

2007

Medium-Specific Regulation of Attorney Advertising: A Critique

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Lidsky, Lyrissa Barnett and Jckowski Peterson, Tera (2007) "Medium-Specific Regulation of Attorney Advertising: A Critique," *University of Florida Journal of Law & Public Policy*. Vol. 18: Iss. 3, Article 1. Available at: <https://scholarship.law.ufl.edu/jlpp/vol18/iss3/1>

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THE LAW AND LAWYERS AS ENEMY COMBATANTS

*Ariel Meyerstein**

“You know you’ve botched it when people sympathize with lawyers.”¹

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I. INTRODUCTION

A. *Subverting the Rule of Law*

This Article contextualizes the Senate debates leading to the passage of the Detainee Treatment Act of 2005 (DTA)² within broader American cultural narratives about the law and lawyers’ roles in society. The DTA was Congress’s first real attempt to help shape the legal regime that serves as a foundation to the “global war on terrorism,” which to many represents an inversion of traditional American values of law and justice.³ The DTA’s provisions stripped federal courts of jurisdiction to hear writs of habeas

2. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739, Pub. L. No. 109-163, 119 Stat. 3474 [hereinafter DTA] (codified as amended at 42 U.S.C.A. §§ 2000dd, 2000dd-1 (West 2007) and 10 U.S.C.A. § 801 (West 2007)).

3. See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263-66 (2002) (arguing that the November 2001 Military Order’s “vagueness invites arbitrary and potentially discriminatory determinations” and “installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law-applier” and thus “authorize[s] a decisive departure from the legal status quo.”).

corpus from “unlawful enemy combatants”⁴ imprisoned in the U.S. military prison at Guantánamo Bay, Cuba. Congress passed the DTA in response to the U.S. Supreme Court’s 2004 decision in *Rasul v. Bush*, which provided that federal courts have jurisdiction over habeas corpus challenges to the “legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”⁵

As it turned out, *Rasul* and the DTA were only the beginning of the continuing legal odyssey of the “unlawful enemy combatants” at Guantánamo. In 2006, the Court ruled the DTA’s jurisdiction-stripping provisions unconstitutional in *Hamdan v. Rumsfeld*.⁶ In response, Congress reasserted itself by passing the Military Commissions Act of 2006 (MCA).⁷ The D.C. Circuit decided not to analyze the constitutionality of the MCA by refusing to review recent cases involving detainees.⁸ The U.S. Supreme Court twice refused to review the D.C. Circuit’s stance,⁹ and in April 2007, rejected an attempt by Salim Ahmed Hamdan, the plaintiff in *Hamdan*, to bypass the D.C. Circuit.¹⁰ Then, in an unexpected turn of

4. 10 U.S.C. § 948a(1) (2006) (defining “unlawful enemy combatant”).

5. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (per Stevens, J., for the Court, with whom Kennedy, J., concurred. Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

6. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

7. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA] (codified in scattered sections of 10 U.S.C.).

8. *Boumediene v. Bush*, 476 F.3d 981, 984 (discussing cases in which courts dismissed detainees’ claims); *but see id.* at 995 (Rogers, J., dissenting) (stating “[t]he MCA . . . is void and does not deprive this court or the district courts of jurisdiction.”).

9. Amy Goldstein, *Justices Again Refuse Guantánamo Bay Cases*, WASH. POST, May 1, 2007, at A04. On April 2, the Court refused to review the February 20 decision of the D.C. Circuit Court upholding the MCA’s habeas-stripping provisions. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007); *Al Odah v. United States*, 127 S. Ct. 3067 (2007). These appeals sought to challenge only the loss of habeas corpus; they did not challenge the constitutionality of the DTA or the MCA process. The Court did not specify reasons, but Justices Stevens and Kennedy wrote separately that though they were bound by the “exhaustion-of-remedies” doctrine, this doctrine did not demand exhaustion of “inadequate” remedies, and thus, if the petitioners found the government to be “unreasonably” delaying the DTA process, perpetrating some “other and ongoing injury,” or “prejudicing” the petitioners in other ways, the Court would reconsider its review under 28 U.S.C. §§ 1651(a), 2241. *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007). These detainees have since petitioned the circuit court to rehear the denial of their cases, but not to act on those petitions until completion of the circuit court’s review of the cases under the DTA process. *See Boumediene*, 127 S. Ct. at 3078; *see also Al Odah*, 127 S. Ct. at 3067.

10. The Court on April 30 again refused to review the circuit court’s upholding of the MCA habeas-stripping provisions, and refused to hear Salim Ahmed Hamdan’s challenge of his trial before a military commission established by the MCA. *Hamdan v. Gates*, 127 S. Ct. 2133, 2133 (2007). There is no pending petition for rehearing of that denial, sending the case back to the D.C. Circuit.

events, on the final day of the term, the Court vacated its earlier decisions in *Boumediene v. Bush* and *Al Odah v. United States*, consolidated cases of dozens of prisoners who sought a writ of habeas corpus after they were detained as enemy combatants at Guantánamo Bay.¹¹ This may have been the first such reversal since 1968.¹² The Court has also considered an original habeas corpus petition that challenges the MCA.¹³

Several other cases in the D.C. and other appellate courts may wind their way to the U.S. Supreme Court.¹⁴ Congress passed bills in both houses which reconsider the MCA's ban on habeas challenges; however, as of October 2007, the bills were still in committee discussions.¹⁵ There was also an attempt to write in habeas restoration provisions in a defense spending bill, but the House Armed Services Committee refused to do so in May 2007.¹⁶ Finally, other bills have been introduced to shutdown Guantánamo Bay altogether, which would result in the remaining detainee population's transfer to either civilian or military courts in the United States.¹⁷

11. *Al Odah v. United States*, 127 S. Ct. 3067 (2007); *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

12. See *Kolod v. United States*, 390 U.S. 136 (1968); see also Lyle Denniston, Court Switches, Will Hear Detainee Cases, *Scotusblog.com* (June 29, 2007), http://www.scotusblog.com/movabletype/archives/2007/06/court_1.html.

13. See, e.g., *In re Ali*, 127 S. Ct. 3037 (2007) (determining whether the court retains jurisdiction over a habeas plea post-MCA).

14. See, e.g., *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). The court found *Al-Marri* to be a civilian, and not an enemy combatant, and held, therefore, that the MCA does not apply to him. *Id.* at 174. Accordingly, federal courts retain jurisdiction to consider his habeas petition and should grant him relief under that writ. *Id.* at 168-74. For an overview of the current litigation, see Lyle Denniston, *Primer on Detainees' Status Now—Part I*, *Scotusblog.com* (May 12, 2007), http://www.scotusblog.com/movabletype/archives/2007/05/primer_on_detai.html; Lyle Denniston, *Primer on Detainees' Status Now—Part II*, *Scotusblog.com* (May 13, 2007), http://www.scotusblog.com/movabletype/archives/2007/05/primer_on_deta.html.

15. *Habeas Corpus Restoration Act of 2007*, H.R. 1416, 110th Cong. (2007) (in committee review by House Armed Services and Judiciary Committees); *Habeas Corpus Preservation Act*, H.R. 1189, 110th Cong. (2007) (in review by House Armed Services, Judiciary, and Foreign Affairs Committees); *Military Commissions Habeas Corpus Restoration Act*, H.R. 267, 110th Cong. (2007) (in review by House Judiciary Committee); *Habeas Corpus Restoration Act of 2007*, S. 185, 110th Cong. (2007) (scheduled for debate in the Senate Judiciary Committee).

16. *National Defense Authorization Act for Fiscal Year 2008*, H.R. 1585, 110th Cong. (2007).

17. To require the President to close the Department of Defense detention facility at Guantánamo Bay, Cuba, and for other purposes, H.R. 2212, 110th Cong. (2007) (in review by House Armed Services Committee); A bill to require the President to close the Department of Defense detention facility at Guantánamo Bay, Cuba, and for other purposes, S. 1249, 110th Cong. (2007) (in review by House Armed Services Committee).

Many legal commentators¹⁸ and others, including the International Committee of the Red Cross¹⁹ and independent experts with mandates from the U.N. Human Rights Commission,²⁰ have criticized the practices at Guantánamo for failing to meet standards of treatment under international humanitarian law, while others have seized upon Guantánamo as a perfect illustration of a juridical phenomenon that Italian political philosopher Giorgio Agamben, has termed a “state of exception.”²¹ As others have noted, Guantánamo is but one of all too many ready examples of how the Bush Administration has inverted the very meaning of the rule of law in the post-9/11 world.²² This perversion of the

18. See, e.g., Katyal & Tribe, *supra* note 3, at 1259. See also Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 286, 329, 347 (2004) (characterizing the military commissions at Guantánamo Bay as “tribunals of exception” and arguing that the central premise of U.S. executive policy is that Guantánamo is “a space within which no rule of law obtains.”); James Theo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 368 (2003) (condemning the notion of “territoriality” used by U.S. appellate courts as “simply a façade for an anti-alien prejudice” and describing Guantánamo Bay as an example of “the rule of law [having been] suspended”). But see Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613, 614 (2005) (arguing against such views, and in a particular reading of Carl Schmitt, contending that “the plight of the Guantánamo Bay detainees is less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities,” and characterizing the Guantánamo military prisons as “spaces where law and liberal proceduralism speak and operate *in excess*.”).

19. See Int'l Comm. of the Red Cross, *Guantánamo Bay: Overview of the ICRC's work for the Internees*, Jan. 30, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5qrc5v?opendocument> (stating “the U.S. authorities have placed the internees beyond the law.”).

20. See Comm'n on Human Rights: Indep. Experts Issue Report on Guantánamo Detainees, U.N. NEWS CENTRE (Feb. 16, 2006) (quoting the press release issued by the experts with the announcement of the report as stating that “[t]errorism suspects should be detained in accordance with criminal procedure that respects the safeguards enshrined in relevant international law . . .”), <http://www.un.org/apps/news/story.asp?NewsID=17523&Cr=Guantanamo&Cr1=Bay>; see also U.N. Econ. & Soc. Council, Comm. on Human Rights, Econ. Soc. & Cult. Rights, Civil & Pol. Rights, *Situation of Detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf.

21. See GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., U. Chi. Press 2005) (2003) (applying notion of “state of exception” to the Military Order of November 2001, which authorized the indefinite detention and trial of alleged enemy combatants at Guantánamo Bay); see also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 36-37, 166-80 (Daniel Heller-Roazen trans., Stan. U. Press 1998) (1995) (describing “the camp”—an emblematic state of exception—as the *nomos* of modern political existence).

22. See SEYMOUR M. HERSCH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* (2006) [hereinafter GREY, *GHOST PLANE*]; DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003). The Bush Administration’s

rule of law has come hand in hand with a radical reinterpretation of the powers of the Executive, which is a continuation of a struggle between the branches that has been particularly acute over the last two decades.²³ As law professor David Cole points out, the extreme “flexibility” displayed in deciphering the constraints imposed by our own U.S. Constitution and the international treaties the United States has signed and ratified has “turned a world in which international law was on our side into one in which we see it as our enemy.”²⁴

This observation, unfortunately, is not a hyperbolic one. One need look no further than the Pentagon’s National Defense Strategy, issued in March 2005, which states, “[o]ur strength as a nation state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial process, and terrorism.”²⁵ As Cole reflects, “something has gone perilously wrong” when “[t]he proposition that judicial processes—the very essence of the rule of law—are to be dismissed as a strategy of the weak, akin to terrorism . . .” and “[w]hen the rule of law is seen simply as a device used by terrorists”²⁶

domestic spying program, run by the National Security Agency (NSA), offers another such subversion of the rule of law. *See infra* note 280.

23. *See* Cass R. Sunstein, *Monkey Wrench*, LEGAL AFFAIRS, Sept.-Oct. 2005, at 36-40, available at www.legalaffairs.org/issues/September-October-2005/feature_sunstein_sep0ct05.msp (arguing against an understanding of the U.S. Constitution ascendant post-9/11 that Sunstein calls “national security fundamentalism,” whose subscribers “understand the Constitution to say that when national security is genuinely threatened, the president must be permitted to do whatever needs to be done to protect the United States.”). *See also* Dahlia Lithwick, *The Imperial Presidency*, WASH. POST, Jan. 14, 2007, at B02. This rise of the “unitary executive” may really have been the rise of the “Shadow Unitary Executive” in the form of the ascendancy of the Vice President, who by most accounts has orchestrated this radical re-empowerment of the executive branch. *See* Marty Lederman, *Addington Speaks!*, BALKANIZATION (June 26, 2007), <http://balkin.blogspot.com/2007/06/addington-speaks.html>. It was eventually revealed that Vice President Cheney brought into the Oval Office the four-page executive order in which the President originally designated terrorism suspects as enemy combatants for the President’s signature on November 13, 2001. The Vice President’s office purposefully hid the details of the order and the fact that the President was to sign the order from the National Security Advisor, Condoleezza Rice, and the Secretary of State, Colin Powell. *See* Sidney Blumenthal, *The Imperial Vice Presidency*, SALON.COM (June 28, 2007), <http://www.salon.com/opinion/blumenthal/2007/06/28/cheney/index.html>; Barton Gellman & Jo Becker, *Angler: The Cheney Vice Presidency*, WASH. POST, <http://blog.washingtonpost.com/cheney/?hpid=specialreports> (last visited Sept. 25, 2007).

24. David Cole, *What Bush Wants to Hear*, 52 N.Y. REV. BOOKS 18, 8-11, Nov. 17, 2005 (reviewing JOHN YOO, *THE POWER OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)).

25. *Id.* at 11 (quoting the Nat’l Defense Strategy, Mar. 2005).

26. *Id.*

This Article will explore how the law and its agents, lawyers, gradually have been transformed in the popular imagination into enemy combatants—destabilizing forces within our society. As will be shown, the rhetoric and cultural narratives surrounding the “War on Terrorism” and its legal regime are far from exceptional within the American cultural engagement with the law. Rather, they draw strength from and help perpetuate a long-standing ideological “jaundiced view”²⁷ of the law and lawyers that has been used to great effect in further marginalizing “undesirable” groups in our society by restricting access to justice, procedural rights, and the scope of judicial discretion. Understanding this genealogy helps contextualize not only the ascendancy of the view of the law and lawyers as enemy combatants, but also reinforces how such cultural pathologies threaten everyone’s freedom. Before proceeding, however, a brief consideration of the evasive figure of the unlawful enemy combatant is in order.

B. *The Image of the “Unlawful” Enemy Combatant*

The image of the enemy combatant first appeared in constitutional culture in *Ex parte Quirin*.²⁸ The Court in *Quirin* was confronted with six German saboteurs caught entering the United States during World War II.²⁹ It classified the Germans as “unlawful” enemy combatants, which it defined as “those who[,] during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property”³⁰ This definition derives from then extant international humanitarian law, namely the Hague Convention No. IV,³¹ which differentiated between lawful combatants, who deserve the status of prisoners of war upon capture, and unlawful combatants, who lose such status upon review by military tribunals that determine the legality or illegality of their activities. However, the term has little legal meaning as it has been applied in the

27. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998) [hereinafter Galanter, *An Oil Strike in Hell*] (defining the “jaundiced view” as “a set of beliefs and prescriptions about the legal system based on the perception that people are suing each other indiscriminately about the most frivolous matters, and juries are capriciously awarding immense sums to undeserving claimants.”).

28. *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

29. *Id.* at 21-23.

30. *Id.* at 35.

31. *Id.* at 30 n.7 (stating that forty-four nations signed Article I of the Annex to the Hague Convention No. IV of Oct. 18, 1907, 36 Stat. 2295, that “define[d] the persons to whom belligerent rights and duties attach . . .”).

“War on Terrorism,” to the extent that, outside the international conflicts in Afghanistan and Iraq, the United States is not engaged in armed conflicts of an international character.³²

According to the Court in *Quirin*, the unlawful enemy combatant acts as a “spy who secretly and without uniform passes the military lines of a belligerent in a time of war, seeking to gather military information and communicate it to the enemy or . . . [passes] secretly through the lines [to] wag[e] war by destruction of life or property”³³ The unlawful enemy combatant thus distinguishes himself from other combatants in that he does not look like a combatant, but rather, passes as a civilian. He is dangerous because he aims to disrupt our way of life not through cannon shot or aerial bombardment, as in conventional warfare, but by creating chaos and carnage within our society, debilitating our infrastructure and forcing us into states of emergency.³⁴ Even when the enemy combatant is not actively engaged in hostilities, his very presence among us is enough to engender a paranoia that interrupts the fluid functioning of our daily affairs.

32. The International Committee for the Red Cross, the guardians of international humanitarian law, stated the following with respect to the enemy combatant:

The term is currently used—by those who view the “global war against terror” as an armed conflict in the legal sense—to denote persons believed to belong to, or believed to be associated with terrorist groups, regardless of the circumstances of their capture From an IHL perspective, the term “combatant” or “enemy combatant” has no legal meaning outside of armed conflict. To the extent that persons designated “enemy combatants” have been captured in international or non-international armed conflict, the provisions and protections of international humanitarian law remain applicable regardless of how such persons are called. Similarly, when individuals are captured outside of armed conflict their actions and protection are governed by domestic law and human rights law, regardless of how they are called.

Int’l Comm. for the Red Cross, *Official Statement: The Relevance of IHL in the Context of Terrorism*, July 21, 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

33. *Quirin*, 317 U.S. at 31.

34. *Id.* at 31-38. The Bush Administration identified enemy combatants, or “terrorists,” as

[i]ndividuals acting alone or in concert involved in international terrorism [who] possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order of Nov. 13, 2001].

The Bush Administration and its interlocutors in Congress, have generated at least some of this paranoia. President Bush's description of the nation's enemies in his address to a joint session of Congress nine days after 9/11 closely-mirrored the image of the enemy combatant.³⁵ He described our enemies as terrorists who "hate our freedoms' and want to 'disrupt and end a way of life.'"³⁶ Senator Graham similarly described the enemy combatant before the Senate:

We find ourselves in a war with a group of people who are not part of a state or a nation. They do not wear uniforms. They are terrorists. They hide among civilians. They cheat. They do anything one can imagine to have their way. They do not abide by any international regimes.³⁷

In short, enemy combatants do not play by the rules—they undermine them, threatening to undermine our society in the process.

In trying to understand a part of the cultural processes by which the law and lawyers, have been turned into enemy combatants, my argument will draw upon the work of cognitive scientists, such as George Lakoff and Steven Winter, who have applied these methodologies to politics and law, respectively.³⁸ These scholars take seriously the notion that there can be no law or reason without metaphor; in other words, that metaphor is in a real sense one of the basic elements of the genetic material of our body politic.

Some have responded to this crisis in our national commitment to the rule of law from a doctrinal perspective,³⁹ and others philosophically, usually by reference to the philosophy of Agamben and of German jurist and political theorist Carl Schmitt, who built his political theory on the necessity of distinguishing between political enemies and friends.⁴⁰ This

35. Nicholas Lemann, *Paranoid Style: How Conspiracy Theories Become News*, NEW YORKER, Oct. 16, 2006, at 96.

36. *Id.*

37. 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham).

38. *See infra* notes 48 & 49.

39. *See, e.g.*, Katyal & Tribe, *supra* note 3, at 1268, 1284-85 (arguing that Art. I, § 8 of the Constitution gives Congress the power "[t]o constitute Tribunals inferior to the [S]upreme Court," that Congress has not exercised to establish military commissions, and that the President has no inherent authority to do so under Article II). *But see* John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 918 (2003) (arguing that only wars between sovereigns demand a formal declaration of war).

40. *See, e.g.*, Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825 (2000). The appeal to Schmitt's philosophy in the post-9/11 era is a global phenomenon. *See The*

Article, however, will attack the problem from a different perspective: within the sphere of American culture. It analyzes a particularly productive few months of Senate hearings in which that body attempted to assert itself in the stewardship of the “War on Terrorism” through a variety of discrete legislative proposals. The primary focus will be on Senator Lindsey O. Graham’s (R.-S.C.) amendment to S.1042, the National Defense Authorizations Act for Fiscal Year 2006,⁴¹ which came to a vote in mid-November 2005 and attempted to alter drastically the procedures of determining and reviewing enemy combatant status at Guantánamo Bay. The President eventually signed a bill that incorporated a version of the amendment into law on December 30, 2005, as the DTA.⁴²

Though language is frequently the source of legal battles and is paramount to constitutional and legislative interpretation, the following analysis will highlight the particularly potent forms of discourse utilized by Graham and other senators in debating the provisions of the amendment. Graham’s language and framing of the debates draw heavily—purposively or not—upon prominent cultural tropes about our justice system and the lawyers within it. These metaphors have pervaded our national cultural consciousness for decades, influenced by conservative politicians, think tanks, media outlets and other sources, including Supreme Court justices, presidents, and vice-presidents.⁴³ I argue that these Senate debates, and any echoes thereof in “popular culture” and other fora beyond the intimate circles of legal elites, may prove foundational in instilling or reinforcing a national attitude towards the law’s role in what has apparently become a “forever war.”⁴⁴ This is a story of how the irresponsible deployment of metaphor comes to undermine public debate on a matter of national importance and how the public acquiesces to the powers of metaphor, due no doubt in part to the salience

International Theory of Carl Schmitt, 19 LEIDEN J. INT’L L. 1 (2006), available at <http://www.ljil.leidenuniv.nl/index.php3?c=187> (last visited Sept. 3, 2007) (addressing Schmitt’s political philosophy in a global perspective).

41. Nat’l Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. (1st Sess. 2005).

42. See DTA, *supra* note 2.

43. See *infra* Part II.A.

44. See Mark Danner, *The War on Terror: Four Years On; Taking Stock of the Forever War*, N.Y. TIMES, Sept. 11, 2005, at 6. Danner writes, “[g]rotesque as it is to say, the spectacle of 9/11 was meant to serve, among other things, as an enormous recruiting poster.” *Id.* Danner argues that the Bush Administration’s “War on Terrorism,” particularly its decisions to invade Afghanistan and Iraq, have helped make a reality of Osama bin Laden’s prophecies of a seemingly endless civilizational war between the West and radical Islam (as President Bush remarked five days following the attacks on 9/11, “This is a new kind of evil and we understand . . . this crusade, this war on terrorism, is going to take a while.”).

and diffusion of similar and related metaphors within the collective consciousness. The force of the metaphor-laden argument enables it to overpower more impassioned, judicial modes of thought leading to disastrous results, including the undermining of the rule of law.

This Article proceeds in several stages. Part I provides the theoretical groundwork to appreciate the contributions of cognitive science towards our understanding of the power of language and metaphor in our political process. Part II provides background on the development and proliferation of the jaundiced view of the law upon which Graham's rhetoric builds. It traces back to earlier manifestations of similar rhetoric in the tort reform debates, which portray the law and lawyers as having a dissolutive effect on society in a variety of ways. We are introduced to the images of the "conniving claimant" and the "predator lawyer," metaphors that continue to resonate today in part because the jaundiced view of the law did not wither away. The rest of Part II follows its journey through other social and legal contexts, including crime, immigration, and the use of the tort system to pursue human rights abuse committed abroad.

In these other spheres of law and culture, the elements of the "conniving claimant"⁴⁵ and predator lawyer metaphors developed in earlier parts of the century and broadcast widely by conservatives during the tort reform debates, have by now diffused more widely. In these other contexts, the construed threat emerges from activist judges who are empowered to use their discretion in decisionmaking. In these realms, the core activity of judges to both hear the cases of marginalized individuals (jurisdiction) and their power to grant relief within legally defined parameters (discretion) are fought against as if they are societal diseases that must be prevented from infecting the body politic.

Part III turns our attention to the "War on Terrorism," focusing on the legal and political setting in which the Graham Amendment arose. It was a period in which Congress awoke from a paralyzing fear-induced legislative slumber and finally took initiative in handling the "War on Terrorism." Part IV analyzes the rhetoric deployed by Senator Graham in support of his amendment to the Defense Appropriations Bill of Fiscal Year 2006—the DTA—demonstrating its linkages to earlier manifestations of the jaundiced view of the law. Finally, Part V explores how the entailments of the enemy combatant metaphor have extended well beyond noncitizens to threaten U.S. citizens and lawyers in particular. The argument is an attempt to show the continuities between, and the

45. See *infra* note 63 and accompanying text.

interdependence of the fates of those designated enemy combatants, and the rest of us who compose the body politic.

