# Wake Round 7

## 1NC

### T

#### Restrictions on authority prohibit- the aff is a condition

William **Conner 78**,former federal judge for the United States District Court for the Southern District of New York United States District Court, S. D. New York, CORPORACION VENEZOLANA de FOMENTO v. VINTERO SALES, http://www.leagle.com/decision/19781560452FSupp1108\_11379

Plaintiff next contends that Merban was charged with notice of the restrictions on the authority of plaintiff's officers to execute the guarantees. **Properly interpreted,** **the "conditions" that had been imposed by plaintiff's** Board of Directors and by the Venezuelan Cabinet **were not "restrictions" or "limitations"** up**on** the **authority of** plaintiff's **agents but rather conditions precedent to the granting of authority**. Essentially, then, plaintiff's argument is that Merban should have known that plaintiff's officers were not authorized to act except upon the fulfillment of the specified conditions.

**Vote neg
limits and ground- anything can indirectly affect war powers--also makes the topic bidirectional because conditions can enhance executive power**

### DA

#### Boehner foot-dragging has just delayed comprehensive reform until next year – business leaders will still ensure a comprehensive agreement happens

VOA News, 11-15-’13 (“US Business Leader Confident Boehner Will Seek Immigration Reform” http://www.voanews.com/content/reu-us-business-leader-confident-boehner-immigration-reform/1790627.html)

The head of the biggest U.S. business group, a traditional ally of Republicans, said on Thursday that he remains confident that the top Republican in Congress will push to enact comprehensive immigration reform. Donohue said he supports Boehner's decision to take a step-by-step approach, with smaller measures to fix the nation's broken immigration system, as opposed to the broader, comprehensive approach favored by Democrat leaders in the Senate. “I believe it will get done,” Donohue said at a news conference attended by business, religious and law enforcement leaders, all of whom echoed his determination and optimism. A landmark bill to bolster border security, help business get needed workers and provide a pathway to U.S. citizenship for up to 11 million undocumented immigrants won Senate approval in June. However, thus far, the House has passed only a handful of limited bills, most dealing with enforcement and none providing a pathway to U.S. citizenship. Donohue promised to help Boehner get the votes to pass a series of bills to provide comprehensive reform, including a pathway to citizenship. He said such legislation would be good for business, labor and the country, and that he expects final congressional approval in the first half of next year. “We're not going away,” said Donohue, whose business group, along with organized labor, helped craft the Senate bill. “We're just getting warmed up.” Boehner drew fire on Wednesday when he said that the House will not negotiate with the Senate to resolve differences between the Senate bill and what the House ends up passing. “We have made it clear that we are going to move on a common sense, step-by-step approach,” the speaker said, repeating his opposition to the Senate legislation. “We have no intention of ever going to conference on the Senate bill,” he continued. Some read Boehner's comments to mean that he was walking away from comprehensive reform. Donohue, whose Chamber of Commerce represents more than 3 million businesses, said he didn't see it that way. “I'm not upset with Boehner,” Donohue said, adding that he believes Congress will end up doing what needs to be done to overhaul the U.S. immigration system. “We will get there,” he said. “It doesn't matter to me what music they play for the dance.” Objection to Pathway The Chamber of Commerce, and much of the business community, has long been allies of Republicans, largely because of the party's anti-tax, anti-regulatory positions. Yet many Republicans have balked at the Senate bill because of the pathway to citizenship for illegal immigrants. Critics say the pathway would provide “amnesty” to law breakers and encourage more illegal immigration. Supporters disagree. Instead, they argue, it would bring millions of illegal immigrants out of the shadows and end their exploitation. Donohue said he remains confident Congress will enact a comprehensive immigration overhaul, largely because polls show more than 70 percent of Americans back it.

#### Plan tanks capital and derails the agenda – empirics prove

Kriner ’10 Douglas L. Kriner, assistant professor of political science at Boston University, “After the Rubicon: Congress, Presidents, and the Politics of Waging War”, University of Chicago Press, Dec 1, 2010, page 68-69

While congressional support leaves the president’s reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president’s foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president’s political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races.59 Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War. 60 In addition to boding ill for the president’s perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson’s dream of a Great Society also perished in the rice paddies of Vietnam. Lacking the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush’s highest second-term domestic proprieties, such as Social Security and immigration reform, failed perhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.61 When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena.

#### Lack of political capital causes Obama to cave to the GOP piecemeal approach – means he’ll give up on a pathway to citizenship

Rubin, 11-14-’13 (Jennifer, “Immigration reform outlook” Washington Post, http://www.washingtonpost.com/blogs/right-turn/wp/2013/11/14/immigration-reform-outlook/)

In fact, I would argue that with the president on the ropes and anxious for something other than scandal, defeat and chaos, he and the Democrats might be willing to deal in ways they weren’t earlier this year. A pro-immigration reform GOP senator with whom I spoke a couple of weeks ago said he was more optimistic lately that Sen. Chuck Schumer (D-N.Y.) and the president could deal with Republicans on something other than, as he put it, a “special path to citizenship.” (“Special” here is the variable.) I would add that with the bruising taken by the far-right in the shutdown and Nov. elections and the re-engagement of Main Street Republicans (evidence by today’s press conference), the House may have more votes for immigration reform than before the disastrous shutdown.

#### CIR solves immigrant marginalization and exploitation

Fitz 12 - Director of Immigration Policy at the Center for American Progress

Marshall, “Time to Legalize Our 11 Million Undocumented Immigrants,” CAP, http://www.americanprogress.org/issues/immigration/report/2012/11/14/44885/time-to-legalize-our-11-million-undocumented-immigrants/

More than two-thirds of the immigrants working without papers in the United States have contributed to our economy and culture for more than a decade. But our outdated and misguided immigration policies, along with our polarized immigration politics, block them from realizing their—and our nation’s—full potential and forces them to live in fear of being ripped from their families.¶ Let’s take a brief look at some of the benefits:¶ Bringing these hard-working immigrants off the economic sidelines would generate a $1.5 trillion boost to the nation’s cumulative GDP over 10 years and add close to $5 billion in additional tax revenue in just the next three years.¶ Registering these immigrants with background checks would ensure that we know who is here and will enable our authorities to focus enforcement resources on criminal elements and security threats instead of hard-working family members.¶ Bringing these immigrants out of the shadows would strike a blow to unscrupulous employers who mistreat their employees (immigrant and native-born alike) and help ensure worker safety for all.¶ Enabling immigrants to earn legal status and to openly participate in civic life will strengthen our communities and reduce marginalization and exploitation.¶ In other words, virtually everyone except exploitive employers and criminals is better off by enabling these immigrants to work above board and pay their full taxes. So if it’s a policy “no-brainer,” why hasn’t reform happened?

### Politics of Schmitt K

#### Politics is Schmittian – trying to fight the executive on their own battlefield is naïve – the aff is just a liberal knee-jerk reaction that swells executive power

Kinniburgh, 5/27 **–** (Colin, Dissent, 5-27, <http://www.dissentmagazine.org/blog/partial-readings-the-rule-of-law>)

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

#### Legality is what feeds a new form of muscular liberalism where these illusions cannot see how much they sustain it which legitimizes wars for democracies and doctrines of pre-emption

Motha 8 \*Stewart, Senior Lecturer, Kent Law School, University of Kent, Canterbury, Kent, Journal of Law, Culture, and Humanities Forthcoming 2008, Liberal Cults, Suicide Bombers, and other Theological Dilemmas

A universalist liberal ideology has been re-asserted. It is not only neo-con hawks or Blairite opportunists that now legitimise wars for democracy. Alarmingly, it is a generation of political thinkers who opposed the Nixonian logic of war (wars to show that a country can ‘credibly’ fight a war to protect its interests1), and those humbled by the anticolonial struggles of liberation from previous incarnations of European superiority that are renewing spurious civilizational discourses. This ‘muscular liberalism’ has found its voice at the moment of a global political debate about the legality and effectiveness of ‘just wars’ – so called ‘wars for democracy’ or ‘humanitarian war’. The new political alignment of the liberal left emerged in the context of discussions about the ‘use of force’ irrespective of UN Security Council endorsement or the sovereign state’s territorial integrity, such as in Kosovo – but gained rapid momentum in response to attacks in New York City and Washington on September 11, 2001. Parts of the liberal left have now aligned themselves with neoconservative foreign policies, and have joined what they believe is a new anti-totalitarian global struggle – the ‘war on terror’ or the battle against Islamist fundamentalism. One task of this essay, then, is to identify this new formation of the liberal left. Much horror and suffering has been unleashed on the world in the name of the liberal society which must endure. However, when suicide bombing and state-terror are compared, the retort is that there is no moral equivalence between the two. Talal Asad in his evocative book, On Suicide Bombing, has probed the horror that is felt about suicide bombing in contrast to state violence and terror.2 What affective associations are formed in the reaction to suicide bombing? What does horror about suicide bombing tell us about the constitution of inter-subjective relations? In this essay I begin to probe these questions about the relation between death, subjectivity, and politics. I want to excavate below the surface oppositions of good deaths and bad, justifiable killing and barbarism, which have been so central to left liberal arguments. As so much is riding on the difference between ‘our good war’ and ‘their cult of death’, it seems apt to examine and undo the opposition. The muscular liberal left projects itself as embodying the values of the ‘West’, a geo-political convergence that is regularly opposed to the ‘East’, ‘Muslims’, or the ‘Islamic World’. I undo this opposition, arguing that thanatopolitics, a convergence of death, sacrifice, martyrdom and politics, is common to left liberal and Islamist political formations. How does death become political for left liberals and Islamist suicide bombers? In the case of the latter, what is most immediately apparent is how little is known about the politics and politicization of suicide bombers. Suicide bombers are represented as a near perfect contrast to the free, autonomous, self-legislating liberal subject – a person overdetermined by her backward culture, oppressive setting, and yet also empty of content, and whose death can have no temporal political purchase. The ‘suicide bomber’ tends to be treated by the liberal left as a trans-historical ‘figure’, usually represented as the ‘Islamo-fascist’ or the ‘irrational’ Muslim.3 The causes of suicide bombing are often implicitly placed on Islam itself – a religion that is represented as devoid of ‘scepticism, doubt, or rebellion’ and thus seen as a favourable setting for totalitarianism.4 The account of the suicide bomber as neo-fascist assassin supplements a lack – that is, that the association of suicide bombing with Islam explains very little. The suicide bomber is thus made completely familiar as totalitarian fascist, or wholly other as “[a] completely new kind of enemy, one for whom death is not death”.5 So much that is written about the suicide bomber glosses over the unknown with political subjectivities, figures, and paradigms (such as fascism) which are familiar enough to be vociferously opposed. By drawing the suicide bomber into a familiar moral register of ‘evil’, political and historical relations between victim and perpetrator are erased.6 In the place of ethnographically informed research the ‘theorist’ or ‘public intellectual’ erases the contingency of the suicide bomber and reduces her death to pure annihilation, or nothingness. The discussion concludes by undoing the notion of the ‘West’, the very ground that the liberal left assert they stand for. The ‘West’ is no longer a viable representation of a geo-political convergence, if it ever was. Liberal discourse has regarded itself as the projection of the ‘West’ and its enlightenment. But this ignores important continuities between Islam, Christianity, and contemporary secular formations. The current ‘clash of monotheisms’, I argue after J-L Nancy, reveals a crisis of sense, authority, and meaning which is inherent to the monotheistic form. An increasingly globalised world is made up of political communities and juridical orders that have been ‘emptied’ of authority and certainty. This crisis of sense conditions the horror felt by the supposedly rational liberal in the face of Islamist terrorism. Horror at terrorism is then the affective bond that sustains a grouping that otherwise suffers the loss of a political project with a definite end. The general objective of this essay is to challenge the unexamined assumptions about politics and death that circulate in liberal left denunciations of Islamic fascism. The horror and fascination with the figure of the suicide bomber reveals an unacknowledged affective bond that constitutes the muscular liberal left as a political formation. This relies on disavowing the sacrificial and theological underpinnings of political liberalism itself – and ignores the continuities between what is called the ‘West’ and the theologico-political enterprise of monotheism. Monotheism is not the preserve of something called the ‘West’, but rather an enterprise that is common to all three Religions of the Book. The article concludes by describing how the writings of Jean-Luc Nancy on monotheism offer liberal left thinkers insights for rethinking the crisis of value that resulted from the collapse of grand emancipatory enterprises as well as the fragmentation of politics resulting from a focus on political identification through difference. I opened with a reference to the ‘liberal left’. Of course the ‘liberal left’ signifies a vast and varied range of political thinking and activism – so I must clarify how I am deploying this term. In this essay the terms ‘liberal left’ or ‘muscular liberal’ are used interchangeably. Paul Berman and Nick Cohen, whose writing I will shortly refer to, are exemplars of the new political alignment who self-identify as ‘democrats and progressives’, but whose writings feature bellicose assertions about the superiority of western models of democracy, and universal human rights.7 Among this liberal left, democracy and freedom become hemispheric and come to stand for the West. More generally, now, the ‘liberal left’ can be distinguished from political movements and thinkers who draw inspiration from a Marxist tradition of thought with a socialist horizon. The liberal left I am referring to would view the Marxist tradition as undervaluing democratic freedoms and human rights. Left liberals also tend to dismiss the so called post-Marxist turn in European continental philosophy as ‘postmodern relativism’.8 PostMarxists confronted the problem of the ‘collective’ – addressing the problem of masses and classes as the universal category or agent of historical transformation. This was a necessary correction to all the disasters visited on the masses in the name of a universal working class. The liberal state exploited these divisions on the left. It is true that a left fragmented through identity politics or the politics of difference were reduced to group based claims on the state. However, liberal multiculturalism was critiqued by anti-racist and feminist thinkers as early as the 1970s for ignoring the structural problems of class or as yet another nation-building device. The new formation of the muscular liberal left have only just discovered the defects of multiculturalism. The dismissal of liberal multiculturalism is now code for ‘too much tolerance’ of ‘all that difference’. The liberal left, or muscular liberal, as I use these terms, should not be conflated with the way ‘liberal’ is generally used in North America to denote ‘progressive’, ‘pro-choice’, open to a multiplicity of forms of sexual expression, generally ‘tolerant’, or ‘left wing’ (meaning socialist). It might be objected that it is not the liberal left, but ‘right wing crazies’ driven by Christian evangelical zeal combined with neo-liberal economic strategies that have usurped a post-9/11 crime and security agenda to mount a global hegemonic enterprise in the name of a ‘war on terror’. It might also be said that this is nothing new – global expansionist enterprises such as 18th and 19th century colonialism mobilised religion, science, and theories of economic development to secure resources and justify extreme violence where necessary. Global domination, it might be argued, has always been a thanatopolitical enterprise. So what’s different now? What is crucial, now, is that the entire spectrum of liberalism, including the ‘rational centre’, is engaged in the kind of mindset whereby a destructive and deadly war is justified in the name of protecting or establishing democracy, the rule of law, and human rights. It might then be retorted that this ‘rational centre’ of liberalism have ‘always’ been oriented in this way. That is partly true, but it is worth recalling that the liberal left I have in mind is the generation that came of age with opposition to the war in Vietnam, other Indo-Chinese conflagrations, and the undoing of empire. This is a left that observed the Cold War conducted through various ‘hot wars’ in Africa, Central and Latin America, and South East Asia and thus at least hoped to build a ‘new world order’ of international law and multilateralism. This is a left that was resolved, by the 1970s, not to repeat the error of blindly following a scientific discourse that promised to produce a utopia – whether this was ‘actually existing socialism’ or the purity of ‘blood and soil’. But now, a deadly politics, a thanatopolitics, is drawn out of a liberal horror and struggle against a monolithically drawn enemy called Islamic fundamentalism. What is new is that Islam has replaced communism/fascism as the new ‘peril’ against which the full spectrum of liberalism is mobilized. Islamist terrorism and suicide bombers, a clash between an apparently Islamic ‘cult of death’ versus modern secular rationality has come to be a central preoccupation of the liberal left. In the process, as Talal Asad has eloquently pointed out, horror about terrorism has come to be revealed as one way in which liberal subjectivity and its relation to political community can be interrogated and understood.9 Moreover, the potential for liberal principles to be deployed in the service of legitimating a doctrine of pre-emption as the ‘new internationalism’ is significant. The first and second Gulf Wars, according to the liberal left, are then not wars to secure control over the supply of oil, or regional and global hegemony, as others on the left might argue, but anti-fascist, anti-totalitarian wars of liberation fought in the name of ‘democracy’. Backing ‘progressive wars’ for ‘freedom and democracy’, those who self-identify as a left which is reasserting liberal democratic principles start by asking questions such as: “Are western freedoms only for westerners?”.10 In the process, freedom becomes ‘western’, and its enemy an amorphous legion behind an unidentifiable line between ‘west’ and the rest (the ‘Muslim world’). The ‘war for democracy’ waged against ‘Islamist terrorism’ and Muslim fundamentalism is the crucible on which the new alignment of the liberal left is forged.

