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#### The Supreme Court refuses to enforce statutory restraints on the president- causes judicial abstention from all cases involving national security and creates a preemptive default to presidential expertism

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After being reversed three times in a row in Rasul, Hamdan, and then Boumediene, the D.C. Circuit finally managed in Kiyemba to reassert, and have effectively sanctioned, its highly deferential stance towards the Executive in cases involving national security. In particular, the D.C. Circuit concluded that an order mandating the Uighurs’ release into the continental United States would impermissibly interfere with the political branches’ exclusive authority over immigration matters. But this reasoning is legal ground that the Supreme Court has already implicitly—and another three-judge panel of the D.C. Circuit more explicitly—covered earlier. As such, the Bush administration’s strategy in employing the “war” paradigm at all costs and without any judicial intervention, while unsuccessful in the Supreme Court, has finally paid off in troubling, and binding, fashion in the D.C. Court of Appeals, where, national security fundamentalism reigns supreme and the Executive’s powers as “Commander-in-Chief” can be exercised with little, if any, real check; arguably leading to judicial abstention in cases involving national security. The consequences of the Kiyemba decision potentially continue today, for example, with passage of the National Defense Authorization Act of 2012,246 which President Obama signed, with reservations, into law on December 31, 2011.247 This defense authorization bill contains detainee provisions that civil liberties groups and human rights advocates have strongly opposed.248 The bill’s supporters strenuously objected to the assertion that these provisions authorize the indefinite detention of U.S. citizens.249 In signing the bill, President Obama later issued a statement to the effect that although he had reservations about some of the provisions, he “vowed to use discretion when applying” them.250 Of course, that does not mean another administration would do the same, especially if courts abstain from their role as protectors of individual rights. In the years after 9/11, the Supreme Court asserted its role incrementally, slowly entering into the debate about the rights of enemy combatant detainees. This was a “somewhat novel role” for the Court.251 Unsurprisingly, in so doing, the Court’s intervention “strengthened detainee rights, enlarged the role of the judiciary, and rebuked broad assertions of executive power.”252 Also unsurprisingly, the Court’s decisions in this arena “prompted strong reactions from the other two branches.”253 This may be so because, as Chief Justice Rehnquist noted, the Court had, in the past, recognized the primacy of liberty interests only in quieter times, after national emergencies had terminated or perhaps before they ever began.254 However, since the twentieth century, wartime has been the “normal state of affairs.”255 If perpetual war is the new “normal,” the political branches likely will be in a permanent state of alert. Thus, it remains for the courts to exercise vigilance and courage about protecting individual rights, even if these assertions of judicial authority come as a surprise to the political branches of government.256 But courts, like any other institution, are susceptible to being swayed by influences external to the law. Joseph Margulies and Hope Metcalf make this very point in a 2011 article, noting that much of the post-9/11 scholarship mirrors this country’s early wartime cases and “envisions a country that veers off course at the onset of a military emergency but gradually steers back to a peacetime norm once the threat recedes, via primarily legal interventions.”257 This model, they state, “cannot explain a sudden return to the repressive wilderness just at the moment when it seemed the country had recovered its moral bearings.”258 Kiyemba is very much a return to the repressive wilderness. In thinking about the practical and political considerations that inevitably play a role in judicial decisionmaking (or non-decisionmaking, as the case may be), I note that the Court tends to be reluctant to decide constitutional cases if it can avoid doing so, as it did in Kiyemba. Arguably, this doctrine of judicial abstention is tied to concerns of institutional viability, in the form of public perception, and to concerns about respecting the separation of powers.259 But, as Justice Douglas once famously noted, when considering the separation of powers, the Court should be mindful of Chief Justice Marshall’s admonition that “it is a constitution we are expounding.”260 Consequently, “[i]t is far more important [for the Court] to be respectful to the Constitution than to a coordinate branch of government.”261 And while brave jurists have made such assertions throughout the Court’s history, the Court is not without some pessimism about its ability to effectively protect civil liberties in wartimes or national emergencies. For example, in Korematsu—one of the worst examples of judicial deference in times of crisis—Justice Jackson dissented, but he did so “with explicit resignation about judicial powerlessness,” and concern that it was widely believed that “civilian courts, up to and including his own Supreme Court, perhaps should abstain from attempting to hold military commanders to constitutional limits in wartime.”262 Significantly, even when faced with the belief that the effort may be futile, Justice Jackson dissented. As I describe in the following section, that dissent serves a valuable purpose. But, for the moment, I must consider the external influences on the court that resulted in that feeling of judicial futility.

#### This reluctance provides the statutory framework for imperialism and the military-industrial complex: defense lobbies use deference as an excuse for widening ties between the military and industries- the result is endless intervention

Scales and Spitz 12 (Ann Scales, prof at U Denver law school. Laura Spitz, prof at U Colorado Law School. The Jurisprudence of the Military-Industrial ComplexSeattle Journal for Social Justice Volume 1 | Issue 3 Article 51 10-11-2012)

First, our nation’s history and legitimacy rest upon a separation of military power from democratic governance. For that reason, the armed forces are subject to constitutional constraint. Second, however, as an aspect of separation of powers, courts try not to interfere in areas of foreign policy and military affairs. Often this is referred to as the “political question” doctrine, a determination that a matter is beyond the capabilities of judges. The strongest argument for this deference is that the political branches—or the military itself—have superior expertise in military matters. That may be true in some situations. I am not sure, for example, the Supreme Court would have been the best crowd to organize the invasion of Normandy. But what we now have is an increasingly irrational deference.7 Consider three cases: a. In Korematsu v. United States,8 the Supreme Court said the internment of Japanese-Americans at the beginning of 1942 was constitutional, based upon a military assessment of the possibility of espionage in preparation for a Japanese invasion of the United States. It turns out that the information provided by the military to the Supreme Court was falsified.9 But note two things: (1) the nation was in the midst of a declared world war, and (2) in subsequent less urgent circumstances, Korematsu would seem to argue strongly for military justifications to have to be based upon better, more reliable information than was offered there. b. In the 1981 case of Rostker v. Goldberg,10 the Supreme Court decided that it was constitutional for Congress to exclude women from the peacetime registration of potential draftees, even though both the Department of Defense and the Army Chief of Staff had testified that including women would increase military readiness. But Congress got the benefit of the military deference doctrine as a cover for what I think was a sinister political purpose—to protect the manliness of war—and the Supreme Court felt perfectly free to ignore what those with the real expertise had to say. c. Most recently, in Hamdi v. Rumsfeld,11 the Fourth Circuit held that a U.S. citizen who had been designated an “enemy combatant”12 could be detained indefinitely without access to counsel. In this case, however, not only is there no declared war,13 but also, the only evidence regarding Mr. Hamdi was a two-page affidavit by a Defense Department underling, Mr. Mobbs. Mobbs stated that Mr. Hamdi was captured in Afghanistan, and had been affiliated with a Taliban military unit. The government would not disclose the criteria for the “enemy combatant” designation, the statements of Mr. Hamdi that allegedly satisfied those criteria, nor any other bases for the conclusion of Taliban “affiliation.”14 And that is as good as the evidence for life imprisonment without trial has to be. Deference to the military has become abdication. In other words, what we presently have is not civilian government under military control, but something potentially worse, a civilian government ignoring military advice,15 but using the legal doctrine of military deference for its own imperialist ends. Third, the gigantic military establishment and permanent arms industry are now in the business of justifying their continued existences. This justification is done primarily, as you know, by retooling for post-Cold War enemies—the so-called “rogue states”—while at the same time creating new ones, for example by arming corrupt regimes in Southeast Asia.16 I was reminded of this recently when we went to see comedian Kate Clinton. She thought Secretary Powell had taken too much trouble in his presentation attempting to convince the Security Council that Iraq had weapons of mass destruction.17 Why not, she asked, “just show them the receipts?” Fourth, we have seen the exercise of extraordinary influence by arms makers on both domestic and foreign policy. For domestic pork barrel and campaign finance reasons, obsolete or unproven weapons systems continue to be funded even when the military does not want them!18 And, just when we thought we had survived the nuclear arms race nightmare, the United States has undertaken to design new kinds of nuclear weapons,19 even when those designs have little military value.20 Overseas, limitations on arms sales are being repealed, and arms markets that should not exist are being constantly expanded21 for the sake of dumping inventory, even if those weapons are eventually used for “rogue” purposes by rogue states. This system skews security considerations, and militarizes foreign policy. Force has to be the preferred option because other conduits of policy are not sufficiently well-funded. Plus, those stockpiled weapons have got to be used or sold so that we can build more. Fifth, enlarging upon this in a document entitled The National Security Policy of the United States, we were treated last September to “the Bush doctrine,” which for the first time in U.S. history declares a preemptive strike policy. This document states, “America will act against emerging threats before they are fully formed.”22 If they are only emerging and not fully formed, you may wonder, how will we know they are “threats”? Because someone in Washington has that perception, and when the hunch hits, it is the official policy of this country to deploy the military.23 All options—including the use of nuclear weapons—are always on the table.

#### **Military supremacy causes endless violence at home and abroad**

Bacevich, 5 -- Boston University international relations professor

[A. J., retired career officer in the United States Army, former director of Boston University's Center for International Relations (from 1998 to 2005), *The New American Militarism: How Americans Are Seduced by Wa*r, 2005 accessed 9-4-13, mss]

