Ending Guantánamo Bay: 
Towards Solving the State of Exception 
in the War Against Terrorism

by

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PROLOGUE

This thesis was written during the historical transition from the Presidency of George W. Bush to that of Barack Obama. As such, it tackled the issue of detainment as a matter that extended itself across disciplines. While it primarily places itself in the discourse of government, heavy lifting is aided through the use of social theory. At the time of writing, Guantánamo existed as part history and part current events, with scholarly research being done as documents became declassified, or developments occurred in the both the Courts and White House. Consequently, a time frame had to be established. Guantánamo was tackled only within the Bush administration. However, several events must be acknowledged.

Within days of coming into office, President Obama declared that he was going to close Guantánamo Bay. While this declaration was celebrated by human rights activists across the globe as a repudiation of the illegality of the Bush administration’s actions, it soon became clear that words were not enough. At the time this thesis was submitted – nearly three months after President Obama vowed to close the camp – it is still in operation. In fact, of the 779 individuals detained at Guantánamo during the War on Terrorism, a full 241 detainees remain.

It must also be noted that Guantánamo is not the only location of indefinite detainment. Guantánamo is a part of a greater network of detainment operations by both the U.S. military and clandestine administrations that have received international outcry during the War on Terror. The secret programs of extraordinary rendition by
the C.I.A. and the larger, more secretive military detention facility at Bagram Air Base in Afghanistan both continue to disappoint human rights activists.

The Obama administration has not provided the change that many hoped would occur at the end of the Bush administration. It continues to oppose judicial review for prisoners indefinitely detained at Bagram without access to lawyers, and has appealed a federal court ruling which extended the right of habeas corpus to some Bagram detainees. While Bagram differs in that it is located in an active theater of war, it serves as yet another method for the government to keep detainees beyond the reach of law.

That being said, readers should note that while the common actor in much of the analysis is defined as ‘the Bush administration,’ it is only done so in that those words now serve as an unfortunate pronoun to an executive that has asserted itself as lawless and uncontestable. This executive by no means is restricted to the controversial policies of the Bush administration from 2001-2008, and may indeed show continue to exist in our new administration as well.
INTRODUCTION

The famous Defense Department photograph of detainees waiting for their ‘in-processing’ at Guantánamo Bay, Cuba shows several men kneeling on the ground with their arms and legs shackled together. They are wearing orange jumpsuits, heads covered sensory-depriving ear-muffs, taped-over ski goggles, and surgical masks. They are under heavy guard and surrounded by a network of barbed-wire fences. These men are not prisoners of war, nor have they been found guilty by any court. They are instead detainees, a term originally used without definition, captured on the indefinable battlefields of the War on Terrorism. Their road to Guantánamo began when President George W. Bush called for the extraordinary treatment of noncitizens whom the executive believed was a member of al-Qaeda or somehow involved in "acts of international terrorism" harmful to "the United States, its citizens, national security, foreign policy, or economy." Subsequently, top administration officials called these men the “worst of the worst,” terrorists who have been captured and detained in the War on Terrorism. The Guantánamo policy began as a reaction to the emergency of the attacks of 9/11, but like any reactive measure, it changed shapes as events of the War on Terror unfolded.

Wartime detentions are traditionally relegated to international humanitarian law, but the nature of the War on Terrorism upset this neat categorization. The attacks of 9/11 were not perpetrated by another nation, but rather a nonstate actor, and therefore fell even further away from the jurisdiction of international humanitarian law. Terrorism has no borders and can come from anywhere – foreign or domestic – regardless of diplomatic interaction or state intervention.

The legal challenges that followed the transfer of detainees to the U.S. military Base at Guantánamo Bay, Cuba found themselves in a gap between the two realms of law – neither being able to instigate constitutional protections for noncitizens outside of the traditional territory of the United States, nor applicable to protection under the Geneva Conventions. Descriptions of Guantánamo as a lawless zone further constructed the legal limbo that created the prison beyond the law: some called it a “permanent United States penal colony floating in another world.”

Guantánamo provided an opportunity for the U.S. government to “hold people outside of any legal or moral system… in dehumanizing isolation, subject to physical duress, psychological manipulation, and in some cases what might amount to torture.”

While the government admits that Guantánamo is an interrogation camp, it denies

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4 The Geneva Conventions, refers to the four conventions signed in 1949, named “Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War, all signed by members of the United Nations on August 12, 1949

that torture is used there. Instead, it admits to using techniques that legally constitute cruel, inhumane, and degrading treatment, all of which are expressly prohibited by the third Geneva Convention. Guantánamo gave the government the opportunity to step outside of the rule of law in its response to the war on terrorism, consequently existing beyond the reach of any rights-protecting institution.

International outrage followed. Some viewed the War on Terror as the perfect opportunity for Western governments to make deep adjustments to society. Through the USA Patriot Act and the executive order of November 13, 2001, a regime of unlimited detention and far-reaching security measures intended to protect the people of the United States. These two actions transformed the government from one instilled with the deepest principles of individual rights, into another where maintaining security and protecting the territory came before all else.

Guantánamo was physically off limits to people outside of the small circle of the military that was in charge there. Journalists, researchers, and human-rights activists were all restricted access based on the government’s decision that the identities of the detainees and the circumstances of their detainment were classified. Challenging Guantánamo legally meant a nearly impossible uphill battle, primarily because the administration had found a way in which to not only detain countless individuals, but also provide outside institutions no check on their treatment. Whereas it makes sense that the US government would take immediate steps to detain those against whom there is evidence that they intend to wage violence against the US, it

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does not follow that suspects such as these should be presumed guilty or that due process ought to be denied to them.

Many of the difficulties in fighting the legal battle against the detentions had to do with simple matters of definition. The original executive order of November 2001 instructed the Department of Defense to classify the detainees as ‘enemy aliens’ – a term used in World War II to classify Japanese in the United States as well as abroad. This initiated a system of military tribunals to try the detainees for violations for the laws of war “and other applicable laws by the military tribunals.” Appealing convictions was relegated to maneuvering through different levels of the executive branch’s military tribunal system. Detainees were forbidden recourse to any domestic, foreign, or international forum. It would seem however, that the process was not effective. A full year after the first detainees arrived, not one detainee had completed a judicial process at Guantánamo Bay.

Perhaps this was because to the administration, their fate was already sealed. In his State of the Union Address in 2003, President Bush said more than 3,000 suspected terrorists “have been arrested in many countries. And many others have met a different fate. Let’s put it this way: they are no longer a problem for the United States.” Petitioners and legal advocacy groups believed otherwise: they persisted in

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pursuing petitions of habeas corpus questioning the legality and legitimacy of the
detainment at Guantánamo Bay.

What lawyers found in the lower courts, however, was that pre-9/11 cases
offered little concrete precedent for the executive’s post-9/11 actions. The
administration was quite clear of its intentions – then-Deputy Assistant Attorney
General John Yoo explained that “what the Administration is trying to do is create a
new legal regime.” How it went about creating this regime, was vehemently
contested. To legal scholar Diane Marie Amann, “the favored gap-filling tool was the
disarmingly simple [method of] ipse dixit.” She believes that the executive was
attempting to

“to etch into legal discourse, to establish as legal truth, its own position regarding the status and fate of selected individuals. It sought to deflect the discourse of rights and thus to make judges see, and treat, certain persons as outlaws, beyond the reach of the law and unworthy of even the most basic rights that law ordinarily accords human beings. Its effort benefited not only from the perceived novelty of the challenge posed by globalized terrorism.”

In decoupling rights from individuals the executive power dehumanizes them. By
taking this first step away from rights-based focus allows the executive is able to use
its security-based argument for a surfeit of human rights violations in its War on
Terror.

Science Monitor, Apr. 9, 2002
11 Proper Guantanamo source, Columbia journal of law, p 286
12 Balkin, Jack M. “The Proliferation of Legal Truth”, Harvard Journal of Law and
Not only did the executive deny the Constitution’s territorial jurisdiction to Guantánamo Bay, it defined the detainees in a language that stripped applicability away from the Geneva Conventions as well. By doing this, the United States separated itself from the normative framework of a state structured international legal system.

It is hard at first blush to understand how the executive was able to achieve all of this. Primarily, many Americans continue to have faith in both of the rights institutions that lawyers and legal advocacy groups have pushed to apply to Guantánamo. After 9/11, the Constitution is still viewed as the protector of the genuine rights and values in American society. They also continue to look to the United Nations for legitimation in matters of international concern. Instead the Bush administration saw the attacks of 9/11 as necessitating a swift and strong response.

Legal challenges to this new set of rules have for the most part failed. While the four most prominent post-9/11 Guantánamo Supreme Court cases have been hailed as a “strong rebuke” against the Bush administration’s lawless behavior, the fact remains that hundreds of individuals continue to be detained without charge. By relying on claims of an illegitimate denial of constitutionally-guaranteed rights, legal scholarship has depended on the extraterritorial application of the Constitution’s protections for detainees at Guantánamo Bay. However, their attempts at an extraterritorial application of the Constitution have met the fact that American legal jurisprudence regarding the degree to which U.S. constitutional guarantees apply abroad has been, at best, inconsistent. Therefore, this has been a particularly difficult,
and often times discouragingly slow method to ending indefinite detainment at Guantánamo Bay.

Other, more theoretical, approaches to the War on Terror have focused on constructing the executive’s actions as a ‘state of exception’, that is, an extra-legal model. Scholars such as Judith Butler and Giorgio Agamben have shed much light on the relationship between the individual and the state within this state. The state of exception is created when the law is effectively suspended in the name of a security alert and a national emergency. This suspension of law at both national and international terms defines a new exercise of state sovereignty that is placed outside of the law, legitimized by an elaboration of administrative bureaucracies. The Military Commissions at Guantánamo serve as this form of bureaucracy, in which state officials – not judges or public jurors – have the ultimate say over an individual’s detainment and life. While their research and additions to the academic community, it fails to put forth concrete recommendations, even in the abstract sense.

This thesis seeks to take a new approach to the controversy of detainment at Guantánamo Bay in the War on Terrorism. There are certain difficulties with presenting this argument. First, making claims that the executive was operating outside of the law is not concomitant to stating that it was breaking laws. The opinions given to the President by different members of the White House’s Office of Legal Counsel do not fabricate circumstances surrounding the detainment at Guantánamo bay. In fact, they are the most useful method of understanding exactly

how far the current legal institutions were able to reach. What these opinions and
executive declarations lack however is a respect and obeisance to the values and
principles of morality embedded within the U.S. Constitution and the Bill of Rights.
Therefore, any argument against the Bush administration will not succeed by simply
stating that its actions were illegal and wrong, but more importantly necessitates
legitimating the claim that the decisions made in the wake of 9/11 pertaining to
detainment were normatively wrong.

While I agree that many of the actions might have seemed necessary for
maintaining national security, in retrospect, they are severely inappropriate. If the
Bush administration had never initiated its ‘War on Terror,’ many of the
constitutional protections afforded to individuals accused of acts of terrorism would
still apply. On the other hand, if the officials at Guantánamo Bay had defined the
detainees as Prisoners of War under the Geneva Conventions, circumstances would
be quite different as well. Unfortunately, neither of these scenarios occurred, and we
are forced to play the cards that we were dealt.

The issue at hand is the failure of these two institutions – the Constitution and
international human rights regimes – to guarantee the rights-protection of individuals
at Guantánamo. Because of this, the detainees found themselves struggling to contest
their detainment, hearing from court to court that they were beyond the applicability
of the Constitution. While the eventual Supreme Court rulings signified a judicial
response to the Executive Branch’s actions, individuals still remain there, most of
whom administration officials noted are indeed innocent.
By centralizing this thesis on the question of what types of institutions are meant to protect rights today, I offer a new conclusion to the scholarship surrounding the war on terrorism. Because of the new nature of the war on terror, both the constitutional and international rights-guaranteeing institutions are not able to protect an individual’s rights from indefinite detention. The gap portrayed by the Bush administration’s assertion of inapplicability of constitutional and international rights-based claims brings only one conclusion: If the Bush administration seeks to develop a new legal regime of detention and legitimacy, the world must respond with a new form of rights-guaranteeing institutions.

In Chapter I, I begin by offering a general overview seeking to understand the controversy of detention within the war on terror. The Bush administration viewed the new nature of terrorism exhibited by the attacks on 9/11 as needing a War-like response. Much of the scholarly response to this action had been viewing it as a rebalancing of the priorities of security and liberty. I survey these understandings, seeking to learn from them how the necessities of security were seen after 9/11 to trump many of the personal liberties.

I argue however, that a standard of rights-protection must always be maintained – even within a new balancing of security and liberty. Chapter II explores the notion that rights are prior to the law, and must always be affirmed and defended. By following the role of rights in the social contract, I resort to the abstract in searching for an answer as to where rights come from. I follow with an analysis of
the difficulties rights-protection has had within the growing internationalization of the world

By realizing that much of the legitimacy for indefinite detainment has based itself on a characterization of an ‘us versus’ them prioritization in the balancing of liberty in security, I place that against the constitutional values of equality and due process. I then argue that there exists an inherently inclusive nature within American rights-guaranteeing institutions, and further, they have extended these protections to noncitizens before. I couple this with a review of the rise of international human rights, focusing more on their normative value, than their actual applicability.

In terms of enforceability, the current constitutional framework of many nation-states rarely allows international human rights norms to influence domestic decisions. Chapter IV details various models which seek to correct the absence of rights-protection in Guantánamo. The conclusion we come to is that a new global order is necessary. The nation state system fails to appropriately protect rights in a world facing the rise of globalization and the dangers of indefinite wars. By suggesting a new architecture of rights-guaranteeing institutions, I seek to resolve the predicament of international human law institutions being incapable of stopping belligerent states throw human rights out the window in the name of security.
CHAPTER I
THE CONTROVERSY OF DETAINMENT IN THE WAR ON TERROR

INTRODUCTION

The events of September 11th were unconceivable on dozens of levels. The simultaneous terrorist attacks on iconic and distinctively American buildings and the massacre of the thousands that ensued scarred American society forever. Not since the infamous day of December 7th, 1941 had Americans experienced an attack on U.S. soil. The American public’s response was extreme, calling for vengeance and for those responsible to be served a swift justice. Instead, the George W. Bush administration, the military, and the clandestine forces began what would become a long and arduous ideological journey against both terrorism and the governments that sponsored it. Congressman Paul Ryan of Wisconsin noted on September 14th, 2001, that the United States needed to act

“with the solemn realization that evil must not go unchecked, that our security must be defended, and that our liberty must be upheld. We stand together tonight united in our resolve to fight the scourge of terrorism and protect our beloved country and its people. We understand that it will not be easy and that it will require sustained action, commitment, and vigilance.”

14 John Ryan, Address to Congress, September 14, 2001 in support of the Authorization for Use of Military Force, (H.J.Res. 64)

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While the War on Terrorism met with sharp criticism, much is not known about what exact types of action this war entails and what the boundaries of it are. As such, many normal definitions and processes associated with more traditional wars do not fit cleanly into this newly defined structure that lacks either a coherent timeline or a defined theater of war.

This chapter will focus on the how the events of September 11th marked a new nature of terrorism unheard of in American history. I will then examine the Bush administration’s response to this new form of terrorism and its defense of its methods. Because this thesis focuses on the detainment of individuals at Guantánamo Bay, I will limit my inquiry into the Bush administration’s actions with respect to detainment. I then analyze the ways in which the detainment at Guantánamo Bay was contested, and the executive’s response of the inapplicability of the methods used for questioning the detainment. I conclude the chapter with an overview of the scholarly response to the detainment at Guantánamo Bay.

THE NEW NATURE OF TERRORISM

For many Americans, terrorism’s existence as a quotidian issue began with the events of September 11th, 2001, but in reality, the genesis of terrorism for the United States came long before. Since the early 1970s, the growing frequency of terrorist events has demanded a policy response from America’s national security.
establishment. Throughout its history terrorism has been both provoked and sustained by development, technological progress, and globalization. To some, terrorism before 9/11 was not the national priority that it should have been, whereas it certainly became so after. The deployment of terror through violence is a strategy and a tactic that has been used to constitute random and systematic intimidation, destruction of communities and nations, and has been used by many forms of power.

Modern terrorism has been characterized by an ideological and theological fanaticism “based on hatred toward one’s perceived enemy.” 9/11 caused a “Shift in definition of national security to focus on physical security and homeland defense—a defense against a decentralized enemy with biological and chemical warfare.” To the State Department however, four basic, enduring policy principles have guided U.S. counterterrorism efforts since the 1980s. These were first enunciated in detail in the State Department’s Patterns of Global Terrorism Report for 2001. They are:

- Make no concessions to terrorists and strike no deals;
- Bring terrorists to justice for their crimes;
- Isolate and apply pressure to states that support terrorism to force them to change their behavior; and
- Bolster the counterterrorism capabilities of those countries that work with the United States and require assistance.

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17 Ibid., p xxii
While this may have been a strategy new to the United States at first blush, the fact that 9/11 brought terrorism to the forefront of U.S. policy was indicative of a greater change in combating terrorism.

**RESPONDING TO TERRORISM THROUGH WAR**

President Bush asserted on September 29, 2001 that the War on Terror would “be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.”

This changed the nature by which the government was able to prosecute its War on Terror. As David Cole noted, viewing terrorism through the lens of “war” raises some interesting problems:

> “So defined, the war on terrorism has infinite enemies and no discernible endpoint. All groups today have potentially global reach, and we will almost certainly cure both cancer and the common cold before politically motivated violence directed at civilians is extirpated from the face of the earth.”

Placing counterterrorism – traditionally prosecuted as a criminal law security method – within the context of a war creates a vast difference in how the government responds to terrorism. During times of peace, governments are bound by strict rules of law enforcement. For example, police are able to use lethal force only when facing

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20 Human Rights Watch, “In Bush's America, Rules of War Trump Civil Law”
an imminent threat of death or serious bodily injury. Once a suspect is detained, he must be charged and tried.\(^2\)

Transforming the fight against terrorism from one of routine police force to a military setting changes the rules completely. Under the rules of war, an enemy combatant can be shot without warning (unless he is incapacitated, in custody or trying to surrender), regardless of any imminent threat. If a combatant is captured, he can be detained without charge or trial until the end of the conflict.\(^3\)

This war has also become an ideological war against an ambiguous identity, with no specific nation or territory in which it takes place. Thus, it is not a war solely against the terrorist network of Al-Qaeda, but against the very notion of terrorism and terrorists in general. President Bush reinforced this in his National Strategy for Combating Terrorism document,

> “The war against global terror will be hard and long. Today, terror cells exist on nearly every continent and in dozens of countries, including our own. Victory will depend on the courage, strength, and fortitude of America's people and our partners around the world. It will be measured through the steady, patient work of dismantling terror networks and bringing terrorists to justice, oftentimes one by one."\(^4\)

It can be understood therefore, that in many ways the nature of the War on Terror was strategically kept unclear. While this is not the first time the United States


government has used the term “war” in an ideological instance, it is the first time it has been the case where they have initiated and relied upon far reaching levels of executive authority in order to further the prosecution of the War on Terror.

**The Executive Order for Detention of Certain Non-Citizens**

President Bush also brought the need to preempt terrorist’s actions through detainment. In a Military Order titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”\(^25\), dated November 16, 2001, President Bush noted that “[t]o protect the United States and its citizens…individuals subject to this order pursuant to section 2 hereof to be detained.” Bush defined the term “individual subject to this matter” to mean “any individual who is not a United States citizen with respect to whom he determines…is or was a member of the organization known as al Qaeda…has engaged in, aided, or aspired to commit, acts of international terrorism.”\(^26\) The Act required the secretary of defense to detain anyone whom the president has reason to believe is an international terrorist, a member of Al Qaeda or any person or country who had harbored such persons. The act does not have any requirement in it that a detained individual be brought to trial, and that detention without charges and without any court review could potentially last a lifetime. These broad allegations as to what sorts of individual can and may be included under the

\(^{26}\) Ibid.
the president’s authority put in place what were to some scholars, a group of liberty-
destroying measures ostensibly justified by the state of emergency.\footnote{Jean-
Claude Paye. ‘Enemy Combatant’ or Enemy of the Government? \textit{Monthly Review.}
Volume 59, Number 4}

Without doubt then, September 11th brought the notion of international
terrorism into the forefront of policy making and emergency reaction. It required the
use of a wide swath of institutions and branches of the government to prosecute, all of
which created significant amounts of controversy around the world.

\textit{The Executive’s Defense}

The executive used the Authorization for the Use of Military Force (AUMF)
given by congress to respond to the security threat swiftly and without hesitation.
Three days after the attacks, President Bush sought congressional approval for his
actions, in defense of his position of Commander in Chief to bring the full power of
the United States Armed Forces to bear against the terrorists who struck on 9/11.

In a memo dated 9/25/2001 by the Justice Department, John Yoo stated that
the president had the "constitutional power to take such military actions as he deems
necessary and appropriate to respond to the terrorist attacks upon the United States."
Those actions can be wide-ranging and cannot be controlled by Congress:

"Military actions need not be limited to those
individuals, groups, or states that participated in the
attacks on the World Trade Center and the Pentagon:
the Constitution vests the President with the power to
strike terrorist groups or organizations that cannot be
demonstrably linked to the September 11 incidents, but
that, nonetheless, pose a similar threat to the security of
the United States and the lives of its people, whether at
home or overseas. In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."  