#### The alt is to reject the aff in favor of building a culture of resilience

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

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

### CP

#### The Executive Branch of the United States should require that persons detained indefinitely receive either civilian trials or be released.

#### The Executive Branch of the United States should create “executive v. executive” divisions as per our Katyal evidence to promote internal separation of powers via separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts.

#### Presidential veto power and executive deference mean external restraints fail – internal separation of powers constrains the president and leads to better decision making

Katyal ’6 Neal Katyal, Professor of Law @ Georgetown, The Yale Law Journal, “Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within” 115 Yale L.J. 2314, 2006

After all, Publius's view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning modus operandi. It is often remarked that "9/11 changed everything"; 2 particularly so in the war on terror, in which Congress has been absent or content to pass vague, open-ended statutes. The result is an executive that subsumes much of the tripartite structure of government. Many commentators have bemoaned this state of affairs. This Essay will not pile on to those complaints. Rather, it begins where others have left off. If major decisions are going to be made by the President, then how might separation of powers be reflected within the executive branch? The first-best concept of "legislature v. executive" checks and balances must be updated to contemplate second-best "executive v. executive" divisions. And this Essay proposes doing so in perhaps the most controversial area: foreign policy. It is widely thought that the President's power is at its apogee in this arena. By explaining the virtues of internal divisions in the realm of foreign policy, this Essay sparks conversation on whether checks are necessary in other, domestic realms. That conversation desperately needs to center on how best to structure the ever-expanding modern executive branch. From 608,915 employees working in agencies in 1930, 3 to 2,649,319 individuals in 2004, 4 the growth of the executive has not generated a systematic focus on internal checks. We are all fond of analyzing checks on judicial activism in the post-Brown, post-Roe era. So too we think of checks on legislatures, from the filibuster to judicial review. But [\*2317] there is a paucity of thought regarding checks on the President beyond banal wishful thinking about congressional and judicial activity. This Essay aims to fill that gap. A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured view of agencies as simple anti-change agents. This Essay celebrates the potential of bureaucracy and explains how legal institutions can better tap its powers. A well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction. Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal variants. When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results. And when there is no neutral decision-maker within the government in cases of disagreement, the system risks breaking down. In short, the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise). A chief aim of this Essay's proposal is to allow each to function without undermining the other. This goal can be met without agency competition - overlapping jurisdiction is simply one catalyzing agent. Other ideas deserve consideration, alongside or independent of such competition, such as developing career protections for the civil service modeled more on the Foreign Service. Executives of all stripes offer the same rationale for forgoing bureaucracy-executive energy and dispatch. 5 Yet the Founders assumed that massive changes to the status quo required legislative enactments, not executive decrees. As that concept has broken down, the risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity. Such claims of executive power are not limited to the current administration, nor are they limited to politicians. Take, for example, Dean Elena Kagan's rich celebration of presidential administration. 6 Kagan, herself a former political appointee, lauded the President's ability to trump bureaucracy. Anticipating the claims of the current administration, Kagan argued that the [\*2318] President's ability to overrule bureaucrats "energizes regulatory policy" because only "the President has the ability to effect comprehensive, coherent change in administrative policymaking." 7 Yet it becomes clear that the Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President). Without that checking function, presidential administration can become an engine of concentrated power. This Essay therefore outlines a set of mechanisms that create checks and balances within the executive branch. The apparatuses are familiar - separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. But these restraints have been informally laid down and inconsistently applied, and in the wake of September 11 they have been decimated. 8 A general framework statute is needed to codify a set of practices. In many ways, the status quo is the worst of all worlds because it creates the facade of external and internal checks when both have withered. I. THE NEED FOR INTERNAL SEPARATION OF POWERS The treacherous attacks of September 11 gave Congress and the President a unique opportunity to work together. Within a week, both houses of Congress passed an Authorization for Use of Military Force (AUMF); 10 two months later they enacted the USA PATRIOT Act to further expand intelligence and law enforcement powers. 11 But Congress did no more. It passed no laws authorizing or regulating detentions for U.S. citizens. It did not affirm or regulate President Bush's decision to use military commissions to try unlawful belligerents. 12 It stood silent when President Bush accepted thinly reasoned legal views of the Geneva Conventions. 13 The administration was content to rely on vague legislation, and Congress was content to enact little else. 14 There is much to be said about the violation of separation of powers engendered by these executive decisions, but for purposes of this Essay, I want [\*2320] to concede the executive's claim - that the AUMF gave the President the raw authority to make these decisions. A democratic deficit still exists; the values of divided government and popular accountability are not being preserved. Even if the President did have the power to carry out the above acts, it would surely have been wiser if Congress had specifically authorized them. Congress's imprimatur would have ensured that the people's representatives concurred, would have aided the government's defense of these actions in courts, and would have signaled to the world a broader American commitment to these decisions than one man's pen stroke. Of course, Congress has not passed legislation to denounce these presidential actions either. And here we come to a subtle change in the legal landscape with broad ramifications: the demise of the congressional checking function. The story begins with the collapse of the nondelegation doctrine in the 1930s, which enabled broad areas of policymaking authority to be given to the President and to agencies under his control. That collapse, however, was tempered by the legislative veto; in practical terms, when Congress did not approve of a particular agency action, it could correct the problem. But after INS v. Chadha, 15 which declared the legislative veto unconstitutional, that checking function, too, disappeared. In most instances today, the only way for Congress to disapprove of a presidential decree, even one chock full of rampant lawmaking, is to pass a bill with a solid enough majority to override a presidential veto. The veto power thus becomes a tool to entrench presidential decrees, rather than one that blocks congressional misadventures. And because Congress ex ante appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block a bill. 16 For example, when some of the Senate's most powerful Republicans (John McCain, Lindsay Graham, and John Warner) tried to regulate detentions and trials at Guantanamo Bay, they were told that the President would veto any attempt to modify the AUMF. 17 The result is that once a court [\*2321] interprets a congressional act, such as the AUMF, to give the President broad powers, Congress often cannot reverse the interpretation, even if Congress never intended to give the President those powers in the first place. Senator McCain might persuade every one of the other ninety-nine Senators to vote for his bill, but that is of no moment without a supermajority in the House of Representatives as well. 18 At the same time, the executive branch has gained power from deference doctrines that induce courts to leave much conduct untouched - particularly in foreign affairs. 19 The combination of deference and the veto is especially insidious - it means that a President can interpret a vague statute to give himself additional powers, receive deference in that interpretation from courts, and then lock that decision into place by brandishing the veto. This ratchet-and-lock scheme makes it almost impossible to rein in executive power. All legislative action is therefore dangerous. Any bill, like Senator McCain's torture bill, can be derailed through compromise. A rational legislator, fearing this cascading cycle, is likely to do nothing at all. This expansion of presidential power is reinforced by the party system. When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking. That reluctance is exacerbated by a paucity of weapons that check the President. Post-Chadha, Congress only has weapons that cause extensive collateral damage. The fear of that damage becomes yet another reason why Congress is plagued with inertia. And the filibuster, the last big check in periods of single-party government, is useless against the host of problems caused by Presidents who take expansive views of their powers under existing laws (such as the AUMF). Instead of preserving bicameralism, Chadha has led to its subversion and "no-cameralism." A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics. With this system in place, it is no surprise that recent calls [\*2322] for legislative revitalization have failed. No successful action-forcing mechanisms have been developed; instead we are still in John Hart Ely's world of giving a "halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority." 20 It is time to consider second-best solutions to bring separation of powers into the executive. Bureaucracy can be reformed and celebrated (instead of purged and maligned), and neutral conflict-decision mechanisms can be introduced. Design choices such as these can help bring our government back in line with the principles envisioned by our Founders. 21