Today as never before in their history Americans are enthralled with military power. The global military supremacy that the United States presently enjoys--and is bent on perpetuating-has become central to our national identity. More than America's matchless material abundance or even the effusions of its pop culture, the nation's arsenal of high-tech weaponry and the soldiers who employ that arsenal have come to signify who we are and what we stand for. When it comes to war, Americans have persuaded themselves that the United States possesses a peculiar genius. Writing in the spring of 2003, the journalist Gregg Easterbrook observed that "the extent of American military superiority has become almost impossible to overstate." During Operation Iraqi Freedom, U.S. forces had shown beyond the shadow of a doubt that they were "the strongest the world has ever known, . . . stronger than the Wehrmacht in r94o, stronger than the legions at the height of Roman power." Other nations trailed "so far behind they have no chance of catching up. ""˜ The commentator Max Boot scoffed at comparisons with the German army of World War II, hitherto "the gold standard of operational excellence." In Iraq, American military performance had been such as to make "fabled generals such as Erwin Rommel and Heinz Guderian seem positively incompetent by comparison." Easterbrook and Booz concurred on the central point: on the modern battlefield Americans had located an arena of human endeavor in which their flair for organizing and deploying technology offered an apparently decisive edge. As a consequence, the United States had (as many Americans have come to believe) become masters of all things military. Further, American political leaders have demonstrated their intention of tapping that mastery to reshape the world in accordance with American interests and American values. That the two are so closely intertwined as to be indistinguishable is, of course, a proposition to which the vast majority of Americans subscribe. Uniquely among the great powers in all of world history, ours (we insist) is an inherently values-based approach to policy. Furthermore, we have it on good authority that the ideals we espouse represent universal truths, valid for all times. American statesmen past and present have regularly affirmed that judgment. In doing so, they validate it and render it all but impervious to doubt. Whatever momentary setbacks the United States might encounter, whether a generation ago in Vietnam or more recently in Iraq, this certainty that American values are destined to prevail imbues U.S. policy with a distinctive grandeur. The preferred language of American statecraft is bold, ambitious, and confident. Reflecting such convictions, policymakers in Washington nurse (and the majority of citizens tacitly endorse) ever more grandiose expectations for how armed might can facilitate the inevitable triumph of those values. In that regard, George W. Bush's vow that the United States will "rid the world of evil" both echoes and amplifies the large claims of his predecessors going at least as far back as Woodrow Wilson. Coming from Bush the war- rior-president, the promise to make an end to evil is a promise to destroy, to demolish, and to obliterate it. One result of this belief that the fulfillment of America's historic mission begins with America's destruction of the old order has been to revive a phenomenon that C. Wright Mills in the early days of the Cold War described as a "**military metaphysics"-a tendency to see international problems as military problems and to discount** the likelihood of findinga **solution except through military means.** To state the matter bluntly, Americans in our own time have fallen prey to militarism, manifesting itself in a romanticized view of soldiers, a tendency to see military power as the truest measure of national greatness, and outsized expectations regarding the efficacy of force. To a degree without precedent in U.S. history, Americans have come to define the nation's strength and well-being in terms of military preparedness, military action, and the fostering of (or nostalgia for) military ideals? Already in the 19905 America's marriage of a militaristic cast of mind with utopian ends had established itself as the distinguishing element of contemporary U.S. policy. The Bush administrations response to the hor- rors of 9/11 served to reaffirm that marriage, as it committed the United States to waging an open-ended war on a global scale. Events since, notably the alarms, excursions, and full-fledged campaigns comprising the Global War on Terror, have fortified and perhaps even sanctified this marriage. Regrettably, those events, in particular the successive invasions of Afghanistan and Iraq, advertised as important milestones along the road to ultimate victory have further dulled the average Americans ability to grasp the significance of this union, which does not serve our interests and may yet prove our undoing. The New American Militarism examines the origins and implications of this union and proposes its annulment. Although by no means the first book to undertake such an examination, The New American Militarism does so from a distinctive perspective. The bellicose character of U.S. policy after 9/11, culminating with the American-led invasion of Iraq in March 2003, has, in fact, evoked charges of militarism from across the political spectrum. Prominent among the accounts advancing that charge are books such as The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic, by Chalmers Johnson; Hegemony or Survival: Americas Quest for Global Dominance, by Noam Chomsky; Masters of War; Militarism and Blowback in the Era of American Empire, edited by Carl Boggs; Rogue Nation: American Unilateralism and the Failure of Good Intentions, by Clyde Prestowitz; and Incoherent Empire, by Michael Mann, with its concluding chapter called "The New Militarism." Each of these books appeared in 2003 or 2004. Each was not only writ- ten in the aftermath of 9/11 but responded specifically to the policies of the Bush administration, above all to its determined efforts to promote and justify a war to overthrow Saddam Hussein. As the titles alone suggest and the contents amply demonstrate, they are for the most part angry books. They indict more than explain, and what- ever explanations they offer tend to be ad hominem. The authors of these books unite in heaping abuse on the head of George W Bush, said to combine in a single individual intractable provincialism, religious zealotry, and the reckless temperament of a gunslinger. Or if not Bush himself, they fin- ger his lieutenants, the cabal of warmongers, led by Vice President Dick Cheney and senior Defense Department officials, who whispered persua- sively in the president's ear and used him to do their bidding. Thus, accord- ing to Chalmers Johnson, ever since the Persian Gulf War of 1990-1991, Cheney and other key figures from that war had "Wanted to go back and finish what they started." Having lobbied unsuccessfully throughout the Clinton era "for aggression against Iraq and the remaking of the Middle East," they had returned to power on Bush's coattails. After they had "bided their time for nine months," they had seized upon the crisis of 9/1 1 "to put their theories and plans into action," pressing Bush to make Saddam Hussein number one on his hit list." By implication, militarism becomes something of a conspiracy foisted on a malleable president and an unsuspecting people by a handful of wild-eyed ideologues. By further implication, the remedy for American militarism is self-evi- dent: "Throw the new militarists out of office," as Michael Mann urges, and a more balanced attitude toward military power will presumably reassert itself? As a contribution to the ongoing debate about U.S. policy, The New American Militarism rejects such notions as simplistic. It refuses to lay the responsibility for American militarism at the feet of a particular president or a particular set of advisers and argues that no particular presidential election holds the promise of radically changing it. Charging George W. Bush with responsibility for the militaristic tendencies of present-day U.S. for- eign policy makes as much sense as holding Herbert Hoover culpable for the Great Depression: Whatever its psychic satisfactions, it is an exercise in scapegoating that lets too many others off the hook and allows society at large to abdicate responsibility for what has come to pass. The point is not to deprive George W. Bush or his advisers of whatever credit or blame they may deserve for conjuring up the several large-scale campaigns and myriad lesser military actions comprising their war on ter- ror. They have certainly taken up the mantle of this militarism with a verve not seen in years. Rather it is to suggest that well before September 11, 2001 , and before the younger Bush's ascent to the presidency a militaristic predisposition was already in place both in official circles and among Americans more generally. In this regard, 9/11 deserves to be seen as an event that gave added impetus to already existing tendencies rather than as a turning point. For his part, President Bush himself ought to be seen as a player reciting his lines rather than as a playwright drafting an entirely new script. In short, the argument offered here asserts that present-day American militarism has deep roots in the American past. It represents a bipartisan project. As a result, it is unlikely to disappear anytime soon, a point obscured by the myopia and personal animus tainting most accounts of how we have arrived at this point. The New American Militarism was conceived not only as a corrective to what has become the conventional critique of U.S. policies since 9/11 but as a challenge to the orthodox historical context employed to justify those policies. In this regard, although by no means comparable in scope and in richness of detail, it continues the story begun in Michael Sherry's masterful 1995 hook, In the Shadow of War an interpretive history of the United States in our times. In a narrative that begins with the Great Depression and spans six decades, Sherry reveals a pervasive American sense of anxiety and vulnerability. In an age during which War, actual as well as metaphorical, was a constant, either as ongoing reality or frightening prospect, national security became the axis around which the American enterprise turned. As a consequence, a relentless process of militarization "reshaped every realm of American life-politics and foreign policy, economics and technology, culture and social relations-making America a profoundly different nation." Yet Sherry concludes his account on a hopeful note. Surveying conditions midway through the post-Cold War era's first decade, he suggests in a chapter entitled "A Farewell to Militarization?" that America's preoccupation with War and military matters might at long last be waning. In the mid- 1995, a return to something resembling pre-1930s military normalcy, involving at least a partial liquidation of the national security state, appeared to be at hand. Events since In the Shadow of War appear to have swept away these expectations. The New American Militarism tries to explain why and by extension offers a different interpretation of America's immediate past. The upshot of that interpretation is that far from bidding farewell to militariza- tion, the United States has nestled more deeply into its embrace. f ~ Briefly told, the story that follows goes like this. The new American militarism made its appearance in reaction to the I96os and especially to Vietnam. It evolved over a period of decades, rather than being sponta- neously induced by a particular event such as the terrorist attack of Septem- ber 11, 2001. Nor, as mentioned above, is present-day American militarism the product of a conspiracy hatched by a small group of fanatics when the American people were distracted or otherwise engaged. Rather, it devel- oped in full view and with considerable popular approval. The new American militarism is the handiwork of several disparate groups that shared little in common apart from being intent on undoing the purportedly nefarious effects of the I96OS. Military officers intent on reha- bilitating their profession; intellectuals fearing that the loss of confidence at home was paving the way for the triumph of totalitarianism abroad; reli- gious leaders dismayed by the collapse of traditional moral standards; strategists wrestling with the implications of a humiliating defeat that had undermined their credibility; politicians on the make; purveyors of pop cul- turc looking to make a buck: as early as 1980, each saw military power as the apparent answer to any number of problems. The process giving rise to the new American militarism was not a neat one. Where collaboration made sense, the forces of reaction found the means to cooperate. But on many occasions-for example, on questions relating to women or to grand strategy-nominally "pro-military" groups worked at cross purposes. Confronting the thicket of unexpected developments that marked the decades after Vietnam, each tended to chart its own course. In many respects, the forces of reaction failed to achieve the specific objectives that first roused them to act. To the extent that the 19603 upended long-standing conventions relating to race, gender, and sexuality, efforts to mount a cultural counterrevolution failed miserably. Where the forces of reaction did achieve a modicum of success, moreover, their achievements often proved empty or gave rise to unintended and unwelcome conse- quences. Thus, as we shall see, military professionals did regain something approximating the standing that they had enjoyed in American society prior to Vietnam. But their efforts to reassert the autonomy of that profession backfired and left the military in the present century bereft of meaningful influence on basic questions relating to the uses of U.S. military power. Yet the reaction against the 1960s did give rise to one important by-prod: uct, namely, the militaristic tendencies that have of late come into full flower. In short, the story that follows consists of several narrative threads. No single thread can account for our current outsized ambitions and infatua- tion with military power. Together, however, they created conditions per- mitting a peculiarly American variant of militarism to emerge. As an antidote, the story concludes by offering specific remedies aimed at restor- ing a sense of realism and a sense of proportion to U.S. policy. It proposes thereby to bring American purposes and American methods-especially with regard to the role of military power-into closer harmony with the nation's founding ideals. The marriage of military metaphysics with eschatological ambition is a misbegotten one, contrary to the long-term interests of either the American people or the world beyond our borders. It invites endless war and the ever-deepening militarization of U.S. policy. As it subordinates concern for the common good to the paramount value of military effectiveness, it promises not to perfect but to distort American ideals. As it concentrates ever more authority in the hands of a few more concerned with order abroad rather than with justice at home, it will accelerate the hollowing out of American democracy. As it alienates peoples and nations around the world, it will leave the United States increasingly isolated. If history is any guide, it will end in bankruptcy, moral as well as economic, and in abject failure. "Of all the enemies of public liberty," wrote James Madison in 1795, "war is perhaps the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies. From these proceed debts and taxes. And armies, debts and taxes are the known instruments for bringing the many under the domination of the few .... No nation could preserve its freedom in the midst of continual Warfare." The purpose of this book is to invite Americans to consider the continued relevance of Madison's warning to our own time and circumstances.

