racial and cultural communities, that is the source of the challenge presented to the liberal democratic state. In conditions constructed in terms of emergency, war permeates discourses on politics, so that these come to be subject to the restraints and imperatives of war and practices constituted in terms of the demands of security against an existential threat. The implications for liberal democratic politics and our conceptions of the modern state and its institutions are far-reaching,11 for the liberal democratic polity that considers itself in a state of perpetual war is also a state that is in a permanent state of mobilization, where every aspect of public life is geared towards combat against potential enemies, internal and external.

One of the most significant lessons we learn from Michel Foucault’s writ- ings is that war, or ‘the distant roar of battle’ (Foucault, 1977: 308), is never quite so distant from liberal governmentality. Conceived in Foucaultian terms, war and counter-terrorist measures come to be seen not as discontinuity from liberal government, but as emergent from the enabling conditions that liberal government and the modern state has historically set in place. On reading Foucault’s renditions on the emergence of the disciplinary society, what we see is the continuation of war in society and not, as in Hobbes and elsewhere in the history of thought, the idea that wars happen at the outskirts of society and its civil order. The disciplinary society is not simply an accumulation of institutional and bureaucratic procedures that permeate the everyday and the routine; rather, it has running through its interstices the constitutive elements of war as continuity, including confrontation, struggle and the corporeal removal of those deemed enemies of society. In Society Must Be Defended (Foucault, 2003) and the first volume of the History of Sexuality (Foucault, 1998), we see reference to the discursive and institutional continuities that structurate war in society. Reference to the ‘distant roar of battle’ suggests confrontation and struggle; it suggests the ever-present construction of threat accrued to the particular other; it suggests the immediacy of threat and the construction of fear of the enemy; and ultimately it calls for the corporeal removal of the enemy as source of threat. The analytic of war also encompasses the techniques of the military and their presence in the social sphere – in particular, the control and regulation of bodies, timed pre- cision and instrumentality that turn a war machine into an active and live killing machine. In the matrix of war, there is hence the level of discourse and the level of institutional practices; both are mutually implicating and mutually enabling. There is also the level of bodies and the level of population. In Foucault’s (1998: 152) terms: ‘the biological and the historical are not con- secutive to one another . . . but are bound together in an increasingly com- plex fashion in accordance with the development of the modern technologies of power that take life as their objective’.

What the above suggests is the idea of war as a continuity in social and political life. The matrix of war suggests both discursive and institutional practices, technologies that target bodies and populations, enacted in a complex array of locations. The critical moment of this form of analysis is to point out that war is not simply an isolated occurrence taking place as some form of interruption to an existing peaceful order. Rather, this peaceful order is imbricated with the elements of war, present as continuities in social and political life, elements that are deeply rooted and enabling of the actuality of war in its traditional battlefield sense. This implies a continuity of sorts between the disciplinary, the carceral and the violent manifestations of government.