#### Internal checks comparatively solve better and don’t link to politics

Metzger ‘9, Gillian E. Metzger, Professor of Law @ Columbia Law School, “The Interdependent Relationship Between Internal and External Separation of Powers” 59 Emory L.J. 423, Emory Law Journal, 2009

Several bases exist for thinking that internal separation of powers mechanisms may have a comparative advantage. First, internal mechanisms [\*440] operate ex ante, at the time when the Executive Branch is formulating and implementing policy, rather than ex post. As a result, they avoid the delay in application that can hamper both judicial and congressional oversight. 76 Second, internal mechanisms often operate continuously, rather than being limited to issues that generate congressional attention or arise in the form of a justiciable challenge. 77 Third, internal mechanisms operate not just at the points at which policy proposals originate and are implemented but also at higher managerial levels, thus addressing policy and administration in both a granular and systemic fashion. In addition, policy recommendations generated through internal checks may face less resistance than those offered externally because the latter frequently arise after executive officials have already decided upon a policy course and are more likely to take an adversarial form. 78 Internal mechanisms may also gain credibility with Executive Branch officials to the extent they are perceived as contributing to more fully informed and expertise-based decisionmaking. 79

### Case

#### WOT practices shifting towards capture over kill – options are zero-sum

Dillow, 13 – (Clay, “Obama Set To Reboot Drone Strike Policy And Retool The War On Terror “, 5/23/13, <http://www.popsci.com/technology/article/2013-05/obama-set-reboot-drone-strike-policy-and-retool-war-terror>)

These three topics are deeply intertwined, of course. With the drawdown of troops in Iraq and Afghanistan and a reduced American presence in the regions regarded as power bases for the likes of al-Qaeda, al-Shabab, and the Taliban, American security and intelligence forces have only two real options. Strike at suspected terrorists with drones, or somehow capture those suspects and detain them (at some place like Guantanamo). It would seem that if the war on terror is going to continue (and it is--for another 10 or 20 years according to one recently-quoted Pentagon official) then it seems that either detention or the use of lethal strikes must increase. But that’s not really the case, and in today’s speech Obama is expected to outline why the administration thinks so. In his first major counterterrorism address of his second term, the President is expected to announce new restrictions on the unmanned aerial strikes that have been the cornerstone of his national security agenda for the last five years. For all the talk about drone strikes--and they did peak under Obama--such actions have been declining since 2010. And it seems the administration finally wants to come clean (somewhat) about what it has been doing with its drone program, acknowledging for the first time that it has killed four American citizens in its shadow drone wars outside the conflict zones of Afghanistan and Iraq, something the public has known for a while now but the government has refused to publicly admit. The Obama administration will also voluntarily rein in its drone strike program in several ways. A new classified policy signed by Obama will more sharply define how drones can be used**,** the New York Times reports, essentially extending to foreign nationals the same standards currently applied to American citizens abroad. That is, lethal force will only be used against targets posing a “continuing, imminent threat to Americans” and who cannot be feasibly captured or thwarted in any other way. This indicates that the administration’s controversial use of “signature strikes”--the killing of unknown individuals or groups based on patterns of behavior rather than hard intelligence--will no longer be part of the game plan. That’s a positive signal, considering that signature strikes are thought to have resulted in more than a few civilian casualties. Reportedly there’s another important change in drone policy in the offing that President Obama may or may not mention in today’s speech: the shifting of the drone wars in Pakistan and elsewhere (likely Yemen and Somalia as well) from the CIA to the military over the course of six months. This is good for all parties involved. The CIA’s new director, John Brennan, has publicly said he would like to transition the country’s premier intelligence gathering agency back to actual intelligence gathering and away from paramilitary operations--a role that it has played since 2001 but that isn’t exactly in its charter. Putting the drone strike program in the Pentagon also places it in a different category of public scrutiny. The DoD can still do things under the veil of secrecy of course, but not quite like the CIA can (the military is subject to more oversight and transparency than the clandestine services in several respects, and putting drones in the hands of the military also changes the governing rules of engagement). So what does this all mean for the war on terror? If Obama plans to create a roadmap for closing Guantanamo Bay and draw down its drone strike program, it suggests that the administration thinks we are winning--as much as one can win this kind of asymmetric war. It appears the war on terror is shifting toward one in which better intelligence will lead to more arrests and espionage operations to thwart terrorists rather hellfire missile strikes from unseen robots in the sky.

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

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

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

#### Current debate about drones focuses only on the number of casualties but ignores the context in which drone strikes take place- the act of drone strikes themselves cause more than just civilian casualties, they inflict psychological harm, spur revenge killings, and increase recruitment for terrorist organizations. A concern for those affected by drones is a necessary pre-requisite for ending the drone war.

Luban 12 Daniel Luban is a doctoral student in political science at the University of Chicago. He was formerly a correspondent for the Washington bureau of Inter Press Service. “An Important New Study of the Drone War” Sept 26 http://www.lobelog.com/an-important-new-study-of-the-drone-war/

As the report makes clear, however, the civilian death toll is only the most obvious human cost of the drone war. David Rohde, the New York Times journalist who spent months in captivity with the Taliban, has described life in the Pakistani tribal areas during the war on terror as “hell on earth,” and the accounts of the damage drones inflict on everyday life back up this assessment. Civilians living with the perpetual buzzing of drones overhead have been increasingly afraid to send their children to school, attend social gatherings, and even to provide first aid or burials for the victims of previous drone strikes. While the authors do not engage in diagnosis, their accounts suggest that an enormous chunk of the population of these areas must be living with something like PTSD. Finally, the much-touted strategic benefits of the drone war appear to be quite overblown. An extremely low percentage of the “militants” killed seem to have been significant operational leaders responsible for terrorist attacks, and the deep unpopularity of the drone strikes has further alienated the Pakistani public and raised the likelihood that the next government might swing in a sharply anti-American direction. As I’ve written before, there seems to be no major constituency at present pushing to hold the Obama administration accountable for its conduct of the drone war. Democrats have been more than happy to prove their toughness by claiming “terrorist” scalps — witness Osama bin Laden’s starring role at the Democratic convention earlier this month — while Republicans’ down-the-line opposition to the administration’s every move does not seem to extend to a concern for the rights of dark-skinned civilians in far-off Muslim countries. Until that changes, sad to say, the domestic political benefits of the drone war seem likely to ensure that it will continue.

#### Plan causes extraordinary rendition shift

Kenneth Anderson 09, Professor of International Law at American University, 5/31, “Security Issues Like Squeezing Jello? Reversion to the Mean? Jack Goldsmith on the Effects of Security Alternatives,” http://opiniojuris.org/2009/05/31/security-issues-like-squeezing-jello-reversion-to-the-mean-jack-goldsmith-on-the-effects-of-security-alternatives/#sthash.TB1xcePu.dpuf

One way you might look at this is that there is a sort-of national security constant that remains in equilibrium over time, using one tactic or another, gradually evolving but representing over time a reversion to the national security mean. Or you might say that national security, seen over time, looks a little like squeezing jello – if squeezed one place it pops out another. ¶ I think Jack is right that the administration – any administration – tends to strive for a certain equilibrium, as it is confronted with a flow of threats that the public discounts to near-zero but which it does not see itself quite so able to do, however much it might want to. However, as the op-ed also notes, and I agree, these methods are not completely equivalent or compensating. That is so not just with regards to third party costs, but also with respect to security as such. Intelligence gathering, by all accounts not very effective to begin with, has become much more difficult. This is not compensation, it is a seemingly permanent downward shift in the security mean. ¶ Besides the consequences that Jack identifies, I would add that the current move to semi-compensating policies means two things. First, intelligence is likely to be increasingly outsourced to foreign intelligence services. That can provide valuable information, but it will be increasingly uncorroborated and subject to filtering by those services. That is not good. ¶ Second, in a somewhat unrelated matter, I would guess that future conflicts, where not fought by Predator, will be increasingly outsourced to proxy forces. ¶ In the focus on intelligence and security, I think this second point has not received sufficient attention. The United States has a long familiarity with proxy forces as a form of deniability, among other things – Ronald Reagan, for example, faced with many limitations placed by Congress on his uses of force, found proxy forces an essential element of his foreign policy, in Central America particularly. The domestic risks that policy can entail are illustrated by the Iran-Contra contra-temps; on the other hand, Reagan was reasonably successful in pursuing his administration’s anti-Communist and anti-Soviet policy aims in Salvador and Nicaragua, among other places, by proxy forces. ¶ But I would be quite surprised if proxy war were not today under active discussion for places like Somalia (where we have already undertaken measures close to it) and other places. More precisely, I would surprised if it were not an active discussion among the New Liberal Realists of the Obama administration, whatever the transnationalists say or think.¶ In any case, whether those last two speculations prove true or not, the tendency of the administration to seek compensating policies seems likely at a minimum to complicate the issues of Guantanamo, Bagram, and other matters besides.

#### The executive will give the Congress the finger – secrecy, media and lying

Branfman 13 Fred, Director of Project Air War, interviewed the first Lao refugees brought down to Vientiane from the Plain of Jars in northern Laos, visited U.S. airbases in Thailand and South Vietnam, talking with U.S. Embassy officials, Alternet, 6-9

Whatever his personal beliefs prior to becoming President Mr. Obama, as the Executive's titular leader, has necessarily signed up to support the secrecy, lying, and disinformation it employs to enjoy maximum flexibility from democratic oversight in order to pursue its policies of overt and covert violence. Two important new books - Jeremy Scahill's Dirty Wars and Mark Mazzetti's The Way of the Knife - describe how, in near-total secrecy, the U.S. Executive is a world of its own. Over the last 12 years, Executive officials have unilaterally and secretly launched, escalated or deescalated wars; installed and supported massively corrupt governments, savage warlords, or local paramilitary forces, and overthrown leaders that have displeased it; created the first unit of global American assassins and fleets of machines waging automated war; engaged in vicious turf wars for more money and budget; spied on Americans including the media and activists on a scale unmatched in U.S. history; compiled 3 different sets of global "kill lists" independently operated by the White House, CIA and Pentagon/JSOC; used police-state tactics while claiming to support democracy, e.g. when it fed retina scans, facial recognition features and fingerprints of over 3 million Iraqi and Afghani males into a giant data base; incarcerated and tortured, either directly or indirectly, tens of thousands of people without evidence or trial; and much more. All of these major activities are conducted entirely by the Executive Branch, without meaningful Congressional oversight or the knowledge of the American people. The foundational principle of the U.S. Constitution is that governments can only rule with the "informed consent" of the people. But the U.S. Executive Branch has not only robbed its people of this fundamental right. It has prosecuted those courageous whistleblowers who have tried to inform them. The U.S. mass media, dependent upon the Executive for their information and careers, and run by corporate interests benefiting from Executive largesse, predominately convey Executive Branch perspectives on an hourly basis to the American people. Even on the relatively few occasions when they publish information the Executive wishes to keep secret, it has little impact on Executive policies while maintaining the illusion that the U.S. has a "free press". The U.S. Executive is essentially free to conduct its activities as it wishes. In future articles in this space we will explore three key features of the U.S. Executive Branch: (1) Evil - If evil consists of murdering, maiming, and making homeless the innocent, and/or waging the “aggressive war” judged the “supreme international crime” at Nuremberg, the U.S. Executive Branch is today clearly the world’s most evil institution. It has killed, wounded or made refugees of an officially-estimated 21 million people in Iraq and Indochina alone, far more than any other institution since the time of Stalin and Mao. President Obama is the first U.S. President to acknowledge, in his recent "counterterrorism" speech, that this number has included killing "hundreds of thousands" of civilians in Vietnam whom it officially claimed it was trying to protect. Former Secretary of Defense Robert McNamara put the total number of Vietnamese killed at 3.4 million. [38] (2) Lawlessness - If illegality consists of refusing to obey the law, the Executive is clearly the most lawless institution in the world. It routinely violates even timid legislative attempts to control its unilateral war-making. And no nation on earth has signed fewer international laws, and so failed to observe even those it has signed. These include measures like those intended to clean up the tens of millions of landmines and cluster bombs [39] with which it has littered the world, refused to clean up, and which continue to murder and maim tens of thousands of innocent people until today. (3) Authoritarianism - And if "authoritarianism" consists of a governing body acting unilaterally, regularly deceiving its own citizenry, neutering its legislature ,and prosecuting those who expose its lies, the U.S. Executive is clearly the most undemocratic institution in America. Indeed its deceiving its own people - keeping its activities secret and then lying about and covering them up when caught - throws its very legitimacy into question.