Thus the administration began laying the foundations of an early system to define why this new framework necessitated new definitions. The immediate response to the September 11th attacks by the Bush administration saw a greater need to avoid the protections afforded citizens under the Constitution.  

On Jan 22, 2002, Jay Bybee concluded in a memo that “customary international law, as a matter of domestic law, does not bind the president or restrict the actions of the United States Military, because [Geneva III] does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause.” By following the recommendations made by Bybee, the Bush administration would be able to escape common protections of the rule of law and follow its own legitimation through legal memoranda. According to longtime national security advisor to President George H.W. Bush, Donald P. Gregg, the memoranda “cleared the way for the horrors that have been revealed in Iraq, Afghanistan and Guantánamo and make a mockery of…the vile abuse of prisoners. I

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can think of nothing that can more devastatingly undercut America’s standing in the world, or more important, our view of ourselves, than those decisions.”

In using the above opinions and others, the Bush administration would leave a paper trail that would provide insights into the mindset that the administration had in responding to the attacks of September 11, 2001: “that the end, fighting terrorism, justified whatever means were chosen. It sought repeatedly to eliminate legal constraints on the means it adopted. The order of November 2001 was the first step in keeping the courts out of the picture when it came to fighting the War on Terrorism.

A NOTE ON OTHER CONTROVERSIES IN THE WAR ON TERROR

The issue of detainment is not the only issue in the War on Terror, and it is important to place it in the context of what many believe is a broad, unilateral and uncontrolled era of executive action, which literalized the exceptionalism of the United States in terms of operating within the rule of law. The detentions of illegal enemy combatants have been the key center of both constitutional and human rights arguments against the legality and ethicality of the Bush administration’s War on Terror.

Further human rights issues have been raised arguing that the treatment of enemy combatants at prisons abroad have also been put into the public eye, most

notably the 2004 allegations and discovery of torture, homicide, sodomy and abuse at the Abu Ghraib prison in Iraq. To many, the Administration’s “actions reintegrated pure violence into a legal context that becomes the basis of a new political order that, in turn, permanently grants the president the powers of a judge.”31 Well before this scandal, along with others, came into the public eye, and just months after the 2001 terrorist attacks, the Bush administration began the policy of detaining illegal combatants who were captured in the battlefields of Afghanistan to the U.S. military base in Guantánamo Bay, Cuba.

THE CENTRALITY OF DETAINMENT AS A CONCERN

This thesis assumes the opinion that detainment concerns are the most fundamental and basic rights-based concerns of those raised during the Bush administration. Because on many levels there has been an erosion of civil liberties in the United States32 and the rejection and violation of international agreements regarding rights and justice – all in the name of preserving security – the prisoners held indefinitely at Guantánamo Bay represent a violation of rights and justice at the most fundamental level.33

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31 Ibid.
32 Critics have included the creation of the Department of Homeland Security and legislation such as the USA Patriot Act as examples of the increased infringement on civil liberties.
Because of the vague nature of the war, the United States has defined combatants killed in the War on Terror as ‘illegal enemy combatants.’ These detainees, many of whom were captured in the battlefields of Afghanistan and Iraq, are not members of a state-led military do not fall under standard war applicability. What makes the developments regarding detainment notable is their stark non-conformity with both international and American law and human rights standards. Insofar as the rule of law expectation of due process, - that of habeas corpus – the Bush administration’s post-9/11 detention policy represents an exception.

Guantánamo represents a geostrategic point for this exceptionalism to take place: Geographically, it is far from the traditional theater of war assumed in the War on Terrorism – the Middle East. Legally, it is neither U.S. territory nor controlled by a foreign nation. As a leased land, the choice of Guantánamo Bay is unique compared to normally defined extensions of U.S. jurisdiction abroad – such as embassies and protectorates.

Since 2001 more than 750 detainees have been transferred there, with more than 270 still detained when the Bush administration left office in 2009. Further, the non-territorial status of the military camp renders in a diplomatic grey area where it is neither a combat zone nor U.S. territory according to the Bush administration. Hence, the island military base serves as a strategic and deliberate action by the United States government to aid it in its prosecution of enemy combatants captured in the War on

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Terror. Since President Bush’s executive order on November 13, 2001 more than 1,200 people have been arrested and detained without charge, in most cases on no apparent grounds other than of being Arabic, Muslim, or South-East Asian in origin. Most have since been released, but some are still being held uncharged. They have no legal status, being neither prisoners of war, political prisoners, nor common law detainees. They form an exception that has no placement in the history of law.

CONTESTING DETAINMENT

One can contest detention by an authority through a petition for a writ of habeas corpus, a procedure under which a federal court may review the legality of an individual’s incarceration. The procedure is usually invoked after the exhaustion of the ordinary means of appeal, and therefore understood as the “last hope of the innocent.”35 It is through this constitutional structure that the detainees at Guantánamo Bay sought to seek review of their indefinite detention.

On March 26, 2002, a judge in New Jersey gave civil-rights organizations access to records of those detained in the United States after September 11, saying that secret arrests are “odious to a democracy.” After this ruling, the Inter-American Human Rights Commission of the Organization of American States urged the United States to immediately provide court or tribunal hearings for those detained at Guantánamo Bay, Cuba. On April 30, 2002, a federal judge, addressing the case of one of the detainees in the US, found that the government had no right to jail innocent people to insure their testimony before a grand jury. The judge found that, even in the

aftermath of September 11, the innocent could not be imprisoned: “A proper respect for the laws that Congress does enact—as well as the inalienable right to liberty—prohibits this court from rewriting the law, no matter how exigent the circumstances.” Further calls were made by legal advocacy groups, such as the following by Amnesty International:

“The US is placing these people in a legal limbo. They deny that they are Prisoners of War (POWs), while at the same time failing to provide them with the most basic protections of any person deprived of their liberty… The US has obligations under international law to ensure respect for the human rights of all persons in their custody -- including the duty to treat them humanely and ensure that they have recourse to fair proceedings, regardless of the nature of the crimes they are suspected of having committed.”

The legal limbo, or black-hole of law, that was created by the November 13, 2001 Executive order created a system in which prisoners had no legitimate model for appeal. The prisoners sought the protections of the courts, but in order for the courts to hear the habeas corpus petitions, they needed to ask themselves whether or not U.S. Courts had jurisdiction in this matter. The petitioners sought the claims through the U.S. courts as they were detained by a military order under the color of U.S. authority. The next sections review the historical basis for persons initiating writs of habeas corpus,

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36 First Opinion and Order at 59 in U.S.A. v. Osama Awadallah, 01 Cr. 1026 (SAS) (Decided April 30, 2002).
Historical Basis of Habeas Corpus

The writ of habeas corpus has long been understood as an instrument which provides a judicial inquiry to be made over the legality of the detention of a person. Under English Common Law, the writ traditionally called into question the power of the jailer to detain the petitioner. Chief Justice John Marshall declared that “the meaning of the term habeas corpus resort may unquestionably be had to common law”\textsuperscript{38} This was the predominant method of inquiry which judges used in the 78 years of the United States. Yet, with the ratification of the Habeas Corpus Act of 1867, one of the more broad-reaching post-Civil War laws, the language changed dramatically and was more focused on questioning whether or not the detention of an individual impacted the person’s protected constitutional “right to liberty.”\textsuperscript{39}

This transition, grounded in many of the beliefs that the post-civil war laws had in promoting equality, provides a much different standing as to how judicial interpretation is applied in habeas petitions. Yet, because habeas standards do not traditionally require relief based on individual rights claims, it did not follow that an establishment of a violation of rights was required to make out a habeas claim. It was originally only used to provide a remedy for unlawful imprisonment.

Chief Justice John Marshall is famous for noting that when the judiciary analyzes habeas petitions, rights claims are not a part of the equation. Instead “[t]he question is, what authority has the jailor to detain [the petitioner]?”\textsuperscript{40} This traditional

\textsuperscript{38} \textit{Ex parte Bollman}, 8 U.S. (4 Cranch) 75, 93-94 (1830)
\textsuperscript{39} See 3 William Blackstone, Commentaries on the laws of England
\textsuperscript{40} \textit{Ex parte Burford}, 7 U.S. (3 Cranch) 448, 452 (1806)
setting of habeas corpus follows the provisions and precedents made by the
progression of development of common law habeas petitions in England dating back
to more than a century before the Magna Carta. Goldstein notes that “although
habeas relief can be based on individual rights claims, it does not follow that
establishing a violation of rights is required to make out a habeas claim. Habeas
provides a remedy for unlawful imprisonment.”

Justice Marshall’s understanding of the term “habeas corpus” was seated in
section 14 of the Judiciary Act of 1789, which assembled a historical understanding
of the traditional writ. The Act provides that “the justices of the supreme court, as
well as judges of the district courts, shall have power to grant writs of habeas corpus
for the purpose of an inquiry into the cause of commitment.” The use of the
traditional method of questioning the cause of the commitment instead of the
implications that the commitment has on a person’s rights in American habeas
standards predates the Judiciary Act. This model of judicial review is seen in
Alexander Hamilton’s Federalist # 84, where he stated:

“the observations of the judicious Blackstone in
reference to [habeas corpus], are well worthy of recital.
to bereave a man of life (says he) or by violence to

41 See Blackstone, supra note 2
42 Holmes v. Jennison, 39 U.S. (14) Pet.) 649, 653 (1840) (“if a party is unlawfully
imprisoned, the writ of habeas corpus is his appropriate legal remedy.”)
43 Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 73 (1789). Goldstein, in Habeas Without Rights,
Wisc. L. Rev. 1165, 2007 at 1189 notes that the term “commitment” was not given
technical meaning by federal courts. Instead, it was understood simply as referring to any
restraint on liberty. He cites that upon thorough review one district court noted “[i]n no case
known and accessible to this court, has it ever been held that United States courts of original
jurisdiction cannot issue the writ where a person is held in illegal restraint or by under color
of the authority of the United States, whether there has been a technical commitment or not”
citing In re McDonald, 1 F. Cas. 17, 27 (E.D. Mo. 1861) (No. 8,751)
confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly hurrying him into jail, where his sufferings are unknown or forgotten, is a less public, less striking, and therefore *a more dangerous engine* of arbitrary government.” and as a remedy for this fatal evil, he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus act*, which in one place he calls “the BULWARK of the British Constitution.” 44

According to Hamilton, this explanation of the writ is to guarantee against “arbitrary imprisonment,” in other words, imprisonments without legal cause. 45 By furthering the standard codified in English habeas traditions, federal habeas relief did not originally require the showing that a petitioner’s rights had been violated.

This form of judicial review of habeas claims is unquestionably the standard of interpretation used by federal and supreme courts prior to the Habeas Act of 1867. 46 After a thorough study of habeas petitions made prior to the Habeas Act, David Goldstein notes that there was only one federal habeas corpus case before 1867, which brought forth rights-violation as a part of the petition. In *In re Bates*, a pretrial detainee argued he was guaranteed the right to confront witnesses before commitment. 47 The court rejected that argument. 48

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45 Id.
46 Act of Feb. 5, 1867, ch. 28  1, 14 Stat. 385 (1867)
47 Goldstein, *Habeas Without Rights*, p 1196; *In re Bates*, 2 F. Cas. 1015, 1018, (3 Cranch) 338, 450 (1806). (Goldstein notes that “the basis for the claim of the court is unclear from the decision.
48 *In re Bates*, 2 F. Cas. 1015, 1018, (3 Cranch)
Justice Story is famous for once noting that habeas served as the great bulwark of liberty; “not by protecting a discrete set of individual rights but by requiring that the government act within the bounds of its authority, that is, by imposing imprisonment only for a lawful cause.” This belief was further understood to an assessment of the relationship between government and the individual. He continued by noting that “Habeas thus served to protect individual freedom against tyranny, but it did so by focusing on whether detention exceeded the government’s powers.”

Between the Judiciary Act of 1789 and today, the judiciary has undergone a significant change in its interpretation and judgment on whether or not to hear habeas cases. Whereas Marshall declared “the question is what authority has the [‘jailor] to detain him?” Justice Oliver Wendell Holmes posed the habeas question quite differently: “‘What we have to deal with [is] solely the question of whether [the petitioner’s] constitutional rights have been preserved.’” This change in interpretation marks the expansion from using habeas as a mechanism for ensuring that detention was imposed under a legal basis to one where the writ was seen as a means for protecting individual rights. The 1867 Act shifted the judiciary from inquiring whether or not the detention was authorized to whether the detention was prohibited. Goldman notes,

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49 “Joseph Story, 2 commentaries on the constitution of the united states § 1339 (Melville M. Bigelow ed., 1891) (describing habeas corpus as “justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge.)

50 Moore v. Dempsey, 261 U.S. 86, 87-88 (1923)
“To determine whether authorization for detention exists, a court must determine whether the jailer has been given imprisonment power by the Constitution, by statute, or by some other source, and the court must also determine whether the jailer has acted within the scope of that power. In contrast, the most prominent prohibitions on the government’s imprisonment powers are found in the Bill of rights, such as the rights to due process, counsel, and trial by jury.”

This clarification provides context in understanding that the 1867 Act signaled a shift in judicial focus away from power, and instead toward an inquiry of the specific rights the Constitution provides a petitioner. This inquiry set the stage for a century and a half worth of questioning both rights provided for and by the constitution. This inquiry, however, has only been called in to question with regards to noncitizens a few times.

Much of this shift is because of many provisions set forth in the expansion of rights and equality founded in the values of the Fourteenth Amendment. Goldstein writes that “as a result of the dual expansion of both federal habeas authority and the scope of individual rights cognizable in habeas, federal habeas cases became dominated by claims that judicial processes violated the petitioner’s individual rights.”

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51 Goldstein, 1199
52 Goldstein 1200 quoting Pollak, Louis H. Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ. 66 Yale L.J. 50, 52 (1956) “Typically, the applicant will urge that the state trial was fatally tainted by lack of counsel, y a coerced confession, by officially suborned perjury, by discriminatory jury selection, or by other deprivations of Fourteenth Amendment rights.”
International Protections and Laws Against Detainment

Standards for protecting individual’s against indefinite detention, or detention without trial come both as normative protections that are embodied in internationally-acknowledged Declarations (non-binding) and international treaties (binding) formed through the United Nations.

The Universal Declaration of Human Rights provides the following articles with respect to imprisonment or detention:

“Article 9 – No one shall be subjected to arbitrary arrest, detention or exile.

Article 10 – Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

While it is a non-binding agreement, the UDHR can be understood to reflect a common standard of norms and protections that all member nations shall strive to “secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” Therefore, there are no strict provisions for the implementations for member states to guarantee these rights, but instead only to strive for the recognition and observance of their existence.

International treaties, on the other hand, are binding to its ratifying parties.

Both the 1907 Hague Conventions and 1949 Geneva Conventions (ratified by the US

54 Ibid.
in 1955)\textsuperscript{55} and their subsequent Additional Protocols create binding standards for the conduct of war, including protections for prisoners of war and detained civilians. Further, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man require that persons be tried before courts previously established in accordance with pre-existing laws.

Chapter III provides in-depth and pragmatic analysis to the applicability and enforceability of these international rights-institutions. As such, I only hint at this point to the fact that these institutions exist and the ratification of the United States within them. It is important however, to note that many petitioners in legal cases put forth to the Supreme Court have referenced the binding-nature of the Geneva Conventions to United States laws and statutes.

\textit{Contesting Detainment at Guantánamo Through the Supreme Court}

More than two and a half years after the first detainees arrived at Guantánamo the U.S. Supreme Court pronounced on the appeals of sixteen detainees.\textsuperscript{56} In the joint case, the petitioners questioned their detainment by the U.S. government to the Supreme Court, as it is the strongest guarantor of the Constitution. The question they presented was

\begin{quote}
“Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Naval Base, Cuba.”\textsuperscript{57}
\end{quote}


\textsuperscript{56} Ibid.

\textsuperscript{57} Ibid.
In reply, the courts noted that U.S. courts had traditionally been available to foreigners and nonresidents. As such, the courts noted that the habeas challenges under 28 US.S. §2241 – regarding a court’s jurisdiction on having the power to grant the writ of habeas corpus within U.S. law – authorized district courts even in cases where habeas corpus extended to aliens.

“The Detained Petitioners are not, nor have they ever been, enemy aliens, lawful or unlawful belligerents, or combatants in any context involving hostilities against the citizens, government or armed forces of the United States…The Detained Petitioners are not, nor have they ever been, ‘enemy combatants’…”\(^{58}\) The courts further stated that detainees were able to contest the legality of their detention, understanding that the executive branch of the government was holding them indefinitely and without trial.

Hamdi v. Rumsfeld\(^ {59}\) the second case decided in that summer, concerned not the detainment of nonresident aliens, but of an American Citizen. In it, the petitioners asked:

“Does the Constitution permit Executive officials to detain an American citizen indefinitely in military custody in the United States, hold essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the Executive to be an ‘enemy combatant’? ...  


In a habeas corpus proceeding challenging the indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials an “enemy combatant” does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch’s asserted justification of the detention?60

The Court ruled that the executive had the power to incarcerate a U.S. citizen who was accused of terrorism without trial. Yet, regarding the indefinite detention of prisoners, the court strategically stood strong, reaffirming the “fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law.”61 Further, the O’Connor plurality opinion relied on the Geneva Convention in stating that Habeas Corpus should be available to an “alleged enemy combatant.” The ruling, issued on the same day as *Rasul v. Bush*, held that the U.S. courts had the jurisdiction to hear habeas corpus petitions filed by the Guantánamo Detainees, citizen and non-citizens alike.

However, the Hamdi plurality held that the AUMF authorizes the President to detain ‘enemy combatants’ a term it understood to mean individuals who were “part of or supporting forces hostile to the United States or coalition partners … and who engaged in an armed conflict in the United States there.”62 To the dissenters in the Hamdi plurality, Justice Scalia and Justice Stevens, the Executive power of detention could only come from two different models: either Congress needed to suspend the

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60 Ibid.
61 Ibid.
62 Hamdi (542 U.S.) at 516
right to habeas corpus as provided in the Constitution, which it had not; or detainees needed to be tried under normal criminal law. The new procedures of review tribunals therefore had no grounding in the plurality’s opinion and that the Court should only have deemed the detentions unconstitutional.

Following the 2004 Cases: From Combatant Status Review Tribunals to the Military Commissions Act

In 2005 the Detainee Treatment Act was signed by Congress in order to prohibit inhumane treatment of prisoners, in particular prisoners at Guantánamo Bay. The act set the Army’s standards of interrogation as the standard applicable for all Department of Defense agencies. This extension was meant to articulate a prohibition for “cruel, inhuman, or degrading treatment or punishments.” While this Act is important and central in the War on Terrorism, it included specific provisions permitting the Department of Defense give the Guantánamo Bay detainees no legal recourse.

The Supreme Court followed the signing of the Act by ruling on another Guantánamo case, Hamdan v. Rumsfeld. The Court held the military commissions for detainees at Guantánamo Bay lacked “the power to proceed because its structures and procedures violate both the Uniform code of Military Justice and the four Geneva Conventions signed in 1949.” The Court used the precedent of Ex Parte Quirin, where the court can recognize its duty to enforce Constitutional protections to expedite the review of a trial by military commission. Further, the opinion stated that

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65 Ibid.
the DTA barring habeas corpus petitions would unconstitutionally violated the Suspension Clause of the U.S. Constitution, Article I § 9. “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” The court ruled that if the President was to convene military commissions such as those at Guantánamo, they would need to be sanctioned by the laws of war, as codified by Congress in Article 21 of the UCMJ. The Court held that the laws of war were to include both the UCMJ and the Geneva Conventions. The current commissions, the Court deemed, did no satisfy either of these rulings.

Concerning the types of hearings that the petitioner was to be held, the court ruled that

“Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be “any doubt” whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a “competent tribunal.”. Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13th Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.”

The limits therefore, of rights protection available to individuals contesting their detainment can be seen, as the Court must maintain a necessarily narrow view of its logic concerning its rulings.

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66 United States Constitution, Article I § 9, cl. 2
Following the *Hamdan* ruling, the United States Congress updated its tribunals with The Military Commissions Act of 2006\(^{68}\) (MCA) to meet the changes called for by the Courts. The new rules however, divided the detainees into two categories: rather than citizens and noncitizens - at this point only aliens were on the penal island – the MCA distinguished between lawful and unlawful enemy combatants, thereby exploiting a loophole created by the Geneva Conventions articulating the types of prisoners of war which can be held.\(^{69}\) Further, the MCA claimed that the rights guaranteed by the third Geneva Convention to lawful combatants are expressly denied to unlawful military combatants for the purposes of this Act by Section 948b, subsection (g) “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”\(^{70}\)

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\(^{69}\) Chapter 47A Sec. 948a. Definitions: "The term 'unlawful enemy combatant' means —
(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaeda, or associated forces); or
(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."

... "The term 'lawful enemy combatant' means a person who is —
(A) a member of the regular forces of a State party engaged in hostilities against the United States;
(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States."

Further, the MCA denied courts jurisdiction in considering applications for writs of habeas corpus filed by aliens detained by the United States who have been determined by the United States to have been “properly detained as an enemy combatant or is awaiting such determination.” When coupling that argument with the fact that the Act changed pre-existing law to explicitly forbid the invocation of Geneva Conventions for habeas corpus purposes, it can be seen that the Government was creating a state of exception. A state, where not only would the Executive use its power to detain an individual, but also use its own commission to rule on their standing and then in their case.