#### Allowing Obama to use statutory justifications for indefinite detention causes an indefinite police state- short-circuits activism and causes unspeakable acts of torture and violence

Stephen Lendman (Research Associate of the Center for Research on Globalization) July 19, 2013 “US Courts Approve Indefinite Detention and Torture” http://www.mathaba.net/news/?x=633237

Fundamental freedoms are illusory. They're vanishing. They lie in history's dustbin. National Defense Authorization Act (NDAA) provisions let federal troops arrest and imprison US citizens and foreign nationals. They can do it at home or abroad. They can do it anywhere. They can be held indefinitely uncharged and untried. They can be tortured. They can be forced to admit crimes they didn't commit. They can be murdered on Obama's say. Police state lawlessness rules. It's the law of the land. Obama's a tinpot despot. He's judge, jury and executioner. Fundamental rights are gone. They don't apply. Anyone can be arrested, imprisoned, held indefinitely and tortured for doing the right thing. Protesting imperial lawlessness, social injustice, corporate crime, government corruption, or political Washington run of, by and for rich elites can be criminalized. So can free speech, assembly, religion, or anything challenging America's right to kill, destroy and pillage with impunity. It's official. Tyranny rules. America's unsafe to live in. There's no place to hide. Challenging diktat power's criminalized. Police state ruthlessness targets anyone trying. Military dungeons or secret FEMA concentration camps await victims. America's no democracy. It's not beautiful. It's a battleground. It's nightmarish for countless numbers affected. Law Professor Jonathan Turley called NDAA authority ruthlessness "that would have horrified the Framers." "Indefinitely detaining citizens is something (they) were intimately familiar with and expressly sought to bar in the Bill of Rights." Other legal experts agree. Habeas, due process, and other fundamental rights are too precious to lose. They're now quaint artifacts. They're gone. They lie in history's dustbin. Tyranny replaced them. America's no different from other totalitarian states. It's ruthless. It's militarized for control. It's concentrated money power running things. It's fascism writ large. It's wrapped in the American flag. It's scapegoating challengers. It's out-of-control militarism. It's national security justification to brutalize and oppress. It's controlling the message. It's convincing people fundamental rights are abolished for their own good. It's getting most people to believe it. It's stripping off America's mask. It's showing its true face. It's menacing, cruel and unjust. Federal court decisions explain. In 2012, Hedges et al v. Obama challenged NDAA provisions. Last September, Southern District of New York federal Judge Katherine B. Forrest blocked Obama's indefinite detention law. She's the exception, not the rule. She called it "facially unconstitutional: it impermissibly impinges on guaranteed First Amendment rights and lacks sufficient definitional structure and protections to meet the requirements of due process." She added that: "If, following issuance of this permanent injunctive relief, the government detains individuals under theories of ‘substantially or directly supporting’ associated forces, as set forth in” the National Defense Authorization Act, “and a contempt action is brought before this court, the government will bear a heavy burden indeed." At issue is section 1021 of the 2012 National Defense Authorization Act (NDAA). It states in part: "Congress affirms that the authority of the president to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (AUMF) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war." "Covered persons" are defined as: Anyone "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." Plaintiffs argued that broad, ambiguous language like "substantially supported," "associated forces" and "directly supported" leaves them and others vulnerable to lawless indefinite detention. Legally meeting someone rightly or wrongly called a terrorist, staying in their homes, inviting them to speak at conferences or in panel discussions, interviewing them, or socializing with them can be called dealing with the enemy. So can writing anti-imperial articles, exposing and/or discussing US crimes of war and against humanity, and participating in anti-war protests. Hedges et al won. Obama officials appealed. On Wednesday, the New York Second Circuit Court of Appeals overturned Judge Forrest's ruling. Three judges did so unanimously. They did it shamelessly. They called indefinite detention uncharged and untried OK. They said Hedges et al lacked standing. It's because federal law "says nothing at all about the president's authority to detain American citizens." False! NDAA covers everyone. US citizens are as vulnerable as foreign nationals. Appeals Court Judge Lewis Kaplan said non-citizens "failed to establish standing because they have not shown a sufficient threat that the government will detain them." Plaintiffs' lawyer Carl Mayer said "(w)e're reviewing what our options are, but I strongly suspect that we will appeal to the Supreme Court." The ruling came on the same day the District of Columbia Court of Appeals overturned a lower court ruling. At issue are oppressive Guantanamo prisoner genital area searches. District Court Judge Royce Lamberth ordered them stopped. Appeals Court judges overruled him. They authorized what's conducted to degrade, harass and humiliate. They're unrelated to security. Separately on July 16, Washington, DC District Court Judge Rosemary Collyer ruled against three Guantanamo hunger strikers. They sued to stop force-feeding. It's lawless. It's medically unethical. It's excruciatingly painful. It's torture as international law defines it. Collyer supports it. Her ruling ignored inviolable laws. She's contemptuously dismissive. She said: "There is nothing so shocking or inhumane in the treatment of petitioners - which they can avoid at will - to raise a constitutional concern that might otherwise necessitate review." "Although framed as a motion to stop feeding via nasograstric tube, Petitioners' real complaint is that the United States is not allowing them to commit suicide by starvation." According to the World Federation of Right to Die Societies: "All competent adults - regardless of their nationalities, professions, religious beliefs, and ethical and political views - who are suffering unbearably from incurable illnesses should have the possibility of various choices at the end of their life." "Death is unavoidable. We strongly believe that the manner and time of dying should be left to the decision of the individual, assuming such demands do not result in harm to society other than the sadness associated with death." Brutalizing indefinite Guantanamo detention constitutes an "incurable disease." It includes hopelessness and unbearable suffering. It prevents any chance for freedom. It denies all rights. Death's unavoidable. It'll come sooner, not later. Dying with dignity's excluded. Permitting it is fundamentally right. Not according to kangaroo federal court justice. Collyer's ruling replicated Judge Glady Kessler's July 10 decision. On the one hand, she called force-feeding "painful, humiliating and degrading." On the other, she abstained from ruling responsibly. She wrongfully claimed federal courts have no authority over Guantanamo. Obama alone has "authority to address the issue," she said. False! Kessler doesn't know the law. Maybe she does but spurned it. She ignored High Court rulings. In Rasul v. Bush (June 2004), the Supreme Court held that Guantanamo detainees may challenge their detention in civil court. In response, Congress enacted the 2005 Detainee Treatment Act. It subverted the ruling. In Hamdan v. Rumsfeld (June 2006), the High Court held that federal courts retain jurisdiction over habeas cases. It ruled against military commissions. It said they lack "the power to proceed because (their) structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions." In response, Congress passed the 2006 Military Commissions Act (MCA). In updated form, it's the law of the land. Supreme Court justices can challenge it. They can strike it down. They haven't done so. Perhaps a future court will. In Boumediene v. Bush (June 2008), it affirmed habeas rights for Guantanamo detainees. It let them petition for release from lawlessly imposed custody. Justice Anthony Kennedy wrote the majority opinion. He said America maintains complete jurisdiction over Guantanamo regardless of its offshore location. He opposed political branches "govern(ing) without legal restraint." He expressed concerns about usurping "power to switch the Constitution on or off at will." Doing so "lead(s) to a regime in which they, not this Court, say 'what the law is.' " "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.' " He called habeas "an indispensable mechanism for monitoring the separation of powers." "The test for determining (its) scope must not be subject to manipulation by those whose power it is designed to restrain." This bedrock right has no adequate substitute. It doesn't matter. Justice in America no longer exists. Diktat power replaced it. Perhaps NDAA enactment was when freedom in America died. Post-9/11, it's been on the chopping block for elimination altogether. Tyranny's the law of the land. It's institutionalized. Fundamental rights don't matter. Democracy's a four-letter word. Out-of-control power runs things. It's unaccountable. Nonbelievers aren't tolerated. The worst is yet to come.

#### Obama has used indefinite detention powers to suppress social justice movements at home and abroad- statutory authority creates a state of exception in regards to detention policy.

Ford 11 (Glen, Black Action Radio. “The Racist Roots of Obama’s Preventative Detention” http://blackagendareport.com/content/racist-roots-obama%E2%80%99s-preventive-detention)

With his claim to the right to kill and indefinitely detain American citizens without charge or trial, President Obama “has crossed a Constitutional Rubicon that would have been beyond the capacity of George Bush or any white Republican.” The groundwork for Obama’s nullification of the rule of law was laid through federal “prosecutions whose sole purpose has been to establish that there exists an ‘enemy within’ U.S. borders, that it is largely Black as well as Muslim, and which requires a greatly expanded police state with extraordinary powers.” It should have been clear that the United States was on the road to [preventive detention](http://www.salon.com/2009/05/22/preventive_detention/) of U.S. citizens back in 2006, when the federal government went after the so-called Liberty City Seven, Black men from Miami’s poorest ghetto who were charged with plotting terrorist attacks. With unrelenting zeal, the U.S. Justice Department pressed the case that men who were too poor to escape their own devastated neighborhood – some of whom were actually homeless – represented a grave danger to the United States. They were charged with plotting to bring down the Sears Tower, even though only one of them had ever been to Chicago, and none knew anything about explosives. It took three trials to convict five of the Liberty City Seven, who were sent to prison during President Obama’s first year in office. They have since been joined by the Newburgh 4 and many others, in prosecutions whose sole purpose has been to establish that there exists an “enemy within” U.S. borders, that it is largely Black as well as Muslim, and which requires a greatly expanded police state with extraordinary powers. Before one can successfully eviscerate the Constitution in the name of national security, one must first demonstrate to the public that there exists a class of people for whom the new laws are intended, fellow citizens whose presence is such a danger to society that the rule of law as previously understood should no longer apply. Under George Bush and Barack Obama, the FBI has dedicated vast resources to conjuring up the specter of dark and dangerous internal enemies – with an emphasis on “dark.” The FBI chose to troll its informants and their fishhooks dangling with money among the poor of the Liberty Citys and Newburgh New York’s of the nation, creating a profile of the kind of people that the law should not protect. Under both Republicans and Democrats, the national security state has proven adept at using race, ethnicity and class like battering rams to demolish Constitutional protections. “ It is a great historical irony that the election of the First Black President has vastly accelerated the assault on the most elementary rights to due process – rights without which the rule of law simply disappears. A man who looks like the ethnic group that is most opposed to abuses of state power, a constitutional lawyer from the group that has suffered the most from arbitrary imprisonment, is leading the charge towards indefinite preventive detention of U.S. citizens. Barack Obama announced his principled support for preventive detention only a few months into his term, in the [spring of 2009](http://www.youtube.com/watch?feature=player_embedded&v=IwjCsBQGozM). He didn’t specifically include U.S. citizens in his framework of detention, back then, but once Obama took unto himself the power to assassinate his fellow Americans without trial or charge, preventive detention of citizens became inevitable. Obama has crossed a Constitutional Rubicon that would have been beyond the capacity of George Bush or any white Republican. He is, by these deeds alone, the most effective evil on the political scene, today. But Obama's nullification of the rule of law was ultimately made possible because this country remains so eager to deny Constitutional protections to Black and poor people, like the Liberty City Seven. Its citizens will sacrifice their own freedoms, just to spite the rights of darker people. And that is how they will lose those freedoms.

## solvency

#### Bennett and I endorse critical legal advocacy combined with larger grassroots movements as a method to achieve liberation for the indefinitely detained. Litigation is the public’s power to restrain the president- engaging the courts is critical

Yamamoto 5 (Erick K. Yamamoto: Professor of Law, William S. Richardson School of Law, University of Hawai'iWHITE (HOUSE) LIES: WHY THE PUBLIC MUST COMPEL THE COURTS TO HOLD THE PRESIDENT ACCOUNTABLE FOR NATIONAL SECURITY ABUSES. pg lexis)

And what almost no one has closely examined in both jurisprudential and Realpolitik terms is this: If the task of holding the executive accountable to constitutional standards ultimately falls on the courts, how does the American public hold the judiciary accountable—how do we assure that the courts actually scrutinize, rather than blindly accept, the executive's proffered justification for ostensible national security restrictions of our most basic freedoms? This under-explored question is the focus of this essay, and it opens discussion about the strategic need for critical legal advocacy and the significance of constructive public pressure on the courts. To stimulate that discussion this essay draws a broad "strategic blueprint" for building the political coalitions and cultural momentum needed to impel close judicial scrutiny of executive national security claims. The price for failing to build those coalitions and that momentum is, I suggest, a weak judiciary, unfettered presidential power, and civil liberties disasters in waiting. The proposed blueprint delineates the "who" (a wide array of public advocates tasked with pressuring judges, and the legal process itself, to assure executive accountability); the "how" (critical legal advocacy coupled with organized media and grass roots politicking); and the "what" (judicial acknowledgment that law as interpreted and applied is not neutral or objective in controversial cases, and that, in a genuine democracy, it is the court's role to carefully scrutinize executive national security actions that curtail fundamental liberties).