#### The administration won’t follow through

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

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

#### Courts are just military tribunals 2.0

**Wedel, 11** – (“War Courts: Terror's Distorting Effects on Federal Courtss,” JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit, Legislation and Policy Brief: Vol. 3: Iss. 1, Article 1.)

In recent years, federal courts have tried an increasing number of sus- pected terrorists. In fact, since 2001, federal courts have convicted over 403 people for terrorism-related crimes.1 Although much has been written about the normative question of where terrorists should be tried, scant research exists about the impact these recent trials have had upon the Article III court system. The debate, rather, has focused almost exclusively upon the proper venue for these trials and the hypothetical problems and advantages that might inhere in each venue. The war in Afghanistan, presenting a host of thorny legal issues,2 is now the longest war in United States history.3 This means that the federal courts have never endured wartime conditions for so long. As a result of this pro- longed martial influence, it is clear that this war is corroding federal court jurisprudence. My research represents a first attempt at synthesizing what impact the war in general, and terror trials in particular, have had upon the federal courts. I argue that the hypothetical fear of “seepage” has become con- crete. Indeed, judges already admit that the war has taken a regrettable toll on courts’ opinions.4 In a trend that should alarm both tribunal proponents and detractors alike, tribunals and criminal trials are gradually growing to resemble one another. While efforts to improve the military tribunal system have enjoyed a fair level of success,5 long-entrenched Article III standards are deteriorating at a pace that mirrors the pace of tribunals’ improvements. A cluster of recent cases, proposed bills, and regulatory actions have narrowed the gap between Article III courts and military tribunals considerably. When viewed as a whole, these blurred lines between the military and domestic spheres draw the federal courts into disquieting congruity with the tribunal system.

#### Article III trials will encourage Congress to pass a Comstock statute for terrorist. They will remain indefinitely detained

**Wedel, 11**— (JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011)

Article III trials, therefore, seem to offer the greatest protection against arbitrary and indefinite detention. Regardless what process the courts followed, alleged terrorists would still receive a sentence matching the crime for which they were convicted. But a recent Supreme Court decision and a proposed rule from the Bureau of Prisons cast doubt on whether Article III trials—and, more importantly, Article III sentences—will continue to protect against indefinite detention. The Supreme Court's ruling in United States v. Comstock sets a disturbing precedent for terrorist-detainees. 89 Comstock involved sentencing issues for sex offenders, a topic seemingly unrelated to terrorism. Yet the Court held that Congress may use its Necessary and Proper Clause powers to permanently detain dangerous sex offenders if they appear to pose a threat to the surrounding community upon release." That Congress may order the civil commitment of dangerous prisoners after completing their sentences sets the stage for transplanting an indefinite detention regime into the criminal sphere. The possibility that this reasoning would or could be extended to cover terrorists subject to Article III criminal sentencing is far from remote. Indeed, many commentators noticed instantly Comstock's potential impact on terror connected inmates.91 The statute at issue in Comstock authorizes a court to civilly commit a soon-to-be-released prisoner if he (1) previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) "suffers from a serious mental illness, abnormality, or disorder," and (3) as a result of the disorder, remains "sexually dangerous to others" such that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 92 If a court finds all of these factors, it may commit the prisoner to the Attorney General's custody, who must make "all reasonable efforts" to return the prisoner to the state in which he was tried or in which he is domiciled.9 3 If the Attorney General is unsuccessful in this endeavor, the prisoner is sent to a federal treatment facility and remains there until he is no longer dangerous.94 By its terms, this statute applies to sex criminals, not terrorists. Nevertheless, this opinion, which garnered the support of seven justices, clears away any foreseeable barriers to Congress issuing a similar statute aimed at terrorists. After Comstock, Congress may authorize the Attorney General to detain "dangerous" criminals in perpetuity after the termination of their sentences under its Necessary and Proper Clause powers. A statute codifying that notion would alter terrorism prosecutions radically. Pg. 24

#### The aff is worse - Obama will circumvent it and never release the Gitmo 46.

Michael Crowley, May 24, 2013, Time, “Can Obama End the War on Terror?” <http://swampland.time.com/2013/05/24/can-obama-end-the-war-on-terror/>

 But there’s another other critique. This one holds that Guantanamo itself isn’t the problem. It’s the policy behind it: indefinite detention. Obama’s plan would send some Guantanamo detainees back to their home in Yemen, and possibly to some other countries, and try others in the criminal and military justice systems on U.S. soil. But even Obama’s plan would leave nearly 50 prisoners in a state of indefinite detention. These are prisoners who probably can never be charged in court, either because the evidence against them is tainted by the use of torture, or because the government is convinced they are dangerous but does not have specific charges to mount against them. On this question, Obama essentially punted: “[O]nce we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law,” he said.¶ “[H]istory will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it,” Obama went on to say. But he has not offered a clear plan for what to do with these prisoners who apparently cannot be tried. One thing he does not seem prepared to do is simply release them. America may have damaged al Qaeda enough that Barack Obama can talk about a day when the war against the disciples of Osama bin Laden will be over. But that day has not yet arrived. And until it does, Obama may have to live with some unpleasant moral compromises.

#### The executive will arbitrarily define words, they don’t care

Pollack, 13 -- MSU Guggenheim Fellow and professor of history emeritus [Norman, "Drones, Israel, and the Eclipse of Democracy," Counterpunch, 2-5-13, www.counterpunch.org/2013/02/05/drones-israel-and-the-eclipse-of-democracy/, accessed 9-1-13, mss]

Bisharat first addresses the transmogrification of international law by Israel’s military lawyers. We might call this damage control, were it not more serious. When the Palestinians first sought to join the I.C.C., and then, to receive the UN’s conferral of nonmember status on them, Israel raised fierce opposition. Why? He writes: “Israel’s frantic opposition to the elevation of Palestine’s status at the United Nations was motivated precisely by the fear that it would soon lead to I.C.C. jurisdiction over Palestinian claims of war crimes. Israeli leaders are unnerved for good reason. The I.C.C. could prosecute major international crimes committed on Palestinian soil anytime after the court’s founding on July 1, 2002.” In response to the threat, we see the deliberate reshaping of the law: Since 2000, “the Israel Defense Forces, guided by its military lawyers, have attempted to remake the laws of war by consciously violating them and then creating new legal concepts to provide juridical cover for their misdeeds.” (Italics, mine) In other words, habituate the law to the existence of atrocities; in the US‘s case, targeted assassination, repeated often enough, seems permissible, indeed clever and wise, as pressure is steadily applied to the laws of war. Even then, “collateral damage” is seen as unintentional, regrettable, but hardly prosecutable, and in the current atmosphere of complicity and desensitization, never a war crime. (Obama is hardly a novice atthis game of stretching the law to suit the convenience of, shall we say, the national interest? In order to ensure the distortion in counting civilian casualties, which would bring the number down, as Brennan with a straight face claimed, was “zero,” the Big Lie if ever there was one, placing him in distinguished European company, Obama redefined the meaning of “combatant” status to be any male of military age throughout the area (which we) declared a combat zone, which noticeably led to a higher incidence of sadism, because it allowed for “second strikes” on funerals—the assumption that anyone attending must be a terrorist—and first responders, those who went to the aid of the wounded and dying, themselves also certainly terrorists because of their rescue attempts.) These guys play hardball, perhaps no more than in using—by report—the proverbial baseball cards to designate who would be next on the kill list. But funerals and first responders—verified by accredited witnesses–seems overly much, and not a murmur from an adoring public.

#### Negate to grieve those lives killed and irrevocably damaged by American militarism. Grief for those specific individuals brings them into our frame of reference and creates an ethical reorientation

**Lloyd 08**

Moya (pf Loughborough Univ, feminist author) “Towards a cultural politics of

vulnerability Precarious lives and ungrievable deaths” Judith Butler’s Precarious Politics. 2008

Mourning and politics Precarious Life, published in 2004, contains a series of essays in which Butler reﬂects on politics in the aftermath of the events of September 11, 2001 (‘9/11’). In particular, she is concerned with the political opportunity that was lost when, instead of attempting to ‘redeﬁne itself as part of the global community’, the US ‘heightened nationalist discourse, extended surveillance mechanisms, suspended constitutional rights and developed forms of explicit and implicit censorship’ as public criticism came to be all but silenced (Butler 2004a: xi).1 So what was the lost political opportunity in question? It was, Butler asserts, a chance to acknowledge the fact of human interdependency (that my life depends on ‘people I do not know and may never know’); to reﬂect on the relation between human vulnerability and violence; and to consider ‘what, politically, might be made of grief besides a cry for war’ (2004a: xii). ‘9/11’, that is, furnished an occasion on which to ‘start to imagine a world in which violence might be minimized, in which an inevitable interdependency becomes acknowledged as the basis for a global political community’ (Butler 2004a: xii–xiii). Although the US administration eschewed this opportunity, Butler does not. In Precarious Life, she ponders, to borrow from the book’s subtitle, ‘the powers of mourning and violence’. Butler’s interest in grief and mourning is not new. It is explored in detail, for instance, in Antigone’s Claim. Here, drawing on arguments ﬁrst advanced in Gender Trouble, and developed in Bodies that Matter and The Psychic Life of Power, she explores how heteronormative sexuality works to restrict the public expressions of grief amongst sexual minorities. Moreover, via the story of Antigone, Butler tackles the issue of what happens when against the edict of the state an individual (Antigone) attempts publicly to mourn for a person deemed ungrievable, unmournable by the state and indeed, whose very body it constructs as unburiable. (Recall that the ruler Creon forbids the burial of Polyneices.) In the essay ‘Violence, Mourning, Politics’, contained in Precarious Life, Butler extends this analysis of mourning in new directions. She not only considers how conventions or norms of mourning are shaped by power relations (a thesis already encapsulated in her arguments in Antigone’s Claim and elsewhere).2 She now speculates about how the experience of mourning might open up ‘another kind of normative aspiration within the ﬁeld of politics’ (Butler 2004a: 26); speciﬁcally, an opportunity for rethinking politics, and particularly international politics, in a less aggressive, more ethical mode. In saying this it is important to be aware that Butler is not interested in developing an account of grief or mourning per se. She is interested in them only because they expose the precariousness of life and our vulnerability to the Other. Grief and mourning, that is, are symptomatic of the interdependent nature of human existence. So how does this argument work? **In the act of ‘undergoing’ grief and mourning, Butler surmises, ‘something about who we are is revealed, something that delineates the ties we have to others’, moreover ‘that shows us that these ties constitute who we are, ties or bonds that compose us’** (2004a: 22, my emphasis). It is not only that loss makes a ‘tenuous ‘‘we’’ of us all’ (Butler 2004a: 20) since at some time we will all experience the loss of someone (through death, or simply through separation). It is not even that loss and vulnerability are effects of ‘being socially constituted bodies, attached to others, at risk of losing those attachments, exposed to others, at risk of violence by virtue of that exposure’ (Butler 2004a: 20). **What is critical is that grief and mourning are forms of ‘dispossession’ (Butler 2004a: 28): when loss occurs, that is, ‘I think I have lost ‘‘you’’ only to discover that ‘‘I’’ have gone missing as well’** (Butler 2004a: 22).3 **Loss reveals the subject’s dependence on an other for its own sense of self and thus for its continued existence.** With the dispossession that follows the loss of the other, **a transformation in the self takes place. I am no longer what I was.** It is precisely at the moments **when one body is undone by another** – and for Butler the body is central to her conceptualisation of vulnerability since it is the body that exposes us or opens us up to the other: to their gaze, their touch, their violence (Butler 2004b: 21) – that **human existence is explicitly exposed as one of interdependence.** Vitally, it is this porosity to the other (a corporeal porosity) that is also the source of an ethical connection with the other. Although grief is often assumed to be privatising, Butler demurs. She argues that actually, **mourning ‘furnishes a sense of political community of a complex order’ by foregrounding ‘the relational ties that have implications for theorizing fundamental dependency and ethical responsibility’** (Butler 20004a: 22, my emphasis). Loss exposes the fact that the one thing that all humans share is a physical dependence on other humans for their survival. Clearly violence – individual or state-sponsored; pre-emptive or retaliatory – is one of the principal means by which that survival is put at risk. **In order to counter such violence, and to acknowledge ethically the fact of our being ‘invariably in community’** (Butler 2004a: 27) **with the other, what Butler suggests is the development of a ‘point of identiﬁcation with suffering itself’** (2004a: 30). Instead of denying human vulnerability, **in order to recognise [human vulnerability], losses must be grieved**. **The difﬁculty, of course, is that not all human lives are deemed to be worthy of grief**; indeed, **not all deaths count** as deaths deserving public acknowledgement. It depends on the social norms regulating the scene of recognition (Butler 2005a). Bearing this in mind, from an ethical perspective identifying with suffering has to be allied, for Butler, with a certain critical reﬂexivity about the ways in **which particular lives ﬁgure** as more vulnerable or more valuable than others; in short, **as more human than others** (Butler 2004a: 30). **Making grief into a resource for either ethics or politics invites the question: ‘Who counts as human? Whose lives count as lives?** ... **What makes for a grievable life?’** (Butler 2004a: 20). It is Butler’s emphasis in Precarious Life on the regulatory production of the human and the kinds of normative violence that are operative in ranking who can be mourned or grieved, and more broadly, who counts, that I find most compelling. **Butler** marshals plenty of examples to **demonstrate[s] what she calls ‘a differential allocation of grievability’ [is] at work in the world today. She compares the public grief ensuing in the US over [we grieve] the death of journalist [but not] Daniel Pearl with the San Francisco Chronicle’s refusal** (on the basis that it would cause offence) **to publish either obituaries or memorials for a group of dead Palestinian women and children killed by Israeli troops**. She exposes how **the unmournability of specific lives serves to dehumanise them and thus to effect a form of normative violence against them, a violence, that is, that cannot be seen as violence because we cannot see such lives as lives at all**. Finally, she identiﬁes how mourning as an act of nation building is predicated upon a process of ‘national melancholia’, wherein **certain deaths are disavowed as deaths.** Her point, of course, is not just that **the norms deﬁning who counts** (in all the senses just noted: mournability, grievability, liveability and recognisability as human) **are socially conditioned; it is also that such normatively driven accounting also serves a variety of political purposes.** I am also persuaded by her contention that the experience (both individual and collective) of **mourning might motivate people to act politically [for instance]**. Certainly **grief** at losing a son or daughter in the armed forces serving in Iraq since 2003 **has galvanised parents to become active members of the antiwar movement** on both sides of the Atlantic (McRobbie 2006: 85, n. 2). Take, for instance, Reg Keys of ‘Military Families Against the War’, who stood against Tony Blair in Sedgeﬁeld in the 2005 General Election, campaigning under the strapline ‘War-torn families unite’. Moreover, it is also clear that there are already many instances at work of an ethical or political identiﬁcation with suffering of the kind that Butler advocates. Butler herself cites two particularly potent examples. First, she explores how the ‘shock, outrage, remorse and grief’ produced by the circulation of photos of Vietnamese children being burned and killed by napalm, photos the US public ‘were not supposed to see’, was pivotal in turning the tide of public opinion against the Vietnam War (Butler 2004a: 150). The US public (or at least sectors thereof) identiﬁed with the vulnerability, indeed destruction, of the lives on view and expressed ethical outrage at their (continued) treatment. Second, she touches very brieﬂy upon the activities of Women in Black as an example of feminist opposition to militarism. What is noteworthy about this network is precisely that the silent vigils it holds in cities throughout the world exemplify the very identiﬁcation with suffering that Butler’s ethics advocates: when women, that is, reﬂect on their own suffering and the suffering of other women who have ‘been raped, tortured or killed in concentration camps, women who have disappeared, whose loved ones have disappeared or have been killed, whose homes have been demolished’.4 Butler, however, is not simply concerned with reﬂecting on the kinds of human accounting that prioritise certain lives and that negate particular deaths. She is positing an ethics of responsibility towards the other based on vulnerability. This account of vulnerability draws on arguments that Butler makes in Psychic Life about primary dependency and is thus intrinsically connected to the idea of ek-stasis that she deploys throughout her work.