This Article does not emphasize the merits of Graham's Amendment and other legislative efforts around the "War on Terrorism," though these will be considered where relevant. Indeed, the methodology presented here simply seeks to describe how metaphors travel through the law, from one context to another as they are strategically utilized by various actors within our "constitutional culture."⁴⁶ In this light, the true import of the Graham Amendment goes far beyond its immediate legal effect; its contribution, building upon a long-line of antecedent images, is reinforcing a widespread cultural expectation or sense of normalcy around viewing the law and lawyers, as debilitating elements in our society.

II. "NO LAW OR REASON WITHOUT METAPHOR": UNDERSTANDING CONCEPTUAL METAPHORS IN POLITICS

Studying culture is increasingly recognized as essential to understanding human political and social interaction, be it in the sandbox, in global power relations, or in the law.⁴⁷ Cognitive science in particular has introduced important conceptual models and units of analysis through which we can begin to understand the micro-processes inherent to cultural interactions. Both Steven Winter⁴⁸ and George Lakoff,⁴⁹ two of the most prominent scholars to ply the trade of cognitive science to the realms of law and politics, see metaphor as foundational to both law and reason.⁵⁰ Winter describes "Idealized Cognitive Models" (ICMs) as the fundamental

46. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323 (2006) (explaining how "constitutional culture channels social movement conflict to produce enforceable constitutional understandings.").

47. See Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 3 (2001) (stating "Everywhere it seems that culture is in ascendance."); see also David Brooks, *Questions of Culture*, N.Y. TIMES, Feb. 19, 2006, § 4, at 12 (noting that economics is "no longer the queen of the social sciences" and that recent history has "thrown us back to the murky realms of theology, sociology, anthropology and history," with even the economists recognizing this and consequently "migrating to more behavioralist and cultural approaches.").

48. See generally STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE AND MIND* (2001).

49. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 81 (2003).

50. See Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1063 (2002).

cognitive units by which our minds structure our daily experience of the world, including our understanding of it and interaction with it.⁵¹

Some ICMs present scenarios, scripts or what Lakoff calls “experiential gestalts”⁵² (Winter provides the example of the “restaurant scenario”—we reflexively “know” upon entering a restaurant and sitting down that the waiter is there to take our orders and serve the meal, not to interrogate us or draw our portraits on his or her pad),⁵³ while other gestalts consist of broad concepts, ideas, or categories grounded in a physical or cultural experience, such as the ICM of mother.⁵⁴ Other ICMs structure themselves in terms of metaphors, and still others take the form of metonymies, like racial stereotypes in which characteristics experienced with respect to some members of a social group are ascribed to all members.⁵⁵ In short, ICMs, the metaphors, and the metaphor-making they facilitate, help shape our reality by providing a basis for our knowledge and ability to act on different things; they are the building blocks by which humans order their world and create meaning out of it.

Jonathan Simon brings the cognitive scientists’ thinking in line with Michel Foucault’s concept of “governmentality,” (a condensation of “governmental” and “rationalities”), which Foucault uses to argue that the act of government is “bound up with ways of reasoning about governing.”⁵⁶ Simon has argued for recognizing what he calls “governmental metaphors,” such as the “war on crime,” which he considers so common that “it is easy to forget that it is a metaphor, arguably one of the most successful governmental metaphors of the twentieth century.”⁵⁷ Simon traces how the war metaphor developed after

51. Steven L. Winter, *Legal Storytelling: The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2233 (1989).

52. LAKOFF & JOHNSON, *supra* note 49. Lakoff and Johnson define experiential gestalts as “ways of organizing experiences into *structured wholes*,” which are characterized by multidimensional structures that help us to “make[] our experience *coherent*.” *Id.* at 81. For example, by imposing the gestalt of a “conversation” on our experience of talking to others, listening to them talk, “we experience the talking and listening that we engage in as a particular *kind of experience*, namely, a conversation.” *Id.* at 83.

53. Winter, *supra* note 51, at 2233-34.

54. *Id.* at 2234.

55. *Id.* (citing GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 84-88 (1987) (describing stereotypes as metonymies “because the experientially grounded *part* (the attributes of some) comes to stand for the *whole* (the entire social group).”).

56. Simon, *supra* note 50, at 1063 (citing MICHEL FOUCAULT, *GOVERNMENTALITY* 201, in *3 ESSENTIAL WORKS OF FOUCAULT* (James D. Faubion ed., 2000) (1965-1984)).

57. *Id.* at 1052. With governmental metaphors, Simon notes “[w]hat is being transferred from one domain (war) to another (law enforcement) is specifically a vision of the role of government

World War II, quickly spreading to many domains of government, and, as Simon suggests, supplying a new rationale for governing that entails a specific set of apparatus and approaches.⁵⁸ This occurs through the process of “radial categories,” which as Winter shows, is the way meaning can expand from a primary example of a particular type of thing (Ford for car) to apply to a larger range of very different examples grouped within a general category (i.e., Ford would come to stand in for Buicks).⁵⁹

Conceptual metaphors are significant not only for the initial imposition of a concept from one sphere to another, but also for the entailments produced by that transfer.⁶⁰ As Jonathan Simon notes, “[g]overning through crime metaphors may likewise have had largely political objectives, but its entailments alter the way we know and act on the nation as a body politic.”⁶¹ In the following discussion, I trace the metaphor of the conniving claimant as it travels through various legal contexts, eventually arriving at the “War on Terrorism” in the body of the enemy combatant.

III. AN ICONOGRAPHY OF THE “JAUNDICED VIEW” OF THE LAW

A. *From Jokes and Legends to Pervasive Cultural Understandings*

This Part traces the development of an iconography of a particular set of images and metaphors excavated from the last several decades of American political life. Once collected and analyzed, these images and metaphors present a troubling and persistent picture, which Marc Galanter has termed the “jaundiced view” of the American civil justice system.⁶² As Galanter’s scholarship over the last twenty years has shown, there are grave mischaracterizations about our legal system that proliferate through a series of jokes,⁶³ “legal legends,” and “elite folklore,” which are often

. . . . It seems justifiable, at any rate, to view metaphors like these as operating in the realm of political reason.” *Id.* at 1053; see also JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

58. *Id.* “Nonetheless, the images of a war on poverty, war on crime, war on cancer, war on drugs, and War on Terrorism continue to invoke the image of an empowered central government mobilizing the nation and its resources to undertake systematic measures against an enemy that poses a moral threat.” *Id.*

59. *Id.* at 1037, 1037 n.12.

60. *Id.* at 1041.

61. Simon, *supra* note 50, at 1041.

62. See Galanter, *An Oil Strike in Hell*, *supra* note 27 and accompanying text.

63. See Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647, 653-54 (2000) [hereinafter Galanter, *Conniving Claimant*]

stockpiled and then released strategically by a wide range of political actors within our legal culture, including judges, lawyers, academics, pundits in think tanks and the media, and of course, politicians.⁶⁴ Journalists and scholars have examined these claims, proving them total fabrications or severe embellishments. And yet, in most instances, this limited discovery of these stories' fallaciousness within academic circles does not reach nearly as wide an audience as do the stories themselves. So, these stories have become legends, outliving their debunking by scrupulous researchers, leaving our society at large enraptured by these "horror stories" of a legal system run amok.⁶⁵

Galanter attributes this resilience at least in part to the fact that the legal legends "resonate with many of the basic themes of our legal culture, such as individual responsibility and self-reliance."⁶⁶ These particular themes have been emphasized as the cause of the "turn to litigiousness" by conservative critics who blend secular and religious language into a "powerful and coherent moral vocabulary," that sermonizes against the tendencies of rights claiming, blaming, and litigating as if they were infectious diseases. These moralizing calls for "personal responsibility" view individuals who "control their bodily passions, care for their physical beings, avoid material harm to themselves, rely on their own resolve, and insure themselves against accidents and unexpected maladies [as] both constitut[ing] the moral community and sustain[ing] the health of the larger 'body politic.'"⁶⁷ In these accounts, to abstain from engaging the law and assume personal responsibility for oneself is to emulate the divine, while to sue is to sin.⁶⁸

The following discussion catalogues some of the most pernicious elements of the iconography, laying the groundwork for viewing Senator

(tracing the history of conniving claimant jokes throughout the twentieth century, which initially highlighted Jews, among other ethnic groups as faking injuries or being overly-zealous in their readiness to bring a lawsuit, and eventually becoming "de-ethnicized and generalized into worry about frivolous cases and the litigation explosion.").

64. *Id.* at 658-63; see also Galanter, *An Oil Strike in Hell*, *supra* note 27; Marc Galanter, *Changing Legal Consciousness in America: The View from the Joke Corpus*, 23 CARDOZO L. REV. 2223 (2002) [hereinafter Galanter, *Joke Corpus*]; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) [hereinafter Galanter, *The Day After*].

65. Galanter, *An Oil Strike in Hell*, *supra* note 27, at 731, 739-40 (explaining "[a]lthough the cascade of scholarly criticism has diminished acceptance of the jaundiced view among academic and practicing lawyers, and among some judges and legislators, the major bastions of the jaundiced view remain intact . . .").

66. *Id.* at 722.

67. WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 59 (2004).

68. *Id.* at 56-68.

Graham's Senate floor theatrics as participating in an established American cultural discourse. In the language of cognitive science, these images, metaphors, or stories have over time achieved universal cultural purchase—when encountered, people immediately recognize their validity and normalcy as they form part of a shared cultural understanding. As such, their nefarious origins are taken wholly for granted and forgotten.

B. *Conniving Claimants and Predator Lawyers*

As Galanter notes, jokes used to circulate depicting conniving claimants who either fabricated injuries or attested to them malingering longer than reasonably expected so that those allegedly suffering harm could get a remedy in court. These conniving claimants were often figured as foreigners, specifically Jews. According to Galanter, these stories long ago moved from being a depiction of “bizarre deviations from the normal” to a “new and alarming normality.”⁶⁹ Galanter continues, “[t]he notion that deviants or outsiders are misusing the legal system [was] generalized into the notion that frivolous cases are normal and typical within the legal system.”⁷⁰ This now pervasive view sees too much law as a debilitating force within society, undermining our most important social institutions and relations:

Americans in all walks of life are being buried under an avalanche of lawsuits. Doctors are being sued by patients, [l]awyers are being sued by clients. Teachers are being sued by students. Merchants, manufacturers and all levels of government—from Washington, D.C. to local sewer boards—are being sued by people of all sorts. This epidemic of hair-trigger suing, as one jurist calls it, even has infected the family. Children haul their parents into court, while husbands and wives sue each other, brothers sue brothers, and friends sue friends.⁷¹

It soon became accepted as social fact that the courts were being “clogged with litigation.”⁷² As a result, the public came to view lawyers as agents

69. See Galanter, *Conniving Claimant*, *supra* note 63, at 660.

70. *See id.*

71. *Id.* at 659-60 (citing *Why Everybody is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50).

72. *Id.* at 660; *see also* Galanter, *An Oil Strike in Hell*, *supra* note 27, at 731-32 (citing an Oakland Tribune editorial diatribe about the McDonald's coffee case—perhaps the paradigmatic horror story of litigation circulating in America—that queries the readers: “[i]s there any doubt in anyone's mind that our legal system is being badly abused? Greedy lawyers, victims out to make

catalyzing undesirable changes in American society.⁷³ One survey found that “over half the public thought it a fair criticism of most lawyers that [t]hey file too many lawsuits and tie up the court system[,]” while another survey found that 74% of those queried agreed that “the amount of litigation in America today is hampering this country’s economic recovery.”⁷⁴

One of the primary mediums for transmitting this set of beliefs about the law has come through paradigmatic stories about excessive litigation and excessive damages. These horror stories, such as the McDonald’s coffee case,⁷⁵ or the case of the psychic who brought suit for loss of her business as a spiritual advisor due to complications from a CAT scan⁷⁶—came to plague American society, convincing us of the “litigation explosion”⁷⁷ and its rising monetary and social costs. They have come to comprise a modern folklore expressing conventional wisdom that everyone accepts as true.

As Galanter shows, these stories were worked up into legends by sectors in corporate America, lobbyists, pundits, and writers in corporate-sponsored think tanks, who distorted the numbers and gave partial, decontextualized accounts of the claims and subsequent litigation (if they were even pursued). They bombarded the public with images of “irksome and destructive liability and frequent and excessive punitive awards.”⁷⁸ The McDonald’s coffee case, as Galanter notes, is the most famous

a buck, and a culture that encourages people to sue instead of accepting their own responsibility or working things out, have clogged courts with cases that don’t belong there.”)

73. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 634 (1994) (providing a “taxonomy of anti-lawyer themes” describing lawyers as: “(1) corrupters of discourse; (2) fomenters of strife; (3) betrayers of trust; (4) economic predators.”).

74. Galanter, *Conniving Claimant*, *supra* note 63, at 664. Elsewhere Galanter adds that this “hypertrophy” of our legal institutions is thought to come with a

[C]oncomitant erosion of community, decline of self-reliance, and atrophy of informal self-regulatory mechanisms. It has become a commonplace that the United States is the most litigious nation on earth, indeed in human history, and that excessive resort to law marks America’s moral decline and portends painful political and economic consequences.

Galanter, *The Day After*, *supra* note 64, at 4.

75. *Liebeck v. McDonald’s Restaurants*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

76. *Haimes v. Temple Univ. Hosp.*, 39 Pa. D. & C.3d 381, 1986 WL 2187 (Pa. C.P. 1986).

77. See Galanter, *The Day After*, *supra* note 64, at 5-7 (discussing and providing examples of the “litigation explosion”).

78. Galanter, *An Oil Strike in Hell*, *supra* note 27, at 740.

contemporary example of such horror stories; and who, upon hearing it, does not immediately think of its associated imagery of frivolous lawsuits resulting in excessive rewards?⁷⁹ In a brief review of some then current legends, Galanter describes an ideal type of such stories: they focus on “nutty claims” that are often dismissed by courts (if they are even litigated). They “invariably tell of a claim by an individual against an institution, governmental body, or corporation,” but never deal with claims brought between individuals or by corporate entities against one another nor with “grotesque or frivolous defenses.”⁸⁰ “It is a universe in which corporations and governments are victims, and individuals (and their lawyers) are the aggressors.”⁸¹ Furthermore,

these stories are neither experiential nor analytic accounts, but disembodied cartoon-like tales that pivot on a single bizarre feature They are abstracted from media accounts and re-circulated by entrepreneurial publicists through a succession of other media. In the course of this recirculation, they are further simplified and decontextualized. They are placed in a timeless narrative present. The focus is on the claimant and the triviality of the claim. Thus, the West Virginia horror story emphasizes the pickle jar but omits the violation of state policy concerning reemployment⁸²

79. See *id.* at 731-32 (describing the “pattern of decontextualization” these horror stories present through the illustration of the McDonald’s case). In addition, Galanter notes that the

story of the spill, the suit and the \$2.9 million award is abstracted from the facts about the extent of plaintiff’s injury (third degree burns on legs and groin necessitating skin grafts); the defendant’s practice of serving coffee twenty or so degrees hotter than [*sic*] the standard in the trade; its earlier encounter with some seven hundred claims of this type, some of which it settled (for a total outlay of more than \$500,000); the defendant’s refusal of plaintiff’s initial request for payment of her medical (and attendant) expenses (about \$11,000), which it countered with an offer of \$800; its rejection of settlement proposals by her lawyer and of a court-appointed mediator’s recommendation that the parties settle for \$225,000; and the subsequent judicial reduction of the punitive award (from the jury’s \$2.7 million, supposedly an estimation of two days of McDonald’s coffee sales, to \$480,000, three times the amount of the compensatory damages); or the subsequent settlement between the parties”

Id. at 732. Galanter also noted that the undisclosed settlement did not exceed \$600,000. *Id.* at 732 n.72.

80. *Id.*

81. Galanter, *An Oil Strike in Hell*, *supra* note 27, at 731.

82. *Id.* (footnote omitted).

The psychic and the CAT scan story, which through its extensive recirculation became, in Galanter's words, "a poster child for tort reform"⁸³ through its extensive recirculation, offers a helpful illustration of how these legends are born. A woman claimed she had experienced an allergic reaction and other complications resulting from the injection of dye during a CAT scan. The complications included headaches, which she claimed impaired her clairvoyant abilities, resulting in her being forced to go out of business as a spiritual advisor.⁸⁴ The jury failed to follow the trial court judge's instructions to not consider the claims for losses related to her psychic business, and awarded her \$988,000 in damages.⁸⁵ Four months later, the judge ruled that the jury had either disregarded his instructions or made an award that was "grossly excessive" and set aside the initial award as well as granted the defendant's request for a new trial.⁸⁶ After transfer to a different judge who disqualified the originally proffered expert, the psychic was non-suited and the Pennsylvania Superior Court upheld the ruling.⁸⁷

What could have become a narrative of the law working, of an appropriate correction for a distortion in the system, was not seen as such, but rather, was seized upon and distorted as evidence of the civil justice system run amok. A year after the suit, President Reagan, during a speech to the College of Physicians in Philadelphia, cited the case stating, "well, a new trial was ordered in that case, but the excesses of the courts have taken their toll. As a result, in some parts of the country, women haven't been able to find doctors to deliver their babies, and other medical services have become scarce and more expensive."⁸⁸ According to Reagan's version and later adaptations of it, an outrageous claim led to the use of underhanded tactics like the use of so-called "experts," which led to an outrageous award for damages.⁸⁹ As Reagan summed up the moral of the

83. *Id.* at 727; *see supra* note 76.

84. Galanter, *An Oil Strike in Hell*, *supra* note 27, at 726-27.

85. *Id.* at 727.

86. *Id.*

87. *Id.*

88. *Id.* at 728.

89. *See* Galanter, *An Oil Strike in Hell*, *supra* note 27, at 728. Galanter notes that the story lived on: five years later, Peter Huber used it in a campaign against "junk science" in the courtroom, turning a story "about an outrageous claim and outrageous award . . ." into one about "outrageous expert testimony." *Id.* at 728. This was then picked up by the President's Council on Competitiveness, which in an edited version of the story, failed to mention the reversal of the case, concluding, "[s]tories such as this are becoming almost commonplace . . ." *Id.* Galanter observes that the Council "transforms a cautionary tale of something bizarre that almost happened into a report of something typical and prevalent. Liberated from its anti-climactic ending, the tale of the

story, such litigation disables the productive parts of American society because of the associated costs driven up by the threat of litigation.

The reality is that the tort system suffers from what law professor Richard Abel characterized as a chronic “crisis of underclaiming.”⁹⁰ Indeed, as Galanter’s research shows, the rates of claiming, with the exception of car-related injuries, are low, and potential claims frequently are not pursued. Pertinent to this particular exaggeration by Reagan, a Harvard study of medical malpractice in New York estimated that “eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State.”⁹¹

Reagan’s psychic and the CAT scan legend about rampant medical malpractice was but one in a long line of inaccurate depictions of the civil justice system, including other areas of law, such as employment discrimination claiming.⁹² As early as the infamous 1976 Roscoe Pound

psychic and the CAT scan is free to occupy its rightful place in the canon of tort horror stories.” *Id.* at 728-29 (footnote omitted).

90. See Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987). Abel’s observations remain valid. In 1996, the American Medical Association at last conceded that medical mistakes are “common,” but this was only a superficial “concession,” because it arrived with a new “anti-litigation” argument that “lawsuits harm patients by driving error reports underground[,]” which quickly became conventional wisdom. See David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 896 (2005). There, Hyman and Silver review the evidence on the connections between malpractice exposure, error reporting, and health care quality, and refute the “conventional wisdom among patient safety advocates and legal scholars . . . that medical malpractice lawsuits impede efforts to improve health care quality by encouraging providers to hide mistakes[,]” which serves as a “normative basis for ongoing federal and state efforts to curtail medical malpractice exposure.” *Id.* at 893. Hyman and Silver conclude that “[t]here is no foundation for the widely held belief that fear of malpractice liability impedes efforts to improve the reliability of health care delivery systems.” *Id.* As they observe sardonically, “[t]he tort system is always part of the problem, never part of the solution.” *Id.* at 896.

91. Galanter, *Conniving Claimant*, *supra* note 63, at 663 (footnote omitted).

92. As in most instances, the debates about the relative overextension or underextension of our legal system or particular areas within it need unpacking and contextualization. See, e.g., Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (reviewing doctrinal and statutory developments in employment discrimination law, social scientific literature on discrimination in the workplace, and analyzing data available about employment discrimination litigation in the federal courts from 1990 to 2001). Nielsen and Nelson found that the claim of “overexpansiveness” of the employment discrimination claiming system “is premised on some uncontested observations and some problematic assertions.” *Id.* at 666. Nielsen and Nelson wrote:

It is clear that federal, state, and municipal laws now formally offer broad legal protections from workplace discrimination for minorities, women, the disabled, working parents, and the aged, among others. It is also clear that the number of

Conference, Supreme Court Chief Justice Warren Berger popularized this jaundiced view, which helped give rise to the alternative dispute resolution (ADR) movement that swept thousands of cases from various sectors out of the courts.⁹³ Berger's efforts came as part of a much larger backlash to restrict access to justice that was fueled by an anxiety among elites in the 1970s that the expansion of judicial remedies and its extension to previously marginalized groups had radically raised the citizenry's expectations about the law's ability to vindicate rights.⁹⁴

Lawyers were first characterized as predators in the 1970s, a theme that has continued since then.⁹⁵ Intense feelings of resentment grew among America's professionals and business community for what was perceived as efforts to expose them to "unwanted and unwarranted accountability"⁹⁶ (through the emergence of medical malpractice, product liability, civil rights, wrongful discharge, stockholder class actions, and other sorts of

charges of discrimination made to the EEOC increased over 16% between 1992 and 2002, and that the number of federal employment discrimination lawsuits rose 161% between 1990 and 2001. As the number of claims has grown, the variety of types of discrimination alleged also has increased. Whereas charges of racial and gender discrimination in hiring and promotion predominated in the early years of the Civil Rights Act, the current set of claims include large numbers of allegations of discriminatory firing, sexual harassment, age discrimination, and disability discrimination.

Nielsen & Nelson, *supra* (footnotes omitted). The authors also observe, consistent with Galanter's and Haltom and McCann's research, that the growth in scale and diversity of employment discrimination claims "has produced a backlash of criticism against employment discrimination laws by some members of the employment defense bar and conservative commentators that contains more debatable assertions" than the federal statistics presented above. *Id.* (footnotes omitted). Echoing Galanter, Nielsen and Nelson point out that these critics, "[o]ften focusing on media reports of major awards, . . ." insist that "antidiscrimination law has become a windfall for plaintiffs." *Id.* at 667 (footnote omitted). Insurance companies, the authors note, have tried to capitalize on these perceptions in their marketing of new products by "repeat[ing] the most dramatic stories of employer liability in discrimination suits." *Id.* (footnote omitted). Nielsen and Nelson also point out the complicity of academics in generating this folklore, pointing to the work of John Donohue and Peter Siegelman, who claim that the Civil Rights Act of 1991, along with an increasingly entrepreneurial plaintiffs' bar, generate "more lawsuits and larger awards, even though the underlying phenomena of workplace discrimination may actually be declining." *Id.* (footnote omitted).

93. See LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* 48-49 (2002).

94. Galanter, *An Oil Strike in Hell*, *supra* note 27, at 718.

95. Galanter, *Joke Corpus*, *supra* note 64, at 2230. Galanter further noted the observation of *Wall Street Journal* columnist Paul Gigot that "lawyers have replaced trade unionists as the chief scourge of American business." *Id.* at 2231.

96. *Id.*

litigation.⁹⁷). This resentment is not limited, according to Galanter, to angst over individual victimization at the hands of lawyers; rather, lawyers are also seen as “destroying social assets and unraveling the social fabric.”⁹⁸

Indeed, lawyers came to be viewed as agents of “chaos” and “disorder” in society, and even as a threat to the very foundations of the American way of life, namely, democracy and capitalism.⁹⁹ In the late 1970s, Laurence H. Silberman, who later became a federal judge, asked in a trade journal, *Regulation*, “Will Lawyering Strangle Democratic Capitalism?”¹⁰⁰ In the article he explained how “the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy[,]” and further denounced “the harmful impact of an ever expanding legal process on our society.”¹⁰¹ Silberman traced the expansion of rights discourse to new spheres of the previously disenfranchised to a weakening in the “intermediate institutions [families, churches, schools, corporations, labor unions, and political parties] . . . that are indispensable pillars of a pluralistic democracy.”¹⁰² The proliferation of law to the hitherto unregulated parts of our society and economy, and subsequent purported “litigation explosion” was becoming “a major structural impediment to our economy,” potentially offering a competitive advantage to Japan and Europe.¹⁰³ As Galanter sums it up, the expansion of litigation was no longer a narrow concern affecting discrete spheres of life, institutions, or industries, but had now grown so pernicious that it threatened our collective survival, with lawyers becoming “dangerous parasites in the national bloodstream . . . an entropic drag against the constructive forces of society.”¹⁰⁴

C. Beyond Tort Deform

The attack on conniving claimants and the predator lawyers who aid and abet them could not help but eventually spread to judges as well, as the conservative right began its campaign against liberal activist judges

97. *Id.*

98. *Id.*

99. *Id.* at 2232-33.