#### The plan is part of an intersectional battle to combat violations of habeas rights- but engaging the courts are key to prevent unchecked military force and violence

Chris Hedges (senior fellow at The Nation Institute in New York City. He spent nearly two decades as a foreign correspondent in Central America, the Middle East, Africa and the Balkans. He has reported from more than fifty countries, and has worked for The Christian Science Monitor, National Public Radio, The Dallas Morning News, and The New York Times, where he was a foreign correspondent for fifteen years (1990–2005). In 2002, Hedges was part of the team of reporters at The New York Times awarded the Pulitzer Prize for the paper's coverage of global terrorism. He has taught at Columbia University, New York University, Princeton University and The University of Toronto) February 11, 2013 “The NDAA and the Death of the Democratic State” http://www.truthdig.com/report/page2/the\_ndaa\_and\_the\_death\_of\_the\_democratic\_state\_20130211/

On Wednesday a few hundred activists crowded into the courtroom of the Second Circuit, the spillover room with its faulty audio feed and dearth of chairs, and Foley Square outside the Thurgood Marshall U.S. Courthouse in Manhattan where many huddled in the cold. The fate of the nation, we understood, could be decided by the three judges who will rule on our lawsuit against President Barack Obama for signing into law Section 1021(b)(2) of the National Defense Authorization Act (NDAA). The section permits the military to detain anyone, including U.S. citizens, who “substantially support”—an undefined legal term—al-Qaida, the Taliban or “associated forces,” again a term that is legally undefined. Those detained can be imprisoned indefinitely by the military and denied due process until “the end of hostilities.” In an age of permanent war this is probably a lifetime. Anyone detained under the NDAA can be sent, according to Section (c)(4), to any “foreign country or entity.” This is, in essence, extraordinary rendition of U.S. citizens. It empowers the government to ship detainees to the jails of some of the most repressive regimes on earth. Section 1021(b)(2) was declared invalid in September after our first trial, in the Southern District Court of New York. The Obama administration appealed the Southern District Court ruling. The appeal was heard Wednesday in the Second Circuit Court with Judges Raymond J. Lohier, Lewis A. Kaplan and Amalya L. Kearse presiding. The judges might not make a decision until the spring when the Supreme Court rules in Clapper v. Amnesty International USA, another case in which I am a plaintiff. The Supreme Court case challenges the government’s use of electronic surveillance. If we are successful in the Clapper case, it will strengthen all the plaintiffs’ standing in Hedges v. Obama. The Supreme Court, if it rules against the government, will affirm that we as plaintiffs have a reasonable fear of being detained. If we lose in Hedges v. Obama—and it seems certain that no matter the outcome of the appeal this case will reach the Supreme Court—electoral politics and our rights as citizens will be as empty as those of Nero’s Rome. If we lose, the power of the military to detain citizens, strip them of due process and hold them indefinitely in military prisons will become a terrifying reality. Democrat or Republican. Occupy activist or libertarian. Socialist or tea party stalwart. It does not matter. This is not a partisan fight. Once the state seizes this unchecked power, it will inevitably create a secret, lawless world of indiscriminate violence, terror and gulags. I lived under several military dictatorships during the two decades I was a foreign correspondent. I know the beast. “The stakes are very high,” said attorney Carl Mayer, who with attorney Bruce Afran brought our case to trial, in addressing a Culture Project audience in Manhattan on Wednesday after the hearing. “What our case comes down to is: Are we going to have a civil justice system in the United States or a military justice system? The civil justice system is something that is ingrained in the Constitution. It was always very important in combating tyranny and building a democratic society. What the NDAA is trying to impose is a system of military justice that allows the military to police the streets of America to detain U.S. citizens, to detain residents in the United States in military prisons. Probably the most frightening aspect of the NDAA is that it allows for detention until ‘the end of hostilities.’ ” Five thousand years of human civilization has left behind innumerable ruins to remind us that the grand structures and complex societies we build, and foolishly venerate as immortal, crumble into dust. It is the descent that matters now. If the corporate state is handed the tools, as under Section 1021(b)(2) of the NDAA, to use deadly force and military power to criminalize dissent, then our decline will be one of repression, blood and suffering. No one, not least our corporate overlords, believes that our material conditions will improve with the impending collapse of globalization, the steady deterioration of the global economy, the decline of natural resources and the looming catastrophes of climate change. But the global corporatists—who have created a new species of totalitarianism—demand, during our decay, total power to extract the last vestiges of profit from a degraded ecosystem and disempowered citizenry. The looming dystopia is visible in the skies of blighted postindustrial cities such as Flint, Mich., where drones circle like mechanical vultures. And in an era where the executive branch can draw up secret kill lists that include U.S. citizens, it would be naive to believe these domestic drones will remain unarmed. Robert M. Loeb, the lead attorney for the government in Wednesday’s proceedings, took a tack very different from that of the government in the Southern District Court of New York before Judge Katherine B. Forrest. Forrest repeatedly asked the government attorneys if they could guarantee that the other plaintiffs and I would not be subject to detention under Section 1021(b)(2). The government attorneys in the first trial granted no such immunity. The government also claimed in the first trial that under the 2001 Authorization to Use Military Force Act (AUMF), it already had the power to detain U.S. citizens. Section 1021(b)(2), the attorneys said, did not constitute a significant change in government power. Judge Forrest in September rejected the government’s arguments and ruled Section 1021(b)(2) invalid. The government, however, argued Wednesday that as “independent journalists” we were exempt from the law and had no cause for concern. Loeb stated that if journalists used journalism as a cover to aid the enemy, they would be seized and treated as enemy combatants. But he assured the court that I would be untouched by the new law as long as “Mr. Hedges did not start driving black vans for people we don’t like.”

#### Adopting legal tactics are vital for movements that seek to promote the rights of the disempowered

Hair 01

(Penda D Louder than Words:Lawyers, Communities and the Struggle for Justice, <http://www.racialequitytools.org/resourcefiles/hair.pdf>, Penda D. Hair is Co-Director of the Advancement Project at the Rockafeller Foundation, The many lawyers, clients, community organizations and activists whose visionary work in the field is reflected herein generously shared their time, experiences, lessons and mistakes, as well as triumphs. This is their report. I have tried to be an accurate and thoughtful recorder. Dayna L. Cunningham, Associate Director of the Rockefeller Foundation’s Working Communities Division, conceived this project and brought together the people and the resources to bring it to fruition. Her penetrating ideas on race and lawyering infuse every page of the Report. As important, her strong belief in the project and her incredible determination inspired the author and the advisers, and pushed this work to completion. Susan P. Sturm, Professor of Law, Columbia Law School, and Lani Guinier, Professor of Law, Harvard Law School, were participants from the inception, helping to frame the project, identify case studies and put together the larger group of advisers. Angela Glover Blackwell, then Vice President of the Rockefeller Foundation (now President of PolicyLink, a national organization working to identify, support and promote local policy innovation), played a critical role in initiating and supporting this project and provided many valuable insights. Fifteen advisers guided the development of this report. Coming from national civil rights organizations, local public-interest law centers, universities and foundations, all of the advisers in their separate capacities have been deeply involved in the struggle for justice for many years. Their commitment to this project has been unwavering. )

THE CONTINUING IMPORTANCE OF STRATEGIC LITIGATION Even with judicial cutbacks in legal protections for minorities and the poor, litigation—particularly when carried out in connection with a broader social movement—can effectively build communities’ capacity to confront inequitable power structures. Community-linked litigation can function as “both symbolic and actual political activity: first, it can provide actual educational, participatory experiences for poor groups; second, it is the vehicle through which a community coheres and mobilizes.” 1 Litigation can frame issues powerfully, influence public perceptions and, ultimately, restructure unfair institutions. The courtroom can be an important space for making public the often-hidden stories of marginalized people and for connecting those stories to disputed policies. A well-placed tactical intervention, be it a successful restraining order or discovery motion, can defend a movement against attack, keep it from closing down or remove obstacles that undercut its effectiveness. In the Los Angeles MTA and the El Monte garment-worker struggles, the litigation process provided a platform for activism that helped marginalized people mobilize themselves. They developed a better understanding of the forces shaping their circumstances, of the heightened efficacy of group action, and of the ways that pressure can force local government and institutions to be more responsive. In each of these cases, through their participation, marginalized people actively shaped both the local government decision-making process and the outcomes that had fundamental impact on their lives. MAKING USE OF THE ENTIRE ARRAY OF LEGAL TOOLS In a 1992 report for the Rockefeller Foundation titled “Sustaining the Struggle for Justice,” Professor Charles Lawrence concluded that minorities and the poor ought to have access to 1 See, Lois H. Johnson, “The New Public Interest Law: From Old Theories to a New Agenda,” 1 Public Interest Law Journal, at 169, 185 (1991). 142

#### **Even if the legal sphere is inaccessible, legal education builds community capacity- critical for the struggle towards justice**

Hair 01

(Penda D Louder than Words:Lawyers, Communities and the Struggle for Justice, <http://www.racialequitytools.org/resourcefiles/hair.pdf>, Penda D. Hair is Co-Director of the Advancement Project at the Rockafeller Foundation, The many lawyers, clients, community organizations and activists whose visionary work in the field is reflected herein generously shared their time, experiences, lessons and mistakes, as well as triumphs. This is their report. I have tried to be an accurate and thoughtful recorder. Dayna L. Cunningham, Associate Director of the Rockefeller Foundation’s Working Communities Division, conceived this project and brought together the people and the resources to bring it to fruition. Her penetrating ideas on race and lawyering infuse every page of the Report. As important, her strong belief in the project and her incredible determination inspired the author and the advisers, and pushed this work to completion. Susan P. Sturm, Professor of Law, Columbia Law School, and Lani Guinier, Professor of Law, Harvard Law School, were participants from the inception, helping to frame the project, identify case studies and put together the larger group of advisers. Angela Glover Blackwell, then Vice President of the Rockefeller Foundation (now President of PolicyLink, a national organization working to identify, support and promote local policy innovation), played a critical role in initiating and supporting this project and provided many valuable insights. Fifteen advisers guided the development of this report. Coming from national civil rights organizations, local public-interest law centers, universities and foundations, all of the advisers in their separate capacities have been deeply involved in the struggle for justice for many years. Their commitment to this project has been unwavering. )