#### Their aff’s proscribed grief is re-appropriated to justify the War on Terror

Schneider and Butler 10

Nathan (writer on religion and resistance for Harper’s, The Nation, the New York Times, editor of Waging Nonviolence and Killing the Buddha, author of two books) and Judith (Maxine Elliot Professor in Rhetoric and Comparative Literature at UC-Berkeley). “A Carefully Crafted F\*\*k You.” An Interview with Judith Butler. Guernica. The European Graduate School. March 2010.

Guernica: **Forms of grief are deployed, through certain deplorable exemplars, to justify a military regime**—**the Holocaust, for example, and now 9/11**. Why, then, **can’t grief just as easily be used to justify more war?**

Judith Butler: Well, **I** do **worry about those instances in which public mourning is explicitly proscribed**, and that invariably happens in the context of war. I think **there were ways, for instance, of producing icons of those who were killed in the 9/11 attacks in such a way that the desire for revenge and vindication was stoked**. So we have to distinguish between modes of **mourning [can]** that actually extend our ideas about equality, and those that **produce differentials, such as “this population is worth protecting” and “this population deserves to die**.”

Guernica: **The hawkish wing in the “war on terror” has quite effectively claimed the banner of feminism.** Is feminism as it has been articulated in part to blame for this?

Judith Butler: No, I think that **we have seen quite cynical uses of feminism for the waging of war.** The vast majority of feminists oppose these contemporary wars, and object to the false construction of **Muslim women “in need of being saved**” as a cynical use of feminist concerns with equality. There are some very strong and interesting Muslim feminist movements, and casting Islam as anti-feminist not only disregards those movements, but displaces many of the persisting inequalities in the first world onto an imaginary elsewhere.

Guernica: After millions of protesters around the world could do nothing to prevent the Iraq War, what do you think is the most effective form of protest? Disobedience? Or even thinking?

Judith Butler: Let us remember that Marx thought of thinking as a kind of practice. Thinking can take place in and as embodied action. It is not necessarily a quiet or passive activity. Civil disobedience can be an act of thinking, of mindfully opposing police force, for instance. I continue to believe in demonstrations, but I think they have to be sustained. We see the continuing power of this in Iran right now. The real question is why people thought with the election of Obama that there was no reason to still be on the street? It is true that many people on the left will never have the animus against Obama that they have against Bush. But maybe we need to protest policies instead of individuals. After all, it takes many people and institutions to sustain a war.

Guernica: Anyone who went to an anti-war protest during the Bush administration surely saw the violence of the anger directed personally against the president. People have a need to personalize. It seems to me the strength of your book, though, is that it counter-personalizes, turning our focus not so much to policies or policy-makers as to victims and potential victims.

Judith Butler: It is personal, but it asks what our obligations are to those we do not know. So in this sense, it is about the bonds we must honor even when we do not know the others to whom we are bound.

Guernica: Your account of nonviolence revolves around recognizing sociality and interconnection as well. Does it also rely on the kind of inner spiritual work that was so important, for instance, to Gandhi?

Judith Butler: I am not sure that the work is “inner” in the way that Gandhi described. But I do think that one has to remain vigilant in relation to one’s own aggression, to craft and direct it in ways that are effective. This work on the self, though, takes place through certain practices, and by noticing where one is, how angry one is, and even comporting oneself differently over time. **I think this has to be a social practice, one that we undertake with others.** That **support and solidarity are crucial to maintaining it**. **Otherwise, we think we should become heroic individuals, and that takes us away from effective collective action.**

Guernica: What can philosophy, which so often looks like a kind of solitary heroism, offer against the military-industrial complexes and the cowboy self-image that keep driving us into wars? At what register can philosophy make a difference?

Judith Butler: Let’s remember that the so-called military-industrial complex has a philosophy, even if it is not readily published in journals. The contemporary cowboy also has, or exemplifies, a certain philosophical vision of power, masculinity, impermeability, and domination. So the question is how philosophy takes form as an embodied practice. Any action that is driven by principles, norms, or ideals is philosophically informed. So we might consider: what practices embody interdependency and equality in ways that might mitigate the practice of war waging? My wager is that there are many.

#### TURN – Butler argues for a mourning backed by rage. That rage can only lead to violence toward the Other

McIvor 12, David W. (PhD from Duke University, research associate @ The Kettering Foundation) “Bringing Ourselves to Grief: Judith Butler and the Politics of Mourning” *Political Theory.* 2 May 2012. <http://ptx.sagepub.com/content/40/4/409>

Butler turns to Levinas and Adorno for the cultivation of ethical dispositions in which mourning is refigured as a site of dispossession. Yet this move repeats the melancholic refrain. **Under the thrall of the unforgiving superego figure derived from Levinas and Adorno, the political expression of mourning becomes a curious (if not paradoxical) enraged nonviolence, which Butler calls the “carefully crafted ‘fuck you.’**”80 **Butler presumes that** acts of ek-static **acknowledgement** beneath the gaze of a revised superego **will allow enraged claims to take on a nonviolent character, but it is difficult to accept this idea** at face value. **On the contrary, the deep anger of the political “fuck you”—no matter how carefully crafted—seems to inevitably drift towards violence that,** far from remaining in touch with the ek-static nature of subjectivity, **obliterates the ambivalence of both the targeted other and the social-political world composed of a plurality of multi-faceted others**.81

#### TURN – Butler advocates the removal of the subject’s identity from politics, but complete denial separates us from reality and kills our ability to grieve

McIvor 12, David W. (PhD from Duke University, research associate @ The Kettering Foundation) “Bringing Ourselves to Grief: Judith Butler and the Politics of Mourning” *Political Theory.* 2 May 2012. <http://ptx.sagepub.com/content/40/4/409>

Because **Butler** is leery of the regnant social forces that structure and uphold identity, she **emphasizes mourning as a “disidentificatory” practice**, in the style of Antigone. Hence she initially conceives of mourning as a limit ethos that exposes, tests **and resignifies identity claims that are too dogmatic or too much in denial over identity’s contingent foundation**. Seemingly unsatisfied with the limited nature of an Antigonean politics, Butler turned to claim mourning as a positive process of cultivating ethical dispositions such as generosity and humility, which could serve as resources for a nonviolent politics. However, **the subject’s identity is not secured by this process but, instead, perpetually deferred and decentered by** unwilled **susceptibility to others**. Hence this turn still rests on a claim of melancholic subjectivity reinforced now by a dictatorial, melancholic “Thou Shalt” that obscures the vexed and ambivalent nature of our interactions with, and responsibilities to, multi-faceted others. For Klein, **on the other hand,** non-dogmatic identity results **not from disidentificatory refusals or a perpetual deferral of the self, but** from positive identifications with ambivalent internal and external realities **and objects. In the depressive position we experience loss but manage to internalize objects that make this loss bearable and continued life possible. The work of mourning succeeds not through disintegration but integration of the subject, which will not eliminate our grief over, or grievances with, others but will make these grievances more realistic and our efforts to address them more reparative.**

#### By focusing on an ethic of grief, Butler ignores the political conditions necessary to acknowledge suffering

McIvor 12, David W. (PhD from Duke University, research associate @ The Kettering Foundation) “Bringing Ourselves to Grief: Judith Butler and the Politics of Mourning” *Political Theory.* 2 May 2012. <http://ptx.sagepub.com/content/40/4/409>

Alongside this emphasis on mourning as a practice of resignification, **Butler** **has** more recently **described mourning in terms of an “identification with suffering itself” that cultivates ethical dispositions such as humility and generosity**.12 An acknowledgement of the universal susceptibility to suffering and the “disorientation” of grief puts the individual in a salutary “mode of unknowingness” that might make for a more welcoming form of life.13 As David Gutterman and Sara Rushing see it, **this represents a move by Butler towards an “ethics of grief,” through which a common vulnerability to loss enables individuals to develop humility towards their constitutive limitations.** 14 **In the wake of this move, however**, **critics** such as Bonnie Honig and George Shulman **have faulted Butler for displac[es] politics with ethics, a displacement that compromises her earlier insights into the inevitably contested nature of public life and disavows the political conditions necessary for the acknowledgment of others and their suffering**.