100. Galanter, *Joke Corpus*, *supra* note 64, at 2233 (quoting Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, 2 REGULATION 15 (1978) [hereinafter Silberman, *Democratic Capitalism*]).

101. *Id.* (quoting Silberman, *Democratic Capitalism*, *supra* note 100, at 15, 44).

102. *Id.* (quoting Silberman, *Democratic Capitalism*, *supra* note 100, at 18).

103. *Id.* (quoting Silberman, *Democratic Capitalism*, *supra* note 100, at 21).

104. *Id.* at 2233-34.

who “make up the law”¹⁰⁵ rather than interpret it, aided by legal doctrines such as due process and habeas corpus. Judges themselves were not the immediate threat to society; just as predator lawyers supposedly facilitated and legitimized conniving claimants’ frivolous complaints against honest businesses, so too the conservatives construed judges as giving aid to the enemy, i.e., the criminals who “terrorize the streets in too many of America’s cities.”¹⁰⁶ President Reagan, in defense of his nomination of ultra-conservative Robert Bork, lauded Bork’s tough but fair stance on crime, and stated very clearly the decision Americans had to make:

Three choices are what this battle is all about: the choice between liberal judges who make up the law or sound judges who interpret the law; the choice between liberal judges whose decisions protect criminals or firm judges whose decisions protect the victims; the choice between liberal judges selected by the liberal special interests or distinguished judges selected to serve the people.¹⁰⁷

Of course, the Reagan Revolution and all that it entailed goes far beyond this attack on liberal activist judges; but this; conception of the role of judges within society came to play and continue to play a powerful role in American political discussions, as will be seen in the context of the DTA debates, discussed below. This paradigm portrays liberal judges as inverting the rule of settled legal tradition, while “distinguished” conservative judges protect our traditions on behalf of “the people.”¹⁰⁸ One need look no further than current headlines to see the ever-present reverberations of this mythology. Shortly after a federal judge’s mother and husband were killed and a state court judge was shot to death on the bench in Atlanta, Senator John Cornyn, a Texas Republican, reflected:

I wonder whether there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up and builds up to the point where some

105. See Ronald Reagan, Remarks at a White House Briefing on the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States (Sept. 30, 1987), [hereinafter Reagan Remarks], <http://www.reagan.utexas.edu/archives/speeches/1987/093087b.htm>; see also Jacob V. Lamar, Jr., *Gone with the Wind*, TIME, Oct. 12, 1987, available at <http://www.time.com/time/magazine/article/0,9171,965715,00.html>.

106. Reagan Remarks, *supra* note 105.

107. *Id.*

108. *Id.*

engage in, engage in violence. Certainly without any justification, but a concern I have.¹⁰⁹

The attack on the judiciary and the courts has spread to many other policy areas, including criminal justice, immigration, terrorism, and the Alien Tort Statute,¹¹⁰ which provides civil remedies to noncitizens for human rights abuse suffered abroad. Particularly with crime and immigration, the Republican-dominated 104th Congress attempted a radical redefinition of the rule of law as it pertained to perceived “undesirables” whose very presence in our society supposedly undermines its core values and makes Americans less safe.¹¹¹ The Antiterrorism and Effective Death Penalty Act (AEDPA),¹¹² passed in the wake of the Oklahoma City bombing carried out by American terrorist Timothy McVeigh, semantically linked these groups of “undesirables,” instituting a new paradigm that privileged security over immigrants’ rights.¹¹³ As Senator Kennedy noted during debates over AEDPA, “[u]sing the phony label of antiterrorism, the bill achieves two reprehensible goals: it denies meaningful habeas corpus review to State death row inmates, and it makes it easier to turn away refugees and victims of political persecution”¹¹⁴

In this way, AEDPA linked criminals and immigrants with terrorists. All were collectively labeled as forces within our society—like conniving claimants before them—whose enjoyment of robust political rights and access to court would come at a detriment to normal, innocent peoples’ lives and the smooth functioning of the economy and society. The

109. See *Supreme Court Justice Ruth Bader Ginsburg Happy with Democratic Congress*, ASSOCIATED PRESS, Oct. 11, 2007.

110. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2002) [hereinafter Alien Tort Statute (ATS) or Alien Tort Claims Act (ATCA)].

111. See Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006) [hereinafter Kanstroom, *The Better Part of Valor*]. Kanstroom described 1996 as a year that “saw radical attacks on judicial review of immigration cases,” as the Republican Congress and Clinton Administration “fundamentally restructured immigration law.” *Id.* at 162. Kanstroom pointed out that the Antiterrorism and Effective Death Penalty Act of 1996 was “extraordinarily far-ranging and implicat[ed] constitutional provisions from Article III to the Suspension Clause and the First and Fifth Amendments.” *Id.* at 162 n.6. See also Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

112. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA] (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.).

113. See generally Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998).

114. 142 CONG. REC. S3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy).

jaundiced view of the law viewed criminals and immigrants as opposing both direct and indirect threats to society. The direct threat consisted of their values and lifestyles, which were seen as inherently destructive of mainstream culture, but the indirect threat they posed was more subtle; according to the jaundiced view of the law, subversion by these groups would also happen through the legal efforts expended by their lawyers and the “liberal activist judges” who sought to protect their already emaciated rights. Similar to the conniving claimants’ frivolous claims, the extension of legal protections to these unwanted groups allegedly slowed the works of our justice system. Furthermore, because they were innately undeserving of such protections, such claiming and due process could only be seen as an unnecessary expenditure of precious national energies. The overhaul of these regulatory areas is too vast a topic to cover adequately here, but a brief synopsis will be presented below.

1. AEDPA and IIRIRA

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996¹¹⁵ was Congress’s attempt to deal with what was perceived as the problematic use of federal habeas corpus for state prisoners. In defending the new habeas bill, Senator Orin Hatch argued that reform was needed to eliminate “frivolous appeal after frivolous appeal . . . [.]” particularly in the death penalty context.¹¹⁶ The facts, of course, are more complicated than this blithe statement; warnings, such as Hatch’s, need to be contextualized with the extreme rise in prison population over the last three decades.¹¹⁷

AEDPA was a comprehensive overhaul of habeas law and practice, and now occupies the field, precluding previous arrangements be they

115. See AEDPA, *supra* note 112.

116. 141 CONG. REC. S7596 (daily ed. May 26, 1995) (statement of Sen. Hatch).

117. Galanter synthesizes statistics from several sources to show that in a nine-year period, from 1975 to 1984, prisoner petitions (not necessarily exclusively federal death penalty habeas petitions) increased by 61%, but this must be put into the context that the prison population (state and federal) of the United States grew by 74% during the same time period. The federal prison population grew from 24,131 in 1975 to 34,263 in 1984, and then 40,223 in 1985, but “the rate of petitions dropped sharply from 209.2 per 1,000 in 1975 to 132.1 per 1,000 in 1984, and then jumped back to 155.7 in 1985.” Galanter, *The Day After*, *supra* note 64, at 18 nn.53-54. As of 2005, there are 2.2 million inmates in U.S. prisons and jails, capping off a 33-year continuous rise, placing the U.S. incarceration rate as the highest in the world. In the last decade alone, the federal prison population has doubled despite a return to crime rates unseen since the 1960s. See The Sentencing Project, *New Incarceration Figures: Thirty-Three Consecutive Years of Growth*, <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited July 12, 2007).

statutorily conceived or contrived through decisional law.¹¹⁸ The most controversial provision of the new habeas law is 28 U.S.C. § 2254(d), which governs the deference a federal court reviewing a habeas petition must accord to a state court's decision.¹¹⁹ Past statements about a federal court's duty to review a state prisoners' federal claim de novo suggested that a federal judge reviews the case without necessarily referring to the prior state court judgment. However, the new formulation of § 2254(d) refocuses the reviewing court's attention, requiring it foremost to focus on the state court's adjudication of the claim, answering the question as to whether or not it reached the proper conclusion.¹²⁰

Though the Senate version of what would become AEDPA did not try to address immigration issues, the House version made several drastic changes to asylum law. First, in contravention of Article 31 of the Refugee Convention, it gave prescreening officers the authority to deport, without a full hearing before an immigration judge, an asylum seeker who enters the country with false or no documents. At no point in this accelerated process is the asylum-seeker accorded counsel or an interpreter.¹²¹ In the words of Senator Kennedy, AEDPA also "return[ed] to the discredited cold war guilt-by-association policy of the McCarran-Walter law, excluding individual[s] from our shores based on mere membership in an organization," and did so unnecessarily, because existing law already afforded authority to exclude members of known terrorist organizations.¹²²

As in the criminal context, judicial review has always played a special role as guarantor of individual rights in the realm of immigration law. Over the last decade, however, the government has repeatedly attempted to restrict the access of immigrants to the courts through various jurisdiction-stripping clauses, to streamline the process of review, and to enact provisions that constrain the discretion of judges.

In 1996, Congress passed, and the President signed, both the AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act

118. See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

119. *Id.* at 382 (describing § 2254(d) as the provision that "has drawn the lion's share of attention, both in Congress and in professional and academic circles.").

120. *Id.* at 383.

121. See generally AEDPA, *supra* note 112. Specifically, the amendments were in Subtitle C—Modification to Asylum Procedures, § 421—Denial of Asylum to Alien Terrorists; § 422—Inspection and Exclusion of Immigration Officers; § 423—Judicial Review. *Id.*

122. 142 CONG. REC. S3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy).

(IIRIRA).¹²³ The anti-immigration clauses of the AEDPA and the IIRIRA were aimed at restricting judicial review of final orders of deportation for permanent legal residents convicted of certain enumerated criminal offenses, including minor crimes.¹²⁴ Similar to the efforts discussed below with regard to the enemy combatants, AEDPA and IIRIRA collectively place the entire deportation process under the control of the executive branch. The Acts effectively exclude all opportunities for judicial participation in some cases and limit the scope of review in others.¹²⁵ These changes are profound given the judiciary's historically important role in immigration matters.¹²⁶

It is significant to note that the IIRIRA's name harkens back to the moralizing arguments by social conservatives from the litigation and tort reform debates. Social conservatives blamed conniving claimants and the litigation explosion for eviscerating both the moral fabric of the nation and the longstanding commitment of Americans to individual responsibility. Their argument was that people had stopped taking responsibility for their own actions and instead preferred to "pass the buck" by suing someone else rather than face their guilt.¹²⁷ Here too, harsh deportation procedures against an unwanted population are presented as necessary. The IIRIRA puts forth the moral argument that if a legal, permanent resident has committed a crime, then the resident has abused his or her privileges and the kind hospitality of the United States. Therefore, a legal, permanent resident must assume individual responsibility for illegal actions. As will be seen with the DTA, the scope of the IIRIRA taps into a persistent trope that warns against both overextending the resources of the U.S. legal system and, more importantly, not being taken advantage of by forces that seek to undermine our society. The argument behind the latter warning is

123. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 [hereinafter IIRIRA] (codified in scattered sections of 8, 18, & 42 U.S.C.A.).

124. IIRIRA § 306(a), 110 Stat. at 3009-607 (codified at 8 U.S.C. § 1252(a)(2)(C) (2002)) ("Notwithstanding any other provision of law . . . no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain] criminal offense[s]"); 110 Stat. at 3009-612 (codified at 8 U.S.C. § 1252(g) (2002)) ("[N]otwithstanding any other provision of law . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."); *see also* IIRIRA § 306(b), 110 Stat. at 3009-611 (repealing 8 U.S.C. § 1105a).

125. *See* Hafetz, *supra* note 113, at 2509.

126. *Id.*

127. *See supra* Part II.A.

that providing undeserved support makes us vulnerable. In truth, however, providing such support is merely providing equal protection under the law.

As Hafetz notes, the joint operation of AEDPA and IIRIRA forecloses courts from reviewing a variety of legal questions.¹²⁸ Prior to IIRIRA, judges could weigh a range of considerations in determining whether aliens who were found deportable could be granted relief under § 212(c).¹²⁹ Additionally, before AEDPA and IIRIRA, a judge could look at a variety of favorable elements under § 212(c), including family ties and duration of residence within the United States, evidence of hardship in the event of deportation, employment history, armed forces service record, community service, and other evidence of good character and potential to contribute to American society.¹³⁰ Barring this discretionary review thus reduces a convicted legal resident to nothing but an illegal immigrant who has overstayed his or her welcome and has taken advantage of the good graces of the United States by violating its laws.

Moreover, as in other areas where the jaundiced view of the law operates, these restrictive gestures did not confine themselves to the criminal context, as in AEDPA, but seeped into the targeting of noncriminal aliens as well.¹³¹ Hafetz gathers several cases where district courts “have already found that the IIRIRA narrows judicial review of the INS’s denial of a noncriminal alien’s attempt to stay deportation pending a motion to reconsider his deportation order.”¹³² In addition, he observes, the IIRIRA eliminates judicial review over “all denials of discretionary relief except asylum,”¹³³ including denials of suspensions of deportation based on continuous presence, good moral character, or hardship resulting from deportation.¹³⁴

A few short years later, the 9/11 attacks created a fresh impetus for new restrictive measures. The Department of Homeland Security replaced the Immigration and Naturalization service, and streamlining regulations

128. Hafetz, *supra* note 113, at 2509-10.

129. See *id.* at 2510. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (codified as amended at 8 U.S.C. § 1182(c) (2002)); see also *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (holding that § 212(c) relief is available in deportation as well as exclusion proceedings). “The IIRIRA eliminated [§] 212(c) relief and replaced it with ‘cancellation of removal.’” IIRIRA § 304(b), 110 Stat. at 3009-594 to -596 (codified at 8 U.S.C. § 1229b (2002)). Hafetz, *supra* note 113, at 2510 n.7.

130. Hafetz, *supra* note 113, at 2510 n.10 (citing *In re Marin*, 16 I. & N. Dec. 581, 584-85 (B.I.A. 1978)).

131. *Id.* at 2510.

132. *Id.*

133. *Id.*

134. *Id.*

adopted in August 2002 emaciated the internal review of judicial decisions by the Board of Immigration Appeals (BIA). The BIA was halved in size, with its three-judge panels reduced to panels of one. This streamlining also created greater pressure on federal courts, leading to calls for further restriction of judicial review, despite the recognition by astute observers such as Judge Richard Posner of the Seventh Circuit that federal judicial review was necessary to compensate for the “staggering” error rate of the BIA.¹³⁵

Though the Supreme Court would reaffirm the importance of judicial review of habeas petitions over deportation orders in *INS v. St. Cyr*,¹³⁶ this precipitated yet another restrictive lashing back in the form of the REAL ID Act of 2005 (REAL ID).¹³⁷ notably, REAL ID, came packaged as part of the much larger (and widely regarded as essential)¹³⁸ Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief. REAL ID precluded district court jurisdiction over habeas appeals from not only final removal proceedings (as had been the case) but in other contexts as well.¹³⁹ Significantly, a substantial aspect of REAL ID was a concerted effort to harmonize state and federal

135. *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

136. *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001).

137. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 [hereinafter REAL ID].

138. See 152 CONG. REC. S11,742, S11,746 (daily ed. Dec. 8, 2006) (statement of Sen. Akaka) (describing the passage of REAL ID). Senator Akaka claimed that it was

attached to a must-pass piece of legislation . . . in Conference and therefore received virtually no scrutiny before passage. Every member of Congress who supported providing much needed funding to our troops and relief to the Indonesia tsunami victims was forced to vote in favor of the REAL ID Act, an unrelated bill.

Id.

139. See Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231; 8 U.S.C.A. § 1252(a)(2)(B) (2007); Kanstroom, *The Better Part of Valor*, *supra* note 111, at 164, 164 n.14 (noting that this change was an apparent response to cases since 1996 determining that 8 U.S.C. § 1252(a)(2)(B) applied only to decisions made in the removal context) (citing cases). See also Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459 (2006). According to Motomura, *St. Cyr*

confirmed that although many noncitizens subject to final removal orders could not obtain review of pivotal issues in their cases by means of a petition for review in the courts of appeals, they nevertheless could challenge final removal orders by raising questions of law in habeas petitions filed in the federal district courts.

Id. at 469.

identification documentation with the databases linked to motor vehicle records, which would enhance the ability of law enforcement authorities to gather and share information on state driver's license holders.¹⁴⁰ These changes, like many other processes introduced in the post-9/11 administrative state, raised significant worries among those concerned about privacy rights and civil liberties.¹⁴¹

2. Attacking the Alien Tort Statute (ATS)

The ATS was introduced in the 1789 Judiciary Act, and provides for jurisdiction in the lower courts for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁴² On October 17, 2005, Senator Diane Feinstein (D-CA) introduced S. 1874, "The Alien Tort Statute Reform Act," which she said was aimed at "clarif[ying] the meaning and scope of the Alien Tort Statute [ATS]."¹⁴³ Feinstein claims to have introduced the legislation to clarify ambiguities left by the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*.¹⁴⁴ By "clarifying" Feinstein really meant "stripping" because her legislation would have eviscerated the ATS, one of the only substantial legal remedies for victims of human rights abuse.

140. See REAL ID, *supra* note 137, §§ 201-208.

141. See 152 CONG. REC. S11,742, S11,746 (daily ed. Dec. 8, 2006) (statement of Sen. Akaka). Senator Akaka commented regarding civil liberties concerns:

The REAL ID Act will require each state's driver's licensing agency to collect and store substantial numbers of records containing licensees' most sensitive personally identifiable information, including one's social security number, proof of residence, and biometric identifiers such as a digital photograph and signature. If the new state databases are compromised, they will provide one-stop access to virtually all information necessary to commit identity theft.

Id. For more, see ACLU, Real Nightmare, at <http://www.realnightmare.org/>. As of this writing, the states are in various stages of implementation or outright protest of the REAL ID Act. See Thomas Frank, *6 States Defy Law Requiring ID Cards*, USA TODAY (June 18, 2007), http://www.usatoday.com/news/nation/2007-06-18-id-cards_N.htm?csp=34. Six state legislatures (Maine, Montana, New Hampshire, Oklahoma, South Carolina, and Washington) have passed laws opposing the national legislation. *Id.* Most states complain that the REAL ID Act's new standards are too costly to implement (the National Conference of State Legislatures estimates a total of \$11 billion), and the new national ID card does not have enough safeguards to prevent identity theft. *Id.*

142. Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2002).

143. 151 CONG. REC. S11,433 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein).

144. See *id.*; *Sosa v. Alvarez-Macrain*, 542 U.S. 692 (2004).

What is fascinating about this instance of the jaundiced view is that the rhetoric is wielded by a Democratic politician, demonstrating the absolute prevalence of this discourse in our society. In advocating for her legislation, Feinstein pointed to a *Washington Post* editorial on *Alvarez-Machain*, which expressed concerns that deciding the grounds for lawsuits in the United States for human rights abuses abroad is “surely a legislative question, not one for the freewheeling discretion of judges.”¹⁴⁵ To this Feinstein added, “[t]he Court’s hesitation to legislate from the bench shifts the responsibility to this body”¹⁴⁶ Feinstein’s rhetoric should not be seen solely in terms of separation of powers; it partakes in, and thereby reinforces, folklore positioned against “an intrusive activist judiciary” and all that has been shown above to go along with it.¹⁴⁷

Feinstein also borrowed from, and further reinforced, other cultural tropes concerning the litigation explosion and the rising costs of litigation. She presented the Senate with “facts” stating that “[t]here are estimates that dozens of existing alien tort suits claim damages collectively in excess of \$200 billion dollars.”¹⁴⁸ Feinstein then editorialized, “[t]hat’s an extraordinary sum that rightly concerns the U.S. business community, particularly given numerous inconsistent federal courts verdicts handed down in the past two decades.”¹⁴⁹ In other words, this is a substantial threat, and the law is unruly and prone to excess and irrational behavior. Therefore, the current law needs to be reigned in and controlled through reform.

Feinstein reinforces this threat by presenting the ATS in its current formulation the way Justice Berger and the corporate propaganda machine portrayed the proliferation of rights and legal remedies a few decades ago. Her legislation “deters private plaintiffs from filing sweeping and specious claims simply because a corporation has a U.S. legal nexus and deep pockets.”¹⁵⁰ In defending the need for a requirement of specific intent, Feinstein argued that “[i]n my view, we need to deter legal fishing expeditions, whereby plaintiffs come to the bar with flinty facts backing weak charges.”¹⁵¹ Here Feinstein taps into what Galanter, Haltom, and McCann have shown to be popular cultural beliefs about conniving claimants and predator lawyers: the zealotry with which American

145. 151 CONG. REC. S11,433 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein).

146. *Id.*

147. *See generally* Galanter, *An Oil Strike from Hell*, *supra* note 27.

148. 151 CONG. REC. S11,434 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein).

149. *Id.*

150. *Id.*

151. *Id.*

lawyers tempt potential clients into suing for baseless claims is nothing more than greedy opportunists going after large corporate defendants' deep pockets.¹⁵²

Feinstein also reinforces the mythological effects of litigation: destabilizing and undermining core social institutions, such as economic activity. Feinstein suggests that the real intent of these actions to hold corporations accountable for gross violations of human rights "is to rely on an extensive legal discovery process to uncover matters that embarrass companies and delay their business plans."¹⁵³ Even more boldly, Feinstein asserts that "these particular suits, brought by foreigners for massive monetary damages, threaten the international economic activities that are important to sustaining the American economy."¹⁵⁴ Once again, litigation to enforce basic rights is seen as a counterproductive force in society—an "entropic drag," as Galanter phrased it.¹⁵⁵ Furthermore, these unmeritorious claims clogging our courts and slowing down our economy are being brought by "foreigners." Though Feinstein does not draw it out further, the subtle added value of mentioning the identity of the claimants has a powerful impact, as it draws upon and reinforces earlier images of foreign conniving claimants fabricating or embellishing injuries for monetary reward.

Similar to the restrictions on habeas and judges' discretion in immigration cases, Feinstein's proposals sought procedural modifications as well, which would have had the effect of restricting the ATS's utility as a tool for human rights activists seeking justice for victims of the most heinous crimes known to humanity. The most regressive of Feinstein's proposals were her attempts to heighten the standard for liability under ATS¹⁵⁶ to prohibit lawyers suing under ATS from charging contingency

152. See *supra* Part II.A.

153. 151 CONG. REC. S11,435 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein).

154. *Id.* This echoed arguments put forward by a report published in 2003 by a Washington, D.C. think-tank, the Institute for International Economics (IIE), which "described ATCA [also called ATS] as 'an awakening monster' that could expose multinational corporations to the possibility of being sued in U.S. courts for 'abetting China's denial of political rights,' or observing Chinese bans on unions, or damaging the Chinese environment." See *Under the Shadow of ATCA*, FDI MAG. (June 5, 2006), http://www.fdimagazine.com/news/fullstory.php/aid/1668/Under_the_shadow_of_ATCA.html. The IIE argued that the "real victim" of these suits would not be the corporations paying out upwards of \$20 billion in punitive damages, but the global economy. *Id.* "It argued that the scope of awards under ATCA would be such that 'investment and trade in developing countries will be seriously threatened . . . the ultimate losers will be millions of impoverished people denied an opportunity to participate in global markets.'" *Id.*

155. See Galanter, *Joke Corpus*, *supra* note 64 and accompanying text.

156. 151 CONG. REC. S11,435 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein). While the elements for vicarious liability claims under the ATS have been proof of a defendant "aiding

fees,¹⁵⁷ and to impose a statute of limitations on ATS claims.¹⁵⁸ These efforts mirror other attempts at the reform of more conventional torts, such as medical malpractice.¹⁵⁹

and abetting” violations, Feinstein’s “reform” act sought to ratchet-up the standard so that to be held liable, a defendant must be a “direct participant acting with specific intent to commit the alleged tort.” *Id.* Feinstein’s proposed standard is nearly impossible to meet, particularly because most situations of violations that would be actionable under ATS occur through joint ventures like the Unocal/Total-Burma pipeline project, in which the actual violations may be perpetrated not by the U.S. incorporated company, but by its partners or subcontractors. *See also* Center for Constitutional Rights Docket: *Doe v. Unocal*, *Synopsis* [hereinafter *Synopsis*], http://www.ccrny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnm&Content=45 (last visited Sept. 10, 2007). As human rights lawyers have pointed out, “[c]orporations are liable because they have the power *not* to be complicit in human rights violations.” *Id.* (statement of Judith Chomsky, cooperating attorney on *Doe v. Unocal*). Furthermore, the standard of “direct participation” with “specific intent” goes against most contemporary understandings of liability for gross violations of human rights under international law. In August 2004, the Bush Administration made similar arguments against a standard of aiding and abetting in an amicus brief filed in the U.S. Court of Appeals for the Ninth Circuit on behalf of California oil giant Unocal. *Id.* The Administration argued that Unocal should not be held liable for aiding and abetting human rights abuses committed against villagers living near Unocal’s Yadana pipeline in southern Burma. *Id.* The Burmese military, Unocal’s partner on the pipeline project, was accused of subjecting the villagers to rape, murder, torture, and forced labor. *Id.* “The Administration want[ed] the case dismissed, arguing that aiding and abetting liability ‘could deter’ companies from ‘economic engagement’ with oppressive regimes.” *Synopsis, supra*. As human rights lawyers commented, “[t]he Administration has previously argued in court that those who aid and abet terrorists can be sued. But to protect narrow business interests, they now say those who aid and abet crimes against humanity should be immune.” *Id.* (statement of Richard Herz of EarthRights International, co-counsel for the plaintiffs).