Louder Than Words“the full range of problem-solving tasks that lawyers traditionally employ to enhance the political and economic capacity of their paying clients.” Lawyers possess key technical and transactional skills for building community capacity. They can advise clients about vehicles for structuring organizations and transactions. They can identify sources of capital, analyze regulatory schemes, negotiate on the client’s behalf, structure relationships, draft agreements and navigate procedural obstacles. 2 By defining problems in ways that target structural obstacles and providing research that highlights structural elements of exclusion, lawyers can also explore with community members the importance of democracy and engagement as a means of achieving more responsive policies. For example in the Boston Chinatown case, the attorneys researched and publicized, then challenged, the 34-year history of land-use decisions by the local, state and federal authorities that led to the virtual disappearance of open space in Chinatown. In Greensboro, activists focused on local incentives that were enacted to prevent corporate flight but rewarded companies that paid lower wages. In the Texas Ten Percent Plan case, the lawyers drafted creative legislation that targeted educational-system failure and provided research to demonstrate the linkages between systematic barriers and student performance. Attorney/Client Relationships Legal options are important tools in the fight for racial inclusion. But lawyers will be most effective if they are connected and responsive to constituencies. In the traditional representation model, lawyers are the chief problem solvers. They frame the claims and legal theories and generally neither cultivate nor rely on the prvoblem-solving skills of their clients. They tell clients what is possible and give voice to client concerns through pleadings and formal proceedings that may marginalize or compartmentalize local knowledge and expertise. Clients can become dependent on lawyers as problem solvers. Leadership development within the community takes low priority. Legitimate protest may get discouraged in favor of “respectable” legal channels. Given the procedural nature of litigation, in the traditional representation model, high priority is placed on technical indicia of success. It is hard to assess impact on a community with the traditional tools of the lawyer. By contrast, under a community-based approach, the particularized knowledge and skills of lawyers retains its critically important role. But when the ultimate goal is working with clients or a community to exercise their voice, changes occur in the nature of relationships, the definition of problems, the ways lawyers perform their tasks and the way they evaluate success. By drawing on local resources the attorneys can “bring together different fragments and patterns of local community know-how to bear on their work.” 3 Significantly, many of the best models of this approach first emerged within the civil rights movement, when lawyers were called to assist activists such as the Freedom Riders in local communities. 2 See, e.g., Ann Southworth, “Taking the Lawyer Out of Progressive Lawyering,” 46 Progressive Lawyering, at 213, 223 (1993). One of many practical examples of such transactional contributions is found in the creative argument by a Brooklyn Legal Services attorney that a New York statute governing tax-exempt bond financing for hospital expansion permitted a local medical clinic to utilize such bonds. See, “So Goes a Nation,” supra. 3 Gerald Lopez, Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice, (Westview Press, 1992), at 53. 143 Chapter 7Many racial-justice innovators are driven to adopt more participatory approaches by the necessity of understanding changing forms of racial exclusion today. To protect against exploitation of low-wage and immigrant workers, to respond to the assault on affirmative action, to combat massive shifts of resources from cities to expanding suburbs, to halt environmental degradation in minority communities, and to win incorporation of increasingly diverse noncitizen populations requires thoroughgoing knowledge of the impacts on people’s lives. Lawyers and clients must collaboratively engage in problem-solving efforts to make this knowledge available. New approaches that stress engagement may build upon the traditional role of legal counselor/adviser by interpreting and applying legal standards. However, in the case studies, lawyers were most effective when they functioned as part of a broader problem-solving process, working to mediate between the role of the law and the goals of organized and cohesive community members. This is particularly important when community aspirations are not easily translated within the existing paradigms of justice. In this role, lawyers continuously ask how the law can be interpreted and applied to advance community goals. When possible, they reject abstract legal theories in favor of appeals to community values and for concrete practical needs. They also assist clients in drawing on their own problem-solving skills, demystifying the law and lawyering, and encouraging people to handle routine legal problems on their own. It requires special attention to avoid a hasty resort to more structured and familiar legal procedures that can overtake the slower, less-scripted process of community-centered lawyering. Significantly different skills are needed than the litigation and transactional approaches taught in law school. The lawyer’s inquiry begins by looking at the concrete needs and values of community members. The goal is to frame claims within a larger moral vision rather than principally in terms of a formal legal theory. Thus, in Greensboro, the formal claim of the Kmart workers came under Title VII employment discrimination and several employees brought a successful lawsuit on these grounds. But the community-centered vision of the ministers was larger, putting the workers’ claims for fair individual treatment within the larger context of a community struggling to defend its declining living standard against irresponsible corporate behavior. At the same time, the ministers connected their vision to legitimate local economic and business needs. Kmart’s motion for a restraining order to stop the protests might have silenced the ministers. The lawyers intervened at a critical moment in their struggle, converting the lawsuit from a device to stifle the community’s voice to an additional opportunity to tell the workers’ story. Attorney James Ferguson joined the ministers, union representatives and community members at press conferences and other public activities. Rather than present very tight legal arguments focused on specific procedural issues, they filed expansive papers to surface the underlying issues of racism and exploitation that concerned community members. They worked 144 Louder Than Wordsclosely with community members, listening to what they were trying to accomplish. They involved them in the court proceedings so that community members could grasp the connections between the legal work and their struggles. The lawyers also measured their success in terms of community objectives, rather than in terms of procedural outcomes.

#### Even if it fails, court action on detention prompts social movements: aligning movements toward particular court actions is a successful and productive methodology

Serrano and Minami, ‘03 (Susan, Project Director, Equal Justice Society; J.D. 1998, William S. Richardson School of Law, University of Hawai', partner, Minami, Lew & Timaki, Asian Law Journal, Korematsu v. United States: A "Constant Caution" in a Time of Crisis, p. Lexis)

Today, a broadly conceived political identity is critical to the defense of civil liberties. In 1942, Japanese Americans stood virtually alone, without allies, and suffered the banishment of their entire race. Forty years later, Japanese Americans, supported by Americans of all colors, were able to extract an apology and redress from a powerful nation. That lesson of the need for political empowerment was made even more obvious after September 11, 2001, when Arab and Muslim American communities, politically isolated and besieged by hostility fueled by ignorance, became targets of violence and discrimination. In the aftermath of September 11, Japanese Americans knew from history that the United States, which turned on them in 1942, could repeat itself in 2001. Therefore, on September 12, 2001, the Japanese American Citizens' League, the oldest Asian American civil rights organization in the country, immediately issued a press release warning against racial discrimination against Arab and Muslim Americans and supporting their  [**[\*49]**](http://www.lexis.com/research/retrieve?_m=bee887063044547ab12532f483726d11&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAk&_md5=f0e31afba24c7755402ea0ead0b3cfb6&focBudTerms=%2522serrano%2522%20and%20%2522minami%2522%20and%20%2522korematsu%2522&focBudSel=all)  civil rights.n60 Other Japanese American individuals and groups have offered their friendship, political support, and solidarity with Arab and Muslim Americans. Japanese Americans also knew from their Redress experience that political power was the strongest antidote. The coram nobis legal teams understood the political dimensions of their cases and adopted a course of litigation that would discredit the Wartime Cases by undermining the legal argument that the Supreme Court had legitimized the World War II exclusion and detention. This impaired (though did not overturn) the value of Korematsu, Hirabayashi, and Yasui as legal precedents for mass imprisonments of any definable racial group without due process. The even larger vision of these cases, however, was the long-term education of the American public. Many still believed (and continue to believe) that there were valid reasons for incarcerating Japanese Americans en masse: the coram nobis cases strongly refuted that notion and boldly illuminated the essentially political nature of the judicial system. In doing so, the coram nobis cases have contributed to the public's education about the frailty of civil rights and the evanescence of justice in our courts. As such, these cases highlight the need for continuing political activism and constant vigilance to protect our civil rights. In today's climate of fear and uncertainty, we must engage ourselves to assure that the vast national security regime does not overwhelm the civil liberties of vulnerable groups. This means exercising our political power, making our dissents heard, publicizing injustices done to our communities as well as to others, and enlisting allies from diverse communities. Concretely, this may mean joining others' struggles in the courts, Congress, schools and union halls; organizing protests against secret arrests, incarcerations, and deportations; building coalitions with other racial communities; writing op-ed essays or letters to politicians; launching media campaigns; donating money; and writing essays and articles.n61 Through these various ways, "our task is to compel our institutions, particularly the courts, to be vigilant, to "protect all.'" n62 The lesson of the Wartime Cases and coram nobis cases taken together is not that the government may target an entire ethnic group in the name of national security; the cases teach us instead that civil rights and liberties are best protected by strongly affirming their place in our national character, especially in times of national crisis. As Fred Korematsu avowed nearly twenty years ago, we must not let our governmental  **[[\*50]](http://www.lexis.com/research/retrieve?_m=bee887063044547ab12532f483726d11&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAk&_md5=f0e31afba24c7755402ea0ead0b3cfb6&focBudTerms=%2522serrano%2522%20and%20%2522minami%2522%20and%20%2522korematsu%2522&focBudSel=all)**  institutions mistreat another racial group in such a manner again. To do this, we must "collectively [turn] the lessons learned, the political and economic capital gained, the alliances forged and the spirit renewed, into many small and some grand advances against continuing harmful discrimination across America."n63 We must become, as Professor Yamamoto has argued, "present-day social actors, agents of justice, because real, hard injustices are occurring all around us every day to Asian Americans and other racial communities and beyond." n64

#### Failure to have a working knowledge of the law and the court makes one a terrible activist

Paul Burstein, pub. date: 1991, Professor of sociology and political science at the University of Washington, “Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity”, JSTOR

What types of actions should we examine? For most sociologists, and for many political scientists studying social movements, the distinction between political action "inside the system" and that taking place "outside” is critical. They see groups resorting to a "politics of protest" when they are not allowed to use institutionalized channels to express their political demands or when such channels prove ineffective. Those interested in social movements see themselves as examining political behavior not directed into "proper channels"-that is, demonstrations, strikes and boycotts, as opposed to election campaigns, lobbying, or legal proceedings. This distinction is often useful, but at times it impedes progress in understanding political change. Those using outsider tactics are often trying, first, to gain access to power holders and, then, to influence their decisions. By defining their interests in terms of particular tactics, those studying social movements virtually force themselves to abandon the field of inquiry when the groups they are interested in begin to have influence-when they gain access to proper channels. I suggest that successful movements generally utilize proper channels as well as outsider tactics and that an adequate understanding of move- ments must therefore consider both. In fact, social movement analysts seem to recognize this, even if only implicitly. This implicit recognition takes two forms: in definitions of social movement and in analyses of particular movements. As for definitions, consider one of Tilly's recent attempts to define social movement (1984, p. 305; italics in original): "The term social movement applies most usefully to a sustained interac-tion between a specific set of authorities and various spokespersons for a given challenge to these authorities. The interaction is a coherent, bounded unit in roughly the same sense that a war or political campaign is a unit." Tilly struggles to limit the definition to outsider groups, but nothing in it excludes the legal tactics often employed by the civil rights movement, even though such tactics involved going through proper channels In fact, analysts of American social movements frequently ascribe im- portance to court cases. McAdam, for example, shows that a Supreme Court decision on segregation had a critical effect on the bus boycotts (1983, p. 741), while Harding (1984, pp. 3 93-95) argues that the decisions of a federal judge undermined the hegemony of white-supremacist ideol- ogy in Mississippi (also see Jenkins and Eckert 1986, p. 827). The role of the courts is seldom the subject of theorizing because so much emphasis is placed on demonstrating the importance of outsider tactics. Yet deep historical knowledge of particular movements consistently forces social movement analysts to report how critical court decisions are.