*Boumediene v. Bush: Striking down the MCA*

*Boumediene v. Bush* challenged the constitutionality of the MCA on the grounds that it illegally suspended the writ to habeas corpus without an adequate substitute. The court held that “Congress intended the DTA and the MCA to circumscribe habeas review, as is evident from the unequivocal nature of MCA §7’s jurisdiction-stripping language;” The government argued that the MCA provisions were comparable to the habeas restrictions found in the Antiterrorism and Effective

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71 Ibid: Section 1005(e)(1): “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”


73 Ibid.
Death Penalty Act of 1996. The Court however, did not take to this, instead ruling that the MCA and AEDPA were distinguishable in the fact that AEDPA applied in practice to prisoners who have been tried in open court and whose sentences have been held up under direct appeal.

More importantly, legal advocacy groups believed that habeas corpus rights needed to be extended to the petitioners because “anyone detained will not have a meaningful opportunity to demonstrate that ‘error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.’”\(^74\)

Much of the legal precedent the Court used in its opinion rested on questioning Guantánamo applicability to the standards set by *Johnson v. Eisentrager*\(^75\). The Court ruled that the *Eisentrager* line did not apply in that although the detainees “have been afforded some process in CSRT proceedings, there has been no Eisentrager–style trial by military commission for violations of the laws of war.”\(^76\) By relying on his *Rasul* concurrence, the America Bar Association Brief quoted Justice Kennedy explaining that

> “Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone

\(^{74}\) Brief *Amicus Curiae* of the American Bar Association in support of Petitioners; Citing *Harris*, 394 U.S.at 292.

\(^{75}\) *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

\(^{76}\) 553 U. S. ____ (2008)
of hostilities, detention without proceedings or trial
would be justified by military necessity for a matter of
weeks; but as the period of detention stretches from
months to years, the case for continued detention to
meet military exigencies becomes weaker.”

Thus the case for indefinite detention showed that the language of the
Suspension Clause is essential in maintaining the rule of law.

Regarding territory, the Court held that the Constitution grants Congress and
the President the power to acquire, dispose of, and govern territory, not the power to
decide when and where its terms apply. The detainees also cited the Insular Cases in
which “fundamental personal rights” extended to U.S. territories. Justice Kennedy
resolved to hold that the political branches may switch the Constitution on or off at
will would lead to a regime in which they, not this Court, say “what the law is.” The
court further concluded that the detainees were not required to exhaust the review
procedures prior to petitioning for a habeas corpus action in the district court. This
extension is central in that it was on the ruling that the United States government had
de facto sovereignty over the Military base at Guantánamo Bay, Cuba. Therefore,
Courts could extend the power of the Constitution there.

Rights protection is also central to the majority’s differences from the
dissenting opinions. The district court which struck down the previous opinion noted:

“The dissent offers the distinction that the Suspension
Clause is a limitation on congressional power rather
than a constitutional right. But this is no distinction at

77 Rasul, 542 U.S. at 488 (Kennedy, J., concurring),
78 See Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); and Dorr v. United States, 195 U.S.
138, 148 (1904)
79 553 U. S. ____ (2008)
all. Constitutional rights are rights against the government and, as such, are restrictions on governmental power.\textsuperscript{80}

In the Supreme Court ruling, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause.\textsuperscript{81} The Court further realized, that even if the CSRTs did satisfy Due Process standards, it would not matter. The court decided that because of the territorial jurisdiction, the nature of the detainment, and the case history, the court concluded that the detainees held at Guantánamo had the right to challenge their detention through the writ of habeas corpus.

Many legal scholars viewed this as a forceful repudiation of the lawlessness of the Bush administration’s policy. Steven R. Shapiro, Legal Director of the American Civil Liberties Union saw it as marking the

“beginning of the end of the military commission process, which permits the use of coerced evidence and hearsay and thus cannot survive the constitutional scrutiny that today’s decision demands. It is time to close Guantánamo, end indefinite detention without charge and restore the rule of law.”\textsuperscript{82}

Legal Advocacy groups writ large, such as the ACLU believed that the petitioners were entitled to invoke the Suspension and Due Process clauses because

\textsuperscript{80} Ibid. \textit{citing} H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949) (\textquotedblleft Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.\textquotedblright)

\textsuperscript{81} 553 U. S. ____ (2008)

\textsuperscript{82} Press Release, American Civil Liberties Union. \textquoteleft\textquoteleft Supreme Court Restores Rule of Law to Guantánamo\textquoteright\textquoteright (6/12/2008)
both provisions protect fundamental rights.\textsuperscript{83} It asserted that these rights are rights that should be available to all individuals, not simply U.S. citizens.

**GLOBAL LEGAL AND SCHOLARLY RESPONSE**

Much of the legal and academic response to the detainments at Guantánamo Bay have framed themselves within an argument on balancing the value of rights against the need for security. Within constitutional law, there is a plethora of academic research concerning the emergency powers needed by the Executive to respond to emergencies appropriately, versus the need for the Judiciary to maintain constitutional principles and the protect of the normal balance between the three branches of the government.\textsuperscript{84}

The focus on the value of rights within the legal structure of what can generally be defined as counterterrorism policy has always reflected a tension between security and rights. Terrorism poses the greatest security threat to governments and people today, as such, governments have responded to the new, international character of terrorism by translating their counterterrorism policies from criminal law structures to a structure of war.\textsuperscript{85}

The intensity of the War on Terrorism has therefore created ongoing scholarship on the relationship between security and human rights. This scholarship has often pushed many to rethink more generally the idea of security and its

\textsuperscript{83} Brief Amicius Curiae of the American Civil Liberties Union and Public Justice in Support of Petitioners. Cecila D. Wang and CArthur H. Briant Nos. 06-1195 & 06-1196

\textsuperscript{84} See generally: Dyzenhaus Book, Posner, Gross,

relationship to rights, rather than simply rearrange current constitutional precedents and structures afforded to the Supreme Courts. The debate can generally be broken into two different camps: neoconservatives, who argue that the balance between security and rights ought to give security more prominence; and civil libertarians who argue that rights must be protected at all costs, regardless of the current situation.86

David Dyzenhaus has stated that our current era causes particular stresses considering the more general changes that globalization has forced onto all disciplines of the social sciences: governments, the economy, and social structures more generally. He believes that “9/11 draws our attention to the fact that, for a long time, security has been gaining to much prominence in its relationship with human rights”87 As such, the event should serve as a wake up call to restore the prominence of rights. The following sections will briefly summarize different scholarly views concerning the relationship between rights and security within the War on Terrorism.

**The Image of Balance: Security is Purchased at the Cost of Rights**

Jeremy Waldron believes that the matter is most generally a question of balancing the need for security against the value of rights. Opposing the many legal scholars who continue to defend the counter-majoritarian power of the judiciary, Waldron believes that some sort of “curtailment of liberty might be appropriate in the wake of the terrorist attacks, and that it might be unreasonable to insist that the same restrictions on state action after September 11 as we insisted on before September

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86 Ibid., p. 23
87 Ibid.
Waldron proposes that the change in the scale and the nature of the harms that threatened the government both explains and justifies a change in the primacy assigned to civil liberties. That is, “striking a balance between liberty and security.”

Waldron instigates a sort of mathematical balancing rhetoric in analyzing the situation, but also understands that the term civil liberties “represents a variety of concerns about the impact of governmental powers upon individual freedom.”

Waldron also takes into account the distributional effects of any rebalancing exercise, understanding that the impact of any rebalancing will fall more favorably to the majority who will believe that the rebalancing is a success. Dyzenhaus describes how Waldron presents the distorting nature this image of balance has on our thinking: “It assumes …that an increase in insecurity requires less weight be given to the rights or liberty side of the scales,” but even if there is a rethinking “no simple exercise in addition can capture the kinds of complex justifications we require for limitations on rights in a society committed to justice.”

I argue instead that because our society is committed to justice, rights need to be at the forefront of any argument.

While clearly countering the countermajoritarian nature of the judiciary, this view is one that contests only that consequences must be taken into account, and therefore that the balancing be a dialogue between the consequentialists and the

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89 Ibid., p. 192
90 Ibid., p. 195
deontologists – persons who argue that rights must be upheld whatever the consequences.

Eric Posner and Adrian Vermeule, in *Terror in the Balance*, both subscribe to the idea that there is a security-liberty frontier and that “any increase in security will require a decrease in liberty, and vice versa”92 Posner and Vermeule believe that the debate concerning institutional competence should be central to understanding the structures in which the liberty-security frontier is defended in their argument, a claim I agree with. Yet, moving the debate about human rights and security away from a philosophical debate to one centered on the relationship of institutions, the argument, in my opinion, does not push hard enough the restructuring of rights-guaranteeing institutions that this thesis promotes.

*Other Institutional Models*

The institutional models presented by many leading scholars in the civil rights vs. security debate are often constitutionally grounded. They propose domestic-level propositions such as Oren Gross’ extra-legal measures models that support rights within the new problem of international terrorism. Gross suggests that the business-as-usual model and the models of accommodation which are adopted in response to emergency situations fail because 1) business-as-usual models are blind to the fact that true emergencies are significant enough that they exceed ordinary law, and 2)

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Gross’ extra-legal measures model and other others similar to it fail for one reason: they seek to construct a defined extra-legal space and, by definition, there is no way to control such a model once it is put into place. The structures and institutions of constitutional law seek to protect the overreaching of executive power in any situation, fearing that if the executive is able to claim emergency powers the provisions seeking to protect individual rights will be eliminated, thereby clearing the way for a permanent state of exception.

The constitutional models that are most commonly recognized in the War on Terrorism are: The Emergency Constitution Model, exemplified by Bruce Ackerman, the weak Constitutionalism model elaborated by Cass Sunstein, and The Strong Constitutionalism model put forth by Lucia Zedner and Kent Roach.

\textit{The Emergency Constitution}

Bruce Ackerman proposes an idea of a ‘supramajoritarian escalator’ that is the requirement for a state of emergency required by legislative endorsement that can be used for limited periods of time.\footnote{Ackerman, Bruce “The Emergency Constitution”} While this system does have its benefits, the intricacies fail on a number of levels. Firstly, a key flaw is his suggestion for a permissible form of preventative detention under executive power. Giving the executive large scale sweeps of detainees, affording them no protection within the
rule of law, becomes the definitive conceptualization of a state that is able to suppress any reactionary within reach. David Cole’s response to this model is appropriate in analyzing the flaws, noting that it would be a destruction of the constitutional protections of individual rights embedded so deeply within our values of society. Cole notes that,

“If we can resist the temptation to treat foreign nationals as ‘enemy aliens,’ and instead treat them as human beings entitled to the same fundamental rights as the citizenry we may be able to temper the overreactions before it is too late.”

Further, Cole asserts that the Emergency Constitution has a blind spot in its proposal to legitimate the practice of suspicionless preventive detention. He believes that “history suggests that we ought to do everything we can to restrict suspicion less detention, not expand it.” The restriction of the habeas corpus suspensions already present in our constitution are so restricted that it has only legally been resorted to four times. To Cole, Ackerman’s proposal offers no reason to believe that such measure would make the population of the United States more secure. Judith Butler raises an additional concern regarding executive’s indefinite detainment:

“In the moment that the executive branch assumes the power of the judiciary, and invests the person of the President with unilateral and final power to decide when, where, and whether a military tribunal takes place, it is as if we have returned to a historical time in which sovereignty was indivisible, before the

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95 Cole, David, *Enemy Aliens.*
separation of power has instated itself as a precondition of political modernity.”

In my mind, Ackerman’s failure to confront the difficult substantive tradeoffs the emergency powers he presents is the very inclusion of the elimination of individualized judicial review, acknowledged and poorly justified detention of innocent persons, and an inappropriate compensation scheme to those who are unnecessarily detained. Therefore, Cole views Ackerman’s argument as nothing less than a panic-driven rational to find solace in some sort of legal structure that would better provide security, even if that security is a greater amount of the public’s peace of mind.

Weak Constitutionalism

Cass Sunstein’s argument for a form of constitutional minimalism seeks to better reconcile the tension between constitutional rights and national security. He constructs constitutional minimalism as an alternative to both ‘national security maximalism,’ where a highly deferential court exists, and ‘liberty’ maximalism’ which suggests that judges protect liberty to the same extent they do in times of peace. To him, the questions raised by the terrorist attacks of September 11, 2001 are especially pressing in the face of conflicts between national security and claimed violations of constitutional rights. But, by rejecting both of the forms of maximalism and instead specifying a minimalist approach to intrusions suggests that, an

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99 Ibid., p. 48
identifiable form of minimalism can capture the American courts even when national security is threatened.\textsuperscript{100}

The minimalist approach Sunstein puts forth includes: 1) clear congressional authorization, where courts “must give the authorization before the executive intrudes on interests with a strong claim to constitutional protection”\textsuperscript{101} 2) hearing rights where the courts can insist on the core principles of the Due Process Clause, including a certain “procedure be put in place to ensure against erroneous deprivations”\textsuperscript{102} and 3) Judicial self-discipline through narrow theorized decisions which will ensure against judicial overreaching against executive power and excessive judicial modesty that pose a risk during large-scale intrusions on liberty.\textsuperscript{103}

While these principles are provocative, they do not actually provide for a strict guaranteeing of security. As can be seen in the Guantánamo debate, the form of military tribunals put forth by the executive by no means follow the ‘rudiments of judicial due process’ because they fail to provide 1) sufficient forms of evidentiary exposure to both the prosecuted and an independent third party and 2) do not have an objective judiciary overseeing the case. To this extent, the use of constitutional minimalism as a proposition of weak constitutionalism fails to properly secure rights and does not structure definitively enough the protection of rights to individuals.

\textsuperscript{100} Ibid., p 50
\textsuperscript{101} Ibid., 54
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid., Sunstein gives an example of judicial modesty where “judges can refuse to specify the precise procedure that must be used, allowing the executive to use military tribunals or otherwise to depart from ordinary adjudicative procedures, so long as the rudiments of due process are observed.”
Ergo, by setting out suggestions of forms of judicial modesty and executive restraint, Sunstein leaves too much unanswered.

**Strong Constitutionalism**

Lucia Zedner’s proposition\(^{104}\) that a rejection of the notion of balance in favor of a pragmatic approach of adherence to the structural and procedural safeguards in the criminal justice system does not fit with the reality of the situation: the Bush administration has turned international terrorism into both a structural and ideologically driven war. By using the ‘impassive logic’ of criminal justice, Zedna suggests that even alleged terrorists should be give the ordinary principles of due process. Further, by placing the War on Terrorism within the structure of the criminal justice system, Zedner believes that criminal justice legislation will provide clear answers about whose interests are being effected by a the legislation, and “the priority given to liberty in criminal justice helps to ensure tat claims made in the name of a protean idea like that of security will be clarified.”\(^{105}\)

While Zedner advocates the pragmatic advantages of the criminal justice model, the reality is, her system does not fit with the reality of the situation. In the War on Terror, many of the detainees held at Guantánamo Bay were captured by military forces. It does not make much sense for a military force to use the laws of war to capture an enemy combatant and then subjugate them to standard domestic terrorism law, when the facts are, in all likelihood the evidence gathered and context

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\(^{105}\) Dyzenhaus, David. “Introduction” *Civil Rights and Security* p. xviii
of the situation vary much more in the War on Terrorism than the standard domestic
criminal justice standards used in cases prior to 9/11.

*The Law that Puts America in Danger: The Discriminatory Effect of the MCA*

Neal Katyal’s attention on rights provides a focus on the subject that has been
neglected: that of the right to equality. In ‘Equality in the War on Terror,’ the
challenge to terrorist legislation is put on a basis of formal equality rather than on
substantive constitutional grounds. Further, Katyal asserts that a commitment to
formal equality can push away from an ‘us’ and ‘them’ dichotomy which is
destructive to the human community.

For Katyal, the dichotomy is painfully present in the commissions set up by
the MCA, which were the first in American history designed to apply only to
prisoners. Because Congress justified of the MCA on the grounds of sparing
American citizens, the asymmetry becomes its constitutional defect. Noting that the
Equal Protection Clause was viewed by the drafters as intentionally extending

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107 Ibid., p. 1371 citing 152 Cong. Rec. §10,355 (Daily ed. Sept. 28, 2006) (Statement of Sen. Kyl) (“[T]here is nothing wrong with this legislation before us limiting the rights of habeas to those who are citizens and not extending it to alien enemy combatants.”); 152 Cong. Rec. S10,250 Daily ed. Sept. 27, 2006)(Statement of Sen. Warner)(“It is wrong to say that this provision captures any .S. Citizens. Ti does not. It is only directed at aliens – aliens, not U.S. citizens – bomb –makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are – again, only aliens…”); see also Donnelly, John M.
protection to ‘persons’. Katyal states that the MCA is unnecessarily restrictive of the right to habeas corpus.

Analysis of Katyal is compelling, but adoption of his views is difficult to apply to the response to the War on Terrorism. The habeas stripping provisions in the MCA are viewed to Katyal as “shutting our courthouse doors to alien detainees, both green card holders and foreigners.” which will effectively send the message “that their rights are less worthy of protection than those of U.S. citizens...[while] everything about the Equal Protection Clause...shudders at the notion that the access to justice could be conditioned on citizenship.”

The key lessons to take from Katyal’s article are not that there should be adopting a rearticulating of judicial interpretation of previous cases to better fit the structure of the War on Terrorism, but that the undermining of the value of equality in the U.S. Constitution has significant effects on our diplomatic and social position in the world.

“the disparity between the rights of alien and citizen detainees presumes the former are more dangerous, so much so that the confines of our constitutional protections cannot contain them but our country knows all too well that the kind of hatred and evil that has led to the massacre of innocent civilians is born both at home and abroad. The threat of terrorism knows no nationality; rather it is a global plague, and its

109 Ibid. p 1379
110 Ibid.
perpetrators must be brought to justice no matter what their country of origin.”

Creating this breakdown between citizen and alien is destructive to our global positioning the War on Terrorism and will further alienate us from the rest of the world. Missing from. By simply concluding that “by splitting our legal standards on the basis of alienage, we are in effect jeopardizing our own safety and national interest…” Katyal’s argument misses a distinct suggestion of how to fix the pernicious discrimination against aliens present in the MCA and other laws.

PRESSING TOWARDS COSMOPOLITANISM

It is impossible to separate the War on Terrorism from the temporal reality of globalization. If David Dyzenhaus is correct in viewing 9/11 as a wake-up call to the growing cracks and shifting structures between our societies at all levels of life, then globalization must be central to resolving the gap in rights-guaranteeing institutions today. Has Kant’s optimistic diagnosis finally come true?

With the growth of human rights from a concept to a system of international regimes, globalization has created a system where, as a subject of human rights, the individual becomes a subject of international law. Klaus Günther views the

111 Ibid., p. 1388
112 Ibid., p. 1392
113 Kant, Immanuel. “Perpetual Peace: A Philosophical Sketch,” Kant, Political Writings, ed. Hans Reiss, 2nd Edition. (Cambridge: Cambridge University Press, 1991) “The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves towards a perpetual peace.” Pp. 107-108
community of peoples as placing itself protectively before the individual against sovereign states. That is, the international community can serve to shield individuals from state injustices. Günther see that the instinctual reaction to the threat of terrorism has been a fleeing of individuals to “national citizen status in order to oblige a state to take appropriate measures to protect them.” The critical fact is however, that the nation states that individuals fled towards were in the midst of a structural change from national security to a ‘transnational security architecture.’

Viewing the purchase of our security at the expense of rights, Günther legitimizes it through a discourse in international la about transnational security law, where Kant’s cosmopolitan right is realized. For Günther, the ‘universal right of humanity’ to security is conceived as the security of the transacting individual. Because individuals enjoy both rights and security under a system of general laws, they have become detached by fleeing to the old institution of the nation state.

This thesis argues otherwise. Instead, I believe that the architecture of the constitutional rights institutions gave individuals the assumption that the nation-state is the best place to seek rights-protection. Everything that has been embedded in to student’s minds regarding the structure of our government, and the respective roles of the different political branches, all points to the conclusion that when in need, one should run to the courts for rights-protection. This however is not the best answer in the War on Terrorism. By losing international legitimation through its unilateral

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extra-legal actions, the Bush administration has entered a state of exception that had no proper definition of rights-placement in society at all.

The previous models for resolving the greater need for security in the War on Terrorism were steadfastly constitutional. That is, they focused on resolving models of balancing the need for security against the values of liberty through shifting the constitutional institutions already present in today’s society. Some of these shifts were more predominant than others – such as Ackerman’s preventative detention policy, while others were noticeably less so, regarding Zedna’s call for terrorism to be continued to be prosecuted as a criminal law issue rather than a wartime circumstance. The next section of this chapter will focus on the issue from a more theoretical angle. If readers can address the situation from a more distant, sociological positioning than analyzing the War on Terrorism as a question of constitutional law, it may help at resolving the greater issue at hand – securing rights for individuals detained at Guantánamo Bay.