157. *See* 151 CONG. REC. S11,436 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein) (referencing Alien Tort Statute Reform Act, § (g) which states “[c]ontingency fee arrangements are prohibited in any action brought under the jurisdiction provided in this section.”). This would severely limit the capacity of nonprofit organizations like the Center for Constitutional Rights, which pioneered the use of ATS in *Filartiga*, from bringing future ATS claims. *See* *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

158. *See* 151 CONG. REC. S11,436 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein) (referencing Alien Tort Statute Reform Act § (h) which states “no action shall be maintained under this section unless it is commenced not later than 10 years from the date the injury occurred.”). This statute of limitations is an excessively restrictive move because many ATS claims arise out of gross violations of human rights in which victims have a difficult time reaching lawyers and the courts. Furthermore, victims are not often aware that the ATS statute offers them a legal remedy against their abusers. There is no statute of limitations in the original statute, though courts have implied a ten year statute of limitations. *See* *John Doe I v. Unocal Corp.*, 395 F.3d 932, 944 n.13 (9th Cir. 2002) (noting the Ninth Circuit’s ten year statute of limitations for ATCA claims), *vacated by*, 395 F.3d 978 (9th Cir. 2003) (en banc); *see also* *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (en banc).

159. *See supra* notes 90 & 91 and accompanying text.

A tremendous outpouring of criticism from civil and human rights advocacy groups persuaded Feinstein not to request that Senator Arlen Specter, Chairman of the Senate Judiciary Committee, schedule her legislation for a hearing.¹⁶⁰ Feinstein's proposals, even though she withdrew them, provided support to similar policy arguments aimed at limiting access to the courts for the most vulnerable populations is not what matters. The significance is in the language she deployed, the rhetoric of "court-clogging," "free-wheeling" judges who may be tempted to "legislate from the bench," thereby disincetivizing American companies from doing business and expanding the American economy. The effect was clear, and it furthered an argument we have heard before: the overextension of legal rights and remedies has left the country overexposed, and thus, we need to curtail this law-run-amok before it undermines our productive efforts as a society.

The colonization by the jaundiced view of the law of these various legal settings—civil damages for corporate and medical torts, habeas corpus review for criminals, substantial judicial review in the immigration system, and the availability of the causes of action for violations of human rights committed abroad—by the jaundiced view of the law served as mere precursors to the most radical undermining of traditional American legal values that have occurred in the "War on Terrorism." The next Part explores how an instrumental piece of this inversion of the rule of law—the Detainee Treatment Act—came about.

IV. THE POLITICO-CULTURAL MILIEU OF THE GRAHAM AMENDMENT

A. "*Congress has been AWOL*"¹⁶¹ as an Executive Runs Amok

Unlike previous instances when U.S. security and sovereign integrity have been attacked, Congress had for several years remained "essentially silent" about the technologies of power deployed by the Bush Administration to combat al-Qaida in the aftermath of 9/11.¹⁶² Both during the Civil War, when President Abraham Lincoln suspended the writ of

160. See Senator Diane Feinstein, *Letter to Senator Arlen Specter, Chairman, Senate Comm. On the Judiciary*, Oct. 25, 2005, http://www.earthrights.org/campaignfeature/senator_feinstein_puts_breaks_on_anti-atca_bill_s_1874.html. Feinstein explained that "the legislation in its present form calls for refinement in light of concerns raised by human rights advocates, and thus a hearing or other action by the Committee on this bill would be premature." *Id.*

161. 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham).

162. See Michael Greenberger, *The Missing Link*, LEGAL AFF., Sept./Oct. 2005, at 32-34.

habeas corpus, and following the attacks on Pearl Harbor during World War II, when President Franklin D. Roosevelt ordered Japanese-Americans incarcerated, Congress responded promptly, ratifying the Executive's wartime unilateral actions taken in defense of the nation. In stark contrast to these earlier moments of crisis, Congress did not pass a single piece of legislation granting approval to what many view as the Bush Administration's most excessive reactions to the 9/11 attacks.¹⁶³

Congress did nothing about the detainees and the military commissions, issues that had festered since 2001, until the Judiciary Committee held a hearing on June 15, 2005. This sudden congressional action occurred just over a week before the Supreme Court, according to Senator Arlen Specter, "took the bull by the horns and came down with three decisions in June of 2004 [*Rasul*, *Hamdi*, and *Padilla*] because the Congress had not acted."¹⁶⁴ According to Specter, congressional acquiescence may be largely attributed to a lack of ideas and deference for the Executive.¹⁶⁵ Senator Specter claims that Congress "didn't know what to do. It didn't know quite how to approach it. And perhaps it was too hot to handle."¹⁶⁶ Senator Specter attempted to make this deference to the Executive seem like business as usual "in the face of assertions by the executive of the

163. *Id.* at 32-33. On September 18, 2001 Congress passed the Authorization of the Use of Military Force (AUMF), giving the President authority to invade Afghanistan in 2001 with Operation Enduring Freedom. *Id.* at 34. The plurality decision in *Hamdi v. Rumsfeld* found that the AUMF provided authority to detain enemy combatants, including citizens, for the duration of that conflict (at least as long as "United States troops are still involved in active combat in Afghanistan") so long as detainees received some form of process, as demanded by the Geneva Conventions. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion). This implies not broad congressional authorization for the duration of the "War on Terrorism," but rather permission for such practices until the end of hostilities in Afghanistan. Congress also passed the USA PATRIOT Act in October 2001, but Michael Greenberger, Law Professor and Director of the Center for Health and Homeland Security, argues this did not address the detention, extradition, and interrogation practices that are viewed as the most abusive. See Greenberger, *supra* note 162, at 33. Furthermore, Greenberger questions just how involved Congress was in the passage of the Patriot Act. He describes it as "another example of unilateral action by the Administration, rather than a rare instance of collaboration between the president and Congress." *Id.* He notes that the Justice Department proposed the principal elements of the Act only a week following 9/11, and that Congress reviewed it in one "cursory hearing" and voted to approve it within the following six week period during which Congress was largely closed due to the anthrax virus scare. *Id.* Greenberger adds that according to a reliable report, the House had not received a final written draft of the Act at the time of the vote. *Id.*

164. 151 CONG. REC. S12,659 (daily ed. Nov. 10, 2005) (statement of Sen. Specter). Specter said that the Supreme Court's action did not solve the problem completely, but did initiate momentum as *Hamdan* did in 2005. See *id.*

165. *Id.*

166. *Id.*

need to defer to Presidential power[,]”¹⁶⁷ but others would argue that Congress has been unduly negligent in their constitutional duty to check the uses of presidential power.¹⁶⁸

In those years, Congress sheepishly watched as the Executive enacted its vision of the “War on Terrorism,” committing grave abuses of human rights, including those involved in the Abu Ghraib prison scandal and other ghastly acts.¹⁶⁹ As of this writing, there are approximately 395 unlawful enemy combatants being held indefinitely at the Guantánamo Bay Naval Base in Cuba (down from a high point of 650 in late 2002), approximately 400-600 inmates in Bagram prison in Afghanistan, and an estimated 14,500 at various sites in Iraq.¹⁷⁰ Inmates at Bagram live in even harsher conditions and have fewer rights than those at Guantánamo. Many of the Bagram detainees have been held there for several years, and none of them have spoken with attorneys or had a chance to challenge the basis of their detention.¹⁷¹ Worse off still are the “ghost detainees,”¹⁷² the estimated dozens of humans secreted away in “black site

167. *Id.*

168. See Greenberger, *supra* note 162, at 33 (arguing that the failure to perform this duty, which is backed by its various war-related powers, has led not only to a “weakening of representative government, but damage to the nation’s international reputation”). See also Noah Feldman, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, at 55 (describing the various claims of executive power by the Bush Administration as “easily the most aggressive formulation of presidential power in our history,” and suggesting that it is essentially Congress’s job to reign in the Executive’s excesses). After a trip to Guantánamo Bay, Senator Graham actually suggested to David Addington, Vice-President Cheney’s counsel, that Addington coordinate the writing of legislation with Congress, so that the Supreme Court would be more likely to uphold it. Addington, clutching a copy of the Constitution, replied that “the Administration didn’t need congressional authorization for what it was doing. The President had the inherent authority to handle the prisoners any way he wanted.” Jeffrey Toobin, *Killing Habeas Corpus*, NEW YORKER, Dec. 4, 2006, at 46.

169. Joseph Lelyveld, *No Exit*, N.Y. REV. BOOKS, Feb. 15, 2007, <http://www.nybooks.com/articles/19853>.

170. See Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, at A1; see also Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

171. See Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at A1.

172. See Human Rights Watch, *The United States “Disappeared”: The CIA’s Long-Term “Ghost Detainees”* (Oct. 2004), at 5, available at <http://www.hrw.org/background/usa/us1004/us1004.pdf>; see also ACLU, *Extraordinary Rendition* [hereinafter *Extraordinary Rendition*], <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html>; Report Committee on Legal Affairs and Human Rights, Council of Europe (Rapporteur Dick Marty), *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, June 12, 2006, <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm> (describing participation and cooperation of various Council of Europe member states in the CIA’s “extraordinary rendition” program).

prisons”—undisclosed CIA-run locations scattered throughout the world. These prisoners have disappeared “like the victims of a Third World dictatorship; they have never been registered with the International Red Cross, provided with a legal review of their cases or allowed to communicate with the outside world.”¹⁷³ The kind of treatment these detainees are subjected to remains a matter of mystery and grave concern.¹⁷⁴ All told, Human Rights First estimates (based on released government figures) that between 60,000 and 70,000 persons have been detained around the globe at some point since 2001; a figure some argue should also “include the more than one thousand aliens, mostly Muslim, held in the United States after the September 11 attacks, on unrelated immigration charges or as so-called ‘material-witnesses,’ on orders of Attorney General John Ashcroft.”¹⁷⁵

Whatever the causes of its overly long hibernation, Congress suddenly sprang to life in the summer of 2005, in between Memorial Day and Veteran’s Day, with a flurry of legislative activity addressing the “War on Terrorism.” The members of Congress likely were energized by the contrast presented by reports of worsening violence in Iraq with the Executive’s bold prophecies that the insurgency was in its final throes.¹⁷⁶ The members of Congress may also have been motivated by the U.S. Supreme Court’s decisions of the previous summer that did exercise some check on the Executive’s rampage.¹⁷⁷ Indeed, Senator Graham’s statements made it clear that his amendment was an effort to get Congress involved precisely because, in his view, *Rasul* had changed the law.¹⁷⁸

173. Editorial, *Close Guantánamo? Yes, But Keep in Mind: It's Not the Main Problem*, WASH. POST, June 22, 2006, at A28.

174. See Joanne Mariner, *CIA Detainees: First the Crime, Then the Cover-Up*, FINDLAW, Jan. 31, 2007, <http://writ.news.findlaw.com/mariner/20070131.html>; see also Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 836 n.96 (2005).

175. Lelyveld, *supra* note 169.

176. *Iraq Insurgency in "Last Throes," Cheney Says*, June 20, 2005, <http://www.cnn.com/2005/US/05/30/cheney.iraq/>.

177. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (*per* O'Connor, J., for the Court, with whom Rehnquist, C.J., Kennedy & Breyer, J.J., joined. Souter & Ginsburg, JJ., concurring in the judgment but dissenting with the reasoning in part, and Scalia, Stevens & Thomas, JJ., dissenting); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (*per* Stevens, J., for the Court, with whom Kennedy, J., concurred. Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

178. See 151 CONG. REC. S12,664 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

B. Congress Slouches Toward the Trenches of the “Forever War”

One could tell the story of the Graham Amendment almost exclusively through a separation of powers narrative, providing a dramaturgical description of the not so delicate ballet danced between the coordinate branches around the issue of terrorism and national security.¹⁷⁹ In fact, Senator Graham himself colorfully portrayed his amendment and that of Senator McCain’s (on prohibiting torture and abusive treatment of Department of Defense detainees) as constructive interventions into the Executive’s campaign in the “War on Terrorism”¹⁸⁰ that were encouraged by the U.S. Supreme Court itself (Graham explicitly cited Justice Scalia’s invitation in the *Rasul* dissent for Congress to involve itself more assertively.¹⁸¹). Graham repeatedly described Congress as having been AWOL in the effort to deal with the dirty details of the “War on Terrorism.” The amendments offered by Graham, McCain, and other members of Congress were going to help get the country back on track.¹⁸²

179. Justice Kennedy’s concurrence in *Rasul* argues that the situation must be dealt with in context of separation of powers. He argues for reading *Johnson v. Eisentrager*, 339 U.S. 763, to consider the scope of habeas “against the backdrop of the constitutional command of the separation of powers.” *Rasul v. Bush*, 542 U.S. 466, 485-86 (2004) (Kennedy, J., concurring). Kennedy continues by stressing that *Eisentrager* indicates:

[T]here is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented.

Id. at 487.

180. 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham). “The Congress does not need to give the executive branch a blank check on how to run this war.” *Id.*

181. Senator Graham noted Scalia’s invitation when he first introduced his amendment. See 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham). In the first paragraph of his dissent in *Rasul*, Justice Scalia all but abdicates the Court’s role in dealing with the issue entirely. See *Rasul*, 542 U.S. at 488-89 (“I would leave it to Congress to change § 2241, and dissent from the Court’s unprecedented holding.”). See 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham).

182. Senator Graham introduced his amendment, linking it with that of Senator McCain’s, as a restoration of our national moral imperative:

It is clear to me from Abu Ghraib backward, forward, and other things we know about that at times we have lost our way in fighting this war. What we are trying to do in a series of amendments is recapture the moral high ground and provide

It was likely not Justice Scalia's invitation alone that invigorated Congress during those months. Also prompting congressional involvement were the President's remarkably low approval ratings following new convincing evidence that the Administration had used false intelligence to mislead the nation into the war in Iraq.¹⁸³ Other reports about the use of "extraordinary rendition" of individuals to clandestine terror facilities located in the former Soviet gulag system and across eastern Europe (known as "black site" prisons) also gave Congress new impetus to involve itself.¹⁸⁴ This executive branch misuse of power presumably instigated the amendment to the Defense Authorization Act of 2006 by Senator Kerry. Senator Kerry's Amendment required the Administration to disclose to the Senate Intelligence Committee the location and nature of all Department of Defense detention facilities all over the world.¹⁸⁵ Other amendments presented in response to gross unilateral action by the Administration include McCain's on interrogation techniques,¹⁸⁶ and the Iraq war exit strategy amendments proposed by Senators Reid, Levin, and Warner.¹⁸⁷ Strife arose over the McCain Amendment when Vice President Cheney demanded that the Amendment exempt the CIA from the torture prohibition. President Bush threatened to veto the legislation if Cheney's demands were not met. All this political strong-arming forced Senate

guidance to our troops. That is why Senator McCain's amendment, which I cosponsored, is so important, and it passed by voice vote.

151 CONG. REC. S12,655 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

183. See James Gerstenzang, *GOP Pressure Over Detainee Policy Leads to Defense Bill Delay*, L.A. TIMES (July 27, 2005), at A14 (implying that Senator Graham and Senator McCain's Amendments "suggest a growing independence among Senate Republicans as President Bush struggles with declining support for the war in Iraq as well as an investigation into the involvement of top White House aides" in the disclosure of Ambassador Joseph Wilson's wife as a CIA agent).

184. See Priest, *supra* note 170.

185. 151 CONG. REC. S12,645-46 (daily ed. Nov. 10, 2005) (statement of Sen. Kerry). Kerry's Amendment No. 2507 requires the President to ensure that the government complies with the authorization, reporting, and notification requirements of Title V of the National Security Act of 1947 (50 U.S.C. § 413) and in particular to report to the members of the Senate Intelligence Committee. *Id.*

186. Note the popularity of McCain's Amendment (90-9) versus Graham's (49-42, originally). If Graham's Amendment passed un-amended, then it would render McCain's meaningless. Senator Kyl clarified by stating that, with or without his changes, McCain's Amendment is largely meaningless because it does not create a private cause of action. 151 CONG. REC. S12,660 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl).

187. See 151 CONG. REC. S12,756-63 (daily ed. Nov. 14, 2005) (statements of Sen. Warner & Sen. Levin).

Majority Leader Bill Frist to postpone consideration of the \$491-billion defense authorizations bill until September.¹⁸⁸

We have since learned that despite Congress's efforts, the Executive had its way in the end. The Executive, particularly the Vice-President's counsel, David S. Addington, and his interlocutors in the Office of Legal Counsel in the Justice Department, had pushed so hard against the McCain amendment, which sought to outlaw "cruel, inhuman and degrading treatment," because they were trying to get official sanction over policies it had already approved in secret.¹⁸⁹ Though the Justice Department declared torture "abhorrent" in a December 2004 legal opinion it subsequently issued two secret opinions in February 2005 and later in 2005. The first opinion officially sanctioned barraging terror suspects with a combination of painful and physical tactics, while the second opinion declared, no doubt disingenuously, that none of the CIA interrogation methods violated the standard of "cruel, inhuman and degrading" treatment.¹⁹⁰

Though conventional doctrinal analysis correctly places the Graham Amendment squarely within a debate about separation of powers,¹⁹¹ we cannot be too quick to separate that discussion from a broader discussion about the depravity of justice within American society more generally. In this view, Senator Graham's Amendment cannot be seen as an isolated assault against the law but rather as part of a cultural movement to impoverish the very concept of justice and rule of law in the United States.¹⁹² This broader view may be the key to understanding how the DTA passed; congresspeople, like ordinary Americans, have grown accustomed to taking the jaundiced view of the law for granted.

188. Gerstenzang, *supra* note 183.

189. See, e.g., Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (exposing the Executive's secret endorsement of severe interrogation methods).

190. *Id.*

191. See, e.g., Greenberger, *supra* note 162; Sunstein, *supra* note 23.

192. See Neil Kinkopf, *Furious George*, LEGAL AFF., Sept./Oct. 2005 (describing the ascendance of the "exclusivity view" of the Constitution, manifest in the belligerence of the Office of the Legal Counsel in the last several Republican administrations, which views the Constitution as dividing power into separate spheres controlled by the separate branches, and linking this to a preference for a government in which coordination, and thus "ambitious federal programs" are impeded, thereby forcing Americans to "rely on the private sector to provide necessities like health care, a clean environment, and safe products and workplaces").

V. THE GRAHAM AMENDMENT

A. *The Legal Apparatus at Guantánamo*

President Bush's November 2001 Military Order established the authorization for detaining individuals determined by the President to be suited for such detention in "an appropriate location designated by the Secretary of Defense outside or within the United States."¹⁹³ Pursuant to another Military Order in January 2002, shortly after the start of Operation Enduring Freedom in Afghanistan, the United States started to transfer hundreds of captured individuals to Guantánamo Bay. Since that time, the United States has held these prisoners at Guantánamo Bay without charge as unlawful enemy combatants.¹⁹⁴ Initially, administrative review boards determined the status of these detainees, but none of the review boards released any prisoners. In 2003, the Department of Defense issued further directives governing the procedures by which military was to determine the guilt or innocence of those detained at Guantánamo Bay.¹⁹⁵ On July 7,

193. Military Order of Nov. 13, 2001, *supra* note 34.

194. The argument in support of this status is that these individuals do not meet the criteria of those deserving prisoner of war status as defined under Article 4(2) of the Third Geneva Conventions (1949). Geneva Convention (III) art. 4(2), Aug. 12, 1949. The term, unlawful enemy combatant, in fact, derives from the pre-Geneva Conventions 1942 *Quirin* case discussed above in which the Supreme Court upheld the use of military commission for German saboteurs captured on American soil. *See supra* notes 28-31 and accompanying text. President Bush's Military Order of Nov. 13, 2001 defined these individuals who were to be subject to detention at an "appropriate location designated by the Secretary of Defense outside or within the United States," as follows:

any individual who is not a United States citizen with respect to whom I determine from time to time in writing that (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor[e], that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.

Military Order of Nov. 13, 2001, *supra* note 34.

195. *See* Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba, Department of Defense Order, May 11, 2004, available at <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>; Military Commission [sic] Instructions issued by the Department of Defense during 2003 and 2004,

2004, the week after the U.S. Supreme Court ruled in *Rasul v. Bush*, the Bush Administration initiated the Combatant Status Review Tribunals (CSRTs) to review whether those detained at Guantánamo had in fact been properly classified as enemy combatants.¹⁹⁶ In the order, Deputy Secretary of Defense Paul Wolfowitz determined that enemy combatants included individuals “supporting” Taliban or al-Qaida forces “or associated forces,” “includ[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”¹⁹⁷ The Secretary of the Navy was appointed to run the CSRTs.¹⁹⁸ As a result, most of those detained at Guantánamo had their CSRT review almost two years after arrival.¹⁹⁹ This nearly indefinite detention stands in stark contrast to the timeline and process of status review required by the Geneva Conventions.²⁰⁰

available at <http://www.globalsecurity.org/security/library/policy/dod/mil-commission-instructions-2003.htm> (last visited July 16, 2007).

196. See *supra* note 192.

197. Deputy Secretary for Defense, Memorandum: Order Establishing Combatant Status Review Tribunal, July 7, 2004, available at <http://www.dod.gov/news/Jul2004/d20040707review.pdf>.

198. Secretary of the Navy, Memorandum: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba, July 29, 2004, available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

199. A U.S. government press release of June 16, 2002, noted the total number of detainees was 536 persons, while a subsequent press release of August 5, 2002, noted that 34 individuals arrived that day, increasing the total of detainees to 598. See Center for Constitutional Rights, Letter, Update to Inter-American Commission on Human Rights, 1 n.1, available at http://www.ccr-ny.org/v2/legal/September_11th/docs/08-22-02updatetoIACHR.pdf. This accounting of prisoners at Guantánamo Bay leaves a gap of 28 additional prisoners who are not accounted for in any press release or official notification. *Id.*

200. Under Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, hearings are intended to happen by a competent tribunal at the site of capture, i.e., on the field of battle, to make an initial determination, relying on the immediate circumstances of capture, as to a captured individual's status (POW, innocent civilian, or civilian security threat). See Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 325 (2002). Under the Geneva Conventions and U.S. military regulations, “combatants” include those individuals engaged in hostile activities at the time of capture whose detention ends at the conclusion of conflict. For arguments criticizing the sufficiency of process by the commissions, see Harold Honjuh Koh, *The Case Against the Military Commissions*, 96 AM. J. INT'L L. 337, 338-39 (2002); Mundis, *supra*, at 328 (arguing that “the military commissions will be difficult to reconcile with the U.S. obligations under the Geneva Convention”). The Inter-American Commission on Human Rights in fact demanded that the United States take Precautionary Measures to “have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal.” Inter-American Commission on Human Rights, *Pertinent Parts of Decision on Request for Precautionary Measures* Mar. 12, 2002, www.photius.com/rogue_nations/guantanamo.html.