#### Solely acting outside the realm of the law fails to provide a solution- institutions are key

Jenks and Talbot-Jensen 11 (INDEFINITE DETENTION UNDER THE LAWS OF WAR Chris Jenks\* & Eric Talbot Jensen\*\* Lieutenant Colonel, U.S. Army Judge Advocate General's Corps. Presently serving as the Chief of the International Law Branch, Office of The Judge Advocate General, Washington D.C. The views expressed in this Article are those of the author and not The Judge Advocate General's Corps, the U.S. Army, or the Department of Defense. \*\* Visiting Assistant Professor, Fordham Law School. The authors wish to thank Sue Ann Johnson for her exceptional research and editing skills, and the organizers and attendees at both the 3rd Annual National Security Law Jtinior Faculty Workshop at the University of Texas School of Law, where we first discussed the ideas for this article, and the Stanford Law and Policy Review National Defense Symposium, where we first presented the finished product. STANFORD LAW & POLICY REVIEW [Vol. 22:1] Page Lexis)

Those who would deconstruct the law of war as applied to detention stemming from armed conflict with non state actors may achieve victory, but in an academic, and, practically speaking, pyrrhic sense. Arguing that the Geneva Conventions for Prisoners and Civilians do not, on their face, apply to members of al-Qaeda or the Taliban may be correct, and in more than one way. But in so arguing, the deconstructionist approach removes a large portion of intemationally recognized and accepted provisions for regulating detention associated with armed conflict—^the Geneva Conventions—^while leaving the underlying question of how to govern detention unanswered. At some point, even the deconstmctionist must shift to positivism and propose an altemative, an altemative we submit would inevitably resemble that which is already extant in the law of war. Moreover, while there has been discussion about the strained application of the Geneva Conventions and Additional Protocols to states combating transnational terrorism, attempts at a new convention have gained little traction. Our approach is more an attempt at pragmatism than radicalism—there are individuals currently detained, purportedly indefinitely and under the law of war. Yet despite years of such detention, two administrations have provided little if any information on what exactly such detention means, how and by what it is govemed, and if and how it ends. Conflating aspects of intemationally recognized law of war conventions allows for a transparent process that could be promulgated now. Whether for the up to fifty or so individuals currently detained at Guantanamo or for those who may be detained in the future, we posit that the law of war provides a legitimate model for indefinite detention. And, as the Walsh Report recognized,^' the longer detainees are held, the more concern for their individual situations must be given. We therefore analyze the complete protections provided by the law of war and advocate that all of them, over time and to varying degrees, be applied to the detainees in Guantanamo. In this way, detention under the laws of war can provide a humane system of indefinite detention that strikes the right balance between the security of the nation and the rights of individuals

# 2AC

## afropessimism

**Slavery focus obscures the other proximate causes of racialization, including the court system**

**Robinson 2k4** (Reginald Leamon, prof law @ Howard U, researcher on the relation between race and academic thought “Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practive/Praxis” American University Law Review 53, no.6 (August 2004): 1361-1419)

By deconstructing elite white narratives, Race Crits must believe that a payoff exists. The payoff must be white guilt, consciousness raising, or the end of white oppression.147 This exposé should make visible the invisible privilege that whites unjustifiably enjoy,148 and with real, sober analysis,149 elite whites will suffer regime changing remorse. Feeling badly, they will condemn themselves as evil, greedy people. With heavy hearts and grieving minds, they will become better people. If CRT’s political game is white guilt and black innocence, Race Crits cannot now surgically destroy the mindsets of ordinary people, implying that it is a locus for co-creating their personal experiences of white racism. From CRT’s structural determinism perspective, ordinary people are **simple, empty-headed sheep.** Like other liberal subjects, ordinary people, having consumed ideas about limited autonomy, not only serve themselves up as meat for their keepers, but also fall easy prey to systemic predators. To this extent, Race Crits are academic priests who hope to redeem, not ordinary people who cannot control the next moments in their lives, but white elites who have structureshaping agency. CRT’s religious movement discounts ordinary people, seeking not to empower them, but to destroy white narratives, so that ordinary people like blacks can become the unabashedly raced people their parents train them to be!150 Specifically, macro structuralism focuses on white structural oppression and how dominant narratives impact ordinary people. Let’s consider public education. Blacks have struggled to educate their children and to break down artificial barriers to formal education.151 Yet, during slavery and Jim Crow, blacks were educated, and they excelled academically. Do slavery and Jim Crow politics explain how ordinary people like blacks perform academically? If so, Race Crits must identify the specific historic markers that prevent ordinary people from academic excellence. If not, Race Crits must identify multiple factors, including parental role models, that perforce impact school-age children.152 As such, structural forces alone cannot explain why blacks do not excel academically. By examining other factors, Race Crits would have to consider cultural practices, core beliefs, and emotions, including the power of thought.153 This approach subjects ordinary people to attack, perhaps condemnation. Yet, if Race Crits give ordinary people like blacks a pass, thus suggesting that their core beliefs cannot govern academic performance, then they must blame structural forces. They must look to “out there” forces—the power elite and white oppressors. In this way, structural determinism is a proxy for mindsets.154 It shapes and contours everything, displacing agency so that ordinary people serve ends beyond their known intentions. To bracket this liberal project, Race Crits convince themselves that they can discern the way language, culture, and practices operate against ordinary people and the public interest. Invariably, Race Crits start with slavery and Jim Crow politics. Proceeding linearly to the present, they question whether extant laws can cope with a history of racial discrimination. Logic thus mandates that slavery and Jim Crow must explain why ordinary people like blacks simply cannot keep up. Within the present effects of past discrimination, ordinary people and how they co-create are cast aside so that Race Crits can simply and gratuitously blame structural forces. In addition to his indictment of structural forces, Charles Lawrence posited correctly that racism affects all of us,155 and in the context of his argument about unconscious racism and cultural meaning, he asked us and the courts to focus not on intent but on effects.156 In a complex way, Lawrence found a compelling argument so that we could broadly understand how racism worked in Freudian and cognitive ways.157 Whether whites liked it or wished to acknowledge their racial prejudice,158 society experienced their repressed or unconscious racial ruinations as effects that, if all else failed, we could explain through a cultural meanings test.159 Should Lawrence’s insights apply to ordinary people like blacks? Like whites, ordinary people have consumed self-annihilating discourse, and at deep, unacknowledged levels, this discourse like any effective mindset produced effects in black life. Even in the absence of whites, blacks would fulfill latent prophecies. Are blacks different from whites? Human beings can hold powerful narratives that undermine their efficacy at junctures where they may feel especially vulnerable. By lifting Lawrence’s insight beyond a straight-forward structuralist critique of white racism, Race Crits can examine ordinary people as well as structural forces. In this way, CRT’s macro structuralism rejects any meaningful link between white structural oppression and ordinary peoples’ core beliefs. Only through positing that liberal consciousness and white racism construct interracial conflicts can macro structuralism account for the Neighborhood Committee for Justice’s crusade against the Nguyens,160 and the Ho litigation which tried to grant Asian students greater access to the San Francisco Unified School District.161 Race Crits can eradicate these conflicts by getting ordinary people to appreciate the power of American Indian value-based narratives and to reassess and rearticulate an identity that allows ordinary people to peel the fog-inducing substances from their liberal brains. By implication, Race Crits, like Williams and Yamamoto, tell us that mindsets negate a subject who can name a reality that embraces values and that ends interracial conflicts. By identifying structural forces, by destroying mindsets, and by permitting ordinary people to name their reality, they can project the legitimacy of their core beliefs out into the world. These core beliefs are values on which ordinary people would otherwise have relied, in the absence of white racism. Expose white racism for what it does to ordinary people. Thereafter, they can restore valueteaching narratives of American Indians to their rightful place, and they will have an antidote to interracial conflicts.

Rejecting insititutions worse than the institutions themselves- instead we should reconstruct them internally using grassroots advocacy

Pasha ’96 [July-Sept. 1996, Mustapha Kamal, Professor and Chair of the Department of Politics and International Relations at the University of Aberdeen, “Security as Hegemony”, Alternatives: Global, Local, Political, Vol. 21, No. 3, pp. 283-302, JSTOR]

An attack on the postcolonial state as the author of violence and its drive to produce a modern citizenry may seem cathartic, without producing the semblance of an alternative vision of a new political community or fresh forms of life among existing political communities. Central to this critique is an assault on the state and other modern institutions said to disrupt some putatively natural flow of history. Tradition, on this logic, is uprooted to make room for grafted social forms; modernity gives birth to an intolerant and insolent Leviathan, a repository of violence and instrumental rationality's finest speci- men. Civil society - a realm of humaneness, vitality, creativity, and harmony - is superseded, then torn asunder through the tyranny of state-building. The attack on the institution of the state appears to substitute teleology for ontology. In the Third World context, especially, the rise of the modern state has been coterminous with the negation of past histories, cultures, identities, and above all with violence. The stubborn quest to construct the state as the fount of modernity has subverted extant communities and alternative forms of social organization. The more durable consequence of this project is in the realm of the political imaginary: the constrictions it has afforded; the denials of alternative futures. The postcolonial state, however, has also grown to become more heterodox - to become more than simply modernity's reckless agent against hapless nativism. The state is also seen as an expression of greater capacities against want, hunger, and injustice; as an escape from the arbitrariness of communities established on narrower rules of inclusion/exclusion; as identity removed somewhat from capri- cious attachments. No doubt, the modern state has undermined tra- ditional values of tolerance and pluralism, subjecting indigenous so- ciety to Western-centered rationality. But tradition can also conceal particularism and oppression of another kind. Even the most elastic interpretation of universality cannot find virtue in attachments re- furbished by hatred, exclusivity, or religious bigotry. A negation of the state is no guarantee that a bridge to universality can be built. Perhaps the task is to rethink modernity, not to seek refuge in a blind celebration of tradition. Outside, the state continues to inflict a self-producing "security dilemma"; inside, it has stunted the emergence of more humane forms of political expres- sion. But there are always sites of resistance that can be recovered and sustained. A rejection of the state as a superfluous leftover of modernity that continues to straitjacket the South Asian imagination must be linked to the project of creating an ethical and humane order based on a restructuring of the state system that privileges the mighty and the rich over the weak and the poor.74 Recognizing the constrictions of the modern Third World state, a reconstruction of state-society re- lations inside the state appears to be a more fruitful avenue than wishing the state away, only to be swallowed by Western-centered globalization and its powerful institutions.A recognition of the patent failure of other institutions either to deliver the social good or to procure more just distributional rewards in the global political economy may provide a sobering reassessment of the role of the state. An appreciation of the scale of human tragedy accompanying the collapse of the state in many local contexts may also provide im- portant points of entry into rethinking the one-sided onslaught on the state. Nowhere are these costs borne more heavily than in the postcolonial, so-called Third World, where time-space compression has rendered societal processes more savage and less capable of ad- justing to rhythms dictated by globalization

#### Using social death metaphors prevent political mobilization

Brown 9 Vincent Brown, Prof. of History and African and African-American Studies @ Harvard Univ., December 2009, "Social Death and Political Life in the Study of Slavery," American Historical Review, p. 1231-1249

Specters of the Atlantic is a compellingly sophisticated study of the relation be- tween the epistemologies underwriting both modern slavery and modern capitalism, but the book’s discussion of the politics of anti-slavery is fundamentally incomplete. While Baucom brilliantly traces the development of “melancholy realism” as an op- positional discourse that ran counter to the logic of slavery and finance capital, he has very little to say about the enslaved themselves. Social death, so well suited to the tragic perspective, stands in for the experience of enslavement. While this heightens the reader’s sense of the way Atlantic slavery haunts the present, Baucom largely fails to acknowledge that the enslaved performed melancholy acts of accounting not unlike those that he shows to be a fundamental component of abolitionist and human rights discourses, or that those acts could be a basic element of slaves’ oppositional activities. In many ways, the effectiveness of his text depends upon the silence of slaves—it is easier to describe the continuity of structures of power when one down- plays countervailing forces such as the political activity of the weak. So Baucom’s deep insights into the structural features of Atlantic slave trading and its afterlife come with a cost. Without engagement with the politics of the enslaved, slavery’s history serves as an effective charge leveled against modernity and capitalism, but not as an uneven and evolving process of human interaction, and certainly not as a locus of conflict in which the enslaved sometimes won small but important victories.11