#### Your starting point is too abstract and prevents respect of the Other in the world

McIvor 12, David W. (PhD from Duke University, research associate @ The Kettering Foundation) “Bringing Ourselves to Grief: Judith Butler and the Politics of Mourning” *Political Theory.* 2 May 2012. <http://ptx.sagepub.com/content/40/4/409>

**Insofar as these claims about precariousness and vulnerability, however, are pitched at the level of an abstract, universal humanism, they elide the concrete messiness of our actual, lived communities in which we (imperfectly) act, speak, love, and mourn. The difficulty** with Butler’s ethics of responsibility in the thrall of Levinas **is not that we can reasonably deny our impingement by the other’s “face” but that we are responsive to a plurality of faces, and that each of these faces has more than one face. The origin of ethics** in a pre-ontological relation **can only serve to obscure the multiple ambivalent relationships that comprise our ethical and political commitments, visions, responsibilities, and actions.**

#### Butler’s reliance on Adorno’s ethic of responsibility makes acting impossible

McIvor 12, David W. (PhD from Duke University, research associate @ The Kettering Foundation) “Bringing Ourselves to Grief: Judith Butler and the Politics of Mourning” *Political Theory.* 2 May 2012. <http://ptx.sagepub.com/content/40/4/409>

**Butler** herself **seems nervous about the abstract nature of Levinas’ claims, which is why she turns to Adorno** in order to reconnect an ethics of responsibility to a theorist indebted to a Weberian “ethic of responsibility.” For Adorno, **responsibility required a critical investigation of both the social and material conditions of our time and the ideological discourses surrounding and justifying those conditions.** Adorno formulated this as “an element not just of self-criticism, but of criticism of that unyielding, inexorable something that sets itself up in us.”75 The pressure of this “inexorable something” puts into circulation a critical process of investigating “damaged life” that is the antipode to moral narcissism. **For Butler, this resembles a tarrying with grief as a means of interrogating the limits of subjugation.** **She follows Adorno** in seeing the “unyielding, inexorable something” as a means of recalling the subject to its own opacity or fallibility. **Yet** **Adorno’s unyielding self-criticism reflects his melancholic faith that “life itself is so deformed and distorted that no one is able to live the good life**.76 Therefore, **the only responsible course for Adorno is to follow an absolute “negative prescription” of resistance “to all the things imposed on us**, to everything the world has made of us.”77 **On this view, there are no benign or innocuous (let alone positive) actions or forms of life; even an occasional “visit to the cinema” becomes a “betrayal” of self-critical insights and an unforgiveable act of conformism to the deformed and violent world.**78

## 2NC

#### All of our solvency arguments are *net offense*---legalism creates the façade that the executive is being constrained while allowing the government to do as it pleases under the guise of constraint---this swells executive power and turns the case

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The examples cited in this section suggest not the formation of an utterly lawless regime, but, rather, within an order that continues to understand itself in terms of the categories provided by liberal contractarianism, the more insidious creation, multiplication, and institutionalization of what David Dyzenhaus calls "grey holes." Such holes are "spaces in which there are some legal constraints on executive action...but the constraints are so insubstantial that they pretty well permit government to do as it pleases."40 As such, they are more harmful to the rule of law than are outright dictatorial usurpations, first, because the provision of limited procedural protections masks the absence of any real constraint on executive power; and, second, because location of the authority to create such spaces within the Constitution implies that, in the last analysis, they bear ex ante authorization by the people. When created, in other words, they may receive but they do not require ratification, whether by Congress or by those whom its members are said to represent. What this means in effect is that the second Bush administration has dispensed with Jefferson's stipulation that extra-constitutional executive acts (or, rather, acts that Jefferson deemed to be outside those constitutionally permitted) require ex post facto ratification; and, in addition, that it has dispensed with Locke's contention that, however unlikely, at least in principle, specific exercises of extra-legal prerogative power (or, rather, acts that Locke deemed to be outside those legally permitted) are properly subject to revolutionary rejection. What one finds in the second Bush administration, then, is a denial of both models of accountability, combined with an aggressive commitment to the constitution of a security state that is liberal only in name. As it extends its reach, perfection of that state renders the prospect of popular repudiation of prerogative power ever more chimerical, and, indeed, renders recognition of the problematic character of its exercise ever less likely.

#### Their method is bad – (1) it’s rooted in tyrannaphobia (2) the state is hijacked by elites who control decision making and normalize an authoritarian state that wages war on populations – debate should focus on how cultural elements combat normalization of violence

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In addition, as the state is hijacked by the financial-military-industrial complex, the “most crucial decisions regarding national policy are not made by representatives, but by the financial and military elites.”53 Such massive inequality and the suffering and political corruption it produces point to the need for critical analysis in which the separation of power and politics can be understood. This means developing terms that clarify how power becomes global even as politics continues to function largely at the national level, with the effect of reducing the state primarily to custodial, policing, and punishing functions—at least for those populations considered disposable. The state exercises its slavish role in the form of lowering taxes for the rich, deregulating corporations, funding wars for the benefit of the defense industries, and devising other welfare services for the ultra-rich. There is no escaping the global politics of finance capital and the global network of violence it has produced. Resistance must be mobilized globally and politics restored to a level where it can make a difference in fulfilling the promises of a global democracy. But such a challenge can only take place if the political is made more pedagogical and matters of education take center stage in the struggle for desires, subjectivities, and social relations that refuse the normalizing of violence as a source of gratification, entertainment, identity, and honor. War in its expanded incarnation works in tandem with a state organized around the production of widespread violence. Such a state is necessarily divorced from public values and the formative cultures that make a democracy possible. The result is a weakened civic culture that allows violence and punishment to circulate as part of a culture of commodification, entertainment, distraction, and exclusion. In opposing the emergence of the United States as both a warfare and a punishing state, I am not appealing to a form of left moralism meant simply to mobilize outrage and condemnation. These are not unimportant registers, but they do not constitute an adequate form of resistance .What is needed are modes of analysis that do the hard work of uncovering the effects of the merging of institutions of capital, wealth, and power, and how this merger has extended the reach of a military-industrial-carceral and academic complex, especially since the 1980s. This complex of ideological and institutional elements designed for the production of violence must be addressed by making visible its vast national and global interests and militarized networks, as indicated by the fact that the United States has over 1,000 military bases abroad.54 Equally important is the need to highlight how this military-industrial-carceral and academic complex uses punishment as a structuring force to shape national policy and everyday life. Challenging the warfare state also has an important educational component. C. Wright Mills was right in arguing that it is impossible to separate the violence of an authoritarian social order from the cultural apparatuses that nourish it. As Mills put it, the major cultural apparatuses not only “guide experience, they also expropriate the very chance to have an experience rightly called ‘our own.’”55 This narrowing of experience shorn of public values locks people into private interests and the hyper-individualized orbits in which they live. Experience itself is now privatized, instrumentalized, commodified, and increasingly militarized. Social responsibility gives way to organized infantilization and a flight from responsibility. Crucial here is the need to develop new cultural and political vocabularies that can foster an engaged mode of citizenship capable of naming the corporate and academic interests that support the warfare state and its apparatuses of violence, while simultaneously mobilizing social movements to challenge and dismantle its vast networks of power. One central pedagogical and political task in dismantling the warfare state is, therefore, the challenge of creating the cultural conditions and public spheres that would enable the U.S. public to move from being spectators of war and everyday violence to being informed and engaged citizens.Unfortunately, major cultural apparatuses like public and higher education, which have been historically responsible for educating the public, are becoming little more than market-driven and militarized knowledge factories. In this particularly insidious role, educational institutions deprive students of the capacities that would enable them not only to assume public responsibilities, but also to actively participate in the process of governing. Without the public spheres for creating a formative culture equipped to challenge the educational, military, market, and religious fundamentalisms that dominate U.S. society, it will be virtually impossible to resist the normalization of war as a matter of domestic and foreign policy. Any viable notion of resistance to the current authoritarian order must also address the issue of what it means pedagogically to imagine a more democratically oriented notion of knowledge, subjectivity, and agency and what it might mean to bring such notions into the public sphere. This is more than what Bernard Harcourt calls “a new grammar of political disobedience.”56 It is a reconfiguring of the nature and substance of the political so that matters of pedagogy become central to the very definition of what constitutes the political and the practices that make it meaningful. Critical understanding motivates transformative action, and the affective investments it demands can only be brought about by breaking into the hardwired forms of common sense that give war and state-supported violence their legitimacy. War does not have to be a permanent social relation, nor the primary organizing principle of everyday life, society, and foreign policy. The war of all-against-all and the social Darwinian imperative to respond positively only to one’s own self-interest represent the death of politics, civic responsibility, and ethics, and set the stage for a dysfunctional democracy, if not an emergent authoritarianism. The existing neoliberal social order produces individuals who have no commitment, except to profit, disdain social responsibility, and loosen all ties to any viable notion of the public good. This regime of punishment and privatization is organized around the structuring forces of violence and militarization, which produce a surplus of fear, insecurity, and a weakened culture of civic engagement—one in which there is little room for reasoned debate, critical dialogue, and informed intellectual exchange. Patricia Clough and Craig Willse are right in arguing that we live in a society “in which the production and circulation of death functions as political and economic recovery.”57 The United States understood as a warfare state prompts a new urgency for a collective politics and a social movement capable of negating the current regimes of political and economic power, while imagining a different and more democratic social order. Until the ideological and structural foundations of violence that are pushing U.S. society over the abyss are addressed, the current warfare state will be transformed into a full-blown authoritarian state that will shut down any vestige of democratic values, social relations, and public spheres. At the very least, the U.S. public owes it to its children and future generations, if not the future of democracy itself, to make visible and dismantle this machinery of violence while also reclaiming the spirit of a future that works for life rather than death—the future of the current authoritarianism, however dressed up they appear in the spectacles of consumerism and celebrity culture. It is time for educators, unions, young people, liberals, religious organizations, and other groups to connect the dots, educate themselves, and develop powerful social movements that can restructure the fundamental values and social relations of democracy while establishing the institutions and formative cultures that make it possible. Stanley Aronowitz is right in arguing that: the system survives on the eclipse of the radical imagination, the absence of a viable political opposition with roots in the general population, and the conformity of its intellectuals who, to a large extent, are subjugated by their secure berths in the academy [and though] we can take some solace in 2011, the year of the protester…it would be premature to predict that decades of retreat, defeat and silence can be reversed overnight without a commitment to what may be termed “a long march” through the institutions, the workplaces and the streets of the capitalist metropoles.58 The current protests among young people, workers, the unemployed, students, and others are making clear that this is not—indeed, cannot be—only a short-term project for reform, but must constitute a political and social movement of sustained growth, accompanied by the reclaiming of public spaces, the progressive use of digital technologies, the development of democratic public spheres, new modes of education, and the safeguarding of places where democratic expression, new identities, and collective hope can be nurtured and mobilized. Without broad political and social movements standing behind and uniting the call on the part of young people for democratic transformations, any attempt at radical change will more than likely be cosmetic.

#### Legalism is epistemologically flawed and violent.

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.

#### Sequencing DA – alt has to come first or movements get sapped

Nagin 5 Tomiko Brown, Visiting Associate Professor, University of Virginia School of Law, “ELITES, SOCIAL MOVEMENTS, AND THE LAW: THE CASE OF AFFIRMATIVE ACTION,” Columbia Law Review, 105 Colum. L. Rev. 1436

Those seeking to have an impact on the political and legal orders should not root a mass movement in the courts;instead, affirmative litigation about constitutional rights should be anchored upon and preceded by a mass movement.Efforts to achieve fundamental change shouldbegin with the target constituency and be waged initially outside of the confines of institutionalized politics.Law should be understood as a tactic in an ongoing political struggle, where the struggle is the main event and favorable legal outcomes are its byproducts. There is a crucially important temporal component to this view. Legal claims can be tactically useful in a political strategy for achieving change - butonly after social movements lay the groundworkfor legal change. Social movements must first create political pressure that frames issues in a favorable manner, creates cultural norm shifts, and affects public opinion; these norm shifts then increase the likelihood that courts will reach outcomes favored by lawyers. [437](http://www.lexis.com/research/retrieve?_m=b1b76c3bff33e7c7527182cc42568c87&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAl&_md5=b4841fe459fa752b47486b13d84385b6&focBudTerms=milliken%20w/150%20hispanic%20or%20latino&focBudSel=all#n437) Again, my claims find support in the history of the mid-twentieth-century civil rights movement. This narrative posits an intimate relationship between the sociopolitical dynamics within black client communities and the success (or failure) of civil rights lawyers' litigation campaigns for rights. The postwar civil rights movement confirms that the moral suasion of participatory democratic groups of nonlawyers, and typically nonelites, was integral to law's movement from a Jim Crow regime to a [\*1523] constitutional order in which formal equality was the norm. During the past three decades, historians who have analyzed social change have discovered that small groups of inexpert individuals can be the leading edge of a social movement, especially when they work in coalition with those who traditionally wield influence in society. [438](http://www.lexis.com/research/retrieve?_m=b1b76c3bff33e7c7527182cc42568c87&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAl&_md5=b4841fe459fa752b47486b13d84385b6&focBudTerms=milliken%20w/150%20hispanic%20or%20latino&focBudSel=all#n438)Through their commitment to a social cause, ordinary people with no insider knowledge of the technical aspects of the broad issue on which they are mobilizing can create circumstances in which those with actual power (political, economic, and, ultimately, legal power) are persuaded to act in their favor.