B. *Hiding Bodies*

As of November 2004, the International Committee of the Red Cross counted 550 detainees at Guantánamo.²⁰¹ The military has long admitted that it had been holding innocent civilians at Guantánamo for nearly four years; the deputy commander of Guantánamo, General Martin Lucenti, stated as early as October 2004 that “[m]ost of these guys weren’t fighting. They were running.”²⁰² In January 2005, still months before Graham’s Amendment, the *Wall Street Journal* reported, “American commanders acknowledge that many prisoners shouldn’t have been locked up here in the first place because they weren’t dangerous and didn’t know anything of value. ‘Sometimes, we just didn’t get the right folks,’ says Brig. Gen. Jay Hood, Guantánamo’s current commander.”²⁰³

Indeed, evidence had emerged as early as August 2002 that a substantial number of those detained at Guantánamo had not been captured in Afghanistan.²⁰⁴ Subsequent habeas petitions have revealed that individuals were turned over to the U.S. military in countries as geographically diverse as Bosnia, Gambia, Zambia, Egypt, and elsewhere.²⁰⁵ Later in the month, Pakistani officials demanded the release of all fifty-eight of their citizens, whom they did not consider to be al-Qaida leaders, a view reportedly shared by other countries at the time.²⁰⁶ A majority of those detained never committed a single hostile act against the United States. In fact, careful studies of Defense Department records indicate that, “[i]n reality, more than 55% of those detained in Guantánamo are *not* accused of ever having committed a single hostile act against the United States or its coalition forces[,]” and furthermore, that “[o]nly 8% of the detainees were characterized by the DOD as ‘al Qaeda fighters.’ Of the remaining detainees, 40% have no definitive connection

201. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

202. See Center for Constitutional Rights, *Graham Myths* [hereinafter *Graham Myths*], www.ccr-ny.org/v2/reports/listing.asp?offset=150 (last visited Nov. 11, 2005).

203. Christopher Cooper, *Detention Plan: In Guantánamo, Prisoners Languish in Sea of Red Tape; Inmates waiting to Be Freed are Caught in Uncertainty; Improvising Along the Way—A Split Over Interrogations*, WALL ST. J., Jan. 26, 2005, at A1.

204. See Ian Burrell, *War on Terror: Britons at Camp Delta Make a Sorry Bunch of Warriors*, INDEPENDENT (London), Aug. 3, 2002 (one of the seven British detainees had been taken from Zambia); *Terror in South-East Asia: The Elusive Enemy*, ECONOMIST (London), Aug. 3, 2002, at 45-46; *They’re on Both Sides of the Pond*, ECONOMIST (London), Aug. 10, 2002.

205. *Graham Myths*, *supra* note 202.

206. Julian Borger, *Call for Release of “Low-Level” Guantánamo Inmates*, GUARDIAN (London), Aug. 20, 2002.

with al Qaeda at all and 18% have no definitive affiliation with either al Qaeda or the Taliban.”²⁰⁷ These calls for the end of the detention no doubt were influenced by mounting reports that the health of the inmates at Guantánamo was deteriorating, despite contrary claims by the U.S. government. In fact, as of August 2002, the BBC reported that thirty detainees had attempted suicide.²⁰⁸ Over two years later, their detention still apparently interminable, dozens of detainees went on a hunger strike.²⁰⁹

Hunger strikes began a consistent response by detainees, leading to new policies of force-feeding by the military.²¹⁰ Later, other reports emerged about the existence of twenty-six “ghost detainees”—those held in total secret outside of the United States—whose existence as detainees was never disclosed to third parties such as the International Committee for the Red Cross.²¹¹

C. A Sleeper Amendment

Senator Graham first introduced his amendment to the Defense Authorizations Bill of 2006 on July 25, 2005.²¹² He presented it as mainly codifying the administration-implemented CSRTs to “get Congress involved in that process so that the courts will understand that Congress agrees with the concept of unlawful enemy combatant and that the review process in place is a good process.”²¹³ Disagreement over Senator

207. See Mark P. Denbeux, *The 14 Myths of Guantánamo*, Statement Submitted to the Senate Armed Services Committee, Apr. 26, 2007, at 5-6 (footnotes omitted), available at http://law.shu.edu/media/fourteen_myths_of_gtmo_final.pdf.

208. *Terror Suspects “Attempted Suicide,”* BBC (Aug. 15, 2002), available at <http://news.bbc.co.uk/1/hi/world/americas/2194517.stm>.

209. See Carol Williams, *Hunger Strike at Guantanamo*, L.A. TIMES, Apr. 9, 2007, at 9.

210. See Tim Golden, *Guantanamo Detainees Stage Hunger Strike Despite Force-Feeding Policy*, N.Y. TIMES, Apr. 9, 2007, at A12.

211. See Human Rights Watch Backgrounder, *List of “Ghost Prisoners” Possibly in CIA Custody*, Nov. 30, 2005, <http://hrw.org/english/docs/2005/11/30/usdom12109.htm>.

212. 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham).

213. *Id.* The Senator stated that his amendment:

allows Congress to define “unlawful enemy combatant” in a very flexible way similar to what is being used at Guantanamo Bay now. It incorporates the procedures that are used to classify and review enemy combatant status . . . [w]e are codifying that procedure. We are accepting most of it. We are tweaking the definition in line with Supreme Court cases that have reviewed this whole subject matter.

McCain's proposed amendment to prohibit torture and abuse of Department of Defense detainees forced consideration of the Defense Authorization bill until after the summer.²¹⁴

In a deft move out of a saboteur's playbook, Graham re-introduced his proposals as a sleeper amendment towards the end of the congressional session on November 11, 2005.²¹⁵ November 11, 2005 was Veterans Day, and the Senate was about to retire for the holiday weekend. The previous morning of November 10th, the executive branch brought motions to the D.C. District Court seeking to stay the habeas claims until procedural issues were resolved on appeal. Towards the end of the day on November 11th, hours away from a holiday weekend, Senator Graham proposed an amendment that differed significantly from the amendment he proposed during the summer months.

Unlike his previous proposals of July 2005, his new amendment was modified to include a section D, "Judicial Review of Detention of Enemy Combatants," which stated under subsection (1)(e): "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 outside the United States . . . who is detained by the Department of Defense at Guantánamo Bay, Cuba."²¹⁶ The last detainee of the over 600 individuals incarcerated at Guantánamo arrived in September 2004. The use of the CSRTs had ceased by March 2005, months before Graham's amendment was introduced.²¹⁷ Therefore, when the Senator re-proposed his amendment in November with the new section, its only practical effect would have been to strip federal courts of their jurisdiction over pending and future habeas petitions.²¹⁸

Senator Bingaman, who opposed the Amendment, noted in speaking before the vote that there had been no hearings on Graham's amendment in either the Senate Judiciary Committee or the Armed Services Committee, either of which would have been a better forum for considering this type of proposal. According to Senator Bingaman, "[i]t would be a terrible mistake for us to do this sort of as a by-the-way kind of amendment on a Thursday afternoon as we are preparing to leave for

214. See 151 CONG. REC. S12,667 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

215. *Id.*

216. 151 CONG. REC. S12,655 (daily ed. Nov. 10, 2005) (statement of Sen. Graham) (introducing text of Amendment No. 2515).

217. Sgt. Sara Wood, *Administrative Tribunals to Begin for High-Value Guantanamo Detainees*, AM. FORCES PRESS SERVICE, Mar. 6, 2007, <http://www.globalsecurity.org/security/library/news/2007/03/sec-070306-afps01.htm>.

218. As the Center for Constitutional Rights notes, "[s]ince all the CSRTs are complete, improvements in the procedures will be academic." *Graham Myths*, *supra* note 202.

the weekend.²¹⁹ The vote, which passed 49-42, occurred in the absence of several senators.²²⁰ Considering that several of those absent were Republican Senators, and only five Democrats voted for the Amendment, it is unclear whether the absent members would have changed the outcome. Either way, the point is that Graham attempted to sneak a fast one by Congress.

As Senator Bingaman points out, the profound effect of the surreptitiously introduced clause cannot be overstated. Senator Graham proposed to strip federal courts of their jurisdiction to hear habeas corpus petitions from detainees at Guantánamo Bay.²²¹ In so doing, Graham's Amendment threatened to make irrelevant the McCain Amendment prohibiting torture in all Department of Defense interrogations. The McCain Amendment passed just prior to the Graham Amendment debates. The Graham Amendment would have rendered the McCain Amendment useless because if you cannot access the courts, you cannot allege mistreatment at the hands of those detaining you; thus, the McCain Amendment would become a right without a form of relief (and, as noted above, the McCain amendment did not provide its own cause of action). The intense criticism of Graham's maneuvering forced him to entertain negotiations²²² leading to a compromise amendment, co-sponsored with fellow Republican Senator Jon Kyl (R-A.Z.) and Democratic Senator Carl M. Levin (D.-Mich.), which passed the Senate 84 to 14.²²³ The subsequent enemy combatant legislation—the MCA—passed the Senate on September 28, 2006, by a count of 65-34, with one abstention.²²⁴

219. 151 CONG. REC. S12,657 (daily ed. Nov. 10, 2005) (statement of Sen. Bingaman).

220. See 151 CONG. REC. S12,667 (daily ed. Nov. 10, 2005) (statement of Sen. Vitter); *A Compromise With Caveats*, WASH. POST, Nov. 16, 2005, at A18 (describing the passage of the eventual compromise amendment between Senator Graham, Jon Kyl (R-Ariz.), and Carl M. Levin (D-Mich.) as a "momentous change in policy governing the power of the courts, following backroom bargaining that bypassed normal Judiciary Committee consideration").

221. Republican Senator Arlen Specter, chair of the Senate Judiciary Committee, described it as "a sophisticated, blatant attempt at court-stripping." See Jeremy Brecher & Brendan Smith, *Ban Torture or Protect Torturers?*, NATION, Dec. 2, 2005, <http://www.thenation.com/doc/20051219/brecher>.

222. See *id.* (noting that "Newsweek has reported that Attorney General Alberto Gonzales and White House Counsel Harriet Miers were also in on the negotiations").

223. Neil A. Lewis, *U.S. to Seek Dismissal of Guantanamo Suits*, N.Y. TIMES, Jan. 4, 2006, at A11; see also Ian Wallach, *No Habeas at Guantánamo? The Executive and the Dubious Tale of the DTA*, JURIST, Mar. 6, 2006, <http://jurist.law.pitt.edu/forumy/2006/03/no-habeas-at-guantanamo-executive-and.php>.

224. See S. 3930 [109th]: Military Commissions Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=s109-3930>.

D. Militant Metaphors

As outlined above, several images have persisted over the last several decades contributing to a quite popular, though grossly inaccurate, view of the justice system in America. These metaphors and stock images have been the foot soldiers in an all-encompassing campaign—a cultural movement—to restrict the possibilities of justice in the United States, particularly for marginalized segments of the population. As discussed above, these militant metaphors have attacked the judicial process in several significant sectors of American law: tort and product liability, criminal process, immigration law, employment discrimination, and even the rare cases of corporate accountability for gross violations of human rights. We need not pay that close attention to Senator Graham's speeches in support of his amendment to hear his deployment of these militant metaphors in new, but not altogether unfamiliar, uniforms.²²⁵

One of the most profound images provided by Senator Graham is a not-too-distant cousin to the conniving claimant who appeared in jokes throughout the early twentieth century before being de-ethnicized and diffused into broader caricatures of lawyers and an atmosphere of litigiousness within American society. The image of the conniving claimant was that of an individual, usually a foreigner, who took advantage of society—who abused the well-ordered system of rule of law—to pursue personal gains at the expense of the nation.²²⁶

Senator Graham has refashioned the conniving claimant into the conniving detainee and the lawyers who help him. There are several components to this complex image. First, the claim made is frivolous and undeserving.²²⁷ Second, allowing the courts to hear the claim and awarding damages for such a claim undermines the law because it misuses it, thereby taking advantage of all the honest people who rely on the system. In this instance, Graham claims that allowing habeas petitions radically

225. Janet Malcolm, covering the Senate's confirmation hearings for Justices Roberts and Alito, described Graham as "a Southerner [who] speaks at Northern speed, and to highly entertaining effect," and as having a "gift for comedy—he delivers his lines as if he were working a night-club crowd—and exudes an air of cynicism that right wing politicians do not usually permit themselves, and that is very refreshing." See Janet Malcom, *Annals of the Senate: The Art of Testifying—The Confirmation Hearings as Theatre*, NEW YORKER, Mar. 13, 2006, at 73.

226. See *supra* text accompanying note 69.

227. Echoing Orrin Hatch on immigration habeas: "Currently, we have an absurd situation in which criminal aliens are entitled to more review and have more opportunities to file frivolous dilatory appeals than non-criminal aliens." Orrin G. Hatch, Floor Statement: "The Fairness in Immigration Litigation Act," May 19, 2004, http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.View&PressRelease_id=1052.

changes 200 years of the law of armed conflict.²²⁸ Third, the proliferation of such claims changes the normative fabric of our society; in allowing such claims, the courts provide incentive to the behavior and cause the claims to multiply, which can lead to a breakdown of trust and a corrosion of the ties that bind our social relations and institutions. These claims also clog our courts, slowing the system, and undermining our productive capacities because of the increased associated costs. Finally, recognizing the legitimacy of the conniving claimant/detainee necessarily devalues the status of our own citizenship; our rights, it is argued, are cheapened and trampled upon as their rights are recognized.²²⁹ In other words, granting detainees privileges due to the fact that they are human beings recognizes their humanity, which necessarily insults our own because detainees are evil and are not due this respect nor protection under the law. Moreover, allowing access to the courts creates the false impression that the “War on Terrorism” should operate in the criminal context, rather than the extra-legal, “forever war” paradigm the Bush Administration has imposed.²³⁰

1. Clogging the Courts with Frivolous Claims

Senator Graham and his allies recast the familiar story of frivolous claims in terms of national security while simultaneously weaving in aspects of the litigation explosion myth from other legal contexts, such as criminal habeas petitions and medical malpractice suits. He establishes the first element of the frivolity of the claims by distorting the true significance of the habeas corpus petitions. Senator Graham fails to discuss the petitions challenging the factual bases of prisoners’ detentions, which without federal court intervention are exclusively handled by the Administration through the CSRTs. Instead, Graham focuses on those petitions that include complaints against the conditions of detention, which a federal court can always use its discretion to dismiss. He creates an image of a deluge of “hundreds of habeas petitions that will be clogging the Federal courts[,]” thereby not only slowing up our normal judicial

228. Senator Graham stated, “Here is what has happened. If you want to give a Guantánamo Bay detainee habeas corpus rights as a U.S. citizen, you [have] changed the law of armed conflict like no one else in the history of the world.” 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

229. Senator Graham stated “They are not entitled to this status. They are not criminal defendants. And here is what they are doing in our courtrooms.” 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

230. Senator Graham stated clearly that “[w]ith my amendment, which we voted on last week, the concern I had was we were about to criminalize the war because of the Rasul case.” 151 CONG. REC. S12,753 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

process with unmeritorious claims, but also preventing the efficient running of Guantánamo Bay.²³¹ As he catalogues the claims, he attempts, not unlike President Reagan's speech about the psychic and the CAT scan, to portray them as so outrageous as to approach the comically absurd:

A Canadian detainee who threw a grenade that killed an army medic in a firefight and who came from a family of longstanding al-Qaida ties moved for preliminary injunction forbidding interrogation of him or engaging in cruel, inhumane, or degrading treatment of him. It was a motion to a Federal judge to regulate his interrogation in military prison.

Another example. A Kuwaiti detainee sought a court order that would provide dictionaries in contradiction of Gitmo's force protection policy and that their counsel be given high-speed Internet access at their lodging on the base and be allowed to use classified DOD telecommunications facilities, all on the theory that otherwise their right to counsel is unduly burdened.

This is one of my favorites. There was a motion by a high-level al-Qaida detainee complaining about base security procedures, speed of mail delivery, and he is seeking an order that he be transferred to the least onerous conditions at Gitmo and asking the court to order that Gitmo allow him to keep any books and reading materials sent to him and to report to the court on his opportunities for exercise, communication, recreation, and worship.

Can you imagine Nazi prisoners suing us about their reading material?

Two medical malpractice claims have come out of this.

Here is another great one. There was an emergency motion seeking a court order requiring Gitmo to set aside its normal security policies and show detainees DVDs that are purported to be family videos.

Where does this stop? It is never going to stop.²³²

As Graham portrays them, these claims are frivolous and unmeritorious.

In a deft move, Senator Kyl, a strong advocate of Graham's Amendment, slyly blends in an example of an "outrageous" petition from the criminal habeas context with the enemy combatant issue. He also mixes in an allusion to the medical malpractice suits, blurring the line

231. 151 CONG. REC. S12,659 (daily ed. Nov. 10, 2005).

232. 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

between federal criminal inmate and enemy combatant. In mixing these areas, Senator Kyl reinforces the wisdom—and inherent power—wielded by Congress in limiting habeas through AEDPA in 1996, while simultaneously using that gesture to support restricting habeas now:

But what we have gotten rid of are these hundreds of habeas petitions that will be clogging the Federal courts. We have already seen them making medical malpractice claims against the doctors, saying they want one kind of food as opposed to another kind of food and so on. It is going to get like it did with prisoners. One of the real-life cases that came out of Arizona that we tried to take care of in 1996 law is a prisoner said: I want chunky peanut butter, I don't want creamy peanut butter. And that was the habeas petition. You have a right to question food in a habeas petition. Do we want our Federal courts clogged with terrorists making these kind of petitions? No.²³³

Of course, these kinds of petitions are not the ones over which the real debate centers, and they are not “clogging” our courts. In fact, all 160 petitions have been made to one court—the U.S. District Court for the District of Columbia—in coordinated proceedings before a magistrate judge.²³⁴

233. 151 CONG. REC. S12,659-60 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl).

234. *Graham Myths*, *supra* note 202; *see also* Wallach, *supra* note 223. Wallach notes that the stock quote regarding the “floodgates of litigation” was circulated and appeared in many of the letters by military personnel Senator Graham presented into the congressional record. Wallach argues that contrary to the letters produced by Senator Bingaman, in which the military personnel discussed the importance of habeas to the military—an issue with which they are familiar—the letters introduced by Senator Graham featured military personnel discussing “the efficiency of the federal court system, an issue with which military leaders have no expertise.” *Id.* Wallach also attempts to shed some light on Graham’s “fuzzy” math in this regard:

As of February 17, 2006, there were approximately 5,287 cases pending in the United States District Court for the District of Columbia. And approximately 180 of those were Guantánamo habeas actions. The cases that amount to the alleged “floodgates” comprise point zero three four percent (.034%) of the cases pending in that Court.

But more appropriate math would take into consideration Senator Graham’s statement that “there are 160 habeas corpus petitions in Federal Courts throughout the United States.” To my knowledge, there are about 180 habeas petitions, all of which were filed in one court—the United States District Court for the District of Columbia. If we assume that Senator Graham is correct and cases could be brought “throughout the United States”, then the math gets even less “floodgate”

The real debate is over the ability of individuals who have been detained for years without real due process of law to access federal courts to challenge the factual basis of their detention. The facts (obtained through Freedom of Information Act requests and details revealed through the habeas corpus petitions to date) are that the prisoners in Guantánamo have been

held in extreme solitary confinement for periods exceeding a year; deprived of sleep for days and weeks; exposed to prolonged temperature extremes; beaten; subjected to severe sensory deprivation or over-stimulation; threatened with extraordinary rendition; tortured in foreign countries or at U.S. military bases abroad before transfer to Guantánamo; sexually harassed and raped or threatened with rape; deprived of medical treatment for serious conditions, or allowed treatment only on the condition that they “cooperate” with interrogators; subjected to injections of unknown medications; and routinely “short-shackled” (wrists and ankles bound together and to the floor).²³⁵

The non-frivolity of these allegations cannot be overstated, and it is surprising that senators would dare mention these practices in the same breath as the practice of depriving detainees of chunky peanut butter, let alone substitute one for the other as if they were morally equivalent.

2. Suing Our Soldiers

Continuing to allow detainees access to our courts for these frivolous claims, Graham argues, weakens our national moral resolve and our ability to protect ourselves.²³⁶ “if we do not rein in prisoner abuse, we are going to lose the war. But if we do not rein in legal abuse by prisoners, we are going to undermine our ability to protect ourselves.”²³⁷ Graham loosely mentions U.S. violations of basic human rights at Abu Ghraib,

like. The DC District Court is a busy court. If we assume every District Court in the nation is half as active as the DC District Court and has only 2,643 cases, and if there are 94 District Courts, then there would be a total of about 248,442 (2,643 times 94) cases in federal courts. The 180 habeas actions would comprise about point zero zero zero seven two four five percent (.0007245%) of the Courts’ cases.

Id.

235. *Graham Myths*, *supra* note 202.

236. *See* 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

237. *Id.*

Guantánamo, and elsewhere, which weaken our international reputation and undermine our efforts in Iraq, and in the same breath, addresses the petitions for review of the conditions that enable such abuses in an attempt to morally equate the prisoners' pleas for relief with the acts of abuse. A certain unity of discourse emerges when we examine Justice Scalia's arguments in his dissent in *Rasul*. Scalia decries the majority's decision as an "irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field."²³⁸

Senator Graham was not satisfied, however, with merely raising the specter of weakened defenses. He used a rhetorical move akin to President Reagan's linkage of the psychic and the CAT scan scandal leading (quite improbably) to "babies not being delivered" because the litigation drove up the costs of medical practice to an unsustainable level.²³⁹ Graham continually raged against detainees suing our soldiers for frivolous claims: "[i]t is not fair to our troops fighting in the [W]ar on [T]error to be sued in every court in the land by our enemies based on every possible complaint."²⁴⁰ Elsewhere he pleaded: "[d]o not give the terrorists, the enemy combatants, the people who blow up folks at weddings, who fly planes into the Twin Towers, the ability to sue our own troops all over the country for any and everything."²⁴¹ Not unlike Vice President Cheney's claims that those who accuse the Bush Administration of having misled the nation into war are "morally reprehensible" and foremost harm our soldiers,²⁴² Senator Graham contends that allowing habeas petitions is a direct assault against our soldiers and weakens our capacity to protect ourselves. A vote to restrict the right to habeas corpus then, is a vote for our troops; restricting habeas becomes the patriotic thing to do: "[I]et us stand up for our troops in a reasonable way, protect them from abuses, and

238. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (Scalia, J., dissenting). There would appear to be some precedent for such thinking—that somehow access to the courts weakens our defenses—which Justice Kennedy's concurrence in *Rasul* points out. Kennedy explains that the *Eisenrager* Court considered the extent to which granting jurisdiction for habeas petitions to the Germans detained in Lansberg Castle in occupied Germany, would "hamper the war effort and bring aid and comfort to the enemy." *Id.* at 486 (Kennedy, J., quoting *Eisenrager*, 339 U.S. 763, at 779).

239. Galanter, *An Oil Strike in Hell*, *supra* note 27, at 727.

240. Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 10, 2005, at A6; *see also* 151 CONG. REC. S12662-63 (2005).

241. 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

242. Press Release, Office of Vice President Dick Cheney, Vice President's Remarks on the War on Terror (Nov. 21, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/11/20051121-2.html>.

protect them from the court suits filed by the people they are fighting.”²⁴³ Restricting habeas, in other words, protects the American way of life. As in the tort reform context, suing has become a sin, a betrayal of the moral community of the nation.

Graham complains that lawyers are complicit in this attack on our moral resolve and actual self-defense capabilities. The detainees’ lawyers are made to appear analogous to, the plaintiff’s lawyers who undermine our productive capacities through product liability suits,²⁴⁴ slowing down the economy and giving comfort to our economic enemies, competitors from other countries. Quoting civil and human rights advocate Michael Ratner of the Center for Constitutional Rights, Graham points out how paralyzing lawyers’ and courts’ interventions can be:

We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder for the U.S. military to do what they’re doing. You can’t run an interrogation . . . with attorneys. What are they going to do now that we’re getting court orders to get more lawyers down there? [end Michael Ratner quote]

[Graham:] Know what. The people at Gitmo are asking that same question: What are we going to do? It is impossible to interrogate people with this much court intervention. We are undermining the role Gitmo plays in helping our own national security.²⁴⁵

243. 151 CONG. REC. S12,667 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

244. See Galanter, *Oil Strike in Hell*, *supra* note 27, at 737 (stating “[a]ssertions that the tort system inhibits the creation of jobs and the economic health of the country are so commonplace as to pass without notice. However, proof of such effects is not easy to find.”).