**INDEFINITE DETENTION AS STATE OF EXCEPTION**

The rule of law was effectively suspended in both national and international terms by the actions of the Bush administration after 9/11. As a legal innovation, indefinite detention carries the implications for not only when and where law can be suspended, but also as determining the limit and scope of legal jurisdiction itself. By saying that constitutional rights could not extend to persons detained by the military at Guantánamo Bay, the government established an uncontestable boundary; a legal
black hole where detainees would be put, away from the war on terror and out of reach of human rights protections.

To Judith Butler, this exercise of state sovereignty was new in that it not only took place outside of the law but was done so through an elaboration of administrative bureaucracies that stemmed from the legal memoranda of the White House’s Office of Legal Counsel to the procedural rulings made during the CSRT appeal processes. For Butler, the indefinite detainment forced questions on the circumstances surrounding the detainment itself, Butler believes that “it crucial to ask under what conditions some human lives cease to become eligible for basic, if not universal, human rights.”  

Because the tribunal regulations stated that those who were tried would have no rights of appeal to US civil courts, the law itself is suspended or to Butler, is consequently “regarded as an instrument that the state may use in the service of constraining and monitoring a given population.” These strong ties of the state revealing its extra-legal status by designating a state of emergency, or in Giorgio Agamben’s words, a state of exception. To Agamben and Butler, the state of exception is a new rule of law, withdrawing the different parts of the law selectively from its new application.

115 Butler, Judith, “Indefinite Detention,” p. 57
116 Butler, p.57. Butler also notes the strong ties to Foucault’s Governmentality model, where the act of suspending the law, the state therefore is “further disarticulated into a set of administrative powers that are, to some extent, outside the apparatus of the state itself; and the forms of sovereignty resurrected in its midst mark the persistence of forms of sovereign political power for the executive that precede the emergence of state in its modern form.”
Butler continues:

“the state produces, through the act of withdrawal, a law that is no law, a court that is no court, a process that is no process. The state of emergency returns to the operation of power from a set of law (juridical) to a set of rules (governmental), and the rules reinstate sovereign power: rules that are not binding by virtue of establishing law ore modes of legitimation, but fully discretionary, even arbitrary, wielded by officials who interpret them unilaterally and decide the condition and form of their invocation.”\(^\text{118}\)

While it may make sense that the U.S. government would take the steps to detain persons against which there is evidence that they are willing to engage against the United States through violence, it does not follow that these suspects should be presumed guilty, or that due process not be afforded to them.\(^\text{119}\) While this is the same as the human rights side of the argument, similar to that articulated above by Amnesty International, it also follows from the point of view of a critique of power; of an objection to the indefinite extension of lawless power based on the definitional indefiniteness of the War on Terror. Butler simplifies: “”If detention may be indefinite, and such detentions are presumably justified on the basis of a state of emergency, then the US government can protract an indefinite state of emergency.”\(^\text{120}\)

While it may seem a far stretch to presume that the government would extend a general military state, one must consider the facts: the state of exception that is Guantánamo Bay was direct response for the need to hold and detain – even preemptively detain – terrorist suspects whom the executive believed were dangers to

\(^{118}\) Butler, p. 62
\(^{119}\) Ibid., p. 63
\(^{120}\) Ibid.
the security of America. As such, it is not a far step to conclude that the state of emergency that encompasses the War on Terrorism exists at home as well as abroad.\textsuperscript{121}

Further, the jurisdiction sweeping language of the MCA is indicative of a new rule of law. By instituting these military tribunals,

\begin{quote}
“the executive branch has effectively set up its own judiciary function, one that overrides the separation of power, the writ of habeas corpus and the entitlement to due process. It is not just the constitutional protections that indefinitely suspended, but that the state (in its augmented executive function) arrogates to itself the right to suspend the Constitution, or to manipulate the geography of detentions and trials so that constitutional and international rights are effectively suspended.”\textsuperscript{122}
\end{quote}

The revocation of US Court jurisdiction in hearing habeas petitions creates a legal boundary that not only can it set up its own judiciary function, but also denies any opportunity for the rights-protecting institution of the government to contest the ruling. Butler believes this is an example of “how the systematic management and derealization of populations function to support and extend the claims of a sovereignty accountable to no law; how sovereignty extends its own power precisely through the tactical and permanent deferral of the law itself.”\textsuperscript{123} The derealization of

\textsuperscript{121} Indeed, it may already. Many legal scholars focus on the new surveillance and data-collecting clauses in the USA PATRIOT act, which is viewed to severely infringe upon many civil rights. While the civil rights in question are more often than not concerning the right to privacy, if the government was able to push the PATRIOT act with such speed in the wake of 9/11, what is to stop it from including sections in further documents that will extend previously unheard of detention policies, all in the name of protecting the state from its enemies ‘no matter where they are.’

\textsuperscript{122} Butler, p. 63

\textsuperscript{123} Ibid., p. 68
humans is no small matter. Comparing this to the notion of *homo sacer* – bare life – creates a situation which necessitates the reaffirmation of a rights guaranteeing institution.

Yet, the simultaneous denial of there being any international law applicability of the detainees further disputes the legality of the detention center at Guantánamo. By rejecting the international structure set up to protect individuals beyond the borders of nation-states, the Bush administration lost legitimacy in the international structure.

The inapplicability of the Geneva Conventions was taken right from the start, on January 9th, the day after detainees began to arrive at Guantánamo Bay, then-Assistant Deputy White House Counsel Alberto Gonzales said, "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."124 By eliminating Geneva Convention jurisdiction, the administration destroyed the last resort for any chance for contesting one’s detainment. Butler sees this as the

“… operation of a capricious procedural outside of law, and the production of the prison as the site for the intensification of managerial tactics untethered to law, and bearing no relation to trial, to punishment, or to the rights of prisoners… [It is, in fact,] an effort to produce a secondary judicial system and a sphere of non-legal detention that effectively produces the prison itself as an extra-legal sphere maintained by the extra judicial power of the state.”125

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125 Butler, p. 87
The question therefore is poised tightly between the two difficult questions of the executive’s power outside of law as a matter of maintaining national security, and the de-realization of humans through indefinite detainment. The executive’s actions however, through the de-validation of traditional rights-protecting institutions given to all persons in the human community, create a legal black hole for rights-protection to become lost.

CONCLUSION

One must ask: How is this possible? Constitutional rights protection has been developed over centuries and in response to a wide variety of circumstances. Further, how can the international structure of rights-guaranteeing be so easily abandoned, as being anachronistic and irrelevant to the situation. By articulating the argument into one where “The major distinction … is not between those who claim that the situation is safe and those who claim it is not, but between those who appeal to the logic of security and those who do not,”126 the government has created a situation where rights must bow down to security concerns.

This thesis argues that instead of thinking of responding to the profound constitutional challenges posed by the problem of terrorism by re-balancing the frontier between security and liberty, or creating a temporary (or permanent) state of exception, we must recognize that the illegitimacy of the United States actions has been grounded in the existence of Guantánamo Bay as an extra-legal space.

Guantánamo Bay was chosen for its geostrategic benefits to the United States, and, while it is not the only place where enemy combatants are being detained, it is the one that has proved the government wrong the most.

As Dyzenhaus points out, security is constitutive – as the raw material of society, which makes it possible for social society to exist. It is also necessarily actively responsive to the subjective sense of insecurity.

“Security is intimately related to a sense of belonging, and what sense is expressed in as shared understandings of what it is to belong…The state must react to events which create subjective feelings of insecurity, but must also do so in ways that reinforce the sense of security of individuals in their relationship with both intimates and strangers.”

It seems therefore that the government has responded to the events of September 11 in a way that, while seeking to protect the security of American individuals, has failed to reinforce American’s sense of security.

The government believed that it could create a sphere of extra-legality in a gap between the rights regime that is Constitutional law and the regime that is International Humanitarian law. In the following chapter, I will explore the existence and practicality of placing rights before law, asserting that law has only served as an articulation of inherent rights. Chapter 3 will detail the history of these two rights guaranteeing institutions with relation to the United States of America. I will finish in chapter four by exploring the solutions provided to resolving this gap, as they are

different than the models presented in this chapter, which concerned the controversy at a more general level.
CHAPTER II
WHERE DO RIGHTS COME FROM?

INTRODUCTION

Understanding where rights come from within the context of law opens many controversial issues which disciplines across the board fail to find a direct answer for. Perhaps it is because the question touches upon the very foundations of the relationships of governments and the governed, theories of jurisprudence, and the development of norms in society. The first section of this chapter questions and explores the establishment of rights within the social contract, as expanded upon by John Rawls and his theory of the original position. By using Ronald Dworkin’s assumption that rights predate law – not that rights are created by law – I seek to explore the origin of rights in society. The second half of the chapter will focus on the development of rights within the historical construction of the modern nation state, as experienced in the West. Hannah Arendt’s view on the problematic relationship created by the combination of the nation and the state explores how rights have been treated and applied in ‘Western’ governments since the French and American Revolutions of the late eighteenth century. By citing the simultaneous declaration of rights within the state, and the desire of nationalism to establish itself within the structure and institution of the state, Arendt brings to light key issues associated with the establishment and protection of rights. These issues, such as the breadth and incorporation of rights in, between, and across states, shows clearly that there has been no definitive and universal positioning of rights in modern civilization.
The twentieth century saw a great deal of scholars touch on this subject under the headings of writing on general theories of laws. The debate has been between legal positivists – such as H.L.A. Hart and J.L. Austin – and those who viewed the general theory of law as interpretive of norm, most notably Ronald Dworkin. Introducing rights as predating law – in other words, as natural or fundamental – comes in direct contrast with legal positivism, which holds that the truth of legal propositions have no inherent connections with the validity conditions in ethics or morality. Because of this bidirectional relationship, questioning how the law can reinforce rights contrasts thinking that rights produce law. By expanding the debate into of the role of individual rights and the social contract, one encounters difficult discussions surrounding the balancing of these interests, and the placement of utilitarianism as a means for decision making.

Civil libertarians view rights as inherently trumping infractions upon rights, regardless of the consequences. John Rawls appropriate calls attention to rights developing both strong and weak relationships in the development of a social contract. Balancing between types of rights is often constructed in terms of fairness and provides a bridge between the conceptual and normative parts of the theory at hand. In Taking Rights Seriously, Ronald Dworkin presents a convincing argument

not only for the incorporation of rights within theories of justice and institutions of justice, but how through in-depth analysis, the theory of general rights can allow an understanding of how a collective goal may itself be derived from certain fundamental rights by way of social contract. By exploring this process, we are better able to understand how exactly rights fit into our own society from the standpoint of political philosophy. This positioning will enable us to use this structure as a basis for comprehending the dynamics of the rights and laws we experience today.

**Incorporating Rawls’s Theory of Justice and Developments of Social Contracts**

The theory of general rights Dworkin develops allows that there may be different sorts of argument, but each is sufficient to establish some reason why a collective goal that normatively provides a justification for a political decision does not justify a particular damage to some individual. By thoroughly analyzing Rawls’s theory of justice, Dworkin develops the distinct conception of the right to equality, which he calls the “right to equal concern and respect.”\(^{129}\) Within the American framework, this conception of equality has been used to interpret the famous Equal Protection Clause of the Fourteenth Amendment, but also how this conception is able to confirm institutions both physical and theoretical in the United States.

As such, we discover an insight into the foundations of our own American rights-based institutions and the importance of their heritage within contemporary interpretations of law. Connecting the ‘right to equal concern and respect’ to the construction Dworkin applies will provide an explanation as to why the Fourteenth

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Amendment and other rights-based statutes within the history of American jurisprudence have been essential to the extension and provision of rights in society.

Dworkin’s analysis of legal positivism questions the development of the law of a community and how legal rules can be distinguished from social rules. Legal positivism conjectures that the reason a society has a legal system depends on the presence of certain structures of governance, not by the extent to which it satisfies ideals of justice, democracy, or the rule of law. By noting that the law of a community is a set of “special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power” Dworkin notes that the legal rules stand apart from the ‘moral’ rules because they are followed by the community, while not technically enforced through public power.¹³⁰ Noting Hart’s development and elaboration of Austin’s positivism, Dworkin appreciates the distinction between primary and secondary rules in a society. Whereas ‘primary’ rules grant rights or impose obligations upon members of the community, ‘secondary’ rules stipulate the enactment of legislation and organization of the government.¹³¹ Certainly, not all laws invoke the use of rights as legitimation for their existence; many exist for the purpose of maintaining government and order. These ‘secondary’ rules are not of concern in the discussion of the role of rights in the establishment of the social contract and subsequent construction of a Constitution. Yet, as will be addressed later in the thesis, these ‘secondary’ laws must not be

¹³⁰ Taking Rights Seriously, p. 13
¹³¹ Ibid., p. 54
ignored for they can significantly impact the application and authority of rights-based institutions within human civilization.

Yet, none of this explains the existence of how conceptions of rights are developed and established within a society. In order to do so, Dworkin probes the presence of social rules with notions of human morality. Social rules in morality distinguish not only the way in which consensus on values is reached, but also “the conceptual sense that when such conception exists.” 132 That is, there is inherently a process necessitated in order to obtain group consensus on a particular value. Members within the community understand the duties established within the social construct requisite to embrace in order for membership, but they may still refuse to honor these duties. As such, the duties within a society are not sufficient in explaining the development of social rules and their implication on the establishment of rights.

The development of law is contingent on the creation of propositions within the legal construct. Dworkin separates propositions into two distinct categories: principles and policies. Dworkin notes that arguments of principle within law develop so as to “establish an individual right.” 133 Principles differ from policies – similar to how primary rules differ from secondary rules – in law in that while the former are propositions that describe rights, the latter are propositions that describe goals.

132 Ibid., p. 57
133 Ibid., p. 90
Linguistically, the development of principles sets a distributional tone as to the importance of rights in a society. By principle, some rights may be considered more important than others, or vice versa; rights may be absolute, such as the right to be treated humanely, but may also be less than absolute, such as the necessity to yield to another so as to not infringe on their rights. Dworkin provides the example of how freedom of speech may have to yield to the goal of collective welfare, thereby noting a distinct hierarchical distribution of rights within a particular society.\textsuperscript{134}

This distributional character of rights gives rise to the concept of ‘concrete rights.’ Dworkin describes these as value-based principles which are defined by the government to “express more definitely the weight that they have against other political aims on particular occasions.”\textsuperscript{135} By ‘political aims’ Dworkin inserts them into the development of ‘hard cases’ where a necessary vertical construction of rights-priority is established within a society – often on political motivations; some rights necessarily trump others. It is in these hard cases that the “rights thesis provides that judges decide hard cases by confirming or denying concrete rights.”\textsuperscript{136} Consequently, these concrete rights require existence as institutionalized rights rather than background rights, and must become legal rather than some other form of value-based norm. Thus, rights become established in law.

\textsuperscript{134} This raises many issues on the process of how this hierarchy of rights develops. I address it below when Utilitarianism and Rawlsian justice conceptions are introduced into the rights-law framework.
\textsuperscript{135} Taking Rights Seriously, 91
\textsuperscript{136} Ibid., 101
Justice and Rights

Dworkin invokes Rawls’s famous Theory of Justice into the dialogue on rights at this point. Because Dworkin’s analysis of legal positivism notes that a society’s legal structure should not begin with an account of political organization, he begins instead with an end-type goal. That is, an ideal that consequently regulates the conditions under which governments may use coercive force over their subjects. This calls into question previous theories of rights development and how they are incorporated into law. John Locke and Jean-Jacques Rousseau are credited with providing the most comprehensive theory of the Social Contract within the modern West. Yet, these understandings of man and liberties as invoked by Locke and Rousseau are important to Dworkin, but he requires incorporation of Rawls’s original position for the development of equal respect and concern in the design of political institutions.137 It is not the goal of this section to analyze deeply the Rawlsian construction, but it is important to observe the necessary parts of it which Dworkin requires for his construction of liberty and equality into rights. By doing this, we will establish a more concrete understanding of the important placement of liberty and equality into the social contract of western democracies.

Rawls establishes two principles of justice from his ‘original position’

1) That every person must have the largest political liberty compatible with a like liberty for all,

137 Ibid., 182
2) That inequalities in power, wealth, and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members in society.

These are used to institute “a device for calling attention to some independent argument for fairness of the two principles.” The development of these principles is requisite in a moral society. Dworkin writes:

It is the task of moral philosophy, according to the technique of equilibrium, to provide a structure of principles that supports these immediate convictions about which we are more or less secure, with two goals in mind. First, this structure of principles must explain the convictions by showing the underlying assumptions they reflect; second it must provide guidance in those cases about which we either have no convictions or weak or contradictory convictions. If we are unsure…[of a particular issue], we may turn to the principles that explain our confident convictions, and then apply these principles to that difficult issue.

Thus, moral philosophy is established into the development of political society. While Rawls’s theory of justice does not directly incorporate the notion of rights as part of the process stemming from the original position, it does reflect on the conditions embodied in the description of the original position. Rawls’s uses the original position, albeit being hypothetical, as a method to take interest in principles, moral or otherwise. Rawls notes that the use of the original position allows us to

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138 Ibid., 153
139 Ibid., 155. By “technique of equilibrium” Dworkin talks about the technique of reflective equilibrium in Rawls’ argument which assumes that his readers have a sense that certain particular political arrangements or decisions are just, whereas other are unjust. (such as conventional trials as just, and slavery as unjust). More importantly, Rawls assumes that we are each able to arrange these convictions in an order that designates some of them as more certain than others.
“define more clearly the standpoint from which we can best interpret moral relationships. We need a conception that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us.”  

Rawls believes that theories similar to his original position can rest on a hypothetical social contract of some sort, whereas theories like utilitarianism cannot. Rawls believes that this differentiation – between theories that rest on, versus theories that are products of social contracts – are able to use the contract as a powerful argument for his principles because it embodies philosophical principles which we accept.

The purpose of this exploration into Rawls is for the reader to understand a model which takes the social contract as a hypothetical that positions rights before the law, and through a model of justice incorporation, rights are incorporated into the law. This provides a grounding in the debate concerning the War on Terrorism and the right of individuals against indefinite detainment, in that regardless of whatever legal construct they find themselves in, this fundamental right can and should exist outside and apart from legal constructs.

**Development of the Contract in Deontological Moral Theory**

Dworkin uses Rawls’s theory of the contract and its relationship to principles in a society to attend to and refine the distinction philosophers make between the two types of moral theories – teleological theories and deontological theories. Dworkin argues that “any deeper theory that would justify Rawls’s use of the contract must be a particular form of deontological theory, a theory that takes the idea of rights so

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140 Rawls, *Theory of Justice*, pp. 21-22
141 Ibid., *See generally* Chapter 30
seriously as to make them fundamental in political morality. Dworkin believes that deontology, and deontology only is able to give the contract the role and prominence that Rawls does, in particular with respect to rights. By understanding the deontological placement of rights within the social contract, we are better able to understand why Western democracies are inherently rights-based. This will provide a justification for the reexamination of the placement and value of equality and rights in our application of laws to ‘hard cases’ such as the universal right to due process confronted at present in the War on Terrorism.

The definition of goals, rights, and duties within a deontological theory of the contract is necessary for the complete understanding of the contract within a fundamental political morality. He defines a goal as a state of affairs within a particular political theory. These may be as specific as the concept of full employment or as abstract as a particular concept of human goodness. Rights to particular political acts are afforded to individuals if a failure to provide that act would be unjustified within the theory or if the goals would be dis-serviced by that act. Dworkin writes that an individual has a duty to act in a particular way if a political decision is justified within a theory.

Dworkin takes these concepts to work in different ways, all the while serving to justify or condemn, at least pro tanto, particular political decisions. “In each case,
the justification provided by citing a goal, a right, or a duty is in principle complete, in the sense that nothing need be added to make the justification effective, if it is not undermined by some competing considerations.”146 He uses these tentative initial classifications of political theories by constructing them as deep theories that might contain contracts as intermediate devices. Theories may be goal-based, duty based, or right-based, the last of which would, for example take a ‘right’ as being fundamental, such as the right of all men to be afforded the greatest possible liberty.

This construction then allows an understanding of rights as natural within Rawlsian theory Western government. Dworkin elaborates: “Any right-based theory must presume rights that are not simply the product of deliberate legislation or explicit social reform, but are independent grounds for judging legislation and custom.”147 This assumption that rights are natural allows the power rights to explain the power and unity of political convictions. Dworkin explains that the basic right of Rawls’s deep theory is necessarily an abstract right – not one of simply the right to liberty.

“Some writers have distinguished between a) equality as it is invoked in connection with the distribution of certain goods, some of which will almost certainly give higher status or prestige to those who are more favored, and b) equality as it applies to the respect which is owed to persons irrespective of their social position. Equality of the first kind is defined by the second principal of justice... but equality of the second kind is fundamental.”148

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146 *Taking Rights Seriously*, 170
147 Ibid., 177, emphasis added.
148 Rawls, 511, emphasis added.
Rawls is well aware then, that his argument for equality stands on a different footing from his argument for other rights within his theory. While simultaneously acknowledging that he does not set out the premises from which his conclusion on equality follows, he also notes that it is this development that places the basis of equality as the natural source of justice as fairness.\textsuperscript{149} Dworkin notes that this extension of justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect. As such, the right becomes a right they possess by virtue of existing as human beings with the capacity to make plans and give justice.\textsuperscript{150} As such, Dworkin contends that Rawls’s most basic assumption is not that men have a right to the same rights and liberties that Locke and Mill thought important, but that they have a right to equal respect and concern in the design of political institutions. This analysis has enabled us to inculcate rights into our system of government and its subsequent justice-serving institutions. Further, by incorporating Dworkin’s analysis of Rawls’s experiment, we can cement the principle of equality within the social contract.