#### Aff gets lost in the details of specifics like \_\_\_\_\_ policy which ignores broader systemic criticism and normalizes war on terror

Saas, 12 \*\*William O. Pf Department of Communication Arts and Sciences at the Pennsylvania State University. symploke > Volume 20, Numbers 1-2

How might one critique this massive network of violence that has become so enmeshed in our contemporary geo-socio-political reality? Is there any hope for reversing the expansion of executive violence in the current political climate, in which the President enjoys minimal resistance to his most egregious uses of violence? How does exceptional violence become routine? Answers to these broad and difficult questions, derived as they are from the disorientingly vast and hyper-accelerated retrenchment of our current political situation, are best won through the broad strokes of what Slavoj Žižek calls "systemic" critique. For Žižek, looking squarely at interpersonal or subjective violences (e.g., torture, drone strikes), drawn as we may be by their gruesome and immediate appeal, distorts the critic's broader field of vision. For a fuller picture, one must pull one's critical focus back several steps to reveal the deep, objective structures that undergird the spectacular manifestations of everyday, subjective violence (Žižek 2008, 1-2). Immediately, however, one confronts the limit question of Žižek's mandate: how does one productively draw the boundaries of a system without too severely dampening the force of objective critique? For practical purposes, this essay leaves off discussion of neoliberal economic domination, vital as it may be to a full accounting for the U.S.' latest and most desperate expressions of state solvency.

#### Bad for the left – as progressives stay focused on the law, conservatives chalk up more wins. Reliance on the law is WORSE than doing nothing

West 6, Pf Law @ Georgetown, (Robin, *Harvard Journal of Law & Gender*, Winter, lexis)

And law is indeed a strikingly conservative and conserving set of institutions and practices. I argued in the book that legal critics, feminist and otherwise, should elevate the concept of harm in our thinking about law. And when we do so, we should think much more than we currently do about the harms sustained by various subordinated groups, including women. All I want to add here in response to some of Halley's remarks is that harm- and law-focused inquiries with respect to gender or otherwise that come from such a focus are indeed reformist projects. They are projects about how law could do better, instrumentally, what it claims to do, and what it does do some of the time, what it does not do at all well most of the time, and often does not do at all, period. However, while it is important to get judge-made law to do better what it already does, it is even more important. I think, to put law in its place. Law--meaning here, adjudicative law--is (lo and behold) not politics. It cannot do what politics might be able to do. It has been a tragic mistake, I think, of liberals, radicals, identitarian theorists, critical legal scholars, and progressives of all stripes involved in law, legal theory, and legalism of the past half century, to assert, and so repetitively and confidently, the contrary. The domain of adjudicative law has its own ethics. It is for the most part deeply moored in conservative values. It has some redemptive potential and therefore some play for progressive gains, but really not much. More important, it has the potential, all in the name of justice, to further aggravate the harmsit manages to so successfully avoid. *Caring for Justice* was an attempt to expose the aggravation of harm done by law in the name of justice, exploit its redemptive potential, and argue that others should do this also. But completely aside from the arguments of that book, I think this is still a very important and very much under-examined question for progressive lawyers to ask: how much can be asked of adjudicative law? Again, my answer is "not much." Others disagree. My current retrospective on the place of Catharine MacKinnon's jurisprudence in our law and letters, for example, argues that a part of the brilliance of her labors over the last thirty years has been her quite conscious embrace of law and legalism, rather than the domain of politics, culture, or education, to achieve evolutionary changes in our understanding of both sexual injury and sexual justice. [**97**](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n97) She has been phenomenally successful in pushing law to become a **[\*48]** vehicle for that evolutionary change. By contrast, I think, the benighted attempt over the last half century of progressive constitutional lawyers and theorists to employ the stratagems and ethics of legalism so as to refigure our fundamental politics, to achieve substantive equality, expand liberty, and the like--and to do so by urging on courts the development of progressive interpretations of their constitutional corollaries--has been a pretty striking failure, and not only because of the current Republican staffing of the courts. Obviously, the arguments put forward by progressives, radicals, and liberals in their thousands upon thousands of pages of briefs--arguments about what equality should look like, about what freedoms we all should or should not have, about democracy, about speech, about reproduction, about race, about sex, and so on and so on and so on, as well as their constitutional corollaries, from *Brown* [98](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n98) to *Roe* [99](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n99) to *Casey* [100](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n100) to *Lawrence* [101-](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n101-)-are vital arguments with which to engage. The problem is that these arguments should be--and are not--the bread and butter of very ordinary politics, completely traditionally understood. The repeated insistence by liberal legalists over the last half-century that these arguments are, in fact, in law's domain has not secured progressive victories and has had the perverse effect instead of impoverishing our politics. [**102**](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n102) The repeated insistence by critical legal scholars over the last thirty years that, contra liberalism, there is no difference between law and politics--and that what follows is simply that all those legal arguments in all of those endless Supreme Court opinions pontificating over the meaning of liberty and equality are in fact political arguments--has not changed this dynamic one bit. It has not only underscored the total absence of any coherent progressive instrumentalism from left understandings of the potential of law. Of greater consequence, it has also even **further emasculated and eviscerated** our politics, worse than liberalism could have done if it had tried, and it did not. The critical insistence on the deconstruction of the differences between law and politics has only reinforced, rather than challenged in any meaningful way, the liberal legalist conceit that law, rather than politics ordinarily understood, is the domain of radical and liberal political thought. We have no political "left" in this country, in part, because those who would otherwise be inclined to make one have instead poured their thought, their passion, and their commitments into litigation [\*49] strategies or into the project of pointing out over and over the politics of those projects**.** The result of this has been an entrenched conservatism across the board**-**-the board, that is, of both law and politics. Progressives need to re-direct their political arguments, including the radical arguments, out of law and law reviews and into the domain of politics. We first have to get over the lazy assumption that there is no need to do so--either because law is much loftier than ordinary politics, such that ennobling political arguments *ought* to be made in judicial fora (liberalism); or because there's no difference between law and politics, so that pointing out that legal arguments are through and through political is the beginning and end of political thought (critical). There are alternatives to both, and we ought to start figuring out what they are.

## 1NR

### Case – Solvency

#### Obama will redefine policies

NYT 12 (New York Times, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will”, 5/29/12, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0>)

What the new president did not say was that the orders contained a few subtle loopholes. They reflected a still unfamiliar Barack Obama, a realist who, unlike some of his fervent supporters, was never carried away by his own rhetoric. Instead, he was already putting his lawyerly mind to carving out the maximum amount of maneuvering room to fight terrorism as he saw fit. It was a pattern that would be seen repeatedly, from his response to Republican complaints that he wanted to read terrorists their rights, to his acceptance of the C.I.A.’s method for counting civilian casualties in drone strikes. The day before the executive orders were issued, the C.I.A.’s top lawyer, John A. Rizzo, had called the White House in a panic. The order prohibited the agency from operating detention facilities, closing once and for all the secret overseas “black sites” where interrogators had brutalized terrorist suspects. “The way this is written, you are going to take us out of the rendition business,” Mr. Rizzo told Gregory B. Craig, Mr. Obama’s White House counsel, referring to the much-criticized practice of grabbing a terrorist suspect abroad and delivering him to another country for interrogation or trial. The problem, Mr. Rizzo explained, was that the C.I.A. sometimes held such suspects for a day or two while awaiting a flight. The order appeared to outlaw that. Mr. Craig assured him that the new president had no intention of ending rendition — only its abuse, which could lead to American complicity in torture abroad. So a new definition of “detention facility” was inserted, excluding places used to hold people “on a short-term, transitory basis.” Problem solved — and no messy public explanation damped Mr. Obama’s celebration. “Pragmatism over ideology,” his campaign national security team had advised in a memo in March 2008. It was counsel that only reinforced the president’s instincts. Even before he was sworn in, Mr. Obama’s advisers had warned him against taking a categorical position on what would be done with Guantánamo detainees. The deft insertion of some wiggle words in the president’s order showed that the advice was followed. Some detainees would be transferred to prisons in other countries, or released, it said. Some would be prosecuted — if “feasible” — in criminal courts. Military commissions, which Mr. Obama had criticized, were not mentioned — and thus not ruled out. As for those who could not be transferred or tried but were judged too dangerous for release? Their “disposition” would be handled by “lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice.” A few sharp-eyed observers inside and outside the government understood what the public did not. Without showing his hand, Mr. Obama had preserved three major policies — rendition, military commissions and indefinite detention — that have been targets of human rights groups since the 2001 terrorist attacks.

#### the only way to solve any of this is to have courts step in---that will never happen

Driesen 9 \* David M. University Professor, Syracuse University; Fordham Law Review, October, 78 Fordham L. Rev. 71

The executive branch often interprets the vast body of law it administers unilaterally. In some areas, courts have no opportunity to review its decisions. 217 Even when reviewable, the courts usually approach executive branch decisions deferentially and often correct errors in ways that leave continuing latitude for executive branch shaping of the law. 218 Because of the awkwardness of impeachment and funding cutoffs, congressional oversight provides only a very limited remedy for executive excess, and executive decisions to withhold information can further weaken oversight's effectiveness. 219 Because modern Presidents are so profoundly political, a danger exists that they will interpret the law opportunistically, to increase their own power and advance their faction's political agenda, rather than faithfully execute the laws Congress has publicly passed. 220 The opportunities for abuse have recently multiplied, because of the specter of terrorism, which tends to drive the executive toward secret policy making of his own largely unrestrained by law. 221

### Case – Greif Stuff

#### According to Butler, the ONLY WAY to grieve a life is through the obituary, literally reading names to re-humanize. Otherwise, you commit the same violence. Your author:

**Butler,** Maxine Elliot Professor in Rhetoric and Comparative Literature at UC-Berkeley, **2004**

(Judith, Precarious Life: The Powers of Mourning and Violence, page 34)

**discourse** itself **effects violence through omission**. If **200,000 Iraqi children were killed** during the Gulf War and its aftermath,1 do we have an image, a frame for any of those lives, Singly or collectively? Is there a story we might find about those deaths in the media? **Are there names attached to those children?** There are no obituaries for the war casualties that the United States inflicts, and there cannot be. If there were to be an obituary, there would have had to have been a life, a life worth noting, a life worth valuing and preserving, a life that qualifies for recognition. Although we might argue that it would be impractical to write obituaries for all those people, or for all people, I think we have to ask, again and again, **the obituary functions as the** instrument by which grievability is publicly distributed. It is the **means by which a life becomes**, or fails to become, a **publicly grievable** life, an icon for national self-recogn ition, the means by which a life becomes noteworthy. As a result, we have to consider [he obituary as an act of nation-building. The matter is not a simple one, for, **if a life is not grievable, it is not quite a life**; it does not qualify as a life and is not worth a note. It is already the unburied, if not the unburiable.

#### This means zero solvency since the aff ignores the larger context in which grief occurs and turns case – they only perpetuate violence against the other through war.