245. 151 CONG. REC. S12,657 (daily ed. Nov. 10, 2005) (statement of Sen. Graham). In arguing against the counter-amendment proposed by Senator Bingaman, Senator Graham emphasized this further, though he distorts legal history in the process:

Never in the history of the law of armed conflict has a military prisoner, an enemy combatant, been granted access to any court system, Federal or otherwise, to have a Federal judge come in and start running the prison and determining what is in bounds and what is out. The military is the proper body to determine who an enemy combatant is and how to run a war and how to interrogate people, not Federal judges who are not trained in the art of military science.

151 CONG. REC. S12,731 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

Indeed, Senator Graham reminds us that “[c]ivilian judges cannot run this war,” and that fighting this war is a soldier’s job.²⁴⁶ This is why, Graham argues, the Senate needs to take action; it can no longer afford to sit on the sidelines, cowardly letting the lawyers destroy our chances of survival:

[d]oes this body want to be the first Senate in the history of the United States to confer rights on a POW and an enemy combatant to sue the troops who are trying to protect us? There are 160 cases down there. There are going to be 300 cases. They are going to ruin the ability to get intelligence because we in the Senate haven’t acted, and we need to act.²⁴⁷

Thus, the presence of lawyers is seen as detrimental to the war effort. Too many lawyers reap chaos; they prevent the military from running the prison in an orderly fashion²⁴⁸ and interfere with interrogation techniques. According to Graham, this leads to a loss of crucial intelligence that would save American lives despite ample evidence from former Department of Defense interrogators that these more abusive tactics simply do not work.²⁴⁹

It is important to see these statements in a broader context, one that recalls one of the “legal legends” with the most staying power: the popular myth that America has 70% of the world’s lawyers.²⁵⁰ As Galanter reflects, this “fact” has shown incredible resilience, and long after serious observers concluded that it was meaningless or false, “in the media and political

246. 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

247. 151 CONG. REC. S12,664 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

248. “I think you are undermining our national security because the habeas petitions are flowing out of that place like crazy Three hundred of them have lawyers in Federal court and more to follow. We cannot run the place.” 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

249. 151 CONG. REC. S12,652 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

250. Galanter, *Oil Strike in Hell*, *supra* note 27, at 734-35. Dan Quayle popularized this figure in a 1991 speech, leading to a parade of popular press that Quayle himself considers the best of his vice-presidency. *Id.* Quayle picked the tidbit from obscurity and ingrained it in the national consciousness. It was originally proffered by Chief Justice Berger as part of his general attack on the overly litigious American society, only to be taken up by Justice O’Connor, law school deans, Colorado Governor Lamm’s diatribes about America’s spiral towards doom, and even by Ross Perot, who in blaming lawyers for the inadequate terms of his problematic contract with General Motors, claimed, “[a]s long as two-thirds of the world’s lawyers are in this country you can expect every clause that these people will dream up. I wish more of these lawyers would become engineers and make something.” *Id.* (citing N.R. Kleinfeld, *Silence is Golden*, N.Y. TIMES MAG., Apr. 29, 1990, at 54). That is, stop using the law to slow down the economy, and do something to improve it.

worlds, it is served up without shame or challenge,” eventually taking on the status of “genuine global folklore,” by being featured in British, Japanese, and Singapore media as warnings of the detrimental effects on economic production that would follow should these countries follow America’s example of fostering such an explosion in their lawyer populations.²⁵¹

3. “Geneva Conventions Protections on Steroids”²⁵²—Giving Rights to Nazis

“This is about the rule of law. The rule of law protects people in armed combat. This is about changing our law to give terror suspects rights of U.S. citizens.”²⁵³

The final significant element of Senator Graham’s conniving detainee image is its disingenuous inversion of the rule of law in the name of *preserving* the rule of law. Similar to those who argue against expansive liability and remedies at law, the argument aims at undercutting access to justice in the name of innate fairness. Graham transforms the usual image of the conniving claimant who cheats the system by getting an undeserved windfall from a frivolous lawsuit into a situation in which foreigners, aliens, terrorists, and Nazis, get undeserved rights and entitlements under our laws through a distortion of American legal tradition and the historical framework of the law of armed conflict.²⁵⁴ This image is an echo of similar arguments in the criminal habeas and immigration law contexts.

251. *Id.* at 736-37.

252. “What is going on at Guantanamo Bay is called the Combat Status Review Tribunal, which is the Geneva Conventions protections on steroids.” 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham). Graham used this image multiple times throughout his senate floor arguments.

253. 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

254. 151 CONG. REC. S12,665, S12,667 (daily ed. Nov. 10, 2005) (statement of Sen. Graham). “They are swamping the system. Americans are losing their day in court because somehow we have allowed enemy combatants, people who have signed up to kill us all, to take us into Federal court and sue us about everything.” 151 CONG. REC. S12,732 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Conservative commentators have echoed this language. *See* Andrew C. McCarthy, *Lawfare Strikes Again*, NAT’L REV. ONLINE (June 12, 2007) (describing the policy effects of the recent Fourth Circuit decision regarding U.S. citizen and alleged al-Qaida “sleeper” operative Ali Saleh Halah al-Marri as creating a proceeding in which al-Marri “would receive lavish discovery that could be extremely helpful to the people trying to kill us”).

There are a few derivative effects—or as Jonathan Simon phrases it, “entailments”²⁵⁵—of this complex metaphor. First, Graham’s rhetoric positions the U.S. Supreme Court as producing “absurd”²⁵⁶ changes in “settled law,” recalling the well-established conservative trope of liberal “activist” judges who create new legal remedies otherwise not found in the law.²⁵⁷ Second, it creates a hierarchy of rights, which Graham constructs by blurring the well-established categories of American and international legal precedent, establishing a falsely simplistic dichotomy between rights-bearing (“Americans” or “patriots”) and non-rights bearing individuals (enemy combatants). This move reinforces the Bush Administration’s imposed forever war paradigm (as opposed to alternative approaches, such as the criminal justice system), expanding the “battlefield” to every corner of the globe, and buttressing the civilizational battle between “us” and “them.”

In a particularly clever move, Graham positions his amendment as one of restoring the rule of law, rather than undermining it. Even though it was he who proposed to change the law to suit the Administration’s policies (and the U.S. Supreme Court, in *Rasul*, demonstrated that those policies in fact diverged from the established rule of law) he has positioned himself as the restorer of tradition and the rule of law. Within this construction, those who oppose his amendment will in fact be changing the rule of law in armed conflict, granting unprecedented rights to our enemies.²⁵⁸ Graham’s oratory on this point is remarkable and merits quoting at length:

The question is, 4 years after 9/11, do we want to change our law and give a terrorist, an al-Qaeda member, the ability to sue our own troops in Federal court, all over the country, for anything and everything? I do not. I want to treat them humanely. I want to get good information. And I want to prosecute them within the rule of

255. See *supra* text accompanying note 60 (citing STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE & MIND 2001).

256. See *infra* note 255 and accompanying text.

257. This echoes Senator Feinstein’s arguments about the need to scale back the ATS. See *supra* Part II.C.2.

258.

Do you want to be the Senator who has changed 200 years of law? Do you want to be the Senator who is changing the law of armed conflict to say that an enemy combatant—someone caught on the battlefield, engaged in hostilities against this country—is not a person in a war but a criminal and given the same rights as every other American citizen?

law. But I do not want to do something that is absurd and is going to hurt our national security; that is, allowing a terrorist the ability to go to Federal court and sue our own troops, who are fighting for our freedom, as if they were an American citizen. Do you know why the Nazis did not get to do that when we had them in our charge? Because that is not the law. It has never been the law. We caught six German saboteurs sneaking into this country, trying to blow up part of America. They were tried. Where? In a military commission, a military tribunal, not in a civilian court. We had German POWs who tried to come into Federal court, and our court said: As a member of an armed force, organized against the United States, you are not entitled to a constitutional right of habeas corpus. Do you want to give these terrorists habeas corpus rights just like an average, everyday American citizen or a common criminal to sue our own troops? Well, if you do, vote against my amendment. If you want to get back to where we have been for 200 years, then you need to support me.²⁵⁹

There are so many distortions in these few lines, it is difficult to know where to begin. But it is necessary to bring out the inaccuracies to appreciate more fully how the rhetoric acts to sabotage legality.

First, Graham blatantly misconstrues what happened in *Quirin*.²⁶⁰ Contrary to what Graham claims here and elsewhere in his speeches, in *Quirin* the U.S. Supreme Court *upheld* the right of detained individuals to access the civilian courts to challenge the nature of the military processes that would determine their fates.²⁶¹ The Court ultimately ruled against the enemy combatants in *Quirin*, but only after considering their arguments on the merits.²⁶² Graham also conveniently ignores *In re Yamashita*, which faithfully applied *Quirin* in 1946.²⁶³

259. 151 CONG. REC. S12,662-63 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

260. Elsewhere he more explicitly says “[w]e didn’t let German prisoners file writs. Under the Roosevelt administration, these six people were captured. They were tried. Four were executed. A writ of habeas corpus was not available to them. It should not have been available to them.” 151 CONG. REC. S12,664 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

261. See *Ex parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, four of the Germans were later executed.

262. 151 CONG. REC. S12,664 (daily ed. Nov. 10, 2005) (statement of Sen. Levin) (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005)).

263. *In re Yamashita*, 327 U.S. at 8 (discussing *Ex parte Quirin*). In applying *Quirin* to the writ of habeas corpus sought by General Yamashita, the Court in *Yamashita* offered a limited scope of review of the military commission that had found General Yamashita guilty and sentenced him to death. The Court stated, “[t]he courts may inquire whether the detention complained of is within

Graham also alludes to other “German POWs who tried to come into Federal court,”²⁶⁴ presumably describing the petitioners of *Eisenrager*, the case that the government unsuccessfully relied upon in *Rasul*. As noted above, the Court distinguished the facts surrounding the detainees in *Eisenrager* from those of *Rasul*, significantly noting that in *Eisenrager* the POWs had already been tried by military commissions, whereas in *Rasul*, the petitioners faced a potentially indefinite detention while insisting upon their innocence.²⁶⁵ Still, Graham’s misuse of the precedent

the authority of those detaining the petitioner.” *Id.* at 8. The Court argued further that, by Congress sanctioning trials of enemy aliens by military commission for offenses against the law of war, it had recognized the accuser’s right to make a defense, which could not preclude “their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial.” *Id.* at 9.

Justice Murphy’s dissent in *Yamashita* is worth quoting for its eloquence and its firm defense of the rule of law. Though Justice Murphy dissented from the Court’s ultimate decision, he applauded the majority for having taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused of violating the laws of war:

Jurisdiction properly has been asserted to inquire “into the cause of restraint of liberty” of such a person. 28 U.S.C. 452. Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably. This does not mean, of course, that the foreign affairs and policies of the nation are proper subjects of judicial inquiry. But when the liberty of any person is restrained by reason of the authority of the United States the writ of habeas corpus is available to test the legality of that restraint, even though direct court review of the restraint is prohibited. The conclusive presumption must be made, in this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced. On that basis judicial inquiry into these matters may proceed within its proper sphere.

In re Yamashita, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting), quoted in 151 CONG. REC. S12,730-31 (daily ed. Nov. 14, 2005), Ex. No. 1 [hereinafter Sullivan Letter] (letter from Dwight H. Sullivan, Colonel, USMCR, Chief Defense Counsel, Office of Military Commissions, to Jeff Bingaman, Senator (Nov. 14, 2005)).

264. 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

265. The majority opinion in *Rasul* distinguished the detainees at Landsberg from those in Guantánamo; unlike the Landsberg detainees in *Eisenrager*, the petitioners in *Rasul*

are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against [the United States]; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned

enables him to create a moral equivalency between the “terrorists” (who have not had a reasonable opportunity to protest this status) and Nazis—the universal figure of ultimate evil. Beyond its holding, *Eisentrager* is particularly useful to Graham’s position because it begins by “noting the ‘ascending scale of rights’ that courts have recognized for individuals depending on their connection to the United States.”²⁶⁶ Graham beats this faulty notion into the other senators’ heads that, because statutory rights are not extraterritorial, aliens are precluded from the ambit of any statutory right to habeas, despite the U.S. Supreme Court going to great lengths in *Rasul* to demonstrate that this was not the case. The majority in *Rasul*, argued that because the jurisdictional holding of *Ahrens v. Clark*²⁶⁷—upon which *Eisentrager* relied—had been overruled by *Braden v. 30th Judicial Circuit Court of Ky.*,²⁶⁸ that *Eisentrager* did not control.²⁶⁹

in territory over which the United States exercises exclusive jurisdiction and control.

Rasul v. Bush, 542 U.S. 466, 467 (2004). The Landsberg prisoners were clearly prisoners of war, captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in Landsberg, which was located in occupied Germany—not the territorial United States or a territory, like Guantánamo Bay, under exclusive U.S. control. In response to the government’s argument that *Eisentrager* controls, the Court marshaled the above facts but also distinguished the two cases based on the law in question: *Eisentrager* was decided based on entitlement to habeas corpus in the Constitution, whereas the *Rasul* petitioners sought habeas on the basis of § 2241, which the Court ultimately held does not distinguish between aliens and U.S. citizens. *Id.* at 468.

266. *Id.* at 486 (quoting *Eisentrager v. Forrestal*, 339 U.S. 763, 770 (1949)).

267. 335 U.S. 188 (1948).

268. 410 U.S. 484 (1973).

269. See *Rasul*, 542 U.S. at 467 (noting “[b]ecause *Braden* overruled the statutory predicate to *Eisentrager*’s holding, *Eisentrager* does not preclude the exercise of § 2241 jurisdiction over petitioners’ claims”). In short, *Eisentrager* relied on *Ahrens v. Clark*, 335 U.S. 188, which interpreted the habeas statute to require prisoners’ presence within a district court’s jurisdiction in order to hear a habeas petition. Because the court of appeals in *Eisentrager* held that the way the *Ahrens* Court had construed the habeas statute created an unconstitutional gap that needed to be filled by reference to “fundamentals,” the U.S. Supreme Court in *Eisentrager* similarly proceeded from a presumption that the habeas statute as written did not confer jurisdiction, and thus, the right must be upheld on constitutional grounds. See *Eisentrager*, 339 U.S. at 767. *Braden* then overruled *Ahrens*’s reading of the habeas statute, holding that because the writ of habeas acts not “upon the prisoner who seeks relief, but upon [the] person who holds him in what is alleged to be unlawful custody,” that a district court has jurisdiction to hear a habeas petition on the basis of § 2241 “[s]o long as the custodian can be reached by service of process . . .” *Braden*, 410 U.S. at 494-95. According to the Court in *Rasul*, “*Braden* thus established that *Ahrens* can no longer be viewed as establishing ‘an inflexible jurisdictional rule,’ and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all.” *Rasul*, 542 U.S. at 479. The

Also deeply troubling is Graham's seemingly sloppy, but most likely quite purposeful conflation of POW status with that of the unlawful enemy combatants. This can be read as Graham's effort to legitimize the indefinite detention of the individuals at Guantánamo Bay, while simultaneously legitimizing the Administration's forever war paradigm,²⁷⁰ which has displaced the relevant domestic criminal law paradigm.²⁷¹ Under the Geneva Conventions, POWs get certain protections, and can be held until the end of a conflict. If a detained individual is determined to be an unlawful belligerent, they are not afforded the same privileges of POWs,

majority then goes out of its way to dismiss handedly the arguments put forward by Justice Scalia's dissent that postured "disingenuously" that *Braden* did in fact not overrule *Ahrens*'s jurisdictional holding. *Id.*

270. Senator Graham was very clear about this from the very start of his comments to the Senate:

One thing we need to understand as a nation and we need to understand in the Senate, in my opinion, is that the attack of 9/11 was an act of war. It was not a criminal enterprise. That is an important statement to make. Every Senator needs to understand in their own mind: Was 9/11 and were those who planned it and those who blew up the people in Jordan yesterday common criminals or are these people engaged in acts of terrorism and war? Let it be said clearly, in my opinion, that the United States is at war with al Qaida and associate groups, and we have been since 9/11.

151 CONG. REC. S12,655 (daily ed. Nov. 10, 2005) (statement of Sen. Graham). He soon reiterates: "[w]e are at war; we are not fighting the Mafia. We are fighting an enemy desirous of taking us down as a nation They are not entitled to this status. They are not criminal defendants." 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

271. See John Parry, *Terrorism and the New Criminal Process* 23-24 (Univ. of Pittsburgh School of Law Working Paper Series, 2005).

Habeas corpus—the traditional guarantee of constitutional rights against arbitrary state action—becomes a way of legitimizing departures from tradition. Put more concretely, habeas functions in the "war on terror" cases as a backstop that likely holds out only the possibility of minimal due process protections, while most of the real criminal process—whether for detention or trial—takes place in non-Article III forums.

Id.

Hard-headed analysis, in short, arguably suggests that we are in the exceptional situation in which the war approach trumps the crime approach, with the result that the new criminal process has also become the new presumption. Some things, in other words, have changed after all, at least for a while.

Id. at 25.

but domestic and international laws, such as Common Article 3 of the Geneva Conventions, still apply to them and the conditions of their detention. This was later explicitly held by the Supreme Court in *Hamdan v. Rumsfeld*.²⁷² Graham falsely mixes unlawful enemy combatants with POWs not only to reinforce their shared characteristics (i.e., (1) aliens, (2) enemies of the state), but also to explode the conventional understandings of the law of armed conflict pursuant to the Bush Administration's vision for fighting the "War on Terrorism." He obfuscates history and legal precedent and creates the false notion that the military and civilian court systems have always been completely isolated from one another even for U.S. military personnel.²⁷³ But this is patently untrue.²⁷⁴ In this distorted version of the laws of war and American military code, the supposedly significant differences between those who would be POWs and those would be (unlawful) enemy combatants disappears: "Enemy combatants

272. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamadan does not meet those requirements.

Id.

273. As Senator Levin notes, quoting *Hamdan* verbatim: "Ex parte *Quirin* . . . provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." 151 CONG. REC. S12,664 (daily ed. Nov. 10, 2005) (statement of Sen. Levin) (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005)). See also Sullivan Letter, *supra* note 262.

274. In *Hamdan*, the government unsuccessfully tried to minimize the precedential effect of *Quirin*, by arguing that *Schlesinger v. Councilman*, 420 U.S. 738 (1975), and *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997) present a comity-based abstention doctrine that civilian courts should not interfere with ongoing court-martial proceedings against citizen servicemen. *Hamdan*, 415 F.3d at 36. As the court notes, however, these cases offer little insight on military commissions against alien detainees, and regardless, the concerns presented by *Councilman* and *New* involve the military's institutional need to be battle-ready and enforce "a respect for duty and discipline without counterpart in civilian life," which requires comity (i.e., non-interference) from the civilian courts. *Id.* (quoting *Councilman*, 420 U.S. at 757). *Hamdan* does not come close to raising these issues, the Court observes, and in any case, even operating within the *Councilman* and *New* framework, *Hamdan* can avail itself of an exception to the abstention doctrine: "a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *Id.* (quoting *New*, 129 F.3d at 644). Contrary to the serviceman in *Councilman* (who wished to stop his court-martial for using and selling marijuana) and in *New* (who wanted to stop his court-martial for insubordination), *Hamdan* raised a "substantial" jurisdictional challenge: "[w]hile he does not deny the military's authority to try him, he does contend that a military commission has no jurisdiction over him and that any trial must be by court-martial." *Id.* at 37.

are being held at Guantánamo Bay like POWs were held in the past.”²⁷⁵ He said, “If you are a POW in a war, you are there until the war is over. An enemy combatant falls into that same category, and we are going to make sure they get due process accorded under international law and then some, and the Congress is going to watch what happens.”²⁷⁶ He continued

[f]or those who want to turn an enemy combatant into a criminal defendant in U.S. court and give that person the same rights as a U.S. citizen to go into Federal court, count me out. Never in the history of the law of armed conflict has an enemy combatant, irregular combatant, or POW been given access to civilian court systems to question military authority and control, except here.²⁷⁷

He said, “[t]hese are people caught on the battlefield as the Nazis were caught on the battlefield.”²⁷⁸ One effect of this erosion of difference is that the “battlefield” is now everywhere (Afghanistan, Zambia, or the O’Hare airport, where Jose Padilla was picked up before being put into indefinite detention²⁷⁹), and thus, the important purpose of the procedures of Guantánamo is to keep “terrorists” or enemy combatants off the battlefield:

[t]he people at Guantánamo Bay are captured as part of the war on terror, and some of them may be running. The point is, when you join al Qaeda, whether you stand or fight or run, you have lost your rights to be considered anything other than what you are—an enemy combatant taking up arms against the United States. Here is my message to terrorists: If you join a terrorist organization taking up arms against the United States and you get involved in combat, you are likely to get killed. If you get captured, you will be taken off the battlefield as long as necessary to make sure our country is protected from you.²⁸⁰

275. 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

276. *Id.*

277. *Id.*

278. 151 CONG. REC. S12,664 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

279. *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

280. Sullivan Letter, *supra* note 262. This simplistic dichotomy is echoed again and again in Graham’s speeches: citizens against enemy combatant[s],” or crudely, “person[s] who [are] trying to kill U.S. troops.” 151 CONG. REC. S12,663 (daily ed. Nov. 10, 2005) (statement of Sen. Graham). In truth, the founding principle of the Bush Administration’s entire legal approach is in making a distinction between POWs on the one hand, and enemy combatants, on the other, whom, it claims, are not POWs and are not entitled to any Geneva Convention protections. *See generally* Paust,

Formulations such as these create a simplistic apartheid of rights-bearing and non-rights bearing individuals, which flaunts the protections offered by the Geneva Conventions to which the United States is signatory. In this design, unlawful enemy combatants are segregated from citizens, criminal or otherwise, who have routine access to U.S. courts, while unlawful enemy combatants can be left in a tomb-like, 9.5 x 5.5 foot cell²⁸¹ until the forever war ends. Thus, the Administration's vision of the "War on Terrorism" is that the detainees are to be treated as both unlawful combatants, to whom POW status and privileges do not apply, but at the same time, as POWs (i.e., lawful combatants), in that the military determines their status and fates without recourse to civilian justice, and they can be kept until the end of the conflict. The most troubling effect of this contortion of U.S. and international law is that it has even affected U.S. citizens, as in the case of Yasser Hamdi,²⁸² and others, as the next Part shows.

VI. THE ENEMY COMBATANT IS YOU

As noted above, the power of conceptual metaphors is not limited to the initial development of a concept, its conquering of the public imagination, and its diffusion through the cultural ether. Just as significant as these initial steps is the imposition of a concept from one sphere to another; metaphors continue to exercise ripple effects—entailments—long after a concept is first introduced. These entailments alter the conceptual frameworks through which we come to understand the world and the "governmentalities" through which we define governable subjects and exercise power over them, i.e., how we rule ourselves as a "body politic."²⁸³ We have thus far traced the journey of the conniving claimant as it traveled through various spheres of culture and took on multiple manifestations in new contexts until it arrived in the post-9/11 world in the guise of the enemy combatant/conniving detainee. This evolution does not end here, however. Just as the "war on crime" altered other

supra note 174 (reviewing the legal arguments put forth in the various memos prepared for the Administration by its lawyers).

281. See *Graham Myths*, *supra* note 202.

282. See *supra* note 171. Though the Supreme Court effectively upheld the right of a citizen, such as Hamdi, to not be held indefinitely without charge, the Court has yet to entertain this issue since the passage of the MCA. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2005); *infra* notes 295 & 297.

283. See *supra* text accompanying notes 56-61.

governmentalities that would come to make use of the powerful war metaphor, so has the enemy combatant become the dominant governmentality in the post-9/11 world.