Specters of the Atlantic is self-consciously a work of theory (despite Baucom’s prodigious archival research), and social death may be largely unproblematic as a matter of theory, or even law. In these arenas, as David Brion Davis has argued, “the slave has no legitimate, independent being, no place in the cosmos except as an instrument of her or his master’s will.”12 But the concept often becomes a general description of actual social life in slavery. Vincent Carretta, for example, in his au- thoritative biography of the abolitionist writer and former slave Olaudah Equiano, agrees with Patterson that because enslaved Africans and their descendants were “stripped of their personal identities and history, [they] were forced to suffer what has been aptly called ‘social death.’ ” The self-fashioning enabled by writing and print “allowed Equiano to resurrect himself publicly” from the condition that had been imposed by his enslavement.13 The living conditions of slavery in eighteenth-century Jamaica, one slave society with which Equiano had experience, are described in rich detail in Trevor Burnard’s unflinching examination of the career of Thomas Thistle- wood, an English migrant who became an overseer and landholder in Jamaica, and who kept a diary there from 1750 to 1786. Through Thistlewood’s descriptions of his life among slaves, Burnard glimpses a “world of uncertainty,” where the enslaved were always vulnerable to repeated depredations that actually led to “significant slave dehumanization as masters sought, with considerable success, to obliterate slaves’ personal histories.” Burnard consequently concurs with Patterson: “slavery completely stripped slaves of their cultural heritage, brutalized them, and rendered ordinary life and normal relationships extremely difficult.”14 This was slavery, after all, and much more than a transfer of migrants from Africa to America.15 Yet one wonders, after reading Burnard’s indispensable account, how slaves in Jamaica or- ganized some of British America’s greatest political events during Thistlewood’s time and after, including the Coromantee Wars of the 1760s, the 1776 Hanover conspiracy, and the Baptist War of 1831–1832. Surely they must have found some way to turn the “disorganization, instability, and chaos” of slavery into collective forms of belonging and striving, making connections when confronted with alien- ation and finding dignity in the face of dishonor. Rather than pathologizing slaves by allowing the condition of social death to stand for the experience of life in slavery, then, it might be more helpful to focus on what the enslaved actually made of their situation. Among the most insightful texts to explore the experiential meaning of Afro- Atlantic slavery (for both the slaves and their descendants) are two recent books by Saidiya Hartman and Stephanie Smallwood. Rather than eschewing the concept of social death, as might be expected from writing that begins by considering the per- spective of the enslaved, these two authors use the idea in penetrating ways. Hart- man’s Lose Your Mother: A Journey along the Atlantic Slave Route and Smallwood’s Saltwater Slavery: A Middle Passage from Africa to American Diaspora extend social death beyond a general description of slavery as a condition and imagine it as an experience of self. Here both the promise and the problem with the concept are most fully apparent.16

Both authors seek a deeper understanding of the experience of enslavement and its consequences for the past, present, and future of black life than we generally find in histories of slavery. In Hartman’s account especially, slavery is not only an object of study, but also the focus of a personal memoir. She travels along a slave route in Ghana, from its coastal forts to the backcountry hinterlands, symbolically reversing the first stage of the trek now commonly called the Middle Passage. In searching prose, she meditates on the history of slavery in Africa to explore the precarious nature of belonging to the social category “African American.” Rendering her re- markable facility with social theory in elegant and affective terms, Hartman asks the question that nags all identities, but especially those forged by the descendants of slaves: What identifications, imagined affinities, mythical narratives, and acts of re- membering and forgetting hold the category together? Confronting her own alienation from any story that would yield a knowable genealogy or a comfortable identity, Hartman wrestles with what it means to be a stranger in one’s putative motherland, to be denied country, kin, and identity, and to forget one’s past—to be an orphan.17 Ultimately, as the title suggests, Lose Your Mother is an injunction to accept dis- possession as the basis of black self-definition.

Such a judgment is warranted, in Hartman’s account, by the implications of social death both for the experience of enslavement and for slavery’s afterlife in the present. As Patterson delineated in sociological terms the death of social personhood and the reincorporation of individuals into slavery, Hartman sets out on a personal quest to “retrace the process by which lives were destroyed and slaves born.”18 When she contends with what it meant to be a slave, she frequently invokes Patterson’s idiom: “Seized from home, sold in the market, and severed from kin, the slave was for all intents and purposes dead, no less so than had he been killed in combat. No less so than had she never belonged to the world.” By making men, women, and children into commodities, enslavement destroyed lineages, tethering people to own- ers rather than families, and in this way it “annulled lives, transforming men and women into dead matter, and then resuscitated them for servitude.” Admittedly, the enslaved “lived and breathed, but they were dead in the social world of men.”19 As it turns out, this kind of alienation is also part of what it presently means to be African American. “The transience of the slave’s existence,” for example, still leaves its traces in how black people imagine and speak of home: We never tire of dreaming of a place that we can call home, a place better than here, wherever here might be . . . We stay there, but we don’t live there . . . Staying is living in a country without exercising any claims on its resources. It is the perilous condition of existing in a world in which you have no investments. It is having never resided in a place that you can say is yours. It is being “of the house” but not having a stake in it. Staying implies transient quarters, a makeshift domicile, a temporary shelter, but no attachment or affiliation. This sense of not belonging and of being an extraneous element is at the heart of slavery.20

“We may have forgotten our country,” Hartman writes, “but we haven’t forgotten our dispossession.”21

Like Baucom, Hartman sees the history of slavery as a constituent part of a tragic present. Atlantic slavery continues to be manifested in black people’s skewed life chances, poor education and health, and high rates of incarceration, poverty, and premature death. Disregarding the commonplace temporalities of professional historians, whose literary conventions are generally predicated on a formal distinction between past, present, and future, Hartman addresses slavery as a problem that spans all three. The afterlife of slavery inhabits the nature of belonging, which in turn guides the “freedom dreams” that shape prospects for change. “If slavery persists as an issue in the political life of black America,” she writes, “it is not because of an antiquated obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago.”22 A professor of English and comparative literature, Hartman is in many respects in a better position than most historians to understand events such as the funeral aboard the Hudibras. This is because for all of her evident erudition, her scholarship is harnessed not so much to a performance of mastery over the facts of what hap- pened, which might substitute precision for understanding, as to an act of mourning, even yearning. She writes with a depth of introspection and personal anguish that is transgressive of professional boundaries but absolutely appropriate to the task. Reading Hartman, one wonders how a historian could ever write dispassionately about slavery without feeling complicit and ashamed. For dispassionate accounting—exemplified by the ledgers of slave traders—has been a great weapon of the powerful, an episteme that made the grossest violations of personhood acceptable, even necessary. This is the kind of bookkeeping that bore fruit upon the Zong. “It made it easier for a trader to countenance yet another dead black body or for a captain to dump a shipload of captives into the sea in order to collect the insurance, since it wasn’t possible to kill cargo or to murder a thing already denied life. Death was simply part of the workings of the trade.” The archive of slavery, then, is “a mortuary.” Not content to total up the body count, Hartman offers elegy, echoing in her own way the lamentations of the women aboard the Hudibras. Like them, she is concerned with the dead and what they mean to the living. “I was desperate to reclaim the dead,” she writes, “to reckon with the lives undone and obliterated in the making of human commodities.”23

It is this mournful quality of Lose Your Mother that elevates it above so many histories of slavery, but the same sense of lament seems to require that Hartman overlook small but significant political victories like the one described by Butter- worth. Even as Hartman seems to agree with Paul Gilroy on the “value of seeing the consciousness of the slave as involving an extended act of mourning,” she remains so focused on her own commemorations that her text makes little space for a consideration of how the enslaved struggled with alienation and the fragility of belonging, or of the mourning rites they used to confront their condition.24 All of the ques- tions she raises about the meaning of slavery in the present—both highly personal and insistently political—might as well be asked about the meaning of slavery to slaves themselves, that is, if one begins by closely examining their social and political lives rather than assuming their lack of social being. Here Hartman is undone by her reliance on Orlando Patterson’s totalizing definition of slavery. She asserts that “no solace can be found in the death of the slave, no higher ground can be located, no perspective can be found from which death serves a greater good or becomes any- thing other than what it is.”25 If she is correct, the events on the Hudibras were of negligible importance. And indeed, Hartman’s understandable emphasis on the personal damage wrought by slavery encourages her to disavow two generations of social history that have demonstrated slaves’ remarkable capacity to forge fragile com- munities, preserve cultural inheritance, and resist the predations of slaveholders. This in turn precludes her from describing the ways that violence, dislocation, and death actually generate culture, politics, and consequential action by the enslaved.26 This limitation is particularly evident in a stunning chapter that Hartman calls “The Dead Book.” Here she creatively reimagines the events that occurred on the voyage of the slave ship Recovery, bound, like the Hudibras, from the Bight of Biafra to Grenada, when Captain John Kimber hung an enslaved girl naked from the mizzen stay and beat her, ultimately to her death, for being “sulky”: she was sick and could not dance when so ordered. As Hartman notes, the event would have been unre- markable had not Captain Kimber been tried for murder on the testimony of the ship’s surgeon, a brief transcript of the trial been published, and the woman’s death been offered up as allegory by the abolitionist William Wilberforce and the graphic satirist Isaac Cruikshank. Hartman re-creates the murder and the surge of words it inspired, representing the perspectives of the captain, the surgeon, and the aboli tionist, for each of whom the girl was a cipher “outfitted in a different guise,” and then she puts herself in the position of the victim, substituting her own voice for the unknowable thoughts of the girl. Imagining the experience as her own and wistfully representing her demise as a suicide—a final act of agency—Hartman hopes, by this bold device, to save the girl from oblivion. Or perhaps her hope is to prove the impossibility of ever doing so, because by failing, she concedes that the girl cannot be put to rest. It is a compelling move, but there is something missing. Hartman discerns a convincing subject position for all of the participants in the events sur- rounding the death of the girl, except for the other slaves who watched the woman die and carried the memory with them to the Americas, presumably to tell others, plausibly even survivors of the Hudibras, who must have drawn from such stories a basic perspective on the history of the Atlantic world. For the enslaved spectators, Hartman imagines only a fatalistic detachment: “The women were assembled a few feet away, but it might well have been a thousand. They held back from the girl, steering clear of her bad luck, pestilence, and recklessness. Some said she had lost her mind. What could they do, anyway? The women danced and sang as she lay dying.”