\textit{Government, Rights, and Constitutions – The Trick of ‘Balancing’}

The concept of citizens having rights apart from what the law provides them has been rejected by some philosophers, most notably Bentham.\textsuperscript{151} To confront that rejection, Dworkin explores the implication that citizens have moral rights against their government. He notes that, in practice government will have the last word on what an individual rights are. Government has this ability because its police force and

\textsuperscript{149} Rawls, p. 509
\textsuperscript{150} Taking Rights Seriously, p. 182
\textsuperscript{151} See Bentham, The Principles of Morals and Legislation
executive departments enforce the decisions of the legislatures and the courts.

Dworkin asserts that the Constitution of a government is the fusion of moral and legal issues, validating into the law complex moral problems, such as that of the establishment of equality. Even if the Constitution of a government were perfect, it does not follow that the government could guarantee the individual rights of its citizens. Fundamental rights such as liberty call into question the ability of an individual to have protections against their government. Yet, Dworkin notes that “[t]hough the constitutional system adds something to the protection of moral rights against the government, it falls short of guaranteeing these rights, or even establishing what they are.”

Rights in the strong sense have been exemplified in the United States as fundamental and moral rights protected against the government in the Constitution. However, there is a key differentiation between legal and constitutional rights versus those which are moral. Neither legal nor constitutional rights represent the moral rights against the government so commonly imbued in Rights-based theories of liberty against the government.

This is key because it places this right apart from the law and the Constitution. Therefore, claims of governmental rights-infringement, such as those made by Guantánamo Detainees, have standing in that they do not necessitate a proper law in place to afford them the right to contest their detainment. In this construct, they as members of the global community have the ability to protest their indefinite detention.

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152 *Taking Rights Seriously*, p. 186
Rights against the government invoke a strong sense of conflict between the need of a government to protect rights of others, while not necessarily dis-servicing fundamental rights of a person. Dworkin asserts that “not all legal rights, or even Constitutional rights, represent moral rights against the government.”\textsuperscript{153} But a person who claims that citizens have rights against the government need not state that the government is never justified in overriding that right. Conflicts between rights often seen as fundamental – such as free speech – can come into conflict with the government’s need to maintain a peaceful and calm community. Difficulties ensue, as Dworkin notes:

\begin{quote}
“The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do, and the supposed gains in respect for law are simply utilitarian gains. There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits of our country would receive from overriding these rights when they prove inconvenient. So the general benefit cannot be a good ground for abridging rights, when the benefit in question is a heightened respect for law.”\textsuperscript{154}
\end{quote}

Thus, the plain reality of competing rights – both individual and societal – arises. In this case, Dworkin asserts that it is the job of the government to discriminate and prioritize between these competing rights.\textsuperscript{155} Yet, the existence of said rights against the government can be jeopardized if the government is able to defeat them by simply using the appeal that it is more important for the democratic

\textsuperscript{153} Ibid., p 194
\textsuperscript{154} Ibid., p. 193
\textsuperscript{155} Ibid.
majority to work its will. Dworkin believes that “a right against the government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse of for having it done.”\textsuperscript{156} In this model, competing rights must be acknowledged as only between the rights of \textit{individuals} in a society, and not simply by using the democratic majority as a trump card. In other words, a majority cannot simply invoke its importance as the mainstream in order to disqualify individual rights concerns.

Governmental definitions of rights – prescribed either by the Constitution or in its subordinate statutes – necessarily have to balance individual rights between the rights of the individual and the needs of society at large.\textsuperscript{157} As such, the government is able to calculate the social cost of different definitions and instances of rights and consequently make necessary adjustments in its definitions.

This balancing act has existed as a long legal history of analyzing and incorporating rights-based arguments into the statutes and amendments made after the original constitution. As society has changed, the government has necessarily adjusted this balance.

\textit{Requisites of Taking Rights Seriously}

Dworkin believes that scholars who profess to take rights seriously must have a sense of what the point in doing so is. He elaborates two ideas that must be accepted in order for this to occur. The first is the concept of human dignity.

Dworkin grounds this in a Kantian understanding, but believes that the concept of

\textsuperscript{156} Ibid., p. 194
\textsuperscript{157} Notice the difference between \textit{needs} of society at large versus \textit{rights of a society}.
human dignity has been defended by philosophers of different schools, supposes that there are ways of treating a man that are “inconsistent with recognizing him as a full member of the human community.”\textsuperscript{158} By asserting this claim, a scholar must hold that such treatment is profoundly unjust.

The second idea essential to taking rights seriously is the concept of political equality. This supposes that “weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.”\textsuperscript{159} Giving weaker members of society the right to influence and state their opinions on the betterment of the public good is not axiomatic, especially in that it is simply the right to be able to state your claim, and to be equally respected. Thus, the establishment of Rawls’s two principles is associated with placing original position into the context of rights against government, while the group concomitantly weighs competing rights against one another.

\textit{America and Taking Rights Seriously}

The flexibility of the American Constitution has provided for a great deal of debate concerning the position and role of rights in American governance and jurisprudence. The abstract doctrine of the Bill of Rights has rarely been taken to the logical extreme, and when it has, judges have been relatively quick to correct errors made.

While America will inevitably continue to be divided by social and foreign policy, concern for individual and societal rights against other individuals and against

\textsuperscript{158} Ibid, p. 198
\textsuperscript{159} Ibid., p. 198
the government itself, there must be the understanding that our laws and legal institutions can be contested, and not seen as an invariable conqueror’s law; that the dominant classes impose on the weaker, as Marx supposed the law of capitalist society to be. Dworkin believes that the bulk of the law cannot be neutral; that it must state the majority’s view of the common good. As a result, he views that the “institution of rights is therefore crucial, because it represents a majority’s promise to the minorities that their dignity and equality will be respected.”

Law must be sincere in its application of this gesture, most importantly when the divisions among views are most violent. Because, according to Dworkin, “If the government does not take rights seriously, then it does not take the law seriously either.”

It is necessary to address these questions of the position of rights within the laws and policies of Western democracy in the context of the War on Terrorism. While many of the contestations of the policies of the Bush Administration have been on issues of the application and legitimacy of laws concerning detainee’s rights, they do not address the deeper philosophical questions regarding the positioning of their rights in relation to our societal institutions of justice and equality. Our government promotes itself as one which is committed to the values of inclusion and equality. If that is the case, our prosecution of the War on Terrorism does not fit in with the ideological groundings the founders of America and notions of Western democratic theory established in documents such as the Bill of Rights and the Fourteenth Amendment.

160 Ibid., p. 205
161 Ibid.
PART 2 - RIGHTS AND THE DEVELOPMENT AND DIFFICULTIES OF THE NATION-STATE

The War on Terrorism has shed light on a severe gap between the values our government is founded on – those certain inalienable fundamental such as equality and human dignity— and how we defend the security of our nation. Hannah Arendt provides a unique view into why this is not unique to the current geopolitical emergency. Arendt placed theories of society into a historical analysis of the events and developments of the eighteenth through the twentieth centuries make her one of the most heavily cited thinkers of our time. Referencing her methodology of placing theory into history enables this thesis to better connect the problems concerning the indefinite detainment at Guantánamo Bay.

Arendt offers a unique perspective on the simultaneous evolution of rights-based politics and politically based rights in the modern Western state. Further, this opens the door to understanding the conflict between where we place our values as a nation against how we meet the needs for maintaining the survival of a state. The nation-state model furnished by the French Revolution propagated the notion of the inseparability of human rights and national sovereignty. In Arendt’s view, this combination is toxic and leads to a series of confrontations between the idea of what system most ably represented the notion of a guarantor of individual rights. Arendt points to the tens of millions of nationless people after the First World War, who were in principle rightless according to the French standard. She notes,
“The Rights of Man, after all, had been defined as ‘inalienable’ because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government… no authority was left to protect them and no institution was willing to guarantee them.”

Therefore, the French Revolution did not succeed in constituting a stable space for civic equality and freedom. She blames this on the French Revolution as having its primary energies directed towards ameliorating the suffering of the masses rather than instituting and protecting civil and political rights.

She contrasts this with the American Revolution, which she believed was able to effect the constitutio liberatis because the structures and institutions embedded within the American Constitution and the Bill of Rights were in effect agreed on by all, founders and ordinary citizens alike. Yet, these structures and institutions have not adapted as much as the global environment in the past century. This lack in institutional development has led to a severe deficit in the application of the rights they were founded upon.

Arendt stresses the importance of these structures and institutions as central for the development of how distinct parts of social contracts are placed within modern society. Margaret Canovan paraphrases Arendt’s view on the importance of structures and human civilization:

For to be human beings, (not just members of the natural human species) we need to inhabit a man-made world of stable structures. We need these to hedge us about with laws, to bestow rights upon us, to give us a

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standing in society from which we can form and voice opinions, to allow us to access to the common sense that comes with a shared reality.¹⁶³

Arendt viewed this combination of stable structures in modern society inherently led to grave problems in the western vision of the nation-state idea. Arendt asserted that:

“The state inherited as its supreme function the protection of all inhabitants in its territory no matter what their nationality, and it was supposed to act as a supreme legal institution. The tragedy of the nation-state was that the people’s rising national consciousness interfered with these functions. In the name of the will of the people the state was forced to recognize only ‘nationals’ as citizens, to grant full civil and political rights only to those who belonged to the national community by right of origin and fact of birth. This meant that the state was partly transformed from an instrument of law into an instrument of the nation.”¹⁶⁴

Thus, Arendt views the state as conquered by the nation. The civil and political rights were consequently only granted to citizens, and no longer regardless of nationality. Arendt characterizes this as the “secret conflict between the state and the nation,” which occurred at the very moment the French Revolution combined the Declaration of the Rights of Man with the demand for national sovereignty. Rights, previously believed to be the inalienable heritage of all human beings, were simultaneously incorporated as specific to the heritage of a nation. She elaborates:

“The same essential rights were at once claimed as the inalienable heritage of all human beings and as the specific heritage of specific nations, the same notion

was at once declared to be subject to laws, which supposedly would flow from the Rights of Man, and sovereign, that is, bound by no universal law and acknowledging nothing superior to itself. The practical outcome of this contradiction was that from then on human rights were protected and enforced only as national rights and that the very institution of a state, whose supreme task was to protect and guarantee man his rights as a man, as citizen and as national, lost its legal, rational appearance and could be interpreted by the romantic as the nebulous representative of a ‘national soul’ which through the very fact of its existence was supposed to be beyond or above law. National sovereignty, accordingly, lost its original connotation of freedom of the people and was being surrounded by a pseudomystical aura of lawless arbitrariness."\textsuperscript{165}

This identification of nationalism as the perversion of the state as a protector of fundamental rights leaves modern political reality as missing the principle which would develop rights as universal, thereby protecting citizens of the world.

Rights became fragmented and divided by different conceptions and applications from state to state. Even in the post-Geneva Conventions world we know today, rights continue to fall short of universal application aside from vague treaties established by a body that for all intents and purposes is purely legislative: The United Nations.\textsuperscript{166}

\textsuperscript{165} Arendt, \textit{Imperialism}, p. 110-111, pp. 152, 155, 170-172
\textsuperscript{166} While I understand that this is certainly a strong statement, I contest that it is not axiomatic. It is the purpose of this thesis to provide an understanding of the application and heeding to international treaties such as the Geneva Conventions, thereby noting their need for a significant readdress.
Towards an International Community?

Canovan associates this analysis of the “conquest of the state by the nation,” as a notion drawn from J.-T. Delos’ two-volume *La Nation*. Arendt saw the need to find a political principle that would lay the fundamentals of an international community that could protect the civilization of the modern world. This conflict between nation and state represented two opposing principles. Arendt writes:

A people becomes a nation when [it arrives at a historical consciousness of itself]; as such it is attached to the soil which is the product of past labor and where history has left its traces. It represents the ‘milieu’ into which man is born, a closed society to which one belongs by right of birth. The state on the other hand is an open society, ruling over a territory where its power protects and makes the law. As a legal institution the state knows only citizens no matter of what nationality; *its legal order is open to all who happen to live in its territory.*\(^{167}\)

By associating one’s self to a national society by right of birth, Arendt saw opposition in the legal institutions that were meant to protect human rights. The establishment of the sovereignty of a nation transformed the state into an instrument of the nation. Inherent forms of national identities, most importantly that of fundamental rights associated with the nation, necessitated the force and power of the state to enact them. In analyzing Arendt’s texts of *Imperialism* and “The Nation,” Canovan notices a distinct vacillation on the question of whether the state corrupts the nation or the nation corrupts the state. She concludes however, that the differentiation

\(^{167}\) Arendt, “The Nation” Ibid., p. 139, emphasis mine.
is unimportant, because in either case, the fusion of the two is fatal, with the imperialistic ambitions of the state claimed on behalf of the nation.”

It still remains to be diagnosed as to how exactly the state is the protector of rights of persons within its territory. Arendt offers an answer:

“The state, far from being identical with the nation, is the supreme protector of a law which guarantees man his rights as man, his rights as citizen and his rights as a national… Of these rights, only the rights of man and citizen are primary rights whereas the rights of nationals are derived and implied in them.”

What solutions are available then, to this deep issue Arendt has expanded upon in her writings? How can the rights of man be combined with national sovereignties? These are questions that continue to plague the world of human rights today and necessitate resolute answers. Arendt makes key distinctions between the citizen and the national; between political stability and national calm. Arendt believes that “by putting a man as a national in his right place of public life, the larger political needs of our civilization … would be met with the idea of federation. Within federated structures, nationality would become a personal status rather than a territorial one.” This solution, will be addressed in the final chapter of this thesis, as the concept has only been seen as theoretical to date.

Canovan notes that the lesson of the “ghastly politics” of the twentieth century is that universal human rights are meaningless unless they are rooted into a national community that is committed to enforcing the same rights for its co-nationals – that

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168 Margaret Canovan, “Arendt and Nationalism”
169 Arendt, “The Nation” p. 140-141
the “fundamental ‘right to have rights’ presupposes some particular state agency that will guarantee human rights only for those it considers to be properly its own members.”

Arendt clarifies much confusion as to how rights have been established in modern western political theory. Her assessment of there being a very distinct difference between the state and the nation provides an important and unique view as to why rights have been so difficult to establish both concretely within national politics but also abstractly on a universal scale. The truth is, I think, rights are not defined except by people who insert them into documents and treaties, they are inherent in said documents. The issue comes about when the breadth of certain rights confronts the national boundaries of modern governments. Clearly, even from a more critical standpoint, rights have not been universally established in any manner, and may very well necessitate a reorganization of the modern political structures and institutions in order to achieve such an establishment.

**CONCLUSION**

The goals of this chapter were to assert rights as primary to law, and to therefore place them as only activated by legal structures. Through the course of the twentieth century however, flaws were seen in the applicability of nation-state protection of rights, and a new global system of rights protection developed. While this chapter strongly advocated a philosophy of law provided by Ronald Dworkin, it did so striving to absorb his core principle that every person is entitled to equal

\[171 \text{Arendt, } Imperialism, \text{ p. 176, and Canovan, p. 53}\]
concern and respect in the design and structure of a society. Through this, the chapter achieves a non-constitutional law model of why equality should be principle in rights-based jurisprudence. It is this form of thinking that will allow Guantánamo detainees the access to rights-protection they so desperately seek. It is now time to turn to analyzing the different institutions that have protected these fundamental rights within American society. By doing so, readers will be better able to achieve an understanding of what institutional resources Guantánamo detainees are able to utilize in contesting their indefinite detainment.
CHAPTER III
RIGHTS IN AMERICA: A THEORY OF TWO CONFLICTING REGIMES

INTRODUCTION

Rights exist in a unique landscape within the laws and society of the United States. They simultaneously exist as laws that have been ratified and passed on through nearly three centuries of American legislation and jurisprudence, but also as something more than that – as laws embedded within a global political realm. This combination has created tensions and discrepancies in how both scholars and the courts view rights-placement within contemporary American law and society. Specifically, claims to habeas corpus rights have often focused on the legitimacy of the power of the executive to detain an individual. The Great Writ of Habeas Corpus is understood as one of the fundamental rights one has to contest unnecessary detainment. It must, however, place itself in the context of a rights-guaranteeing institution. In this case, that means either the laws and courts of the United States, or the internationally-approved Geneva Conventions regarding the security of individual rights within a settings of armed conflict. Consequently, analysis in contemporary courts has based its decisions on both institutions when interpreting the rights-based issues concerning unlawful or inappropriate detention.

The failure of these decisions to gain much reaction or respect from the executive branch hinges on the fact that the institutions and structures, which hold direct power over these detentions, are themselves situated between two rights
regimes. The first, the regime of rights-based theories embedded within the domestic laws of the United States, comes from the theory of individual representation based in the concept of the democratic, of a citizens rights against the unjustifiable intrusion of the government in their lives. This relationship is firmly established in the American Bill of Rights (hereafter simply ‘Bill of Rights’), as well as in the structure of the constitution, which govern relations between the different branches of government.

The second set of deeper rights-based claims that exist in the background of the history of the United States have become increasingly important in the last century. These rights, not based on a person’s membership as a citizen of the United States, exist instead beyond this domestic conception of rights. National claims of rights may hold true to the pure conception of representation, but there is another set of legally prescribed rights afforded internationally through the Geneva Conventions. These laws, which have been ratified by virtually every nation on the planet, concern the laws of war and the protection of individual rights during periods of armed conflict.

Given the set of international circumstances following World War II, it was agreed upon to create a set of standards in order to protect the dignity and humanity of all persons affected by armed conflict of international scope. For rights to have power, as we saw in Chapter 2, they must also have structures and institutions to enforce and protect them. While previous documents, such as the French Declaration of Rights and Man and the American Bill of Rights were strictly tied to nation-state
institutions whose power ended at the borders of their territory, they did not address how these rights could have definition and application beyond the domestic territory.

Thus, a second set of rights regimes developed. This global rights-guaranteeing structure of treaties and acts was heavily influenced by a combination of a theoretical understanding of rights as well as the more pragmatic circumstances surrounding modern armed conflict.\textsuperscript{172} Yet, the development of a global conceptualization of universal of rights was not possible until a cohesive global institution arose. The creation of the United Nations allowed for a theory of human rights to gain structure and definition on a global level. As such, the platform for human rights dialogues emerged and was enforced via the structure of the institution.

Though these two rights regimes operate concomitantly in modern nation-state politics, they do not exist in the same landscape. Consequently, there is a lack of dialogue that merges them uniformly together. Instead, each regime tries to integrate the other into itself. Academic scholars on either side of the fence often fail to obtain consensus on how these dilemmas can be solved within the current geopolitical landscape. Efforts are therefore often unsuccessful, leaving many important questions regarding the conflicting rights regimes unanswered, thereby resulting in no concrete solution to the dilemmas of their mutual existence.

This chapter seeks to understand the development of these two rights regimes – that of the rights established by the domestic laws of the United States, and those created

\textsuperscript{172} By “modern armed conflict” I mean the forms of conflict used in WWII. Central to my argument however, is the fact that there is a gap between these “laws of war” and the scenario of the Global War on Terrorism.
and legislated via the Geneva Conventions embedded in the institution of the United Nations and its treaties – with respect to the relationship between the American Government and the individual.\textsuperscript{173} I will begin by outlining the importance of rights to the relation between the American government and the individual, with respect to American laws. I then continue to discuss important issues and events in the expansion of rights-based claims to non-citizens of all degrees.\textsuperscript{174} I then set aside the difficulties raised in this extension of rights-based claims, leaving it for the final chapter of this thesis.

Next, I chronologize the development of the United Nations, paying specific respect to the role of rights within it as a supranational institution. Understanding that there were international protections and treaties that existed prior to the indoctrination of the treaties in the United Nations, I will assess the importance of creating an global institution that seeks to legislate and protect rights. In part three, I discuss how the introduction of a global rights-based dialogue – as a rights-minded laws of war structure – has affected United States constitutional law and its own right-based claims. I conclude this chapter with a discussion of how these two regimes fail to interact both structurally and pragmatically. This will set the stage for the discussion of scholarly recommendations of how this can be resolved concerning the issues of

\textsuperscript{173} I say “individual” rather than ‘citizen’, because this language is key to the expansion of rights-based claims and understandings, both domestically and internationally. When key differences arise, I will make these distinctions, as they are undoubtedly important to the protection and extension of rights afforded to those under the power of the United States government.

\textsuperscript{174} Noncitizens are the class of persons who can legally be defined as permanent resident, legal resident, visiting alien, or illegal resident. These distinctions will become clearer below in this chapter.
detainment and human rights raised with the war on terrorism I lay out in the final chapter of this thesis.

**AN ‘AMERICAN BILL OF RIGHTS’**

While this thesis has discussed the formation of rights within a social theoretical framework in Chapter 2, it is important to understand the particular development and creation of rights within the specific context of U.S. constitutional law. This will set the scene for the current controversy of detainment rights within the War on Terrorism. Because rights-based claims against the government are forced to go through the formalized process in the American courts, reaching from the statutes and laws set forth for local governance and policy to the highest reaches of the Supreme Court of the United States, it is important to see the context and reasoning for which rights have been established as an important and integral part of the laws of the United States.