A. *Hunting the New Enemy Combatants*

Arguably, the enemy combatant governmentality described above, which distinguishes between rights-bearing and non-rights bearing individuals—or more accurately, those with relatively extensive legal protection against the technologies of power employed in the “War on Terrorism,” and those with comparatively fewer (if any) such protections—contributes to a general dehumanization of others not immediately caught in the judicial apparatus of U.S. military prisons all over the world. This dehumanization of people as enemy combatants—those who hate and want to destroy our society—leads to abusive practices, which, while not as harsh as the tactics deployed against those in the military prisons, are nonetheless troubling for the rule of law and our moral fabric as a nation, as they have contributed to the creation and reinforcement of a “culture of fear” in America.²⁸⁴

Indeed, once we look at the wide scope of the post-9/11 security apparatus, including immigration policies and other technologies of surveillance²⁸⁵ implemented by the USA PATRIOT Act,²⁸⁶ we see that the

284. Even former National Security Advisor to President Jimmy Carter, Zbigniew Brzezinski, has decried what he calls the “fear-mongering reinforced by security entrepreneurs, the mass media and the entertainment industry” in what has been “five years of almost continuous national brainwashing on the subject of terror” leading to the creation of a “culture of fear,” which he claims “acquires a life of its own” and threatens to be “demoralizing.” Zbigniew Brzezinski, *Terrorized by “War on Terror”: How a Three-Word Mantra Has Undermined America*, WASH. POST, Mar. 25, 2007, at B01. Brzezinski identifies “terror entrepreneurs,” who he says are “usually described as experts on terrorism,” and as “necessarily engaged in competition to justify their existence.” *Id.* Accordingly, “their task is to convince the public that it faces new threats. That puts a premium on the presentation of credible scenarios of ever-more-horrifying acts of violence, sometimes even with blueprints for their implementation.” *Id.* Brzezinski also highlights the entertainment industry’s contribution to a generalized “Islamophobia” through its portrayal of “evil characters” with “recognizable Arab features.” *Id.*

285. The Bush Administration’s domestic spying program presents a case in point. President Bush authorized the program, which was exposed in December 2005, to monitor the international phone calls and e-mails of U.S. citizens, without first obtaining a court warrant. A federal judge declared the program unconstitutional in August 2006, saying it violated rights to free speech and privacy, and the separation of powers. See Jeannie Shawl, *Federal Judge Rules Domestic Spy Program Unconstitutional*, JURIST, Aug. 17, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/08/breaking-news-federal-judge-rules.php>. The Justice Department appealed and a subsequent Sixth Circuit ruling determined that the program could continue as the appeal was pending. See Alexis Uncovic, *Federal Appeals Court Allows Domestic Spying to*

de-ethnicized version of the conniving claimant—a diffuse image of the law and lawyers as undermining the social order through a litigation explosion—has now been re-formulated²⁸⁷ as an enemy combatant.²⁸⁸ Recall that President Bush’s Military Order of November 13, 2001, gave the President wide authority to determine whether or not an individual was an enemy combatant, including those who have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy”²⁸⁹

All the hateful attributes of the conniving claimant that had been distributed and ascribed to the entire body politic during the tort reform debates,²⁹⁰ have now been concentrated and re-inscribed into the body of

Continue Pending Appeal, JURIST, Oct. 4, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/10/federal-appeals-court-allows-domestic.php>. The program has been so controversial that one federal judge, U.S. District Judge James Robertson, resigned in protest over its abuses in December 2005. See *Unease Rises Over Domestic Spying*, CBSNEWS.COM, Dec. 21, 2005, <http://www.cbsnews.com/stories/2005/12/21/politics/main1150626.shtml>. Reversing the position of defending the policy it held for over a year, the Administration announced in January 2007 that it would begin to seek court approval for its surveillance. See *Senators Grill Gonzalez Over Spying Program*, ASSOCIATED PRESS, Jan. 18, 2007; see also *Administration to Let Court Monitor Domestic Spying*, CNN.com, Jan. 18, 2007, <http://www.cnn.com/2007/POLITICS/01/17/domestic.spying/index.html>. Notably, the program had been tapping 186 “anti-military protests or demonstrations in the U.S.,” as of February 10, 2006, according to an NSA memo procured through a Freedom of Information Act request by the American Civil Liberties Union. See ACLU, *No Real Threat: The Pentagon’s Secret Database on Peaceful Protest*, Jan. 17, 2007, <http://www.aclu.org/safefree/spyfiles/27988pub20070117.html>. This is a direct echo of President Nixon’s domestic surveillance of radical leftist political activists and the anti-war movement. The military, including the CIA, has also been involved in domestic surveillance. See Eric Lichtblau & Mark Mazzeti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at 1.

286. Recall the full title of the USA PATRIOT Act is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.”

287. Recall that foreigners, particularly Jews, were the original stereotypical conniving claimants. See discussion *supra* Part II.

288. See generally DAVID COLE, *ENEMY ALIENS* 57-82 (2003) (stating in pertinent part that the USA PATRIOT Act could extend to any and all aliens who lawfully reside in the United States); see also Office of the Inspector General, Supplemental Report on Sept. 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, N.Y. (Dec. 2003), available at <http://www.usdoj.gov/oig/special/0312/chapter5.htm#V>. This report makes clear that abusive behavior can be directed at “aliens” whether they are in Guantánamo, Abu Ghraib, or Brooklyn. See *id.*

289. See Military Order of Nov. 13, 2001, *supra* note 34.

290. Galanter writes, “[a]s the emphasis shift[s] from jokes about conniving claimants to legends about outrageous claims and undeserved awards, the location of perceived abuse of the

the enemy combatant and terrorist—those working secretly from within our society to destroy it. As a result, after 9/11, Muslims, Arabs, and others perceived to be either, have become targets.²⁹¹ Noncitizens of certain phenotypical and religious orientations are treated as presumed threats.²⁹² Others fitting these categories, including citizens, are perceived by their fellow citizens as targets to whom they can legitimately respond with vigilant justice,²⁹³ and whom law enforcement officials deem too dangerous to be allowed to roam freely.²⁹⁴

Most disturbingly, the enemy combatant metaphor has even broader entailments. It now encompasses far more than its narrow legal definition, including all those, as President Bush described just nine days after 9/11, who “hate our freedoms” and want to “disrupt and end a way of life.”²⁹⁵ As disturbing as Muslim and Arab profiling is, and as problematic as the immigration detention policies became after 9/11, further intrusions into the private sphere produced by the entailments of the enemy combatant metaphor are even harder to explain from the perspective of deterring terrorism. These include, among others, U.S. citizens who are political dissidents against both U.S. policy,²⁹⁶ and against other countries’

system is more general and diffuse, and the miscreants are not outsiders and strangers, but rather, those who look like, and may be, us.” Galanter, *Conniving Claimant*, *supra* note 63, at 665.

291. See, e.g., Neil Macfarquhar, *Echoes of Terror Case Haunt Californian Pakistanis*, N.Y. TIMES, Apr. 27, 2007, at A1.

292. See Omar C. Jadwat, *The Arbitrary Detention of Immigrants After September 11*, available at <http://www.aclu.org/iclr/jadwat.pdf> (last visited Sept. 27, 2007).

293. See Human Rights Watch, *We Are Not the Enemy: Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11* (Nov. 2002), available at <http://www.hrw.org/reports/2002/usahate/>.

294. See generally GREY, GHOST PLANE, *supra* note 22; see also Center for Constitutional Rights, Docket: Arar v. Ashcroft, http://www.ccr-ny.org/v2/legal/September_11th/Sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377 (last visited Oct. 9, 2007) (discussing Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *motion denied*, 2006 U.S. Dist. LEXIS 45550 (E.D.N.Y. 2006)). Maher Arar, a Canadian/Syrian citizen detained by INS in JFK airport, claims he was “rendered” by U.S. officials to Syrian authorities to be tortured for eight months. *Id.* He subsequently received several million dollars in compensation from the Canadian government following the finding of an official commission of inquiry that found the government had been negligent in protecting him while in U.S. custody. See *In Depth: Maher Arar Timeline*, CBC NEWS, Jan. 26, 2007, <http://www.cbc.ca/news/background/arar/>. See also El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, El-Masri v. United States, 2007 U.S. LEXIS 11351 (Oct. 9, 2007). El-Masri is a Kuwait-born German citizen who was detained from December 31, 2003, through May 28, 2004, in a CIA prison known as the “Salt Pit” in Afghanistan. See *Extraordinary Rendition*, *supra* note 172.

295. President Bush, Address to Joint Session of Congress (Sept. 20, 2001).

296. See *supra* note 280 (discussing the U.S. government’s illegal surveillance of peace-activists). This political atmosphere is overly permissive of tactics that can far too easily be trained

policies,²⁹⁷ as well as non-U.S. citizens expressing views unpopular with the U.S. government (and their own governments).²⁹⁸ The spirit of this

on those undeserving of them, meaning that any unwanted political dissent can be construed as terrorist activity. Consider, for example, the Animal Enterprise Terrorism Act (AET), which passed the Senate in September 2006 with unanimous consent, and the House in November 2006 after a voice vote taken under a suspension of rules. Animal Enterprise Terrorism Act, 18 U.S.C.A. § 43 (West 2006). While the bill primarily criminalizes violent protests and other acts by eco-terrorists, activists argue that the law is “excessively broad and vague,” and “imposes disproportionately harsh punishment.” *Why Oppose AETA*, EQUAL JUSTICE ALLIANCE, <http://www.noaeta.com/whyoppose.htm> (last visited Sept. 27, 2007). Activists in the Equal Justice Alliance, a 200-member coalition formed to oppose the law, claim the law “brands animal advocates as ‘terrorists’ and denies them equal protection under the law,” “brands civil disobedience as ‘terrorism’ and imposes severe penalties,” “has a chilling effect on all forms of protest by endangering free speech and assembly,” “interferes with investigation of federal law violations by animal enterprises,” and “detracts from prosecution of real terrorism against the American people.” *Id.* In particular, they argue that there is room to interpret whether to ban more peaceful activities that result in “loss of profits” for almost all “animal enterprises.” *Id.*; see also *Animal Enterprise Terrorism Act Passes; Bush Expected to Sign*, Nov. 12, 2006, <http://www.indybay.org/newsitems/2006/11/12/18329237.php>.

297. See Elaine Cassel, *Is Playing Paintball and Firing Legal Guns Terrorism? Three Disturbing Convictions Strongly Suggest Discrimination Against Muslim Americans*, FINDLAW, Mar. 25, 2004, <http://writ.news.findlaw.com/cassel/20040325.html>. Three Muslim American men (out of an initial batch of eleven) were convicted of aiding and abetting a terrorist organization, thereby exposing them to sentencing of fifty to one hundred years. *Id.* Cassel notes that the United States initially did not even see this case as a “terrorism” case; the charges initially brought were under the Neutrality Act, which criminalizes “attacking” another country with which the United States is at peace. *Id.* Cassel concludes that these prosecutions were arguably motivated by “discrimination and a desire to send a message to Muslims, not out of concern for national security or justice.” *Id.* She adds, “[t]he prosecutorial strategy of ‘Plead guilty or be labeled a terrorist’ is coercive, and wrong for our government to employ in any case, terrorism or no terrorism.” *Id.*

298. The radical expansion of the law enforcement community’s powers through the USA PATRIOT Act has fostered the emergence of very broad categories of “terrorist.” The Patriot Act denies entry into the United States to anyone materially supporting a terrorist organization, which is defined expansively as any group of two or more people who intend to kill or inflict harm upon others. But according to documents released by the Freedom of Information Act, Homeland Security officials have interpreted the Patriot Act so casually that anyone guilty of “irresponsible expression of opinion” can be denied access to the United States. The ACLU reported that under this guise of legitimate authority, the government has denied, revoked or delayed the granting of visas to

a group of seventy-five South Korean farmers and trade unionists opposed to a free-trade agreement; a Marxist Greek academic; a Sri Lankan hip-hop singer, whose lyrics were deemed sympathetic to the Tamil Tigers and the Palestine Liberation Organization; a Bolivian professor of Latin-American history . . . ; a Basque historian; a former Sandinista minister of health; and nine thousand five hundred Burmese refugees.

invasion of the private sphere of legitimate activity has diffused throughout society, even filtering down to local and state law enforcement technologies of power and surveillance.²⁹⁹

Given Senator Graham's rhetoric about how the presence of detainees' lawyers has obstructed the important intelligence work conducted at Guantánamo Bay, it is unsurprising that the expansive net of the enemy combatant category has also started to catch these very lawyers within its grasp. In turning its repressive tactics against lawyers, the enemy combatant governmentality betrays its links to its metaphorical predecessor, the conniving claimant, whose destructive activities were facilitated by predator lawyers.

B. Targeting Lawyers

As the previous section showed, the new metaphor of enemy combatant has fast become a governmentality—a new paradigm for governance—in the “War on Terrorism.” The implications of this development are that the already overly expansive definition of the enemy combatant has been further expanded to the point that it is poised to overpower other legally salient categories at the core of American government, most notably that of citizen. With this overly-powerful tool in their hands, the government has targeted even those who have not taken up arms or planned attacks against the country, but have merely tried to support its long tradition of respecting the rule of law by offering legal defense to those ensnared in the enemy combatant trap.

1. Lynne Stewart

The Lynne Stewart case shook the legal world, as it presented troubling issues about legal ethics and how lawyers should handle the new law

George Packer, *Keep Out: George Packer on Why Giving Tariq Ramadan a Visa is in the National Interest*, NEW YORKER, Oct. 16, 2006, at 59. As Packer notes, there is an “apparent mixture of deliberate ideological exclusion and blind bureaucratic stupidity” in these exclusions, which have also dramatically affected the granting of access to refugees in large numbers. In 1992, the United States admitted more than 130,000 political refugees, but at the time of reporting, only 41,500 of 60,000 slots for 2006 had been filled. *Id.* at 60. Among those refugees excluded were “anti-Castro Cubans, Vietnamese and Laotian Montagnards, Liberians, Somalis, and Colombian peasants,” for whom the United States barred entry because of voluntary or coerced support of armed groups. *Id.*

299. See Jim Dwyer, *City Policy Spied Broadly Before G.O.P. Convention*, N.Y. TIMES, Mar. 25, 2007, at A1 (discussing covert operations by New York police's “R.N.C. Intelligence Squad,” a team of officers who “attended meetings of political groups, posing as sympathizers or fellow activists,” across the country and in Europe, investigating various groups who planned to protest the Republican National Convention in New York City in 2004).

enforcement paradigm ushered in by the “War on Terrorism.” It should be emphasized that the case does not present a clear cut example of a blameless lawyer meekly playing by the rules, whose innocent efforts the government inexplicably and unjustly targeted. Immediately before her sentencing to twenty-eight months in federal prison, Stewart acknowledged as much, claiming responsibility for her wrongdoing, which she claims grew in part out of misjudgments and naiveté over how lawyers defending terrorist clients must behave.³⁰⁰ Nonetheless, the case is important because it demonstrates the government’s new willingness in the post-9/11 world to see the law and lawyers as enemy combatants.

Stewart was convicted in February 2005 for providing material support to a terrorist conspiracy.³⁰¹ The charges grew out of her representation of Sheik Abdel-Rahman, a radical Islamic cleric from Egypt convicted for his connection to the World Trade Center bombings in 1993. The government claimed that Stewart lent support to Rahman and his followers by violating her Special Administrative Measures (SAMs), a list of directives established in October 2001 by General John Ashcroft to govern lawyers’ visitation of clients charged with, or convicted of, crimes of terrorism. Under the SAMs, Stewarts’ visits were subjected to surveillance and recording, she was prohibited from discussing anything with Rahman other than post-conviction representation issues, and she was also proscribed from disclosing the content of their meetings to the press.³⁰²

Stewart admitted to intentionally violating these directives by speaking gibberish to confound the recording of conversations between Rahman and

300. Julia Preston, *Lawyer in Terror Case Apologizes for Violating Special Prison Rules*, N.Y. TIMES, Sept. 29, 2006, available at <http://www.nytimes.com/2006/09/29/nyregion/29stewart.html?ex=1169874000&en=ac4b60b44157b379&ei=5070>. Stewart wrote in a personal letter to the judge handling her sentencing: “My only motive . . . was to serve my client as his lawyer. What might have been legitimately tolerated in 2000-2001, was after 9/11 interpreted differently and considered criminal. At the time I didn’t see this. I see and understand it now.” *Id.* Stewart also acknowledged lapses in judgment, admitting to being “naïve in the sense that I was overly optimistic about what I could and should accomplish as the sheik’s lawyer.” *Id.* Finally, and most importantly, Stewart recognized belatedly the changed environment in which she had been operating, stating that she had failed to understand that in representing a convicted terrorist she might need to “tread lightly,” as she had misjudged the prosecutors’ zealous pursuit of her. *Id.*

301. See *United States v. Sattar*, 395 F. Supp. 2d 66, 69 (S.D.N.Y. 2005).

302. See Elaine Cassel, *The Cases of Lynne Stewart, Clive Stafford Smith, and Navy JAG Lawyer Charles Swift: Government Retaliation Against Attorneys for Terrorism Suspects*, FINDLAW, Oct. 19, 2006, <http://writ.lp.findlaw.com/cassel/20061019.html>. As Cassel notes, the most damaging evidence against Stewart ended up coming not from SAMs-related surveillance, but rather, from surveillance instituted by a warrant secured under the Foreign Intelligence Surveillance Act (FISA), which had been in operation since 2000.

the interpreter, Mohamed Yousry.³⁰³ Yousry also wrote down messages from Rahman and passed these on to Ahmed Abdel Sattar, a New York postal worker associated with Sheik Rahman's Islamic Group.³⁰⁴ Sattar allegedly then forwarded these messages to the Sheik's followers.³⁰⁵ Finally, in a press release in 2000, Stewart said that the Sheik did not agree to a cessation of the kind of terrorist violence with which the Islamic Group had been associated.³⁰⁶ In addition to the attack on the World Trade Center in 1993, terrorism is linked to the attack on the USS Cole on October 12, 2000.³⁰⁷

The government argued that the intent of the press release was to encourage the Sheik's followers to continue plotting and carrying out terrorist attacks.³⁰⁸ Stewart countered that the SAMs were unconstitutional prior restraints on her freedom of speech and on her client's right to counsel under the Sixth Amendment.³⁰⁹ Judge Koeltl rejected her defense, pointing out that Stewart could have used other means, such as seeking an injunction against the SAMs rather than simply breaking them.³¹⁰

The changed environment post-9/11 is evident from several elements of Stewart's case, particularly the prosecutorial strategy that the government pursued and the court's acceptance of it. As Elaine Cassel observes, it is remarkable that there was a prosecution strategy at all. In another era, Stewart merely would have suffered a professional reprimand from the New York State Bar, and likely would not be disbarred.³¹¹ Instead, the government pursued Stewart as an enemy of the state for having conspired with a terrorist.

The government's zest and the court's acquiescence are manifest in the evidence presented. The government was able to introduce evidence attempting to link Stewart and the Sheik to al-Qaida and 9/11, going so far as closing their arguments with a videotape of Osama bin Laden, which was all the more dramatic given the courthouse's close proximity to the site of the World Trade Center attacks. As Cassel notes, this evidence "was arguably highly prejudicial—and Judge Koeltl may well have been wrong

303. *Id.*

304. *Id.*

305. *Id.*

306. Cassel, *supra* note 297.

307. Press Release, Department of Justice, Superseding Indictment Adds New Charges Against Ahmed Abdel Sattar, Lynne Stewart, and Mohammed Yousry (Nov. 19, 2003), http://www.usdoj.gov/opa/pr/2003/November/03_crm_631.htm.

308. *See id.*

309. Cassel, *supra* note 297.

310. *Id.*

311. *Id.*

to deem it admissible—for the government was not able credibly to connect Stewart and her co-defendants' actions to 9/11."³¹²

Finally, as if pursuing her as a terrorist was not enough, the prosecutor also sought to punish Stewart with a thirty-year prison term. However, Judge Koeltl would not grant this, but instead sentenced Stewart to only twenty-eight months in prison in October 2006, citing her lifelong public service in representing court-appointed criminal defendants, her poor physical condition (Stewart is sixty-five and battling cancer and diabetes), and the fact that no one was harmed by her actions.³¹³ Though she scraped by, Stewart's case illustrates how lawyers are no longer seen as the pillars upon which our rule of law is balanced, but rather as obstructing the nation's progress towards winning the "War on Terrorism." Unfortunately, her case is not the only example.

2. Clive Stafford Smith

Clive Stafford Smith, a 27-year opponent of the death penalty in the United States and the Legal Director of the UK-based anti-death penalty advocacy organization Reprieve, took on a new cause in the wake of 9/11: defending Guantánamo detainees. In June 2006, three detainees committed suicide: Manei Shaman Turki al-Habadi, 30, and Yasser Talal al-Zahrani, 21, both from Saudi Arabia, and Ali Abdullah Ahmed, 29, from Yemen.³¹⁴ Then commander of Guantánamo, Navy Rear Admiral Harry Harris, alleged the suicides were not acts of desperation to alleviate suffering of indefinite duration, but rather, were part of a conspiracy of organized "asymmetric warfare."³¹⁵ Lieutenant Commander Jeffrey Gordon, the Pentagon's chief press officer, added that it was not necessary to mourn the men's deaths, as all three men were dedicated terrorists: "These guys were fanatics like the Nazis, Hitlerites, or the Ku Klux Klan, the people they tried at Nuremberg."³¹⁶

More outrageously, the Department of Defense alleged that Clive Stafford Smith organized the suicides. In an email to the Associated Press, Smith recounted how Guantánamo operatives interrogated his client, Mohammed el Gharani, on a weekly basis following the suicides.³¹⁷ During this time, Gharani was "repeatedly questioned about [Smith's]

312. *Id.*

313. *Id.*

314. See David Rose, *How U.S. Hid the Suicide Secrets of Guantánamo*, GUARDIAN, June 18, 2006, at 30.

315. *Id.*

316. *Id.*

317. Cassel, *supra* note 297.

role in the suicides.”³¹⁸ Interrogators told Gharani that Smith had told his other clients “to kill themselves, and word was passed to the three men who did commit suicide.”³¹⁹ During the course of its investigation into the suicides, the Navy seized over one thousand pages of detainee documents. The documents included attorney-client materials and evidence to be used in their defense before military tribunals, including affidavits from family members that the detainees’ lawyers obtained with great difficulty.³²⁰ Given the allegations, it is possible that the government may pursue the matter against Smith further, particularly because he and his organization represent dozens of detainees. After all, in the Stewart case, in order to establish that Stewart gave “material support to a terrorist conspiracy[.]” the government merely had to establish that she carried messages.³²¹

As of October 2007, the government has yet to pursue formal charges against Stafford Smith, but they have continued to hold him in deep suspicion: in late September 2007, Stafford Smith and his co-counsel, Zachary Katznelson, were accused of smuggling contraband—in the form of Speedo swimsuits and men’s briefs—to their clients.³²² Calling the accusations, “patently absurd,” Stafford Smith observed that his work involves “legal briefs, not the other sort.”³²³ He further commented soberly that, “I cannot imagine who would want to give my client Speedos, or why. Mr. Aamer is hardly in a position to go swimming, since the only available water is the toilet in his cell.”³²⁴ It is also unlikely that Mr. Aamer would even have the strength to swim at all; he has been on multiple hunger strikes, including one that has lasted over three hundred days and has left him at half his original body weight.³²⁵

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. Raymond Bonner, *A New Threat at Guantánamo: Smuggled Speedos and Briefs*, N.Y. TIMES, Sept. 29, 2007, at A5.

323. *Id.*

324. Candace Gorman, *And Then There is the Underwear Story*, HUFFINGTON POST, Sept. 16, 2007, available at http://www.huffingtonpost.com/h-candace-gorman-/and-then-there-is-the-und_b_64613.html. Stafford Smith continued, in his response to the Government’s letter, “I should say that your letter brought to mind a sign in the changing room of a local swimming pool, which showed someone diving into a lavatory, with the caption, “We don’t swim in your toilet, so please don’t pee in our pool.” I presume that nobody thinks that Mr. Aamer wears Speedos while paddling in his privy[.]” *Id.*

325. See Unclassified Statement of Shaker Aamer (Nov. 7, 2005), http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/aamer_statement_original.pdf; see also Clive Stafford Smith, *America’s Legal Black Hole*, L.A. TIMES, Oct. 5, 2007, at A27.