Gutterman and Rushing 08

David S. (pf Willamette Univ) and Sara L. (pf Montana St) Judith Butler’s Precarious Politics. “Sovereignty and suffering: towards an ethics of grief in a post-9/11 world” 2008

And yet as President George W. **Bush** **made perfectly clear**, in declaring the time for grieving to be over a mere ten days after 9/11, **grief can figure within American political discourse as nothing but weakness and inaction.** The sign of our strength, in Bush’s opinion, is that ‘Our grief has turned to anger and anger to resolution’ (Bush 2001: para. 6). It is this rapid conversion – **this quick hardening and turning away from grief** – that **Butler laments**. For grieving humanises us, it humanises others. Furthermore, insofar as none of us is above the reality that all human life can be instantaneously annulled, regardless of class, race, ideology, or nationality, ‘grief equalizes us’ (Butler 2003a: 7). Or at least, **grief has the potential to equalise us, if we can recognise both the inequality of our vulnerability and the equality of our grievability**. Here, then, is the political and ethical test Butler places before us. **The actions of the US in the past years – the waging of pre-emptive war, the authorisation of torture, extraordinary rendition, and indeﬁnite detention – can be read as a resounding rejection of the hand of solidarity extended by the world after 9/11. If there was an opportunity to heed the precariousness of life** and to break the cycle of revenge – by identifying with others and with suffering itself, **by grieving our losses**, becoming undone by them – **it was rapidly and decisively shut down. This opportunity was not merely a casualty of war. Bush Administration policies after 9/11 can be read precisely as an attempt to effect that foreclosure, and as a rejection** and/or failure **of Butler’s test**.

#### Butler argues for a mourning backed by rage. That rage can only lead to violence toward the Other

McIvor 12, David W. (PhD from Duke University, research associate @ The Kettering Foundation) “Bringing Ourselves to Grief: Judith Butler and the Politics of Mourning” *Political Theory.* 2 May 2012. <http://ptx.sagepub.com/content/40/4/409>

Butler turns to Levinas and Adorno for the cultivation of ethical dispositions in which mourning is refigured as a site of dispossession. Yet this move repeats the melancholic refrain. **Under the thrall of the unforgiving superego figure derived from Levinas and Adorno, the political expression of mourning becomes a curious (if not paradoxical) enraged nonviolence, which Butler calls the “carefully crafted ‘fuck you.’**”80 **Butler presumes that** acts of ek-static **acknowledgement** beneath the gaze of a revised superego **will allow enraged claims to take on a nonviolent character, but it is difficult to accept this idea** at face value. **On the contrary, the deep anger of the political “fuck you”—no matter how carefully crafted—seems to inevitably drift towards violence that,** far from remaining in touch with the ek-static nature of subjectivity, **obliterates the ambivalence of both the targeted other and the social-political world composed of a plurality of multi-faceted others**.81

#### Turns the aff - The notion of detainees as vulnerable is disproportionately applied to women, implying that they need protection and affirming patriarchy,

Butler and Gambetti 13

Judith and Zeynep (pf Bogazici University, PhD) “RETHINKING VULNERABILITY AND RESISTANCE: FEMINISM & SOCIAL CHANGE” Intro to Istanbul Workshop, September 16-19, 2013

There is always something both risky and true in claiming **that women are especially vulnerable**. The claim **can be taken to mean that women have an unchanging and defining vulnerability, and that kind of argument makes the case for paternalistic protection. If women are especially vulnerable, then they seek protection, and it becomes the responsibility of the state or other paternal powers to provide that protection.** On the model, **feminist activism not only petitions paternal authority for special dispensations and protections, but affirms that inequality of power situates women in a powerless position and, by implication, men in a more powerful one, or it invests state structures with the responsibility for facilitating the achievement of feminist goals**.

#### Butler believes that the subject should be fully removed from a politics of grief because she acknowledges the importance of other actors

Butler 10

Judith. “New Scenes of Vulnerability, Agency and Plurality: An Interview with Judith Butler” Interviewer: Vikki Bell. Theory Culture & Society 27(1). 2010.

One could argue that **the precariousness of life** is the ground or the basis upon which our obligations to shelter life emerge. I also think, maybe, it’s a kind of modest conceit that keeping in mind the transience or precariousness of life allows us to value life differently or more vigilantly, so it does **translate[s] into a more ethical position for me**. I’m aware I don’t have a full theory of life, and I am not sure life admits of a full theory; I’m particularly concerned not to be appropriated by any kind of pro-life discourse – that would be quite abominable. Ann Fausto-Sterling did a wonderful job of rethinking the sex–gender distinction through using an interactive model, suggesting ways in which materiality informs cultural articulation and vice versa, and Liz Grosz has also taken that up in an important way. I have looked at Karen Barad’s (2007) work, at Charis Thompson’s (2005) work on reproductive technology, both of whom are relocating agency in material contexts. **I’ve become more and more interested in modes of agency that don’t reside in human subjects**, and I think there can be institutional modes of agency that are distributed throughout institutional scenes. **When we talk about agency, we in fact need to divorce it from the idea of the subject** and allow it to be a complex choreographed scene with many kinds of elements – social, material, human – at work. I think something like that happens in Rayna Rapp’s (2000) analysis of the pre-natal testing clinics, where she looks at **all the actors in the field [are relevant]**. Charis Thompson, I think, does something very similar. She has a notion of **ontological choreography**, which derived from a Haraway-like position that **suggests an invariable interaction of human and non-human elements in the scene of agency.**

#### Simply knowing of a suffering Other, like the detainees in Gitmo, is not enough for real social change. It doesn’t change how we act

VLIEGHE 10

Joris (laboratory for education and society, PhD education,) “Judith Butler and the Public Dimension of the Body: Education, Critique and Corporeal Vulnerability” Journal of Philosophy of Education, Vol. 44, No. 1, 2010

This train of thought points in the same direction as Levinas’s description of the experience one undergoes **when one is confronted by the face of the suffering other, when one feels oneself responsible**—even if one has no relation to the other and even if there is no conclusive reason why we should take upon us responsibility. Levinas draws this event to our attention in order to criticise that whole tradition of Western philosophy in which moral agency is conceived of as a project in which the autonomous and rational subject unfolds. What **Levinas** essentially does is to place metaphysics between brackets in order to **remind[s] us of an experience that we all might undergo, an experience that exposes us in a radically passive way**: **we are forced out of position and have to acknowledge that we are no longer to be understood as the meaning-giving authors of our lives. We find ourselves confronted with a moral obligation** that predates any intentional control. With regard to criticality in education, this approach is important, especially in connection with the problem of multiculturalism. A Levinasian analysis along these lines shows that **every ‘ethical content approach’**, as Monica Hogan has put this, **is doomed to fail: to know that (other) people may suffer great harm** because they happen to belong to a particular cultural minority **is not in itself sufficient to bring real social change. Such awareness does not automatically lead to a different way of thinking or living.** Monica Hogan contrasts this ‘cognitive’ approach to an ‘ethical contact approach’, which would be a matter of real corporeal exposure, of the experience as if in one’s flesh of the suffering people undergo (Hogan, 2006).

#### Butler ignores context, the historical conditions that shape the social world in which her politics operate

Lloyd 08

Moya (pf Loughborough Univ, feminist author) “Towards a cultural politics of

vulnerability Precarious lives and ungrievable deaths” Judith Butler’s Precarious Politics. 2008

One of **the opposition**s **that sustains Butler’s work** **is** that between **the social and**/or **cultural on the one hand, and a priori universals that transcend** or precede culture and **society, on the other**. Although Butler’s aim, as Laclau contends, may well be to expose these ‘structural determination[s]’, as he calls them, as culturally and historically contingent products (2000: 188), it is how she goes about this that is the issue. In this respect, it is not just that Butler’s own work relies, as I have suggested, on certain universal ontological or metaphysical claims of its own. It is that **her understanding of the social is too narrow and undifferentiated to do the work that she wants it to, because it is insufﬁciently historicised.** When Butler deploys the term ‘social’, whether in relation to norms, culture, or language, it signals a contingent effect circumscribed by power. **What she does not do**, however, **is pay sufﬁcient attention to the historical conditions of emergence of these particular effects.** **She does not**, that is, **examine the historical practices that themselves generate the social.** So to demonstrate that the desire to exist is a thoroughly social rather than metaphysical desire (or, even, one simply affected by social arrangements) **Butler must**, in my view, **do** rather **more** than contend that the form that this desire takes depends upon the material context in which it is articulated, and that consequently shapes it or gives it a determinate meaning. **She has to address** the **historicity** of this idea. **She has to examine the actual historical conditions of its emergence**. She needs, in other words, to minimise what might be thought of her quasi-Derridean impulse to explore ontological conditions of possibility (in this case of an ethical relation with the other with, recall, the capacity to reconﬁgure international relations, and which is based on the abstract notion of a desire to exist) and to maximise the Nietzschean–Foucauldian imperative to examine precisely the kinds of assumptions this desire is predicated upon, **the discourses it is locked into, the norms that conﬁgure it** (and that it conﬁgures) **and the implications it has for particular practices**.9 Only then will she be able to create the potential for a critique of the desire for existence as a social artefact, and thus to open up a space for rethinking the relation between desire, existence, survival and the human. **Only then will she be able to explore fully** what I have tentativelycalled **a cultural politics of vulnerability**.

#### This omission of the Other is violence.

**Butler 04** Maxine Elliot Professor in Rhetoric and Comparative Literature at UC-Berkeley

(Judith, Precarious Life: The Powers of Mourning and Violence, page 34)

**discourse** itself **effects violence through omission**. If **200,000 Iraqi children were killed** during the Gulf War and its aftermath,1 **do we have an image, a frame for any of those lives**, Singly or collectively? **Is there a story we might find about those deaths** in the media? **Are there names attached to those children?** **There are no obituaries for the war casualties that the United States inflicts, and there cannot be. If there were to be an obituary, there would have had to have been a life, a life worth noting, a life worth valuing and preserving, a life that qualifies for recognition**. Although we might argue that it would be impractical to write obituaries for all those people, or for all people, I think we have to ask, again and again, **the obituary functions as the instrument by which grievability is publicly distributed**. It is **the means by which a life becomes**, or fails to become, a **publicly grievable life, an icon for national self-recogn ition, the means by which a life becomes noteworthy**. As a result**, we have to consider the obituary as an act of nation-building.** The matter is not a simple one, for, **if a life is not grievable, it is not quite a life**; it does not qualify as a life and is not worth a note. It is already the unburied, if not the unburiable.

#### Traditional forms of ethical responsibility like the aff make us preoccupied with our own calculations, which prevents a real confrontation with the other

Gutterman and Rushing 08

David S. (pf Willamette Univ) and Sara L. (pf Montana St) Judith Butler’s Precarious Politics. “Sovereignty and suffering: towards an ethics of grief in a post-9/11 world” 2008

**The War on Terror continually raises the question of our ethical obligations to those we do not know (like the people of Iraq), those we know only as inhuman (like bin Laden), and those we refuse to know (like the torture victims who have been rendered utterly ‘other’ to us, masked, both literally and ﬁguratively). If the condition for having ethical obligations to these others is some impossible ideal of recognition grounded on ﬁrm epistemological and communicative foundations, then it seems we are at an impasse unless there are other ethical resources to be found. Butler seeks these resources in the very failure of recognition that would seem to void ethical obligations.** Thus she counsels that, ‘it will be important that we do not expect an answer [to who the other is] that will ever satisfy. And **by not pursuing satisfaction, we let the other live, offering a recognition that is not based on knowledge, but its limits’** (Butler 2000c: para. 10). Another word for this sense of recognition is responsiveness, as an awareness of the constitutive conditions of life that form us all: opacity and vulnerability. If **full recognition is the demand that traditionally precedes and grounds ethics, and yet is a demand we can never meet, then responsiveness, understood as being awake to the world we are affected by and affect, is a way of responding to this failure.** For Butler, ethical relations cannot hinge on ideals of commonality and recognition like those that Socrates discusses. In contrast, she seeks to predicate ethical relations on ‘humility about one’s constitutive limitations’ and generosity as ‘a disposition toward the limits of others’ (Butler 2005a: 80). These dispositional supplements – humility and generosity, as well as patience and restraint – are Butler’s answer to the question, ‘With what, then, shall a man provide himself to secure this double advantage: insurance from doing wrong and suffering it?’ Furthermore, in contrast to Socrates, **Butler argues that ethical responsibility cannot be a matter of reason and will, for she worries that ‘if we locate notions of political responsibility in a willful subject, then we become preoccupied with our own willfulness and our own calculations** ... ’ (Butler 2003a: 5). Socrates might look at Callicles and Polus and agree, and yet would continue to try to convince them to strive for self-mastery. For Butler, though, **making responsibility a matter of individual will afﬁrms what she sees as the fantasy of self-mastery**. When we ﬁgure responsibility as a matter of will, Butler fears that ‘**we are not necessarily responding to what is outside of ourselves and understanding that outside – the world – as essential to who we are’** (Butler 2003a: 5).