Hartman ends her odyssey among the Gwolu, descendants of peoples who fled the slave raids and who, as communities of refugees, shared her sense of dispos- session. “Newcomers were welcome. It didn’t matter that they weren’t kin because genealogy didn’t matter”; rather, “building community did.” Lose Your Mother con- cludes with a moving description of a particular one of their songs, a lament for those who were lost, which resonated deeply with her sense of slavery’s meaning in the present. And yet Hartman has more difficulty hearing similar cries intoned in the past by slaves who managed to find themselves.27

Saltwater Slavery has much in common with Lose Your Mother. Smallwood’s study of the slave trade from the Gold Coast to the British Americas in the late seventeenth and early eighteenth centuries likewise redeems the experience of the people traded like so many bolts of cloth, “who were represented merely as ciphers in the political arithmetic,” and therefore “feature in the documentary record not as subjects of a social history but as objects or quantities.”28 Each text offers a penetrating analysis of the market logic that turned people into goods. Both books work with the concept of social death. However, Smallwood examines the problem of social death for the enslaved even more closely than Hartman does.29

Like Hartman, Smallwood sees social death as a by-product of commodification. “If in the regime of the market Africans’ most socially relevant feature was their exchangeability,” she argues, “for Africans as immigrants the most socially relevant feature was their isolation, their desperate need to restore some measure of social life to counterbalance the alienation engendered by their social death.” But Small- wood’s approach is different in a subtle way. Whereas for Hartman, as for others, social death is an accomplished state of being, Smallwood veers between a notion of social death as an actual condition produced by violent dislocation and social death as a compelling threat. On the one hand, she argues, captivity on the Atlantic littoral was a social death. Exchangeable persons “inhabited a new category of mar- ginalization, one not of extreme alienation within the community, but rather of ab- solute exclusion from any community.” She seems to accept the idea of enslaved commodities as finished products for whom there could be no socially relevant relationships: “the slave cargo constituted the antithesis of community.” Yet elsewhere she contends that captives were only “menaced” with social death. “At every point along the passage from African to New World markets,” she writes, “we find a stark contest between slave traders and slaves, between the traders’ will to commodify people and the captives’ will to remain fully recognizable as human subjects.”30 Here, I think, Smallwood captures the truth of the idea: social death was a receding ho- rizon—the farther slaveholders moved toward the goal of complete mastery, the more they found that struggles with their human property would continue, even into the most elemental realms: birth, hunger, health, fellowship, sex, death, and time.

If social death did not define the slaves’ condition, it did frame their vision of apocalypse. In a harrowing chapter on the meaning of death (that is, physical death) during the Atlantic passage, Smallwood is clear that the captives could have no frame of reference for the experience aboard the slave ships, but she also shows how des- perate they were to make one. If they could not reassemble some meaningful way to map their social worlds, “slaves could foresee only further descent into an endless purgatory.” The women aboard the Hudibras were not in fact the living dead; they were the mothers of gasping new societies. Their view of the danger that confronted them made their mourning rites vitally important, putting these at the center of the women’s emerging lives as slaves—and as a result at the heart of the struggles that would define them. As Smallwood argues, this was first and foremost a battle over their presence in time, to define their place among ancestors, kin, friends, and future progeny. “The connection Africans needed was a narrative continuity between past and present—an epistemological means of connecting the dots between there and here, then and now, to craft a coherent story out of incoherent experience.” That is precisely what the women on the Hudibras fought to accomplish.31

## opacity

#### Visibility key- the courts are a key site

Chang 11 (Robert S., Professor of Law and Founding Director, Fred T. Korematsu Center for Law and

Equality, Seattle University School of Law. THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND ITS VISION FOR SOCIAL CHANGE p. lexis)

There is a rich academic debate about the promise and perils of pursuing litigation to bring about social change. In one narrative, the courts, at least by the start of the civil rights movement, are the engines for social change, producing cases such as Brown v. Board of Education16 that vindicate the rights of the politically powerless even in the face of strong public opposition.17 By taking these courageous stances, the courts are the harbingers for social change, thus justifying the expenditure of resources for litigation.' 8 However, Gerald Rosenberg offers significant evidence that when a court acts ahead of changes in public opinion, all that is really achieved is a symbolic legal victory that brings little real change and offers this pessimistic assessment: [T]he celebration of Brown may serve an ideological function of assuring Americans that they have lived up to their constitutional principles of equality without actually requiring them to do so. Celebration of Brown relieves Americans of the obligation to confront the systematic racial biases that permeate society. It encourages them to look to legal solutions for political and cultural problems. In this way, Brown serves a deeply conservative function of diverting resources away from substantive political battles, where success is possible, to symbolic legal ones, where it is not. 19 Rosenberg's object lessons are that seeking to achieve social change through litigation offers a "hollow hope" at best and, more significantly, may [prevent] progress because it diverts resources from more fruitful avenues and may actually make things worse because "[s]uccessful litigation for significant social reform runs the risk of instigating countermobilization."20 Similarly, legal historian Michael Klarman argues that "court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred.", However, both Rosenberg and Klarman's backlash theses presume that there is some naturalistic force at work and that social reform operates independent of litigation. It is also interesting to note that Klarman states, "[i]n the short term, Brown [prevented] progressive racial reform in the South, 22 but a few pages later after recounting incidents of violence that resulted from the countermobilization to Brown, Klarman states, "[b]y helping to lay bare the violence at the core of white supremacy, Brown accelerated its demise. 23 Thus, even in Klarman's account, Brown ultimately did help to bring about change, although perhaps to Klarman this was merely accidental-it could not have been an intentional social change strategy to try to win in the courts in order to spark violent backlash that would ultimately turn the tide to achieve racial progress. If these are the lessons of Brown, what can justify the Korematsu Center's investment of resources in our Civil Rights Amicus Project? One problem with both Rosenberg's and Klarman's backlash arguments is that they present an unprovable counterfactual: that school desegregation would have happened more quickly if its proponents had not pursued or focused on a litigation strategy. Further, a false choice is presented: that one must choose between a litigation versus a political strategy, as though they are mutually exclusive, and that those seeking social change ought not "succumb to the 'lure of litigation." 24 Both Rosenberg and Klarman extend the backlash thesis to critique the litigation efforts that have taken place in the context of the marriage equality movement. Rosenberg accuses those pursuing marriage equality through the courts as having "confused a judicial pronouncement of rights with the attainment of those rights"26 and suggests that "[t]he battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases. 27 Scott Cummings and Douglas NeJaime offer a strong response to Rosenberg and Klarman. 28 Cummings and NeJaime examine and reject the factual basis for the premises underlying the backlash thesis in the context of the marriage equality movement. 29 But more importantly for our purposes, they reject the false choice between litigation and politics, noting that "[e]fforts to isolate court-centered strategies from the broader advocacy context in order to fit litigation into the standard binary framework-is litigation good or bad?- are artificial and antiquated. 30 Instead of operating within this binary framework, Cummings and NeJaime's case study of the marriage equality movement in California found that LGBT movement lawyers prioritized a nonlitigation strategy over litigation, and conceptualized litigation as a tactic that succeeds only when it works in conjunction with other techniques-specifically, legislative advocacy and public education. Accordingly, lawyers constructed a legislative record that would further eventual litigation efforts at the same time that they pursued litigation that aided their legislative agenda and public education efforts.31 Instead of operating under what Rosenberg understands to be a naive and misguided reliance on the courts, LGBT movement lawyers had a sophisticated political understanding and understood that effective advocacy required multiple strategies. Cummings and NeJaime describe this as "'multidimensional advocacy,' defined as advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education). 32 This description of multidimensional advocacy fits pretty closely with the Korematsu Center's approach to our amicus work and to our broader advocacy efforts. We engage in this work cognizant of the "debate over the promise and perils of social change litigation" 33 though we operate one degree removed, coming in as amicus in litigation that is already in progress. Despite the critiques that litigation represents a "hollow hope" that results in no meaningful social change, or that reform movements are co-opted and "unwittingly tend to rationalize, legitimate, and 'mystify' rather than to challenge existing injustices and hegemonic relations," 34 we believe that courts play an important role in protecting or vindicating the rights of politically disempowered groups, and in this way, play an important role in helping to bring about positive social change.

Litigation based strategies resolve the question of social death in the first place

Yamamoto 5 (Erick K. Yamamoto: Professor of Law, William S. Richardson School of Law, University of Hawai'iWHITE (HOUSE) LIES: WHY THE PUBLIC MUST COMPEL THE COURTS TO HOLD THE PRESIDENT ACCOUNTABLE FOR NATIONAL SECURITY ABUSES. pg lexis)

Even in its preliminary form the blueprint may be especially valuable for those concerned about presidential dissembling and civil liberties because it partially unravels the dynamics of the Japanese American internment challenges within a post-9/11 national security setting and then teases out precepts for strategic action. The blueprint does this by challenging conventional wisdom on several points worthy of summary: The law and legal process are not inherently neutral or objective; traditional narrow legal arguments are important but often fail to convey what is really going on and what is at stake for people and institutions, and that is why judges in controversial cases are at times influenced by political currents and off-therecord general information; public organizing combined with critical legal advocacy in instances can shape a cultural milieu that helps impel courts to step up and assume the role of "watchful care." It is by critically re-examining analytical precepts and by reframing strategic paths that we learn lessons from the internment.266 One often stated lesson is that "America should prevent a present-day internment." A more important and rarely stated lesson, with far broader applicability, is this: Diverse segments of the public must organize, critically analyze and speak out to hold the courts accountable for holding the President accountable for abuses—both at the "front end" and at the "back end" of national security-civil liberties controversies. Only when the "public" (a wide array of individuals, organizations, institutions, and media) is organized and critically attuned will courts be impelled both to afford the Executive branch broad leeway in most efforts to protect the nation's people and, simultaneously, to call the executive branch to account publicly for transgressions of civil liberties and human rights under the possibly false mantle of national security.

#### Your rejection of court structures only serve to reentrench the reasons why racialization exists

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At first glance, the Court's apparent back-stepping on judicial review echoes its approach sixty years ago in Korematsu—first pronouncing heightened judicial scrutiny of government restrictions of fundamental liberties and then, in application, signaling deference to the government's unsupported, or possibly even falsified, claim of national security219 Of course, the setting now differs markedly from the circumstances of the legal challenges to the Japanese American internment. The indefinite detention of two citizens and 600 "aliens" ostensibly apprehended in Afghanistan's battlefields can be compared only mildly to the forced dislocation of 120,000 mostly American citizens from their homes on the West Coast and their indefinite incarceration in desolate in-land internment prisons. And today, many civil liberties groups are organized and active. The vehement and widespread public outcry against the administration's excesses, and against racial discrimination, distinguishes today's national security setting. Equally important, the United States now has the original Korematsu case— its own national security "civil liberties disaster"—and the Korematsu coram nobis case revelations of executive national security lies to learn from. Indeed, much of the present-day critical legal advocacy draws on those lessons and on Justice Jackson's "loaded weapon" warning. Deeper examination, though, reveals four salient common points, then and now. The first commonality is that both specific legal disputes (internment then, enemy combatant detentions now) are part of a much larger picture of government and public vilification of unpopular groups (systematic hostile discrimination against Asian Americans then, harsh treatment of Arabs and Muslims in America now)220 during times of national fear (World War II, War on Terror). The second is the tendency of the executive to deliberately dissemble to the courts about its national security abuses, particularly when those abuses involve the rights of members of unpopular groups. The third common point is the courts' inclination to defer to the executive during times of national stress unless the public culture demands heightened judicial scrutiny to hold the administration accountable. The final commonality is the threat to democracy and the Constitution posed by the combination of Executive national security lies and deferential courts. The salience of this threat, the imperative and illusive nature of this public demand for accountability, and the courts' responses, form the heart of a discussion of a rough "strategic blueprint for national security accountability."