What is also not a laughing matter are the ways in which the Government has attempted to make legal representation of Guantánamo detainees an increasingly arduous task. To accomplish this, the government applies pressure on both the detainees and the lawyers, which strains the attorney-client relationship or makes the task of providing an adequate defense nearly impossible. In spring 2007, the government filed a protective order that contained a wish list of the terms and conditions with which it wanted detainee lawyers to comply in their relationships with their clients.³²⁶ In particular, the government tried to drastically restrict the contact and communication between lawyers and their Guantánamo detainee clients by limiting the definition of “legal mail” and by setting a three-visit limit on face-to-face meetings once a detainee had agreed to be represented by a particular lawyer.³²⁷ The government has also sought to institute censorship of all attorney-client communications. This was necessary, the government argued, because lawyers’ use of mail to communicate with their clients had “‘enabled detainees’ counsel to cause unrest on the base by informing detainees about terrorist attacks[,]”³²⁸ by informing them about the situation in Iraq, activities of various terrorist leaders, the Hezbollah war with Israel, and abuse of prisoners at Abu Ghraib prison in Iraq. The New York City Bar Association responded in a letter saying, “[b]laming counsel for the hunger strikes and other unrest is a continuation of a disreputable and unwarranted smear campaign against counsel.”³²⁹ The new protective order has not yet been issued, but detainees’ lawyers have had to sign waivers stating that they agree to the new rules without prejudice to their later challenge of these rules.³³⁰

3. Lieutenant Commander Charles Swift

Lieutenant Commander Charles Swift was a career Navy JAG lawyer who was ordered to represent Salim Hamdan.³³¹ Before it had filed formal charges against Hamdan, the government informed Swift that he could

326. See *Bismullah v. Rumsfeld*, No. 06-1197, 2006 U.S. App. LEXIS 31160 (D.C. Cir. 2006) (Protective Order and Procedures for Counsel Access to Detainee at the U.S. Naval Base in Guantánamo Bay, Cuba) (on file with author).

327. *Bar Criticizes Proposed Detainee Rules*, N.Y. TIMES, Apr. 30, 2007, at A15.

328. *Id.*

329. *Id.*

330. For a description of a lawyer’s typical interactions with her clients, see H. Candace Gorman, *Inside the Secret Facility*, IN THESE TIMES.COM, Oct. 2, 2007, available at http://www.inthesetimes.com/article/3338/inside_the_secret_facility/.

331. Cassel, *supra* note 297.

assist Hamdan only by negotiating a plea agreement for Hamdan.³³² Swift refused to see Hamdan until the government allowed him to mount a defense. Following his successful defense of Hamdan, leading to the Supreme Court's momentous ruling in *Hamdan v. Rumsfeld*, Swift's status in the Navy was up for review.³³³ Though Swift's direct superior officer had lauded him as among the finest lawyers in the military, the Navy denied his promotion. Subject to regulations, which state that Swift must either be promoted or retire, he has been forced to leave the Navy. However, the Navy denies that Swift's forced retirement was retaliatory.

Swift continues to represent Hamdan as a civilian attorney in conjunction with other attorneys.³³⁴ They have filed challenges to the constitutionality of the Military Commissions Act (MCA), which passed on October 17, 2006.³³⁵ Significantly, the MCA's definition of unlawful enemy combatants includes those who "purposefully and materially supported hostilities against the United States or its co-belligerents."³³⁶ This is an expansion of the traditional humanitarian law definition that limits such persons to those who actively engaged in hostilities. In addition, the MCA grants the President or Secretary of Defense unlimited power to label anyone an unlawful enemy combatant.³³⁷ It remains unclear how this bold new statutory construction will affect U.S. citizens because they are not explicitly proscribed from inclusion in the definition.³³⁸

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. See MCA, *supra* note 7.

337. See Joanne Mariner, *The Military Commissions Act of 2006: A Short Primer (Part One of a Two-Part Series)*, FINDLAW, Oct. 9, 2006 [hereinafter Mariner, *Primer Part One*], <http://writ.news.findlaw.com/mariner/20061009.html>; see also *The Military Commissions Act of 2006: A Short Primer (Part Two of a Two-Part Series)*, FINDLAW, Oct. 25, 2006, <http://writ.news.findlaw.com/mariner/20061025.html>; Michael C. Dorf, *Why the Military Commissions Act is No Moderate Compromise*, FINDLAW, Oct. 11, 2006, <http://writ.news.findlaw.com/dorf/20061011.html>. Aziz Huq, *How The Military Commissions Act of 2006 Threatens Judicial Independence: Attempting to Keep the Courts Out of the Business of Geneva Conventions Enforcement*, FINDLAW, Sept. 26, 2006, http://writ.news.findlaw.com/commentary/20060926_huq.html; *Challenging the Military Commissions Act*, JURIST, Oct. 4, 2006, <http://jurist.law.pitt.edu/hotline/2006/10/challenging-military-commissions-act.php>.

338. See Mariner, *Primer Part One*, *supra* note 337 (commenting "the definition of 'unlawful enemy combatant' is not limited to aliens (even though U.S. citizens cannot be tried by military commissions, and are not covered by the bill's habeas-stripping provisions)").

4. Law Firms—The New Terror Cells

Not all of the attacks on lawyers have come through overt action. As noted above, Senator Graham publicly chastised civil and human rights lawyers as disruptive to the interrogation strategies of the U.S. military in Guantánamo Bay.³³⁹ Others have taken more subtle tones, echoing the discursive strategy deployed by Senator Graham. The most audacious of these incursions came from U.S. Deputy Assistant Secretary of Defense for Detainee Affairs Charles “Cully” Stimson, who implied links between many of America’s leading corporate law firms and enemy combatants.³⁴⁰

As if channeling Senator Joseph McCarthy, Stimson read a list during a nationally broadcast radio interview, of the names of firms that had offered legal defense to Guantánamo Bay detainees.³⁴¹ When asked about the financing of the cases, Stimson replied:

Funding? It’s not clear, is it? Some will maintain that they’re doing it out of the goodness of their heart—that they’re doing it pro bono, and I suspect they are . . . Others are receiving monies from who knows where and I’d be curious to have them explain that.³⁴²

Stimson did not offer evidence that any of the firms he mentioned provided their services on anything other than a pro bono basis, and certainly there is no evidence that the money came from illicit sources or “who knows where,” implying some nefarious link to some unknown evil.³⁴³ Shockingly, Stimson went on to suggest that should CEOs discover

339. See *supra* text accompanying note 248.

340. Editorial, *Unveiled Threats: A Bush Appointee’s Crude Gambit on Detainees’ Legal Rights*, WASH. POST, Jan. 12, 2007, at A18.

341. *Id.*

342. See Kate Heneroty, *DOD Official Slams U.S. Law Firms for Defending Guantánamo Detainees*, JURIST, Jan. 12, 2007, <http://jurist.law.pitt.edu/paperchase/2007/01/dod-official-slams-us-law-firms-for.php>; Audio tape: Federal News Radio Interviewing Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs (Jan. 2007)[hereinafter Stimson Interview] (regarding the fifth anniversary of and what has changed most at Guantánamo), <http://federalnewsradio.com/emedial/59677.wma>. Shortly thereafter, Stimson retracted his comments and apologized after receiving tremendous criticism from lawyers representing some of the detainees (many of whom suggested he should be fired for his comments), and others, including the American Bar Association and 130 U.S. law school deans. The Pentagon distanced itself from Stimson’s comments, saying Stimson’s comments did not “represent the views of the Defense Department or the thinking of its leadership.” See Bernard Hibbits, *Stimson Apologizes to Detainee Lawyers for Guantánamo Representation Comments*, JURIST, Jan. 17, 2007, <http://jurist.law.pitt.edu/paperchase/2007/01/stimson-apologizes-to-detainee-lawyers.php>.

343. Editorial, *supra* note 340.

that their companies are being represented by law firms which also represent the “very terrorists who hit their bottom line back in 2001,” the CEOs should “make those law firms choose between representing terrorists or representing reputable firms.”³⁴⁴

These comments employ rhetorical strategies aimed at keeping the mythical jaundiced view of the law alive. Like the mythical conniving claimant’s supposedly paralyzing effects on the productive forces in our economy, its successor image, the enemy combatant, encompasses the same fear of an anemic economy and a withering national strength. The newer image draws its legitimacy from its predecessor. Now, more than weakening the national defense against the terrorists by interrupting interrogations or trying to free terrorists, the enemy combatants are launching direct attacks on the economy. In typically dramatic fashion, *The National Review* refers to this as “lawfare,” the “use of the American people’s courts as a weapon against the American people.”³⁴⁵

After an immediate backlash of criticism, Stimson quickly apologized and Department of Defense officials distanced themselves from his comments, leading to his resignation.³⁴⁶ Still, his deployment of the jaundiced view of the law achieved its objective; the metaphorical cat was out of the bag, free to roam about and interact with the earlier *gestalts* of the conniving claimant. The power of this example should not be underestimated. With this attack on law firms, more marginalized members of the bar such as criminal defense lawyers and nonprofit activists are no longer alone in being painted as the enemy; societal elites have become enemy combatants too. This is not a case of politics-making-strange-bedfellows. Rather, it is an instance of a powerful ideology run amok, producing consequences unforeseen by the people who created it.

VII. CONCLUSION: THE “NEAR ENEMY” AND THE “FAR ENEMY”

This Article has grappled with Congress’s acquiescence in the face of the Executive’s prosecution of the “War on Terrorism,” despite the abusive practices that this approach has entailed. Rather than challenge these practices, Congress squandered its opportunity to inject reason into our national policies, and instead, merely bolstered the Executive’s stance,

344. Stimson Interview, *supra* note 342.

345. Andrew C. McCarthy, *Lawfare Strikes Again*, NAT’L REV. ONLINE, June 12, 2007, <http://article.nationalreview.com/?q=YWVIMGZIMzJhN2EwMWU0YjIzZjkwOGRIOTBIY2UxYTQ=>.

346. See *supra* note 342 and accompanying text.

first with the passage of the DTA, an effective legislative override of *Rasul v. Bush*, and later and more devastatingly, with the MCA, a reaction to the Supreme Court's decision in *Hamdan v. Rumsfeld*.³⁴⁷

More conventional approaches may have told this story somewhat differently, highlighting the battles between the coordinate branches as the main dramatic narrative. Conventional political science might have tracked the shrinking and growing "decision spaces" of the various branches vis-à-vis the others, to demonstrate how they have kept one another in check over time.³⁴⁸ This more condensed Guantánamo narrative would also fit comfortably with a much longer decades-long struggle between conservatives and liberals over the relative authority of the executive and judicial branches.

Indeed, as discussed above, a major component of the jaundiced view of the law paradigm, as introduced by conservatives into popular cultural discourse, has been an effort to fortify and augment the powers of the executive branch. Their efforts have promoted the notion of the "unitary executive," while attacking the judiciary and its "liberal [activist] judges."³⁴⁹ According to this view, judges have "gone too far" in injecting their own liberal "social and economic ideas" into their decisionmaking and in "weakening the peace forces as against the criminal force in [the] country."³⁵⁰ So, when President Bush declared in 2005 that he had the legal authority to conduct domestic surveillance on Americans despite the clear restrictions on such activity by the Foreign Intelligence Surveillance Act

347. Though in the debates over the MCA, a handful of senators, including Senator Graham, clashed with the Executive over the Administration's attempts to redefine Common Article 3 of the Geneva Conventions within the legislation. 151 CONG. REC. S12,655 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

348. See generally JED BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004); TERRI PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999).

349. See *supra* note 105; see also Reagan Justice Department Office of Legal Policy, *Guidelines on Constitutional Litigation* (1988), available at <http://www.americanconstitutionsociety.org/pdf/guidelines.pdf>; see also QUIET REVOLUTION (Alliance for Justice 2006); HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* (2004); David Cole, *The Dictator Defense*, SALON, Feb. 10, 2006, <http://www.salon.com/opinion/feature/2006/02/10/dictator/print.html>. Of course, as many have ably demonstrated, the Rehnquist court was arguably the most activist court in U.S. history, when viewed from the perspective of its rate of invalidating federal laws. Since 1995, the Court struck down thirty-five federal protections. See QUIET REVOLUTION, *supra*; see also CASS SUNSTEIN, *RADICALS IN ROBES* (2005).

350. Robert A. Kagan, *What if Abe Fortas had been More Discreet?*, in *WHAT IF? EXPLORATIONS IN SOCIAL SCIENCE FICTION* (Nelson Polsby ed., 1982) (Lewis Publ'g 1983) (quoting statements of President Nixon).

(FISA),³⁵¹ he appeared to be channeling President Nixon's declaration that "[w]hen the president does it that means that it is not illegal."³⁵²

Furthermore, in the contemporary round of these battles, the real showdown has indeed occurred between the Executive and the U.S. Supreme Court, which has time and again stood up to the Bush Administration's efforts to augment its own powers, invalidating some or all of its arguments over the past few years of litigation on the "War on Terrorism." Analyzing this battle as simply a separation of powers issue, however, fails to address the persistent cultural mythologies about the law that will remain in place, regardless of which branch can claim victory at the end of the day. To understand why we ended up with the DTA, and now the MCA, I have suggested that we look elsewhere: deep into our cultural understanding of the law.

This approach is buttressed by examining the effects of the words of those against whom "we" (the collective body politic) are at war. A structural similarity confronts us when we compare Osama bin Laden's bombastic prophecies and theological constructions with the ideologies of those elements within our society that promote the jaundiced view of the law. Both have seized upon traditions and perverted them, projecting in their stead all-encompassing worldviews that have been adopted by other people as lenses through which to make meaning of, and interact in, political life—sometimes to disastrous results.

Substance aside, bin Laden's rhetorical strategy bears a structural similarity to the rhetoric employed by Graham and the Bush Administration that is difficult to ignore. Though its promotion of violent struggle to achieve social and political objectives must be condemned unequivocally, bin Laden's message needs to be appreciated for what it is. Bin Laden seized upon a very marginal view—the one emphasized by Salafi teachings—of the concept of jihad, or struggle in the cause of God.³⁵³ Bin Laden's holy war perverted the Salafi value system. Though

351. See *President's Radio Address* (White House Radio Broadcast Dec. 17, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

352. See *Nixon's Views on Presidential Power: Excerpts from an Interview with David Frost, May 19, 1977*, <http://www.landmarkcases.org/nixon/nixonview.html>. It was the abusive domestic intelligence gathering tactics under Nixon that prompted Congress to enact FISA in the first place. Recall that the Huston Plan, unearthed during the Watergate scandal, was an effort not to battle foreign forces, but to have greater leeway in surveillance of left-wing radicals and the anti-war movement. See generally S. REP. NO. 94-755 (1976) (discussing the Huston Plan).

353. There are in fact four schools of jurisprudential thought with Sunni Islam, each with its own views on jihad. The Salafi school, also known as the Wahhabi school, claims to base its radical views on the teachings of the Hanbali school. Salafism emerged in Arabia as both a religious and political movement responding to the decline of the Ottoman empire and the increasing strength

jihad and military conquest have been central to the expansion of Islam throughout the centuries,³⁵⁴ even Salafi teachings have traditionally proscribed attacks against those who cannot defend themselves. Salafi thought forbids attacks on “women, children, monks, old people, the blind, handicapped and their likes . . . [.]” unless “they actually fight with words (e.g. by propaganda) and acts (e.g., by spying or otherwise assisting in the warfare).”³⁵⁵ Yet, bin Laden’s entire strategy is to attack innocent civilians, almost to the exclusion of all military targets. In popularizing this paradigm of jihad, and prescribing it as a solution to the current geopolitical situation, bin Laden successfully established an experiential gestalt for how people who follow him have come to understand their daily reality.

Here we see the structural similarities between the composition of the jaundiced view and bin Laden’s gestalt of jihad. Like the myths of conniving claimants and predator lawyers, what matters is not whether this paradigm is or ever was well-tethered to reality. The media’s attention to bin Laden’s rhetorical strategies and selective presentation of facts give him the opportunity to engage individuals throughout the world, encouraging them to put faith in his paradigm for interpreting world events. Further, once people become jihadists within bin Laden’s conception of the term, they learn to use this lens to interpret their reality independent of bin Laden’s direct instructions and explanations.

In this way, bin Laden’s followers have become habituated to construing in a negative light every action of the American government, its allies, secular nation-states everywhere, and even those of Islamic countries that bin Laden deems unholy. In short, jihad has become a

of Shi’a in Iran in the mid-18th century. See Bulend Shanay, *Islam, in* OVERVIEW OF WORLD RELIGIONS (Division of Religion and Philosophy, St. Martin’s College, Lancaster University), available at <http://philtar.ucsm.ac.uk/encyclopedia/islam/sunni/wahha.html> (last visited Nov. 14, 2007). Collectively, Islamic thought has produced five distinct variations of how jihad can be waged. These include, *jihad bin nafs/qalb*—jihad of the heart/soul, i.e., a personal spiritual struggle; *jihad bil lisan*—jihad by the tongue, i.e., writing and speech against evil; *jihad bil qalam/ilm*—jihad through pen and knowledge, i.e., through scholarly study of Islam and through the sciences; *jihad bil yad*—jihad by the hand, i.e., through acts of charity; and *jihad bis saif*—jihad by the sword, i.e., through holy war. See Wikipedia, *Jihad*, http://en.wikipedia.org/wiki/Jihad#_ref-2 (giving the usage of the term, classifications, and its links to warfare) (as of July 17, 2007, 8:20 EST).

354. See generally EFRAIM KARSH, *ISLAMIC IMPERIALISM* (2005).

355. See Wikipedia, *Opinion of Islamic Scholars on Jihad*, http://en.wikipedia.org/wiki/Opinion_of_Islamic_scholars_on_Jihad (presenting opinions of different scholars on jihad) (as of July 17, 2007, 8:25 EST). This is the view popularized by 14th century scholar Ibn Taymiya, a Hanbali jurist, whose views are generally not accepted or even recognized among mainstream Muslims although they are quite popular with those in the Salafi movement that started in 20th century Egypt, like the Muslim Brotherhood and al-Qaida. *Id.*

governmentality through which these individuals—who compromise a disaggregated, globally distributed “body politic”—make meaning out of their political existences and respond to world events. According to Mark Danner, this is the scariest aspect of our post-9/11 world. We have entered the “era of amateurs,” wherein “Al Qaeda, in the form we knew it, has been subsumed into the broader, more diffuse political world of radical Salafi politics.”³⁵⁶ Al-Qaida’s network now runs itself from the bottom-up, and the next attack will likely originate not with “veteran Qaeda planners,” but from “this new wave of amateurs: viral Al Qaeda, political sympathizers who nourish themselves on Salafi rhetoric and bin Laden speeches and draw what training they require from their computer screens.”³⁵⁷

Bin Laden’s successful use of metaphors and experiential gestalts provides a stark and threatening demonstration of the destructive power of rhetoric in social discourse. As this Article has shown, the deep structures of the conniving claimant-turn-enemy combatant are very salient metaphors in our culture; so salient that the enemy combatant may have ascended to the heights of a new governmentality in the post-9/11 world.

This governmentality, not unlike the McCarthyist response to the “red scare,” creates harsh borders between those who support “American values” and are deserving of rights, and those who are perceived to not fully support the United States or its citizenry’s way of life and are therefore undeserving of such protections. Before the enemy combatant hijacked political discourse, rights flowed from the government’s contract with the governed to uphold the U.S. Constitution. This contract has been replaced by an emotive, supra-patriotism wherein the contract is not between the government and the governed, but between the government and a group of like-minded, right-thinking people. Senator Graham effectively deployed this “in group” versus “out group” mentality, threatening his fellow legislators with the rhetorical question:

Do you want to be the Senator who has changed 200 years of law?
Do you want to be the Senator who is changing the law of armed
conflict to say that an enemy combatant—someone caught on the
battlefield, engaged in hostilities against this country—is not a
person in a war but a criminal and given the same rights as every
other American citizen?³⁵⁸

356. See Danner, *supra* note 44.

357. *Id.*

358. 151 CONG. REC. S12,662-63 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

In doing so, he drew upon the pervasive conservative jibe against “liberal [activist] judges” who, in President Reagan’s words, “make up the law.”³⁵⁹ Like Reagan who perpetuated the myth about the psychic and the CAT scan,³⁶⁰ Graham simply lied about the historical precedent of *Quirin* and *Yamashita*, thereby demonstrating that he had not read Justice Murphy’s dissent in that case.³⁶¹

One person who had read *Yamashita*, and presented Justice Murphy’s dissent in a letter to Senator Bingaman to rebut Senator Graham’s arguments, was Colonel Dwight H. Sullivan, the Chief Defense Counsel of the Office of Military Commissions—the office established to oversee the work of the commissions that will try enemy combatants for violating the laws of war.³⁶² Justice Murphy’s argument strikes the proper balance that the U.S. Supreme Court found again in *Rasul*, affirming the tradition “in this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced.”³⁶³ Contrary to his bombastic claims, Senator Graham’s Amendment sought to disrupt that balance.

While Sullivan’s courageous letter to Senator Bingaman offers some solace, Senator Graham succeeded in erasing the true history of habeas corpus in times of war, promoting the view that the *Rasul* decision, not Graham’s Amendment, was the perversion of justice, fairness, and the rule of law at the backbone of our legal tradition. Indeed, there is great irony and grave danger in the jaundiced view of the law. Once let loose, these interrelated cultural myths about the law and lawyers ramble through the popular imagination without boundaries. The profound irony is that the enemy combatant paradigm renders law itself and lawyers as the tools and technologies of power used to attack themselves and society in some kind of perverse cannibalism. These observations lead us to the troubling question of whether we can combat the jaundiced view of the law, or whether it has become so natural that we have forgotten that it is a perversion of our founding values.

The myths of conniving claimants, predator lawyers, and the flood of litigation over unmeritorious claims encourage the notion that Americans are constantly under attack by outsiders living among us who seek to cheat

359. See *supra* note 105.

360. See *supra* text accompanying notes 85-89.

361. See *supra* text accompanying note 263 (quoting Justice Murphy dissent in *Yamashita*).

362. See Sullivan Letter, *supra* note 262.

363. *In re Yamashita*, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting), quoted in Sullivan Letter, *supra* note 262.

our system or to take advantage of the rights that we have foolishly and overgenerously extended them. Have these myths become foundational knowledge to our consciousness as citizens? Have we come to the point where we are content that the “rule of law” should be selectively applied only to those who we feel do not oppose or threaten certain aspects of our way of life? If so, who gets to make this subjective determination? Are we really satisfied that, as stipulated in the MCA, which the D.C. Circuit deemed constitutional in February 2007, the President and Secretary of Defense can alone dictate who among us are enemy combatants? Has the new governmentality of enemy combatant, building on these entrenched paradigms of thought in our country, really become our new mode of politics? Have we regressed to a McCarthyist state, where, even in the halls of Congress, senators cower at the possibility of being the one legislator “who has changed 200 years of law,” thereby giving comfort to the enemy?

The answer to these questions, for better or worse, is contingent upon each of us. In the context of the long history of attacks on the rule of law and our basic notions of fairness, the extreme and misleading rhetoric advocating the restrictive measures of the DTA is far from exceptional. The terrorist attacks of 9/11 and the response they engendered have fundamentally changed American life, necessitating new, careful compromises between our freedom and our security. However, the war that we find ourselves in is not a forever war simply because that is how long it could take to neutralize the threat of al-Qaida, or because President Bush has declared that this new crusade will have a potentially indefinite duration.³⁶⁴ Rather, it is important to understand that we were caught in a “forever war” long before the tragedy of 9/11, and that it is a forever war because we cannot afford to ever stop waging it.

To explain, I turn again to Bin Laden’s predictions. Bin Laden prophesied a global conflict in two stages: first, a battle against the “near enemy,” the secularized, apostate Middle Eastern states who have welcomed the United States’ financial and military support, as well as aspects of its culture, into their borders, thereby desecrating holy soil. The second, more protracted war would be waged against the “far enemy,” the United States. As some have argued, the Bush Administration hastened these prophecies into reality by invading Afghanistan and Iraq.³⁶⁵

364. President Bush was quoted as saying “‘This is a new kind of evil’ . . . ‘and we understand . . . this crusade, this war on terrorism, is going to take a while.’” See Danner, *supra* note 44.

365. See *id.*; see also FARWAZ A. GERGES, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* (2005).

Americans also have a “near enemy” and a “far enemy.” Our forever war is one in which our core values—the rule of law, liberty, and democracy—are threatened most immediately and most profoundly by the proliferation of the jaundiced view of the law and those willing to promote it. Our far enemy might be al-Qaida and its impersonators; however, our near enemy is not the enemy combatant whom we have learned to fear but the jaundiced view of the law and its sympathizers.

Yes, the threat of terrorism adds urgency and uncertainty to our daily struggle to live free lives, but we cannot win the long war against the far enemy without prevailing in the immediate war with the near enemy. If we ever forget this basic fact of our political existence and fail to remain vigilant, like Justice Murphy once was, or how Colonel Sullivan, Commander Swift, Clive Stafford Smith, and countless others have proven to be, we too may find ourselves, like so many enemy combatants, in a tomb-like 9.5 x 5.5 foot cell, waiting for word that a court will finally give audience to our cries.