The establishment of the Bill of Rights was controversial because many feared the implications it would have on the rights of persons in American society. It survived this debate because the Founders grew to understand the need for a document which expressed the “dominant ideas concerning the relationship between the individual citizen and the government.”

According to early American scholars, the Framers saw the Bill of Rights as “the statement of broad principles rather than as

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a set of legally enforceable rights."\textsuperscript{176} This created a sketch of broad outlines concerning the relationship between individual liberty and community. Instead of a specific enumeration and list of protected liberties, it is a blueprint of the ideal relationship between liberty and community.\textsuperscript{177}

This balancing of competing interests – those of the individual against those of the community – is expressed specific liberties against the public interest. Individual provisions such as the First Amendment are key when it comes to the protection of individual rights regarding the development of a community that seeks to embrace democratic participation and representation. Other provisions, such as the Fifth, Sixth, and Eighth Amendments clearly point out the need for protection against the potential of unjust intrusion by the government into an individual’s personal sphere. The constitution therefore is a document that “consists of a complex of value judgments the framers wrote into the text of the Constitution and thereby constitutionalized.”\textsuperscript{178}

Kommers, Finn and Jacobsohn provide insight into what this blueprint means for the progress of American constitutional law and jurisprudence:

“A Bill of Rights, therefore, is important not only for the specific protections it promises, but also for what it tells us about larger issues of constitutional politics. Implicit in a Bill of Rights are assumptions about human nature, the source and scope of individual rights,

\textsuperscript{176} Quoted in James A. Henretta, \textit{The Nineteenth-Century Revolution in Civil Liberties: From “Rights in Property” to “Property in Rights.”} 19 This Constitution 13 (Fall 1991)

\textsuperscript{177} Kommers, Finn and Jacobsohn, \textit{American Constitutional Law}, (Lanham, MD, Rowman & Littlefield, 2004) p. 425

\textsuperscript{178} Michael J. Perry, \textit{The Constitution, the Courts, and Human Rights}. (New Haven: Yale University Press, 1982) p. 10. Quoted in Kommers, Finn and Jacobsohn
and the relationship of the individual and community."\(^{179}\)

Constitutional interpretation involves a reconciliation between individual rights and the needs of the larger community. Indoctrinating these rights in a communal document creates the same difficulties associated with the debate surrounding legal positivism addressed in Chapter 2. Regardless, the Constitution can be seen as a rights-based legal system. According to Kommers, Finn and Jacobsohn, “If the community is the source of liberty and property – if, in other words, those rights exist because they are the product of democratic agreement – then the community’s authority to regulate them is arguably greater than it is if such rights have an existence independent of the Constitution.”\(^{180}\)

This thesis argues differently: instead of believing that the Bill of Rights is the \textit{source} of liberty, I align with the view that it instead only acknowledges that liberty is \textit{derived} from the human condition. This provides for a direct justification for inferring additional rights not expressly mentioned in the constitution. More specifically, by universalizing the context of these rights, I allow them to extend to persons who might not be directly included in the constitution, such as noncitizens. The American Bill of Rights in my view creates an image of the human person as an autonomous, free individual who exists in a state of tension with the larger community. Thus, in the United States, we become forced to reconcile a desire for individual liberty

\(^{179}\) Kommers, Finn and Jacobsohn, p. 425
\(^{180}\) Kommers, Finn and Jacobsohn, p. 430
against the need for public order – between one’s longing for personal autonomy and
the needs of the community.

It is evident then, that the Bill of Rights is quite distinct in purpose and use
than the Constitution. Key differences between the documents represent similar
concepts to the Rawlsian conception of primary and secondary provisions addressed
in Chapter 2. If the Constitution is focused on the state, then the Bill of Rights is
focused on civil society. Michael Walzer, in What it Means to be an American,
writes that the Bill of Rights is “meant to fix the boundaries of future state action: all
that is most valued in civil society lies on the other side, off limits.” Consequently, we
have a Bill of Rights that supports a diverse and pluralistic society. Rather than being
explicitly functional to our society through a meticulous list of liberties and
provisions, it expresses the sensitivities and aspirations of the members.\footnote{181} Walzer
believes that the first ten amendments are acts of self-defense on the part of potential
non-conformists and dissidents. He sees them as a collective effort to guarantee
diversity.\footnote{182}

The values and principles inherent in the Bill of Rights as are used to describe
the purpose of the machine we call government. “Once it was said that the
government must not violate individual rights as it goes about its business. Now it is
said that the chief business of the government is to realize rights.” This adaptation of
thought is a theoretical ‘sea-change’ as Walzer puts it, which occurred by the
“discovery (and self-discovery) of the invisible men and women of the twentieth

\footnote{181}{Walzer, What it Means to be an American (Marsilio Publishers, 1996) pp. 106-112}
\footnote{182}{Ibid., p. 112}
century civil society. For these people, the first ext of the constitution provides an agency, and the [Bill of Rights] a mandate, for social change."\(^{183}\)

If that is true, then one must seek to understand how an American society that originally only provided certain rights to wealthy land-owning white men, has transitioned to a nation where almost all rights, save the most protected right of franchise, are afforded to any person under the power of the government. Further, with the advent of globalization, how does this ‘sea-change’ respond to the extension of law enforcement and intelligence agencies’ activities across borders? If these are truly inalienable rights that belong to all of humanity, then where does it exist when discussed in terms on noncitizens? These will be addressed further below, but first it is necessary to understand the placement of rights in America.

**Placement of Rights in America, a Brief Overview**

Rights-based protection in the United States originally centered on an individual’s possession of citizenship. This possession was invoked in early laws to convey a state of democratic belonging or inclusion. Certain scholars however, view this inclusion as being premised on a conception of a bounded and exclusive community.\(^{184}\) This does not fit well into the historically inclusive nature of the United States. Here, we tend to view a difference between what the borders of our community are and whom our laws protect. Central to current debate about the dynamics and reaches of citizenship-based rights has been the concept of the ‘national

\(^{183}\) Ibid.,
community’. As the United States progressed from the late eighteenth through the
nineteenth century, citizenship possession moved away from being the litmus test one
needed to pass in order to make rights-based claims in our American community.
Instead, social, legal, and civil rights extended to noncitizens throughout the country.

Much of this has been a result of the extension of legal avenues for making
rights-based claims due to the ratification of the Nineteenth Amendment as well as
the Habeas Corpus act of 1867. The progression of rights inclusion to minority
groups and noncitizens was slow, and relied on the courts to define the extension of
rights-protections as cases came along. As will become evident in this section, this
has created the gap between understandings of the boundaries of rights-based
citizenship in the Marshallian tradition, and the social theoretical arguments for
laws that push for rights-based theories regardless of citizenship.

Linda Bosniak’s The Citizen and the Alien questions the boundaries of rights
between these two groups and addresses many of the concerns raised regarding the
need for laws protecting non-citizens. Continuing this line of theorizing rights
placement with citizenship, Peter Spiro suggests in Beyond Citizenship a new vision
of citizenship that is not bounded by borders, nor defined by nationality. While his
argument does not conclude with a recommendation for cosmopolitanism, it does
address the progression of actual rights-based claims in United States’ history. After
reviewing the inward-looking notion of the development of rights-based claims in

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185 Nineteenth Amendment of the United States Constitution, and Habeas Corpus Act of 1867, 14 Stat. 385 (1867)
United States history, it is necessary to contrast that with the globalization that has grown at an alarming pace in the second half of the twentieth century.

Such globalization was not only economic – the academic field most commonly associated with the term – but also represented an exponential increase in the landscape of wars. A new institution was needed to guarantee a certain code of conduct in the laws of war – a code universally agreed upon by all ratifying members. This code of conduct centered itself on rights-protection and a concern for protecting individual dignity and freedom. The creation of the United Nations pushed against the boundaries of formerly understood notions citizenship and rights. This creation will move into the final section of this chapter, which addresses the creation of a new, global human rights-protecting institution and regime. This regime, established by the development of the United Nations as an institution, pushes against the domestic rights regime of American society reviewed above.

**AMERICAN CITIZENSHIP**

Understanding the meaning of citizenship is necessary because without it, we have no place to which rights can relate. The great classics of modern political theory followed the Aristotelian view that citizenship is defined in the constitution of a land in relation to the process of the democratic republic. However, this version of political representation and franchise is not the only way citizenship is recognized in modern society.
In any modern state, citizenship primarily refers to nationality. Within the modern state, citizenship as nationality is the legal recognition – both domestically and internationally – that a person is a member of a state, either native born or naturalized. Judith Shklar believes that such a form of citizenship is not trivial.\(^{187}\) We are reminded of Arendt’s understanding of the dire condition of statelessness experienced by millions of Europeans post WWI. Shklar writes: “To be a stateless individual is one of the most dreadful political fates that can befall anyone in the modern world.”\(^{188}\) Citizenship within Shklar’s society is therefore integral to achieving inclusion into the community. Views often differ regarding citizenship, however, and in particular they differ on conceptions of how citizenship is actualized in the community. To Shklar, many people incorrectly view citizenship solely within nationality and therefore only as a legal condition, consequently not referring to any political activity. Yet, the reality is that citizenship applies to people of a community who are engaged in political participation and active in the progress of public affairs. To Shklar, “the good democratic citizen is a political agent who takes part in politics locally and nationally, not just on Election Day.”\(^{189}\) We see therefore, a variety of views on what citizenship means to scholars, politicians and the average citizen. Linda Bosniak puts it in the following manner:

\(^{188}\) Ibid.
\(^{189}\) Ibid., p. 5
“We cannot think productively about constitutional citizenship in substantive terms without addressing the question of citizenship's formal subjects as well. We cannot address constitutional citizenship conceived as rights without being likewise mindful of the allocation and effect of national citizenship status.”

Shklar describes four distinct yet relatable meanings of citizenship. These are: citizenship as standing in society, as nationality, as active participation or ‘good’ citizenship, and lastly as ideal republican citizenship. To Shklar, American citizenship has varied in its exclusions and inclusions over the course of history. Yet, it is the first which has caused much of the expansion of rights-based claims away from citizenship. By using citizenship as a notion of standing, the delineation of certain protections afforded to citizens stands in direct contrast to the principles of equality and fairness available to all persons – not just citizens – as expressed in the Bill of Rights. Recognizing citizenship as standing does not effectively create a unified understanding of rights placement within citizenship – it inherently creates a hierarchical distinction of rights-protection. To limit citizenship as to only a definition of a person’s standing within society, we are able to test the notion against the concept of universal human rights. Then, we will understand that hierarchical society degrees of citizenship-based rights are no longer representative of our wishes regarding the placement of rights. For, if rights are based in citizenship, they clearly cannot be universal.

191 Ibid., p. 3
A – Citizenship as Territory-based Nationality

Much of the contention between citizens and noncitizens throughout the history of the United States has dealt with application of rights-based claims within the territory. In her book *The Citizen and the Alien*, Linda Bosniak delves into this difficult comparative study of the relationship and dynamic between the two groups. In order to place a theory of rights with citizenship, Bosniak puts forth a construction of the importance of alienage resting on the historical importance of citizenship.

Bosniak writes, “Although the lives of aliens are significantly shaped by reference to citizenship's universalist commitments, citizenship's nationalism also fundamentally structures their status and experience.”\(^{192}\) She believes that because citizens are full members of the national community, aliens are “by definition those outside of the community.”\(^{193}\) This inward/outward concept of citizenship allows her to explore the dynamics and interplay of existing either inside or outside of the national community.

The usual assumption is that citizens and aliens each apply to a different jurisdictional sphere or domain. Bosniak explains that citizenship's *nationalist* commitments are relevant at the borders, facing outwards, while citizenship's *universalist* commitments are relevant within the community, facing inwards.\(^{194}\) This provides a context for why our constitutional legal history has been deemed undoubtedly inclusive, expanding the rights provided to persons within the territory and under the colors of United States power.

\(^{192}\) Linda Bosniak, supra note 19. p. 1294
\(^{194}\) Bosniak, supra note 19. 1321-1322
Combining the concept of citizenship with the notion of solidarity allows for the inward/outward explanation. Through integration into the national solidarity as being possible by reaching citizenship creates a “normatively privileging identification with, and solidarity toward, compatriots [and therefore] presumes the existence of a class of non-national others who are necessarily excluded from the domain of normative concern.” By breaking down the idea of citizenship into different forms, Bosniak creates an understanding of notions which have traditionally been associated with direct nationality and citizenship as potentially extending outwards. She writes: “even rights-bearing citizens themselves are not a monolithic group: the class of persons enjoying what Marshall termed civil citizenship, for instance, is not always, and has not always been, the same as the class of people enjoying political or social or cultural citizenship.” Thus, in the United States especially, the notion of rights become associated with citizenship. Enjoyments of the benefits associated with the protection of a society often do not require citizenship to be achieved.

The inclusive nature of the United States has created an environment where one needs only to be territorially present in order to enjoy many of the same protections afforded to full members of the society. Many modern interpretations of the laws restricting the powers of the state understand these as protections for persons’ rights, not just citizenship.

195 Ibid., p. 27
196 Ibid., p. 27, Also, see T.H. Marshall, Citizenship and Social Class.
197 See Michael Walzer, Spheres of Justice
We therefore move away from the traditional Aristotelian legalist understanding of citizenship defined as residents of a population who are adults with full political rights. Our constitution doesn’t envision an aristocratic or oligarchic view of rights; there is no legally-constructed pyramid of rights-based privileges that are only afforded to a minority community. Nevertheless, the gap between rights afforded to citizens and those afforded to aliens has shifted over time, narrowing as constitutional interpretation and judicial review have shifted over time. Civil liberties have extended themselves to being available for aliens over the course of the United States’ history. This fits with many theorists view of how civil liberties should extend towards noncitizen residents in a society.

**B – The Fourteenth Amendment – A Dramatic Expansion of Rights in America**

Constitutional scholar Alexander Bickel stands among many others in arguing that citizenship status should be treated as fundamentally insignificant in the American constitutional order. This is reflective of a deep divide in American law over the significance of the status of alienage for the allocation of rights and benefits. The Supreme Court has characterized alienage as a legal status that is an illegitimate basis for discriminatory treatment.

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198 See, Aristotle: *Politics, Book III* especially.
199 See Michael Walzer, *Spheres of Justice*
200 Bickel, Alexander, *The Morality Of Consent* 36 (Yale Univ. Press) 1975
The Fourteenth Amendment dramatically impacted the scope of a domestic rights regime in the United States. Through its opinions, the courts have allowed rights such as the right to Equal Protection and Due Process to extend to noncitizens interpreted its protections. *Yick Wo vs. Hopkins* (1886) was the first case that pushed the boundaries of rights-based claims to more than just citizens. The majority ruled:

> “Not confined to the protection of citizens…. These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality…. The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”

Issues remained however, concerning just how far these protections should extend. Scholarly adoption of a robust reading of constitution citizenship presumes a **dual conception of Fourteenth Amendment citizenship.** In this meaning, the Amendment's provisions work simultaneously in designating the class of persons entitled to citizenship and to setting out a substantive vision of citizenship rights. For Bosniak, this dual conception introduces a problem:

> “Citizenship status is not, in fact, always an antecedent to citizenship rights. While citizenship status is a condition precedent for the enjoyment of some rights, there are many rights that many citizenship revivalists would want to characterize as rights of citizenship… Such rights have been regarded, instead, as attaching to

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201 *Yick Yo v. Hopkins* 118 U.S. 356 (1886)
persons-territorially-present persons, often through the constitutional values of equal protection and due process.

Increasingly, however, rights that scholars now regard as integral to citizenship were once denied to status citizens through court decisions maintaining that such rights fell outside the core substantive requirements of citizenship. Bosniak notes that this conception of citizenship as status does not always serve “as the ground floor in the larger edifice of constitutional citizenship.” Instead, she believes that the two concepts of rights and status are relatively autonomous.

The importance of the Equal Protection Clause in terms of the constitutional protections extending to aliens has been hotly contested throughout the history of the United States. While there are questions that regard the substance of citizenship, invoking the Equal Protection Clause is a means of extending substantive rights to noncitizens is a striking position. Constitutional scholar Kenneth Karst urges the retention of the Equal Protection Clause as the textual site of the equal citizenship principle precisely because it does not limit its protective scope to citizens. While this seems paradoxical, Karst explains that in his view, “for most purposes aliens are entitled to be regarded as respected participants in our national society, even though they lack citizenship in the narrow sense. The broader principle of equal citizenship

202 Bosniak, supra note 19, p. 1305
203 Ibid.
204 Ibid.
205 Ibid. p. 1285 Bosniak clarifies that this “concept of ‘relative autonomy’ has often been used to describe the nature of a relationship between social domains or phenomena in empirical terms; it is meant to convey the idea that two domains (or phenomena) are neither entirely reducible to one other, nor entirely independent. The term has its origins in Marxist thought, and was a key concept of Critical Legal Studies’ accounts of law’s relationship to other social fields.” n83, supra note 19.
extends its core values to noncitizens because for most purposes they are members of our society.”

For Kast this is an important virtue of the constitution because it signals a source for understanding the inclusive nature of our society.

For, if we are an exceptional form of democracy, should we not extend rights that we view as important to noncitizens? If we are to recommend the application of constitutionally defended rights to noncitizens in the context of the Global War on Terror – as this thesis attempts – we must understand the context for applying rights-protection to any noncitizens within American history. While there is a difference in context, it must be that rights-protection can be provided to territorial aliens if we want to follow that rights-protection should exist in an extraterritorial setting.

The disagreement on alien rights-protection began with the idea that illegal aliens could not invoke the Constitution in an effort to protect them from the “express will of the sovereign.” This position was argued in Wong Wing v. United States (1896), where the federal government argued that the Court had the “right…to deny the [alien] accused the full protection of the law and Constitution against every from of oppression and cruelty to them “by virtue of their status as aliens.”

This was held on the belief that the government should not be confined to imposing punishment as an accessory to effectuate its will by the limitations of a Constitution which was not made nor intended for all humanity, “nor to operate as a restriction on

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207 Bosniak, *The Citizen and the Alien*, p. 38
208 Wong Wing v. United States, 163 U.S. 228 (1896)
the Government to protect foreigners against its action in political matters” but
instead was established by the people of the United States for their own benefit and
the benefit of those lawfully within the territory of the nation. The Supreme Court
rejected the Government’s argument, writing that "[i]t is not consistent with our
theory of government that the legislature should, after having defined an offense as an
infamous crime, find the fact of guilt and adjudge the punishment by one of its own
agents." In other words, the court recognized a sphere of constitutional protection for
aliens beyond the domain of immigration regulation. This case is landmark, because
it set opened the floodgates for noncitizen consideration in laws outside of those
explicitly concerning immigration regulation.

C – Recent Supreme Court Cases – Pre-9/11 Conceptions of Extension of
Constitutional Rights-Based Claims on Behalf of Aliens

Further expansions of Fourteenth Amendment Protections occur more
recently in the late twentieth century. In Plyler v. Doe, a case which dealt with
whether or not aliens should receive free education through state funding in Texas, the
court ruled that although a standard of intermediate scrutiny was to be used in
balancing state and individual interests,

“The Protection of the Fourteenth Amendment extends
to anyone, citizen or stranger, who is subject to the laws
of a state, and reaches into every corner of a state’s

209 Ibid.
210 Yick Wo v. Hopkins
211 Intermediate Scrutiny in U.S. Constitutional law is a method of judicial review that is
used to determine the standards of important governmental interests and whether or not they
are met furthered by substantially related means.
territory…. Until he leaves the jurisdiction – either voluntarily or involuntarily in accordance with the Constitution and the laws of the United States – he is entitled to the equal protection of the laws that a state may choose to establish.”

But if this is the case where the individual is subject to the protections of the constitution and the laws of a state by means of territorial presence, question remain when put into terms of law enforcement methods extending beyond our own territorial presence. While this argument understands the aliens in question as within the territory of the United States, the concept was expanded in 1989.

In United States v. Verdugo-Urquidez, the court was asked whether aliens in other countries who are being tried in a United States criminal case could use the protections of due process in their case. Verdugo-Urquidez, a Mexican citizen and resident, was arrested for various narcotics-related offenses. His Supreme Court case questioned whether searches of his house done without a U.S. warrant were applicable to the United States criminal process (viz., within the sphere of the Fourth Amendment’s Search and Seizure Clause.) United States v. Verdugo-Urquidez ruled that the United States Constitution, and especially the Fourteenth Amendment concerns the ‘people.’ Justice Rehnquist delivered the majority opinion, in which deemed that the Constitution

“suggests that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who

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have otherwise developed sufficient connection with this country to be considered part of that community.”

Chief Justice Rehnquist is the first to rule that both illegal and resident aliens may be included as part of the community that is within the nation, yet foreigners with little or no connection to the United States are not under jurisdiction of the Constitution. Most importantly, Chief Justice Rehnquist articulated a theory of the Four Amendment based on the idea of “a social compact under which only those aliens with a sufficient connection to the United States are entitled to constitutional protections.”

With regards to more recent Supreme Court cases regarding the difference of rights-based claims between citizens and aliens, Zadvydas v. Davis is relevant in that it provides the last major court decision made on immigration law before the September 11th attacks of 2001. The Supreme Court was considering whether a U.S. Statute concerning appropriate detention periods for aliens being removed from the country gave the Attorney General permission to detain illegal aliens indefinitely in cases where their home countries were not willing to accept them back. The court ordered illegal aliens substantive due process rights – an order never given before. Critics such as Gerald Neuman argues that this was an unprecedented step in

214 Ibid.
216 Zadvydas v. Davis 533 U.S. 678
the direction of immigration law for the court, and that its ruling was far too vague in terms of the rights for more established minorities.\textsuperscript{218}

Critics argued that the Court was overstepping Congress’ purpose of protecting the country from “aliens who may present danger to America's communities.”\textsuperscript{219}

Expanding the reach of Constitutional rights available to aliens has not been a steady path. Shklar notes that this concept of anti-liberal dispositions that have asserted themselves against equal rights that were

“contained in the Declaration of Independences and its successors, the three Civil War amendments. It is because slavery, racism, nativism, and sexism, often institutionalized in exclusionary and discriminatory laws and practices, have been and still are arrayed against the officially accepted claims of equal citizenship that there is a real pattern to be discerned in the tortuous development of American ideas of citizenship. If there is permanence here, it is one of lasting conflicting claims.”\textsuperscript{220}

These questions place the role of the Constitution against the advent of globalization and the increasing transnationality of both individual geographic presence and identity. Shklar notes, “The task of building a clear and candid system of graduated protections for aliens has never been more urgent, for the Court doubtless will be asked over the next few years to rule on many Constitutional questions posed by the nation's response to the grave challenge of foreign

\textsuperscript{219} Suffolk law journal, also n47 from it.
\textsuperscript{220} Shklar, \textit{American Citizenship}, p. 12
terrorism.”221 For, as law enforcement continues to spread across borders, so too must concern for the placement of rights-based claims with theories of justice.

While much of the legal jurisprudence surrounding the rights of noncitizens has considered persons who have a history of being geographically present within even the strictest interpretation of United States territory, analyzing the struggle of extending these rights is useful in understanding how the regime of constitutional rights in the United States has been able to transcend jurisdiction and territory, if at all. Clearly, the summary of cases where these issues have been called into question leaves one without a authoritative answer. The next section of this chapter analyzes the rise of international human rights institutions during the second half of the twentieth century.

**INTERNATIONAL HUMAN RIGHTS**

Human rights have gained a growing institutional prominence throughout the world since the end of World War II. International Humanitarian Law (IHL), dating back to 1864, their institutional placement began with the 1899 and 1907 Hague Conventions. Further adaptations were made in the four treaties of the 1949 Geneva Conventions, which now act as the bases for international law across the world. This protection of rights on an international scale operates contemporaneously as the Constitutions of individual nation-states throughout the world. Similarly, the Universal Declaration of Human Rights (UDHR), the nonbinding declaration adopted

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221 Ibid.
by the United Nations in 1948 reflects an international norm establishing a set of rights that are considered central in understanding

Unlike the UDHR, the Geneva Conventions are often used as a rights-guaranteeing institution in that they are binding and set the standards for governmental treatment of persons. By safeguarding the treatment of individuals during armed conflict, the Geneva Conventions set the standards of protection for times when infringement of rights were most plausible. After reviewing the difficulties surrounding the application of the constitution to noncitizens, this section attempts to understand more pragmatically the relationship between the IHL as a rights-guaranteeing institution and already existent constitutional rights regimes which are inherently restricted to territorial applicability.

This section will follow Gerald Neuman’s lead by analyzing the dissonance and harmony between constitutional rights and human rights through supposing three important structural features shared by both of the rights regimes. These are: consent, suprapositivity, and institutional context. These features do not have strict conceptual boundaries between them, as they inherently rely on the others for their individual existence.

*Legitimation Through Consent*

In the Western liberal sense of democratic government, national constitutions are understood as originating in direct or indirect exercises of popular sovereignty.  


As such, legitimation for the enforcement of the rights that these constitutions contain is achieved through both the democratic and representative processes. Hence, constitutions have legitimation inherently in their existence. That is, if populations do not agree with a constitution’s principles, they will change them through those processes. Neuman notes,

“Popular sovereignty legitimates the choices that the constitution expresses, and assigns international law its place in the legal hierarchy. Even if a constitutional provision accords supremacy to international law, that provision itself will be subject to amendment, if necessary by resort to the constitution-giving power of the people.”

The process of legitimation through consent for international humanitarian law is different, in that as an institution it relies on the treaties signed and ratified by the states party to the laws. The legitimacy comes from the consent of each state, while also being reinforced by the join consent of all parties. This achieves a near-universal adherence of respect and understanding of states party to the laws. However, given the structure of treaties which are non-binding, the respect and understanding may not always be coexistent to a strict adherence to the norms provided in the protocol or treaty.

**Validity Through Suprapositivity**

Constitutional and treaty norms claim a consensual basis, but the positive fundamental rights embodied in a legal system are often seen as reflections of the “nonlegal principles that have normative force independent of their embodiment in

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224 Neuman, “Harmony and Dissonance” p. 1875
law, or even as superior to the positive legal system.” By means of case jurisprudence and common law, constitutional discourse plays an important role by shaping the fundamental values of a society. Thus, the originally positive rights acquire resonance of suprapositivity.

International human rights differ from constitutional rights in that they rely much more strictly on the claim that fundamental rights derive from the inherent dignity of the human person, and thus at a minimum serve suprapositive ends indirectly. To give an example, Article 1 of the UDHR declares, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Because treaties such as the UDHR may be non-binding, the institution of the UN can only recommend that the principles set forth in the document be respected. International human rights laws such as the Geneva Conventions, on the other hand, because of their structure can consist of obligations unto states to respect the principles put forth in the treaties.

**Human Rights As Institutions**

Human rights institutions develop the norms, principles, and standards of human rights through either voluntary codes of conduct or binding treaties.

Fundamental rights require institutional placement in order to exist as enforceable

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225 Neuman, “Harmony and Dissonance” p. 1868; Also, Neuman importantly notes that by referring to the principles as suprapositive, he does not “mean to assert that they apply of their own force within the legal system to trump positive law, but rather that they supply an external standard of normative evaluation, which the legal system fully or partially internalizes as a positive fundamental right.” (ibid., n10)

legal rules. The application of the rights is what makes them effective and honored in a society. Rights become nothing but words on paper if there is no institution to secure their application in society. However, the securing of fundamental rights in an institution can create concerns over time, as the interpretation of human rights will influence the meaning and structure of the rights over time.\textsuperscript{227} Human rights institutions at the international level indicate the extent of autonomy, robustness, and authority of the norms established by the rights. This section does not seek to describe in detail the history of human rights institutions – which have received significant amounts of scholarly research – but instead will focus more primarily on the intersection between human rights and constitutional rights.\textsuperscript{228}

**INTERSECTING HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS:**

While the individual existence of these rights regimes do not often face controversy regarding their intrinsic existence, issues develop when questions of theoretical jurisdiction apply. Neuman references Stephen Griffin in stating, that “in the face of textual ambiguity, neither U.S. constitutional law nor international law provides a lexical ranking or an algorithm for combining their effects. Any interpretive choice will be vulnerable to criticism from some direction.”\textsuperscript{229} This is important because it shows that because of each rights-regime’s ambiguity when it


comes to including the other, there is not a uniform accord as to how they shall be ranked. The global human rights regime faces difficulty in existing as an enforceable institution as it must take into account geostrategic considerations of widely varying value systems while still articulating common aspirations.

Because of this variance in perspectives, each based in thick culture systems and historically ingrained expectations concerning the shape of the rule of law, merging a constitutional system with a global human rights regime would be particularly difficult. Yet, it is because of these conflicts that the human rights regime came about in the first instance – to create a universal code of conduct for the treatment of humans.

Neuman suggests an alternative model than the current human rights regime existing within the United Nations. He suggests that rights receive extremely thin international definitions, thereby operating “effectively as a composite of national constitutional definitions” and would therefore require states to enshrine the internationally protected civil rights into their national constitutions.230 This concept, suggested in a the wartime setting of World War II by Hersh Lauterpacht, was an precisely an International Bill of Rights.231

While Lauterpacht’s proposal of an international bill of rights did eventually lead to the United Nations’ Universal Declaration of Human Rights, but a key difference exists: The Universal Declaration of Human Rights is a non-binding

230 Neuman, “Harmony and Dissonance” p. 1880
treaty. As such, it did not meet Lauterpacht’s suggestion that a high commission could supervise member state’s compliance of the bill. Lauterpacht indicated that in his model,

"[w]henever there is room for a legitimate difference of opinion as to the meaning of the Bill of Rights, the High Commission would properly give preference to the interpretation adopted by the legislature, the judiciary, or the government of the State concerned.”

While these institutional features of Lauterpacht’s proposal were not implemented into the eventual structure of the International Bill of Rights, Neuman argues that form the international perspective, constitutions come and go at national will. Because of their representative quality, the fact that a rule is entrenched via international regulatory force of a high commission does not mean that the population will accept it.

Thus, constitutionalization does not necessarily make a human rights norm judicially reinforceable. The Supremacy Clause of the U.S. Constitution expressly made treaties supreme over the constitutions and laws of the states, but left unanswered questions regarding their status at federal level. Interpretation has clarified that the treaties are inferior to the Constitution but equal in rank to federal status. Thus, To the extent that constitutionalization does make a human rights norm judicially enforceable, Neuman offers two suggestions: the first, centering on the

232 Lauterpacht, p. 196
233 Neuman, “Harmony and Dissonance” p. 1886
justiciability of certain social or economic rights, questioning whether or not courts as institutions “lack the technical capacity to define and enforce such rights.”

The second objection that international human rights should inspire broad-ranging societal debate on local practices. Neuman suggests a mandatory interpretive rule to coexist with the mandatory constitutionalization. “the requirement to consider international interpretations in construing a constitutional right” shows how a neighborly-referencing approach to constitutional interpretation resolves the issue of judicial bias in adjudication raised by editors of the Harvard Law Review, referenced above. The constitutionalization of the rights gives a small legal elite final power to interpret the rights. Thus, the freedom can result from a mandatory interpretive rule. He suggests the innovativeness of the South African Constitution which exhibits a version of this technique.

“When interpreting the Bill of Rights, a court, tribunal or forum--

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.”

Thus far, the United States has not ratified the American Convention on Human Rights nor has it submitted to the jurisdiction of the Inter-American Court. This reluctance of institutionalizing international human rights treaties is quite

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234 Neuman, “Harmony and Dissonance” p. 1892-3
concerning, and has raised many scholars to analyze these actions as evidence of the United State’s hegemonic goals in the geopolitical landscape. Because “international human rights regimes have limited capacity to accommodate local variation [of norms and domestic rights-guaranteeing] without compromising their central purpose,” Gerald Neuman believes that the coexistence of the two rights regimes creates both opportunities and challenges for the protection fundamental rights. It is certain that given the current structure of constitutionally-based rights and international human rights, liberal democracies across the globe will respond to this situation in different ways. Thus, it might be more productive in meeting the ends of securing universal rights protection concerning extra legal detainment such as that at Guantánamo, to construct a new global structure that will address these concerns on a meta scale rather than remolding the clay to fit the current better problem of securing uniform and global rights-protection. In the final chapter of this thesis, I review different attempts of merging the two rights regimes, taking note of their failures, and then conclude with a suggestion of a new global order that can protect basic human rights such as the right not to be detained outside of the rule of law.

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237 Neuman, “Harmony and Dissonance” p. 1900
CHAPTER IV

PROTECTING RIGHTS – WHY WE NEED A NEW GLOBAL ORDER

INTRODUCTION

The United States’ response to the security threat and the state of emergency produced by the War on Terror was a reaction to not only a newfound threat abroad coming from a nonstate actor, but also the need to accord that reaction within a framework of existing international institutions in order to support meeting the threat. Because legitimacy is ultimately based on consent, achieving international legitimacy can be difficult as it requires working through international institutions that are inherently slow moving. Scholars and legal advocacy groups, both domestically and abroad, have raised many questions concerning the legality and legitimacy of these actions. These include: If the war is against terrorism, and the definition of terrorism expands to include every questionable instance of global difficulty, how can the war end? Further, what are the implications on rights within the rule of law when governments enact states of emergency while simultaneously persecuting traditional wars? Under what rights-guaranteeing institutions should citizens be protected? These questions must be answered in a manner that not only resolves on a legal juridical standpoint, but also resolves at a more baseline, theoretical level as well.

239 Such as the War on Terror being temporally parallel to the wars in Afghanistan and Iraq, as well as geographically identical in the fight against al-Qaeda.
Thus far, this thesis has sought to explain the controversy surrounding the
detainment policies pursued by the Bush Administration in the War on Terror.
Chapter II developed a social-contract based understanding of how rights are
fundamental and self-standing within modern Western socio-political landscape.
Chapter III placed the American legal system in conflict with two rights regimes – the
constitutional, and that of international human rights expanded in the second half of
the twentieth century – and the resulting gap into which detainment policy was
situated. This gap is not to be taken lightly, as it is the boundary surrounding the so-
called ‘legal black hole’ which the detainees at Guantánamo found themselves. This
black hole extends far beyond the direct circumstance of their detainment, impacting
the very relationship people have with their government – the sovereign power. As
Judith Butler substantiates,

“The indefinite detention not only carries implications for
when and where law will be suspended but for
determining the limit and scope of legal jurisdiction
itself. Both of these, in turn, carry implications for the
extension and self-justificatory procedures of state
sovereignty.” 240

The changing relationship between the individual and the sovereign rests on
the increasingly formalized interaction between constitutional rights and human
rights. The implications of court rulings declaring standards for jurisdiction and
applicability of constitutional rights for noncitizens do not take into account the fact
that these courts are often times the only pragmatic recourse for individuals to contest
their detainment.

240 Judith Butler, “Indefinite Detention” Precarious Life, p. 51
However, by elaborating a series of standards and entitlements concerning cross border relationships, Supreme Court rulings do not conclusively fill the ‘black hole.’ It is not enough for courts to say whether or not constitutional laws apply, if in response the executive branch, acting as unilateral sovereign ignores the ruling and continues in a state of exception.

This chapter explores various forms of answers concerning how to answer the issue of the Guantánamo black hole. They include instituting an extraterritorial constitution, moving to a model where rights are decoupled from citizenship, and finally to a global cosmopolitan model of rights-guaranteeing institutions. By doing this, it seeks to understand the implications of this gap on the War on Terrorism by combining both constitutional legal doctrine alongside of more theoretical understandings of the relationship between the sovereign and the state of emergency. Within the legal process of the United States, the supreme court cases regarding detention at Guantánamo Bay sought to understand the legal framework surrounding the extraterritorial application of the Constitution, and whether or not the Executive was violating constitutional law by not providing habeas corpus protection to petitioners. Ultimately, this exploration will prove inconsequential as it fails by resting too heavily on traditional nation-state conceptions of the territorial boundaries of citizenship’s constitutional jurisdiction. This is important as the first chapter of the thesis conclusively summarized that traditional models of habeas corpus petitions focus on the argument of a citizen petitioning rights against their own government.
I follow by outlining Peter Spiro’s unique suggestion of citizenship in America as increasingly unimportant and its resulting needlessness as a boundary for rights today. Through it, readers will see that regardless of how it is examined, American constitutional jurisprudence fails in producing a realistic and universal answer to the question of where detainment rights can be ultimately secured in the War on Terrorism. Instead, because of its deconstruction of the rule of law after 9/11, America finds itself without legitimation neither on a national nor international level.

This will reflect on Agamben’s *State of Exception* reviewed in Chapter 1, and exploring the resulting shifts in sovereignty that Judith Butler explores in her article “Indefinite Detention” in *Precarious Life*. By combining the current constitutional situation, this chapter explores previously presented conceptions of a global shift in the relationship of the sovereign and the War on Terror, suggesting that it may provide the answer for how our current governmental structures and institutions can situate themselves to better fit this new form of war.

Rather than simply reworking new associations of state institutions – such as the coalition of the willing – when well-institutionalized multilateral organizations like the UN do not agree with the form of prosecution, this thesis suggests a new form of global association or cosmopolitanism that could arise in the twenty first century. Sovereignty as an institution has shifted, and the ways in which the Bush Administration responded to the terrorist threat shed light on that change. By using its ultimate executive power as the instrument of securing the state, the government transitioned into a new form of Foucauldian governmentality which replaced the
traditional shape of the state. This new configuration of power requires a new theoretical framework or, at least, a revision of the models for thinking power that we already have at our disposal. One of these is John Rawls’ extension of his _theory of justice_ to a global ‘Law of Peoples.’

**CONSTITUTIONAL EXTRATERRITORIALITY AS A SOLUTION**

Invoking constitutional extraterritoriality is a logical step for extending the already-present model of the constitution to the demands of the Global War on Terrorism. The constitution serves to protect the rule of law, and the courts serve as a check on the executive’s actions. The practicality of an extraterritorial constitution is that it may be the best constitutional model in the War on Terrorism as the it is not a traditional war, and no formal declaration of war has been made, only the AUMF.

The question of whether and to what extent, the constitution applies outside of the United States is central to judicial review concerning whether or not habeas claims can be made by petitioners at Guantánamo. The question of jurisdiction is primary to any judicial review. Constitutional extraterritoriality is not new to the judiciary, and adjudications have been made regarding the scope and extent to which it can exist.\(^{241}\) Important issues in the War on Terrorism that the conventional approach concern the extension of constitutional rights into the realm of international law.

\(^{241}\) See especially _Downes v. Bidwell_, 183 U.S. 244 (1901)
The most recent case prior to 9/11 concerning the extraterritorial application of the constitution was *United States v. Verdugo Urquidez*. In it, Chief Justice Rehnquist put forth a theory of the Fourth Amendment based on the idea of a social compact under which only those aliens with sufficient connection to the United States are entitled to constitutional protections. This standard however, was not taken in *Rasul v. Bush* which ruled only that Guantánamo detainees were statutorily entitled to habeas review, but merely suggested that the constitution may have been violated. Instead, the conventional approach to questions of extraterritoriality use the *Verdugo-Urquidez* standard set out by Justice Kennedy’s concurring opinion which argued that the constitution may apply when the result would not be “impractical and anomalous.”

The impractical and anomalous standard might produce to much variance in court rulings, as it relegates the courts to a case-by-case, discretionary judicial determination of whether the application of the Constitution is “impracticable in policy term can instead be decided more systematically by applying the standard in light of international humanitarian law (IHL).” Prior to this standard, the modus operandi suggested that the substantive content of international law should determine the scope of constitutional rights applicable extraterritorially. Instead, the *Verdugo-Urquidez* standard frames rights in the question of asking “not what rights apply

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244 183 U.S. 244 (1901)
246 Ibid.
under international law, but rather in what sorts of circumstances international law contemplates the protection of individual rights." This thesis believes that it is more important to be asking the former question than the latter, given the changes in global society around rights.

Judicial use of international law such as this is highly contentious in that it upsets the structural balance between the branches of government, allowing judges to bypass American constitutional dualism by manipulating an array of international authorities. A number of scholars and legal institutions argue that this gives judges too much discretion in their opinions. Instead of asking a question of ‘what sorts of rights are fundamental in the American constitution?’ it should instead be ‘under what sorts of circumstances does international law protect individual rights?’ Explained as such, the connection impractical and anomalous standard is a direct link to a question concerning the practicability of the according rights protection in a certain situation.

Put in the context of Guantánamo Bay detention rulings, it would be similar to understanding it in the following construct:

“If the Geneva Conventions establish that in certain situations detainees have individual rights to due process that are carried extraterritorially, this would inform the threshold of whether the Constitution’s due process guarantees apply to extraterritorially held detainees, but the substantive scope of these guarantees would be determined not by the Conventions but by the Constitution’s standards of due process”

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247 Ibid.
248 Ibid., p. 1916
249 Ibid., p. 1918
Thus, even with the new nature of the War on Terrorism, the most clearly relevant body of international law is International Humanitarian Law (IHL). The Court has understood that as well within the current debate.\textsuperscript{250} Theodor Meron puts it bluntly: “IHL has particular analytical usefulness because it controversially applies extraterritorially.”\textsuperscript{251}

Detention law in the War on Terrorism is strictly covered by the Geneva Conventions. Both Combatants and civilians are covered by the Geneva Conventions and are accorded protections that undoubtedly rigorous and individualized. Yet, given the unique nature of the War on Terrorism – especially its various forms of ‘combat’ – judges have been reticent to hold that Guantánamo is the “sort of wartime situation that IHL regards as amenable to strong individual rights protection?”\textsuperscript{252} To some, the answer is clear: IHL is the relevant framework, and because “international law deems it practicable to accord individual rights protection to detainees who have been rendered \textit{hors de combat}, those constitutional rights applicable to detention to apply to extraterritorial detention in the context of the War on Terrorism.”\textsuperscript{253} The question remains however, of applying these concerns to a case-by-case basis, and given the spirited controversy the issue of referencing international law in constitutional

\textsuperscript{250} Hamdan v. Rumsfeld, 126 S. Ct. 2749, (2006) holding that “at least one provision of the of the Geneva Conventions applies to the United State’s conflict with al Qaeda.”
\textsuperscript{251} Theodor Meron, “Extraterritoriality of the Human Rights Treaties,” 89 American Journal of International Law 78, 81
\textsuperscript{253} “The Extraterritorial Constitution and the Interpretive Relevance of International Law,” p. 1923; \textit{see also} Hamdi v. Rumsfeld, 542 U.S. 507, 533–35 (2004) (plurality opinion)
adjudication has triggered, a different approach to rights-based questions should insert itself.

**A Possible Answer: Moving ‘Beyond Citizenship’**

Because of globalization’s effects on migration and geographic placement, the status of aliens in liberal democratic societies has become hardly distinguishable from that of citizens. Because of their territorial presence and their personhood, noncitizens in most societies are routinely entitled to a broad spectrum of important civil and social rights – rights of the very kind that are described in the language of citizenship. Peter Spiro takes this relationship and stresses the unimportance of modern nation-state conceptions of citizenship, including those of birth-right citizenship, naturalized citizenship, and dual citizenship, all fit in the landscape of the globalized world. Because of globalization, the bonds of citizenship have dissipated, thereby making membership with a nation-state become less meaningful. By exploring this relationship, I seek to achieve an understanding of the unimportance of citizenship within contemporary global rights-politics. By doing so, I hope to achieve the conclusion that in today’s modern world, rights – and especially fundamental rights such as habeas corpus – should not be predicated on citizenship at all. That is, if we can decouple rights from citizenship, it may be useful to answer the issues raised by the failure of the United Nations’ legislation and treaties to create a proper global rights-protecting institution.
In the traditional nation-state construct of the world, spacial boundaries such as territories and borders were of utmost importance for the protection and delineation of power and protection. But, according to Spiro, in the face of globalization, “the importance of space and territorial boundaries declines.”

Meaningfully drawing the boundaries of the human community requires a reframing of the institutions that bind us today. Specifically with in the American perspective, the rest of the world has insinuated itself into American space, with persons inside and outside of the territorial boundaries who have distinct identity relationships or individual interactions that, alongside with advances in technology and resistance methods (i.e. terrorism) have newfound abilities to impact the sociopolitical dynamics of a nation. Meanwhile, the law of U.S. citizenship, according to Spiro, “continues to demonstrate a lack of American ethnicity.”

These challenges to the territorial premise of citizenship and national community become challenged from both directions – homage to Bosniak’s inward/outward concept – and it is no longer clear who belongs and who doesn’t belong inside of the boundaries.

According to Spiro, the domestic citizenship structure demonstrates how thin citizenship regimes correspond to cultural or ‘thick’ identity constructs. He believes that the relatively low threshold for naturalization reflects and contributes to a reduced form of national identity. He notes, “if the community admits to membership

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254 Peter Spiro, *Beyond Citizenship*, (Oxford University Press, 2008) p. 4
255 Ibid., p. 27
256 Ibid., p. 30
those who really do not share significant commonality with the existing community, than the community is undermined.”  

Essentially, Spiro believes that because of this low threshold and the inarguably inclusive nature of American democracy and franchise, citizenship is no longer a means of identity in America. He elaborates:

“With the end of the cold war it is possible to situate the world on a trajectory at the end of which democracy alone emerges as a legitimate system of government. If so it will mark both America’s triumph and its decline. To the extent that America has been defined by its adherence to a distinctive governance system, it loses that identity insofar as the system becomes universal. *Once everyone is an American, no one is an American.*”

Spiro believes that citizens are privileged in America in only a few dwindling contexts. Noting that although noncitizens have enjoyed some constitutional protections since the fourteenth amendment, they were historically disadvantaged with respect to important privileges such as the right to own property and engage in businesses. But, throughout the progress of American Constitutional jurisprudence, the courts have become “blind to citizenship status.” With regard to civil rights – that is, the rights of the person to the protection against arbitrary official action, the right to free expression – resident aliens enjoy equivalent rights to the citizenry. When it comes to persons who are territorially present, these rights are enjoyed by all who fit that description “regardless of their citizenship status … Thus the undocumented

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257 Ibid., p. 54  
258 Ibid., p. 52
alien who faces criminal prosecution is entitled to all constitutional due process protections afforded accused citizens.”

Supreme Court Justice Brennan, in his dissent in *United States v. Verdugo-Urquidez*, noted the pattern of U.S. law enforcement growing blind to the citizenship of the persons it sought to persecute. He writes,

“Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes. The enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three largest exports are now 'rock music, blue jeans, and United States law….Our government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of the community for purposes of enforcing our laws. He has become, quite literally, one of the governed.”

Now we have expanded federal criminal jurisdiction so much that it has become a war like situation. The impact of extensions such as this on the Bush administration is well understood from the discussion in Chapter 1. The international terrorist threat demonstrates just how little formal distinctions matter in terms of U.S. law enforcement, or military prosecutions in the War on Terror when it comes to protecting the nation and its citizens. Bosniak argues that, insofar as the Citizenship

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259 Ibid., p. 83
Clause of the Fourteenth Amendment anchors rights for citizens, it can also anchor them for aliens, with the use of ‘citizen’ notwithstanding. 261 As a liberal nationalist challenge, in which citizenship’s ‘equality’ norm is reborn through territorial definitions, rights are able to extend themselves out of the grasp of the word ‘citizenship.’ For Spiro, the approach actualizing the attachments of aliens, and recognizes the possibility of their de facto membership within a society. 262 For him, it coincides with the current state of the law, in which territorially present aliens are extended many of the rights associated with traditional citizenship-based protections.

With regards to the developments in United States jurisprudence post-9/11 Spiro notes the unique nature of our current position regarding noncitizens and American rights. He notes that the deprivation of noncitizen rights have been “vigorously contested in a way that would have been unimaginable in WWII. Guantánamo will be a tarnished precedent for future enforcement parameters” 263 Spiro however, notes that in the context of our nation’s history and probably trajectory, the extraterritorial treatment of citizens and noncitizens in not likely to converge. Partly, this is because in the context of the state, rights and obligations cement an identity. For law, the basis of membership provides entitlements and demands service. Citizenship as a notion, however, cannot be rescued by legal

261 Beyond Citizenship, p. 100
262 Ibid.
263 Ibid., p. 105
revaluation. For Spiro, as the incidents of citizenship fade, so too will the identity itself further dwindle.\footnote{264}

Perhaps in today’s international landscape we must eschew the notion of a global citizen. Spiro’s hypothetical rejects the practicality of genuine cosmopolitanism: “no time soon are we going to witness a global super-state as a universalizer and unifier of humankind. Rather, we will see an increasing diffusion of identity to various nonstate, and in many cases, nonterritorial forms of association.”\footnote{265}

Is this the best solution or vision of the future? Why not rework and reinforce the global institutions that we have in place already. The last section of this chapter proposes a new global structure and why it is necessary in terms of detainment policies, rights protection, and the War on Terrorism.

**The Facts: Detainment as De-realization of Human Subjects**

I now return to a key part of the issues concerning the state of exception regarding the detainment of persons at Guantánamo bay. The Bush Administration’s suspension of law at both national and international levels in the name of security is to some theorists, a new exercise of state sovereignty.\footnote{266} Reaching across multiple disciplines, this exercise was while done so through an “elaboration of bureaucracies”\footnote{267} which take place outside of the law. As a legal innovation, indefinite detention introduces a new configuration of power which “requires a new

\footnote{264}Ibid.  
\footnote{265}Ibid., p. 110  
\footnote{267}Butler, p. 51
theoretical framework” or at least, “a revision of the models for thinking of power that we already have at our disposal”\textsuperscript{268}

This thesis has shown that extralegal assertions of power are by no means new, yet the mechanism that the Bush Administration used to achieve its goals is unique. The present circumstance of the War on Terror becomes transformed into a reality which has been indefinitely extended into the future. Butler shows in “Indefinite Detention” that by controlling the lives of the prisoners at Guantánamo Bay but also holding the fate of constitutional and international law in limbo, a shift in sovereignty has occurred. This shift, she rightly concludes, has deep consequences which touch not only on the legal intricacies in which these institutions exist, but also on the very way the relationship between the government and the individual exists.

\textbf{Closing the Gap Between Rights Regimes}

The gap between the reach and applicability of the two rights regimes explored in Chapter III is symptomatic of a growing gap between globalization and the confinement of the national state to its territory. By combining the two realms of constitutional law and sociological interpretations of rights-guaranteeing institutions both historically and within the War on Terrorism I sought to shed light on the gap in connecting these two realms of thought. It is inadequate to accept the prevailing wisdom that constitutional questions can and should only be answered via

\textsuperscript{268} Ibid., p. 82
jurisprudence, especially given the fact that as a legal positivist, I believe that the rights in question exist outside of law. Unfortunately however, answers to questions based in social theory often only come in the form of the hypothetical. While it may be seen as a methodology to avoid true, pragmatic, and definitive answers to the questions regarding right-based claims in the War on Terrorism, the issue at hand may necessitate taking the step from the hypothetical to the real.

International human rights regimes have become an acceptable and effective method of situating rights-based claims in an arena outside of the national, in most of the world, human rights are enforced through national law itself, or not at all. 269 Harold Koh believes that human rights norms become incorporated into national law throughout the albeit slow, but effective, process known as “transnational legal process.” 270 While this is factually true, the normative analysis regarding detentions of individuals in the War on Terrorism suggests that this process is ineffective.

Thus, how do current institutions react to the major changes that are occurring at the turn of the millennium, given the growing weight of the human rights regime on states under the rule of law. Further, is the growing use of human rights instruments in national courts being applied both in interpretation and adjudication? While justice as Antonin Scalia might believe that referencing international law in constitutional courts is inappropriate, the instance of it occurring represents a denationalization insofar as the international mechanisms become internal to the state.

The use of international law in constitutional courts might be representative of a
denationalization occurring in the legal world – in the greatest sense – but does not
mean that this denationalization is complete or even effective.

Reforming Institutions

Reforming institutions surrounding law and rights-placement becomes
necessary then, if we are to solve the problems presented by the instance of
Guantánamo Bay. 271 Reformation, placed in a pragmatic setting, does not come
without issues. Balakrishnan Rajagopal reveals issues that may occur with a
restructuring of international law: in forming international law and institutions, one
must take into concern the issue of representation and development into the discourse.
In order to provide a real representation of the global landscape, one must be sure that
the appreciation of the role of social movements is in the evolution of international
structures. He writes,

“How does one write resistance into international law
and make it recognize subaltern voices? Substantial
parts of the architecture of international law –
international institutions – have evolved in an
ambivalent relationship with this resistance; second, the
human rights discourse has been fundamentally shaped
– and limited – by the forms of the Third World
resistance to development.”272

While his argument centers around the questions of focusing international
institutions of human rights on the issue of development, Rajagopal provides a unique
perspective that should be translated into the War on Terrorism discourse: the match

271 Rajagopal, Balakrishnan. International Law From Below (Cambridge: Cambridge
University Press., 2003.) p. 1
272 Ibid.,
that set fire to the War on Terrorism – 9/11 – was an act taken by Islamic
fundamentalists calling for the use of violence against the civilians and military of the
United States and any countries that are allied with it. Their actions represented a
clash of values that would necessitate a resolve if a global state were to arise.

Saskia Sassen, an American sociologist focused on the effects of globalization
and migration, notes that the transition to a global world has already begun. She
notes that the destabilizing effects of current political practices produce “operational
and rhetorical openings for the emergence of new types of political subjects and new
spatialities for politics.” The destabilization of legitimate power provides for a
multiplication of nonformalized associations of political actors and assemblages. That
is, just as much as the Bush Administration delegitimized itself with Guantánamo
Bay, the global response to the actions brought together a new assemblage of persons
seeking to prevent the continuance of extra-legal and indefinite detainment of
persons.

Adopting A Hypothetical – Rawls’s Law of Peoples

Creating a political conception of right and justice in a global rights-
guaranteeing institution is no easy task. John Rawls, however, provides a unique
expansion of his seminal work A Theory of Justice, with Law of Peoples. In it, he
views a universal Law of Peoples which can be developed out of the same liberal idea
of justice similar to his concept of ‘justice as fairness.’

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273 Sassen, p. 278
Rawls posits that the greatest evils of history, including unjust war and oppression (which I assume includes extra-legal detention of individuals) follow from political injustice.\textsuperscript{275} To contravene from this possibility, Rawls believes that if people grow up in under a framework of “reasonable and just political and social institutions” they can endure over time, thereby securing human nature as a primary value in the socio-politico landscape.\textsuperscript{276} While it is a utopian concept, Rawls believes it is realistic as it joins reasonableness and justice with conditions enabling persons to realize their fundamental interests.

Following Kant’s lead as sketched in Perpetual Peace (1795) be uses the social contract ideal of the “liberal political conception of a constitutionally democratic regime” and extends it into a global level “in which the representatives of liberal peoples make an agreement with other liberal peoples.”\textsuperscript{277} This is different from an association of states:

“What distinguishes people from states…is that just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals. Their equality doesn’t mean, however, that inequalities of certain kinds are not agreed to in various cooperative institutions among peoples, such as the United Nations, ideally conceived. This recognition of inequalities, rather, parallels citizens’ accepting functional social and economic inequalities in their liberal society.”\textsuperscript{278}

Hence, in a law of peoples, the principles of equality among peoples make room for various forms of cooperative associations – similar to Sassen’s take on

\begin{itemize}
\item[\textsuperscript{275}] Ibid., p. 7
\item[\textsuperscript{276}] Ibid.
\item[\textsuperscript{277}] Ibid., p. 5
\item[\textsuperscript{278}] 35
\end{itemize}
Deleuze’s conception of assemblages. This is not concomitant to a world state.

Rawls agrees with Kant in believing that a world government “would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.” Consequently, he promotes the idea of a system of federated states.

It is not my place to detail and critique the blueprint of such a system. I only seek to understand why this new world system might be a better placement of human rights as an guaranteeing institution rather than the either the currently constructed United Nations or the more forceful institution of a bill of rights promoted by Hersh Lauterpacht. Rawls believes his system is possible because

“a reasonably just constitutional democratic society is one that combines and orders the two basic values of liberty and equality in terms of liberty and equality in terms of basic rights, liberties, and opportunities.

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279 Sasha Sassen, Territory Authority Rights, and Gilles Deleuze and Guattari, Thousand Plateaus: Capitalism and Schizophrenia. (Continuum International Publishing Group, 2004) Deleuze and Guattari write “assemblages are necessary for states of force and regimes of signs to intertwine their relations. Assemblages are necessary in order for the unity of composition enveloped in a stratum, the relations between a given stratum and the others, and the relation between these strata and the plane of constituency to be organized rather than random.” p. 79 Deleuze combines his theory of assemblages and equality: “Herein, perhaps, lies the secret: to bring into existence and not to judge. If it is so disgusting to judge, it is not because everything is of equal value, but on the contrary because what has value can be made or distinguished only by defying judgment. What expert judgment, in art, could ever bear on the work to come?” Essays Critical and Clinical, p. 135.

280 Citing Kant, Ak:VIII:367, “the idea of international law presupposes the separate existence of independent neighboring states. Although this condition is itself a state of war (unless federative union prevents the outbreak of hostilities), this is a rationally preferable to the amalgamation of of states under one superior power, as this would end in one universal monarchy, and laws always lose in vigor what government gains in extent; hence a condition of soulless despotism falls into anarchy after stifling seeds of good.”
Then it assigns to these freedoms a priority characteristic of such a regime. “

To Rawls, human rights in the Law of Peoples express a special class of urgent rights. These are rights which restrict the justifying reasons for war and its conduct, and in particular to a regime’s internal autonomy. This way, he believes that human rights within the Law of Peoples can “reflect the two basic and historically profound changes in how the powers of sovereignty have been conceived since WWII.” As such, “The Law of Peoples proceeds from the international political world as we see it, and concerns what the foreign policy of a reasonably just liberal people should be.”

While Rawls’s proposition is hypothetical and optimistic, at best it can be seen as a possibility for forming a uniform rights-guaranteeing institution that would formally install itself into more territorial conceptions of the rule of law within smaller sovereignties. His hypothetical distinguishes itself from the issues raised with the United Nations as a rights-guaranteeing institution in that it incorporates the starting-point of reasonableness and a uniform promotion of justice. Differences in states’ understand of justice and reasonableness are what have caused them not to ratify international declarations of human rights, or argue their inapplicability within their national laws.

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281 Law of Peoples, p. 49
282 Ibid., p. 78-9
283 Ibid., p. 80
284 Ibid., p. 83
Such a law of peoples would resolve the gap between rights regimes within the United States and its War on Terrorism. It would also resolve the issue of the applicability of Koh’s transnational legal process and the issues constitutionalists have raised with justices incorporating foreign jurisprudence into their adjudications. Issues certainly arise, primarily on the practicality of such a Law of Peoples coming to life within today’s world of fractured and conflicting civilizations. Regardless, a solution is necessary if one wants to protect the right to a freedom from extra-legal detainment and the consequent de-subjectification of the individual in indefinite detainment.

The executive’s detainment policy at Guantánamo Bay serves as a wake up call: the current nation-state foundation of our international human rights regime is the very reason it fails. Lauterpacht was correct in his assumption that in order for international human rights norms to be followed, they necessitated strict enforcement. The time has come for the world to take great steps in meeting the challenge of a failing global rights institution.
CONCLUSION

By instating a sovereign form for itself, the Bush Administration destroyed the balance of powers and the concept of the tripartite government. Through the suspension of the rule of law – in Foucauldian terms – the Executive self-referentially provided a legitimating ground for its law. This form of power – governmentality – was addressed in Chapter I. Through this form of sovereignty, the Bush administration acted self-referentially when it based its arguments on the opinions of white house legal council and ignored outside opinions. This self-referential legitimating ground shifted the form of governmentality and disrupted the traditional relationship between individuals and governments. So long as the United States acted outside of the rule of law, rights-protection fell to the side in the state of exception.

The government used traditional forms of executive power to ground its new legal regime, but did so in a way that in its defense, it never left the law, instead only creating its own form of law. Sovereignty becomes the instrument by which the power of the government is legitimized, but only in that the Bush Administration sought to secure the security of the state.

The presidential declarations concerning detainment of individuals in the wake of 9/11 was an action of executive power-grabbing which suspended of the rule of law. Importantly, however, this does not mean that the state ceases to manufacture law, only that any law that it manufactures ceases to be legitimate. The delegitimation
occurs at both the domestic and international level. By operating on its own with neither the consent of domestic representative government nor with international approval, the Bush Administration faced the outcry of national and international critics alike. Even at the most basic level, the contestation of law was called into question: institutions such as the American Bar Association urged lawyers not to represent defendants, as their participation would be construed as an agreement that the military tribunals were legitimate.

The Bush Administration’s process of de-subjectifying individuals as detainees “neither alive nor dead, neither fully constituted as a subject nor fully deconstituted in death” creates enormous consequences for an international conception of rights and obligations. These international human rights regime found itself lacking the authority and structure to bring to an end to the extra-legal actions of the United States. No longer enforceable, normatively grounded laws fail to confront belligerent governments.

My new internationalism nevertheless strives for the rights of the stateless, regardless of how international models are exploited by those who exercise the power to use them to their advantage. If the Bush administration’s extension of lawless and limitless power were to continue, as it could in the indefinite time period that is War on Terrorism, international rights protection will be much harder to reintroduce.

In his inaugural speech on January 20th, 2001, President George W. Bush spoke of citizenship. "I ask you to be citizens," Mr. Bush said. "Citizens, not

[285] Butler, p. 98
spectators. Citizens, not subjects. Responsible citizens, building communities of service and a nation of character." He also spoke of grand and enduring ideal, among the grandest if these ideals Mr. Bush intoned, “is an unfolding American promise: that everyone belongs, that everyone deserves a chance, that no insignificant person was ever born.” These values of an inclusive community within the United States, that appreciated every human life were indicative of the path that America was on until that point. Many institutions within the United States protected not just citizens but also people of any background, regardless of race, heritage, or nationality.

Nine months later, we saw a very different America. The attacks of September 11th, 2001 changed the way America viewed its position in the world. The deep insecurity people felt about their level of safety and vulnerability to terrorism translated into a shifting political atmosphere where the security of the nation was primary in importance. Perhaps now it is time to consider security as a global concept along with rights. It may be the moment where we transition from thinking of ourselves as citizens of a nation, but citizens of the world. Because, just as much as the grandest ideal of the American promise, it may be more appropriately situated as a global promise

Universal Declarations similar to Lauterpacht’s *International Bill of Rights* failed because they were contingent on the structure of state sovereignty and the notion of an independent state. So long as we exist in a global structure of

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independent states where national priorities come first, and international obligations second, there is no possibility of securing rights. The War on Terror is unique because it independently situates itself within the ‘us-versus-them’ structure of fear and priorities. If we run to this conclusion – that ‘they’ are inherently evil and consequently subhuman – we will never achieve a system of universal rights-guarantees based on the concept of the human and the inherent dignity of the ‘being.’

Global human rights of equality and due process require uniform application. When the extension of lawless and illegitimate power occurs, state sovereignty is purchased at the expense of global cooperation. Such cooperation is necessary for a redistribution of rights-protection needed to enforce the standards that ought to govern the treatment of humans. In order to solve Guantánamo then, the state of exception must be put to an end, even if it means doing so by securing rights-protection within a new global structure of associated peoples.
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